

US EPA ARCHIVE DOCUMENT

Clean Water Rule Comment Compendium
Topic 6: Ditches

The Response to Comments Document, together with the preamble to the final Clean Water Rule, presents the responses of the Environmental Protection Agency (EPA) and the Department of the Army (collectively “the agencies”) to the more than one million public comments received on the proposed rule (79 FR 22188 (Apr. 21, 2014)). The agencies have addressed all significant issues raised in the public comments.

As a result of changes made to the preamble and final rule prior to signature, and due to the volume of comments received, some responses in the Response to Comments Document may not reflect the language in the preamble and final rule in every respect. Where the response is in conflict with the preamble or the final rule, the language in the final preamble and rule controls and should be used for purposes of understanding the scope, requirements, and basis of the final rule. In addition, due to the large number of comments that addressed similar issues, as well as the volume of the comments received, the Response to Comments Document does not always cross-reference each response to the commenter(s) who raised the particular issue involved. The responses presented in this document are intended to augment the responses to comments that appear in the preamble to the final rule or to address comments not discussed in that preamble. Although portions of the preamble to the final rule are paraphrased in this document where useful to add clarity to responses, the preamble itself remains the definitive statement of the rationale for the revisions adopted in the final rule. In many instances, particular responses presented in the Response to Comments Document include cross references to responses on related issues that are located either in the preamble to the Clean Water Rule, the Technical Support Document, or elsewhere in the Response to Comments Document. All issues on which the agencies are taking final action in the Clean Water Rule are addressed in the Clean Water Rule rulemaking record.

Accordingly, the Response to Comments Document, together with the preamble to the Clean Water Rule and the information contained in the Technical Support Document, the Science Report, and the rest of the administrative record should be considered collectively as the agencies’ response to all of the significant comments submitted on the proposed rule. The Response to Comments Document incorporates directly or by reference the significant public comments addressed in the preamble to the Clean Water Rule as well as other significant public comments that were submitted on the proposed rule.

This compendium, as part of the Response to Comments Document, provides a compendium of the technical comments about ditches submitted by commenters. Comments have been copied into this document “as is” with no editing or summarizing. Footnotes in regular font are taken directly from the comments.

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Topic 6. DITCHES

6.0. GENERAL

Agency Summary Response

Historical Regulation of Ditches under the Clean Water Act

EPA and the Corps have consistently interpreted the Clean Water Act (CWA) “waters of the United States” definition to include ditches. Moreover, Congress clarified its intention that ditches would be covered under the CWA when it amended the Act in 1977 to exempt specific activities in ditches from the need to obtain a CWA section 404 permit, including “construction or maintenance of...irrigation ditches, or the maintenance of drainage ditches” (33 U.S.C. §1344). By these actions, Congress confirmed CWA jurisdiction of these ditches, and simply exempted specified activities taking place in them from the need for a CWA section 404 permit.

In the preamble of the November 13, 1986, Federal Register notice announcing the *Final Rule for Regulatory Programs for the Corps of Engineers*, the Corps stated that it generally did not consider “non-tidal drainage and irrigation ditches excavated on dry land” to be waters of the United States. However, the preamble also noted that both the Corps and EPA reserved the right on a case-by-case basis to determine that such a ditch would be regulated as a water of the United States (51 Federal Register 219:41217). The EPA restated this policy verbatim in the preamble of the June 6, 1988, Federal Register notice announcing the *Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations* (53 Federal Register 108:20765).

The Supreme Court has addressed the scope of “waters of the United States” protected by the CWA in three cases: *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (Riverside), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC), and *Rapanos v. United States*, 547 U.S. 715 (2006) (Rapanos). The significant nexus standard evolved through those cases. More information about these cases and the resulting opinions of the Court can be found in section III.A of the preamble to the final rule, section I of the Technical Support Document (TSD), and Topics 5 and 10 of this Response to Comments (RTC) document.

The 2008 guidance (*Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, December 2, 2008) that resulted from the *Rapanos* decision included a minimum flow for ditches to be considered jurisdictional and also stipulated that only ditches that met the tests established by the Supreme Court would be considered waters of the United States. The 2008 guidance indicated that the agencies “generally

[would] not assert jurisdiction over ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.” The guidance further described waters with *relatively permanent flow* as “typically (e.g., except due to drought) flow[ing] year-round or waters that have a continuous flow at least seasonally (e.g., typically three months).” Thus, the 2008 guidance reiterated that the agencies would regulate at least some ditches that had a continuous flow at least seasonally and were shown to have a significant nexus to downstream waters.

Federal courts have also consistently recognized that ditches could be regulated under the CWA, before and after the Supreme Court decisions in *SWANCC* and *Rapanos* (e.g. *U.S. v. Edison*, 1997. 109 F.3d 1336, 1342, 11th Cir. 1997; *Headwaters, Inc. v. Talent Irrigation District*, 2001, 243 F.3d 526, 529 (9th Cir. 2001). *National Association of Home Builders v. U.S. Army Corp of Engineers*, No. 07-972 (D.D.C. Mar. 30, 2010)). For more details on the legal background for the regulation of ditches, see Section I of the Technical Support Document.

Jurisdiction of Ditches under the Proposal

In the proposal, the agencies acknowledged their longstanding practice of recognizing that some ditches are waters of the United States and other ditches are not. The agencies further recognized that there have been inconsistencies implementing this policy across the nation. Therefore, the agencies sought to improve the clarity and consistent implementation of CWA jurisdiction over ditches by, for the first time, specifically excluding certain ditches by rule that had previously been referred to only in preamble and guidance documents as not “generally” considered waters of the United States.

The proposal identified two types of ditches that would be excluded as waters of the United States: (b)(3) ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow; and (b)(4) ditches that do not contribute flow, either directly or through another water, to a traditionally navigable water, interstate water, territorial sea or impoundment. The agencies sought comment on these exclusions, and specifically on the appropriate flow regime for an excluded ditch excavated wholly in uplands and draining only uplands.

Based on scientific literature and data used to support the conclusions of the EPA’s Office of Research and Development Science Report (*Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, U.S. EPA 2014), the agencies recognize that many ditches provide similar functions as tributaries. In its review of the science support for the Proposed Rule, the EPA Science Advisory Board stated, “...certain other exclusions listed in the Proposed Rule and the current regulation do not have scientific justification. There is, for example, a lack of scientific knowledge to determine whether ditches should be categorically excluded,” (letter by Dr. David T. Allen, Chair, Science Advisory Board to EPA Administrator Gina McCarthy, September 30, 2014). Nonetheless, while there may remain some uncertainty in the science, the agencies have determined that it is important to clarify the status of ditches to make implementation of the Act more understandable and consistent, and to reinforce long-standing practices and priorities. As a result, the rule codifies the longstanding policy of the agencies to consider certain ditches as not subject to regulatory protection as “waters of the United States.”

The CWA regulates and controls pollution at its source, in part because most pollutants do not remain at the site of the discharge, but instead flow and are washed downstream through the tributary system to endanger drinking water supplies, fisheries, and recreation areas. These fundamental facts about the movement of pollutants and the interconnected nature of the tributary system demonstrate why the agencies have determined that when ditches meet the definition of tributary and contribute flow to a traditional navigable water, interstate water or the territorial seas, they have a significant nexus to the above referenced downstream waters and are themselves jurisdictional waters of the United States.

Summary of General Comments Regarding the Jurisdiction of Ditches

Many commenters stated or implied that regulating ditches as tributaries and waters of the U.S. is an expansion of federal jurisdiction, constituting overreach beyond what either Congress intended to regulate under the Clean Water Act, or the Supreme Court interpreted as jurisdictional waters in its *Rapanos* opinions. Others stated or implied that only perennial ditches or ditches channelizing natural streams have been historically or currently regulated. Many commenters were concerned that ditches currently considered non-jurisdictional under the CWA would become jurisdictional under the proposed rule. For example, there were a number of comments that regulating ditches would result in a substantial increase in the miles of streams within states or local jurisdictions that would fall under Clean Water Act jurisdiction, and therefore increase the need for permits, resulting in additional burden and cost to landowners and the regulated public. A few commenters questioned the agencies' legal ability to assert jurisdiction over ditches as tributaries.

Many commenters stated that the rule would adversely impact the ability of farmers, ranchers, road departments, water utilities, and other local jurisdictions to maintain drainage ditches and other ditches, and to conduct operations without requiring additional permitting. These commenters were concerned the proposed rule would make the jurisdictional status of ditches so confusing and uncertain that land owners would be compelled to first seek concurrence from the agencies before doing any work. Consequently, these commenters anticipated that the proposed rule would increase regulatory and economic burdens on the public and create potential safety concerns. Many of these commenters asked specifically about ditches used to convey or manage stormwater, irrigation water, drinking water or water wholly contained within industrial sites and used for industrial purposes, including mining.

Commenters expressed uncertainty about whether or not existing statutory exemptions under the Clean Water Act would continue to apply after the rule is finalized. Many expressed that the exemption for construction and maintenance of irrigation ditches and maintenance of drainage ditches under CWA 404(f)(1)(C) is narrowly and inconsistently applied throughout the country and the need to obtain CWA 404 permits delays maintenance, resulting in public safety concerns. Several commenters requested that the agencies develop an interpretive rule or additional guidance to make it clearer that the ditch maintenance exemption can apply to roadside ditches, and not only agricultural ditches.

Many other commenters recommended relying on existing Clean Water Act programs, rather than including ditches as jurisdictional waters of the U.S., specifically the CWA 402 program which requires permits for point source discharges of pollutants to navigable waters, rather than asserting jurisdiction over ditches themselves. Many of the commenters asked that the agencies clarify that point sources that are covered by NPDES permits are not waters of the U.S., and a number of commenters expressed concern that a ditch, including components of a permitted MS4, could be viewed as both a point source and a "water of the United States."

Most comments that were received related to ditches focused on the exclusions for ditches in the Proposed Rule. A number of comments were received related to the appropriate flow regime for ditches that are excluded from the definition of waters of the United States, which the Proposed Rule had specifically sought public comment on. Many commenters recommended that the flow regime "less than perennial" is the most appropriate standard for the excluded ditches in (b)(3). A few noted that perennial flow is the flow regime that is the simplest to understand and document. Others requested a more specific definition of "perennial flow" and a more thorough explanation of the agencies' use of the term. For instance, some commenters requested clarification on whether the presence of standing or pooled water year-round in a ditch constitutes perennial flow. In general, several commenters requested that definitions of one or more of the flow regimes referenced in the exclusions be provided in the final rule, in addition to guidance on how to determine the flow regime of a ditch.

In addition, although ephemeral ditches are excluded from waters of the U.S. in the proposed and final rules, a number of commenters requested that the agencies clarify the differences between jurisdictional ephemeral streams and non-jurisdictional ephemeral and erosional features such as ephemeral ditches, gullies, rills, and non-wetland swales. Some requested definitions for these terms as well. Several commenters were concerned with the Agencies' assertion that non-jurisdictional geographic features (e.g. non-wetland swales, ephemeral ditches) could still be considered a connection between otherwise non-jurisdictional wetlands or waters with a traditional navigable water, interstate water or territorial sea.

The agencies received many comments expressing that the exclusions for ditches in the Proposed Rule were overly narrow because even ditches that are constructed in uplands and drain only uplands and have less than perennial flow most often still contribute flow, either directly or indirectly, to a traditionally navigable water, interstate water, territorial seas or impoundment. Therefore, the second ditch exclusion in the Proposed Rule could not likely be satisfied. In contrast, some commenters objected to the proposed exclusions for ditches because they were too broad. These commenters stated that ditches should not be treated differently than other tributaries for the purpose of jurisdiction because the agencies have no scientific rationale to do so, and excluding ditches could further impair water quality in downstream waters. Some stated that if the agencies continue to exclude ditches, they should only exclude ephemeral ditches or those that contribute *de minimis* flow downstream.

Many commenters also expressed concerns that the exclusions for ditches in the proposed rule were difficult to interpret clearly and asked that the agencies define the term "upland." Several commenters requested that the final rule define the terms "ditch" and "roadside ditch." Many also sought clarification regarding the quantity or timing of flow from a ditch that would be

required to satisfy the rule’s meaning of “contribute flow,” which is part of the definition of “tributary and tributaries.” Several commenters asked whether a ditch that was excavated primarily in uplands, but bisected even a single jurisdictional wetland or intersected a single other jurisdictional water would itself become jurisdictional throughout its length. Similarly, many commenters asked whether ditches would be segmented, whereby some parts of a ditch would be jurisdictional waters of the United States, but other parts of the same ditch would not be. Some commenters requested clarification whether otherwise excluded ditches would remain non-jurisdictional even if they developed wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) in the bottom of the ditches themselves.

Finally, numerous commenters asked the agencies to provide clear guidance for the public to differentiate jurisdictional ditches from non-jurisdictional ditches. Many of these commenters specifically recommended that such guidance recognize regional variation nationwide.

Revised and Clarified Exclusions for Ditches under the Final Rule

In response to comments, the agencies have revised the exclusions for ditches to provide greater clarity and consistency. The agencies recognize that the term “upland” in the rule created concern, because “upland” itself was not explicitly defined. In order to increase clarity, the term “upland” has been removed. The revised ditch exclusion language states: “(A) ephemeral ditches that are not a relocated tributary or excavated in a tributary; (B) Ephemeral and intermittent roadside ditches that drain a Federal, state, tribal, county or municipal road, and that are not a relocated tributary or excavated in a tributary; (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (a)(3) of this [rule].” A ditch that meets any one of these three conditions is not a water of the United States. Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(4) through (a)(8) of the rule. For example, an excluded ditch would not become a jurisdictional water of the United States if wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) developed in the bottom of the ditch.

Therefore, jurisdictional ditches may include ditches such as the following: Ditches that have perennial flow directly into a traditional navigable water, interstate water or the territorial seas, or indirectly through the tributary network into these same waters; ditches with intermittent flow that drain wetlands and flow into a traditional navigable water, interstate water or the territorial seas; and ditches, regardless of flow, that are excavated in or relocate a tributary as defined in this rule. To be jurisdictional, any such ditch would need to also meet the definition of tributary. Any of the other above described ditches may also be excluded if they meet the definition of one of the other exclusions under paragraph (b) of the definition, such as stormwater control features.

It is possible for the jurisdictional status of a ditch to change along the ditch’s length. For example, where an otherwise excluded ditch is excavated in or relocates a tributary, only the

segment(s) of the ditch actually excavated in or relocating the jurisdictional tributary would be considered jurisdictional.

Jurisdiction of Ditches not Expanded by the Rule

While many commenters stated or suggested that the federal jurisdiction of ditches would be significantly expanded by the proposed rule, the agencies do not intend to increase the number of ditches that are jurisdictional. In fact, by clarifying and expanding the specific exclusions for ditches, the agencies anticipate that more ditches will be clearly excluded in comparison to previous regulations and guidance related to waters of the U.S. For example, under the 2008 *Rapanos* guidance, the agencies regulated many intermittent ditches that were considered to have a relatively permanent flow of water and a significant nexus to downstream jurisdictional waters. Many such ditches would be excluded under the final rule because they were not excavated in or relocating a tributary or draining wetlands.

Ditches that Meet the Definition of Tributary and are Not Excluded

The term “ditch” is not specifically defined in the rule. The agencies considered several options for addressing the definition of ditches but ultimately concluded that a definition of ditch may increase rather than decrease potential confusion. In reviewing the comments on the proposed rule, it is clear the terminology surrounding ditches varies widely regionally. Instead, the agencies will continue to rely on their existing practice of addressing the regulatory status and requirements with respect to ditches on a more case-specific basis. The agencies have a wealth of experience addressing ditches in the context of the 404(f) permitting exemptions and general programmatic implementation, such as Nationwide Permit 46 (Discharge in ditches). The agencies believe that relying on existing practice will better achieve the goal of clarity than introducing a new definition of ditch in the final rule.

The agencies' longstanding interpretation of the CWA has considered modified or artificial channels that contribute to and function as part of the tributary system as waters of the United States. Many such channels are commonly referred to as ditches, yet not all ditches are modified or artificial channels that contribute to and function as part of the tributary system. Thus, while this rule excludes specific types of constructed waters from jurisdiction, including some ditches, it continues to interpret constructed or modified tributaries and most ditches that function as tributaries to be jurisdictional.

The definition of tributary includes natural, undisturbed waters and those that have been man-altered or constructed, but which science shows function as a tributary. Ditches subject to regulation as “waters of the US” under this rule must meet the definition of tributary, having a bed and banks and an ordinary high water mark and “contributing flow” either directly or indirectly through another water to a traditional navigable water, interstate water, or the territorial seas. This latter provision alone would exclude, for example, distributary canals for drinking water if those canals carried water from a jurisdictional water of the United States to a drinking water treatment facility. Ditches that are not a relocated tributary or excavated in a tributary, would only be jurisdictional waters of the United States if they also had an ordinary

high water mark and bed and banks, as well as the minimum flow requirements stated in the final rule, and are not excluded under paragraph (b) of the definition.

In addition, the preamble makes it clear that natural streams and rivers that are altered or modified for purposes as flood control, erosion control, and other reasons remain tributaries for the purposes of the rule. A stream or river that has been channelized or straightened because its natural sinuosity has been altered, cutting off the meanders, remains a tributary. A stream that has banks stabilized through use of concrete or rip-rap (*e.g.*, rocks or stones) also remains a tributary. The Los Angeles River, for example, is a “water of the United States” (and, indeed, a traditional navigable water) and remains a “water of the United States” even where it has been ditched, channelized, concreted and runs alongside a road because it has perennial flow and does not meet any of the exclusion criteria. In addition, the preamble states that a stream is relocated either when at least a portion of its original channel has been physically moved, or when the majority of its flow has been redirected. A ditch that is a relocated stream is distinguishable from a ditch that withdraws water from a stream without changing the stream’s aquatic character. The latter type of ditch may be excluded from jurisdiction where it meets the listed characteristics of excluded ditches under paragraph (b).

Agency staff can determine historical presence of tributaries using a variety of resources, such as historical maps, local surface water management plans, street maintenance data, wetlands and conservation programs and plans, as well as functional assessments and monitoring efforts. Evidence, such as current or historic photographs, prior delineations, or USGS and state and local topographic maps, may be used to determine whether a ditch is an excluded ditch. Site characteristics may also be present to inform the determination of whether the water body is a ditch, such as shape, sinuosity, flow indications, etc., as ditches are often created in a linear fashion with little sinuosity and may not connect to another “water of the United States.”

The definition of “tributary” in the final rule retains the phrase “contributes flow, either directly or through another water.” This reflects scientific literature summarized in the Science Report, as well as in the rule preamble and Technical Support Document, about the connectivity among waters. The dendritic nature of the tributary system would make it virtually impossible to protect the integrity of traditional navigable waters, interstate waters, or territorial seas if only the tributaries that flowed directly into those waters were jurisdictional waters of the United States. Science also supports the agencies’ conclusion that ditches that are part of the tributary system provide the connectivity and have a significant nexus to traditional navigable waters, interstate waters, or territorial seas.

Ditches, like other tributaries, export sediment, nutrients, and other materials downstream. Due to their often channelized nature, ditches are very effective at transporting water and these materials, including nitrogen, downstream. It is the agencies’ position that ditches that meet the definition of tributary provide the same chemical, physical, and biological functions as other water bodies defined as tributaries under the proposed rule.

Determinations of whether a water “contributes flow” are expected to be done in a manner similar to what has been practiced in the field for decades. While precise measurements of flow volume and duration are not required, tools such as aerial photographs, topographic maps, flow

gauges, and the like will be helpful in determining contribution of flow. The final rule preamble discusses this process in greater length in Section IV.F.1.

The final rule does not require that the flow be contributed either directly or through waters that are themselves jurisdictional. For the reasons discussed above, and explored in further detail in the final rule preamble and Technical Support Document, waters contributed through non-jurisdictional features can have the same impact on the integrity of downstream waters as water contributed through jurisdictional waters. Note that a non-jurisdictional feature contributing a tributary's flow does not itself become jurisdictional as a result.

Exclusions for Erosional Features

The agencies have not provided specific definitions of the terms “ditch,” “gully,” “rill,” or “swale,” in the final rule. However, the rule makes it clear that ditches are included in the definition of tributary and would have the physical features required of other jurisdictional tributaries, including bed and banks and an ordinary high water mark. Ephemeral erosional features that are neither tributaries or excluded ditches, such as gullies, rills, and non-wetland swales, do not have the physical features of tributaries and are specifically excluded from waters of the U.S. under paragraph (b)(4)(F). The preamble makes it clear that gullies, rills, and non-wetland swales can be important conduits for moving water between jurisdictional waters. However, they are not jurisdictional waters themselves. It should be noted that some ephemeral streams are colloquially called “gullies” or the like even when they exhibit a bed and banks and an ordinary high water mark; regardless of the name they are given locally, waters that meet the definition of tributary are not excluded erosional features. Further discussion of exclusions for erosional features is found in the summary responses for section 7.3.7: Gullies, Rills, and Non-Wetland Swales in the topic Features and Waters Not Jurisdictional.

Flow Regimes Used in the Ditch Exclusions

Under longstanding agencies' interpretation and practice, perennial streams are those with flowing water year-round during a typical year, with groundwater or streamflow from higher in the stream or river network as primary sources of water for stream flow. Intermittent streams are those that have both precipitation and groundwater providing part of the stream's flow, and flow continuously only during certain times of the year (*e.g.*, during certain seasons such as the rainy season). Ephemeral streams have flowing water only in response to precipitation events in a typical year, and are always above the water table. Precipitation can include rainfall as well as snowmelt.

Ditches excavated in low lying areas can intercept the shallow water table and consequently fill with groundwater. Just as stream baseflow, springs, seeps, and other surface expressions of groundwater can be jurisdictional waters of the United States, water standing in a ditch that intercepts the shallow water table may also be a jurisdictional water of the United States. The water level in the ditch may rise or fall solely in response to fluctuations in the water table with seasonal changes (*e.g.* snowmelt, shallow depth to the water table during the non-growing season, etc.) or annual variation in the distribution of rainfall. The pathways for delivery of

groundwater to a ditch, as well as the variations in the volume of groundwater that is in the ditch, are effectively the same processes that contribute baseflow in natural streams. In both cases, shallow groundwater provides the low flow discharge in the stream (i.e. baseflow), and discrete rainfall events or snow melt drives the short term stormflow or elevated seasonal flows, respectively. Consequently, the agencies believe that permanent standing water in a ditch or other channel generally equates to perennial flow conditions for purposes of this rule.

However, the fundamental determination of jurisdiction for a ditch that is neither a relocated tributary or excavated in a tributary is based on the regularity with which the ditch discharges water either directly or through another water to the downstream traditional navigable water, interstate water, or the territorial sea. If for example, a ditch characterized at least in part by discontinuous reaches of pooled water only discharges to a downstream water in direct response to rainfall, the ditch has an ephemeral flow regime despite the fact that water is pooled in some portion of it year round. Similarly, if the same ditch discharges to downstream waters seasonally in response to annual or seasonal rainfall patterns, seasonal increases in groundwater discharges to the ditch, etc., then the ditch has an intermittent flow regime. And finally, if the ditch possesses standing water year-round that is consistently in contact with, or discharging either directly or through another water to a downstream traditional navigable water, interstate water, or territorial sea, then the ditch has a perennial flow regime, even though the rate of discharge may vary significantly between seasons or in response to rainfall.

The agencies believe that perennial flow caused by agricultural irrigation is none the less perennial flow. Irrigation water that infiltrates the soil surface, percolates through the upper soil horizons and is eventually expressed as flow in an adjacent ditch or tributary allows that ditch or tributary to effectively function in a similar manner as perennial ditches or tributaries whose flow is supported by sources other than agricultural irrigation. Similarly, ditches that withdraw water from a tributary, deliver some or most of that water for various uses (e.g. irrigation), but return some or most of the water back to the tributary system remain subject to the jurisdictional evaluation as potential waters of the United States that is defined in the final rule. That is, the agencies believe that ditches that are part of the tributary system and meet the definition of tributary in the final rule, and are not otherwise excluded under paragraph (b) of the final rule, maintain connectivity to and have a significant nexus with traditional navigable waters, interstate waters, or territorial seas regardless of the source of water flowing in the ditches (e.g. water derived from agricultural irrigation water, water withdrawn from tributaries, etc.). Such ditches are thereby considered by the agencies as jurisdictional waters of the United States.

Statutory Exemptions under Clean Water Act Sections 404, 402, and 502

The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule. Section 404(f)(1)(B) exempts dredge and fill activities “for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures.” Additionally, the construction or maintenance of irrigation ditches, as well as the

maintenance, but not construction, of drainage ditches are exempt activities under CWA 404(f)(1)(C). This rule has not changed these exemptions. Other ditch maintenance work may be covered by non-reporting Nationwide Permit 3. See Corps Regulatory Guidance Letter (RGL) 07-02: “Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches under Section 404 of the Clean Water Act” for more information. The rule also does not affect or modify existing statutory and regulatory exemptions from NPDES permitting requirements, such as those for return flows from irrigated agriculture (CWA 402(l)(1); 502(14)), stormwater runoff from oil, gas and mining operations (CWA 402(l)(2)), or agricultural stormwater discharges (CWA 502(14)). However, consistent with longstanding practice, these exempt activities do not change the jurisdictional status of the water body as a whole, or the potential need for CWA permits for non-exempted activities in these waters or non-exempted discharges to these waters.

Ditches that are Point Sources

The approach that some ditches may be considered simultaneously both a point source, covered by an NPDES permit, and a water of the U.S., reflects the CWA itself as well as longstanding agency policy. For example, MS4s often are made up of a combination of jurisdictional waters and non-jurisdictional features. If a ditch that is part of an MS4 meets the definition of tributary and is not otherwise excluded, it is a water of the U.S. Section I of the Technical Support Document provides the legal framework under which a ditch could be considered both a point source and a “water of the United States.”

Exclusions for Waters Including Waste Water Treatment and Stormwater Control Features

This rule also does not change the longstanding regulatory exclusions for waste water treatment systems designed to meet the requirements of the CWA or prior converted cropland (40 CFR 232.2). In fact, exclusions have been expanded under the new rule and provide, for the first time, that certain ditches and other features that the agencies have long “generally” not considered to be waters of the United States are in fact expressly excluded as waters of the United States by rule. In addition to the types of ditches referenced previously in this response, the agencies have clarified stormwater related exclusions in response to numerous public comments. Stormwater control features constructed to convey, treat or store stormwater that are created in dry land are expressly excluded as waters of the United States in the rule. As discussed in the preamble, stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule. However, the agencies do not expect the scope of ditches excluded to be different under (b)(3) and (b)(6), so there should be little practical need to distinguish between the two. This means that stormwater ditches that have perennial flow, e.g., because they intersect groundwater or are combined with other flows, would be jurisdictional if they meet the definition of tributary as explained above. This exclusion does not change the agencies’ longstanding interpretation that “waters of the US” includes waters, such as channelized streams or piped streams, even where used as part of stormwater management systems. Thus, stormwater control features that have been built in or excavated

from jurisdictional waters continue to be jurisdictional waters of the United States. This is not a new agency interpretation. New exclusions in the rule also relevant to ditches apply to wastewater recycling structures, including distributary canals constructed in dry land and used for wastewater recycling, and pits excavated in dry land incidental to mining and construction activity. As a result of the aforementioned changes, the agencies do not anticipate increased jurisdiction over ditches or an increase in jurisdictional determinations.

While non-jurisdictional geographic features listed in the rule's exclusions (e.g. non-wetland swales, non-jurisdictional ditches, etc.) are never "waters of the United States," they may nonetheless serve as a hydrologic connection under a case-specific significant nexus evaluation. This approach is supported by the science and long-standing agency practice. For example, a wetland may be directly hydrologically connected to a jurisdictional tributary via flow through a non-jurisdictional ditch. While the ditch itself will always be excluded from jurisdiction, the connection of the wetland through the ditch to the tributary is relevant for determining whether the wetland has a significant nexus to downstream jurisdictional waters and should therefore be considered jurisdictional. In addition, non-jurisdictional geographic features may function as "point sources" under CWA section 502(14)), such that discharges of pollutants to jurisdictional waters through these non-jurisdictional features would be subject to other CWA regulations (e.g., CWA section 402).

Implementation, Training and Guidance

Section IV(F) of the preamble to the final rule and section VII of the Technical Support Document discuss other evidence, besides direct field observation, that may establish the presence of bed and banks and another indicator of OHWM. These same tools have been used by the agencies and practitioners for many years to help identify flows paths among waters. State, tribal and local governments have well-defined and longstanding working relationships with the Corps and EPA in implementing CWA programs. The final rule reflects the current state of the best available science and is guided by the need for clearer, more consistent and easily implementable standards to govern administration of the Act. The agencies will continue a transparent review of the science and learn from ongoing experience and expertise as the rule is implemented. The agencies plan to work with our regulatory partners on timely development of necessary training and guidance, as appropriate, to build upon existing working relationships, to inform stakeholders, and to ensure successful implementation of this rule.

Conclusion

In summary, in the Proposed Rule, the agencies for the first time establish by rule that certain ditches are excluded from jurisdiction. Many comments received on the Proposed Rule addressed ditches, and these comments are reflected in the approach to ditches articulated in the final rule. The majority of commenters requested that the agencies' ditch exclusion be clarified or broadened. Many commenters were confused by the term "uplands" and did not feel the term had a common understanding. Many expressed concerns that all ditches would be jurisdictional under the proposed rule. Many groups especially called for exclusions of roadside ditches. The revised exclusions respond to these comments. The agencies have deleted the term "uplands" in

response to the confusion the term created and have focused instead on flow. The flow regimes as used in the exclusions and described earlier have been used by the agencies consistently and are generally readily understood by field staff and the public. Deleting the term “uplands,” which was more subject to misinterpretation, from the exclusions will therefore improve clarity and simplify implementation. The agencies have also addressed roadside ditches in particular and have clearly identified which roadside ditches are excluded. The rule further reduces existing confusion and inconsistency regarding the regulation of ditches by explicitly excluding certain categories of ditches, including ditches that flow only after precipitation and most roadside ditches. This rule appropriately reduces regulatory burdens and minimizes costs for states, tribes, and municipalities charged with maintaining the nation’s roads. These ditch exclusions are clearer for the regulated public to identify and more straightforward for agency staff to implement than the proposed rule or current policies.

Specific Comments

Oak Ridge National Laboratory (Doc. #14463)

- 6.1 The Agencies should exclude from jurisdiction water features primarily dependent on man-made flows.(...) An example, other than a wetland, would include a man-made ditch constructed in uplands with continuous effluent from a NPDES-permitted wastewater treatment plant and several other NPDES outfalls. The water is conveyed to jurisdictional Water. The ditch has developed jurisdictional qualities such as bed, bank, and ordinary high water mark over time and has continuous, man-made flow. (p. 1)

Agency Response: See summary response for discussion of revised and expanded exclusions for certain ditches, stormwater control features and wastewater recycling structures in the final rule.

The Senate of Maryland (Doc. #4870)

- 6.2 The Clean Water Act has never defined ditches and other upland features as "Waters of the United States" I believe this is an unnecessary expansion of federal jurisdiction without the approval of Congress. (p. 1)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act.

Attorney General of Texas (Doc. # 5143.2)

- 6.3 Perhaps more troubling than this reliance on the "ordinary high water mark" standard is the federal agencies ' explicit inclusion of "ditches" as "waters of the United States." Under this untenable and legally baseless definition, any landowner who has a ditch on his or her private property is at risk of having the federal government exert regulation over that ditch and impose burdensome and expensive federal regulations over dry land that does not remotely resemble any common-sense understanding of "waters of the United States". At a bare minimum, this will require farmers to pay fees for environmental assessments-just to determine whether their ditch is a "water of the United States." These landowners will then be required to obtain permits just to till the soil near

gullies, ditches or dry streambeds where water only flows when it rains. It seems inconceivable that this is what Congress intended when it penned the term "navigable waters."

The federal agencies argue that this explicit inclusion of "ditches" will result in no additional waters or lands being subject to federal jurisdiction, as "ditches" are still explicitly exempted under Clean Water Act Section 404(t). See e.g. 33 U.S.C. § 1344(t)(1)(C). However, the federal agencies fail to take into account that ditches are not similarly and explicitly exempted under the Clean Water Act Section 402 program, which, like the 404 program, will be subject to this new definition of "waters of the United States". (p. 4)

Agency Response: See summary response for discussion about the historical regulation of ditches under the Clean Water Act, and the exclusions for certain ditches and erosional features such as gullies, rills, and non-wetland swales in the final rule. Statutory exemptions under 404(f)(1) apply to certain activities conducted in waters of the U.S., including activities related to normal farming, ranching, and silviculture, and these exemptions are unchanged by the rule. Although certain point source discharges into waters of the U.S., including ditches, require 402 permits, the rule does not expand regulation of ditches.

Kerr Environmental Services Corp. (Doc. #7937.1)

- 6.4 Ephemeral and intermittent ditches are not jurisdictional, or tributaries to Waters of the United States and thus should continue to not be regulated as has been the case since 1986. All ditches are by definition at least ephemeral as they convey water when it is raining. Many ditches in the Coastal Plain are intermittent, in that they intercept the seasonal high water table, and can be in part why they were designed and constructed. Such conveyances have never been regulated. The only ditches regulated to date have been channelized natural tributaries, or those ditches with perennial flow as demonstrated by the presence of bed and bank and other characteristics of the "Ordinary High Water Mark" (33 CFR 328.3(e). In that manner the conveyance is demonstrating that it is in fact a "water" and part of the aquatic system regulated via interstate commerce under the CWA.7)

Agency Response: See summary response for discussion about the historical regulation of ditches under the Clean Water Act, and the exclusions for certain ditches under the final rule.

State of Iowa (Doc. #8377)

- 6.5 There are 946 cities across the State of Iowa and over 500 of those cities are under 500 in population. Many of these communities are utilizing controlled discharge lagoons for their wastewater systems and have a system of roadside ditches to control stormwater. These small cities move water away from the community and to a low lying area. These ditch systems have never been regulated and the communities have never considered them to be point sources that would come under the jurisdiction of the EPA. These small cities are concerned that the proposed rule could impact these storm ditches and would request that these ditches be excluded under the rule. (p. 7)

Agency Response: See summary response for discussion about the historical regulation of ditches under the Clean Water Act, and the exclusions for certain ditches under the final rule, as well as an exclusion for stormwater control features constructed in dry land.

- 6.6 If the scope of the “waters of the U.S.” expands to include all intermittent and ephemeral waters, this would appear to expand the application of the rebuttable presumption that CWA section 101(a)(2) uses to apply to these waters. If so, Iowa may have 46,000 intermittent and ephemeral stream miles which are suddenly presumed to be fishable and swimmable after EPA has previously approved a determination that they are not. This would create an incredible burden on our Water Quality Standards, NPDES Permitting, Water Quality Assessment (305b), Impaired Waters Listing (303d), and Total Maximum Daily Load (TMDL) programs in Iowa and across the country. Permits would be delayed for years while use attainability analyses were completed and streams re-designated, often back to their current designations. (p. 11)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule and a discussion about the historical regulation of ditches under the Clean Water Act. The tributaries, including ditches, that are regulated under the Clean Water Act connect to traditionally navigable waters, interstate waters, or the territorial seas, either directly or indirectly. See the summary response for Topic 8: Tributaries regarding the jurisdiction of ephemeral streams. Also, this rule does not require States to expand their jurisdiction under state law. States will be the typical entity choosing how to adopt and apply water quality criteria. States may take a variety of approaches for establishing designated uses and corresponding protective criteria for ditches.

Urban Counties (Doc. #9973)

- 6.7 Although the EPA has indicated the rule proposal is intended only to clarify existing CWA jurisdiction, county officials are concerned that the proposed rule could have a major impact on county infrastructure and activities.

Many county officials are concerned that the new rule will increase the number of county-maintained ditches or conveyances that fall under federal regulation. This will add an expensive and time consuming permit or clearance process that has not historically been required.

The delay that this extra regulation would add to construction, repair, or removal of vegetation and debris from drainage ditches or other flood control facilities could lead to citizen suits should damage occur due to heavy rains while the county is waiting on federal action.

The EPA should amend the proposed rule to clarify that currently exempt local drainage-made ditches and man-made conveyances are excluded from the new definition of “Waters of the United States.” Many larger Texas counties have local storm-water management facilities that are already subject to regulation and would be negatively impacted by additional regulation under the CWA. The proposed rule should be amended to clearly exempt these storm-water facilities from being classified as “waters of the United States” (p. 1)

Agency Response: See summary response for discussion about the historical regulation of ditches under the Clean Water Act, revised and clarified ditch exclusions in the final rule, the maintenance exemptions for existing irrigation or drainage ditches under CWA 404(f)(1)(C), and an additional exclusion in the rule for stormwater conveyance features constructed in dry land.

State of Hawaii Department of Transportation (Doc. #10184)

- 6.8 Since stormwater management activities are not explicitly exempt under this proposed rule, HDOT is concerned that its Municipal Separate Storm Sewer System (MS4s) infrastructure could now be classified as a "water of the U.S." This infrastructure includes many HDOT MS4 conveyances, including ditches, channels, pipes and gutters that flow into a water of the U.S. and are already regulated under the Clean Water Act (CWA) Section 402 stormwater permit program.

Ditches are of specific concern to HDOT. Highway ditches funnel water away from highway right-of-way to prevent accidents and flooding. The proposed rule redefines "waters of the U.S." and for the first time includes a definition for tributary, characterizing it by "the presence of a bed and banks and ordinary high water mark" and stating specifically "a tributary ... can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches..". The proposed rule states that man-made conveyances, including ditches, are considered "jurisdictional tributaries" if they flow "directly or indirectly" into a water of the U.S., regardless of perennial, intermittent or ephemeral flow.

HDOT is unsure how this connection with a water of the U.S. will be determined, or whether there is a limit to connectivity. As such, this could constitute a significant expansion in the number of ditches that are considered waters of the U.S. Once a ditch is under federal jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming and expensive, leaving HDOT vulnerable to citizen lawsuits if the federal permit process is not significantly streamlined. Ultimately, HDOT is liable for maintaining the integrity of its ditches, even if federal permits are not approved by the EPA in a timely manner.

EPA may be forced to regulate MS4s as "waters of the U.S." through citizen/environmental group CWA lawsuits as these ditches, pipes, channels and green infrastructure under the rule's "tributary" and "adjacency" definitions could very well be interpreted to be "waters of the U.S." In order to avoid this, HDOT respectfully recommends that MS4 and green infrastructure activities be specifically exempt under the proposed rule. Otherwise, we feel that this rule has great potential to increase HDOT risk of litigation, create unnecessary delays and confusion, and cause a disincentive for adequately constructed and maintained drainage ditches and stormwater management infrastructure. Excluding MS4s from waters of the U.S. jurisdiction will not lower protection of aquatic resources, because pollutant discharges from these systems are fully covered by the comprehensive and exhaustive NPDES regime. (p. 1-2)

Agency Response: See summary response for discussion of ditch exclusions in the final rule, the maintenance exemptions for ditches under CWA 404(f)(1)(C), the

jurisdiction of components of MS4s, and an additional exclusion in the rule for stormwater conveyance features constructed in dry land.

Kansas Water Authority (Doc. #12350)

- 6.9 The expansion of streams with this new proposed rule would include ephemeral waters and ditches as WOTUS and would potentially increase the total number of stream miles falling under Clean Water Act jurisdiction from 30,620 miles to 174,410 miles in Kansas. This is a 460 percent increase in federally regulated stream miles. This would burden our state agencies with more unnecessary administrative costs, removing money from water improvement projects and cause Kansas to lose momentum on the recent improvements that have been made. (p. 2)

Agency Response: See summary response for a discussion of historical jurisdiction of ditches under the Clean Water Act, and the exclusions and exemptions that apply to ditches in the final rule. See summary response for Topic 8: Tributaries regarding regulation of ephemeral streams.

Virginia Department of Transportation (Doc. #12756)

- 6.10 VDOT considers roadside ditches to be vital safety features of our road system, as they are installed and maintained to collect and remove stormwater from roadway surfaces. VDOT has greater than ten million linear feet of unpaved roadside ditches in Virginia. Ditches were never intended to be regulated under the Clean Water Act as originally written and should not be considered jurisdictional. Under paragraphs (b)(3) and (b)(4) on p.22263, VDOT supports providing exclusions for ditches in the proposed rule and believes that roadside ditches should be excluded from Clean Water Act jurisdiction regardless of flow regime. The ditch exemptions as currently written, however, could actually be interpreted by federal staff as determining many of our roadside ditches as jurisdictional.

A typical roadside ditch is constructed alongside the entire length of a roadway (sometimes on both sides). With the exception of roads that run along a ridgeline, most roads and the associated ditches run through uplands, drain to streams, and run alongside streams and wetlands throughout the multi-mile length. With this understanding, these ditches would not be excavated wholly in uplands, as certain lengths of the ditch may be in uplands, but not the whole length if they intercept springs, streams or wetlands along the way. These ditches also would not drain only uplands, as the portions of the ditch that are located in uplands may drain only uplands, but once the ditch intercepts a spring, stream or wetlands, it no longer drains only uplands. (p. 2)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the exclusions and exemptions that apply to ditches in the final rule.

New Mexico Department of Agriculture (Doc. #13024)

- 6.11 The explanation in the Federal Register of the proposed changes to the definition of the term tributaries is not clear enough to systematically discern EPA's jurisdiction over

ditches. The inclusion of this category is already causing confusion for the regulated public in distinguishing jurisdictional from nonjurisdictional ditches. As such, NMDA would support an additional paragraph in the definitions section clarifying EPA's intentions regarding jurisdictional determinations over ditches separate from the language pertaining to tributaries. (p. 5)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. While some ditches will still be regulated as tributaries, the agencies have provided greater clarity in the final rule about which ditches will be excluded from waters of the U.S.

- 6.12 NMDA would support an additional paragraph in the definitions section clarifying EPA's intentions regarding jurisdictional determinations over ditches separate from the language pertaining to tributaries.

NMDA requests clarification on how perenniality will be determined. Specifically. We would like to know if the public will be given the opportunity to be involved in the determination process and how conflicting determinations will be mediated. (p. 25)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches in the final rule, and the meaning of the term “perennial flow” as used in the rule and preamble. The agencies believe that determination of perennial flow is clear and implementable. Approved jurisdictional determinations can be appealed through the USACE administrative appeals process.

Southern Environmental Law Center et al. (Doc. #13610)

- 6.13 Under the proposed rule most ditches are considered tributaries.

We offer the following comments concerning ditches. In contrast to other tributaries, ditches are required to meet additional characteristics before even being potentially considered jurisdictional. Ditches must have an OHWM, connect directly or indirectly to a traditional navigable water or interstate water and meet one of five other factors, and the proposed Guidance presumes that ditches are not tributaries.¹ Historically, ditches commonly have been protected under the CWA. Some so called ditches have been regulated under the Clean Water Act because they are actually altered streams (i.e., streams that have been dredged out), and because ditches can transport pollutants downstream they are functionally no different than other tributaries. Ditches can also be regulated under the Clean Water Act if they flow into other bodies of water that are protected by the Clean Water Act even if the ditches themselves are artificial.² There is no compelling legal or scientific reason to treat ditches differently from other tributaries and find them jurisdictional under the significant nexus test and we urge EPA to remove the unnecessary and burdensome additional factors (48-49)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the exclusions and statutory

¹ Proposed Guidance, p.12.

² *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001); *United States v. Holland*, 373 F. Supp. 665 (M.D. Fla. 1974).

exemptions that apply to ditches in the final rule. Ditches that relocate a tributary or are excavated in a tributary are not excluded under the rule.

Alabama Department of Transportation (Doc. #14116)

- 6.14 Two areas in the public sector with potentially the greatest impact are municipal and transportation. Both have thousands of miles of roadside and urban ditches to maintain; both have limited resources; and both are specifically regulated under multiple sections of the Clean Water Act, being assigned responsibility for restoring and protecting the physical, chemical, and biological integrity of our Nation's waters. With some added clarification and consideration, the proposed rule can benefit water quality, these agencies, and others in the regulated community.

Added clarification and consideration for specific exemptions for municipal and roadside conveyances (with less than perennial flow), and exemptions for stormwater treatment facilities, including green infrastructure, are in order. The good works and advancements of stewards of our urban environment should not be further frustrated by regulatory burdens without significant additional benefit to the environment.

The proposed rule is convincing in connecting tributaries physically, chemically, and biologically to larger receiving waters. It has also made the case for declaring ditches as tributaries by applying and publishing the fairly well understood and accepted definition of tributary. Due to the significance and magnitude of regulatory reach represented by these clarifications, ALDOT appreciates the proposed exclusions for upland ditches with less than perennial flows, and non-contributing ditches. However, additional clarity and expansion of the exemptions is requested. We offer the following specific comments and requests concerning these two exemptions for ditches. (p. 1-2)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the exclusions and statutory exemptions that apply to ditches in the final rule, and an additional exclusion for stormwater conveyance features constructed in dry land.

North Dakota Soybean Growers Association (Doc. #14121) (Doc. #14594)

- 6.15 The agencies' proposed definition of "tributary" is extraordinarily vague and overbroad. The definition would cover just about anything that conveys water and is not otherwise ruled out by narrow exclusions. A "tributary" can be anything that "contributes" even the tiniest amount of water; may only "contribute" water infrequently, e.g., during rare, extreme precipitation events; may only contribute water to major waters by an "indirect" route through another "water" which, in turn, could also convey only small, infrequent flows via indirect routes; and can be a man---made feature, such as a ditch.

The agencies' proposal includes ditches within the definition of "tributary." However, the jurisdictional coverage of ditches, like many other aspects of the proposal, is unclear. The proposal provides, in part, that "[a] tributary . . . includes water such as rivers, streams, lakes, ponds, impoundments, canals, and ditches. Most ditches will also eventually contribute some sort of flow to larger waters." This action is precisely why a ditch exists in the first place, to carry water from the site to drain elsewhere. Therefore, despite the

agencies' assurances of agriculture's exception, most ditches, ultimately, would not be excluded or exempted from CWA permitting requirements or some exasperating process to guarantee the permanent exception status of these ditches. (p. 7)

Agency Response: Section IV.F of the preamble of the final rule, Section VII of the Technical Support Document and Topic 8 of this RTC discuss tributaries in detail. See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule.

North Carolina Forestry Advisory Council (Doc. #14123)

- 6.16 Neither ephemeral streams nor ditches should be regulated under the proposed WOTUS rule. North Carolina's Forestry Best Management Practices (BMPs) have proven to be more than adequate for minimizing erosion and protecting water quality. The rule's proposal to include "all tributaries" seems to be over-reaching the intent of the Clean Water Act. If adopted, this new rule would undermine forty years of stale forestry BMPs that are currently working well. (p. 1)

Agency Response: See summary response for a discussion of historical jurisdiction of ditches under the Clean Water Act, and the exclusions and exemptions that apply to ditches in the final rule. See summary response for Topic 8: Tributaries, in Section 8.1.1: Relevance of flow regime, regarding regulation of ephemeral streams. The rule will not prevent the implementation of forestry BMPs to further protect water quality.

Commonwealth Pennsylvania Department of Agriculture (Doc. #14465)

- 6.17 Additional uncertainty is created by:

- creating exemptions for certain ditches, but making the exemptions so narrow that few ditches can meet the criteria (p. 4)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

North Carolina Department of Agriculture and Consumer Services (Doc. #14747)

- 6.18 In general, NCDA&CS feels that ditches are not natural tributaries and should not be subject to CWA jurisdiction, and NCDA&CS opposes expansion of federal jurisdiction to include ditches. EPA has stated that the proposed rule does not expand existing jurisdiction over ditches; however, some of the wording of the proposed rule, specifically the exclusions for ditches, has raised concerns that jurisdiction over ditches will in fact be increased. If a final rule is adopted, NCDA&CS urges EPA and USACE to exclude ditches from jurisdiction. (p. 2)

Agency Response: See summary response for a discussion of historical jurisdiction of ditches under the Clean Water Act, and the revised exclusions for ditches in the final rule. Ditches perform similar functions to tributaries and in many cases have a significant nexus to downstream waters. In addition, many

ditches are natural tributaries that have been modified or relocated, and remain jurisdictional.

Devon Energy Corporation (Doc. #14916)

- 6.19 The Proposed Rule’s tributary definition will sweep in many “ditches” that were not previously regulated as WOTUS.

Even if ditches do not have bed, bank and OHWM and so are not tributaries, the Proposed Rule allows for them to be jurisdictional as “adjacent waters” or “other waters.” Key terms like “uplands” and “contribute flow” are undefined and therefore do not provide the stakeholder with any guidance to determine what ditches are affected and which are exempted. Also, if shallow groundwater enters ditches and creates perennial flow, then they are likely jurisdictional.

Agency Response: See summary response for a discussion of the revised exclusions for ditches in the final rule, and the flow regimes referenced in the rule.

Louisiana Department of Environmental Quality (Doc. #15164)

- 6.20 *Expands its reach beyond that of the SWANNC (2001) and Rapanos (2006) U.S. Supreme Court decision and may result in required protection for waters that are truly non-jurisdictional under the CWA.*

It is likely that this proposed rule expands the federal authority beyond what was intended by the United States Supreme Court. The expanded inclusion of waters under the proposed rule may encompass waters that are non-navigable, minor, or manmade water bodies, all of which truly non-jurisdictional under the CWA. This expansion may also be inconsistent with state definitions of waters of the state. As such, states that are the delegated authority over water programs under the CWA may be forced to expand their programs to include waters that are not considered by the state to be jurisdictional (i.e. roadside ditches, ephemeral waters). Accordingly, the proposed definition of Waters of the U.S. may improperly undermine state authority in regulating and determining state jurisdiction under the CWA. (p. 3)

Agency Response: See summary response for a discussion of historical jurisdiction of ditches under the Clean Water Act, and the revised exclusions for ditches in the final rule. The tributaries, including ditches, that are regulated under the Clean Water Act connect to traditionally navigable waters, interstate waters, or the territorial seas, either directly or indirectly. See the summary response for Topic 8: Tributaries regarding the jurisdiction of ephemeral streams. Also, this rule does not require States to expand their jurisdiction under state law. Whether to implement a federal CWA regulatory program (e.g. NPDES or Section 404) is entirely discretionary for states. Any state that does not choose to implement a CWA regulatory program, for any reason can leave implementation of that program to EPA.

Arizona Game and Fish Department (Doc. #15197)

- 6.21 The proposed Rule lacks clarity and consistency as to which ditches are categorically jurisdictional. Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow, or ditches that do not contribute flow to waters of the U.S. are not jurisdictional. 40 CFR 230.3 (t)(3) and (4). However, a ditch that delivers stream flow via a diversion and a water delivery ditch are not excluded from federal jurisdiction. The final Rule should define such ditches as non-jurisdictional, or further clarify the "significant nexus" of these ditches to waters of the U.S. (p. 3)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. Distributary canals for water delivery that do not flow to a downstream water would not be jurisdictional. However, diversion ditches that return flow to waters of the U.S. may be jurisdictional if they meet the definition of “tributary” in the final rule and are not otherwise excluded from waters of the U.S.

West Virginia Department of Environmental Protection (Doc. #15415)

- 6.22 As discussed above, the WVDEP questions the inclusion of ditches as jurisdictional waters. For similar reasons to those expressed above, the WVDEP supports broadening the exclusions for ditches. Many of the ditches constructed to comply with state counterparts to SMCRA are not excavated wholly in upland areas and do contribute flow, at least indirectly, if not directly, to downstream waters. While some of these ditches will be permanent, others will be reclaimed at the conclusion of mining. During mining, all of these features are subject to standards requiring maintenance on an ongoing basis. Therefore, the exclusions for ditches would inappropriately include such features as jurisdictional waters.¹³)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

State of South Dakota (Doc. #16925)

- 6.23 **Jurisdictional Status of Stormwater Management Systems** - The proposed rule identifies as non-jurisdictional by rule wastewater treatment systems, including ponds or lagoons, but it is unclear if this applies to green stormwater management systems. In South Dakota, the SD Department of Environment and Natural Resources has been delegated responsibility for permitting facilities, including transportation projects and facilities covered by the National Pollutant Discharge Elimination System, under Section 402 of the Clean Water Act. SDDOT is interested in whether green infrastructure, such as wetlands constructed specifically to receive and treat stormwater run-off from roads with important ecological benefits, could themselves be deemed jurisdictional waters. If this is a possible scenario, SDDOT could be in the odd position of being required to obtain a

Section 404 permit to discharge stormwater into a facility constructed to satisfy stormwater permit requirements under Section 402 of the Clean Water Act. That makes no sense under any scenario. The SDDOT recommends clarification regarding the application of stormwater exclusions, including wetlands and ditches such that this CWA conflict does not have the potential to happen. (p. 5)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the exclusions and exemptions that apply to ditches in the final rule. The rule also adds specific exclusions for waste treatment systems designed to meet the requirements of the CWA, stormwater control features and wastewater recycling structures created in dry land. These features will not be considered waters of the United States.

California Department of Transportation, Division of Environmental Analysis (Doc. #19538)

- 6.24 The discussion of ditches on pages 22203 and 22219 conflict. Page 22203 identifies ditches that connect two or more "waters of the United States" as jurisdictional while page 22219 identifies that a non-jurisdictional ditch may constitute a hydrologic connection between a neighboring water and a tributary, however, this ditch would then be deemed jurisdictional according to the discussion on page 22203. Please clarify how jurisdiction would be determined in this case. (p. 4)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule.

Forrest County, Mississippi (Doc. #0927.1)

- 6.25 [W]e believe the argument of local government being responsible for our own ditches is universal in nature, and should extend to every county within the U.S. (p. 2)

Agency Response: Waters, including ditches, located within a county or local jurisdiction fall under federal jurisdiction of the Clean Water Act when those waters connect to traditionally navigable waters, interstate waters, or the territorial seas, either directly or indirectly. See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the exclusions and statutory exemptions that apply to ditches in the final rule.

Skamania County Board of Commissioners (Doc. #2469.1)

- 6.26 Counties own and operate a number of public infrastructure ditches-roadside, flood control channels, drainage conveyances and stormwater; these ditches are used to safely funnel water away from homes, properties and roads to keep our citizens protected. The proposed "waters of the U.S." regulation from EPA and the Corps could have a significant impact on counties by potentially increasing the number of county-owned ditches that fall under federal jurisdiction. (p. 3)

Agency Response: Waters, including ditches, located within a county or local jurisdiction fall under federal jurisdiction of the Clean Water Act when those waters connect to traditionally navigable waters, interstate waters, or the territorial seas, either directly or indirectly. See summary response for a discussion of the

historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. Ditches, including roadside ditches, not otherwise excluded under paragraph (b) of the final rule must meet the definition of “tributary” in order to be a water of the United States. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule. The rule also adds specific exclusions for waste treatment systems designed to meet the requirements of the CWA, stormwater control features and wastewater recycling structures created in dry land. These features will not be considered waters of the United States.

Nye County Board of County Commissioners (Doc. #3255.2)

- 6.27 Expansion of waters under Federal jurisdiction to include intermittent streams, county-maintained ditches, and flood channels. If designated as “waters of the US”, ditches currently maintained by the County would come under Federal jurisdiction and require CWA Section 404 permits to be obtained from USACE prior to continued maintenance. This would certainly add unnecessary time, expense, and liability to the County’s maintenance process. (p. 1)

Agency Response: Waters, including ditches, located within a county or local jurisdiction fall under federal jurisdiction of the Clean Water Act when those waters connect to traditionally navigable waters, interstate waters, or the territorial seas, either directly or indirectly. See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. Ditches, including roadside ditches, not otherwise excluded under paragraph (b) of the final rule must meet the definition of “tributary” in order to be a water of the United States. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

Sheridan County Commission (Doc. #3271.2)

- 6.28 The proposed "waters of the U.S." regulation from EPA and the Corps would have a significant impact on counties across the country [...]. Potentially increase the number of county-owned ditches under federal regulation: The proposed rule would define some ditches as "waters of the U.S." if they meet certain conditions. This means that more county-owned ditches would likely fall under federal oversight. In recent years, Section 404 permits have been required for ditch maintenance activities such as cleaning out vegetation and debris. Once a ditch is under federal jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to citizen suits if the federal permit process is not streamlined. (p. 2)

Agency Response: Waters, including ditches, located within a county or local jurisdiction fall under federal jurisdiction of the Clean Water Act when those

waters connect to traditionally navigable waters, interstate waters, or the territorial seas, either directly or indirectly. See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. Ditches, including roadside ditches, not otherwise excluded under paragraph (b) of the final rule must meet the definition of “tributary” in order to be a water of the United States. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

Minnehaha County Commission, South Dakota (Doc. #4116)

6.29 [C]oncerns expressed by our Highway Department that could have a direct impact on our county's ability to meet our responsibilities to local citizens:

1) Depending on how "waters of the US" gets defined, there could be a huge impact on our county highway ditches because virtually all of them end up draining to a major water way such as the Big Sioux River, Split Rock Creek, Cherry Creek, Skunk Creek, etc. At this time, unless immediately adjacent to the regulated water way, most ditches are not regulated because there is no "hydraulic nexus."

2) Regarding the "bed, bank and ordinary high water mark" way of defining potentially US jurisdictional waters, this poses less of a concern because most of our ditches are well draining, lined with grass, and do not have a definable bed and 'bank and do not have an identifiable high water mark. Some poorly draining ditches contain cattails and willows, which we try and avoid but it does happen. (p. 1)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. Ditches, including roadside ditches, not otherwise excluded under paragraph (b) of the final rule must meet the definition of “tributary” in order to be a water of the United States. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

Wayne County Commissioners (Doc. #4226)

6.30 Regulating man-made ditches is especially problematic for counties, who are responsible for a number of man-made ditches, such as culverts, storm channels and roadside ditches. The proposal could potentially increase the number of county ditches under federal jurisdiction, as it would define certain ditches to fall under the "Waters of the U.S." if they meet certain conditions (p. 1)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. Ditches, including roadside ditches, not

otherwise excluded under paragraph (b) of the final rule must meet the definition of “tributary” in order to be a water of the United States. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule. The rule also adds specific exclusions for waste treatment systems designed to meet the requirements of the CWA, stormwater control features and wastewater recycling structures created in dry land. These features will not be considered waters of the United States.

Davies County Indiana Board of Commissioners (Doc. #4295)

- 6.31 The proposed rule change, if adopted, will require permits that in the past only applied to navigable waters. Under the Rule, these permits would also apply to work on ditches (any feature with a defined bed and bank and ordinary high water mark), small ponds and even depressions in fields and pastures. The increased regulations on private property owners, home builders, potential developers, farmers, and county municipalities will delay projects and increase costs. (p.1-2)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for normal farming activities and maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule. The rule also adds specific exclusions for certain features constructed in dry lands, including artificial lakes and ponds, waste treatment systems designed to meet the requirements of the CWA, stormwater control features and wastewater recycling structures. These features will not be considered waters of the United States.

Fairfield County Commissioners (Doc. #4775)

- 6.32 [The proposed rule potentially] increases the number of county-owned ditches under federal regulation: The proposed rule would define some ditches as “waters of the U.S.” if they meet certain conditions. This means that more county-owned ditches would likely fall under federal oversight. Once a ditch is under federal jurisdiction, the Section 404 permit process can be cumbersome, time-consuming and expensive, leaving counties vulnerable to citizen suits if the federal permit process is not streamlined. (p. 1)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. Ditches, including roadside ditches, not otherwise excluded under paragraph (b) of the final rule must meet the definition of “tributary” in order to be a water of the United States. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or

drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

Bonner County Board of Commissioners (Doc. #4879)

- 6.33 The proposed rule potentially increases the number of county-owned ditches under federal regulation. The proposed rule would define some ditches as "waters of the U.S." if they meet certain conditions. Counties own and operate a number of public infrastructure ditches—roadside, flood control channels, drainage conveyances and stormwater; these ditches are used to safely funnel water away from homes, properties and roads to keep our citizens protected. This means that more county-owned ditches would likely fall under federal oversight. In recent years, Section 404 permits have been required for ditch maintenance activities such as cleaning out vegetation and debris. Once a ditch is under federal jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to citizen law suits if the federal permit process is not streamlined. (p. 2)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. Ditches, including roadside ditches, not otherwise excluded under paragraph (b) of the final rule must meet the definition of “tributary” in order to be a water of the United States. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule. The rule also adds specific exclusions for waste treatment systems designed to meet the requirements of the CWA, stormwater control features and wastewater recycling structures created in dry land. These features will not be considered waters of the United States.

North Cass Water Resource District (Doc. #5491)

- 6.34 [E]ven the articulated exclusions identified in the proposed rule are unnerving. For example, ditches that do not contribute flow to any jurisdictional waters are not subject to the CWA; however, every ditch in the Red River Valley ultimately contributes to the Red River watershed, and the District is concerned a very narrow interpretation of the ditch exclusion could render every single ditch in the Valley jurisdictional. (p. 3)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule.

St. Johns County Board of County Commissioners (Doc. #5598)

- 6.35 Counties own and operate a number of public infrastructure ditches such as roadside swales, flood control channels, drainage conveyances and stormwater, and these ditches are used to safely funnel water away from homes, properties and roads to keep our citizens protected. The proposed rule could have a significant impact on counties by

potentially increasing the number of county owned ditches that fall under federal jurisdiction.

The proposed rule excludes certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to a "water of the U.S." However, key terms like "uplands" and "contribute flow" are not defined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S." (p. 2)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. Ditches, including roadside ditches, not otherwise excluded under paragraph (b) of the final rule must meet the definition of "tributary" in order to be a water of the United States. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule. The rule also adds specific exclusions for waste treatment systems designed to meet the requirements of the CWA, stormwater control features and wastewater recycling structures created in dry land. These features will not be considered waters of the United States.

Board of Supervisors, Amity Township (Doc. #5603)

- 6.36 Due to the amount of ditches or low areas that become bodies of water when heavy rains fall, as well as the number of ponds, wetlands, rivers and lakes that exist in Pennsylvania, broadening the definition of "waters of the U. S." will essentially require almost any land development to obtain EPA permission. It will also create massive uncertainty because the EPA will need to determine on a case-by-case basis what waters will be defined as contributing "waters of the U. S." (p. 1)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. The agencies do not believe that the final rule broadens the definition of waters of the U.S. Instead, the final rule simplifies definitions to identify waters that are protected under the CWA, for the purpose of minimizing delays and costs, making protection of clean water more effective, and improving predictability and consistency for landowners and regulated entities.

Board of Supervisors, Dingman Township (Doc. #5604)

- 6.37 The Board believes that the expansion of the Act's regulations to govern every ditch and swale to be an extreme over reach by an agency known for overzealous actions. (p. 1)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. The rule also adds specific exclusions for erosional features including non-wetland swales.

New Hanover County, North Carolina (Doc. #5609)

- 6.38 Case by case jurisdiction determinations could lead to "waters of the US" determinations for ditches, swales and other engineered stormwater conveyances that are part of stormwater management systems and are not part of naturally flowing streams. These systems currently fall under the enforcement of local and state stormwater permits that require operation and maintenance agreements and covenants to be in place. Declaring these systems "waters of the US" will reduce the ability to maintain them to the standards and functions to which they were designed. Furthermore, if one part of a stormwater system is determined to be jurisdictional, similar systems within the same watershed could receive the same jurisdictional determination. (p. 2)

Agency Response: Tributaries, including ditches, will not require case-by-case significant nexus determinations. Ditches that meet the definition of tributary are jurisdictional unless otherwise excluded by rule. See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. The rule also adds specific exclusions for waste treatment systems designed to meet the requirements of the CWA, stormwater control features and wastewater recycling structures created in dry land. These features will not be considered waters of the United States. However, some stormwater conveyances that are natural tributaries, would remain jurisdictional under the rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

- 6.39 There is no clear distinction between a "ditch" and a "swale" which is an important differentiation since natural and man-made swales are not tributaries according to portions of the proposed rule. (p. 3)

Agency Response: Ditches must meet the definition of "tributary" in the final rule, including the required physical features of bed and bank and an ordinary high water mark, in order to potentially be considered waters of the United States. Even a ditch that possesses these physical features must also not be excluded under paragraph (b) of the final rule in order to be a water of the United States. Non-wetland swales are excluded from waters of the U.S.

Consolidated Drainage District #1, Mississippi County, MO (Doc. #6254)

- 6.40 [W]e do build drainage ditches in order to move the water from one point to another, and this does mean there is connection from the one body of water to whatever land we are draining. It is a connection we recreate by digging into the ground however deeply we need to move the amount of water we need moved; it is a connection we can stop or alter by digging in a different direction or filling in the area; most importantly, it is one already governed under the Clean Water Act's various provisions except under specific exemptions for very important agricultural purposes. There is no need to call a manmade ditch, one that is likely to be empty for large parts of the year; likely to be altered when there is good reason related to agricultural purposes; and quite importantly, there to

enable the cultivation of land for production of food and produce, anything other than a “ditch”. . (p. 2)

Agency Response: Ditches often function as part of the tributary system and perform similar functions to natural tributaries. The agencies agree that ditches can currently be jurisdictional under the Clean Water Act, and will continue to regulate certain ditches under the rule. See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for normal farming activities and maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

- 6.41 These ditches are not flowing into a parent river. They are not the sorts of affluents generally acknowledge as tributaries in freshwater systems. They tend to be relatively short, shallow, and do not have as their parent a mainstem river or a lake. Unlike a tributary that flows to its parent river or lake, we choose where the water goes when we build a ditch. These characteristics make ditches quite distinct from a tributary, and as such, they simply cannot be regulated as a “tributary” under the Clean Water Act. To the extent that a ditch is “adjacent water”, it only is adjacent if we decide it ought to be. That is to say, unlike a tributary that naturally flows to its parent and is obviously naturally adjacent, ditches are only adjacent to what we decide they are adjacent to. (p. 1)

Agency Response: By definition, tributaries, including ditches and other man-made tributaries, fall under federal jurisdiction of the Clean Water Act when those waters connect to traditionally navigable waters, interstate waters, or the territorial seas, either directly or indirectly. If a feature such as a ditch does not contribute flow to a downstream water, it is not a tributary. See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule.

Texas Soil and Water Conservation District #343 (Doc. #6793)

- 6.42 [Y]ou now have included agricultural ditches into the category of “tributaries.” This is inappropriate. The two exclusions you have provided for ditches are not adequate to alleviate the enormous burden you just placed on the entire agriculture community. “Ditches” should not be waters of the U.S. Farm ponds should not be waters of the U.S. Dry washes, dry streambeds, and ephemeral streams should not be waters of the U.S. (p. 1)

Agency Response: Ditches often function as part of the tributary system and perform similar functions to natural tributaries. See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for normal farming activities, remain in effect and have not been changed or modified in any way by this rule. The rule also adds a specific exclusion for artificial lakes and ponds created in dry lands

and used primarily for purposes such as stock watering, irrigation, settling basins, rice growing, or cooling ponds. Erosional features such as non-wetland swales, gullies, and rills are excluded, but ephemeral streams are waters of the U.S. under the rule. See summary response for Topic 8: Tributaries, in Section 8.1.1: Relevance of flow regime, regarding regulation of ephemeral streams.

Sweetwater County Board of County Commissioners, Sweetwater County, Wyoming (Doc. #6863)

- 6.43 Sweetwater County maintains approximately 1200 miles of county roads and approximately 2,400 miles of associated drainage ditches. Approximately two thirds or 1,600 miles of these county ditches drain uplands into ephemeral waterways that flow into the Green River and then into the Colorado River. Under the proposed rule, both the Green and the Colorado Rivers are designated as waters of the United States, but it is unclear, under the proposed rule, whether or not the 1,600 miles of Sweetwater County road ditches are considered waters of the United States. (p. 1)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. Ditches, including roadside ditches, not otherwise excluded under paragraph (b) of the final rule must meet the definition of “tributary” in order to be a water of the United States.

Butler County, Pennsylvania (Doc. #6918.1)

- 6.44 As interpreted by the EPA and Corps, the proposed rule and definitional implementation expansion could (and would) lead to significant increases in waters, including roadside ditches, falling under federal CWA §404 permitting processes. Counties and local municipalities maintain public safety infrastructure consisting of roads, roadside ditches, bridges, flood control channels, drainage conveyances, storm water systems and green infrastructure. Expanding the number of ditches under federal regulatory jurisdiction will increase necessary public infrastructure, such as existing flood damage reduction systems directly impacting public projects, budgets and timelines. If more waters (and ditches) fall within federal jurisdiction, compliance with water quality standards established by States based on federally designated "waters of the U.S." would be triggered. In water quality standards determinations, States must treat all waters equally regardless of size or flow. State standards for those waters must include impact statements based on "a highest beneficial use based on scientific analysis-fishable, swimmable, water supply." Under the permitting process, the applicant must "mitigate" environmental impact often times at significant cost. Additional conditions for maintenance activities could be included requiring a lengthy negotiation process. (p. 9-10)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. Ditches, including roadside ditches, not otherwise excluded under paragraph (b) of the final rule must meet the definition of “tributary” in order to be a water of the United States. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or

drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

White Pine County Board of County Commissioners, White Pine County, Nevada (Doc. #6936)

- 6.45 [T]here is a fine line between the reality of the potential for a ditch to flow contaminants into "waters of the U.S." Therefore, all definitions of verbiage that will pose new restrictions on public and private lands must be extremely clear and existing agricultural (farm and ranch) uses of public and private lands must not be burdened with regulation and permitting processes that limit the use of the lands and pose additional fees or delays in the use of those lands. (p. 1)

Defining ditches as "waters of the U.S." must meet established guidelines that are very specific in nature, that detail perennial yields in volume, and put the burden of proving such on the U.S. Army Corps of Engineers prior to classifying as such to affect future use and classification of ditch. -Once a ditch is classified, who will assume responsibility to clean the ditch when required and by what measures will such process be executed to satisfy the need at hand and at who's cost? (p.2)

Lack of state and local involvement. How will local jurisdiction public improvements such as new street, gutter, and human-made ditches that direct water flows in weather conditions be excluded from such definitions to becoming a tributary artery and require 404 permitting processes? (p. 2)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches and normal farming and ranching activities, remain in effect and have not been changed or modified in any way by this rule. However, local jurisdictions remain responsible for maintaining their drainage ditches. The rule also adds specific exclusions for waste treatment systems designed to meet the requirements of the CWA, stormwater control features and wastewater recycling structures created in dry land. These features will not be considered waters of the United States. However, some stormwater conveyances that are natural tributaries, would remain jurisdictional under the rule.

City of Westminster, (Colorado) (Doc. #7327.2)

- 6.46 Under the proposed rule, a variety of ditches will now be within the scope of "Waters of the U.S." The definition is vague regarding whether only a segment of the ditch that "contributes flow" to a jurisdictional water, or the entire ditch network associated with that segment would be jurisdictional. The definition needs further clarity. In the past, the USACE has determined these types of ditches to not be jurisdictional. The proposed rule limits those case-by-case judgments and increases the number of jurisdictional ditches within the City. (p. 2)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. See summary response regarding how the jurisdictional status of a ditch may change along portions of its reach. One of the purposes of the rule and its exclusions is to provide greater clarity and consistency in making jurisdictional determinations.

Oxford Township Board of Trustees, Erie County Ohio (Doc. #7834)

- 6.47 We also have a concern that most ditches, including roadside, floodwater, and agricultural drainage, would fall under jurisdiction of the Proposed Rule unless they meet specific exemptions. (p. 1)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. Ditches, including roadside ditches, not otherwise excluded under paragraph (b) of the final rule must meet the definition of “tributary” in order to be a water of the United States.

Board of Douglas County Commissioners, Castle Rock, CO (Doc. #8145)

- 6.48 Ditch and ditch systems are complex constructed facilities that are critical to a wide range of stormwater, flood and other water resource management objectives. The Proposed Rule opens the door to these features being WOUS, but does not sufficiently evaluate the specific considerations which apply to these systems. (p. 12)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule.

Franconia Township (Doc. #8661)

- 6.49 A primary concern for agricultural and rural groups critical of the proposed rule pertains to what the rule would mean for ditches that are used to drain stormwater off farm fields or to deliver irrigation water to them. EPA has said its proposal will not increase regulation of ditches that do not flow water to navigable waters or covered tributaries, but many ditches do flow water either directly or through other waters to a navigable water body.

That means they would not only be subject to the CWA's permitting requirements, but they would also be subject to other requirements of the law, including water quality standards, pollution cleanup plans and oil spill prevention measures. There is some question as to whether a ditch that collects agricultural runoff could end up needing a pollution discharge permit for where it flows into navigable waters. The proposed rule is ambiguous enough that there is an uncomfortable possibility that the ditches and streams running through farms and ranches in lowlands could receive closer scrutiny if the rivers and lakes downstream from them rank as "polluted" under the CWA. (p. 5)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. The agencies anticipate that due to

the exclusions for ditches, fewer ditches will be jurisdictional under the rule compared to the Rapanos guidance. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for normal farming activities, remain in effect and have not been changed or modified in any way by this rule.

Hamilton County Engineer's Office (Doc. #8669)

- 6.50 A primary concern for agricultural and rural groups critical of the proposed rule pertains to what the rule would mean for ditches that are used to drain stormwater off farm fields or to deliver irrigation water to them. EPA has said its proposal will not increase regulation of ditches that do not flow water to navigable waters or covered tributaries, but many ditches do flow water either directly or through other waters to a navigable water body.

The proposed rule would also add a perennial flow requirement for a ditch to be considered jurisdictional. Under the proposal, those jurisdictional ditches would be considered to be just like any other tributary. The proposed rule would also add a perennial flow requirement for a ditch to be considered jurisdictional. Under the proposal, those jurisdictional ditches would be considered to be just like any other tributary. That means they would not only be subject to the CWA's permitting requirements, but they would also be subject to other requirements of the law, including water quality standards, pollution cleanup plans and oil spill prevention measures. There is some question as to whether a ditch that collects agricultural runoff could end up needing a pollution discharge permit for where it flows into navigable waters. The proposed rule is ambiguous enough that there is an uncomfortable possibility that the ditches and streams running through farms and ranches in lowlands could receive closer scrutiny if the rivers and lakes downstream from them rank as "polluted" under the CWA. (p. 5)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. The agencies anticipate that due to the exclusions for ditches, fewer ditches will be jurisdictional under the final rule compared to the Rapanos guidance. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for normal farming activities, remain in effect and have not been changed or modified in any way by this rule.

White Pine County, Board of County Commissioners (Doc. #9975)

- 6.51 There is a need to insure U.S. water ways provide safe drinking water for communities with risks from possible upstream contamination. However, there is a fine line between the reality of the potential for a ditch to flow contaminants into "waters of the U.S." Therefore, all definitions of verbiage that will pose new restrictions on public and private lands must be extremely clear and existing agricultural (farm and ranch) uses of public and private lands must not be burdened with regulation and permitting processes that limit the use of the lands and pose additional fees or delays in the use of those lands. (p. 1)

Defining ditches as "waters of the U.S." must meet established guidelines that are very specific in nature, that detail perennial yields in volume, and put the burden of proving such on the U.S. Army Corps of Engineers prior to classifying as such to affect future use and classification of ditch. - Once a ditch is classified, who will assume responsibility to clean the ditch when required and by what measures will such process be executed to satisfy the need at hand and at who's cost? (p. 2)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for ditch maintenance and normal farming and ranching activities, remain in effect and have not been changed or modified in any way by this rule. However, local jurisdictions remain responsible for maintaining their drainage ditches. The rule also adds specific exclusions for waste treatment systems designed to meet the requirements of the CWA, stormwater control features and wastewater recycling structures created in dry land. These features will not be considered waters of the United States. However, some stormwater conveyances that are natural tributaries, would remain jurisdictional under the rule.

Dayton Valley Conservation District (Doc. #10198)

- 6.52 It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S." A public infrastructure ditch system-roadside, flood, or stormwater is interconnected and can run for several miles. How will this ambiguous language be interpreted and who will be doing the interpreting? (p. 1)

DVCD requests that it be made clear in the proposed rulemaking that irrigation ditches and drains which receive stormwater do not lose their agricultural exemptions. (p. 2)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for normal farming activities and maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

Pleasant Vale Township, Pike County, Illinois (Doc. #10200)

- 6.53 Pleasant Vale Township has many miles of public infrastructure ditches-roadside, flood control channels, drainage and stormwater conveyances; these ditches are used to safely funnel water away from homes, properties, and roads to keep our citizens protected and our roads safely maintained. The proposed "waters of the U.S." regulation from EPA and the Corps could have a significant impact on my township by potentially increasing or maintaining the number of ditches that fall under federal jurisdiction. (p. 1)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

Elk County Commissioners (Doc. #10941)

- 6.54 [M]unicipal-owned ditches would likely be defined as "waters of the U.S.". Permitting processes would be extremely cumbersome, time-consuming and expensive, as we've seen under other federal jurisdictions.

Clean Water Act Programs would subject county governments to increasingly complex and costly federal regulatory requirements; counties are already maxed out on unfunded state and federal mandates.

We believe that it is completely impractical for the federal government to regulate every ditch, pond and rain puddle that may have some vague connection, miles away, to a body of water currently defined as navigable. (p. 1)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. A number of other features are excluded from waters of the U.S., including artificial ponds and lakes constructed in dry land, and puddles.

Grant County Commission, New Mexico (Doc. #10963)

- 6.55 Under the new rule the definition of tributaries will be re-defined and henceforth potentially increase the need for local governments to obtain permits for example, routine maintenance of a rural roadway. Although within the rule there are exemptions identified related to ditches and their relationship with "waters of the United States" the definition of tributaries all but negates this exemption unless the ditches go absolutely nowhere. These exemptions, unless the ditch has no significant grade is useless. Most if not all ditches are designed to remove or transport water from adjacent infrastructure to nearby natural drainages to prevent erosion or damage. (p. 1)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

Kendall County Board, Illinois (Doc. #10965)

- 6.56 We object to the establishment of jurisdiction over man-made features created for the purpose of land drainage that comprise a significant and connective piece of the existing public drainage infrastructure in highly productive agricultural regions. (p. 2)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for normal farming activities, remain in effect and have not been changed or modified in any way by this rule.

Maryland Association of Counties (Doc. #11120)

- 6.57 MACo is concerned that the proposed "waters of the US" definition may expand jurisdiction of the CWA to county-maintained road and drainage ditches by including such ditches in the definition of a "tributary" while failing to clarify an already inconsistently applied drainage ditch exemption found in Section 404 of the CWA. If these ditches and channels, which counties are legally responsible for maintaining, were to fall under the CWA, counties could be forced to go through the onerous and time-consuming Section 404 permit process, as well as other programmatic requirements of the CWA. This could also increase county liability exposure and limit a county's ability to respond to a valid public safety concern. (p. 1-2)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

Board of Commissioners, Brown County, Minnesota (Doc. #11988)

- 6.58 All County roads have ditches. As noted, the proposed rule leaves the term "ditch" undefined. Ditches have the potential to be considered jurisdictional under the new rule. These interpretations would greatly increase the permitting process and time needed prior to starting a construction project or a normal maintenance project. The proposed rule changes could further delay these projects in an area of the United States that already has a very limited construction season. (p. 1)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. Ditches, including roadside ditches, not otherwise excluded under paragraph (b) of the final rule must meet the definition of "tributary" in order to be a water of the United States. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or

drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

Board of Commissioners, Wallowa County, Oregon (Doc. #12247)

6.59 Volume 79, N. 76 22202. "The agencies identified these tributary characteristics as indicative that the water is the type of hydrologic feature protected under the CWA because, for example, of a tributary's ability to transport pollutants to downstream traditional navigable waters, interstate waters, and the territorial seas, and thereby have a significant effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (a)(4). The flow in the tributary may be ephemeral, intermittent or perennial, but the tributary must drain, or be part of a network of tributaries that drain, into an (a)(1) through (a)(4) water under today's proposed rule.

Volume 79, No. 76 22203. "Such jurisdictional ditches may include, but are not limited to, the following:

- natural streams that have been altered (e.g., channelized, straightened or relocated);
- ditches that have been excavated in "waters of the United States," including jurisdictional wetlands;
- ditches that have perennial flow; and
- ditches that connect two or more "waters of the United States."

"In an effort to distinguish ditches that are not "waters of the United States" from those that are "waters of the United States," the proposal states that ditches with less than perennial flow that are excavated in uplands, rather than in wetlands or other types of waters, for their entire length are not tributaries and are not "waters of the United States" under the proposed rule".

The above excerpts from the [rule] show the EPA and the Corps have gone far beyond the Justice Kennedy's in Volume 79, No. 76 22204 "While Justice Kennedy focused on adjacent wetlands in light of the facts of the cases before him, it is reasonable to utilize the same standard for tributaries." To utilize the standards Justice Kennedy established for wetlands on tributaries is just nothing more than a power grab by regulatory agencies. Retain the existing definition of tributaries and exclude all man-made ditches, and natural streams that have been altered from the definition. (p.2)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary addresses why the agencies have determined that when ditches meet the definition of tributary and contribute flow to a traditional navigable water, interstate water or the territorial seas, they have a significant nexus to the above referenced downstream waters and are themselves jurisdictional waters of the United States, unless otherwise excluded.

Wibaux County Commissioners, Wibaux, Montana (Doc. #12732)

- 6.60 Wibaux County has over 550 miles of non-paved roads. The ditches drain the runoff from rain and snow melt into the creeks that take it to the next reservoir or major river. Much of it is soaked into our soil before it makes it to the streams and rivers. The proposed act will greatly reduce the ability of our road crew to maintain culverts and ditches in our county. They are already excessively burdened with the permit process to get things done in our county. The list of hardships to our County and many others are too great to list. (p. 2)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. Ditches, including roadside ditches, not otherwise excluded under paragraph (b) of the final rule must meet the definition of “tributary” in order to be a water of the United States. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

California Central Valley Flood Control Association (Doc. #12858)

- 6.61 Of particular concern for the Association and its members is the proposal to treat waters separated by a levee or other manmade barrier as “adjacent” waters, even if those waters otherwise lack any kind of nexus. Without allowing districts the opportunity to present evidence showing otherwise, the proposal would treat all waters on either side of a levee as “adjacent,” even where no chemical or biological nexus exists. The science relied on by the proposal seems to be based on a few examples, such as the finding that some levee-toe water bodies “can” fix nitrogen. Even if true, this does not seem to present enough evidence to create an irrefutable presumption of a significant and measurable nexus.

This proposal is of grave concern in the Delta, because most Delta levees have a “waterside” and a “landside,” with the water side levee toe always submerged in the river. This design profile is somewhat unique to California Delta and Central Valley levees. Currently, most landside projects do not require permitting. However, many levees in the Delta have drainage ditches or irrigation ditches near them. Because of the simple presence of these ditches, many, many more landside projects would become jurisdictional. Again, this would penalize Central Valley flood control agencies because of a simple design profile particular to most Delta levees.

As a result of this determination, drainage ditches and irrigation ditches that have not historically been considered jurisdictional appear to be included in the definition of “adjacent” waterways. Thus, their construction, maintenance, and drainage activities would suddenly fall within the jurisdiction of the Clean Water Act and related permits. Even more worrisome, the apparent inability to rebut the levee presumption means that no amount of scientific, hydrological, or other evidence will suffice to show that a reclamation district, farmer, or local government does not discharge into an adjacent

waterway when maintaining a drainage ditch. This would even include ditches alongside the newest “super fat” levees, which may be 50 feet or more across the crown. (p. 6)

Agency Response: Section IV.G of the preamble of the final rule, Section VIII of the Technical Support Document and Topic 3 of this RTC address “adjacency” in detail. Simply, the presence of a ditch does not mean that the ditch or the lands adjacent to it are automatically considered jurisdictional waters of the United States. See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. In addition, the summary response for Section 6.2, Excluded Ditches, describes that all existing statutory exemptions, including those addressing the maintenance of existing drainage and irrigation ditches, remain in place and unaffected by the final rule.

Whitman County Commissioners, Colfax, WA (Doc. #12860)

- 6.62 This proposal does nothing to increase benefits-it simply creates more burdensome regulation and paperwork. In fact, I expect the extra delays caused by these changes will result in degradation to the environment. Ditches not properly maintained will cause damage to roads, fields, businesses, etc...that results in materials not intended to enter our streams being forced into them. Emergency measures to correct problems are many times more costly than preventative measures taken beforehand. I have recently talked with a farmer trying to maintain a ditch not currently part of “Waters of the U.S.” regulation, but would likely be under this rule. He is having enough trouble with the state permit process as it is. Adding one more layer would likely result in his not even trying to clean out the ditch in question. But if the ditch isn’t cleaned, it will blow out in the next big runoff event and again damage a county road. Our local farmers, ranchers and small businessmen don’t have “staff” to deal with excess red tape. They have to take time away from running their business to do so. It is inherent upon us to minimize regulations and the proposed change doesn’t do that—it increases the regulatory burden (p. 2)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches and normal farming activities, remain in effect and have not been changed or modified in any way by this rule.

Carson Water Subconservancy District Carson City, NV (Doc. #13573)

- 6.63 Another agricultural community concern is that many of the counties' and cities' stormwater systems flow into agricultural ditches. Depending on the storm intensity, it is possible for the stormwater to flow through the agricultural ditches and reach the "Waters of the US." Based on the proposed rules, these ditches could fall under the Corps jurisdiction. To resolve this concern, CWSD requests that it be made clear in the proposed rulemaking that irrigation ditches and drains which receive stormwater do not lose their agricultural exemptions. (p. 3)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for normal farming activities, remain in effect and have not been changed or modified in any way by this rule.

Northeastern Soil and Water Conservation District (Doc. #13581)

- 6.64 The definition of waters of the United States encompasses everything and seems to contradict itself in several areas. Such as "ditches" was in the exclusion list and later listed under the definition of tributary (which is not excluded). The NSWCD is located in a part of our country that has numerous dry creek beds that have not had a continuous flow of water in hundreds of years. The only time we see water in them is after a heavy rain fall (which is rare). That water quickly evaporates and does not reach any major bodies of water. Creek beds like we have here should not be included in the definition as they rarely have water in them and when they do it is only accessed by wildlife not people. (p. 1)

Agency Response: The final rule clearly indicates that any feature excluded in paragraph (b) is not a jurisdictional water of the U.S., even where it otherwise meets the terms of paragraph (a) describing waters of the United States. Under the final rule, only ditches that meet the definition of "tributary" are waters of the United States. Section IV.F of the preamble of the final rule, Section VII of the Technical Support Document and Topic 8 of this RTC discuss tributaries in detail.

Big Horn County Commission (Doc. #13599)

- 6.65 Current rules do not include ditches, but the agencies have informally interpreted rules to include ditches as "tributaries" under some circumstances. The new rule would put this in regulations for the first time and would categorically define almost all ditches as "tributaries." (79 Fed. Reg. 22203-4) What's more, the rule does regulate activities on land that is usually dry but where water channels and flows or ponds when it rains. The rule calls these areas ephemeral streams" and "wetlands" and "seasonal ponds"-A Major Federal Action. (p. 2)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. See summary response for Topic 8: Tributaries regarding regulation of ephemeral streams. Wetlands regulated as adjacent (a)(6) waters, or (a)(7) or (a)(8) waters must meet the three parameters of a wetland, as well as the requirements of the above referenced subparagraphs, to be considered jurisdictional.

City of Buckeye, Arizona (Doc. #14591)

- 6.66 This new recommended revised rule language does not address ditches that are not "roadside ditches". We urge EPA to consider a similar approach and similar revised rule

language for these other types of ditches, especially where these ditches are urban SCMs. (p. 4)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. Both the proposed rule and the final rule address all ditches, and not only roadside ditches.

Board of County Commissioners, Larimer County (Doc. #14741)

- 6.67 Larimer County owns, operates and maintains many miles of public stormwater infrastructure such as roadside ditches and drainage conveyances. The proposed rule could potentially increase the number of county-owned ditches classified as "Waters of the U.S." and therefore under federal regulation and oversight. We support the intent of the Clean Water Act but we believe that additional scientific review is required to accurately determine if there is a "significant physical, chemical, or biological nexus" between County owned ditch systems and the navigable Waters of the U.S. This is an important distinction because, once a ditch is under federal jurisdiction, the Section 404 permit process could be applicable and that process can be cumbersome, time-consuming and expensive. In general, Larimer County's position is that most County owned and operated roadside ditches should not be considered jurisdictional "waters of the U.S." However, as an alternative to a complete exclusion, we suggest that the proposed rule continues to provide the USACE with the flexibility to make these determinations on a site specific basis. (p. 2)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

Valley Center Municipal District (Doc. #14752)

- 6.68 VCMWD joins the Association of California Water Agencies and other California water utilities in recommending the following:
- Water conveyance systems should be excluded from the proposed definition of the "waters of the United States." (p. 2)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. It is not clear what the commenter means by "water conveyance systems," but the rule also adds specific exclusions for waste treatment systems designed to meet the requirements of the CWA, stormwater control features and wastewater recycling structures created in dry land. These features will not be considered waters of the United States.

North Carolina Soil and Water Conservation Commission (Doc. #14790)

- 6.69 **Jurisdiction of Ditches:** The SWCC feels that ditches are not natural tributaries and should not be subject to CWA jurisdiction. The SWCC opposes expansion of federal jurisdiction to include ditches. EPA has stated that the proposed rule does not expand existing jurisdiction over ditches. However, some of the wording of the proposed rule, specifically the exclusions for ditches, has raised concerns that jurisdiction over ditches will in fact be increased. If a final rule is adopted, the SWCC urges EPA and USACE to exclude ditches from jurisdiction. (p. 2)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule.

Office of the Governor, State of Kansas (Doc. #14794)

- 6.70 [T]he document (with emphasis added) states "... ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are generally not waters of the United States because they are not tributaries or they do not have a significant nexus to downstream traditional navigable waters. Even when not jurisdictional waters subject to CWA §404, these geographic features (e.g., swales, ditches) may still contribute to a surface hydrologic connection between an adjacent wetland and a traditional navigable water."

The guidance clearly acknowledges that ditches may contribute flow downstream (usually the purpose of a ditch) but is still not jurisdictional. The proposed Rule, however seems to ignore the previous guidance by not only including ditches in the rule, but sweeping them into the definition of a "tributary" based on the following Rule language:

"A tributary, including wetlands, can be a natural, man-altered, or manmade water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph {2}(iii) or (iv) of this definition."

This definition precludes EPA or the ACOE from mandatory site-specific evaluations of ditches to determine significant nexus. Again, the sweeping of numerous ditches (including roadside ditches) into the definition of a "tributary" is a significant expansion of CWA jurisdiction. 10)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule.

San Joaquin County Board of Supervisors (Doc. #15017.1)

- 6.71 We believe the agencies should specifically exempt ditches and drains constructed and maintained in association with agricultural irrigation uses, and all lowland agricultural and roadside stormwater and irrigation return flow drainage ditches from CWA jurisdiction. Section (b) (3) should be revised to strike "ditches wholly in the uplands" and replace with "upland ditches". Also, certain drains that drain uplands do have perennial flow, mostly due to the timing of agricultural return flows in the form of

groundwater, and should be excluded as well. If irrigation were to cease, these perennial flows would eventually cease. In the case of such delayed agricultural runoff causing perennial flows in drainage ditches, these upland agricultural drains should be considered excluded from the definition of "waters of the U.S." as well. Finally, maintenance of agricultural drains located in the floodplain that essentially drain upland irrigated lands should be excluded from CWA jurisdiction, or at the very least be exempted from CWA permitting requirements provided in the Corps/EPA Regulatory Guidance Letter (RGL) 07-02. (p. 7)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

National Association of Counties (Doc. #15081)

6.72 Recommendations:

- Exclude ditches and infrastructure intended for public safety
- Streamline the current Section 404 permitting process to address the delays and inconsistencies that exist within the existing decision-making process
- Provide a clear-cut, national exemption for routine ditch maintenance activities (p. 14)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. This is a definitional rule, and the permitting process itself is outside the scope of the rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

Los Angeles Department of Water and Power (Doc. #15238)

6.73 LADWP recommends that the Proposed Rule be modified to:

- Clarify that ditches are not considered tributaries and therefore not WOUS. (p. 8)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary addresses why the agencies have determined that when ditches meet the definition of tributary and contribute flow to a traditional navigable water, interstate water or the territorial seas, they have a significant nexus to the above referenced downstream waters and are themselves jurisdictional waters of the United States, unless otherwise excluded.

Idaho Association of Counties (Doc. #15525)

- 6.74 [T]he proposed regulations regarding "ditches" require additional detail. The implications of the proposed definition of "ditches" are vast not only for agricultural reasons but transportation reasons as well. Under the proposed definitions of exempt ditches in 40 C.F.R.(t)(3) and (4), the Counties are concerned that the EPA and the Corps may consider roadside ditches as a potential "tributary," a determination that could make regular road maintenance very time-consuming and expensive. The Counties therefore request that the proposed rule be modified to include additional information in the definitions (40 C.F.R. 230.3(s)) and the exclusions (40 C.F.R. 230.3(t)) that would provide guidance regarding roadside ditches that do not neatly fit in the proposed exclusions in 40 C.F.R. 230.3(t). (p. 3)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches. The final rule does not distinguish roadside ditches from non-roadside ditches. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches and normal farming activities, remain in effect and have not been changed or modified in any way by this rule.

Ouray County Board of County Commissioners (Doc. #15622)

- 6.75 **Concern about possible increase of jurisdiction over County Ditches and lack of clarity in Proposed Definition.**

The National Association of Counties staff have done a thorough comparison and analysis of the current definition and the Proposed Definition. A question that has come up repeatedly for 3 years now has been concerns that the Proposed Definition more broadly defines manmade and natural ditches as tributaries, and would potentially increase the number of county-owned ditches under federal jurisdiction. This is a million-dollar question. Would the Proposed Definition do this or not? We need certainty that it would not be intended to, and that it is written in such a way as it could never be interpreted to. (p. 3)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches and normal farming activities, remain in effect and have not been changed or modified in any way by this rule.

Colorado Springs Utilities (Doc. #16351.1)

- 6.76 Ditches are commonly used in the West not only to meet agricultural irrigation demands, but also to move water for municipal purposes. Such ditches, originating at the river's

edge, would not qualify for the narrow exemptions found in the proposal, thereby creating additional obstacles in meeting essential water supply needs. (p. 2)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule.

South Kansas Groundwater Management District No. 3 (Doc. #16465)

6.77 To address the issues identified in this letter the Federal Agencies should:

- Clarify that manmade irrigation canals, ditches and drains are not navigable waters, are not "waters of the U.S.," are not "tributary" to waters of the United States and are not subject to CWA jurisdiction. (p. 2)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. Certain ditches and man-made or man-altered waters are jurisdictional under current regulations and Rapanos guidance, and will continue to be jurisdictional under the final rule.

City of Beaverton's, Oregon (Doc. #16466)

6.78 Ditches and other drainage features that protect and ensure the operation of public infrastructure shall not be considered waters of the U.S. (p. 3)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. Certain ditches will continue to be regulated as waters of the U.S.

Brady Township Supervisors, Clearfield County, Pennsylvania (Doc. #16480)

6.79 We believe the agencies should specifically exempt all roadside ditches, as well as ditches and drains constructed and maintained in association with agricultural uses, from CWA jurisdiction. Section (b)(3) should be revised to strike "ditches wholly in the uplands" and replace with "upland ditches." Also, certain upland drainage that has perennial flow due to the timing of agricultural return flows in the form of groundwater. If irrigation were to cease, these perennial flows would eventually stop. In the case of delayed agricultural runoff causing perennial flows, these upland agricultural drains should also be considered excluded from the definition of 'waters of the U.S.'

Under the proposal's broadened definition of a "tributary" that is considered a "water of the U.S.," certain farm or roadside "ditches" could qualify as a tributary and be subject to CWA regulation. We are concerned with what this proposed rule would mean for ditches that are used to drain stormwater off farm fields. EPA has said its proposal will not increase regulation of ditches that do not flow water to navigable waters or covered tributaries, but many ditches do carry water either directly or through other waters to a navigable water. (p. 5)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified

exclusions for ditches in the final rule. Certain ditches and roadside ditches will continue to be regulated as waters of the U.S. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches and normal farming activities, remain in effect and have not been changed or modified in any way by this rule.

San Bernadino County, California (Doc. #16489)

- 6.80 The language pertaining to the jurisdictional exclusion of "ditches" is confusing, particularly when juxtaposed with the language pertaining to "tributaries". A broadly construed reading of these definitions might conclude that all "ditches" flowing to navigable waters are "tributaries" and, therefore "jurisdictional by rule" (p. 4)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. The final rule clearly indicates that any feature excluded in paragraph (b) is not a jurisdictional water of the U.S., even where it otherwise meets the terms of paragraph (a) describing waters of the United States

Missoula County Commissioners (Doc. #16656)

- 6.81 The final rule should make clear what if any, permits would be required for these ditches and how that determination would be made. The final rule also should also clarify if maintenance activities, such as removing overgrowth from a riparian area, would be exempt from the permitting process. (p. 2)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

Hot Springs County Commissioners (Doc. #16676)

- 6.82 Hot Springs County diverts snowmelt for agricultural use in some cases, which under the proposed rule appears to be exempt. However, it is often difficult to determine which conveyances are for agriculture purposes and which are merely for snowmelt flood mitigation. The proposed rule's exemption definitions are too vague, and in the case of tributaries the definition is so expansive as to imply that Hot Springs County might experience significant increase in federal permits required to continue this practice. (p. 7)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule.

Cascade County Commissioner (Doc. #16904)

- 6.83 We are unclear whether county-owned roadside ditches, flood control channels, drainage conveyances and storm water systems are considered tributaries. Many of the county roadside ditches regularly run water during wet periods of the year and after large rain events. Some ditches may have the "presence of a bed and bank with ordinary high water mark." Flood irrigation from agricultural land creates continuous water in some roadside ditches during the summer season. In some instances, these roadside ditches flow into minor tributaries, so we question whether they would be considered "jurisdictional waters." With over 1100 miles of county road, county maintenance costs and operations could be significantly impacted if the Public Works Department was required to acquire permits and administer additional regulations. Additional federal permitting could delay routine maintenance operations and/or expose Counties to misplaced citizen review. We ask that the definition of exempt ditches be further clarified. (p. 2)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

Amador County Board of Supervisors (Doc. #17450)

- 6.84 Rural roadside ditch systems often drain directly into tributaries, or neighboring waterways that are connected to tributaries that eventually connect to navigable streams. It is unclear whether these roadside ditches would be classified as "excavated wholly in uplands, drain only uplands, and have less than perennial flow" and therefore specifically excluded from the proposed definition of Waters of the U.S. If included, it will require counties to seek Section 404 permits for routine maintenance of such ditches, adding significant costs and maintenance delays from processing permits through the U.S. Army Corps of Engineers.

Ditches used to convey municipal storm water discharge under the Municipal Separate Storm Water Sewer System (MS4) program could be reclassified as Waters of the U.S. The reclassification would change the control standard from the "maximum extent practicable under Section 402(p) of the CWA to the attainment of water quality standards requiring the imposition of numeric effluent limits. Unless specifically exempted, the costs from new permits will rise exponentially for local governments. (p. 2)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule. The rule also adds specific exclusions for waste treatment systems designed to meet the requirements of the CWA, stormwater control features and

wastewater recycling structures created in dry land. These features will not be considered waters of the United States.

City of St. Petersburg (Doc. #18897)

- 6.85 **The threshold to exclude ditches from the proposed rule is high, arbitrary, and it fails to appropriately value their role in stormwater retention and attenuation.** While the City agrees that ditches with "less than perennial flow" should automatically be excluded as waters of the U.S., it is arbitrary for the EPA to restrict the exclusion to only those ditches that are "excavated wholly in uplands." For low-lying St. Petersburg, which is at (or even below) sea level throughout much of its extent, this is an unnecessarily high threshold and fails to evaluate the role of ditches and similar features in stormwater management, regardless of their relative elevations. The proposed rule must include some exemptions for water features built solely with a stormwater management purpose. The City's ability to comply with MS4 requirements and its duties under the National Pollution Discharge Elimination System (NPDES) could otherwise be jeopardized. These ditches are necessary in achieving the success the City has in meeting ambient water quality standards for surrounding lakes, bays, and estuaries. (p. 3)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule. The rule also adds specific exclusions for waste treatment systems designed to meet the requirements of the CWA, stormwater control features and wastewater recycling structures created in dry land. These features will not be considered waters of the United States.

- 6.86 **The proposed rule burdens the City's ability to maintain and build new infrastructure, on the banks of ditches.** The broadening jurisdiction over waters of the U.S. subjects the City to an increased permitting process when installing utility poles, signs, or other traffic devices. Cities will continue to be liable for maintaining these ditches, even if federal permits are not approved by federal agencies. This opens the door to increased litigation against the City. (p. 4)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

Pitkin County Colorado Board of County Commissioners (Doc. #18921)

- 6.87 Ditches are the lifelines which allowed development of the rural West. Given the essential nature of ditches to our community, and communities throughout the nation, the

preamble, discussion, and definition of ditches necessarily requires elaboration and clarification. The proposed rule includes categorical exclusions for certain types of ditches and Pitkin County supports this approach, but refinement of the exclusions is needed. Pitkin County also supports the explicit recognition in the rule that excluded ditches cannot be "recaptured" under other provisions of the rule. (p. 2)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule.

Maui County (Doc. #19543)

- 6.88 A ditch that treats runoff is "green infrastructure." The rule should clearly address such an exception. Similarly, upland vegetated swales may be fortified to prevent erosion; however, leaving a swale unfortified may retain its non-WOTUS status, or fortifying it may subject it to CWA jurisdiction. The proposed rule should clarify this situation and provide for an exemption.

Ditch and ditch systems are critical to stormwater, flood and other water resource management objectives. The proposed rule opens these features to being WOTUS, but does not evaluate the specific considerations applying to these systems (p. 6)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. The rule also adds specific exclusions for stormwater control features and wastewater recycling structures created in dry land, and non-wetland swales. These features will not be considered waters of the United States. Finally, the summary response and the final rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule.

Association of Minnesota Counties (Doc. #3309)

- 6.89 Another issue that our membership raised questions on is the issue of "connectedness." A ditch could be jurisdictional if it is connected directly, or indirectly, to another jurisdictional water. How will this connection be determined and how far into the ditch system will this connectedness extend? Is there a limit to the connectivity? Could one ditch leading to another ditch that leads to jurisdictional waters be considered connected, no matter how far away it would be? This question could also extend to wetland areas in the state. (p. 2)

Agency Response: See summary response the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. Ditches that are not excluded and meet the definition of tributary are regulated under this rule; the significant nexus to downstream jurisdictional waters has been determined by rule.

Rural County Representatives of California (Doc. #5537)

- 6.90 As it stands, the proposed rule provides no clarification on ditches used as conveyance for runoff in municipal storm water activities. Ditches are commonly used by municipalities for storm water discharge under the Municipal Separate Stormwater Sewer Systems (MS4) program, and such activities are already regulated as waste treatment systems under Section 402(p) of the CWA. The proposed rule would reclassify those ditches as Waters of the U.S., whereby the applicable control standard would no longer be maximum extent practicable under Section 402(p), but the attainment of water quality standards thereby requiring the imposition of numeric effluent limits. (p. 3)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule. The rule also adds specific exclusions for waste treatment systems designed to meet the requirements of the CWA, stormwater control features and wastewater recycling structures created in dry land. These features will not be considered waters of the United States.

Association County Commissioners of Georgia (Doc. #5912)

- 6.91 In a lawsuit by a citizen/environmental group, it will be very difficult to successfully claim that any county-maintained ditches drain only in uplands and do not contribute flow to a “Water of the U.S.”, particularly with the humidity and precipitation we get in the Southeastern United States?

Furthermore, the terms “uplands” and “contribute flow” are undefined, and we feel that their definitions would also be litigated extensively. (p. 1)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule.

Area II Minnesota River Basin Projects, Inc. (Doc. #7185)

- 6.92 Proposed Action: The draft rule should clarify that local streets, gutters and human-made ditches, as well as their maintenance, are exempted from the definition of “Waters of the U.S.” (p. 2)

Agency Response: See summary response for a discussion of the historical regulation of ditches, including certain man-made ditches, under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502, including those for maintenance of existing irrigation or drainage ditches, remain in effect and have not been changed or modified in any way by this rule. The rule also adds specific exclusions

for waste treatment systems designed to meet the requirements of the CWA, stormwater control features and wastewater recycling structures created in dry land. These features will not be considered waters of the United States.

Missouri Association of Municipal Utilities (Doc. #7931)

- 6.93 Drafters have used the term 'excavated' without qualification, resulting in situations where ditches created by:
- Contour modifications on either side of a future ditch bed by addition of soil and rock (such as parallel roads) and without excavation for the ditch itself would not qualify for consideration as a categorically excluded 'ditch'.
 - Natural land forms such as swales would not qualify for categorical exclusions even though they can and often do include all of the characteristics of a 'ditch' because they weren't excavated.

Drafters also have used the phrase "are created" which grammatically is a future tense of the word limiting the exclusion application only to ditches that are created at some point in the future. It would not address existing ditches as potential candidates for exclusion. In this case, some entity would need to establish a database of all 'ditches' within a municipality in order to determine which ones are and aren't covered by the rule. (p. 3)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. Non-wetland swales are excluded from waters of the U.S. under the final rule. The rule addresses existing and future ditches under the exclusions in paragraph (b) of the final rule. A ditch does not have to be "excavated" in order to be excluded under the final rule.

Florida Association of Counties (Doc. #10193)

- 6.94 There are other definitions of concern in the rule in addition to those regarding the "other waters" revision. For example, a "tributary" would encompass those features with perennial, intermittent or ephemeral flows, and jurisdiction will be asserted irrespective of whether these features are man-made or man-altered.³ Any ditch - even if dry most of the time - would be jurisdictional unless it comports with the very narrow exemption of being excavated and draining only in uplands.⁴ (p. 5)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule.

Nebraska Association of Resources Districts (Doc. #11855)

- 6.95 The Proposed Rule's exemption for ditches is particularly troubling, as it does not cover any ditches that contribute flow, either directly or through another water, to a traditionally navigable water, interstate water, interstate wetland, or impoundments of

³ 79 Fed. Reg. 76, 22248 (Apr. 21, 2014), 22201-22202

⁴ 79 Fed. Reg. 76, 22248 (Apr. 21, 2014), 22201-22202. It should be noted that the term "uplands" is not defined.

such waters or tributaries.⁵ The Agencies' overbroad assumptions regarding the impacts an isolated intrastate conveyance, such as a ditch, must have if it indirectly contributes flow to a traditionally navigable water effectively negates the exemption. Absent a meaningful exemption, federal jurisdiction will be asserted over many ditches under the broad definition of "tributary." (p. 9)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule.

Illinois Association of County Engineers (Doc. #13628)

- 6.96 We strongly urge the EPA and the Corps of Engineers to propose a final rule that clearly specifies road side ditches are exempt (regardless of their location within the hydrological hierarchy). (p. 1)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. Ditches, including roadside ditches, not otherwise excluded under paragraph (b) of the final rule must meet the definition of "tributary" in order to be a water of the United States.

County Commissioners Association of Pennsylvania (Doc. #14579)

- 6.97 A] ditch in a backyard or a swale could arguably be jurisdictional by the definition of "adjacent" or "significant nexus", if it rains and the resulting water flow runs downhill to a stream. If a homeowner fills that ditch or swale in without a federal permit, what happens? Is that homeowner then subject to the extensive penalties found in the CWA, even if that individual met all other state and local permitting obligations intended to assure water quality is adequately protected? (p. 6)

How will the jurisdiction of a ditch be determined? The proposed rule states that man-made conveyances are considered jurisdictional tributaries if they have a bed, bank and ordinary high water mark, and flow directly or indirectly into an interstate water, territorial sea or their impoundments, regardless of perennial, intermittent or ephemeral flow. There is an exemption for certain types of upland ditches with less than perennial flow or those that do not contribute flow to a WOTUS. But based on the uncertainty of terminology, what does "contribute flow" mean, and how will "do not contribute flow" in the exemption be determined? How would this be proven (i.e. what tests would be used?). Who would have the onus to prove the ditch does not contribute to flow – the agencies or the permittee? (p. 9)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. Ditches that flow only in response to rainfall are ephemeral ditches, which are excluded from waters of the U.S. unless they are excavated in or relocating a natural tributary. Non-wetland swales are also excluded from waters of the U.S. The final rule does not use the phrase "contribute

⁵ Proposed definition at 40 C.F.R. 230.3(t)(4)

flow" in the exemption for ditches and should provide more certainty in implementation.

Western Urban Water Coalition (Doc. #15178.1)

- 6.98 Similar to the proposed rule's use of ephemeral and intermittent without distinguishing between the two terms, it is not clear if the proposed rule is using the terms "canal" and "ditch" interchangeably, or if exemption applies only to ditches since the exemption language uses the term "ditch" but not "canal." For the purposes of these comments, it is assumed that the proposed rule uses "canal" and "ditch" interchangeably. It is also not clear if the proposed rule is distinguishing between drainage ditches (drains) and ditches used to deliver water. The way the proposed exemptions are written, they are potentially more applicable to drainage ditches. This may explain why the exemptions do not include the term "canal." It is further reinforced that the proposed rule may focus on drains and not irrigation canals by comments from the EPA SAB Panel on ditches that also focus on drains (EPA SAB Panel 2014). It is also unclear how the proposed rule would define or consider an otherwise dry natural tributary or gully used seasonally to convey water for irrigation (Appendix A, Photo 11). (p. 24-25)

Agency Response: The definition of tributary includes canals that meet the physical requirements of the term. The agencies have consistently regulated aqueducts and canals as waters of the United States where they serve as tributaries, removing water from one part of the tributary network and moving it to another. The agencies do not distinguish between canals and ditches in the rule. In addition, the exclusions for ditches in the rule do not distinguish between ditches constructed for drainage and ditches constructed for irrigation, and the 404(f)(1)(C) exemptions for construction and maintenance of irrigation ditches and maintenance of drainage ditches are unchanged by the rule. However, natural tributaries used to convey irrigation water remain regulated tributaries under the rule. A gully is a non-jurisdictional erosional feature which lacks the physical characteristics of a tributary and is excluded under section (b)(4)(F) of the final rule.

Wyoming County Commissioners Association (Doc. #15434)

- 6.99 Because ditches will be automatically considered jurisdictional if the ditch meets the definition of tributary, the exclusions must be taken in the context of the broad definition of tributary discussed above. In contrast to agricultural ditches and canals, which may exist in uplands and drain in uplands to meet specific agricultural purposes, county owned and maintained ditches exist primarily to divert water away from roads and other structures, but may also serve a dual use. The specific purpose of a county-owned or maintained ditch is to convey water - particularly during heavy rain or snowmelt events away to somewhere else. If these ditches carry water through a series of connected "tributaries," perhaps "considered in combination," and eventually drain in a water of the U.S., then the exclusion appears to no longer apply to the ditch. Quite plainly, for a county evaluating a road, bridge, or other infrastructure project, the exclusions provided in the proposed rule simply are not explicit enough to provide the assurance necessary to move ahead with these projects absent an on-the-ground "significant nexus" determination. (p. 7)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule.

Coalition of Local Governments (Doc. #15516)

- 6.100 With the expansion of the definition of “waters of the United States” to include nonnavigable waters and ephemeral or intermittent streams, the Proposed Rule will expand the regulation of ditches and canals to those that were never before regulated due to their lack of continuous flow and significant nexus to navigable waters as historically defined. It would be rare for a ditch to fall under the exclusion because the principle purpose of a ditch is to carry water from one source to another, such as for irrigation purposes. (p. 17-18)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule.

Washington State Water Resources Association (Doc. #16543)

- 6.101 [In the proposed rule, all] ditches are jurisdictional unless specifically exempted, and the only ones exempted are those which are excavated wholly in uplands, drain only uplands and have less than perennial flow or ditches that do not contribute flow to a TNW, interstate water, the territorial seas or impoundments thereof. Contrary to EPA public statements, these exemptions are of limited utility in the West. In many western states, for example, ditches are often used to move water to fields for irrigation purposes or to municipal intakes. Hence, they commence at a ditch headgate “on the stream,” i.e., not in an upland. Further, they oftentimes eventually provide return flows back to the stream after use in accordance with water court decree requirements. Further, under the proposal, the ditches themselves would be treated as jurisdictional waters even though point source discharges into the ditch that may reach a TNW will be regulated under state law. (p. 4-5)

Agency Response: See summary response for a discussion of the historical regulation of ditches under the Clean Water Act, and the revised and clarified exclusions for ditches in the final rule. If a diversion ditch or a water delivery ditch fails to flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (a)(3) of the final rule, then the ditch itself is not a water of the United States. If on the other hand, some of the water withdrawn from the stream is delivered back into the stream or another water of the United States by the ditch, and the ditch is not subject to any of the exclusions in the rule, then the ditch may be a tributary and thus a water of the United States under this rule.

- 6.102 Other issues that must be addressed, through clarification and in the context of an ongoing dialogue amongst stakeholders, include:
- Will man-made swales used to capture stormwater be jurisdictional;
 - How will the agencies treat “upland” ditches (or portions of ditches) that happen to have standing water present after rainfall events or due to other natural conditions at such times as irrigation water is not being introduced;

- If a ditch starts at a jurisdictional water or ultimately drains to such a water is it categorically jurisdictional. (p. 17-18)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule. Non-wetland swales and stormwater control features constructed in dry land are excluded under sections (b)(4)(F) and (b)(6) of the final rule.

Iowa League of Cities (Doc. #18823)

- 6.103 Through the language provided in the preamble and the exemptions, the extrapolation of the EPA's understanding of the word "ditches" misses the mark on the purpose of a ditch in both large and small communities for the purposes of storm-water control. The exemptions provided for ditches are rendered meaningless as the ditch must move water upland and the water must remain upland and as to the other do not contribute to flow toward the amorphous case-by-case definition that was discussed above. Without a clear understanding of the new waters to be included, cities will continue to have questions about whether their system will somehow be regulated through the CWA. (p. 5)

Agency Response: See summary response for a discussion of the revised and clarified exclusions for ditches in the final rule.

- 6.104 The EPA should better define ditch and specifically define the term so cities can understand how this will impact ditches that are utilized for the management of storm-water. (p. 6)

Agency Response: See summary response for a discussion of the term "ditch."

U.S. Chamber of Commerce (Doc. #14115)

- 6.105 Impacts from the WOTUS rule on Manufacturers - Any ditch that contributes flow to these waters—directly or indirectly—becomes a tributary, and its use and management is regulated, which can trigger section 404 permits. Besides the cost and time required for the permit itself, companies may be required to comply with costly and resource-intensive mitigation/restoration requirements. In some cases, the cost of mitigation will exceed the cost of the project itself.⁶ These facilities are also likely to face more stringent federal requirements under sections 402 and 311. Companies anticipate that their ditches next to service roads will be automatically regulated as tributaries. At these types of

⁶ A business owner who wants to do a project in WOTUS must design the project to (1) avoid adverse impacts if possible, (2) minimize impacts if they can't be avoided, (3) compensate for the impacts. If adverse impacts can't be avoided, compensatory mitigation is required, and the land-owner or project sponsor must restore, create, enhance, or preserve wetland areas. The mitigation generally must be completed in the same watershed as the impacted area. The most common method of satisfying the compensatory mitigation obligation is to buy credits from a pre-approved wetlands mitigation bank. The amount of credits needed to offset the purported adverse impacts of a project is determined by the Agencies, using a formula that considers the amount and quality of impacted WOTUS areas. Wetland mitigation credits are already in short supply in arid regions and in watersheds with significant development activities. This means that even a small project that disturbs a few acres may have to buy credits at a 2:1 or 3:1 ratio. Mitigation credits typically cost anywhere from a few thousand dollars per credit to many thousand dollars per credit.

facilities the roadways function as corridors connecting the plant to other areas. Maintenance and operation of these kinds of vital roads will be made more difficult. Also, work that is necessary to improve these roads may be delayed or prevented by more stringent permitting.

Impacts from the WOTUS rule on Mining operations - A longwall coal mining company in the Northeast reports that it has ditches and culverts that are connected to other ditches that eventually flow to streams. While the company has a robust stormwater management monitoring and management program, it has never had to obtain section 404 permits for its ditches, culverts and impoundments. Because the company stores coal, byproducts, and other materials that contribute sediment to the facility's stormwater, the company expects that it would have to obtain section 402 NPDES and section 404 permits if the WOTUS definition is finalized.

Impacts from the WOTUS rule on Landfills – Landfills are highly regulated and face many siting restrictions that limit their placement. They serve a vital function in integrated waste management. Rising as a mound above ground with an impermeable liner beneath, they are constructed with numerous ditches and swales both on and around the landfill to convey stormwater off the hill. At times, these ditches and swales drain to stormwater retention or detention ponds designed to retain and release the flow based on local conditions. The ponds can be utilized for stormwater control, as fire ponds, and for sediment control. In order to operate as designed, routine maintenance of ditches, swales and the artificial ponds is necessary. However, these ditches, swales and ponds, not currently subject to CWA permitting, could become jurisdictional because they ultimately drain to waters of United States. As a result, landfills, already subject to intense public scrutiny, could become the target of unwarranted citizen suits filed as a result of this rule

Impacts from the WOTUS rule on Agriculture [W]ith the exception of very narrow section 404 exemptions, regulating drains, ditches, stock ponds, and other low spots within farm fields and pastures as “navigable waters” would mean that any discharge of a pollutant (e.g., soil, dust, pesticides, fertilizers and “biological material”) into those ditches, drains, ponds, etc. will be unlawful without a CWA permit. This will likely result in a drastic increase in permitting requirements for farmers seeking to plow through and generally farm ephemeral drains that cross through productive farmland.. (p. 11-22)

Agency Response: See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Please also note that the final rule excludes artificial lakes and ponds created in dry land and used primarily for uses such as stock watering, irrigation, settling basins, rice growing or cooling ponds. In addition, waste treatment systems designed to meet the requirements of the CWA are excluded, and so are stormwater control features created in dry land.

John Deere & Company (Doc. #14136.1)

- 6.106 New Ditch Definition and Areas with Elevation Change. In some areas, concentrated changes in elevation create steep slopes and ditches that collect runoff. At one facility, under the proposed definitions, it is expected all the ditches beside service roads will be

automatically regulated as tributaries, and not fall under the ditch exemption. The service roads are currently unpaved, and serve as a corridor connecting the plant to a testing area upslope. They cannot be improved, repaired or widened without impacting a WOTUS if the ditches are declared tributaries. Factory Master Plans and resulting work related to the improvement of these roads may be delayed or impaired by the new standard. (p. 14)

Agency Response: See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Georgia Chamber of Commerce (Doc. #14430)

6.107 To estimate the scale of how many miles of ditches there are in America that would become WOTUS under this rule, let us look at the example of highways:

- Highways in America are constructed so that rain water will run off to the sides of the road. This is done so the road surfaces will not flood and cause accidents during rainfall.
- Most highways in America (with some exceptions in the flat, arid parts of the nation) are constructed with ditches or swales beside them. These ditches are designed to convey the runoff water to natural ephemeral, intermittent, or perennial streams (WOTUS) in most cases.
- In some parts of the country, these highway ditches may discharge to an upland, but that would be rare in the eastern half of the United States where there is relatively abundant rainfall and where the topography of the land has produced many streams.
- Assume that the "eastern half of the United States" is made up of Louisiana, Arkansas, Missouri, Iowa, Minnesota, plus all the other 26 states east of those five.
- Assume that the best national database for highway miles is kept by the Office of Highway Policy Information (OHPI) of the Federal Highway Administration (FHWA) on its website.
- The OHPI's Highway Statistical Services lists highway miles for each state and for the national total for a variety of highway types in two broad categories: rural and urban.
- Assume that all urban highways have curbs and gutters and drain to piped stormwater systems. Thus, do not count them as ditches or swales.
- Assume that in the 31 states of the eastern half of the US, all rural highways have ditches on both sides of each mile of highway.
- Assume that in the 19 states of the "western half" (includes Alaska and Hawaii), one fourth of the highway miles have ditches on both sides that do eventually connect to navigable waters, and the remaining miles of ditches do not.

The following table of figures is constructed from data on the FHWA/OHPI website.

	TOTAL MILES OF HIGHWAYS	RURAL MILES OF HIGHWAYS	URBAN MILES OF HIGHWAYS
50 States	4,077,000	2,982,000	1,095,000
31 Eastern States	2,451,000	1,713,000	738,000
19 Western States	1,626,000	1,269,000	357,000

To calculate miles of ditches along highways, take 1,713,000 eastern rural miles, plus one-fourth of 1,269,000 western rural miles, and multiply the sum by two (one ditch on each side of the highway). Total equals 4,050,000 miles of highway ditches. Call it 4 million.

It is a safe assumption that the estimated 4 million miles of ditches will all become WOTUS under the current draft rule. This, of course, is only the ditches along public highways. This does not include the ditches along private roads, or on farms and forests. There may well be hundreds of thousands of miles of those other ditches.

To put 4 million miles of ditches into some context, go to EPA's website and find "Water: Rivers and Streams". The first sentence says: "There are over 3.5 million miles of rivers and streams in the U.S., covering an enormous and diverse landscape." So the proposed WOTUS rule will approximately DOUBLE the miles of jurisdictional waters by defining highway ditches as WOTUS. (p. 46-47)

Agency Response: See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Corporate Environmental Enforcement Council, Inc. (Doc. #14608)

- 6.108 CEEC understands and strongly supports the need to exempt ditches from jurisdiction. However, CEEC believes that the Proposal is far too narrow to serve its purpose. Outside of the two exemptions that have been proposed, the Agencies will assert jurisdiction over all of the following types of ditches: (1) natural streams that have been channelized, (2) ditches excavated in waters of the U.S., including wetlands, (3) ditches with a perennial flow, and (4) ditches that connect two or more waters of the U.S. Since ditches, by design, are intended to direct flow from one place to another, this fourth category of regulated ditch will almost always be in play, in effect eliminating the effectiveness of the two, limited exemptions. In addition, the Agencies have provided no direction or guideposts to inform determinations in the field. How often must a ditch flow, i.e., one day, one week, one month, several months per year, or every year? What happens when an otherwise non-jurisdictional upland ditch overflows during a flooding event and contributes flow to another water body that eventually flows to a TNW – does that ditch lose its exemption? Likewise, the Agencies have provided no direction or guideposts to distinguish exempt gullies, rills and swales from jurisdictional, ephemeral tributaries. How will one be distinguished from the other?

In practical terms, these ambiguities mean that none of the exemptions can be relied on for compliance purposes without a field determination, and all of them will be susceptible to conflicting and inconsistent determinations from EPA Region to EPA Region and Corps District to Corps District across the country. Far from achieving greater

consistency, clarity and certainty, the Proposal will force the Agencies and regulated community to expend enormous resources simply trying to confirm whether certain ditches are exempt. (p. 8)

Agency Response: See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. See the summary response for Section 7.3.7 of Features and Waters Not Jurisdictional for a discussion of these and other ephemeral features that are not jurisdictional. In addition, the summary response for Section 8.4 in Tributaries, discusses distinguishing tributaries from non-jurisdictional erosional features.

Resource Development Council for Alaska, Inc. (Doc. #14649)

6.109 The rule should offer clarity on ditches and trenches, as well as snowpack, artificial ponds, and ephemeral streams. (p. 2)

Agency Response: See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The rule also clarifies the status of artificial ponds. Ephemeral streams are addressed in detail in the preamble and Topic 8 of this RTC document. The commenter did not provide enough information on their concern over snowpack for the agencies to be able to respond.

Minnesota United Snowmobilers Association (Doc. #14758)

6.110 As ditches are undefined in the proposed rules, they have the potential to be considered jurisdictional in the new rule. Minnesota Statutes allow snowmobiling in our road ditches and there are many miles of trails in those ditches. Although our clubs obtain all the necessary permits for their bridges and trail alignments, we are concerned that the new rule could require additional federal permitting for use of some of the ditches for our public trail system. Our season is short and additional time to obtain permits could have a devastating effect. (p. 1.)

Agency Response: Snowmobiling in ditches is not an activity regulated under this rule.

Golf Course Superintendents Association of America et al. (Doc. #14902)

6.111 Additional uncertainty is created by:

- creating exemptions for certain ditches, but making the exemptions so narrow that few ditches can meet the criteria. (p. 12)

Agency Response: See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

6.112 The proposed rule for the first time ever specifically defines ditches as jurisdictional tributaries (unless excluded) under all CWA programs. Ditches which are excluded from the proposed WOTUS definition is far and few between. The inclusion of roadside, irrigation and stormwater ditches will have huge practical consequences that have yet to be evaluated by EPA or the Corps.

Also, although certain ditches, groundwater, gullies and non-wetlands swale are not considered WOTUS under the proposed rule, they can serve to establish a connection in the proposed rule (e.g. connection that demonstrates adjacency to jurisdictional waters or demonstrates that an “other water” has a significant nexus. This is of significant concern.

Ditches, that are part of water management activities and are associated with the design and management of a valuable greenspace, like golf courses, should be exempt. They function in a manner that is beneficial to the watershed and community. This function may be severely impacted if these features become jurisdictional and thereby costly to develop or maintain.

The Agencies should clarify that (1) on-site ditches associated with permitted activities; (2) roadside; and (3) open ditches, swales and channels on a golf course setting are not jurisdictional WOTUS (p. 14-15)

Agency Response: See the summary response. While the rule does not expressly address golf courses, water management activities at a golf course may be covered under a number of the exclusions in the rule.

American Foundry Society (Doc. #15148)

- 6.113 Because the proposed rule would make most ditches into “tributaries” subject to jurisdiction under the CWA, routine maintenance and process activities in ditches, on-site ponds, and impoundments could trigger expensive federal permits. In addition, these permitting requirements could impose addition, unnecessary environmental reviews that could add years and significant costs to finalize ordinary projects at or near the facility. (p. 9)

Agency Response: See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Please also note that the final rule excludes artificial lakes and ponds created in dry land and used primarily for uses such as settling basins, cooling water, etc. In addition, waste treatment systems designed to meet the requirements of the CWA are excluded, and so are stormwater control features created in dry land.

American Chemistry Council (Doc. #15186)

- 6.114 The agencies propose to consider a ditch as one element of the “waters of the U.S.” unless it meets the terms of a specific exemption. A ditch would be exempt only if it is excavated wholly in uplands, drains only in uplands, and has less than perennial flow or it does not contribute flow (directly or indirectly) to a “water of the U.S.” Unfortunately, this already ambiguous description is made even more imprecise as the Proposal does not define the term “uplands” and does not specify if the contributing flow covers surface flow, groundwater, or both.

ACC requests that the Agencies consider the types of ditches that many ACC member facilities employ. Many of these facility ditches are used as a conveyance to carry water from a final NPDES monitoring point to a receiving “water of the U.S.” Under the Clean Water Act, these conveyance ditches meet the point source definition criteria of being “discernible, confined, and discrete,” and as such, should not be considered “waters of

the U.S.” themselves. Further, the discharge that enters these conveyance ditches would already be subject to CWA Sections 402 (NPDES) or 404 (dredge-and-fill) requirements. Thus, designating these conveyance ditches as “waters of the U.S.” would create a superfluous regulatory layer that would provide little to no tangible benefit to human health or the environment.

The language in the Proposal concerning ditches is ambiguous enough to include these conveyance ditches. If these ditches were subject to the full range of CWA requirements, many facility operators would be forced to discontinue the use of these conveyances and install new pipe systems to manage storm and wastewater. The new systems would come at a substantial cost to manufacturers but would provide no added environmental benefit.

As an example, one ACC member facility is located 200 feet from an estuary and contains a ditch that connects its NPDES-permitted outfall with the estuary. The flow in the ditch rises and falls with the tide. Given that the Proposal does not define the type of contribution flow that would make a waterbody jurisdictional, it is unclear if based on its flow the ditch would be considered a “water of the U.S.” based under this new Proposal. Its flow could be considered less than perennial, but the Proposal’s exemption provides no more information than that in describing the appropriate qualification criteria. The resulting ambiguity creates a substantial amount of regulatory uncertainty for the facility owner/operator. To improve clarity for these types of jurisdictional determinations, the parameters for the type of “less than perennial flow” that would clearly exempt a conveyance ditch from CWA jurisdictional need to be clearly defined. (p. 2)

Agency Response: See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Note that ditches that convey water as part of an internal manufacturing process and do not flow either directly or through another water into a traditionally navigable water, interstate water or territorial sea are not themselves waters of the United States, as stated in paragraph (b)(3)(C) of the final rule. However, the scenario whereby a “conveyance” or “ditch” carries water from a final NPDES monitoring point is too generic for the agencies to specifically comment on. Such a feature would be a water of the United States if it meets the definition of “tributary” in the final rule and is not otherwise excluded in paragraph (b). Finally, the Technical Support Document Section I provides the legal framework under which a ditch could be considered both a point source and a water of the United States.

Aluminum Association (Doc. #15388)

- 6.115 [The] broad [tributary] definition could be interpreted to include any water into WUS, unless the water is specifically excluded.

The most significant problem with this definition is that it may, for the first time, bring ditches, which are wholly on private property and used to transport wastewater around a facility, into the scope of WUS. This would be in conflict with information outlined in Part III.I of the preamble (beginning on p. 22217), which states that the Agencies do not intend to change, through this proposed rule, long standing policies that certain waters, including roadside ditches, are excluded from the definition of WUS and are not jurisdictional. However, by defining WUS to include these broadly defined tributaries, it

appears that the Agencies are expanding the scope of WUS beyond the intended scope. If such ditches are within the scope of the definition of tributary, and consequently in the definition of WUS, it may require facilities to meet water quality criteria in the ditches, or to install costly treatment systems or pumps and pipes to move water instead of allowing the current simple operation of ditches to continue. This cost prohibitive measure would be wasteful in terms of energy use and resources for little or no commensurate benefit. (p. 5)

Agency Response: Section IV.F of the preamble of the final rule, Section VII of the Technical Support Document and Topic 8 of this RTC discuss tributaries in detail. See the summary response for a discussion of how ditches are regulated in the final rule. Also, the final rule explicitly excludes wastewater treatment systems designed to meet the requirements of the CWA from jurisdiction as waters of the United States.

Texas Chemical Council (Doc. #15433)

- 6.116 Another example that has caused TCC members concern is the potential impacts of the proposed rule on ditches, which are commonly used for conveyance of water used for manufacturing purposes. As currently written, the proposed rule considers ditches “waters of the U.S.” unless it meets a defined exemption. The agencies exclude only ditches “that are excavated wholly in uplands, drain only uplands, and have less than perennial flow,” or “that do not contribute flow, either directly or through another water, to a [jurisdictional water].”⁷ The agencies fail to define any of the supporting terms (i.e., “uplands” or “perennial flow”), which leaves the rule open for wide interpretation and overreach. For example, the proposed rule could easily incorporate ditches used for conveyance at industrial facilities within the meaning of “waters of the U.S.,” as they meet the CWA definition of a point source: “discernible, confined and discrete.”⁸ Additionally, any discharges into the conveyance ditches are required to comply with both NPDES and Section 404 requirements. Thus, the conveyances used to carry water from a final NPDES monitoring point to a receiving “water of the U.S.” should not also be considered WOTUS. Requiring compliance with CWA regulations on such conveyance systems, which are very widely used, would potentially require facilities to exchange the use of conveyance ditches for pipe systems to manage storm and wastewater. This would impose undue cost burdens on facilities, yet would offer no additional environmental benefit. (p. 9)

Agency Response: See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Note that ditches that convey water as part of an internal manufacturing process and do not flow either directly or through another water into a traditionally navigable water, interstate water or territorial sea are not themselves waters of the United States, as stated in paragraph (b)(3)(C) of the final rule. However, the scenario whereby a “conveyance ditch” carries water from a final NPDES monitoring point

⁷ 79 Fed. Reg. 22193

⁸ CWA §502(14) (33 U.S.C. §1362(14)).

is too generic for the agencies to specifically comment on. Such a feature would be a water of the United States if it meets the definition of “tributary” in the final rule and is not otherwise excluded in paragraph (b). Finally, the Technical Support Document Section I provides the legal framework under which a ditch could be considered both a point source and a water of the United States.

American Council of Engineering Companies (Doc. #15534)

- 6.117 Unclear examples of [...] features include ditches that are excavated in uplands, drain only uplands, and have less than perennial flow; ditches that do not contribute flow to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water; and gullies, rills, and non-wetland swales. (p. 3)

Agency Response: See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Business Council of Alabama (Doc. #15538)

- 6.118 The proposed rule continues to exempt water treatment systems that for many of our members would be ash ponds metal cleaning waste ponds, lagoons, and stormwater retention ponds. These treatment ponds do not meet the definition of Impoundments as defined on page 22201 of the proposed rule. What is not clear in the proposed rule is whether the roadside ditches and other drains that flow or discharge to these waste treatment systems are also exempt. Based on the exemption of 328.3 (b)(4), ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) are not WOTUS. Also, ditches that are (or have in the past been) excavated wholly in uplands, drain only uplands, and have less than perennial flow, are not WOTUS. (p. 4)

Agency Response: The commenter is correct that waste treatment systems designed to meet the requirements of the CWA are excluded in the final rule and are thereby not considered waters of the United States. See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

GBMC & Associates (Doc. #15770)

- 6.119 The proposed rule includes "man-made or man altered tributaries", including impoundments, canals and ditches in their definition of tributaries, provided they are not excluded from the definition by paragraphs (b)(3) or (b)(4). The rule also notes that these man-made tributaries "...provide the same chemical, physical, and biological functions as other water bodies defined as tributaries under the proposed rule." (Sec.III. F.) The inclusion of man-made/man-altered tributaries, including ditches is a significant addition to the rule. Two important points can be inferred from this; first, that the agencies do not intend to exempt ditches (in many cases) from being jurisdictional; second, that replacement of any tributary by a man-made tributary (or ditch) will replace the functions lost by the loss of that tributary. This second point, accomplishes one of two things, it either supports the reality that ephemeral streams should not be jurisdictional, since their

functions are so easily replaced, or, it indicates that mitigation for loss of small streams, particularly ephemeral streams, should be a simple rerouting of the stream or another simple alteration to drainage paths to compensate for loss of the stream's drainage capacity. If this proposed rule is adopted, the USACE and the EPA should revise their mitigation requirements such that either no mitigation is required for ephemeral streams, or the mitigation that is required, is limited to compensating for site drainage consistent with the volume the ephemeral stream in question would have conveyed. (p. 5)

Agency Response: See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Mitigation requirements for authorized impacts to jurisdictional waters of the United States are beyond the scope of this final rule.

Federal Water Quality Coalition (Doc. #15822.1)

6.120 The Broad Legal Rationale For the Proposed Rule Agencies Has Caused Confusion.

The legal rationale for the proposed rule is the assertion that almost all water is connected and therefore jurisdictional. This rationale is so broad that it would justify federal jurisdiction over water that the agencies may never have considered or evaluated when developing the rule. As a result, not only are the SAB Panel members confused, as noted above, but EPA and the Corps of Engineers have not been able to explain how their proposal applies to many waters. This has led to confusion about both what is covered and what is not covered by the proposed rule. For example, as noted by the SAB Panel, most, if not all of the focus of the Draft Connectivity Report has been on natural waterbodies. This focus has left EPA and the Corps unprepared to answer questions about manmade features.

In a June 30 blog, Acting Assistant Administrator Stoner said that “Ditches that are IN are generally those that are essentially human-altered streams, which feed the health and quality of larger downstream waters.” However, the proposed rule says ditches that provide flow yearround during periods of normal rainfall are waters of the U.S. whether or not they previously were natural streams.

Ms. Stoner’s posting also reveals that EPA did not focus on ditches and conveyances that have year-round flow, not because of rainfall, but because these ditches are designed to move water around a facility, or from a storage basin to a town, farm, or industrial facility. The proposed rule does not provide clear exclusions for these types of conveyances. (p. 54)

Agency Response: See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

- 6.121 The recommendations [...]for defining tributaries and identifying what wetlands are jurisdictional will [...]clarify the regulatory status of drainage ditches. A manmade ditch would not be a tributary, obviating the need to define what it means to contribute flow and what is “perennial” flow. A manmade ditch could be excavated through a wetland that is not jurisdictional, obviating the need to define the term “uplands.” A manmade ditch that develops wetland characteristics would remain outside federal jurisdiction. A manmade ditch that allows water to percolate into the ground would not be a water of the

U.S. Only a ditch that replaces a natural stream, consistent with that Acting Assistant Administrator Stoner's explanation, would be jurisdictional. These changes would eliminate significant confusion engendered by the proposed rule. (p. 66)

Agency Response: See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Minnesota Chamber of Commerce (Doc. #16473)

6.122 **Key Definitions Need to Be Clarified.** Although the Agencies' stated intent for the Proposed Rule is to provide greater regulatory clarity, the Proposed Rule, as written, creates greater confusion through vague and unclear definitions of key terms and concepts, such as "ditches" [and] "conveyances [...]." This lack of clarity is likely to result in inconsistent and unpredictable application of the Proposed Rule. (p. 2)

Agency Response: See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Association of Equipment Manufacturers (Doc. #16901)

6.123 Additional uncertainty is created by:

- creating exemptions for certain ditches, but making the exemptions so narrow that few ditches can meet the criteria. (p. 3)

Agency Response: See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

6.124 Treating ditches necessary to support agricultural field drainage as "waters of the U.S." will be expensive and onerous for AEM's agricultural customers. For example, the CWA stormwater program requires the construction of ditches/stormwater retention ponds to manage stormwater. If the stormwater BMPs are treated as waters of the U.S., this will result in a never-ending cycle of regulation. Ditches are important for many construction projects. The proposed rule will also have a chilling effect on our construction equipment customers. (p. 4)

Agency Response: See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Note that in addition to the significantly edited and clarified exclusions for ditches, the final rule also excludes stormwater control features constructed in dry land and water-filled depressions created in dry land incidental to mining or construction activities.

Water Advocacy Coalition (Doc. #17921.1)

6.125 The issue of ditches is critically important because ditches are pervasive and endemic to every type of landscape and human activity across the nation. Ditch systems are very complicated and varied throughout the United States. In outreach meetings during the comment period, the agencies have indicated that they are seeking to regulate natural

streams that have been channelized.⁹ If this is the case, the proposed rule should cover channelized or human-altered streams, not all “ditches.” The term “ditch” as drafted covers most all ditches, many more than those that replace natural streams.

Most ditches have not historically been regulated as “waters of the United States” under the CWA.¹⁰ As noted above, the proposed rule, for the first time, expressly includes “ditches” in the definition of “tributary,” meaning that ditches with a bed, bank, and OHWM that contribute flow will be categorically jurisdictional unless they meet one of two narrow exclusions. 79 Fed. Reg. at 22,262. This categorical regulation of ditches is an expansion from current practice and impinges on traditional State and local authority over water and land use. The proposed rule’s two narrow ditch exclusions are unclear and unlikely to provide meaningful relief. Ditches are regulated in other ways under the CWA (e.g., as point sources); they do not need to be regulated as “waters of the United States” for the agencies to ensure the protection of waters connected to ditches. (p. 49-50)

Agency Response: See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The summary response also briefly discusses the history of CWA jurisdiction pertaining to ditches. Many ditches function as tributaries and have a significant nexus to downstream waters, playing an important role in the physical, chemical, and biological integrity of these waters. Nonetheless, the final rule reduces the number of ditches considered jurisdictional by for the first time explicitly excluding certain ditches that have previously generally not been considered waters of the United States. Ditches protected by the final rule must meet the definition of tributary. The Technical Support Document Section I provides the legal framework under which a ditch could be considered both a point source and a water of the United States.

- 6.126 By identifying ditches as jurisdictional tributaries in the proposed rule, the agencies significantly increase the scope of jurisdictional “waters of the United States.” Historically, the agencies took the position that ditches were not “waters of the United States,” but they have gradually expanded their claims of jurisdiction over ditches without any change in the law. The Corps’ 1975 regulations stated explicitly that “[d]rainage and irrigation ditches have been excluded” from CWA jurisdiction. 40 Fed. Reg. 31,320, 31,321 (July 25, 1975). The Corps’ 1977 regulations similarly disavowed jurisdiction over ditches. 42 Fed. Reg. 37,122, 37,144 (July 19, 1977) (“[M]anmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition.”). Signaling that if ditches were meant to be regulated at all under the CWA, they were meant to be regulated as point sources and not “waters of the United States,” in the preamble to the 1977 regulations, the Corps emphasized,

⁹ See Nancy Stoner blog entry, Exhibit 21, Setting the Record Straight on Waters of the U.S. (June 30, 2014), <http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/> (“Ditches that are IN are generally those that are essentially human-altered streams, which feed the health and quality of larger downstream waters.”).

¹⁰ See WAC Comments on 2011 Draft Guidance, Exhibit 1 at 69.

[N]ontidal drainage and irrigation ditches that feed into navigable waters will not be considered “waters of the United States” under this definition. To the extent that these activities cause water quality problems, they will be handled under other programs of the FWPCA, including Section 208 and 402.

Id. at 37, 127.¹¹

Nonetheless, the agencies’ position on ditches has equivocated over time, beginning in the mid- to late-1980s, when the agencies began treating ditches as “waters of the United States” in the section 404 context on a case-by-case basis, using OHWM and the Migratory Bird Rule tests.¹² The preamble to the 1986 regulations, which adopted the broad Migratory Bird Rule, continued to maintain the exclusion for ditches (“We generally do not consider [drainage and irrigation ditches excavated on dry land] to be ‘Waters of the United States.’”), but included a new reservation of “case-by-case” regulatory authority to claim jurisdiction after all. 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).¹³ Likewise, EPA had also historically resisted regulating ditches as “waters of the United States,” and did not even discuss the possibility that ditches might be waters of the United States until 1988, when it included a similar reservation of “case-by-case” authority to regulate upland ditches as “waters of the United States” in the section 404 context.¹⁴ Without any Congressional authorization, the agencies have thus recently and incrementally expanded their claims of jurisdiction without any change in the law. And the proposed rule goes even further.

The proposed definition of “tributary” expands the agencies’ previous claims of jurisdiction. This is the first time the agencies are categorically proposing to regulate ditches in the regulations for all CWA programs. In the past, the agencies have said that, for purposes of the section 404 program, some ditches could be regulated as “waters of the United States” on a case-by-case basis. 51 Fed. Reg. at 41,217. That is a far cry from categorically regulating essentially all ditches as “waters of the United States” under all CWA programs, unless they satisfy one of two very narrow exclusions. The preamble states that manmade and man-altered tributaries, such as ditches, “usually continue to have chemical, physical, and biological connections downstream . . . [b]ecause these tributaries are hydrologically connected to downstream waters.” 79 Fed. Reg. at 22,235.

¹¹ Through the 1980s and 1990s, the Corps maintained that manmade upland ditches were not jurisdictional. For example, in proposed rules in 1980, the Corps stated that “man-made, non-tidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States.” 45 Fed. Reg. 62,732, 62,747 (Sept. 19, 1980). In addition, in 1983, in proposed jurisdictional rules, the Corps stated, “Waters of the United States do not include the following manmade waters: (1) Non-tidal drainage and irrigation ditches excavated on dry land, (2) Irrigated areas which would revert to upland if the irrigation ceased.” 48 Fed. Reg. 21,466, 21,474 (May 12, 1983).

¹² See e.g., 65 Fed. Reg. 12,818, 12,823-24 (Mar. 9, 2000) (In the 2000 NWP regulations, the Corps’ disavowal of jurisdiction shrank to “ditches constructed entirely in upland areas,” finding that non-tidal drainage ditches are waters of the United States if they extend the OHWM of an existing water of the United States.).

¹³ See also U.S. Army Corps of Eng’rs, Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the CWA, Regulatory Guidance Letter No. 07-02 (July 4, 2007), <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl07-02.pdf> (confirming that, pursuant to Corps and EPA guidance, upland ditches are generally not subject to CWA jurisdiction).

¹⁴ See 53 Fed. Reg. 20,764, 20,765 (June 6, 1988) (noting that the agencies “generally do not consider” non-tidal drainage and irrigation ditches excavated on dry land to be “waters of the United States,” but EPA reserved the right on a case-by-case basis to determine that such features are jurisdictional).

This is the equivalent of the “any hydrological connection” standard rejected by five Justices in *Rapanos*.

Moreover, the categorical significant nexus determination for ditches is not supported by science. The GEI Report explains that “no scientific literature is presented that suggests ditches themselves should be considered water bodies, nor that evaluates the effects that ditches have on the integrity of downstream waters.”¹⁵ The SAB Panel also pointed out the lack of scientific support for such categorical regulation, noting, “Panelists generally agreed that many research needs must be addressed in order to discriminate between ditches that should be excluded and included.”¹⁶ With respect to ditches and other manmade features regulated as “tributaries” by the proposed rule, Dr. Michael Josselyn of the SAB Panel noted, “The Draft Science Report focused on research from natural systems and therefore does not provide sufficient information on which to discuss the role of these man-made features.”¹⁷ As a result, the GEI Report concludes that “there is a disconnect between the science cited and the text of the proposed rule.”¹⁸ (p.50-52)

Agency Response: See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The summary response also briefly discusses the history of CWA jurisdiction pertaining to ditches. Many ditches function as tributaries and have a significant nexus to downstream waters, playing an important role in the physical, chemical, and biological integrity of these waters. Nonetheless, the final rule reduces the number of ditches considered jurisdictional by for the first time explicitly excluding certain ditches that the agencies have previously generally not considered waters of the United States. Ditches subject to regulation under the final rule must meet the definition of tributary.

- 6.127 Rail, road, agriculture, irrigation, and MS4 ditches are prevalent throughout the United States. Treating all of these features as jurisdictional would drastically change the regulatory landscape. As an example, looking at rails alone, the national rail system consists of hundreds of thousands of miles of ditches spanning the continent. Ditches have been an integral part of rail construction since the inception of the rail industry in the 1800s. Ditches are critical to rail safety to avoid washouts, undermining of rail road bed material, and potential sloughing, shifting, uneven trackage. Rail drainage is required under federal regulations, and is subject to detailed industry specifications. 49 C.F.R. Part 213. Rail ditches are typically very flat, with a slope and grade of nearly 0.0 percent and ranging to a maximum (rarely applied) of 2 percent for most railroads. Rail ditches are also typically very wide, 10 feet is a standard width, and are often designed to handle storms much greater than standard 25-year storm common for municipal codes. As a result of these features, rail ditches very often contain standing water which may not flow, and often contain vegetation which can include facultative or obligate species (subject to maintenance schedule). Vegetation actually provides a benefit in many circumstances, reducing potential for scour and slowing the drainage or movement of

¹⁵ GEI Report, Exhibit 6 at 4.

¹⁶ Rodewald Memo, Exhibit 7 at 7.

¹⁷ SAB Panel Member Comments on Proposed Rule, Exhibit 7 at 43 (comments of Dr. Michael Josselyn).

¹⁸ GEI Report, Exhibit 6 at 5.

water. These features exist regardless of ditch location – “upland” or other area. Finally, rail ditches are intended to drain rail lines, and often require crossings of streams and wetlands. This is well-recognized by the agencies, which authorize such impacts under nationwide permit (“NWP”) 14.

These features which are integral to safe rail design also result in a very high likelihood that rail ditches would be considered jurisdictional under the proposed rule because they would not qualify for the upland ditch exclusion. The flat slope and large ten foot width result in very slow flows except during substantial rain events. Due to stormwater encroachment from increases in adjacent development and impervious surfaces, especially in heavily populated counties and cities, many rail ditches are receiving much greater amounts of water than originally designed. All would have a bed, bank, and OHWM as specified in the proposed rule. Many would have “presence” of water – albeit exclusively or primarily stormwater drainage. Further, the characteristics of these ditches are such that wetland vegetation can be present (obligate, facultative, and often exotics, such as exotic phragmites or obligate cattail). Soil that is collected and deposited in these large ditches emanates from other areas that may include hydric soil types, and due to the flat nature of the ditches, hydrology indicators are often present.

Applying the proposed rule to rail ditches could very well result – erroneously and in contravention of the CWA – in a determination that rail ditches as a whole or segments of rail ditches are waters of the United States. In addition to being incorrect and an impermissible expansion of the CWA, identifying rail ditches as waters of the United States would restrict railroads’ ability to maintain ditches for safe operations, adjust ditch capacity or flow to manage the previously referenced stormwater encroachments, and result in extensive permitting delay and expense should a ditch be required to be removed or significantly altered. Thresholds for NWPs allow impacts to only 300 linear feet of tributary in most cases, which means that any project where more than 300 linear feet of rail ditch were altered would require an individual permit under section 404 of the CWA. Three hundred linear feet of ditch is a very small amount, particularly compared to the hundreds of thousands of miles of rail ditch in the United States. Because rail ditches have no value in terms of chemical, physical, and biological integrity of the nation’s waters, there would be no commensurate environmental benefit. This would result in permitting for permitting’s sake. Increased section 404 permitting requirements for rail ditches would impose extensive expense and delay for the regulated entity as well as for consulting agencies for a simple ditch alteration project.

Individual section 404 permit requirements for rail ditches would result in mitigation requirements that could completely halt ditch alteration. The 2008 mitigation rule requires mitigation for even minor alterations or changes to waters of the United States. 73 Fed. Reg. 19,593 (Apr. 10, 2008). The compensatory mitigation regulations as applied to the proposed rule would treat a rail drainage ditch as a “stream” and require stream mitigation – difficult and in many cases impossible to obtain in many parts of the country. This issue alone could bring to a halt ditch alterations required for safety, optimization of transportation, and increases in passenger and freight rail offerings. Many other industries have similar concerns about the burdens they would face if ditches are per se jurisdictional “waters of the United States.” (p. 55-56)

Agency Response: See summary response and the preamble of the final rule. Note that in addition to the significantly edited and clarified exclusions for ditches, the final rule also excludes waste treatment systems designed to meet the requirements of the CWA and stormwater control features constructed in dry land. Note also that the final rule clearly states that the excluded features identified in paragraph (b) are not “waters of the United States” even where they otherwise meet the terms of “waters of the United States” outlined in paragraphs (a)(1) through (a)(8).

- 6.128 Millions of miles of ditches are encountered, built, and relied on every day by Coalition members, as part of the construction, operation, and maintenance of homes, natural gas transmission and distribution pipelines, electric generation facilities, electric transmission and distribution lines, transportation-related infrastructure (including roads and railways), agricultural irrigation, flood control, rural drains and roads, and mines located across the country. Drainage ditches play a major role in all of these activities, ensuring that stormwater is properly channeled away from facilities and land where it would otherwise collect, interfering with the intended use of the land and facilities. Ditches are also an integral part of creating a proper drainage system, which in turn prevents flooding. Use of drainage ditches offers a way to remove excess water from agricultural fields, roads, and vital urban spaces, without the erosion rates and pollution transport that result from direct surface runoff. Modern drainage engineering criteria increasingly call for slowing drainage and runoff to reduce erosive force and potential collection in flood areas. As a result, there is a high likelihood that the “presence” of water in a ditch would render it jurisdictional.

The proposed rule does not need to call such conveyances “waters of the United States” to protect these features and connected waters against the discharge of pollutants. EPA has developed an extensive system of regulation of stormwater ensuring that such conveyances themselves do not impact waters of the United States. See, e.g., 40 C.F.R. § 122.26 (industrial stormwater program, including construction NPDES permitting); § 122.34 (MS4 program).

By treating ditches as “waters of the United States” under the proposed rule, ditches that are necessary to support the nation’s infrastructure, agriculture, construction, transportation, energy, and mining activities (among others), and to prevent flooding, will now be subject to additional costly and onerous CWA requirements, as well as enforcement by third parties under the CWA section 505 citizen suit provision.¹⁹ The CWA stormwater program requires the construction of ditches/stormwater retention ponds to manage stormwater.²⁰ If the ditches and ponds created to comply with stormwater best management practices (“BMPs”) are treated as waters of the United

¹⁹ With this expansion, the proposed rule directly conflicts with this Administration’s stated commitment to expediting expansion and modernization of infrastructure. See Executive Order 13604: Improving Performance of Federal Permitting and Review of Infrastructure Projects, 77 Fed. Reg. 18,887 (Mar. 28, 2012).

²⁰ See generally Comments of the Coalition of Real Estate Associations on the proposed rule, “Definition of ‘Waters of the United States’ Under the Clean Water Act,” Docket ID No. EPA-HQ-OW-2011-0880 (August 8, 2014) (addressing the impact of any revised definition of “waters of the United States” on MS4s and the component conveyances within these systems that channel and discharge stormwater runoff).

States, this will result in a never-ending cycle of regulation. Just to imagine the vast majority of agricultural, roadside, and railroad right-of-way ditches that dot the U.S. landscape being required to meet water quality standards (“WQS”) and resultant total maximum daily loads (“TMDLs”) reveals how out of touch the proposed rule is with law or reality.

Similarly, Federal Emergency Management Agency (“FEMA”) flood control provisions require stormwater management and drainage and flood control. Federal safety requirements for roads and railways require stormwater management and drainage. See, e.g., 40 C.F.R. Part 213. Municipal and county codes also require stormwater management and drainage, in many circumstances encouraged by EPA’s MS4 guidance. The Corps manages, administers, and promotes vast national flood control and drainage of stormwater, using ditches which would qualify as waters of the United States under the proposed rule, directly and in partnership with State and local governments. (p.57-58)

Agency Response: See summary response and the preamble of the final rule. Note also that in addition to the significantly edited and clarified exclusions for ditches, the final rule also excludes waste treatment systems designed to meet the requirements of the CWA and stormwater control features constructed in dry land.

Virginia Manufacturers Association (Doc. #18821)

- 6.129 VMA is gravely concerned that the Proposal substantially broadens Clean Water Act jurisdiction over ditches, despite the Agencies' claims to the contrary. While the Agencies assert that the Proposed Rule helps clarify which ditches are jurisdictional, this in and of itself is of concern because it is the first time that ditches are defined and included as jurisdictional tributaries. [...]

All of this ambiguity creates a troublesome likelihood of subjective agency discretion, leading to greater inconsistency in decisions about whether certain ditches are subject to Clean Water Act jurisdiction. Accordingly, these so-called exclusions actually do little or nothing to promote clarity, certainty and predictability with regard to federal CWA jurisdiction over ditches. (p. 3)

Agency Response: See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The summary response also briefly discusses the history of CWA jurisdiction pertaining to ditches.

Pinnacle Construction & Development Corp. (Doc. #1807)

- 6.130 Of importance to developers and builders are the limited exemptions provided for ditches that provide only upland drainage and those without any flow (including indirect) to a TNW. (p. 1)

Agency Response: See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Coalition of Real Estate Associations (Doc. #5058.2)

- 6.131 [T]he Proposed Rule’s narrow exemptions of certain ditches will not likely cover many parts of an MS4.²¹ In subparagraph (b)(4) of the Proposed Rule, the Agencies exempt ditches that do not “contribute” flow to the (1)-(4) waters. Many MS4 ditches would not expressly fall within this exemption, as a major purpose of an MS4 is to convey and “contribute” stormwater to receiving waters. The other ditch exemption in the Proposed Rule requires the ditch to have less than perennial flow and only drain upland areas. This exemption is equally ineffective as many MS4 ditches will contain water throughout the year and may receive water from non-upland areas. (p. 19)

Agency Response: The final rule provides an explicit exclusion for stormwater control features constructed to convey, treat or store stormwater that are created in dry land. The agencies’ longstanding practice is to view stormwater control measures that are not built in “waters of the United States” as non-jurisdictional. Conversely, the agencies view some waters, such as channelized or piped streams, as currently jurisdictional even where used as part of a stormwater management system. Nothing in the proposed rule was intended to change that practice, and the final rule likewise leaves this longstanding policy in place. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. Please also see the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Carroll Area Development Corporation (Doc. #5600)

- 6.132 As it relates to county government, the “Waters of the U.S.” rule would expand the number of ditches that are regulated by the Environmental Protection Agency. This would increase both the timeline and budget for public infrastructure projects. The CWA Section 404 permit process can be complex, time-consuming and expensive to counties. (p. 1)

Agency Response: See summary response and the preamble of the final rule. Note also that in addition to the significantly edited and clarified exclusions for ditches, the final rule also excludes waste treatment systems designed to meet the requirements of the CWA and stormwater control features constructed in dry land. The final rule asserts jurisdiction over only those ditches that meet the definition of “tributary” and that are not excluded under paragraph (b) of the final rule. Furthermore, all existing statutory exemptions, including but not limited to those for the maintenance of existing drainage and irrigation ditches at CWA section 404 (f)(1)(C), remain in place and unaffected by the final rule.

²¹ Insofar as ditches are concerned, these comments only address exclusion of such features to the extent they that are identified and mapped within, and subject to an NPDES permit for, MS4 systems. Other comments submitted by CORE Association participants will address treatment of non-MS4 ditches.

Kolter Land Partners and Manatee-Sarasota Building Industry Association (Doc. #7938.1)

- 6.133 Although certain ditches are deemed non-jurisdictional under the proposed rule, the expansive definition of "tributary" will ensure that more ditches will be subject to regulation than will be exempt. (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule

Home Builders Association of Michigan (Doc. #7994)

- 6.134 The Agencies have erroneously stated the proposed rule does not regulate new types of ditches. For the first time the proposed rule explicitly includes ditches unless they fall within one of two exceptions based on the location and flow. Many ditches throughout Michigan and the rest of the country will be unable to meet the rule's limited exemption provision and will, contrary to the Agencies' claim, become subject to regulation under the proposed rule. (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Farris Law Group PLLC (Doc. #10199)

- 6.135 The proposed rulemaking creates exemptions for certain ditches, but making the exemptions so narrow that few ditches can meet the criteria, and also allows for exempted features, such as groundwater, gullies, and rills to serve as connections that can render a feature a jurisdictional "adjacent water" or "other water." Ditches are constructed and used as part of the construction, operation, and maintenance of commercial properties. Drainage ditches play a major role in all of these activities, ensuring that storm water is properly channeled away from facilities and land where it would otherwise pond, interfering with the intended use of the land and facilities. Ditches are also an integral part of creating a proper drainage system, which in turn prevents flooding. Use of drainage ditches offers a way to remove excess water from roads and vital urban spaces, without the erosion rates and pollution transport that result from direct surface runoff (p. 2-3)

Agency Response: See summary response and the preamble of the final rule.

DreamTech Homes, Ltd. (Doc. #11012)

- 6.136 Although certain ditches are deemed non-jurisdictional under the proposed rule, the expansive definition of "tributary" will ensure that more ditches will be subject to regulation than will be exempt. (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

National Ready Mixed Concrete Association (Doc. #13956)

6.137 Inclusion of ditches as waters of the United States triggers the full protection and federal requirements of the CWA for features that are designed, and often mandated, to protect the environment and public safety during rain fall. It is clear that the agencies intend that some ditches be regulated as waters of the United States under the proposed rule. While the agencies have provided exclusions for two specific categories of ditches: “Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow; Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or a jurisdictional impoundment,”²² this exclusion is dependent on how agencies interpret “uplands.” “Uplands” is used 94 times in the proposed rule. It is a key component of determining what is not a water of the United States, both for ditches and other features, and yet it has been left undefined in the proposed rule and thus open to interpretation. The “uplands” definition included in the 2003 Watershed Protection Glossary - “Uplands - an area of the terrestrial environment that does not have direct interaction with surface waters”²³ - is not adequate for ditch exclusion. Ditches by their very nature have direct interaction with surface waters as they are designed to channel and transport collected surface water during and after periods of rainfall.

Drainage ditches ensure that stormwater is properly channeled away from facilities and land where it would otherwise accumulate, causing damage to land and property and endangering public safety. Ditches are an integral part of creating a proper drainage system to flooding. Use of drainage ditches offers a way to remove excess water from roads, facilities, and helps reduce erosion rates and pollution transport. Nearly all ready mixed concrete plants will have a ditch somewhere on or near their property.

Ditches should not be considered waters of the United States. Instead, the agencies should continue to use existing NPDES and stormwater management programs for the regulation of ditches, rather than including the ditches themselves as jurisdictional.

At a minimum, NRMCA cannot stress enough, the agencies need to clarify that point sources that are covered by NPDES permits, such as ditches and ponds that are part of a stormwater management plan, are not waters of the U.S. The agencies need to work with stakeholders and state regulatory agencies to fully understand the implications on other regulatory programs and revise the rule to avoid duplication and conflicting requirements. (p. 10-11)

Agency Response: See summary response and the preamble of the final rule. Note also that in addition to the significantly edited and clarified exclusions for ditches, the final rule also excludes stormwater control features constructed in dry land. The final rule asserts jurisdiction over only those ditches that meet the definition of “tributary” and that are not excluded under paragraph (b) of the final

²² 79 FR 22193

²³ Glossary from Watershed Analysis and Management Guide for States and Communities (EPA 841-B-03-007). http://ofmpub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do;jsessionid=FtPMa3PSra2atonIaEvgjdbD1ezkZqVN4tizdHJMZ4yWdGCI0k5i!11587641512. Accessed 10/01/14.

rule. Furthermore, all existing statutory exemptions, including but not limited to those for the maintenance of existing drainage and irrigation ditches at CWA section 404 (f)(1)(C), remain in place and unaffected by the final rule. The Technical Support Document Section I provides the legal framework under which a ditch could be considered both a point source and a water of the United States.

Lydig Construction Inc. (Doc. #14147)

- 6.138 Specifically, I have serious objections to the regulatory language that would, for the first time, categorically claim ditches as ‘waters of the United States.’ Notwithstanding the exclusions in the proposal, CWA jurisdiction would reach many ephemeral ditches (e.g., roadside, irrigation, stormwater) that serve limited aquatic functions and values, and may flow only intermittently and indirectly over a great distance to reach navigable water. The proposal would trigger additional CWA requirements (e.g., Section 404 dredge and fill permits) before any construction work could be performed in the frequently dry channels that run along the 3.9 million miles of roads in our U.S. highway system. (Roadside ditches that make up a ‘Municipal Separate Storm Sewer System’ and drain runoff already are covered by the CWA’s NPDES program.) This would slow economic growth by delaying and increasing the cost of vital public and private infrastructure repairs currently underway in every state and major city across the nation. It would also put more motorists at risk and cause harm to downstream receiving waters. Permit authorization and compensatory mitigation would likely be required just to maintain the important functions of ditches that serve to convey, re-distribute and filter out the pollutants in stormwater runoff. (p. 4)

Agency Response: See summary response and the preamble of the final rule. Note also that in addition to the significantly edited and clarified exclusions for ditches, the final rule also excludes stormwater control features constructed in dry land. The final rule asserts jurisdiction over only those ditches that meet the definition of “tributary” and that are not excluded under paragraph (b) of the final rule. Furthermore, all existing statutory exemptions, including but not limited to those for the maintenance of existing drainage and irrigation ditches at CWA section 404 (f)(1)(C), remain in place and unaffected by the final rule.

Associated General Contractors of America (Doc. #14602)

- 6.139 AGC has serious objections to the regulatory language that would, for the first time, categorically claim ditches as "waters of the United States." Notwithstanding the exclusions in the proposal, CWA jurisdiction would reach many ephemeral ditches (e.g., roadside, irrigation, and stormwater) that perform limited environmental function and have limited value, and may flow only intermittently and indirectly over a great distance to reach navigable water. The proposal would trigger additional CWA requirements (e.g., Section 404 dredge and fill permits) before any construction work could be performed in the frequently dry channels that run along the 4 million miles of roads in our U.S. highway system. (Roadside ditches that make up a Municipal Separate Storm Sewer System (MS4) and drain runoff, already are covered by the CWA's NPDES program.) This double-regulation would slow economic growth by delaying and increasing the cost of vital public and private infrastructure repairs currently underway in every state and

major city across the nation. It would also put more motorists at risk and cause harm to downstream receiving waters. Permit authorization and compensatory mitigation would likely be required just to maintain the important functions of ditches that primarily serve to convey and re-distribute stormwater runoff.

This proposed category of jurisdiction is problematic for AGC members - and has raised many questions by construction industry professionals. First, the proposed definition declares a ditch to be a WOTUS if that ditch drains directly to another WOTUS. Ditches draining a linear facility can be quite long. Will the entire length of the ditch be considered a WOTUS, even if the majority of the ditch drains and is contained wholly in upland areas? Second, typically, roadside ditches have bed and bank features (as intended by those who designed and constructed them). Ordinary high water marks are more difficult to distinguish. Would the presence of debris and/or bent and matted vegetation be enough to declare a roadside ditch a WOTUS if they were the only indications of an OHWM? Third, the definition states that standing or pooled water in a ditch would not trigger jurisdiction. If water in a ditch flows for a portion of the year and pools for a portion of the year, would this presence of water alone cause the ditch to be considered jurisdictional? Fourth, if flow did not exist prior to, and was created by the excavation of a ditch, or through maintenance frequency, will the entire ditch be considered a WOTUS?

The agencies' premise that ditches and tributary water bodies are similar is deeply misplaced. Such an analogy fundamentally misrepresents the stark functional differences between ditches and "waters of the United States." Historically, federally-controlled WOTUS have provided many functions and services critical for our nation's economic and environmental health. In addition to providing habitat, rivers, lakes, ponds, and wetlands cleanse our drinking water, ameliorate storm surges, provide invaluable storage capacity for some flood waters, and enhance our quality of life by providing myriad recreational opportunities, as well as important water supply and power generation benefits. In contrast, ephemeral ditches (e.g., irrigation, roadside, and stormwater) primarily serve to convey and re-distribute stormwater runoff. Ditches are unique features that do not perform the same environmental function or serve the same value as those waters that have historically been afforded protection under the CWA.

Likewise, AGC members are required to manage stormwater runoff in the course of building roads via ditches. Per U.S. Department of Transportation (U.S. DOT) design specifications and federal regulations, all federally-funded roads must be "designed ... and maintained to have adequate drainage, cross drains, and ditch relief drains."²⁴ The United States' public road network consists of approximately 4.08 million miles of roads and includes 604,493 bridges, and federally-funded road projects are ongoing in every state and major city across the nation.²⁵ Do the agencies intend a program that would

²⁴ See 30 C.F.R. Part 816.151(d); U.S. Department of Transportation Federal Highway Administration, Technical Advisory: Developing Geometric Design Criteria and Processes for Nonfreeway RRR Projects, T 5040. 28, <http://www.fhwa.dot.gov/design/t504028.cfm> (Oct. 17, 1988).

²⁵ See U.S. Department of Transportation, Federal Highway Administration, Highway Statistics 2001 § V, Roadway Extent, Characteristics, and Performance Tbl. HM-10, at <http://www.fhwa.dot.gov/ohim/hs01/hm10.htm> U.S. Department of Transportation Federal Highway Administration, 2013 Status of the Nation's Highways, Bridges, and Transit: Conditions and Performance, <http://www.fhwa.dot.gov/policy/2013cpr/overviews.htm#part1> (2013).

trigger all CWA programs and requirements before any construction work could be performed along our U.S. highway system?

The issue of ditches being deemed tributaries per se is critically important because ditches are pervasive and endemic to every type of landscape and human activity across the Nation. Based on input from the Association's membership, AGC's key concerns with the agencies' proposed regulation of ditches are that it would (1) deter vital infrastructure repairs, (2) run counter to public safety, (3) inhibit sediment control practices, and (4) lead to illogical outcomes - as explained more fully below.

Deter vital infrastructure repairs. The proposed regulation of ditches would deter vital infrastructure repairs. Many states seek to upgrade their public roads to incorporate multi-modal transportation needs and to meet the latest standards that move traffic more safely and efficiently - and therein helping to avoid congestion-related accidents and excessive exhaust-related emissions. According to the 2013 Report Card for America's Infrastructure, "Forty-two percent of America's major urban highways remain congested, costing the economy an estimated \$101 billion in wasted time and fuel annually.... Currently, the Federal Highway Administration estimates that \$170 billion in capital investment would be needed on an annual basis to significantly improve conditions and performance."²⁶ By another estimate, traffic congestion wasted 2.8 billion gallons of fuel in 2007 - approximately three week's worth of gas for every traveler.²⁷ Clearly, infrastructure improvements are critical to our economy and the environment; however, such work inevitably involves the discharge of dredged or fill material in existing roadside ditches. Construction work on these roads and ditches (per DOT requirements) would (per the proposal) encounter "jurisdictional waters" and require expensive and time-intensive Section 404 permits. Even a temporary freeze on new highway construction could prevent states from "obligating" their federal highway funds, which could, in turn, result in a loss of those federal dollars. What is more, the delay of much needed repairs and investments to our roadways and transportation infrastructure will only exacerbate air quality concerns. (p. 5-9)

Agency Response: See summary response and the preamble of the final rule. Note also that in addition to the significantly edited and clarified exclusions for ditches, the final rule also excludes waste treatment systems designed to meet the requirements of the CWA, stormwater control features constructed in dry land and wastewater recycling structures created in dry land (e.g. green infrastructure). The final rule asserts jurisdiction over only those ditches that meet the definition of "tributary" and that are not excluded under paragraph (b) of the final rule. Furthermore, all existing statutory exemptions, including but not limited to those for the maintenance of existing drainage and irrigation ditches at CWA section 404 (f)(1)(C), remain in place and unaffected by the final rule.

- 6.140 The proposed regulation of ditches would run counter to public safety. Drainage systems that remove stormwater runoff from streets and highways are an integral feature of a safe

²⁶ See American Society of Civil Engineers, 2013 Report Card for America's Infrastructure. <http://www.infrastructurereportcard.org/a/#p/roads/overview>.

²⁷ See Texas Transportation Institute, Texas A&M University, 2009 Urban Mobility Report, July 2009.

system. Water that remains on the roadway surface can contribute to vehicle hydroplaning. In the winter, standing water can freeze and cause skidding. According to the U.S. DOT, there are over 5,870,000 vehicle crashes each year, of which 23 percent are weather-related and result in more than 6,000 fatal crashes annually. The vast majority of weather-related crashes are attributed to wet pavement (74 percent).²⁸ In addition to ditches and side slopes, incorrectly maintained drop inlets, pipe ends, culvert ends, head walls, and other drainage features located adjacent to the roadway may be potentially hazardous (by causing ponding to occur on road surfaces, for example).²⁹ Under the proposal, DOTs and highway contractors would need to wait for Section 404 permit authorization to maintain their system of roadside ditches because they would be depositing "dredged or fill" material through the process of mechanized land clearing. Delaying maintenance and repair activities or threatening safety-related highway projects increases potential for injuries and fatalities to the traveling public.

In addition, DOTs would need to obtain an NPDES permit to sand, salt, or chemically treat the roadway because they would be discharging pollutants directly into a WOTUS. Already, according to the U.S. DOT, "winter road maintenance accounts for roughly 20 percent of state DOT maintenance budgets...." And "each year, state and local agencies spend more than 2.3 billion dollars on snow and ice control operations."³⁰ The proposal would move the point of compliance from the receiving surface water to the bank/side of the roadway. By regulating ephemeral ditches (e.g., irrigation, roadside, and stormwater) owners and operators will lose the ability to treat runoff in a cost-effective manner and the costs of winter road maintenance will be driven up. Long term, the threat of additional regulatory oversight, higher costs, mitigation, and risk will discourage the potential creation of new WOTUS and thereby discourage low-impact development strategies to manage runoff. (See discussion on stormwater controls in Section VI of these comments.)

Inhibit sediment control practices and projects. The proposed regulation of ditches would inhibit sediment control practices and projects. Past efforts to move highway and road drainage along quickly led to the installation of many straightened channels (ditches). Today, per EPA's movement to promote low-impact development and other green design strategies, MS4s are hiring contractors to maintain, stabilize soils, and control flow in roadside ditches, as well as introduce a natural or curvilinear channel character. The proposal would inhibit the ever-increasing practice of retrofitting past, less natural ditch designs to use practices - such as bioretention - intended to filter out particles in the runoff that has entered a ditch before the runoff reaches a surface receiving water. Moreover, as stated above, roadway personnel would not be legally authorized to maintain the sediment controls built into their ditches - for the primary purpose of

²⁸ See U.S. Department of Transportation, Road Weather Management Program http://www.ops.fhwa.dot.gov/weather/q1_roadimpact.htm.

²⁹ See http://safety.fhwa.dot.gov/local_rural/training/fhwasa09024.

³⁰ See U.S. Department of Transportation, Road Weather Management Program http://www.ops.fhwa.dot.gov/weather/q1_roadimpact.htm, also references "Highway Statistics Publications, Highway Finance Tables SF-4C and LGF-2," 1997 to 2005, <http://www.fhwa.dot.gov/policy/ohpi/hss/hsspubs.cfm>

protecting the quality of receiving waters - without first securing a federal permit.³¹ (Interestingly, environmental advocates have incorrectly concluded that expansive federal control over small streams and wet areas is needed to curb pollution that would otherwise flow downstream to vital fish habitat.)

Lead to illogical results. The proposed regulation of ditches would lead to illogical results (see related discussion in Sections V and VI below). For example, the construction industry would face increased spill and emergency response reporting requirements whenever a roadside ditch receives a spill - due to roadway work or accidents - or whenever it rains during a paving operation. Paving contractors would need to immediately report an oil spill to the National Response Center every time it rains on their project site because the water leaving the roadway would run into the roadside ditch and cause a film or "sheen" on the surface of a WOTUS, which would trigger the reporting requirements of the Discharge of Oil regulation.³²

What is more, if roadside ditches are WOTUS, then CWA Section 303 would require states to establish water quality standards and "designate uses" for them. The main purpose of an MS4 is to transport stormwater; however, that use would plainly violate EPA's regulations that state "in no case shall a State adopt waste transport ... as a designated use for any water of the United States."¹⁸

On top of meeting CWA Section 404 permit requirements for ditch maintenance and related roadwork (as explained above), Section 404 permittees would need to provide mitigation to ensure "no net loss" of waters whenever they maintain the millions of miles of ditches along our nation's roadway system. Costs will significantly increase in densely populated areas where mitigation opportunities are non-existent and the only options are "unlike" and "out of kind."

AGC maintains that EPA should not require compensatory mitigation for the maintenance of ditches - including maintenance for the safety of public roadways or to maximize sediment control practices - where the primary function of the ditch is to convey stormwater. The fact that a ditch often develops wetland characteristics over time, and in between scheduled maintenance activities, is ancillary to its primary function. The development of wetland characteristics in ditches is very different from that of compensatory mitigation sites, where recruitment of ecological receptors is the primary function and goal. (p. 5-9)

Agency Response: See summary response. The final rule includes significantly edited and clarified exclusions for ditches. Additional exclusions in the final rule include waste treatment systems designed to meet the requirements of the CWA, stormwater control features constructed in dry land and wastewater recycling structures created in dry land (e.g. green infrastructure). The final rule asserts jurisdiction over only those ditches that meet the definition of "tributary" and that are not excluded under paragraph (b) of the final rule. Furthermore, all existing statutory exemptions, including but not limited to those for the maintenance of existing drainage and irrigation ditches at CWA section 404 (f)(1)(C), remain in

³¹ See, e.g., <http://lakeerie.ohio.gov/Portals/0/LEPF/LEPF%20Final%20Report%20415-11.pdf>

³² See <http://newsmanager.commpartners.com/agcenv/issues/2006-12-29/3.html>.

place and unaffected by the final rule. The rule does not affect the implementation or reporting requirements for spills and is outside the scope of this rule. If a spill has occurred into any water, the National Response Center (NRC) should be notified, regardless of the jurisdictional status of the water. The NRC is the federal government's national communications center, which is staffed 24 hours a day by U.S. Coast Guard officers and marine science technicians. The NRC is the sole federal point of contact for reporting all hazardous substances releases and oil spills. The NRC receives all reports of releases involving hazardous substances and oil that trigger federal notification requirements under several laws. The number is 1-800-424-8802.

Hawaii Reserves, Inc. (Doc. #14732)

- 6.141 Expansion of federal jurisdiction pursuant to the proposed rule would result in the regulation of waters including ditches and man-made canals, even if they are generally dry systems which become wet only during rainfall. As a result, many areas presently not considered "waters" will be affected by the rule, triggering permit requirements for activities such as construction or development to be conducted in those areas. (p. 1)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Business Alliance for a Sound Economy (Doc. #14898)

- 6.142 Under the Proposed Rule, any channelized features that contribute flow to a traditional navigable water, including man-made features, are jurisdictional tributaries. See 79 Fed. Reg. at 22,263. Categorical assertion of jurisdiction over ditches and similar man-made waters goes beyond the intent of the Clean Water Act by expanding its reach far beyond "navigable waters." This is especially true when the ditches carry only ephemeral flow. The exemptions for ditches included in the Proposed Rule are too narrow to remedy this problem. As an example, municipal stormwater ditches and conveyances could now be classified as waters of the United States. Routine maintenance on stormwater conveyances could require a Section 404 permit. Additional costs and restrictions on the use of stormwater ditches and conveyances would affect the way developers satisfy their own stormwater obligations in these areas. The result would be to impose additional burdens on an activity intended to promote clean water. (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Additional exclusions in the final rule include waste treatment systems designed to meet the requirements of the CWA and stormwater control features constructed in dry land. Furthermore, all existing statutory exemptions, including but not limited to those for the maintenance of existing drainage ditches at CWA section 404 (f)(1)(C) remain in place and unaffected by the final rule.

Council for Quality Growth (Doc. #15147.1)

- 6.143 [T]he EPA and the Corps state that the purpose of the rule is to provide clarity in the jurisdictional process. However, the definitions are unclear. The proposed rule states that man-made conveyances, including ditches, are considered jurisdictional tributaries if they have a bed, bank and ordinary high water mark (OHWM) and flow directly or indirectly into a "water of the U.S.," regardless of perennial, intermittent or ephemeral flow. The proposed rule excludes certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to a "water of the U.S." However, key terms like "uplands" and "contribute flow" are not defined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S." A public infrastructure ditch system-roadside, flood or stormwater- is interconnected and can run for hundreds, if not thousands of miles. Ditches are not wholly in uplands nor do they strictly drain in uplands, since they are designed to convey overflow waters to an outlet. (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Additional exclusions in the final rule include waste treatment systems designed to meet the requirements of the CWA and stormwater control features constructed in dry land.

Leigh Hanson, Inc. (Doc. #15781)

- 6.144 Finally, the last example of our interpretation concerns relate to the issue associated with "ditches" and its effect on permitting and operations. Ditches, sedimentation ponds and sedimentation traps are the primary erosion and sedimentation control measures and are considered best management practices on the sites. These controls must be periodically cleaned of accumulated sediments and maintained (vegetated and rip rap lined) and relocated as operations expand. It is unclear how the accumulated sediments in these conveyances, if they are determined to be jurisdictional, could be managed without temporary permit exemptions or duplicate control structures. We estimate that 96% of our aggregate sites would encounter new permit conditions related to management of onsite ditches and open water conveyances. (p.4-5)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Additional exclusions in the final rule include waste treatment systems designed to meet the requirements of the CWA and stormwater control features constructed in dry land.

Ames Construction, Inc. (Doc. #17045)

- 6.145 [...] I have serious objections to the regulatory language that would, for the first time, categorically claim ditches as 'waters of the United States.' Notwithstanding the exclusions in the proposal, CWA jurisdiction would reach many ephemeral ditches (e.g., roadside, irrigation, stormwater) that serve limited aquatic functions and values, and may flow only intermittently and indirectly over a great distance to reach navigable water. The proposal would trigger additional CWA requirements (e.g., Section 404 dredge and fill permits) before any construction work could be performed in the frequently dry channels

that run along the 3.9 million miles of roads in our U.S. highway system. (Roadside ditches that make up a 'Municipal Separate Storm Sewer System' and drain runoff already are covered by the CWA's NPDES program.) This would slow economic growth by delaying and increasing the cost of vital public and private infrastructure repairs currently underway in every state and major city across the nation. It would also put more motorists at risk and cause harm to downstream receiving waters. Permit authorization and compensatory mitigation would likely be required just to maintain the important functions of ditches that serve to convey, re-distribute and filter out the pollutants in stormwater runoff. (p.2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Additional exclusions in the final rule include waste treatment systems designed to meet the requirements of the CWA and stormwater control features constructed in dry land.

Home Builders Association of Tennessee (Doc. #19581)

- 6.146 In attempting to clarify waters that would not be subject to jurisdiction, the Agencies included ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow. The term "upland" is not defined in the Proposed Rule. While the Agencies issued a clarifying description in September 2014, such clarification was not part of the rulemaking process and likely invalidates the rulemaking procedure. Nevertheless, assuming uplands are water features that are not jurisdictional waters, then the question remains as to when an upland excavated ditch drains a jurisdictional feature. For example, a roadside ditch in certain areas of Tennessee may drain areas that could be wetlands or prior converted croplands, and contribute less than perennial flow to a jurisdictional water. Likewise an upland excavated ditch could drain an ephemeral stream with less than perennial flow to a jurisdictional water. In that event, it could mean that the entire drainage system takes on the jurisdictional component. (p. 11)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

South Carolina Forest Association (Doc. #6855)

- 6.147 New definitions for tributary, neighboring, riparian area and floodplain will expand WOTUS into areas previously not considered jurisdictional. The proposed rule will define most ditches that connect with other waters or wetlands, intermittent streams, and ephemeral streams as WOTUS. This has the potential to greatly impact forestry operations. For example, a ditch along a forest road may connect with a public highway ditch that has a permitted discharge into a wetland or waterway, making the entire ditch system WOTUS.

The most commonly encountered forestry concerns arise in some of the very areas that are newly covered under the proposed definition, including ephemeral and intermittent streams, man-made ditches, riparian areas, and floodplains. Some forestry activities previously covered under state Best Management Practices and state water quality laws will now also be subject to CWA enforcement. Inclusion of man-made ditches and minor

drainage that connect with wetlands or other waters will greatly extend CWA jurisdiction into upland areas.

Man-made ditches and minor drainage features should not be considered WOTUS and should not be regulated in the same way as natural streams and wetlands. However, these areas should still be considered for significant nexus and discharges should be addressed under state water quality laws. (p. 1)

Agency Response: The agencies do not agree that all man-made ditches should be excluded from the definition of “waters of the United States”. As discussed in the summary response and the preamble of the final rule, certain ditches provide similar functions as natural tributaries. The final rule asserts jurisdiction over only those ditches that meet the definition of “tributary” and that are not excluded under paragraph (b) of the final rule. The exclusions in the final rule have been edited and clarified. Note too that all existing statutory exemptions, including but not limited to those at CWA section 404(f)(1)(A) for normal farming, silviculture and ranching activities, remain in place and unaffected by the final rule.

Texas Mining and Reclamation Association (Doc. #10750)

- 6.148 The Agencies Should Clarify that Previously Non-Jurisdictional Water Features on Mine Sites Will Not Become Jurisdictional Waters Under the Proposed Rule.

Of critical concern to TMRA's members is the possibility that many water features constructed and used to manage water associated with mining operations which are currently not considered jurisdictional could fall within the definition of "waters of the United States" under the proposed rule. Diversion and conveyance ditches, including natural features within a permitted mine site, sediment and treatment ponds and impoundments, and other components of water treatment facilities are integral to mining operations, and are used to manage, contain, convey, and treat on-site waters in order to comply with existing environmental standards pursuant to the CWA, Surface Mining Control and Reclamation Act ("SMCRA"), and other federal and state mining laws and regulations. These features are currently excluded from CWA jurisdiction and should clearly remain excluded in any final rule. (p. 3)

Agency Response: The final rule asserts jurisdiction over only those ditches that meet the definition of “tributary” and that are not excluded under paragraph (b) of the final rule. The summary response and the preamble of the final rule discuss how the proposed exclusions for ditches were edited and clarified for the final rule. Additional exclusions in the final rule include waste treatment systems designed to meet the requirements of the CWA, stormwater control features constructed in dry land and wastewater recycling structures created in dry land.

- 6.149 On-Site Stormwater and Surface Water Management Features are Integral to Mining Operations.

Specifically, TMRA members must construct different types of ditches and conveyances throughout mine sites to serve a variety of required water management functions. For example, mine operators construct and maintain temporary and permanent diversion ditches and channels to manage stormwater runoff and keep water away from active pits

and other operational areas within the mine site. Some ditches collect and discharge stormwater runoff directly from areas not disturbed by mining to downstream waters. Others carry water from disturbed areas to ponds within the mine site, where solids can settle out, and water is subsequently beneficially reused for dust suppression or discharged from the mine site to downstream waters pursuant to an NPDES permit (in primacy state Texas these are "TPDES" permits). Simply put, ditches are commonly found on mine sites statewide and due to the dynamic nature of mining, mining companies constantly have to maintain, modify, move, and reclaim them. Additionally, small stretches of undisturbed drainages are also used to convey water from disturbed areas to sediment ponds, after flowing through sediment traps and silt fences to protect the short stretch of undisturbed channel. (p. 5)

Agency Response: See summary response. The final rule asserts jurisdiction over only those ditches that meet the definition of “tributary” and that are not excluded under paragraph (b) of the final rule. The summary response and the preamble of the final rule discuss how the proposed exclusions for ditches were edited and clarified for the final rule. Additional exclusions in the final rule include waste treatment systems designed to meet the requirements of the CWA, stormwater control features constructed in dry land and wastewater recycling structures created in dry land.

American Exploration & Mining Association (Doc. #13616)

6.150 Ditches and Conveyances Should Not Be Regulated as Waters of the U.S.

Ditches are constructed and used as part of the construction, operation, and maintenance of mines, homes, natural gas pipelines, electric generation facilities, transmission and distribution lines, transportation-related infrastructure, agricultural irrigation, flood control, rural drains and roads, and railroad corridors located across the country. Drainage ditches play a major role in all of these activities, ensuring that stormwater is properly channeled away from facilities and land where it would otherwise pond, interfering with the intended use of the land and facilities. Ditches are also an integral part of creating a proper drainage system, which in turn prevents flooding.

Treating ditches necessary to support mining as “waters of the U.S.” will be expensive and onerous for AEMA members. For example, the CWA stormwater program requires the construction of ditches/stormwater retention ponds to manage stormwater. If the stormwater BMPs are treated as waters of the U.S., this will result in a never-ending cycle of regulation. Mining companies, in particular, will face tremendous difficulty invoking the ditch exclusions. Given the scale of mining operations, which often span several thousands of acres, on-site ditches tend to be very long in comparison to ditches found on project sites in other industries and thus, it is more likely that, at some point, they will intersect a “water of the United States.” Under the proposed rule, even if a ditch system on a mine site was excavated almost entirely in uplands and drains only uplands, the entire system could nevertheless be deemed jurisdictional based on a single intersection with a jurisdictional water.

At a minimum, the Agencies should clarify, as they have suggested they would during outreach meetings, that a ditch that is excavated in uplands, drains only uplands, and has

less than perennial flow is nevertheless excluded even if it contributes flow to a water of the U.S. because the two ditch exclusions are independent of one another. The Agencies should also clarify that the upland ditch exclusion applies to all reaches of a ditch system that are upstream of the point of intersection with a “water of the United States.” Third, the Agencies should indicate in the preamble that the mere presence of groundwater in a ditch does not, by itself, convert an upland ditch into a jurisdictional tributary, so long as the ditch does not flow perennially as a result of the groundwater connection. Finally, the Agencies should not narrow the upland ditch exclusion by imposing a requirement that the ditch has less than intermittent flow.² Many ditches on mine sites do, in fact, carry flow and contain water intermittently, but should not be subject to jurisdiction as federally protected waters as explained above. (p. 5-6)

Agency Response: See summary response. The final rule asserts jurisdiction over only those ditches that meet the definition of “tributary” and that are not excluded under paragraph (b) of the final rule. The summary response and the preamble of the final rule discuss how the proposed exclusions for ditches were edited and clarified for the final rule. Additional exclusions in the final rule include waste treatment systems designed to meet the requirements of the CWA, stormwater control features constructed in dry land and wastewater recycling structures created in dry land.

National Stone, Sand and Gravel Association (Doc. #14412)

- 6.151 The agencies treatment of the drainage ditch exclusion especially typifies the proposed rule's intrusion into traditional state and local land use regulation. Local agencies often regulate and maintain drainage ditches. These ditches meet truly local functions such as road maintenance, flood control, and agricultural management. Many ditches are treated as "point sources."³³ Under a local jurisdiction's Municipal Separate Storm Sewer System (MS4) to manage storm water. The proposed rule exempts drainage ditches excavated wholly in uplands, that drain only uplands, and have less than perennial flow." Id at 22193. However, ditches can become WOTUS if they contribute flow "either directly or indirectly through another water" to a traditionally navigable water or interstate water. Id. The rule does not even define the term "upland", nor explain how to reconcile this contradictory language. In any case, very few ditches would meet the very narrow exemptions under the proposed rule. Drainage ditches are designed to convey stream water from a site, such as a road, so it is hard to conceive of any ditch that never indirectly contributes flow to another water.

³³ For example, EPA defines municipal separate storm sewer system as, "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels or storm drains...owned or operated by a state, city, town, borough, parish, district, association or other public body)" 40 CFR 122.26(b)(8). Maryland Department of the Environment (MDE) has been reissuing MS4 permits to a number of large and medium Maryland Counties and Baltimore City that denies the MS4 regulated "permit area" as encompassing the entire geographic area within the political boundaries of a Phase I NPDES municipal stormwater jurisdiction. Thus, under the proposed rule, drainage ditches considered "point sources" for the MS4 program would then also become Waters of the United States, triggering a host of additional requirements.

The agencies treatment of the drainage ditch exclusion will likely also lead to arbitrary actions by agency regulators in the field. Suppose a ditch with an intermittent flow drains uplands but also conveys some flow to a WOTUS. Under the proposed rule, that ditch would likely be considered a WOTUS. Indeed, the agencies could find that a drainage ditch was jurisdictional based on a desk top finding that the ditch may indirectly drain to a "single point of entry" through a "circuitous" and "shallow subsurface route" connecting to an ephemeral tributary. Thus, landowners are at the mercy of a reviewer's subjective judgment that (based on regional ecosystem data or other studies), the ditch and its adjacent wetlands, as well as all other similarly situated ditches and adjacent wetlands and all other tributaries in the watershed collectively, provide functions and values benefitting the watershed. The ditch could even be required to comply with state water quality standards no matter how remote the ditch is from a TNW. Field staff could make a jurisdictional finding without even a walk-through of the site.³⁴

Examples from aggregate producers illustrate the impact of regulating otherwise excluded drainage ditches at quarry sites:

- One commenter noted that 'the purpose of the ditches is to divert run off from the facility and comply with water quality standards. Permitting and requiring ditches to comply with water quality standards will be an uphill battle. The proposed rule would also require an individual study to determine if the stormwater ditch contributes flow indirectly to waters of the U.S. through a shallow subsurface connection. If found that stormwater drainage ditches do contribute to a water of the U.S., then an NPDES permit would be required for all stormwater ditches on site. "
- Another commenter stated, "The real danger is the creation of ditches during quarry operations to direct the flow of stormwater toward sediment basins and then to traditional streams. We fear that these ditches and basins could become jurisdictional ... Our ability to properly reclaim developed quarry land into a more passive post-quarry use will be compromised."
- One large producer highlighted the practical difficulties of permitting ditches stating, "Ditches, sedimentation ponds and sedimentation traps are the primary erosion and sedimentation control facilities and BMPs on the sites. They must be periodically cleaned of accumulated sediments and maintained (vegetated and rip rap lined) and relocated as operations expand. It is unclear how these conveyances could be maintained of accumulated sediments without temporary permit exemptions or duplicated control structures. We estimate that 96% of our aggregates sties would encounter new permit conditions related to management of onsite ditches and open water conveyances." (p. 33-35)

³⁴ For example, field staff could use a range of information records whether documented for an individual water or based on scientific literature describing functions), finding that certain ephemeral systems a distance away from TNWs (such as in the Mojave River California watershed) are jurisdictional, even though they only flow in very rare storm events and treat them as equal to a perennial or intermittent stream close to the TNW just because they are in the same watershed. Yet, the nexus between such ephemeral systems and the closest TNW is often very attenuated, if at all.

Agency Response: The final rule asserts jurisdiction over only those ditches that meet the definition of “tributary” and that are not excluded under paragraph (b) of the final rule. The summary response and the preamble of the final rule discuss how the proposed exclusions for ditches were edited and clarified for the final rule. Additional exclusions in the final rule include waste treatment systems designed to meet the requirements of the CWA, stormwater control features constructed in dry land, wastewater recycling structures created in dry land, artificial lakes and ponds created in dry land and water-filled depressions created in dry land incidental to mining or construction activity. Note also that the final rule clearly states that the excluded features identified in paragraph (b) are not “waters of the United States” even where they otherwise meet the terms of “waters of the United States” outlined in paragraphs (a)(1) through (a)(8). The Technical Support Document Section I provides the legal framework under which a ditch could be considered both a point source and a water of the United States.

Alliance Coal, LLC (Doc. #14577)

- 6.152 Of critical concern to Alliance is the possibility that many water features commonly found on mine sites which are currently not considered jurisdictional could nevertheless fall within the definition of "waters of the United States" under the proposed rule. Ditches, closed loop systems, on-site ponds, impoundments, and other water management features are integral to mining operations, and are used to manage on-site waters in an environmentally sound and frequently statutorily mandated manner. Defining such features as jurisdictional waters would likely render mining operations impossible (p. 1)

Agency Response: The final rule asserts jurisdiction over only those ditches that meet the definition of “tributary” and that are not excluded under paragraph (b) of the final rule. The summary response and the preamble of the final rule discuss how the proposed exclusions for ditches were edited and clarified for the final rule. Additional exclusions in the final rule include waste treatment systems designed to meet the requirements of the CWA, stormwater control features constructed in dry land, wastewater recycling structures created in dry land, artificial lakes and ponds created in dry land and water-filled depressions created in dry land incidental to mining or construction activity.

Continental Resources, Inc. (Doc. #14655)

- 6.153 The Proposed Rule is the first time that the agencies propose to categorically regulate numerous ditches, including irrigation ditches, roadside ditches, drainage ditches, and other conveyances. This extension applies not just to Section 404 but to all CWA programs. Our nation's infrastructure, agriculture, construction, transportation, and industrial activities rely upon ditches for beneficial purposes, including flood control, and until now ditches have been primarily regulated by state and local governments. While the agencies have explicitly excluded a small number of ditches from jurisdiction, the exclusion is too narrow and not well defined. For example, the term "uplands" is not defined and therefore it is unclear when ditches would be excavated wholly in uplands and drain to only uplands. 79 Fed. Reg. at 22,263 (Proposed 33 C.F.R. § 328.3(b)(3)). Continental is particularly concerned about the definition of tributaries as it relates to the

impoundments, run-on ditches, and run-off ditches the company uses at its sites given their potential to overflow to roadside ditches deemed tributaries under the Proposed Rule. (p. 7)

Agency Response: The final rule asserts jurisdiction over only those ditches that meet the definition of “tributary” and that are not excluded under paragraph (b) of the final rule. The summary response and the preamble of the final rule discuss how the proposed exclusions for ditches were edited and clarified for the final rule. They also briefly discuss the history of CWA jurisdiction pertaining to ditches. Additional exclusions in the final rule include waste treatment systems designed to meet the requirements of the CWA, stormwater control features constructed in dry land and wastewater recycling structures created in dry land.

Montana Mining Association (Doc. #14763)

6.154 Ditches are constructed and used as part of the construction, operation, and maintenance of mines, homes, natural gas pipelines, electric generation facilities, transmission and distribution lines, transportation-related infrastructure, agricultural irrigation, flood control, rural drains and roads, and railroad corridors located across the country. Drainage ditches play a major role in all of these activities, ensuring that stormwater is properly channeled away from facilities and land where it would otherwise pond, interfering with the intended use of the land and facilities. Ditches are also an integral part of creating a proper drainage system, which in turn prevents flooding.

Treating ditches necessary to support mining as “waters of the U.S.” will be expensive and onerous for MMA members. For example, the CWA stormwater program requires the construction of ditches/stormwater retention ponds to manage stormwater. If the stormwater BMPs are treated as waters of the U.S., this will result in a never-ending cycle of regulation. Mining companies, in particular, will face tremendous difficulty invoking the ditch exclusions. Given the scale of mining operations, which often span several thousands of acres, on-site ditches tend to be very long in comparison to ditches found on project sites in other industries and thus, it is more likely that, at some point, they will intersect a “water of the United States.” Under the proposed rule, even if a ditch system on a mine site was excavated almost entirely in uplands and drains only uplands, the entire system could nevertheless be deemed jurisdictional based on a single intersection with a jurisdictional water. (p. 5)

Agency Response: The final rule asserts jurisdiction over only those ditches that meet the definition of “tributary” and that are not excluded under paragraph (b) of the final rule. The summary response and the preamble of the final rule discuss how the proposed exclusions for ditches were edited and clarified for the final rule. Additional exclusions in the final rule include waste treatment systems designed to meet the requirements of the CWA, stormwater control features constructed in dry land, wastewater recycling structures created in dry land, artificial lakes and ponds created in dry land and water-filled depressions created in dry land incidental to mining or construction activity.

Waterton Global Mining Company (Doc. #14784)

- 6.155 Waterton and its portfolio companies share the concerns expressed by others that the proposed rule appears to assert jurisdiction over many water features that lack any substantial connection to navigable waters which Congress intended to be governed by the CWA. Not only would this exceed the statutorily authorized jurisdiction under the CWA, it would have major adverse impacts on numerous industrial facilities, such as mines, that rely on industrial ponds and impoundments (which are subject to other statutes and regulations for environmental oversight and compliance) for their operations. The proposed rule should explicitly recognize, consistent with prior practice that ditches, feeder streams, and other on-site waters carrying flow to and from ponds and impoundments used to treat wastewater and storm water are part of waste treatment systems at mine sites. Indeed, a National Pollutant Discharge Elimination System ("NPDES") permit is required for conveyance of waters from the mine site to downstream jurisdictional waters and NPDES permitting authorities generally have agreed that additional permits above the point of discharge to the downstream jurisdictional waters is unnecessary. This is only one of many examples of the redundancies in and unnecessary addition of regulation (or federalization of state regulations) created by the proposal. (p. 2)

Agency Response: The final rule asserts jurisdiction over only those ditches that meet the definition of “tributary” and that are not excluded under paragraph (b) of the final rule. The summary response and the preamble of the final rule discuss how the proposed exclusions for ditches were edited and clarified for the final rule. Additional exclusions in the final rule include waste treatment systems designed to meet the requirements of the CWA, stormwater control features constructed in dry land, wastewater recycling structures created in dry land, artificial lakes and ponds created in dry land and water-filled depressions created in dry land incidental to mining or construction activity.

Nevada Mining Association (Doc. #14930)

- 6.156 While most of the flow to artificial ponds is by pipe, and not in open channels or ditches, some of the flow into stormwater retention ponds and other ponds is by constructed ditches. These ditches divert stormwater, and also at times mine water, around or away from disturbed areas. If mining artificial ponds are deemed jurisdictional waters under the Proposal, then so too must any constructed channels or waters that convey solutions, wastewaters, groundwater, or other liquids to these ponds, because these constructed channels would arguably be tributaries to such jurisdictional waters. See, e.g., paragraph (a)(5) at 79 Fed. Reg. 22263. Nor would these constructed channels fall within either of the "ditch exceptions" in the Proposal. They could not be deemed ditches that are excavated only in uplands under the first ditch exception, because they would drain into a jurisdictional water (i.e., the artificial pond). See, e.g., paragraph (b)(3) at 79 Fed. Reg. 22263. Nor would they be exempted under the second ditch exemption because, again, they would "contribute flow" to a jurisdictional water (i.e., the artificial ponds). See, e.g., paragraph (b)(4) at 79 Fed. Reg. 22263.

As in the case of the ponds themselves, any constructed channels conveying waters to or from these ponds are encompassed within State WPC permits, and they are designed and constructed to ensure that there is no discharge to surface water. Just as it makes no sense to regulate the artificial ponds themselves as jurisdictional waters, so too would it make no sense that the constructed channels conveying wastewaters, solutions, groundwater, or process waters to these artificial ponds be deemed jurisdictional waters. The reason, of course, is that these channels could not by any stretch of the imagination be deemed to affect, or to have the potential to affect, the chemical, physical, or biological integrity of any TNW. And again, the "science" on which the Agencies' Proposal is based does not establish, or support, the proposition that such isolated channels or ditches could have an impact, much less a significant impact, on a downstream TNW. Finally, given the isolated nature of the mining artificial pond/channel system, the Agencies' assertion of jurisdiction over such channels would be flatly contrary to SWANCC. (p. 13-14)

Agency Response: The final rule asserts jurisdiction over only those ditches that meet the definition of “tributary” and that are not excluded under paragraph (b) of the final rule. The summary response and the preamble of the final rule discuss how the proposed exclusions for ditches were edited and clarified for the final rule. Additional exclusions in the final rule include waste treatment systems designed to meet the requirements of the CWA, stormwater control features constructed in dry land, wastewater recycling structures created in dry land, artificial lakes and ponds created in dry land and water-filled depressions created in dry land incidental to mining or construction activity.

National Mining Association (Doc. #15059)

- 6.157 These water management features historically have not been deemed “waters of the United States.” Indeed, EPA has determined that these on-site waters are “treatment systems” that represent best practicable control technology and best available technology economically achievable for purposes of managing process wastewater consistent with the requirements of the CWA, or in other cases, that these features are part of required non-process and stormwater management systems.³⁵ Under SMCRA, these features are considered components of required water diversion and drainage systems, or, in the case of coal slurry impoundments, are considered part of a coal preparation plant’s water circuit.³⁶

By way of example, NMA members must construct and maintain different types of ditches and conveyances throughout mine sites to serve a variety of required water management functions, such as diversion ditches and channels that manage stormwater runoff and keep water away from active pits and other operational areas within the mine

³⁵ See effluent limitation guideline development for coal, hard rock and phosphate mining sectors, determining use of ponds, impoundments, and basins to be best practicable control technology for controlling discharge of process generated waste water. 42 Fed. Reg. 21380 (Oct. 17, 1975); 44 Fed. Reg. 2586 (Jan. 12, 1979); 46 Fed. Reg. 28873 (May 29, 1981); 47 Fed. Reg. 45382 (Oct. 13, 1982); 50 Fed. Reg. 41296 (Oct. 9, 1985); 67 Fed. Reg. 3370 (Jan. 23, 2002); 42 Fed. Reg. 35843 (Jul. 12, 1977); 43 Fed. Reg. 9808 (Mar. 10, 1978); 43 Fed. Reg. 29711 (Jul. 11, 1978); 47 Fed. Reg. 54598 (Dec. 3, 1982); 53 Fed. Reg. 18764 (May 24, 1988).

³⁶ 30 C.F.R. Part 816; 50 Fed. Reg. 41296, 41303 (Oct. 9, 1985).

site. Some of these ditches collect and discharge stormwater runoff directly from areas not disturbed by mining to downstream waters. Others carry water from disturbed areas to ponds within the mine site, where solids can settle out, and water is subsequently beneficially reused for mining processes or other needs, or discharged from the mine site to downstream waters pursuant to an NPDES permit. Mine operators also sometimes rely on ditches and channels to carry process wastewater to water treatment facilities. Simply put, ditches are commonly found on mine sites nationwide, and due to the dynamic nature of mining, mining companies constantly have to maintain, modify, move, and reclaim them. (p. 9-10)

Agency Response: The final rule asserts jurisdiction over only those ditches that meet the definition of “tributary” and that are not excluded under paragraph (b) of the final rule. The summary response and the preamble of the final rule discuss how the proposed exclusions for ditches were edited and clarified for the final rule. Additional exclusions in the final rule include waste treatment systems designed to meet the requirements of the CWA, stormwater control features constructed in dry land, wastewater recycling structures created in dry land, artificial lakes and ponds created in dry land and water-filled depressions created in dry land incidental to mining or construction activity.

- 6.158 Although the proposal attempts to exclude certain ditches from the definition of “waters of the United States,”³⁷ the exclusions are too narrow and are unlikely in practice to exclude many ditches from CWA jurisdiction. NMA shares all of the concerns outlined in the comments by WAC et al. regarding the proposed rule’s treatment of ditches, including, among other things, the need to clarify: (1) whether the entire length of a ditch must be excavated in uplands and drain only uplands for the exclusion to apply or whether, in the case of a ditch that intersects a “water of the United States,” the exclusion still applies to the portion of the ditch upstream from the intersection; (2) what constitutes a “ditch” and how the Agencies intend to distinguish ditches from erosional features; (3) the jurisdictional status of ditches that were excavated prior to the new requirement that ditches drain only uplands; and (4) the showing required for a landowner to invoke one of the ditch exclusions.

Mining companies, in particular, will face tremendous difficulty invoking the ditch exclusions. Given the scale of mining operations, which often span several thousands of acres, on-site ditches tend to be very long in comparison to ditches found on project sites in other industries and thus, it is more likely that, at some point, they could intersect a “water of the United States.” Under the proposed rule, even if a ditch system on a mine site was excavated almost entirely in uplands and drains only uplands, the entire system could nevertheless be deemed jurisdictional based on a single intersection with a jurisdictional water, despite the fact that the ditch never discharges off-site except through an NPDES permit.

At a minimum, the Agencies should clarify, as they have suggested they would during outreach meetings, that a ditch that is excavated in uplands, drains only uplands, and has less than perennial flow is nevertheless excluded even if it contributes flow to a water of

³⁷ See 79 Fed. Reg. at 22,203.

the United States because the two ditch exclusions are independent of one another. The Agencies should also clarify that the upland ditch exclusion applies to all reaches of a ditch system that are upstream of the point of intersection with a “water of the United States.” The Agencies should further indicate in the preamble that the mere presence of groundwater in a ditch does not, by itself, convert an upland ditch into a jurisdictional tributary, so long as the ditch does not flow perennially as a result of the groundwater connection. Finally, the Agencies should not narrow the upland ditch exclusion by imposing a requirement that the ditch has less than intermittent flow.³⁸ It goes without saying that a properly functioning ditch system on a mine or industrial site does, in fact, carry flow and contain water intermittently, but should not be subject to jurisdiction as a federally protected water simply because it is performing its intended function, as explained above. It should also be noted that it is not unusual that a ditch would not flow at all if not for the industrial use associated with it. (p. 21-22)

Agency Response: The final rule asserts jurisdiction over only those ditches that meet the definition of “tributary” and that are not excluded under paragraph (b) of the final rule. The summary response and the preamble of the final rule discuss how the proposed exclusions for ditches were edited and clarified for the final rule. Additional exclusions in the final rule include waste treatment systems designed to meet the requirements of the CWA, stormwater control features constructed in dry land and wastewater recycling structures created in dry land.

Corporate Communications and Sustainability, Domtar Corporation (Doc. #15228)

- 6.159 Under the proposal, some ditches are exempt while others, such as some storm water ditches, are considered to be WOTUS and will be subject to water quality standards and permitting requirements for discharges of pollutants. Ditches should be excluded from jurisdiction and the ditch exemption needs to be expanded to include all ditches. (p. 2)

Agency Response: The agencies do not agree that all ditches should be excluded from the definition of “waters of the United States”. As discussed in the summary response and the preamble of the final rule, certain ditches provide similar functions as natural tributaries. The final rule asserts jurisdiction over only those ditches that meet the definition of “tributary” and that are not excluded under paragraph (b) of the final rule. The exclusions in the final rule have been edited and clarified and include not only certain ditches, but also stormwater control features constructed in dry land and wastewater recycling structures created in dry land.

- 6.160 For the first time the proposal includes ditches as WOTUS. Ditches are included in the definition of “tributary,” agencies staff point to the definition of tributary requiring that it be “physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e).” (See Proposal at § 328.3(c)(5)). However, these terms themselves are far from certain³⁹ and allow the agencies to easily conclude such

³⁸ See 79 Fed. Reg. at 22,203.

³⁹ Indeed, in August 2014, the Corps Engineer and Research Development Center (ERDC) released two new guidance documents regarding “ordinary high watermark” (OHWM): (1) A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valley, and Coast Region of the United

features exist when making jurisdictional determinations. Thus, these provisions do not of themselves sufficiently constrain unwarranted claims of federal jurisdiction. Domtar recommends the rule language should continue to not include ditches as WOTUS. (p. 6)

Agency Response: The summary response and the preamble of the final rule discuss the history of CWA jurisdiction pertaining to ditches. The U.S. Army Corps of Engineers has utilized ordinary high water mark since at least 1986 to determine, at least in part, the lateral extent of jurisdiction under Section 404 of the CWA.

- 6.161 The current regulations do not mention “ditches.” The proposal would specify for the first time that a tributary, can include “man-altered, or man-made water and includes waters such as...canals and *ditches*...” (emphasis added). Concern over the proposal’s treatment of ditches has been widespread among stakeholders. The agencies claim that the regulation of ditches would be limited under the proposal and, among other things, point to the new proposed exemption for ditches at 122.2(b)(3) which covers “[D]itches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.” (p. 12)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The summary response and the preamble of the final rule also discuss the history of CWA jurisdiction pertaining to ditches.

National Sustainable Agriculture Coalition (Doc. #15403)

- 6.162 While we welcome the clarity regarding excluded ditches, certain key definitions are missing in this section. First and foremost, the rule fails to define ditch. One of the most contentious points of this proposed rule has been a lack of clarity surrounding regulation of agricultural ditches. While it may seem unnecessary to explicitly define something as basic as a ditch, given the concern surrounding the ambiguity of the proposed rule it would be better for the agencies to err on the side of clarity. Therefore, we recommend the following definition of ditch informed by a Corps regulatory guidance letter⁴⁰:

Ditch. The term *ditch* means a man-made water conveyance used for drainage or irrigation purposes. (p. 8)

Agency Response: See summary response for a discussion of the term “ditch”.

States, and (2) A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark (OHWM) Classification. Matthew K. Mersel and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valley, and Coast Region of the United States (August 2014), <http://acwc.sdp.sirsi.net/client/search/asset/1036027>; Matthew K. Mersel, Lindsey E. Lefebvre, and Robert W. Lichvar, U.S. Army Engineer Research and Development Center (ERDC), A Review of Land and Stream Classifications in Support of Developing a National Ordinary High Water Mark (OHWM) Classification (August 2014), <http://acwc.sdp.sirsi.net/client/search/asset/1036026>.

⁴⁰ Regulatory definitions of the word ditch were reviewed from U.S. Army Corps of Engineers Regulatory Guidance Letter 07-02 Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act, July 4, 2007.

Illinois Coal Association (Doc. #15517)

6.163 We find the Agencies' proposed revisions regarding jurisdiction over ditches to be similarly inappropriate and inconsistent with established practice and controlling law. The Proposed Rule would, for the first time, expressly define certain ditches as jurisdictional tributaries. Presumably, seeking to avoid a fight over ditches, the Agencies seek to exclude from jurisdiction two specific types of ditches: (1) ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow and (2) ditches that do not contribute flow, either directly or through another water to (a)(1) through (a)(4) waters. See Proposed Rule at 22263. Yet, in the first instance, though the Agencies purport to exclude "ditches that are excavated wholly in uplands and have less than perennial flow," the Proposal fails to define "perennial flow," thereby leaving broad and subjective agency discretion over ditches, including those with water that may flow only one day a year. See *id.* And the second "exemption" is plagued by even greater ambiguity. The Agencies make no attempt to place reasonable bounds on what is meant by "contribute flow," especially "through another water," to a TNW. Under the Proposal, "another water" could be interpreted broadly to include any movement of water, even surface sheet flow or groundwater. Under such an interpretation, essentially all water features could be said to "contribute flow" to TNWs sooner or later. Thus, in reality, this second "exemption" is even more illusory than the first.

Indeed, under the Proposed Rule, the Agencies' would define for the first time four types of ditches as jurisdictional waters of the U.S.: (1) natural streams that have been altered, (2) ditches that have been excavated in waters of the U.S., (3) ditches with perennial flow, and (4) ditches connecting two or more waters of the U.S. See *id.* at 22203. Arguably, under the Proposal, CWA jurisdiction would reach many ephemeral ditches (e.g., roadside, irrigation, stormwater drains) that may flow only episodically and indirectly over a great distance to reach navigable water, and could even extend to ditches from surface mine bench ponds and sediment ponds that ultimately drain to a navigable water. Particularly troubling for many of the ICA members is the fact that these changes under the Proposed Rule could subject coal mine operators to duplicative and unnecessary permitting obligations. (p. 10-11)

See summary response and the preamble of the final rule for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

6.164 Also troubling to us is the potential for significantly expanded jurisdiction over stormwater ditches and temporary diversion ditches under the current Proposal. If adopted as written, the broad new definition of "tributary" and narrow, if not meaningless, exclusions for ditches under the Proposed Rule would bring many, perhaps even most, stormwater ditches under federal jurisdiction. Specifically, the Proposed Rule would extend jurisdiction to all stormwater ditches with an identifiable bed, bank, and OHWM that drain into "waters of the U.S." Considering the Proposal's expanded interpretation of "waters of the U.S.," this would likely become an exceedingly common scenario, necessitating a substantial increase in the number of jurisdictional determinations and permit applications required at regulated sites across the country.

The types of ditches identified above as potentially being "federalized" under the Proposed Rule are all abundant features in and across coal mine sites. Few of these

ditches are likely to meet the incredibly narrow criteria for exemption proposed by the Agencies. Indeed, given the ambiguous and unbounded terminology used to craft these exemptions, it is hard to imagine that many ditches anywhere would. While the preamble is replete with assurances from the Agencies that the Proposed Rule will not significantly expand CWA jurisdiction, the proposed jurisdictional treatment of ditches is yet another example in a long list of changes that most assuredly would necessitate far more jurisdictional determinations and 404 permit authorizations. It is hard to fathom how this translates into a net public benefit. The financial burden on regulated parties associated with expanding protection to such marginally connected and relatively insignificant ditches would be staggering, while the added protection to water quality would be negligible. (p. 12)

Agency Response: See summary response and the preamble of the final rule for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Additional exclusions in the final rule include waste treatment systems designed to meet the requirements of the CWA, stormwater control features constructed in dry land, artificial lakes and ponds created in dry land and water-filled depressions created in dry land incidental to mining or construction activity.

Countrymark Cooperative Holding Corporation, LLC; Countrymark Refining and Logistics, LLC (Doc. #15656)

6.165 [W]hen siting pipelines, it is easiest to use existing rights of way. These often can be ditches along a road. These ditches receive runoff from the road and from land. In rainy parts of the country, the ditches may hold water every month of the year. Such a ditch would not be exempt under the rule (which exempts only ditches with less than perennial flow) and thus could be considered a tributary. The ditch may begin to exhibit wetland characteristics. A ditch should be exempt even if it turns into a wetland, but the rule is not clear on this point. Ditches along interstate highways may cross state lines. Such a ditch would be per se jurisdictional under the proposed rule. Thus, the proposed rule would hinder the siting of new pipelines and would make it more difficult to maintain existing pipelines. (p. 3)

Agency Response: See summary response and the preamble of the final rule for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule asserts jurisdiction over only those ditches that meet the definition of “tributary” and that are not excluded under paragraph (b) of the final rule. Note also that the final rule clearly states that the excluded features identified in paragraph (b) are not “waters of the United States” even where they otherwise meet the terms of “waters of the United States” outlined in paragraphs (a)(1) through (a)(8).

Pennsylvania Grade Crude Oil Coalition (Doc. #15773)

6.166 In most cases, ditches are installed around well sites in Pennsylvania to divert water from the well site. Given the topography of Pennsylvania, and a large amount of the Appalachian Basin, a shallow groundwater table or groundwater seeps are often encountered, resulting in perennial flow in the ditches. Under the Proposed Rule, these

ditches would become jurisdictional (as tributaries). These same ditches, however, would also be required to be restored when drilling is completed, under Pennsylvania law. If the Proposed Rule is adopted, operators would be required to obtain a Section 404 permit before they could comply with the site restoration requirements. Delays in receiving, or the inability to receive, the Section 404 permit could cause a violation of Pennsylvania restoration requirements. (p. 8)

Agency Response: See summary response and the preamble of the final rule. While the final rule provides for numerous exclusions, including water-filled depressions created in dry land incidental to mining or construction activity, ditches that meet the definition of “tributary” in the final rule and that are not excluded are regulated as waters of the United States.

Coeur Mining, Inc. (Doc. #16162)

- 6.167 Treating ditches necessary to support mining as “waters of the U.S.” will be expensive and onerous for Coeur Mining. For example, the CWA stormwater program requires the construction of ditches/stormwater retention ponds to manage stormwater. If the stormwater BMPs are treated as waters of the U.S., this will result in a never-ending cycle of regulation. Mining companies, in particular, will face tremendous difficulty invoking the ditch exclusions. Given the scale of mining operations, which often span several thousands of acres, on-site ditches tend to be very long in comparison to ditches found on project sites in other industries and thus, it is more likely that, at some point, they will intersect a “water of the United States.” Under the proposed rule, even if a ditch system on a mine site was excavated almost entirely in uplands and drains only uplands, the entire system could nevertheless be deemed jurisdictional based on a single intersection with a jurisdictional water.

At a minimum, the Agencies should clarify, as they have suggested they would during outreach meetings, that a ditch that is excavated in uplands, drains only uplands, and has less than perennial flow is nevertheless excluded even if it contributes flow to a water of the U.S. because the two ditch exclusions are independent of one another. The Agencies should also clarify that the upland ditch exclusion applies to all reaches of a ditch system that are upstream of the point of intersection with a “water of the United States.” Third, the Agencies should indicate in the preamble that the mere presence of groundwater in a ditch does not, by itself, convert an upland ditch into a jurisdictional tributary, so long as the ditch does not flow perennially as a result of the groundwater connection. Finally, the Agencies should not narrow the upland ditch exclusion by imposing a requirement that the ditch has less than intermittent flow.⁴¹ Many ditches on mine sites do, in fact, carry flow and contain water intermittently, but should not be subject to jurisdiction as federally protected waters as explained above.

Specifically, the mining industry constructs different types of ditches and conveyances throughout exploration and mine sites to serve a variety of functions. For example, explorers and mine operators construct and maintain temporary and permanent diversion ditches and channels to manage stormwater runoff and keep water away from disturbed

⁴¹ See 79 Fed. Reg. at 22,203.

areas within the exploration or mine site. Some ditches collect and discharge stormwater runoff directly to downstream waters pursuant to NPDES permits. Others carry water to ponds within the exploration or mine site, where solids can settle out, and water is subsequently reused in drilling or mining processes or discharged from the mine site to downstream waters pursuant to an NPDES permit. Mine operators also sometimes rely on on-site water conveyances to carry wastewater to treatment facilities. Simply put, ditches are found everywhere on exploration and mine sites nationwide, and due to the dynamic nature of mining, mining companies constantly have to maintain, modify, move, or reclaim them. (p. 5-6)

Agency Response: See summary response and the preamble of the final rule for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Additional exclusions in the final rule include waste treatment systems designed to meet the requirements of the CWA, stormwater control features constructed in dry land, artificial lakes and ponds created in dry land and water-filled depressions created in dry land incidental to mining or construction activity.

- 6.168 Rather than labeling ditches as “waters of the U.S.,” the Agencies should rely on existing CWA programs which require permits for discharges to navigable waters and stormwater management systems rather than labeling ditches themselves as jurisdictional waters. Moreover, the Agencies should clarify that point sources covered by NPDES permits are not waters of the U.S. The Agencies should also clarify that (1) on-site ditches associated with permitted activities; (2) roadside ditches and swales; and (3) agricultural ditches are not jurisdictional waters of the U.S. (p. 6)

Agency Response: The Technical Support Document Section I provides the legal framework under which a ditch could be considered both a point source and a water of the United States. Please also see the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

American Gas Association (Doc. #16173)

- 6.169 AGA contends that [minimally-connected hydrologic] features should not be jurisdictional based on the insignificant and tenuous nature of their connection to downstream WOTUS. AGA is particularly concerned that the Proposed Rule can be broadly interpreted to include as WOTUS the wide variety of ditches and drainage structures that natural gas utilities construct to ensure the proper channelization of stormwater, as required by EPA regulations and stormwater, erosion and sediment control best management practices. These ditches are necessary to support natural gas facilities and pipelines, and it will be expensive and onerous for AGA members to have these features regulated directly or indirectly as WOTUS. For example, given that the CWA stormwater program requires the construction of ditches/stormwater retention ponds to manage stormwater, the treatment of stormwater best management practices as WOTUS would result in the additional regulation of structures required by other regulations. Additionally, these utility best management practices require regular maintenance, clean-out, and eventually, replacement, all which may trigger even more regulatory oversight. (p. 8)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The exclusions in the final rule also include stormwater control features constructed in dry land.

Dominion Resources Services, Inc. (Doc. #16338)

6.170 Ditches are constructed and used as part of the construction, operation, and maintenance of homes, natural gas pipelines, electric generation facilities, transmission and distribution lines, transportation-related infrastructure, agricultural irrigation, flood control, rural drains and roads, and railroad corridors located across the country. Drainage ditches play a major role in all of these activities, ensuring that stormwater is properly channeled away from facilities and land where it would otherwise pond, interfering with the intended use of the land and facilities. Ditches are also an integral part of creating a proper drainage system, which in turn prevents flooding. Use of drainage ditches offers a way to remove excess water from agricultural fields, roads, and vital urban spaces, without the erosion rates and pollution transport that results from direct surface runoff.

The proposed rule will greatly expand ditches that are subject to CWA jurisdiction through the definition of “tributary”, “adjacency” and “other waters”. While the rule provides two exclusions for ditches, those exclusions are extremely limited and difficult to demonstrate. We do not believe that a significant number of ditches that we encounter in our projects could be demonstrated to meet these limited exclusions and therefore the exclusions provide no meaningful exclusion from CWA jurisdiction. We request that ditches associated with NPDES permitted facilities, roadside ditches and agricultural ditches be added to the explicitly excluded features in 33 CFR 328.3(b) and associated regulatory references. (p. 8-9)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule asserts jurisdiction over only those ditches that meet the definition of “tributary” and that are not excluded under paragraph (b) of the final rule. The exclusions in the final rule include stormwater control features constructed in dry land and wastewater recycling structures created in dry land. Please also note that all existing statutory exemptions, including but not limited to those at CWA Section 404(f)(1)(C) that exempt the maintenance of existing irrigation and drainage ditches from CWA Section 404 permitting, remain in effect and are not changed in any way by the final rule.

Lafarge North America (Doc. #16555)

6.171 The exclusions in the proposed rule (particularly for ditches) do not provide any real clarity. While the proposed rule purports to exclude “drainage ditches,” such ditches can be regulated if they perform as intended by conveying water away from a site even indirectly to a navigable water. Many or most existing drainage ditches would become subject to onerous permitting and costly mitigation requirements. (p. 3)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Please also note

that all existing statutory exemptions, including but not limited to those at CWA Section 404(f)(1)(C) that exempt the maintenance of existing drainage ditches from CWA Section 404 permitting, remain in effect and are not changed in any way by the final rule.

Vulcan Materials Company (Doc. #16566)

6.172 In the event rulemaking proceeds, the proposed rule should be revised as follows to address concerns and issues included in these comments:

- d. Categorically, exempt ephemeral waters from jurisdictional coverage and establish reasonable minimum flow characteristics for a water to be considered subject to CWA jurisdiction.
- e. Clarify the definition of ditches to clearly exempt dry washes, drainage rills, and other upland features that do not exhibit perennial flow characteristics. (p. 3-4)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. In addition, the final rule explicitly excludes erosional features, including gullies, rills and other features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways. The summary response and the preamble of the final rule also discuss flow regimes as they affect the exclusions of ditches at paragraph (b) of the final rule. Section IV.F of the preamble of the final rule, Section VII of the Technical Support Document and Topic 8 of this RTC discuss tributaries in detail.

Virginia Poultry Federation (Doc. #16604)

6.173 For example, the proposed rule excludes "ditches that are excavated wholly in uplands, drain only uplands and have less than the perennial flow." Unfortunately, the term, "uplands," was not explained or clarified in the proposed rule. Similarly, the proposed rule also excludes "ditches that do not contribute flow either directly or through another water" to navigable waters or tributaries. To qualify for this exclusion a ditch must contribute zero flow (even indirectly) to any navigable water or tributaries. Because most ditches convey at least small flow indirectly to minor tributaries, this exclusion is a nonfactor for agricultural operations. The agencies' claims that exclusions provide some relief from the expanded CWA jurisdiction are meaningless, cannot withstand close scrutiny and do not provide poultry and egg farmers with the benefits the agencies assert. (p.8)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Please also note that all existing statutory exemptions, including but not limited to those at CWA section 404(f) remain in place and unchanged under the final rule.

Marcellus Shale Coalition (Doc. #18880)

6.174 In Pennsylvania, oil and gas owners and operators are required to restore "the land surface within the area disturbed in siting, drilling, completing and producing the well"

(58 Pa.C.S. 3216(a)). Within nine months after completion of drilling a well (extensions may be granted for an additional two years), the owner/operator must restore the well site (58 Pa.C.S. 3216(c), (g)). The law states that the failure to restore a well site as required by this provision is a violation of the law, while the law also requires restoration activities to comply with all applicable provisions of the Clean Streams Law.

Ditches installed around well sites in Pennsylvania to divert water from the well site often contain perennial flow. Under the Proposed Rule, these ditches would become jurisdictional (as tributaries). The Rulemaking would require operators to obtain a Section 404 permit before they could comply with the site restoration requirements. These same ditches, however, would also be required to be restored when drilling is completed, under Pennsylvania law. Delays in receiving, or the inability to receive, the Section 404 permit could cause a violation of PADEP jurisdictional restoration requirements. (p. 4)

Agency Response: The agencies are uncertain of the specific details of the scenario described by the commenter. However, the final rule not only includes edited and clarified exclusions for ditches, but also exclusions for other features. Other excluded features include stormwater control features constructed in dry land and water-filled depressions created in dry land that are incidental to mining or construction activity. As described in more detail in the preamble of the final rule, if the ditches referenced by the commenter are actually relocated tributaries or excavated in tributaries and are not otherwise excluded, they would be considered waters of the United States under the final rule, just as they are so considered under present regulations.

Grower-Shipper Association of Central California (Doc. #4710.2)

- 6.175 The EPA has stated that the proposed Waters of the U.S. rule does not regulate new types of ditches. As the current rule does not include ditches at all, we are concerned that this new rule will lead to a situation in which most ditches are defined as tributaries. As the rule is currently written, “tributaries” will be widely defined as all non-navigable “ephemerals” that ever carry any amount of water that finds its way to navigable water, regardless of the volume, frequency and duration of flow and the distance to actual navigable waters. (70 Fed. Reg. 22206) (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The summary response and the preamble of the final rule also discuss the history of CWA jurisdiction pertaining to ditches. Section IV.F. of the preamble of the final rule, Section VII of the Technical Support Document and Topic 8 of this RTC discuss tributaries in detail.

Pike and Scott County Farm Bureaus (Doc. #5519)

- 6.176 Under the rule, if water ever flows to a ditch from any wetland area (often just a small low spot), or from any ephemeral drain, or from any overflow of a pond during very heavy rains, the ditch will be regulated. Also, if the ditch itself has wetland characteristics as many ditches do as they carry water; the ditch will be regulated wherever it is located

in the landscape. Very few ditches will qualify for exclusion as most ditches will be jurisdictional. (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Town of Carolina Beach, North Carolina (Doc. #5618)

6.177 BE IT FURTHER RESOLVED, that the rule include the following provisions that are priority concerns for local governments:

- Ditches, streams and other drainage features that protect and ensure the operation of public infrastructure shall not be considered waters of the U.S. (p. 2)

Agency Response: As discussed in the summary response and the preamble of the final rule, certain ditches provide functions similar to natural tributaries. The final rule asserts jurisdiction over only those ditches that meet the definition of “tributary” and that are not excluded under paragraph (b) of the final rule. The exclusions in the final rule have been edited and clarified and include not only certain ditches, but also stormwater control features constructed in dry land and wastewater recycling structures created in dry land.

Montana Wool Growers Association (Doc. #5843.1)

6.178 The Proposed Rule lists ditches as tributaries; the CWA lists ditches as point sources. 33 U.S.C. § 1362{14}. As the plurality explained in *Rapanos v. U.S.*, a ditch cannot be both a navigable water and a point source without rendering the definition of discharge nonsensical. 547 U.S. 715, 735 (2006) (plurality) (quoting 33 U.S.C. § 1362{12}(A): “discharge of a pollutant” [means] “any addition of any pollutant to navigable waters from any point source”). (p. 4)

Agency Response: The Technical Support Document Section I provides the legal framework under which a ditch could be considered both a point source and a water of the United States.

National Farmers Union (Doc. #6249)

6.179 With regards to section (b)(3), the preamble states “Ditches that are excavated wholly in uplands means ditches that at no point along their length are excavated in a jurisdictional wetland (or other water).”⁴² The agencies should restate this description of “upland ditches” as a definition of “uplands” by writing, “an upland is any land that is not a wetland, floodplain, riparian area or water.” This definition should be included in the final rule in order to provide clarity.

The agencies should provide further clarity to the regulated community by defining “perennial flow” in section (c) of the final rule. The description of “perennial flow” in the

⁴² Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22198 (proposed April 21, 2014) (amending 33 C.F.R. 9328.3) at 22219.

preamble T6 could be altered slightly to function as the definition, codifying that "perennial flow" is "the presence of water in a tributary year round when rainfall is normal." Including this definition in the final rule would reduce the administrative burden for members of the regulated community as they attempt to maintain compliance with the CWA.

The agencies request comment on whether perennial flow is the proper distinction to use in separating excluded ditches from ditches that may be jurisdictional under section (b)(3). Given the agencies' stated goal of providing clarity to the regulated community, perennial flow is the proper distinction. The presence or absence of perennial flow is easily-verifiable. Using perennial flow as the distinction allows the regulated community to be confident in their own assessment of ditches, which encourages the normal course of business and reduces unexpected enforcement actions. It also checks the agencies' administrative burden, since the presence or absence of perennial flow would also be easier for the agencies to verify than intermittent flow (p. 9)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The summary response and the preamble of the final rule also discuss flow regimes as they affect the exclusions of ditches at paragraph (b) of the final rule.

Livestock Marketing Association (Doc. #8364)

- 6.180 This proposal has taken far too much liberty in expanding the definition of Waters of the U.S. Many agriculture ditches, despite the limited exceptions, would now be considered Waters of the U.S. This is inappropriate. Similarly, ephemeral streams and dry streambeds should not be included in the definition of Waters of the U.S. (p. 1)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Please also note that all existing statutory exemptions, including but not limited to those at CWA Section 404(f)(1)(C) that exempt the maintenance of existing irrigation and drainage ditches from CWA Section 404 permitting, remain in effect and are not changed in any way by the final rule. Please refer to section IV.F of the preamble of the final rule and RTC Topic 8 for a discussion of tributaries, including ephemeral tributaries.

Coon Run Levee and Drainage District (Doc. #8366)

- 6.181 Ditches which are pervasive in drainage districts were never considered to be jurisdictional by the Corps. District ditches are under the jurisdiction of the local levee and drainage districts through easements. Concern arises relative to ongoing operation and maintenance that facilitates proper drainage of the land should they fall under the expanded federal jurisdiction as "waters of the United States". (p. 1)

Agency Response: See summary response. Please also note that all existing statutory exemptions, including but not limited to those at CWA Section 404(f)(1)(C) that exempt the maintenance of existing drainage ditches from CWA

Section 404 permitting, remain in effect and are not changed in any way by the final rule.

Sny Island Levee and Drainage District (Doc. #8371)

- 6.182 Of particular concern is the potential of Federal jurisdiction being imposed on local levee and drainage district waterways known as "district ditches". It is these waterways that facilitate the proper drainage of district land following storm events. The proper maintenance of these "district ditches" was entrusted to local drainage officials over the years by private landowners through legally executed easements. It is these legal documents that provide a basis for the overall strength and integrity of the local levee and drainage district. The redefinition of "waters of the United States" to include virtually every waterway in the country effectively wrests control of these "district ditches" away from locally elected and trusted drainage district Commissioners, serving to undermine the very essence of what they stand for. In effect, the Federal Government would usurp authority historically entrusted to local officials through state statute and local elections. (p. 1-2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Please also note that all existing statutory exemptions, including but not limited to those at CWA Section 404(f)(1)(C) that exempt the maintenance of existing drainage ditches from CWA Section 404 permitting, remain in effect and are not changed in any way by the final rule.

Floyd County Farm Bureau, Inc. (Doc. #9673)

- 6.183 While there are numerous concerns, we will focus on just a few. First, the rule indicates that most ditches within the state could be subject to federal jurisdiction. This concern arises primarily from the provision which lists upland ditches with less than perennial flow as exempt. Few ditches in Indiana will be solely upland ditches which meet this criterion. (p. 1)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Maryland Farm Bureau (Doc. #10755)

- 6.184 Ditches and conveyances should not be regulated as Waters of the U.S. (p. 2)

Agency Response: The agencies do not agree that all ditches and conveyances should be excluded from the definition of "waters of the United States". As discussed in the summary response and the preamble of the final rule, certain ditches provide similar functions as natural tributaries. The final rule asserts jurisdiction over only those ditches that meet the definition of "tributary" and that are not excluded under paragraph (b) of the final rule.

Relief Ditch Company (Doc. #11977)

- 6.185 The Relief Ditch irrigation canal begins with a diversion structure in the Gunnison River and flows inland to many local farmers for agricultural irrigation. The ditch company is a water provider who maintains and repairs many miles of canal to bring water to dry land.

The jurisdictional status of our canal is of concern to us. We do not feel that the drainages in Western Colorado should be compared with wetter portions of the U.S. and should not be considered jurisdictional by rule in our area. We are opposed to canals and ditches being lumped together with rivers and streams that negatively effect riparian and wildlife habitat. Our canals and ditches convey water seasonally and contribute to the surrounding semi-arid landscape which helps provide cover and seasonal habitat for wildlife. (p. 1)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Specifically, ditches or canals that do not flow into a traditional navigable water, interstate water or territorial sea are excluded. The summary response and the preamble of the final rule also discuss how ditches may affect the chemical, physical and biological integrity of downstream traditional navigable waters, interstate waters or the territorial seas.

Hancock County, Indiana (Doc. #11980)

- 6.186 We have significant concerns about the potential reach of this rule with respect to ditches. As written, the rule appears to give the agencies control over nearly every ditch in existence in the state. We recognize that there are exemptions for certain ditches, but it will apply to few ditches. The fact is that few ditches are solely in uplands. It is also true that most ditches are ephemeral features. It is our suggestion that the regulation of ditches should only apply to those ditches which are perennial in nature. Those ditches are more closely akin to the perennial streams that the agencies regulate. (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

United FCS (Doc. #12722)

- 6.187 We are very concerned about the following aspects of the proposed rule and the impact this could have to agriculture:

For the first time, rulemaking is defined and makes WOTUS:

- a. Tributaries, no matter how limited their flow of water or how remote they are;
- b. Numerous ditches found in common agricultural circumstances. (p. 2)

Agency Response: Please refer to section IV.F of the preamble of the final rule, the Technical Support Document Section VII, and RTC Topic 8 for discussions addressing the regulatory jurisdiction of tributaries.

See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Please also note that all existing statutory

exemptions, including but not limited to those at CWA section 404(f) remain in place and unchanged under the final rule.

Colorado Farm Bureau (Doc. #12829)

- 6.188 Even if farmers or ranchers have a ditch that at least on their property only drains uplands, that does not mean the ditch is excluded from federal jurisdiction. The proposal's fine print also limits the exclusion only to those ditches that are excavated in uplands (the term uplands is not defined in the proposed rule) at all points "along their entire length." Id. at 22,203. Ditches can run for miles, and farmers or ranchers generally have no idea of what types jurisdictional waters (wetlands and ephemeral drainages in particular) connect to the ditch outside of their own property. Moreover, ditch segments are connected via pipes and other conveyances. At what point does one ditch start and another ditch begin? Or, do the Agencies believe that the "entire" length of a ditch begins when the water is first diverted from its original source of water? None of these questions are answered in the proposal, yet they are the questions that must be answered before anyone can determine the boundaries of these so-called "navigable waters" under the proposed rule. Farmers and ranchers would be hard pressed find a ditch that does not have an ephemeral water or wetland at any point along its entire length.

This problem is exacerbated because over the last several decades, the Agencies have broadened the criteria for classifying land as "wetland" (e.g., expanding the list of wetland vegetation). In many cases, low spots on the landscape that were not considered wetlands in the '70s and '80s would be considered wetlands today. Because the purpose of ditches is to carry water, many ditches will tend to develop "wetland" characteristics and therefore will not be "wholly in uplands." (p. 7)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Milk Producers Council (Doc. #13022.1)

- 6.189 Most dairy farms have drainage ditches for removing excess water from their fields. In most cases these ditches have intermittent flow during periods of rainfall and snowmelt. Under the proposed rule these ditches would be subject to jurisdiction under the Clean Water Act. Ditches are essential to our farm operations and should not be subject to regulation. (p. 1)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

North American Meat Association and American Meat Institute (Doc. #13071)

- 6.190 Ditches and Conveyances Should not be Regulated as Waters of the U.S.

There are many millions of miles of ditches throughout the United States and miles of additional ditches are built every day by countless businesses and people. Drainage ditches play a major role in ensuring that stormwater is properly channeled away from facilities and land where it would otherwise collect, potentially adversely affecting use of land and facilities. Ditches are also an integral part of creating a proper drainage system

to help prevent flooding. Drainage ditches provide a mechanism to remove excess water from agricultural fields, roads, and urban spaces, helping to mitigate or prevent erosion and pollution transport that can happen from direct surface runoff.

The proposed rule should not consider these and other like conveyances to be “waters of the U.S.” because EPA already has a complex stormwater regulation system that helps ensure that such conveyances do not adversely affect waters of the United States.² Considering ditches as “waters of the U.S.” will subject them to additional costly and onerous CWA requirements, and enforcement by third-parties under the CWA section 505 citizen-suit provision.⁴³ (p. 2-3)

Agency Response: See summary response. The final rule provides an explicit exclusion for stormwater control features constructed to convey, treat or store stormwater that are created in dry land. The agencies’ longstanding practice is to view stormwater control measures that are not built in “waters of the United States” as non-jurisdictional. Conversely, the agencies view some waters, such as channelized or piped streams, as currently jurisdictional even where used as part of a stormwater management system. Nothing in the proposed rule was intended to change that practice, and the final rule likewise leaves this longstanding policy in place.

USA Rice Federation (Doc. #13998)

- 6.191 The tributary definition and ditch exemption create several problems for rice farmers. Rice farmers use ditches extensively to deliver water to and drain water from their fields. See exhibit 2. Under the proposed rule, ditches on a rice farm could be considered waters of the U.S. As noted, at some farms water from fields is drained to ditches and water from the ditches can be drained into an irrigation canal that eventually discharges to water of the U.S. So, a ditch at a rice field may contribute flow, indirectly, to a water of the U.S. If it also has a bed, bank and ordinary high water mark, it would meet the tributary definition. (...)

As noted above, farmers flood and drain rice fields multiple times a year for different purposes and move water around the farm. That movement of water should be dependent on the farmer’s needs to manage the crop and habitat, not on a definition of “perennial flow.”

The same concerns apply to irrigation canals. Irrigation canals will receive flow from rice fields so the analysis for irrigation canals would be the same as for ditches. In addition, irrigation canals will usually hold water year-round. As noted above, irrigation canals serve multiple farms, but the water remains in agricultural use as it moves from farm to farm. In accordance with water rights established under state law, that water is being used for an agricultural purpose until it is returned to waters of the U.S. where it would then be available for another user, if the other user has rights to that water. (p. 5)

⁴³ With this expansion, the proposed rule directly conflicts with this Administration’s stated commitment to expediting expansion and modernization of infrastructure. See Executive Order 13604: Improving Performance of Federal Permitting and Review of Infrastructure Projects, 77 Fed. Reg. 18,887 (Mar. 28, 2012).

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Also, as the preamble to the final rule and the Technical Support Document explain, ditches that function as part of the tributary system and meet the definition of “tributary” in the final rule are jurisdictional unless they are otherwise excluded under paragraph (b) of the final rule. However, even in such cases, all existing statutory exemptions for specified activities in jurisdictional ditches (e.g. CWA section 404(f)) remain in place and unaffected by the final rule. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. For a further discussion of the CWA and state water rights, see the summary response for 1.1.2: Water Supply and Allocation.

- 6.192 Accordingly, rice farmers need a clear exemption for agricultural drainage ditches and irrigation canals. (p. 7)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Existing statutory exemptions at CWA Section 404(f) already exempt the maintenance of existing drainage or irrigation ditches, as well as the construction of new irrigation ditches, but not new drainage ditches. The final rule does not in any way affect these statutory exemptions.

North American Meat Association and American Meat Institute (Doc. #14454)

- 6.193 There are many millions of miles of ditches throughout the United States and miles of additional ditches are built every day by countless businesses and people. Drainage ditches play a major role in ensuring that stormwater is properly channeled away from facilities and land where it would otherwise collect, potentially adversely affecting use of land and facilities. Ditches are also an integral part of creating a proper drainage system to help prevent flooding. Drainage ditches provide a mechanism to remove excess water from agricultural fields, roads, and urban spaces, helping to mitigate or prevent erosion and pollution transport that can happen from direct surface runoff.

The proposed rule should not consider these and other like conveyances to be “waters of the U.S.” because EPA already has a complex stormwater regulation system that helps ensure that such conveyances do not adversely affect waters of the United States.² Considering ditches as “waters of the U.S.” will subject them to additional costly and onerous CWA requirements, and enforcement by third-parties under the CWA section 505 citizen-suit provision.⁴⁴

Rather than designating ditches as “waters of the U.S.,” the agencies should continue to utilize and rely on existing CWA Section 402 requirements for discharges to navigable waters and stormwater management systems. The agencies should affirmatively state that

⁴⁴ With this expansion, the proposed rule directly conflicts with this Administration’s stated commitment to expediting expansion and modernization of infrastructure. See Executive Order 13604: Improving Performance of Federal Permitting and Review of Infrastructure Projects, 77 Fed. Reg. 18,887 (Mar. 28, 2012).

point sources covered by National Pollutant Discharge Elimination System (NPDES) permits are not waters of the U.S. Such an assertion would help provide the certainty “to the regulated public and the regulators” that the agencies contend is the purpose of the proposed rule. (p. 2-3)

Agency Response: See summary response. The final rule provides an explicit exclusion for stormwater control features constructed to convey, treat or store stormwater that are created in dry land. The agencies’ longstanding practice is to view stormwater control measures that are not built in “waters of the United States” as non-jurisdictional. Conversely, the agencies view some waters, such as channelized or piped streams, as currently jurisdictional currently even where used as part of a stormwater management system. Nothing in the proposed rule was intended to change that practice, and the final rule likewise leaves this longstanding policy in place. The Technical Support Document Section I provides the legal framework under which a ditch could be considered both a point source and a water of the United States.

LeValley Ranch, LTD (Doc. #14540)

- 6.194 LeValley Ranch is very concerned that a dry ditch could be a “water of the U.S.” under the proposed definition if it flows once per year but drains to a jurisdictional creek. In Colorado ditch irrigation is heavily utilized and this provision would cause major concerns for farmers and ranchers throughout the state. Beyond Colorado, American ranches throughout the United States have millions of these features dotted across their landscapes. The agencies’ use of the phrase “through another water” could remove all ditches from the excluded categories and could make them jurisdictional. Making these features jurisdictional would cripple the production of food and fiber across this country by requiring permits to conduct many routine activities no longer exempt under different sections of the CWA due to the agencies’ new interpretation of the 404(f)(1)(A) exemption for “normal farming, silviculture and ranching activities.” Ditches should not be per se jurisdictional tributaries. (p. 4)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Please also note that all existing statutory exemptions, including but not limited to those at CWA section 404(f)(1)(A) and 404(f)(1)(C), remain in place and unchanged under the final rule.

Walker River Irrigation District (Doc. #14562)

- 6.195 The District finds little comfort in th[e] exclusions. First, it is not clear whether the term “ditch” also includes a “drain.” Ditch is not defined. Second, uplands are not defined in the proposed rule. Third, “through another water” is also not defined. (p. 5)

Agency Response: See summary response and the preamble to the final rule.

Oregon Farm Bureau (Doc. #14727)

- 6.196 To state the obvious, the purpose for a ditch is to move water. In certain areas of the state whether it be for irrigation or drainage, ditches are part of a larger system. The proposed rule fails to delineate where one ditch starts and another ditch ends. Alternatively, the agencies may propose that a ditch is in fact an entirely connected delivery system. (p. 3)

Agency Response: See summary response.

Browns Valley Irrigation District (Doc. #14908)

- 6.197 Water conveyance systems, including ditches, should be excluded from the proposed definition of "waters of the United States." (p. 2)

Agency Response: Water conveyance systems may be excluded if they are stormwater conveyance features created in dry land or wastewater recycling structures created in dry land. They may also be excluded if they are part of a waste treatment system designed to meet the requirements of the CWA. Finally, they may be excluded if they fail to meet the definition of "tributary" in the final rule or if they are excluded under paragraph (b) of the final rule.

Indiana Corn Growers Association (Doc. #14933)

- 6.198 -The proposed rule excludes from jurisdiction ditches excavated wholly in uplands, draining only uplands and flowing less than permanently. "Upland" is not defined in the rule, leaving the entire interpretation of the statement to subsection. Ditches in the northwestern area of Indiana do not fall into either of the two exempt categories in the proposed rule and would be considered WOTUS. We do not believe that is an accurate determination. (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Iowa Farmers Union (Doc. #15007)

- 6.199 At a minimum, the final rule should:

- Provide a basic definition of "ditch" and clarify the definitions of "upland" and "perennial flow" to help determine whether a ditch is regulated or exempt;
- Clarify the definition of "upland" to include any land that is not a wetland, floodplain, riparian area, or water;
- Clarify the definition of "perennial flow" as the presence of water in a tributary year-round when rainfall is normal or above normal. (p. 7)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

New Hampshire Farm Bureau Federation (Doc. #15011)

- 6.200 We find the rule particularly confusing when dealing with ditches. Is a water bar in a roadway considered a ditch? Water bars do not appear to be addressed in the rule. (p. 1)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Only ditches that meet the definition of “tributary” and are not excluded in paragraph (b) of the final rule would be considered waters of the United States.

New Mexico Acequia Association (Doc. #15036)

- 6.201 Generally, in the past, acequias and community ditches have not come under the jurisdiction of the EPA and the ACoE for purposes of obtaining permits for return flows or discharge into streams and rivers resulting from operation, maintenance, and improvements. Any changes in EPA and ACoE regulation that would require acequias and community ditches to obtain federal permits for future operations, maintenance and improvements would impose an unreasonable burden on acequias. As traditional and historical institutions, acequias and community ditches, which are not significant sources of pollution, should be specifically exempted from the jurisdictional waters defined under the Waters of the US rule. (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Please also note that all existing statutory exemptions, including but not limited to those at CWA section 404(f) remain in place and unchanged under the final rule.

Klamath Water Users Association (Doc. #15063)

- 6.202 One of our main concerns is how the rule would treat ditches that are used to drain stormwater or agricultural drainage (tailwater and tile water) from farm fields or to deliver irrigation water to them. The EPA has said its proposal will not increase regulation of ditches that do not flow water to navigable waters or covered tributaries. However, this proposed exemption is too narrow because many ditches do flow water either directly, or through other waters, to traditionally navigable waters. All agricultural ditches, canals, and drains should be exempt regardless of where , and when they flow. (p. 2-3)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Colorado Cattlemen’s Association (Doc. #15068)

- 6.203 CCA is also very concerned that a dry ditch could be a "water of the U.S." under the proposed definition if it flows once per year but drains to a jurisdictional creek. In Colorado ditch irrigation is heavily utilized and this provision would cause major concerns for farmers and ranchers throughout the state. Beyond Colorado, American ranches throughout the United States have millions of these features dotted across their landscapes. The agencies' use of the phrase ~ "through another water" could remove all

ditches from the excluded categories and could make them jurisdictional. Making these features jurisdictional would cripple the production of food and fiber across this country by requiring permits to conduct many routine activities no longer exempt under different sections of the CWA due to the agencies' new interpretation of the 404(f)(1)(A) exemption for "normal farming, silviculture and ranching activities." Ditches should not be per se jurisdictional tributaries. (p. 5-6)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Please also note that all existing statutory exemptions, including but not limited to those at CWA section 404(f)(1)(A) and 404(f)(1)(C), remain in place and unchanged under the final rule.

- 6.204 In Colorado, there will likely be disputes of whether a feature will be considered a ditch or a gully. The agency needs to articulate their definition of "ditches, and provide a clear indication of the difference between a ditch and a gully. The agencies exclude gullies, but there are many features on the landscape where it is unclear whether the feature will be a regulated ditch, or an unregulated gully.⁴⁵ The agencies explanation in the preamble regarding gullies is inadequate landowners to adequately distinguish them from regulated tributaries.⁴⁶ The agencies' explanation says that gullies are younger than streams and lack an OHWM. It will likely difficult for a rancher or landowner to determine the age of a stream. (p. 6)

Agency Response: The final rule requires both a bed and bank and ordinary high water mark to define a tributary, as further described in section IV.F of the preamble of the final rule, Section VII of the Technical Support Document and Topic 8 of this RTC, including section 8.4: Tributaries distinguished from non-jurisdictional gullies, rills, and non-wetland swales. The physical indicators of bed and banks and ordinary high water mark demonstrate that there is sufficient volume, frequency and flow in such tributaries to a traditional navigable water, interstate water, or the territorial seas to establish a significant nexus and thereby make such tributaries waters of the United States.

Snell & Wilmer L.L.P. (Doc. #15206)

- 6.205 Another aspect of the West that the Proposed Rule fails to consider is the existence of extensive and interconnected canal systems, which deliver a variety of water sources not only to farmers, but also municipalities and other large water users. The Proposed Rule demonstrates a misconception about canals and ditches. The Proposed Rule suggests that all man-made ditches are altered stream beds "purposely constructed to allow the hydrologic flow of the tributary to continue downstream." 79 Fed. Reg. at 22235. This concept is exactly the opposite of a canal's purpose in Arizona, which is to carry water away from a traditional navigable water. (p. 5)

⁴⁵ Proposed Rule at 22218

⁴⁶ Proposed Rule at 22218

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

- 6.206 Canals in Arizona, unlike drainage ditches in more humid parts of the United States, exist to transport water away from a natural channel for subsequent consumptive use by the recipients of the water. It is precisely because of the lack of water in Arizona that there are intricate canal systems that transport a variety of sources of water, including groundwater, remediated water, Central Arizona Project water and surface water. Regulation of a water supply delivery system was not the intent of the Act and should not be the subject of Clean Water Act regulation. (p. 5)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Missouri Farm Bureau Federation (Doc. #15224)

- 6.207 Ditches are not defined as “waters of the U.S.” under current regulations, but the Agencies have informally interpreted those regulations to sometimes include ditches as tributaries on a case-by-case basis. In the promotion of this proposal, the Agencies have insisted that the rule does not expand jurisdiction over ditches, that most ditches will not be regulated, that ditches are excluded, and that the Agencies do not intend to regulate ditches.⁴⁷ To the contrary, the term “tributary” in the text of the proposed rule includes “ditches” and “canals.” Virtually all ditches that ever carry any amount of water that eventually flows (over any distance and through any number of other ditches) to a navigable water would be regulated as “tributaries.” (p. 3)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

National Alliance of Forest Owners (Doc. #15247)

- 6.208 While we support the Agencies’ attempt to categorically exclude certain waters from the definition of “waters of the U.S.,” the proposed exclusions are too restrictive to provide meaningful relief. In addition, the Agencies should clarify the scope of the upland ditch exclusion by defining “upland(s)” [...]. (p. 3)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

- 6.209 NAFO maintains that the proposed rule will improperly expand CWA jurisdiction to non-tidal ditch systems that are currently not regulated as waters of the United States and thus, the proposed rule should clarify that such ditches are not jurisdictional. If, however, the Agencies insist upon defining “tributary” and “adjacent” waters broadly, they should revise the ditch exclusions because they are too narrow as currently drafted. (p. 6)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

⁴⁷ <http://www2.epa.gov/uswaters/ditch-myth>.

- 6.210 [T]he Agencies’ prior practice reflects that they have traditionally discussed ditches with an eye toward excluding them from the definition of “waters of the United States,” subject to case-by-case assertions of jurisdiction over particular ditches. By contrast, the proposed rule reverses course and categorically includes ditches within the definition of “waters of the United States” for all CWA programs, subject to the application of two narrow exclusions. Because many upland ditches may have permanent flowing or standing water and do eventually contribute flow to downstream jurisdictional waters, they will be deemed jurisdictional under the proposed rule. This new approach to ditches exceeds the outer limits of CWA jurisdiction recognized in *Rapanos*. [...]

Despite these important discussions in *Rapanos*, the Agencies have proposed a rule under which roadside ditches, irrigation ditches, and other stormwater conveyances that are many miles away from a navigable water, interstate water, territorial sea, or jurisdictional impoundment and that contribute insubstantial flow to such a jurisdictional water are nevertheless per se jurisdictional. The proposal cannot be reconciled with the plain language of the Act and the Supreme Court’s interpretations of it. [...]

The Agencies should therefore remove the reference to ditches from the definition of “tributary.” Ditches with less than perennial flow should not be jurisdictional, and ditches with perennial flow should be evaluated as “other waters” subject to a case-specific “significant nexus” analysis. (p. 14-15)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. In addition, please refer to the preamble to the final rule and the Technical Support Document for discussions regarding the agencies’ scientific and legal justification for asserting jurisdiction over some ditches.

US Dry Bean Council (Doc. #15256)

- 6.211 Specifically, the rule’s definition of “minor drainage” is not defined in the proposal. We ask that it be made clear that the exemption for minor drainage includes the maintenance of all existing natural and man-made drainage ditches, which takes place in many cases on an annual basis. This exemption should also include the maintenance of existing tile drainage as well as the installation of new tile drainage on farmland. (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Existing statutory exemptions at CWA Section 404(f) already exempt the maintenance of existing drainage or irrigation ditches, as well as the construction of new irrigation ditches, but not new drainage ditches. The final rule does not in any way affect these statutory exemptions.

Union County Cattlemen (Doc. #15261)

- 6.212 **FR Page 22206** *Due to their often channelized nature, ditches are very effective at transporting water and these materials, including nitrogen, downstream. It is the agencies' position that ditches that meet the definition of tributary (which does not include ditches excluded under paragraphs (b)(3) and (b)(4)) provide the same chemical,*

physical, and biological functions as other water bodies defined as tributaries under the proposed rule they have a SN and should be considered WoUS. The final rule clarifies and expands the ditch exclusions.

Comment: We disagree. The narrative of this proposed rule implies that all streams are the same within any Ecoregion and that is not correct. Different areas at a smaller scale the Ecoregion receive different amounts of precipitation, have different geologic origins, and water transport is generally not examined at the scale the proposed rule suggests. (p. 4)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Note however, that one goal of the final rule is to provide for consistent implementation of the CWA that is nationwide in scope. The agencies believe that the final rule is practical to understand and implement and protects those waters that significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters or the territorial seas.

American Forest & Paper Association (Doc. #15420)

- 6.213 There should be no question that any stormwater management facilities (e.g., green infrastructure, detention ponds, etc.) that are part of an industrial stormwater pollution prevention plan required under an NPDES stormwater permit or required by conditions in an NPDES stormwater permit are clearly covered by the waste treatment system exemption. Nonetheless, due to the expansive definitions and other provisions previously discussed, the preamble to any final rule should specifically state that this is the case to remove any doubt among all stakeholders. Due to the concern about ditches (see below), the Preamble should make clear that ditches that are conveying stormwater to or from stormwater management facilities also are covered by the exemption. (p. 9)

Agency Response: The final rule explicitly excludes stormwater control features and wastewater recycling structures as waters of the United States when they are constructed in dry land. Section IV.I of the preamble to the final rule further describes the intent of the exclusions.

Oregon Association of Nurseries (Doc. #15489)

- 6.214 In addition, similar concerns may be raised with regard to some of the specified exclusions from jurisdiction. example only, the rule excludes "[d]itches that do not contribute flow, either directly or through another to a [traditionally navigable water body.]" Such an exclusion, therefore, also creates a class of ditches that necessarily will be considered jurisdictional simply because they do contribute any amount of water no matter how small, or how infrequent. Ditches should not as a matter of course be considered jurisdictional absent a finding under clear criteria that the flows from such structures possess a significant relationship to traditionally navigable waters. To the extent that any final rule attempts to employs criteria based on Justice Kennedy's test, at a minimum, that test must be adhered to within the rule. This rule does not. (p. 3)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Minnesota Soybean Growers Association (Doc. #15542)

- 6.215 The rule's exemptions on ditches are largely useless in Minnesota. The definitions are poorly defined and do not give guidance as to what "wholly" or "perennial" actually means. Ditches are designed to convey water to waters identified in paragraphs (s)(1) through (4). It would be difficult in most of Minnesota to have a ditch that was excavated "wholly" in uplands and that did not contribute some water to another water body. (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

National Barley Growers Association (Doc. #15627)

- 6.216 EPA has said that ditches fall outside the definition of waters subject to federal jurisdiction, but the proposed rule explicitly includes ditches unless they fit within one of two narrow exceptions based on location and flow. Many ditches throughout the country will be unable to meet the rule's limited exemption provision and thus will be subject to federal jurisdiction under the rule, contrary to EPA's claims. This part of the WOTUS definition needs serious review and narrowing. (p. 5)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Oklahoma Grain and Feed Association et al. (Doc. #16067)

- 6.217 Inconsistent with the limits established by Congress and recognized by the U.S. Supreme Court, the proposed rule creates sweeping jurisdiction under newly devised definitions. Through use of the broad definition of tributary, the agencies will extend jurisdiction to any channelized feature [ie ditches, drainages], wetland, lake or pond that directly or indirectly contributes flow to navigable waters without any consideration of the duration or frequency of flow or proximity to navigable waters. Ditches, conveyances, and standing water after storms should not be considered as having a significant link to traditional navigable waters. (p. 1-2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Connecticut Farm Bureau Association, Inc. (Doc. #16125)

- 6.218 The Connecticut Farm Bureau Association is greatly concerned about the EPA's proposed rule that would expand the definition of navigable waters to include ditches and low-spots and treat them as tributaries. (p. 1)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule will, for the first time, categorically exclude certain ditches and other features that were previously generally not assumed to be jurisdictional.

National Sustainable Agriculture Coalition (Doc. #16357.1)

6.219 Even if a farmer or rancher has a ditch that only drains uplands on his own property, that does not mean the ditch is excluded from federal jurisdiction. The proposal limits the exclusion only to those ditches that are excavated in uplands (the term uplands is not defined in the proposed rule, but presumably means not waters or wetlands) at all points “along their entire length.” Id. at 22,203. Ditches can run for miles, and farmers or ranchers generally have no idea of what types jurisdictional features (wetlands and ephemeral drainages in particular) connect to the ditch outside of their own property. Moreover, ditch segments are connected via pipes and other conveyances. At what point does one ditch start and another ditch begin? Or, do the Agencies believe that the “entire” length of a ditch begins when the water is first diverted from its original source of water—and ends when the ditch flows into a natural creek or stream? None of these questions are answered in the proposal, yet they are the questions that must be answered before anyone can identify these so-called “tributaries” under the proposed rule. At the very least, farmers and ranchers might reasonably be hesitant to “bet the farm” that a ditch running through their land is not, and never was, excavated in an ephemeral drain or wetland at any point along its entire length.

This problem is exacerbated because over the last several decades, the Agencies have broadened the criteria for classifying land as “wetland” (e.g., expanding the list of wetland vegetation). In many cases, low spots on the landscape that were not considered wetlands in the ‘70s and ‘80s would be considered wetlands today. Because the purpose of ditches is to carry water, many ditches will tend to develop “wetland” characteristics and therefore will not be “wholly in uplands.”

Moreover, because the purpose of a ditch is to carry water, few ditches are excavated along the tops of ridges that could never have contact with “navigable waters.” The most logical places to dig stormwater ditches are at natural low points on the landscape to act as drains. Clearly, most ditches will have some section that was excavated in a natural ephemeral drainage or a low area with wetland characteristics. Such ditches will not qualify for the proposed exclusion for “wholly upland” ditches.

Ironically, in an agricultural setting, the ditch itself might be jurisdictional even though the surrounding areas are “prior converted cropland” (PCC) specifically excluded from CWA jurisdiction. For example, if a ditch was excavated in wetland and otherwise meets the Agencies’ broad “tributary” definition, but the ditch was constructed to drain a wetland prior to 1985, which is now PCC, is the PCC excluded but the ditch that runs within or alongside it jurisdictional? (p. 9-10)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

National Sustainable Agriculture Coalition (Doc. #16357.2)

6.220 Given the expansive definition of “tributary” and the extremely limited exclusion, the vast majority of ditches in the U.S. will be categorically regulated as “navigable waters” under the proposed rule. The results could be startling. For example, the typical suburban homeowner would likely be surprised to find that EPA and the Corps view the roadside

ditch at the edge of her lawn as “navigable water” worthy of the full weight of Clean Water Act protections. She would also likely be surprised to find that landscaping, insect control or even mowing the grass in that ditch are violations of the Clean Water Act. Yet that will be the result of the proposed rule.

Will EPA seek enforcement against a homeowner mowing the lawn? Probably not. But the fact that it could illustrates the ridiculous implications of the proposed rule. In addition, if the agencies will have to pick and choose which discharges they actually regulate, then the rule hardly provides the certainty that the agencies claim. (p. 7)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

- 6.221 [T]he text and preamble of the current regulations (promulgated in 1986 by the Corps and in 1988 by EPA) contain no reference to “ephemeral” streams or drains. Likewise, the regulations say nothing to suggest that ditches can be “tributaries.” EPA and the Corps have asserted in guidance and in enforcement actions that certain ditches and “ephemeral streams” are subject to CWA jurisdiction as “tributaries,” but that is ad hoc “regulatory creep,” not proper notice-and-comment rulemaking. In other words, the fact that EPA and the Corps have at times asserted jurisdiction over these “types” of features does not make it right—and does not make it lawful to categorically regulate virtually all ditches and ephemerals. (p. 9)

Agency Response: See summary response. Also see Section I of the Technical Support Document and the preamble to the final rule for a discussion of the authority to regulate ditches and ephemerals.

National Sustainable Agriculture Coalition (Doc. #16357.51)

- 6.222 Specifically, a proposed rule should make clear that ditches and other upland drainage features far removed from navigable waters are not jurisdictional. In addition, the proposed rule should be consistent with the Supreme aggregation approach contained in the agencies’ 2011 draft Guidance and consistent with SWANCC, the proposed rule should explicitly state that isolated (or “non-physically proximate”) waters are not subject to CWA jurisdiction. Court’s decisions in SWANCC and Rapanos In this regard, the rule should not allow for the watershed. (p. 1)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Please refer to the preamble for the final rule and the Technical Support Document for discussions regarding the agencies’ interpretation of judicial precedent and significant nexus.

Peltzer & Richardson, LC (Doc. #16360)

- 6.223 [T]he rule will likely lead to a greater demand for “jurisdictional determinations” for waterways that should obviously not be considered jurisdictional, such as private and isolated agricultural basins and water conveyance ditches that have no downstream connection and, at present, are assumed non-jurisdictional; the wording of the rule appears to require that even these waterways be assessed for potential jurisdictional qualities, an absurdity that should be avoided, not encouraged. (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The agencies do not anticipate that the final rule will result in a greater demand for jurisdictional determinations.

New York Farm Bureau (Doc. #16547)

- 6.224 Never before has EPA regulated the type of ditches that commonly occur on our farms. Some of these ditches are used to divert water away from pollution sources, like manure storage, and others are used to collect water efficiently and direct it during rainstorms or the spring snowmelt. Many of these on-farm ditches have been either constructed under the guidance of Soil and Water Conservation District personnel or designed and built in concert with nutrient management or other on-farm conservation systems as dictated by NRCS or state standards, such as NRCS Codes 607 and 608.

Under the proposed rule, EPA and the Corps specifically include ditches in the definition of tributaries for the first time and this will likely cause a number of farm ditches, not previously regulated under the Clean Water Act, to fall under the new definition of a tributary. This is an obvious expansion of the reach of the agency. (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule, for the first time, categorically excludes certain ditches and other features that were previously generally not assumed to be jurisdictional. By contrast, the existing statutory exemptions that were passed by the U.S. Congress in 1977, did not eliminate CWA jurisdiction of these features, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit. These activity exemptions remain in place and are unaffected by the final rule.

- 6.225 The definition changes in this rule would increase the difficulty for livestock farms, operating under a state or federal CAFO permit, to spread organic fertilizer (manure) onto farm fields. This is a sound (p agricultural practice when applied at an agronomic rate and frequency under appropriate field and weather conditions that limits the possibility of any runoff. This practice is a key part of New York's certified CAFO plans and has the added benefit of decreasing the use of synthetic fertilizers. However, this practice could become too impractical to continue if this rule moves forward, due to a maze of buffer zones crisscrossing small farm fields so as to avoid even a drop of manure (considered a pollutant) landing in a low-spot or ephemeral drainage now considered a "water of the U.S." -even if that feature is dry at the time. In this case, how does EPA propose addressing the nutrient management needs of farms and disposing of this previously valuable resource?

It is not practical for farms to fence off or draw a buffer zone around every potential low spot that collects rainwater and every ephemeral flow that is only wet in the Spring after snowmelt just so they can avoid moving any soil or releasing a drop of manure when it is spread. Congress knew that when they wrote the agricultural exemptions into the Clean Water Act. (p. 4)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The agencies do

not believe that the final rule will make “every potential low spot that collects rainwater and every ephemeral flow that is only wet in the spring after snowmelt” jurisdictional waters of the United States. The final rule reduces the number of ditches considered jurisdictional, by for the first time explicitly excluding certain ditches that the agencies have previously generally not considered waters of the United States. Furthermore, the final rule provides exclusions for other features, such as non-wetland swales, and does not change any of the existing statutory exemptions, including for normal farming, silviculture and ranching activities at CWA Section 404(f)(1)(A), in any way.

The Walker River Irrigation District (Doc. #16567)

- 6.226 Ditches and drains are of critical importance within the District and to all agricultural communities which depend on irrigation to make lands productive. There is no question that the East Walker, West Walker and Walker Rivers are interstate waters, and as a result of the proposed rule, will be waters of the United States. That, coupled with the breadth of the definition of a tributary, results in ditches and drains and waters adjacent to ditches and drains within the District also being waters of the United States. The exclusions in the proposed rule do not clearly exclude them.

The proposed rule provides that certain "ditches" are not "waters of the United States" even if they otherwise meet the definition. The excluded "ditches" are those which "are excavated wholly in uplands, drain only uplands, and have less than perennial flow," or those which "do not contribute flow, either directly or through another water" to an interstate water or a tributary.

The District finds little comfort in those exclusions. First, it is not clear whether the term "ditch" also includes a "drain." Ditch is not defined. Second, uplands are not defined in the proposed rule. Third, "through another water" is also not defined. (p. 5)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Glenn-Colusa Irrigation District (Doc. #16635)

- 6.227 [T]he Proposed Rule states, “[d]itches created by altering natural waters could be considered WOTUS, so long as they contribute flow to another jurisdictional water.” The Agencies’ statement rests on the presumption that certain ditches may contribute flow to traditional navigable waters, and thus may be evaluated as tributaries. Here, the Agencies’ approach to asserting jurisdiction contravenes the Court’s decision in *Rapanos* to restrict the definition of WOTUS, and again skirts the responsibility to undertake a case-by-case analysis of the particular waters or ditches in question. Ostensibly, the Agencies acknowledge this failure by including in the Proposed Rule two exclusions for (1) ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow, and (2) ditches that do not contribute flow directly or indirectly to a traditional navigable water.⁴⁸ Nonetheless, based on *Rapanos*, the Proposed Rule should

⁴⁸ 79 Fed. Reg. 22203.

require the Agencies to perform an individualized analysis to determine whether a ditch that does not fall within one of the exclusions satisfies the relatively permanent or significant nexus test before asserting jurisdiction. (p. 5)

Agency Response: See Section I of the Technical Support Document with respect to the legal framework for the final rule generally and ditches in particular.

Mendocino County Farm Bureau (Doc. #16648)

- 6.228 The prospect of additional federal land use controls or removal of land from agricultural production is concerning. EPA and the Corps's Rule, along with the Interpretive Rule, will have material economic impacts on our members. Coupled together, the Rule and the Interpretive Rule will significantly increase potential liability for farmers and ranchers. Many ephemeral streams, ponds, depressions, and ditches found across fields and pastures will now fall under EPA's and the Corps' jurisdiction, and may require permits for activities taking place on the land. (p. 2)

Agency Response: The final rule will not remove any land from agricultural production. The final rule reduces the number of ditches considered jurisdictional, by for the first time explicitly excluding certain ditches and other features that the agencies have previously generally not considered waters of the United States. The final rule does not change any of the existing statutory exemptions, including for normal farming, silviculture and ranching activities at CWA Section 404(f)(1)(A), in any way. The Interpretive Rule was withdrawn on January 29, 2015. See summary responses in 14.2 and 14.2.3 regarding concerns related to the Interpretive Rule and ongoing and normal farming.

Florida Crystals Corporation (Doc. #16652)

- 6.229 Almost all farmland and urban areas in Florida are located on former wetlands. This is especially true in South Florida, which was almost entirely a wetland a century ago, and which was drained by the Army Corps and private landowners in the early- to mid-20th Century to make human settlement possible. Figure 1⁴⁹ compares the historic and current South Florida landscape, and illustrates how vast agricultural and urban areas are located on converted wetlands. In particular, the map on the right side of Figure 1 reveals that most of the urban areas of Broward County, and the entire Everglades Agricultural Area, are located in former wetlands.

On most farms in Florida, ditches are necessary to maintain appropriate water levels. Those ditches often were excavated before the enactment of the CWA in the early 1970s to make areas suitable for farming and urban development. On farms, such ditches crisscross fields and are used seasonally to provide drainage irrigation, or both. In the Everglades Agricultural Area, where most of Florida Crystals' lands are located, the farm ditches are separated from off-site canals by levees and water control structures. In urban areas, ditches also were excavated many decades ago in what now are the urban areas of Southeast Florida, much of which historically were part of the Everglades, to drain those

⁴⁹ Figure 1 not included here

areas for urban development. Figure 2⁵⁰ shows the ditch network on farms in the Everglades Agricultural Area of Southern Florida. All or nearly all of the Everglades Agricultural Area was converted to cropland prior to 1972 when the Clean Water Act was enacted. (p. 2-3)

Agency Response: The agencies interpret this particular comment as statements of alleged fact, and do not have any response.

- 6.230 Most ditches are unregulated under the agencies' current application of the CWA. In 1986, the Army Corps stated in the preamble to the rule defining "waters of the United States" that "[f]or clarification, it should be noted that we generally do not consider the following waters to be 'Waters of the United States.' ... (a) *Non-tidal drainage and irrigation ditches excavated on dry land.* (b) Artificially irrigated areas which would revert to upland if the irrigation ceased.") Army Corps, *Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986). The EPA made a similar statement in 1988 when it promulgated its parallel regulations under the CWA. EPA, *Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations, Final Rule*, 53 Fed. Reg. 20764, 20765 (June 6, 1988) ("[I]t should be noted that we generally do not consider the following waters to be 'waters of the United States.' ... *Non-tidal drainage and irrigation ditches excavated on dry land.* Artificially irrigated areas which would revert to upland if the irrigation ceased."). Based on these statements and other provisions of the CWA, the U.S. District Court for the Southern District of Florida held that farm ditches in the Everglades Agricultural Area (where most of Florida Crystals' farmlands are located) are not "navigable waters" within the meaning of the CWA. *FADE v. Closter Farms*, Case No. 89-8917, Final Judgment *2, 2001 WL 838437 *1 (S.D. Fla. March 16, 2001) ("The court entered partial summary judgment in favor of plaintiff on August 29, 1995. In so doing, the court determined that culvert 12A was a point source. This court held that the canal system constituted surface runoff which was collected and channeled by man and, therefore, *not navigable waters*. As such, culvert 12A was the point source from which pollutants ... might be added to Lake Okeechobee.") (emphasis added), *affirmed*, 300 F.3d 1294 (11th Cir. 2002). The Florida Department of Environmental Protection, which administers CWA § 402 pursuant to a delegation from the EPA, also has treated ditch networks internal to farms as non-jurisdictional waters, and has only issued NPDES permits for certain culverts where those ditches connect to offsite canal systems. (p. 3-4)

Agency Response: See Section I of the Technical Support Document for the discussion of the legal framework for this rule in general, and ditches in particular.

- 6.231 Expansion of CWA jurisdiction over farm ditches and ponds will not result in more stringent regulation of water pollution. From a CWA § 402 perspective, agricultural return flows are exempted from regulation as point sources under the NPDES program, 33 U.S.C. § 1362(14), which means that water quality issues associated with farm runoff are regulated by the states, 33 U.S.C. § 1329. To the extent that there are pollution concerns not associated with agricultural stormwater, farm ditches already are regulated as point sources (but not jurisdictional waters), 33 U.S.C. § 1362(14), the discharge of

⁵⁰ Figure 2 not included here

non-farm pollutants into which requires a permit. Including farm ditches within the definition of "navigable waters" therefore will not result in greater regulation of pollution than already exists. (p. 9)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule does not change any of the existing statutory exemptions in any way. The statutory exemptions instituted by the U.S. Congress in 1977, including those at CWA Section 404(f), did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit. By contrast, the final rule categorically excludes certain ditches and other features from jurisdiction as waters of the United States. The Technical Support Document Section I provides the legal framework under which a ditch could be considered both a point source and a water of the United States.

- 6.232 The use of the term "excavated" also makes the exclusions ambiguous. As discussed above, there are many ditches, lakes and ponds in Florida (and elsewhere) which were constructed years ago in wetlands. At the time these features were dug from the ground, they were located in wetlands, but now the areas around them are no longer "wetlands" within the meaning of the CWA or other waters subject to CWA jurisdiction. (Examples of such areas are the ditches in the Everglades Agricultural Area shown in Figure 2.) The various formulations of the terms "excavated in uplands" could be read to mean that the exclusions only apply if the ditches, ponds and lakes were constructed after the surrounding areas were no longer "wetlands" within the meaning of the CWA or other waters subject to CWA jurisdiction. Those exclusions also could be read to mean that ditches, ponds and lakes are covered if they are located in areas which are non-jurisdictional to the CWA today. We recommend that the agencies clarify that the exclusions are meant to cover the latter situation, i.e., if a ditch, lake or pond is located among non-jurisdictional areas today (i.e., non-wetlands), then they are excluded from the definition of "navigable waters." (p. 12)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. In particular, the phrase "excavated in uplands" is not in the final rule. See summary response 6.3 for a discussion.

Young Farmers and Ranchers Committee American Farm Bureau Federation (Doc. #16850)

- 6.233 Despite the Agencies' claims, the section 404 "normal farming" exemptions will not protect farmers and ranchers from the expansive new permit requirements of the proposed "waters of the U.S." rule. If ephemeral drains, ditches and wet spots in farmlands are regulated as "waters," farming and ranching in and around those features will be more expensive and more difficult, if not impossible. (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule does not change any of the existing statutory exemptions in any way. All activities exempted by statute will remain exempted from CWA permitting requirements

under the final rule. In addition, the final rule categorically excludes certain ditches and other features from jurisdiction as waters of the United States.

Coachella Valley Water District (Doc. #16926)

- 6.234 The proposed rule states currently applicable CWA exemptions for fanning and ranching will continue to preclude permitting requirements. However, the proposed rule also includes ditches and man-made conveyances as jurisdictional waters, many of which are used for fanning and ranching. In addition, these ditches and man-made conveyances could be considered tributary under the proposed rule. The Coachella Canal is a man-made, concrete conveyance that carries Colorado River water 123 miles to supply CVWD's agriculture irrigation system. Ditches, manmade canals and water conveyances should be specifically excluded from the definition of Waters of the U.S. (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule does not change any of the existing statutory exemptions in any way. The final rule categorically excludes certain ditches and other features from jurisdiction as waters of the United States.

Montana Stockgrowers Association (Doc. #16937)

- 6.235 Ditches by definition of "tributary" are included as jurisdictional waters. The proposed rule provides for exceptions, however, our organizations are unable to see where any of the exclusions would apply or reflect any realistic relief from regulation on the landscape. The first exclusion is for ditches that are (1) excavated wholly in uplands, (2) drain only uplands, and (3) have less than perennial flow. It is our understanding that all three criteria must be met for a ditch to be excluded. The rule does not provide a definition of "uplands," which is critical to a practical understanding of when and where this exclusion might apply. Most diversions are within a stream and thus within the high-water mark which would necessarily make the ditch not "excavated wholly in uplands." (p. 7)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Greene County Farm Bureau (Doc. #17007)

- 6.236 We have significant concerns about the potential reach of this rule with respect to ditches. As written, the rule appears to give the agencies control over nearly every ditch in existence in the state. We recognize that there are exemptions for certain ditches, but it will apply to few ditches. The fact is that few ditches are solely in uplands. It is also true that most ditches are ephemeral features. It is our suggestion that the regulation of ditches should only apply to those ditches which are perennial in nature. Those ditches are more closely akin to the perennial streams that the agencies regulate. (p.2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

West Side Canal Company, Inc. (Doc. #17044)

6.237 WSC is especially concerned about whether or which irrigation ditches will fall under the jurisdiction of the CWA under the proposed new rules. WSC understands the EPA and the Corps will exercise jurisdiction under the CWA of man-made conveyances or ditches and will consider them "jurisdictional tributaries" if they have a bed, bank and an ordinary high water mark and they flow directly or indirectly into navigable waters (apparently regardless of whether such flow is perennial, intermittent or ephemeral). WSC's canal is man-made, has a bed and banks and has an ordinary high water mark. In typical years, water flows in the canal from April through October. WSC knows that some of the water diverted and carried in the canal and applied to the lands of its shareholders makes its way back to the Beaverhead River, indirectly, via return flow. WSC cannot determine whether its main canal would be considered a "jurisdictional tributary" or an exempt upland ditch. The EPA claims the proposed rule exempts or excludes certain types of upland ditches with less than perennial flow or those ditches which do not contribute flow to a navigable water. However, terms such as "upland" and "contribute flow" are not defined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a navigable water. Until the EPA, assisted with scientific evidence, can establish clear rules regarding return flows, farmers and ranchers would be left in limbo under the proposed rules trying to determine whether they are subject to the CWA's permitting and punitive fine provisions. (p. 3)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule does not change any of the existing statutory exemptions in any way. The agencies' respectfully note however that the statutory exemptions instituted by the U.S. Congress in 1977, did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit. By contrast, the final rule categorically excludes certain ditches and other features from jurisdiction as waters of the United States.

Walsh Centennial, LLC (Doc. #17056)

6.238 Walsh Centennial, LLC is especially concerned about whether or which irrigation ditches will fall under the jurisdiction of the CWA under the proposed new rules. We understand the EPA and the Corps will exercise jurisdiction under the CWA of man-made conveyances or ditches and will consider them "jurisdictional tributaries" if they have a bed, bank and an ordinary high water mark and they flow directly or indirectly into navigable waters (apparently regardless of whether such flow is perennial, intermittent or ephemeral). The EPA claims the proposed rule exempts or excludes certain types of upland ditches with less than perennial flow or those ditches which do not contribute flow to a navigable water. However, terms such as "upland" and "contribute flow" are not defined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a navigable water. We know that much of the irrigation water we divert from the several streams on the ranch eventually makes its way to the Red Rock River via return flow. Until the EPA, assisted with scientific

evidence, can establish clear rules regarding return flows, farmers and ranchers would be left in limbo under the proposed rules trying to determine whether they are subject to the CWA's permitting and punitive fine provisions. (p. 3)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. In addition, none of the existing statutory exemptions in the CWA are changed in any way by the final rule, and all of them remain in effect.

West Virginia Farm Bureau, Inc. (Doc. #17091)

6.239 It is clear from the "navigable" language of the Clean Water Act that Congress did not intend for the law to extend to small remote waters and land features such as farm ponds, ditches and even depressions that are only wet when there is an excessive rain event. Our members urge EPA to respect the limits set by Congress. (p. 1)

Agency Response: The legal framework under which EPA interprets the CWA is discussed in the preamble to the final rule and in Section I.A. of the Technical Support Document.

Schroeder Law Offices, P.C. (Doc. #18873)

6.240 The most alarming section of the rule is in the discussion related to the "significant nexus" test. The rule purports to include "Tributaries" which are connected to navigable waters. The comments go on to state that these tributaries include "perennial, intermittent, and ephemeral streams [which] are physically and chemically connected to downstream traditional navigable waters."⁵¹ The rule itself expressly includes man-made canals and ditches as tributaries. Thus, if the EPA finds that Filippini's water systems are not exempt under the prior discussed agricultural exemptions, they can assert jurisdiction over them even though the ditches only hold water a few months out of the year. This of course goes directly against what the Supreme Court said in *Rapanos*. (p. 4)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. In addition, none of the existing statutory exemptions in the CWA are changed in any way by the final rule, and all of them remain in effect.

North Platte Valley Irrigators Association (Doc. #18963)

6.241 Prior to the construction of these irrigation projects, there were few, if any, perennial streams that were tributaries to the North Platte River. Since the project was constructed, due to seepage and return flows generated by the projects, many of the formerly dry draws convey return flows, irrigation run off, seepage water and flows caused by the occasional precipitation events away from the irrigated lands. We have always considered these draws or conveyances to be irrigation related ditches, but we believe the proposed

⁵¹ Vol. 79, No. 76, Federal Register, April 21, 2014 at 22197.

rule creates significant uncertainty with regard to how the new rule would be applied. (p. 1-2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Wilkin County Farm Bureau (Doc. #19489)

6.242 Wilkin County Farm Bureau has significant concerns with the limitless jurisdiction the proposed rule provides the agencies. Specifically:

- The rule would consider remote landscape features that carry only minor volumes of water (if any) or only carry water after a weather event as subject to CWA jurisdiction, including the addition of ditches and ephemeral drainages. (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

M. Ingram (Doc. #2480)

6.243 If the proposed changes would require that we get a permit each time we need to clean a ditch because a rain event that silts a culvert under or causes water to go over the road I fear that I would spend all my time sending for and waiting for permits. It would be difficult if not impossible to determine exactly where the work would start and stop so applying for a permit that required locations would be equally impossible. (p. 1)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. For those drainage ditches that are jurisdictional waters of the United States, maintenance is exempted under CWA Section 404(f)(1)(C). The final rule does not change any of the existing statutory exemptions in any way.

Pike County Highway Department (Doc. #6857)

6.244 Counties own and operate a number of public infrastructure roadside ditches, flood control channels, drainage conveyances and storm water; these ditches are used to safely funnel water away from homes, properties and roads to keep our citizens protected and roadbeds stable. The proposed "waters of the U.S." regulation from the EPA and the Corps could have a significant impact on counties by potentially increasing the number of county-owned ditches that fall under federal jurisdiction.

Additionally, the EPA and the Corps state that the purpose of the rule is to provide clarity in the jurisdictional process. However, the definition is unclear. The proposed rule states that man-made conveyances, including ditches, are considered jurisdictional tributaries if they have a bed, bank and ordinary high water mark (OHWM) and flow directly or indirectly into a "water of the U.S.," regardless of perennial, intermittent or ephemeral flow. The proposed rule excludes certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to a "water of the U.S." However, key terms like "uplands" and "contribute flow" are not defined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are

near a "water of the U.S." A public infrastructure roadside ditch system, flood or storm water- is interconnected and can run for hundreds, if not thousands of miles. Ditches are not wholly in uplands nor do they strictly drain in uplands, since they are designed to convey overflow waters to an outlet.

Please consider the following:

- The county highways in my counties have approximately 500 miles of ditches that we maintain. This does not include townships which have approximately 2900 miles of ditches. The definition will be critical and important to us.
- The proposed rule states that some ditches would not be considered "waters of the U.S." if the ditches are excavated wholly in uplands, drain only uplands and have less than perennial flow OR ditches that do not contribute flow either directly or through another water. How can a county prove its ditches do not "contribute to flow? How can exempt ditches be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S."?
- Additionally, how will the agency delineate how seasonal ditches will be regulated under the proposal? (p. 2-3)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Minnesota County Engineers Association (Doc. #6996.2)

6.245 Roadway ditches in the upper Midwest perform several essential functions. They drain water from the roadway to provide a firm foundation for the driving surface, store snow in the winter, and help perpetuate the overland drainage patterns. The ditches often provide an economical and low impact source of borrow to construct the road. They improve water quality by filtering, storing and slowing the flow of storm water. When roads are reconstructed, the ditches generally are widened, flattened and moved further from the road centerline. Some of the existing low areas in the ditch may be filled to widen the road, however, a larger low area is created. This means ditch reconstruction is generally "self-mitigating". The exception is when the existing ditch low area is contiguous to an existing jurisdictional wetland. In this case, the wetland is made smaller by the road widening. We therefore propose roadway ditches in the upper Midwest be exempt from WOUS, except for work in a ditch that is contiguous to a WOUS exterior to the road right of way. (p. 3)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

New York State Association of Town Superintendents of Highways, Inc. (Doc. #7641.1)

6.246 Under these new guidelines, roadside ditches and flood mitigation systems would be placed under the same federal regulations as streams and lakes. Many communities, responsible for the upkeep of local roadways, would find their budgets and timetables for mundane acts of road maintenance increased to untenable levels. Debris falling into a roadside ditch under these regulations could be considered a prohibited discharge due to

the far-removed connection to navigable, federally regulated waters. Though these new classifications do give some consideration to "upland" ditches where water would not in any measurable sense flow toward and contribute to the "waters of the U.S.", these terms are ill-defined and lend no clarity to where federal jurisdiction would begin or end.

The costs will be felt most greatly by town and county governments who are already financially stretched to properly maintain disintegrating local infrastructure systems. The additional burdens that will come at the directive of the EPA and other regulatory agencies will greatly affect the ability of local governments to properly maintain the roadways and structures they are responsible for. Additional costs from proposed submittals and permit applications will drain budgets while waiting periods delay crucial repairs. (p. 1-2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. For those drainage ditches that are jurisdictional waters of the United States, maintenance is exempted under CWA Section 404(f)(1)(C). The final rule does not change any of the existing statutory exemptions in any way.

New Salem Township (Doc. #8365)

- 6.247 New Salem Township has many miles of public infrastructure ditches-roadside, flood control channels, drainage and stormwater conveyances; these ditches are used to safely funnel water away from homes, properties, and roads to keep our citizens protected. The proposed "waters of the U.S." regulation from EPA and the Corps could have a significant impact on my township by potentially increasing the number of ditches that fall under federal jurisdiction.

Additionally, the EPA and the Corps state that the purpose of the rule is to provide clarity in the jurisdictional process. However, the definition is unclear. The proposed rule states that manmade conveyances, including ditches, are considered jurisdictional tributaries if they have a bed, bank and ordinary high water mark (OHWM) and flow directly or indirectly into a "water of the U.S.," regardless of perennial, intermittent or ephemeral flow. (...)

Additionally, how will the agency delineate how seasonal ditches will be regulated under the proposal?

In recent years, Section 404 permits have not been required for ditch maintenance activities such as cleaning out vegetation and debris. While, in theory, a maintenance exemption for ditches exists; it is difficult for local governments to use the exemption. The federal jurisdictional process is not well understood and the determination process can be extremely cumbersome, time-consuming and expensive, leaving townships vulnerable to lawsuits if the federal permit process is not streamlined. (p. 1-2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. For those drainage ditches that are jurisdictional waters of the United States, maintenance is exempted under CWA Section 404(f)(1)(C). The final rule does not change any of the existing statutory exemptions in any way. The commenter states that it is

difficult for local governments to use the exemptions but does not state why; as a result, the agencies do not have enough information to respond.

Kane County Division of Transportation (Doc. #9831)

- 6.248 The proposed rule states that man-made conveyances, including ditches, are considered jurisdictional tributaries if they have a bed, bank and ordinary high water mark and flow directly or indirectly into a "water of the U.S.," regardless of perennial, intermittent or ephemeral flow. The proposed rule excludes certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to a "water of the U.S." However, key terms like "uplands" and "contribute flow" are not defined and a public infrastructure ditch system—roadside, flood or stormwater—is interconnected and can run for hundreds, if not thousands of miles. Ditches are not wholly in uplands nor do they strictly drain in uplands, since they are designed to convey overflow waters to an outlet. It is unclear how a county can prove its ditches do not "contribute to flow", and how exempt ditches can be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S." Additionally, it is unclear how the EPA will delineate how seasonal ditches will be regulated under the proposal. (p. 1)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Roads and Drainage Department, DeKalb County, Georgia (Doc. #13572)

- 6.249 Counties use public infrastructure ditches to funnel water away from low-lying roads, property and businesses to prevent accidents and flooding. The proposed rule states that man-made conveyances-- including ditches--are considered "jurisdictional tributaries" if they flow "directly or indirectly" into a water of the U.S., regardless of perennial, intermittent or ephemeral flow. Encouragingly, it also notes that certain types of upland ditches with less than perennial flow or that do not contribute flow are not jurisdictional. However, we are not sure how this connection with a water of the U.S. will be determined, or whether there is a limit to connectivity. In a lawsuit by a citizen/environmental group, will a local entity ever be able to successfully claim that any locally-maintained ditches drain only in uplands and do not contribute flow to a "water of the U.S.", particularly with the precipitation we get in the Southeastern United States? That's going to be difficult. Furthermore, the terms "uplands" and "contribute flow" are undefined, and we feel that their definitions would also be litigated extensively. Once a ditch is under federal jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to citizen lawsuits if the federal permit process is not significantly streamlined. Ultimately, a county is liable for maintaining the integrity of its ditches, even if federal permits are not approved by the EPA in a timely manner in order to avoid other lawsuits by motorists or property owners who sue us claiming lack of maintenance contributed to an accident or diversion of water onto their property. Recommendation: The draft rule should clarify that local streets, gutters and human-made ditches, as well as their maintenance, are exempted from the definition of "waters of the U.S." (p. 1-2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Elmore County Highway Department, Wetumpka, Alabama (Doc. #14072)

- 6.250 Counties own and operate a number of public infrastructure ditches-roadside, flood control channels, drainage conveyances and storm water; these ditches are used to safely funnel water away from homes, properties and roads to keep our citizens protected. The proposed "waters of the U.S." regulation from EPA and the Corps will have a significant impact on counties by potentially increasing the number of county-owned ditches that fall under federal jurisdiction. Additionally, the EPA and the Corps state that the purpose of the rule is to provide clarity in the jurisdictional process. However, the definition is unclear. The proposed rule states that man-made conveyances, including ditches, are considered jurisdictional tributaries if they have a bed, bank and ordinary high water mark (OHWM) and flow directly or indirectly into a "water of the U.S.," regardless of perennial, intermittent or ephemeral flow. The proposed rule excludes certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to a "water of the U.S." However, key terms like "uplands" and "contribute flow" are not defined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S.A. public infrastructure ditch system-roadside, flood or storm water- is interconnected and can run for hundreds, if not thousands of miles. Ditches are not wholly in uplands nor do they strictly drain in uplands, since they are designed to convey overflow waters to an outlet. (p. 4)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Association of American Railroads (Doc. #15018.1)

- 6.251 Ditches have been an integral part of rail construction since the start of the rail industry in the 1800s. Ditches play a critical role in rail safety by ensuring proper drainage, thus preventing the undermining of rail road bed material and potential sloughing, shifting, and uneven trackage. Ditches also avoid washouts and ensure safe travel at speed. Rail drainage is required under federal regulations and is subject to detailed industry specifications. See 49 C.F.R. Part 213. Given the ubiquitous presence of ditches along railroad rights-of-way, well over 100,000 miles of rail ditches may potentially be affected by the proposed rule and may be considered Waters of the United States for purposes of permitting, mitigation, and enforcement as Waters of the United States. Rail ditches are implicated because the proposed rule erroneously defines ditches as perennial tributaries based merely upon presence of water, even during above-normal rain years. (p. 4)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

- 6.252 (a) **The CWA defines ditches as Point Sources**

The text of the CWA explicitly states that a ditch is a point source. A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe,

ditch...from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14) (emphasis added). As the Supreme Court and many courts have noted, point source and navigable waters are “two separate and distinct categories.”⁵² The proposed rule eliminates any meaningful distinction between point sources and Waters of the U.S. in contravention of these court decisions.

(b) EPA Regulations and reports define ditches as Point Sources

Similarly, EPA regulations explicitly define a ditch as a point source. “Point source means any discernible, confined, and discrete conveyance, including but not limited to, any...ditch...from which pollutants are or may be discharged.” See 40 C.F.R. § 122.2 (emphasis added). The Agencies have consistently interpreted “ditch” as a point source. EPA recently affirmed that a ditch is a point source in its 2012 re-issuance of the EPA General Construction Permit.⁵³ Specifically, EPA’s Question and Answer document, as well as text of the permit itself, confirms that a ditch is point source.⁵⁴ Therefore, the Agencies’ proposal to identify ditches as Waters of the United States contradicts not only the CWA text at 33 U.S.C. § 1362(14) and Supreme Court jurisprudence, but also the text of EPA promulgated regulations.

Similarly, EPA’s scientific report issued in September 2013 in support of the proposed rule supports the position that ditches are not Waters of the United States.⁵⁵ The EPA Connectivity Report states “pollutants enter wetlands via various pathways that include . . . point sources such as outfalls, pipes, and ditches.” EPA Connectivity Report at Section 1.4.2, Key Findings, Page 1-9, line 22 (emphasis added).⁵⁶

(c) Ditches Cannot be Both a Point Source and Waters of the United States

Under the Agencies’ proposed rule, a ditch would be both a point source under Section 502(7) of the Act and regulations at 40 C.F.R. § 122.2 and a Water of the United States under the proposed rule. Of course, a ditch cannot be both a “point source” and a “Water of the United States” at the same time. “Discharge of a pollutant” means “any addition of any pollutant to navigable waters⁵⁷ from any point source.” (p. 4-5)

⁵² *Rapanos v. United States*, 547 U.S. 715, 735-36 (2006). See also 547 U.S. at 759 (“as relevant here, the term “discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.”); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137, 1141 (C.A.10 2005) (2.5 miles of tunnel separated the “point source” and “navigable waters”).

⁵³ http://water.epa.gov/polwaste/npdes/stormwater/upload/cgp2012_finalpermit.pdf.

⁵⁴ Frequently Asked Questions on EPA’s 2012 NPDES Construction General Permit, at Page 1 (“Point sources are defined at CWA section 502(14) and, generally speaking, are discrete conveyances including but not limited to any pipe, ditch, channel, or conduit from which pollutants may be discharged.”)

⁵⁵ Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, EPA/600/R-11/098B EPA Office of Research and Development (Sept. 2013)(“EPA Connectivity Report”).

⁵⁶ See also Section 5.3.2, The Chemical-Nutrient Influence of Riparian Areas on Streams, page 5-10, line 7 (referring to “point sources such as outfalls, pipes and ditches.”).

⁵⁷ As the Agencies note in the proposed rule, the definition of ‘navigable waters’ is Waters of the United States, including the territorial seas. 42 U.S.C § 1362(7), CWA § 502(17). 79 Fed. Reg. at 22,195.

Agency Response: The Technical Support Document Section I provides the legal framework under which a ditch could be considered both a point source and a water of the United States.

6.253 The Agencies have Not Established a Definition of Ditch

“Ditch” is not defined under the proposed rule or in existing regulations. The term “ditch” is used, undefined, within the proposed rule’s definition of “tributary.” The definition states: “A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.” 79 Fed. Reg. at 22,262-22,274 (emphasis added).

“Tributary” is further defined in the proposed rule as “water physically characterized by the presence of a bed and banks and ordinary high water mark.” However, it is clear that the definition of ordinary high water mark (“OHWM”) is intended to reference natural systems, not ditches.⁵⁸ OHWM is defined as a “line on the shore” such that a “clear, natural line” is present and where changes in the character of soil, destruction of terrestrial vegetation, and litter and debris are present. Ditches have no shore, any “line” is either constructed or the result of erosion, and any changes in soil and vegetation are physical changes resulting from the engineering and construction of the ditch. If litter and debris are present they are the result of the configuration of the ditch and its design to collect organic and other materials.

The fact that a “tributary” is intended to refer to a natural system, not a ditch, is also evident from the EPA Connectivity Report, which defines tributary as a “stream or river that flows into a higher-order stream or river.” EPA Connectivity Report, at A-20, line 5. Of course, a ditch is not a stream or river and therefore could not be a tributary under the EPA Connectivity Report, which constitutes the primary technical support document for the proposed rule.

The Agencies’ definition is also contrary to the U.S. Supreme Court holding in *Rapanos*. Justice Kennedy specifically pointed out that applying OHWM by itself was too broad and would specifically capture ditches as Waters of the United States even where their contribution would be minor. 547 U.S. at 780. Justice Kennedy also addressed the use of OHWM by stating that the definition might be appropriate so long as “this standard presumably provides a rough measure of the volume and regularity of flow.”

Id. The Agencies have not, however, introduced any concept of volume and flow in the proposed rule despite flow being requisite according to the EPA Connectivity Report. The proposed rule in fact requires only the “presence” of water, not flow, as is discussed in Section III.A.3(b), below. There is no concept of flow or volume in the proposed rule contrary to Justice Kennedy’s holding in *Rapanos*.

⁵⁸ “The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.” 33 C.F.R. § 328.3(e).

Further, the proposed rule has failed to acknowledge that ditches excavated in Waters of the United States which do not result in discharge of dredged or fill material do not require Section 404 permits. The rule must acknowledge that ditches excavated in Waters of the United States meeting incidental fallback provisions do not require a permit under Section 404 of the CWA, and are otherwise not subject to the rule. (p. 6-7)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Section IV.F of the preamble to the final rule and section VII of the Technical Support Document provide additional information regarding the agencies’ position on ditches and tributaries. This is a definitional rule, and the permitting process itself is outside the scope of the rule.

Union Pacific Railroad Company (Doc. #15254)

6.254 ***Rapanos Made it Clear that Ditches are Not Waters of the United States***

Both the Rapanos plurality and Justice Kennedy’s concurrence made it clear that ditches should generally not be subject to CWA jurisdiction. The plurality emphasized plain language of the CWA in regulating “navigable” waters and rebuked the Agencies for regulating ditches, drains, and desert washes far removed from navigable waters. Rapanos, 547 U.S. at 733-34. In fact, Justice Kennedy expressed concern with the Agencies’ existing tributary standard because it “leave[s] wide room for regulation of drains, ditches, and streams remote from any navigable-in fact water and carrying only minor water volumes.” Id. at 781.

Ignoring Rapanos, the Proposed Rule categorically includes “ditches” in the definition of tributary. Under this formulation, ditches with a bed, bank, and OHWM will be jurisdictional unless they meet one of the narrow exclusions: (1) Ditches located entirely in uplands, draining only uplands, and with less than perennial flow; and (2) ditches that do not directly or indirectly contribute flow to a traditional navigable water, interstate water, territorial sea, or impoundment. 79 Fed. Reg. at 22,203, 263. Many ditches will not fit within these exclusions, and therefore, under the Proposed Rule, many ditches will be regulated as tributaries regardless of their function or distance from traditional navigable waters. As such, the inclusion of ditches as categorically subject to CWA jurisdiction is overbroad, confusing, and contrary to the jurisdictional limitations set forth in Rapanos.

Ditches are pervasive throughout our landscape, including railroad facilities and rights of way, serve many functions and cannot be easily categorized. The Proposed Rule’s attempt to dramatically expand CWA jurisdiction, including the unprecedented assertion of jurisdiction over ditches that have not been subject to such jurisdiction, would severely impact UPRR and other rail operators that are required to maintain thousands of ditches for track and ballast drainage to ensure safe rail operations,⁵⁹ as described in Section VI below. These ditches often have little grade and little or no connection to a surface water,

⁵⁹ See 49 CFR §213.33, which provides “[e]ach drainage or other water carrying facility under or immediately adjacent to the roadbed shall be maintained and kept free of obstruction, to accommodate expected water flow for the area concerned.”

but based on the interstate nature of the rail system and the Proposed Rule's bed, bank and OHWM criteria, many could be identified as subject to CWA jurisdiction, hampering and delaying maintenance operations and adding unnecessary agency review and cost.

The Rapanos plurality and Justice Kennedy's concurrence made it clear that CWA jurisdiction generally does not extend to ditches. The Proposed Rule ignores the Rapanos limitations and purports to provide a basis for the Agencies to categorically assert jurisdiction over ditches. Based on the limits acknowledged by the Rapanos Court, ditches should be excluded from jurisdiction, particularly where they carry only minor water volumes and are remote from traditional navigable waters. (p. 19-20)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Ditches have been regulated under the CWA as "waters of the United States" since 1977, when the United States Congress acknowledged that ditches could be covered under the CWA by exempting specific activities in ditches from the need to obtain a CWA section 404 permit. By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit. By contrast, the final rule categorically excludes certain ditches and other features from jurisdiction as waters of the United States. For those drainage ditches that are jurisdictional waters of the United States, maintenance is exempted under CWA Section 404(f)(1)(C). The final rule does not change any of the existing statutory exemptions in any way. See Section I of the Technical Support Document for a discussion of the legal framework for the regulation of ditches.

American Road & Transportation Builders Association (Doc. #15424)

6.255 Roadside Ditches Should Not Be Covered by the Proposed Rule

ARTBA is particularly concerned with the treatment of roadside ditches under the proposed rule. Current federal regulations say nothing about ditches, but the proposed rule expands EPA and Corps jurisdiction to the point where virtually any ditch with standing water could be covered. Federal environmental regulation should be applied when a clear need is demonstrated and regulating all roadside ditches under the theory of interconnectedness fails to meet this threshold. A ditch's primary purpose is safety and they only have water present during and after rainfall. In contrast, traditional wetlands are not typically man-made nor do they fulfill a specific safety function. As such, roadside ditches are not, and should not be regulated as, traditional jurisdictional wetlands because the only time they contain water is when they are fulfilling their intended purpose.

The unacceptable length of the environmental review and approval process for federal-aid highway projects has been routinely documented and acknowledged by the Obama Administration. Adding more layers of review—for unproven benefits—will only lengthen this process. Further, requiring wetland permits for ditch construction and maintenance would force project sponsors and the private sector to incur new administrative and legal costs. The potential delays and increased costs that would result from EPA's proposal would divert resources from timely ditch maintenance activities and potentially threatened the role ditches play in promoting roadway safety. (p. 5)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule categorically excludes certain ditches and other features from jurisdiction as waters of the United States. Ditches, including roadside ditches, not otherwise excluded under paragraph (b) of the final rule must meet the definition of “tributary” in order to be a water of the United States. For those drainage ditches that are jurisdictional waters of the United States, maintenance is exempted under CWA Section 404(f)(1)(C). The final rule does not change any of the existing statutory exemptions in any way.

Department of Public Works, City of Harrisonville, Missouri (Doc. #4038)

- 6.256 I am concerned about potential expansion of federal regulation by the US Army Corps of Engineers (USACOE) and the Environmental Protection Agency (EPA) over activities conducted in and around roadway ditches, open stormways, and other constructed water channels which do not carry water on a regular basis, but which are utilized on a regular basis to convey stormwater away from areas of concentration into either ephemeral streams or clearly into jurisdictional waters. (p. 1)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Department of Public Works, City of Chesapeake, Virginia (Doc. #5612.1)

- 6.257 The Rule states that a tributary, including wetlands, can be a man-made water and includes waters such as impoundments and ditches. The City of Chesapeake does not support the inclusion of man-made impoundments or ditches as WOUS, and the exemptions provided within the Rule for impoundments and ditches are too narrow to address the unique hydrology of the City of Chesapeake and neighboring jurisdictions. (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule also excludes some impoundments (e.g. detention and retention basins constructed in dry land and built for waste water recycling). The preamble to the final rule explains that existing regulations provide that impoundments of “waters of the United States” remain jurisdictional waters of the United States.

Florida Federation of Garden Clubs (Doc. #5725)

- 6.258 In addition, we support the Agencies’ definition of tributary and strongly agree that ditches should be defined as “waters of the U.S.” where they function as tributaries. There is sufficient scientific evidence that some ditches function as tributaries moving water and pollutants downstream. In those cases protection is important. (p. 2)

Agency Response: While the final rule provides exclusions for certain ditches, the agencies believe that the final rule is practical to understand and implement and protects those waters that significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters or the territorial seas.

Associated Equipment Distributors (Doc. #13665)

- 6.259 Further, by reclassifying ditches and other landscape features that occasionally carry water as tributaries to navigable waterways, the EPA would acquire new power to regulate development, farming, mining and other activity in large swathes of the country, effectively making the agency the nation's chief land manager. (p. 1-2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule provides many new explicit exclusions for features that will not be considered waters of the United States. In addition, none of the existing statutory exemptions in the CWA are changed in any way by the final rule, and all of them remain in effect.

Southeast Metro Stormwater Authority (Doc. #14935)

- 6.260 The proposed rule regarding ditches appears to take away any flexibility and will possibly increase the number and type of ditches that are considered jurisdictional. SEMSWA is concerned that the maintenance of ditches that are part of our stormwater infrastructure, such as detention flood storage/water quality ponds, storm sewer culverts, and other conveyance facilities will not be considered "excluded ditches" under the proposed ruling. The proposed Rule and resulting increased permitting will increase time and cost to the MS4 maintenance efforts, taking away time allotted for the actual implementation of our routine maintenance program. For this reason, SEMSWA requests that ditches constructed as part of MS4 permit requirements be added to the excluded ditch definition. (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule provides an explicit exclusion for stormwater control features constructed to convey, treat or store stormwater that are created in dry land. The agencies' longstanding practice is to view stormwater control measures that are not built in "waters of the United States" as non-jurisdictional. Conversely, the agencies view some waters, such as channelized or piped streams, as currently jurisdictional currently even where used as part of a stormwater management system. Nothing in the proposed rule was intended to change that practice, and the final rule is based on this longstanding policy.

Arizona Public Service Company (Doc. #15162)

- 6.261 **Ditches are Necessary to Protect Energy Infrastructure and Overly Narrow Exemptions are of No Benefit**

APS's facilities contain ditches for the purposes of re-routing storm water and other flows from around facilities, including, but not limited to, electric generating units, substations, transformer pads, and transmission and distribution line corridors. The Agencies propose to include a broader WOTUS definition that includes ditches, floodplain waters, and isolated waters. Such an expansion to the definition would result in more activities triggering the need for CWA Section 404 permits. Once subject to Section 404 permit requirements, APS's activities could also trigger other regulatory

requirements (including under CWA Section 401, the National Environmental Policy Act, and Section 7 of the Endangered Species Act), which could drastically extend the planning phase of projects and increase their costs.

APS also relies on NWP 12 for construction and maintenance of utility lines that include a loss of no more than one-half acre of WOTUS for each “single and complete” project that relies upon NWP 12. APS plans for compliance with NWP 12 by avoiding wetland and stream features to the extent practicable. However, the proposed rule’s expansion of jurisdiction to include the types of ditches, ponds, and other wet features often found on land spanned by transmission lines will substantially increase the likelihood that APS will be unable to stay within NWP 12 limits. APS recommends that the Agencies further clarify their intentions with respect to the regulation of these features.

In addition to these comments, APS supports and incorporates by reference UWAG’s comments regarding the proposal’s treatment of ditches, as they are a necessary component to site maintenance in the arid Southwest, and the narrow exemptions proposed by the Agencies would not keep them from being listed as per se jurisdictional.⁶⁰ (p. 14-15)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

City of Albuquerque (Doc. #15456)

6.262 In addition, because of the COA’s location in the semi-arid southwestern U.S., definitions attempting to clarify flow in its storm water conveyance system only create greater uncertainty. As stated above, storm water flows through these conveyances only during localized storm events of relatively short duration and may not have a direct surface connection with or affect the integrity of the downstream navigable water, the Rio Grande. (p. 1)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Southern Illinois Power Cooperative (Doc. #15486)

6.263 By its terms, the proposed rule expands CWA jurisdiction to ephemeral drainages, ditches (including roadside, flood control, irrigation, stormwater, railroad right of way, and agricultural ditches), waters in riparian and floodplain areas, industrial ponds, and isolated waters that have not previously been regulated as “waters of the U.S.” [...] (p. 10)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule in section (b) provides explicit exclusions for many of the features referenced by the commenter.

⁶⁰ See UWAG Comments on WOTUS, Section IV – The Ditch Exclusions Are So Narrow that They Are of Little to No Use (Nov. 14, 2014).

- 6.264 The proposed rule will have unintended consequences and economic impacts because it allows for the agencies to treat ditches, stormwater drainages, MS4s, and water supply and flood control structures, as waters of the U.S. (p. 10)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

National Association of Clean Water Agencies (Doc. #15505)

- 6.265 In Section 3 of the proposed rule, EPA and USACE address tributaries including roadside and agricultural ditches. The current regulations do not define “ditches” as a category of jurisdictional water and EPA’s 2008 Rapanos Guidelines generally excluded them. Other municipal organizations have raised myriad concerns with the Agencies on the topic of ditch jurisdiction. However, NACWA’s main concerns center around how ditch jurisdiction will impact MS4 systems and the potential implications on sewer overflows into dry ditch systems. Under the draft rule, ditches are excluded if they are built in uplands, drain uplands and have less than perennial flow. But in many areas, coastal areas especially, ditches that are built in and drain uplands may have significant groundwater inputs and associated flows. This leads to the possibility that many ditches will be deemed jurisdictional. This is a concern as most sewer construction occurs in easements along roadways in ditches. Making these ditches jurisdictional would create additional permitting requirements and could add significant costs, unnecessary administrative requirements and delays to clean water utility projects. Greater clarity on this point is needed, especially regarding how ditches could impact jurisdictional determinations for MS4s, as noted above.

There are numerous potential consequences to the jurisdiction of ditches, and one in particular that concerns a number of clean water utilities is a potential increase in federal enforcement over sewer overflows that previously would not be considered jurisdictional. While there are numerous policy implications surrounding sanitary sewer overflows (SSOs), this is an illustrative example of the nuanced ramifications of considering dry ditches as WOTUS. The specific scenario troubling wastewater utilities concerns SSOs of a small volume that might occur occasionally in a wastewater collection system and not reach jurisdictional waterways. Collection system pipes often lie parallel to dry ditch systems used for things like highway maintenance or as part of an MS4 system. Right now in many states those dry ditches are not considered jurisdictional, so in the event of a small SSO into a ditch, where it is cleaned up before any contact with flowing water, there are no mandatory reporting requirements for the utility. But should those ditches be deemed jurisdictional, then the dry ditch SSO scenario above could potentially constitute a permit violation as a discharge to WOTUS and trigger a slew of reporting requirements under an NPDES permit. The increase in potential enforcement and related legal implications for these very minor SSO events are unnecessary burdens on the clean water community’s already overtaxed resources. (p. 3-4)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule provides an explicit exclusion for stormwater control features constructed to convey, treat or store stormwater that are created in dry land. The agencies’

longstanding practice is to view stormwater control measures that are not built in “waters of the United States” as non-jurisdictional. Conversely, the agencies view some waters, such as channelized or piped streams, as currently jurisdictional even where used as part of a stormwater management system. Nothing in the proposed rule was intended to change that practice, and the final rule likewise leaves this longstanding policy in place.

West Bay Sanitary District, Novato Sanitary District, West County Wastewater District, Union Sanitary District and West Valley (Doc. #16610)

6.266 The draft rule's proposal to include "ditches" in the definition of WOTUS contradicts the statutory definition of "point source." Section 502 of the CWA defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged" 33 U.S.C. §1362(14)(emphasis added). Because Congress expressly defined ditches and channels to be point sources discharging to waters of the United States, these water conveyances cannot also be waters of the United States. See accord Rapanos at 735 ("Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,' by including them in the definition of 'point source.' ... The definitions thus conceive of 'point sources' and 'navigable waters' as separate and distinct categories."⁶¹ The definition of 'discharge' would make little sense if the two categories were significantly overlapping. The separate classification of 'ditch[es], channel[s], and conduit[s]'-which are terms ordinarily used to describe the watercourses through which intermittent waters typically flow-shows that these are, by and large, not 'waters of the United States. ""(emphasis added). [...]

Excluding these "point sources" is no different from the proposed exclusion of swales, gullies and rills in the currently proposed rule - it is all just a matter of degree. Swales, gullies and rills carry water to downstream tributaries to navigable waters the same way that ditches and channels do. Drawing a line at those channels deemed to be a "point source" under the CWA would be a logical delineation that would survive judicial scrutiny. (p. 6)

Agency Response: The Technical Support Document Section I provides the legal framework under which a ditch could be considered both a point source and a water of the United States.

Sacramento Stormwater Quality Partnership (Doc. #17005)

6.267 Although the Proposed Rule attempts to clarify that tributaries are waters that have a bed, bank, and high water mark, more than likely disagreement will result with respect to the occurrence of such characteristic's in a natural or man-made channel, 'canal, ditch,- or

⁶¹ Notwithstanding this language in the 2006 Rapanos opinion, case law has still blurred the lines. See U.S. v. Viestra, 803 F. Supp. 1166, 1167 (D. Id. 2011)(finding federal CWA jurisdiction whether the channels are carrying water or not and even though the canal might also be deemed a point source).

swale. For example, some MS4 conveyance facilities have open channels that ultimately enter a WOTUS through an outfall.⁶² Under the federal regulations, an outfall is defined to mean "a point source ... at the point where a municipal separate storm sewer system discharges to waters of the United States."⁶³ (40 C.F.R. § 122.26(b)(9).) However, under the Proposed Rule, these open channels could be considered a WOTUS even though they have been viewed and regulated as being part of the MS4, and are considered to be part of the point source itself. If these facilities were found to be a tributary to a WOTUS, they would become subject to CWA section 404 requirements, and current maintenance activities could require a section 404 permit as well as section 401 certification from the state. Further, water quality standards would apply in the open channels rather than after discharge into a "traditional" navigable water. Such a result is nonsensical considering that discharges from these types of open channels to traditional navigable waters are currently regulated under the MS4 permit program pursuant to section 402(p) of the CWA. (p. 3-4)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule provides an explicit exclusion for stormwater control features constructed to convey, treat or store stormwater that are created in dry land. The agencies' longstanding practice is to view stormwater control measures that are not built in "waters of the United States" as non-jurisdictional. Conversely, the agencies view some waters, such as channelized or piped streams, as currently jurisdictional even where used as part of a stormwater management system. Nothing in the proposed rule was intended to change that practice, and the final rule likewise leaves this longstanding policy in place. The Technical Support Document Section I provides the legal framework under which a ditch could be considered both a point source and a water of the United States.

McGee Creek Levee & Drainage District (Doc. #6858.1)

- 6.268 The proposed rule will define some ditches as "waters of the U.S." if they meet certain conditions. This means that more district-owned ditches would fall under federal oversight. In recent years, Section 404 permits have not been required for ditch maintenance activities such as cleaning out vegetation and debris. Once a ditch is under federal jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming, and expensive. Our district cannot afford the time or expense of getting a 404 permit for normal maintenance projects. (p. 2)

⁶² The Partnership recognizes that in some cases waters that are considered to be traditional navigable waters, or waters previously identified as jurisdictional, have been modified for flood control and other purposes. The Partnership's comments are not intended to imply that these waters are no longer WOTUS due to their use for flood control purposes and to the extent that these waters convey storm water. Rather, the Partnership is stating that storm water facilities connected to these traditional navigable waters or waters previously identified as jurisdictional, and that are regulated under the MS4 permit program, are not WOTUS, and should not be converted to being WOTUS due to their connectivity.

⁶³ An outfall does not include open conveyances connecting two MS4s, or pipes, tunnels, or other conveyances, which connect segments of the same stream or other waters of the United States. (40 C.F.R. § 122.26(b)(9).)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Ditches have been regulated under the CWA as “waters of the United States” since 1977, when the United States Congress acknowledged that ditches could be covered under the CWA by exempting specific activities in ditches from the need to obtain a CWA section 404 permit. By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit. By contrast, the final rule categorically excludes certain ditches and other features from jurisdiction as waters of the United States. For those drainage ditches that are jurisdictional waters of the United States, maintenance is exempted under CWA Section 404(f)(1)(C). The final rule does not change any of the existing statutory exemptions in any way.

Southeast Florida Utility Council (Doc. #11879)

- 6.269 Determining whether a ditch is located wholly in uplands will be based on historical evidence. Historically, almost all of south Florida was wetlands. Large ditches and canals were constructed and used to drain these wetlands and create dry land upon which to build. In fact, the federal government implemented one of the largest flood control and drainage projects in the world, the Central and Southern Florida Flood Control Project, to accomplish this goal. Therefore, regardless of the size, flow or nexus to other navigable waters, it will be near impossible to have any ditches in south Florida excluded from the WOTUS definition because historically, virtually none of south Florida was “uplands”.

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

- 6.270 SEFLUC recommends the EPA revise the Proposed Rule to provide more specific guidance on how to determine if a ditch is jurisdictional. In providing that guidance, the EPA should clarify and provide a specific exemption for ditches that are used to manage stormwater or are part of the Central and Southern Florida Flood Control Project. Furthermore, the EPA should establish a baseline period for the determination of historical uplands. (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule provides an exclusion for stormwater control features constructed to convey, treat or store stormwater that are created in dry land.

Florida Water Environment Association Utility Council (Doc. #12856)

- 6.271 Florida is naturally rich in wetlands, but the State has experienced significant alterations in its wetland and drainage systems, much of which predates the Clean Water Act. Thus identifying “uplands” for the purpose of this rule will likely be a very difficult exercise, fraught with judgment calls. Also, the State cycles between distinct (but temporally inconsistent) wet and dry weather cycles, and it often has a shallow water table. Thus it will likely prove difficult to distinguish between perennial and non-perennial flows in cut ditches. Accordingly, regardless of whether a ditch is part of a local government's essential infrastructure system, the sum result is that EPA and the Army Corps will have

significant discretion to assert that a particular ditch is jurisdictional and subject to the federal regulatory requirements associated with the designation. (...) The FWEA Utility Council questions whether such an expansive assertion of jurisdiction over storm water management and roadside ditches has a basis in the text of the Clean Water Act and further whether the asserted authority will actually create environmental benefits. (p. 3)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The summary response and preamble to the final rule discusses flow regime and methods to document flow regimes.

Duke Energy (Doc. #13029)

- 6.272 On numerous occasions, the agencies have adamantly claimed that the proposed rule is not extending jurisdiction to any new types of waters, including any new types of ditches, and that by including the two exclusions for ditches, is actually narrowing the jurisdictional impact³⁸. Acting Administrator Nancy Stoner specifically stated on a July 16 “Ditch the Myth” webinar that “we are not extending jurisdiction over ditches.” However, the regulatory language in the proposed rule contradicts this statement. The agencies should clarify the regulatory language to ensure it is consistent with the agencies’ intent. (p. 27)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule reduces the number of ditches considered jurisdictional, by for the first time explicitly excluding certain ditches that the agencies have previously generally not considered waters of the United States.

- 6.273 Duke Energy contends that man-made ditches and minor drainage features should not be considered “waters of the United States” and should not be regulated in the same way as natural streams and wetlands. Treating these features as “waters of the United States,” for purposes of all CWA programs is a vast expansion of CWA jurisdiction. (p. 28)

Agency Response: See summary response regarding historical regulation of ditches under the CWA, and the scientific basis. The summary also provides a a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Peabody Energy (Doc. #13560)

- 6.274 Old works are likely jurisdictional under the proposed rule.

Pre-law mining works typically contain numerous construction related depressions that fill with water. Under the proposed rule these features may be deemed jurisdictional. Increased jurisdiction results in increased cost and liability, which will likely prevent or minimize additional mining or re-mining of these areas. Re-mining involves the application of modern reclamation standards that would provide a significant environmental lift to these areas. In Virginia, 80 percent of the surface mining takes place in old works. Deeming these areas jurisdictional does not make sense from a technical or environmental viewpoint. (p. 2)

Agency Response: The commenter did not provide enough information for the agencies to fully respond. However, the final rule does include an exclusion for certain mining pits and depressions incidental to construction or mining. Such features will not be considered waters of the United States, regardless of the time elapsed since they were created. The agencies disagree that these types of features or activities should be categorically excluded from consideration as “waters of the United States.” The agencies support the goals of remining activities but feel it is more appropriate to encourage these activities through streamlined permitting options, such as Nationwide Permits.

National Lime Association (Doc. #14428.1)

- 6.275 NLA also strongly urges the Agencies to support and supplement the final rule with pictorial examples of jurisdictional and non-jurisdictional waters (including examples of ditches, gullies, rills, et cetera) that is referenced by the regulatory text and thereby made a substantive part of the final rule; for example, as an appendix to the final rule once codified. To that end, the Corps’ Guidebook could be used as a model for such an appendix. (p. 13)

Agency Response: Waters of the United States, under either existing regulations or the final rule, are highly variable nationwide due to significant differences in climate, geology, vegetative cover, etc. The agencies believe that the Corps District offices and EPA Regional offices across the country are the most capable entities to provide local knowledge on waters of the United States.

CPS Energy (Doc. #14566)

- 6.276 [W]e request that the Agencies clarify which ditches they intend to regulate by defining tributaries as only the ditches or conveyances that have been modified and manaltered man altered jurisdictional waters. Additionally, we suggest the Agencies provide a definition of uplands to clarify what areas are specifically excluded. (p. 3)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule

Colorado Water Congress Federal Affairs Committee (Doc. #14569)

- 6.277 How will the agencies treat “upland” ditches (or portions of ditches) that happen to have standing water present after rainfall events or due to other natural conditions at such times as irrigation water is not being introduced (should adopt ditch exemption)?

If an exempt ditch eventually takes on wetland characteristics due to the running of water through it, does it become jurisdictional (should clarify that it is not jurisdictional)? (p. 1)

Agency Response: See summary response.

Metropolitan Water District of Southern California (Doc. #14637)

- 6.278 The Agencies should address the issue of abandonment for water-filled depressions created incidental to construction activity.

Some of these depressions may take on wetland characteristics over time. Is there a period of time after which such a depression would become subject to CWA jurisdiction? Metropolitan requests that depressions created incidental to construction activities that might take on wetland characteristics over time, continue to be excluded, regardless of the length of time between evaluation and establishment, and regardless of whether the depression has taken on features that would otherwise make it jurisdictional. (p. 7)

Agency Response: The final rule provides an exemption for water-filled depressions created in dry land incidental to mining or construction activity, and these features remain non-jurisdictional regardless of the time elapsed since they were created.

ERO Resources Corporation (Doc. #14914)

6.279 [I]t is not clear if the proposed rule is using the terms "canal" and "ditch" interchangeably, or if exemption applies only to ditches since the exemption language uses the term "ditch" but not "canal." (p. 19)

Agency Response: The agencies consider the terms “canal” and “ditch” to be synonymous for the purposes of the final rule.

American Public Power Association (Doc. #15008)

6.280 APPA’s members also conduct activities and operations that are likely to cross or impact ephemeral drainages and ditches. For example, municipal utilities often install (and periodically replace) power poles in the sides of ditches alongside roadways. It appears under the proposed rule that the utility will have to apply for the same types of Corps permits as if they were conducting these pole installation and replacement activities in the middle of a navigable river. (p. 6)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Utility Water Act Group (Doc. #15016)

6.281 Congress clearly did not contemplate that many ditches would be jurisdictional as WOTUS. Instead, Congress included “ditch” in the definition of a “point source” subject to permitting under CWA § 402. “[P]oint source” is defined as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well . . . [or] container . . . from which pollutants are or may be discharged.” CWA § 502(14), 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2. If a ditch or any of the other features identified in the definition of “point source” were WOTUS, then the “discharge of a pollutant” definition in CWA § 402, which contemplates discharges from ditches into WOTUS, would make no sense. “[D]ischarge of a pollutant” is defined as “any addition of any pollutant to navigable waters from any point source” CWA § 502(12), 33 U.S.C. § 1362(12). In Congress’ view, “point source” and “navigable waters” (i.e., WOTUS, as defined at CWA § 502(7), 33 U.S.C. § 1362(7)) are separate and distinct types of features. Instead of being regulated as WOTUS, many ditches are already, and appropriately, regulated under the CWA § 402 program as point sources.

Regulation of the ditches as WOTUS therefore would not mark the first time that the ditches were regulated, but it would be a significant duplication of the regulatory burdens, as those features now would be subject to new requirements, like water quality standards. Moreover, now all of the smaller runs and other features that converged into a ditch (e.g., from facility sources like railroad tracks, or fuel piles) would themselves now be point sources (or potentially even WOTUS). (p. 59)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Ditches have been regulated under the CWA as “waters of the United States” since 1977, when the United States Congress acknowledged that ditches could be covered under the CWA by exempting specific activities in ditches from the need to obtain a CWA section 404 permit. By these actions, Congress did not eliminate CWA jurisdiction of these ditches, but rather exempted specified activities taking place in them from the need for a CWA section 404 permit. By contrast, the final rule categorically excludes certain ditches and other features from jurisdiction as waters of the United States. The Technical Support Document Section I provides the legal framework under which a ditch could be considered both a point source and a water of the United States.

Montana-Dakota Utilities Co. (Doc. #15066)

6.282 Ditches (and other conveyances) should not be regulated as Waters of the U.S. Ditches are constructed and used as part of the construction, operation, and maintenance of homes, natural gas pipelines, electric generation facilities, transmission and distribution lines, transportation-related infrastructure, agricultural irrigation, flood control, rural drains and roads, railroad corridors, and mines located across the country. Treating ditches (that are necessary to support Montana-Dakota's use for gas and electric transmission operations) as "waters of the U.S." will be expensive and difficult to demonstrate compliance with the CWA. The agencies should clarify that point sources that are covered by NPDES permits are not waters of the U.S. The agencies should clarify that (1) on-site ditches associated with permitted activities; (2) roadside; and (3) agricultural ditches are not jurisdictional waters of the U.S. (p. 4)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Technical Support Document Section I provides the legal framework under which a ditch could be considered both a point source and a water of the United States.

Colorado River Water Conservation District (Doc. #15070)

6.283 [W]e believe that there is a desperate need for additional clarification on ditches and other man-made conveyance structures.

- Clear and unequivocal recognition is required that the agencies understand that most ditches in the arid West have their origins (points of diversion) in waters of the may, at least initially, traverse some riparian and/or wetland areas. This requisite relationship to waters of the U.S. at the point of diversion should be explicitly as not disqualifying canals and ditches from the intended exclusion.

- Clear definitions are needed for ditches and canals. As described in the proposed rule, it is not clear if the term 'ditch' describes drains or applies exclusively to agricultural irrigation to delivery ditches, nor if such application extends to water conveyance ditches if used, in whole or in part, for non-agricultural purposes. (p. 2-3)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The agencies consider the terms “canal” and “ditch” to be synonymous for the purposes of the final rule.

Northern Colorado Water Conservancy District (Northern Water), Berthoud, Colorado (Doc. #15114)

- 6.284 It is not clear whether the proposed rule is using the terms "canal" and "ditch" interchangeably. The exclusion language refers only to ditches and does not include a reference to canals. (p. 6)

Agency Response: The commenter is correct that the agencies consider the terms “canal” and “ditch” to be synonymous for the purposes of the final rule.

International Brotherhood of Electrical Workers (Doc. #15174)

- 6.285 **Ditches will be considered waters of the U.S.** Ditches are constructed and used as part of the construction, operation, and maintenance of homes, natural gas pipelines, electric generation facilities, transmission and distribution lines, transportation-related infrastructure, agricultural irrigation, flood control, rural drains and roads, railroad corridors, and mines located across the country. Rather than labeling ditches as "waters of the U.S.," the agencies should rely on existing CWA programs which require permits for discharges to navigable waters and storm water management systems rather than labeling ditches themselves as jurisdictional waters. Moreover, the agencies should clarify those point sources that are covered by NPDES permits are not waters of the U.S. The agencies should clarify that on-site ditches associated with permitted activities, roadside ditches, and agricultural ditches are not jurisdictional waters of the U.S. (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The Technical Support Document Section I provides the legal framework under which a ditch could be considered both a point source and a water of the United States.

Aquatic Ecosystem Restoration Foundation (Doc. #15204)

- 6.286 [W]e suggest “waters of the United States” should include all non-farm ditches delineated within the 100-year floodplain. We suggest the Agencies rely upon Flood hazard areas identified by FEMA on the Flood Insurance Rate Map (FIRM) as identified as a Special Flood Hazard Area (SFHA). SFHA are defined as the area that will be inundated by the flood event having a 1-percent chance of being equaled or exceeded in any given year. The 1-percent annual chance flood is also referred to as the base flood or 100-year flood. Compilations of digital geographic information system (GIS) data representing the same

information presented on the FIRMs, and in the Flood Insurance Study (FIS) report are available. This GIS data is designed to provide the user with the ability to determine the flood zone, base flood elevation and the floodway status for any location in the United States. (p. 5-6)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule does not limit jurisdictional determinations for ditches based on the presence or absence of floodplains.

Grand Valley Water Users Association et al. (Doc. #15467)

6.287 It is not clear whether the exemptions for ditches are limited to those used exclusively for agricultural activities. Ditches may have multiple uses and there is no identified reason in the proposed rule why one type of use is exempt and others are not. All ditches should be excluded from jurisdictional water. (p. 3)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule does not change the existing statutory exemptions in any way. The final rule does, however, add new exclusions for certain ditches.

San Luis & Delta-Mendota Water Authority (Doc. #15645)

6.288 The proposed rule is ambiguous enough to allow for ditches and streams running through farms and ranches in lowlands to be listed as "polluted" or "impaired" under the CWA Section 303(d). This ambiguity and the possibility should be eliminated. (p. 3)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. In addition, please note that all statutory exemptions under CWA Section 404(f) remain in effect and unchanged.

Lower Arkansas Valley Water Conservancy District (Doc. #15767)

6.289 The Lower Ark WCD has the following concerns with this approach:

- Canals and ditches are usually parts of managed artificial water delivery systems that are different from perennial rivers and streams. Water flow in most canals and ditches is controlled, many ditches and canals are lined, and vegetation along these systems is frequently managed through methods such as mowing and burning. These are typically part of a "working" infrastructure that would not be there but for "artificial" efforts and that requires periodic maintenance and improvement. As such, most canals and ditches are very different from typical rivers and perennial streams. This difference should be recognized from a jurisdictional standpoint, consistent with Justice Scalia's plurality opinion in *Rapanos*.⁶⁴ That opinion recognized that man-

⁶⁴ See *Rapanos v. United States*, 547 U.S. 715, at 736, n. 7 (2006).

altered, highly artificial and controlled systems may not be jurisdictional notwithstanding the fact that they may perform some of the same ecologic functions as natural tributaries.

- The proposed exclusions are too narrow. Many canals and ditches run for miles. The Fort Lyon Canal in the Lower Ark Valley, for example, is nearly 100 miles long. Under the first proposed exclusion, the potential for these types of structures to cross only uplands, and for the water entering the structures to flow only over uplands, is remote. The same holds true under the second exclusion with respect to the requisite lack of contribution of any flow to downstream waters.
- The proposed rule seems to use the terms "canal" and "ditch" interchangeably. The exclusion language, however, refers only to ditches and does not refer to canals.
- To address these issues, the Lower Ark WCD believes the final rule should expressly exclude man-made and controlled water structures (including ditches and canals) from the definition of "tributary." (p. 2-3)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The summary response and the preamble to the final rule describe the science that shows that man-made or man-altered tributaries or ditches that are part of the tributary system function as tributaries, especially in their capacity to deliver pollutants to downstream traditional navigable waters, interstate waters or the territorial seas. The commenter is correct that the agencies consider the terms "canal" and "ditch" to be synonymous for the purposes of the final rule.

Northern California Association (Doc. #17444)

6.290 The proposed rule would also add a perennial flow requirement for a ditch to be considered -"jurisdictional. Under the proposal, those jurisdictional ditches would be considered to be just like any other tributary" That means they would not only be subject to the CWA's permitting requirements, but they would also be subject to other requirements of the law, including water quality standards, pollution cleanup plans and oil spill prevention measures" There is some question as to whether a ditch that collects agricultural runoff could end up needing a pollution discharge permit for where it flows into navigable waters" The proposed rule is ambiguous enough that there is an uncomfortable possibility that the ditches and streams running through farms and ranches in lowlands could receive closer scrutiny if the rivers and lakes downstream from them rank as "polluted" or "impaired" under the CWA Sec. 303(d).

Lowland or roadside ditches common in rural agricultural areas of the country could be brought under CWA regulation if they are determined to either flow to navigable waters (tributary) or are considered "adjacent" to a "water of the U.S." or have a "significant nexus" to those waters, which would require a specific case-by-case determination by the agencies. These ditches typically do not have perennial flow and should be considered exempt from CWA jurisdiction. If they are not clearly exempted and are considered "waters of the U.S.", more of these ditches will likely fall under federal jurisdiction and certain maintenance activities may require a CWA Section 404 permit. This permitting

process is very expensive and time consuming, creating legal vulnerabilities for small communities and the farms and ranches that are responsible for maintaining these ditches. (p. 9)

Agency Response: The commenter is correct that all provisions of the CWA utilize a single definition for “waters of the United States.” See the summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Neither the proposed rule, nor the final rule would modify the statutory exemptions at CWA Section 404(f) in any way. All statutory exemptions remain in effect and unchanged. In addition, the final rule adds explicit exclusions for certain ditches, and other water features, that will categorically not be considered waters of the United States

Xcel Energy (Doc. #18023)

6.291 [T]he Proposed Rule does not provide guidance on the treatment of multi-use water-supply ditches. The preamble to the Proposed Rule confirms that the exemption for construction or maintenance of irrigation ditches pursuant to the Section 404(f)(1)(A) would remain. However, the Proposed Rule does not clarify the manner in which this exclusion would be applied. The "interpretive rule" that was adopted on March 25, 2014 indicates that in order for discharge of dredged or fill materials in a Waters of the U.S. to be considered "normal farming" activities, then the activities must be implemented in conformance with Natural Resources Conservation Service technical standards. However, neither the Proposed Rule nor the interpretive rule provide any guidance with respect to multi-use ditches. (p. 5)

Agency Response: Neither the proposed rule, nor the final rule would modify the statutory exemptions at CWA Section 404(f) in any way. All statutory exemptions remain in effect and unchanged. The final rule adds explicit exclusions for certain ditches, and other water features, that will categorically not be considered waters of the United States. The Interpretive Rule was withdrawn on January 29, 2015. For a discussion of the Interpretive Rule and issues related to ongoing and normal farming, see summary responses for sections 14.2 and 14.2.3 of the RTC.

6.292 If water supply ditches remain jurisdictional, the agencies should specifically define the thresholds for municipal and industrial ownership. We recommend that the agencies clarify that the agricultural exemption for ditches applies to all ditches in which any portion of the water delivered therein is used for "normal farming" activities. In addition, the agencies should revise the Proposed Rule to clarify that augmentation uses of irrigation ditches qualify as "normal farming" practices. (p. 8)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Neither the proposed rule, nor the final rule would modify the statutory exemptions at CWA Section 404(f) in any way. All statutory exemptions remain in effect and unchanged.

Hull (Doc. #18909)

6.293 The 701.4.3.1 USACE Ditch Guidance states:

Wetland: Occasionally roadway ditches can form wetlands due to the lack of maintenance (aggraded ditch profiles or clogged culverts) or by their design (such as a fade-away ditch line). In these circumstances, hydrology traveling through the ditch has become impeded in such a way that it has resulted in the formation of a jurisdictional wetland. For this characterization to apply to a site, the area of the wetland boundary must extend more than an insignificant amount beyond the configuration of the ditch. Portions of the ditch abutting the wetland should be delineated as part of the wetland. Wetlands formed in this way should be characterized and assessed as wetlands rather than ditches. Sections of ditch flowing into or out of the wetland area should be characterized separately to determine if they are potentially jurisdictional or not. Will this still be the case under the new proposed rule if the ditch does not have an OHWM and perennial flow? (p. 1)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

- 6.294 Within Appendix G of the Army Corps of Engineers Standard Operating Procedures for the Regulatory Program dated October 15, 1999 it states “The preamble to 33 CFR Part 328 states that features excavated from uplands are not considered waters of the United States. For example, a drainage ditch excavated in the uplands, and/or located along a roadway, runway, or railroad that only carries water from upland areas, is not considered jurisdictional, even if it supports hydrophytic vegetation.” Why is this language “even if it supports hydrophytic vegetation” not carried through and explicitly stated in the new proposed rule? I believe to further reduce confusion regarding delineations of drainage ditches as linear wetlands that the statement “even if it supports hydrophytic vegetation” which is found in Appendix G of the Army Corps of Engineers Standard Operating Procedures for the Regulatory Program dated October 15, 1999, be included in paragraph (t)(3) of the proposed rule: “(3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow, even if they support hydrophytic vegetation.” (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Note also that if a ditch meets any one of the criteria to be excluded as waters of the United States, it is excluded even if it otherwise satisfies the terms of paragraphs (a)(1) through (a)(8) of the final rule, which defines “waters of the United States.”

- 6.295 Within the Questions and Answers – Waters of the U.S. Proposal it states under question/answer 19: “Where a ditch is constructed through a wetland or a stream and connects to a navigable water, it will be treated the exact same way it was treated before this proposal” I would prefer clarification as to how it will be treated as I have worked with many USCAE agents and have been directed by them to permit these in different ways from one another. From the terminology used within the supporting documents of this proposed rule, “ditches that do not have the features of tributaries”, it does indeed refer to ditches in terms of streams. If this is correct, will we be adding jurisdictional ditch impacts to the stream impacts of the DOA permits, or will a new line for jurisdictional ditch impacts be added to the permit form? (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Specific administrative matters pursuant to permitting are beyond the scope of this rule.

Pacific Legal Foundation (Doc. #14081)

6.296 In response to the Corps’ assertion that it has jurisdiction over drains and ditches, the plurality stated that the natural definition of “waters,” the Court’s own prior interpretations, the provisions of the statute, and judicial cannons of construction, “all confirm that ‘the waters of the United States’ in § 1362(7) cannot bear the expansive meaning the Corps would give it.” Id. at 731-732.

Moreover, similarly to SWANCC, the plurality stated that the Corps’ regulation of “ditches, channels and conduits” was inconsistent with the congressional objective expressed in the Act to “recognize, preserve and protect the primary responsibilities and rights of States . . . to plan the development and use ... of land and water resources ...” and that such regulation impinged on fundamental States powers and raised significant constitutional questions. Id. at 737-738. The plurality concluded, therefore:

In sum, on its only plausible interpretation, the phrase the “waters of the United States” ... does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps’ expansive interpretation of “the waters of the United States” is thus not “based on a permissible construction of the statute.” [Citing *Chevron*, 467 U.S. at 843].

Id. at 739.

The proposed rule directly conflicts, therefore, with the *Rapanos* plurality. But that is not all. It also conflicts with Justice Kennedy’s opinion.

Although Justice Kennedy presented his “significant nexus” test for determining jurisdictional wetlands, he did not suggest that the same test could or should be applied to determine jurisdictional tributaries. More to the point, Justice Kennedy expressly rejected the agencies’ approach to regulating tributaries described in the proposed rule. According to Justice Kennedy, the Corps in *Rapanos* “deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark...” Id. at 781. This is the same definition found in the proposed rule. But Justice Kennedy observed that the Corps was incapable of consistent identification of the ordinary high water mark, citing a GAO audit, and concluded that “the breadth of this standard--which seems to leave wide room for the regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it--precludes its adoption” as a standard for determining jurisdictional waters. Id. Inexplicably, the proposed rule adopts the very definition of tributaries Justice Kennedy determined the Act precludes.

The simple fact is that the agencies’ unrestrained definition of covered tributaries has already been rejected by a majority on the Supreme Court in *Rapanos*. The proposed rule should, therefore, be amended to reflect this fact. The *Rapanos* plurality has even suggested such an amendment:

Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from “navigable waters,” by including them in the definition of “‘point source.’” The Act defines “‘point source’” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). It also defines “‘discharge of a pollutant’” as “any addition of any pollutant to navigable waters from any point source.” § 1362(12)(A) (emphasis added). The definitions thus conceive of “point sources” and “navigable waters” as separate and distinct categories. The definition of “discharge” would make little sense if the two categories were significantly overlapping. The separate classification of “ditch[es], channel[s], and conduit[s]”—which are terms ordinarily used to describe the watercourses through which intermittent waters typically flow—shows that these are, by and large, not “waters of the United States.”

Id. at 735-736. (p. 6-7)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The Technical Support Document Section I provides the legal framework under which a ditch could be considered both a point source and a water of the United States.

The Association of State Wetland Managers (Doc. #14131)

6.297 ASWM member states have reported widespread concern and uncertainty regarding the distinctions among unregulated or “upland” ditches, regulated tributaries, and activities that are (currently) exempted in ditches or tributaries. We strongly recommend additional clarification of these distinctions in the final rule and associated implementing guidance.

Primary concerns reported to ASWM include the following, many of which have been expressed by transportation and other public works agencies:

- On the ground interpretation of “upland areas” and “perennial flow” are critical, but will likely be problematic; seasonal and meteorological conditions will affect the determinations made by reviewers. The review of soils and hydrologic conditions on a given date may not be definitive. Following publication of the final rule, additional indicators will need to be developed on a regional basis, taking into account the structure, appearance, and landscape position of a “ditch”.
- Roadside ditches are often constructed to promptly remove water from the road surface. Where such ditches are not a natural part of a stream system, there is concern that they may be regulated if water routinely flows in the ditch following storm events. However roads are linear features that cut across wetlands, streams and other aquatic resources and sometimes roadside ditches become part of the overall stream system either through design or by accident. Guidance is needed to clarify how to evaluate roadside ditches following publication of a final rule.
- The phrase, “Ditches that do not contribute flow...” in the list of non-jurisdictional waters has raised the concern that channels that convey any amount of flow

following storm events will be considered regulated. During final rulemaking, some exclusion for insignificant or de minimis flow should be considered.

- Terms such as "gullies," "rills" and "arroyos" that are used in the list of non-jurisdictional waters lack a precise scientific definition. These terms may have variable meanings locally and regionally; therefore, it is suggested that such terms be removed from the preamble to the final rule.
- ASWM encourages adoption of technical and field methods developed by states and tribes, where consistent with CWA definitions and requirements. Methods that have already been proven to be efficient and accurate in a given region - e.g. use of regional soil attributes, geometry and configuration, types of available mapping, etc. should be used to support both state and federal jurisdictional decisions to avoid duplication of effort and added cost.

We generally concur with the comments made by the Association of Clean Water Administrators (ACWA) regarding this issue (p. 6-7)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule, and a discussion of erosional features excluded in the rule. The summary also includes a general discussion of rule implementation. The agencies believe that the Corps District offices and EPA Regional offices across the country are the most capable entities to provide local knowledge on waters of the United States, as well as those features excluded as waters of the United States in the final rule.

Center for Regulatory Reasonableness (Doc. #14416)

6.298 The proposed rule intends to include most ditches in the definition of waters of the US:

Ditches created by altering natural waters would be considered "waters of the United States," so long as they contribute flow to another jurisdictional water. Ditches may have been created for a number of purposes, such as irrigation, water management or treatment, and roadside drains.⁶⁵

By design, many ditches are dry for the majority of time and convey water only as a result of precipitation runoff. Accordingly, these ditches will oftentimes contain no water and seldom, if ever, support aquatic life. Others, in lower lying areas, will pool water without flowing to a larger more permanent water body.

- How will the Agency apply water quality criteria in ditches which flow only during and immediately following precipitation events or pool water but remain disconnected?
- EPA's 2013 ammonia criteria are based on the presence of mussels in streams and indicated that such organisms exist in almost all 50 states. Will mussel surveys be required for ditches and other ephemeral waters to avoid application of these criteria under 40 CFR 122.44(d) and Section 303(d) of the Act?

⁶⁵ Federal Register /Vol. 79, No. 76 /Monday, April 21, 2014, Proposed Rules pg. 22203.

- Will EPA's chloride criteria apply to the newly designated waters thereby requiring restrictions to the application of road salt which may be expected to run into such ditches when it rains or snow melts?
- How will EPA nutrient criteria for phosphorus apply to such waters? Will EPA require that no excessive plant growth occur in ditches?
- Ditches may contain some sort of "aquatic" life for a short period (e.g., insects that require water to spawn). Does EPA consider the presence of such "aquatic life" to be an "existing use" which requires protection under federal antidegradation provisions? (p. 5)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Only those ditches that meet the definition of “tributary” in the final rule and are not excluded under any of the provisions in paragraph (b) would be waters of the United States.

This rule does not change the implementation of regulations which cover “waters of the United States,” and the implementation of those regulations is outside the scope of this rule. If a water does not meet the definition of “water of the United States” water quality standards will not apply. States may take a variety of approaches for establishing designated uses and corresponding protective criteria for jurisdictional ditches. It is typical for states to manage ditches such that excessive macrophyte plant growth does not impede drainage or flow through ditches, and the final rule does not affect the existing statutory exemptions for maintenance of existing irrigation and drainage ditches under 404(f)(1)(C) of the CWA.

Texas Wildlife Federation (Doc. #15020)

- 6.299 We recognize the need to clearly exclude certain ditches and other water features that are excavated from dry land and that do not contribute flow to downstream waters. However, we strongly urge the agencies to finalize a “waters of the U.S.” rule that protects our existing headwaters, streams, ponds, and wetlands from pollution, drainage and channelization associated with ditches and mechanized ditching activity. (p. 24)

Agency Response: The agencies believe that the final rule is practical to understand and implement and protects those waters that significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters or the territorial seas. Please see the summary response, as well as the preamble to the final rule, for additional clarification.

Center for Rural Affairs (Doc. #15029)

- 6.300 While we welcome the clarity regarding excluded ditches, certain key definitions are missing in this section. First and foremost, the rule fails to define ditch. One of the most contentious points of this proposed rule has been a lack of clarity surrounding regulation of agricultural drainage ditches. While it may seem unnecessary to explicitly define something as basic as a ditch, given the concern surrounding the ambiguity of the proposed rule it would be better for the agencies to err on the side of clarity. Therefore,

we recommend the following definition of ditch informed by multiple state-level wetland regulations:

The term ditch means a water conveyance channel with bed and banks of human construction. This does not include channelized, redirected, or otherwise manipulated natural water courses.

The terms upland and perennial flow are key to determining exemptions for certain ditches in section (b) discussed above. The preamble to the proposed rule as well as the EPA's Question and Answer document (from September 8, 2014) address these concepts, but the rule does not provide clear definitions to either term. "Upland" should be defined as any area that is not a wetland, stream, lake, or other water body, and clarify that uplands can be located in floodplains and that these areas are not jurisdictional.

Defining perennial flow is also essential to achieve the proposed rule's goal of providing greater clarity to the regulated community. The preamble states that perennial flow is characterized by the presence of flow yearround when rainfall is normal or above normal. This language should be codified as a definition in the proposed rule.

Recommendation: Codify definitions addressed in the preamble and Question and Answer document for upland and perennial flow and develop a clear definition for ditch in section (c) of the proposed rule. (p. 7-8)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The summary response, as well as the preamble to the final rule, provides clarification of the terms and intent of the final rule itself.

Natural Resources Defense Council et al. (Doc. #15437)

- 6.301 The agencies concede that many ditches can function as tributaries. "Ditches" are listed in the proposal's definition of "tributary": "A tributary, including wetlands, can be a natural, man-altered, or *man-made* water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and *ditches* not excluded in paragraph (t)(3) or (4) of this section" (emphasis added). The Federal Register notice further states: "Other ditches not excluded under paragraphs (b)(3) or (b)(4), if they meet the new proposed definition of 'tributary,' would continue to be 'waters of the United States,' as they have been under the longstanding implementation of the statute and regulations by the agencies."⁶⁶ And, in discussing the importance of allowing for man-made tributaries to be protected as such, the agencies state:

Natural, man-altered, and manmade tributaries provide many of the same functions, especially as conduits for the movement of water and pollutants to other tributaries or directly to traditional navigable waters, interstate waters, or the territorial seas. The

⁶⁶ Fed. Reg. at 22,219.

discharge of a pollutant into a tributary generally has the same effect downstream whether the tributary waterway is natural or manmade.⁶⁷

A ditch would meet the definition of “tributary” if it has a bed and banks and an ordinary high water mark, and if it contributes flow to a traditionally jurisdictional water. Indeed, the agencies note in the excerpt above that some ditches may “connect to another ‘water of the United States.’” In fact, if an upland ditch never functioned as a tributary by contributing flow to a water of the U.S., then the upland ditch exemption would not even be necessary; there is already another exemption in the proposal for ditches that do not contribute flow. Thus, the inclusion of the upland ditches exemption in the proposal is an admission that some upland ditches do contribute flow and can function as tributaries.

The Connectivity Report does not distinguish between natural and manmade tributaries (i.e., between natural streams and ditches). The Report defines rivers and streams as flowing water “within a visible channel,” in turn defining “channels” as “natural or constructed passageways or depressions of perceptible linear extent that convey water and associated materials downgradient.”⁶⁸ And throughout the Report’s discussion of the ecological functions of tributaries, the distinction between natural and manmade channels is never mentioned. In other words, a tributary is a tributary from a functional perspective. When a ditch functions as a tributary, it should be regulated as such. (p. 57-58)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The agencies believe that the final rule is practical to understand and implement and protects those waters that significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters or the territorial seas.

Waterkeeper Alliance et al. (Doc. #16413)

- 6.302 Simply adding a common definition of ditches will not resolve the concern with the categorical exemption because it is often difficult or impossible to determine whether a “ditch” is a natural waterway or a man-made waterway, and the answer to the question is legally and scientifically irrelevant in any event because both can have significant impacts on water quality.⁶⁹ Ditches on agricultural lands “result in rapid removal of excess water over a relatively short time period. This water flowing over the land surface has relatively high energy sufficient to detach and transport soil particles and constituents

⁶⁷ Fed. Reg. at 22,202. Indeed, when discussing why the proposal treats manmade tributaries as ditches in certain circumstances, the agencies explain that these features have numerous and significant impacts on downstream waters, some of which are magnified by the fact that they are ditches. See id. at 22,206 (“Due to the often straightened and channelized nature of ditches, these tributaries quickly move water downstream to (a)(1) through (a)(3) waters. Ditches and canals, like other tributaries, export sediment, nutrients, and other materials downstream. Due to their often channelized nature, ditches are very effective at transporting water and these materials, including nitrogen, downstream.”). The agencies point to no evidence in this discussion that upland ditches that flow less than perennially do not have similar impacts.

⁶⁸ Connectivity Report at 3-1, 3-2, A-3 (emphasis added).

⁶⁹ USGS, North Carolina Water Science Center, Artificial Drainage, available at http://nc.water.usgs.gov/projects/Tile_drains/index.html.

attached to them, such as phosphorus, organic nitrogen, and many pesticides."⁷⁰ Ditching and channelization are prevalent in the Chesapeake Bay watershed, and "[d]itching on agricultural lands in the Pocomoke River watershed is an extensive practice that has been used to drain wetlands", which have been found to be a significant source of sediment loading to the watershed."⁷¹ A significant percentage of stream miles within the coastal plain of North Carolina are modified natural stream channels and ditches. According to the North Carolina Department of Environment and Natural Resources, "[i]t may be difficult to differentiate between an artificial feature (e.g. ditch or canal) and a natural stream that has been modified (e.g. straightened or relocated)."⁷² In North Carolina, many swine concentrated animal feed operations ("CAFOs") are located "in an area of the coastal plain where the groundwater table is high which requires ditching or tile drain in order to allow for crop harvesting and waste application. These are direct conveyances for the highly nutrient laden water to reach surface waters. These operations are having a significant negative impact on the Neuse River water quality."⁷³ Without regulatory oversight over these waters that feed North Carolina's rivers and coastal estuaries, we are likely to be unable to restore water quality and fisheries that are severely impaired by pathogens, nitrogen and phosphorus. (p. 36-37)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The preamble to the final rule also states clearly that nothing in the rule prevents individual States from implementing regulatory programs to safeguard water resources that are more stringent than federal regulations under the CWA.

Texas Wildlife Association (Doc. #12251)

6.303 Additional uncertainty is created by:

- creating exemptions for certain ditches, but making the exemptions so narrow that few ditches can meet the criteria (p. 3)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

⁷⁰ Gilliam, I.W., D.L. Osmond, and R.O. Evans. 1997. Selected Agricultural Best Management Practices to Control Nitrogen in the Neuse River Basin. North Carolina Agricultural Research Service Technical Bulletin 311, North Carolina State University, Raleigh, NC.

⁷¹ A. Gellis, et al., Identifying Sources of Fine-Grained Suspended-Sediment for the Pocomoke River, An Eastern Shore Tributary to the Chesapeake Bay, Proceedings of the Eighth Federal Interagency Sedimentation Conference (8thFISC), April 2-6, 2006, Reno, NV, USA, available at http://pubs.usgs.gov/misc/FISC_1947-2006/pdf/1st-7thFISCs-CD/8thFISC/Session%20C-1_Gellis.pdf.

⁷² North Carolina Division of Water Quality, Identification Methods for the Origins of Intermittent and Perennial streams, Version 4.11 (NCDENR 2010), available at http://www.xerces.org/wpcontent/uploads/2009/03/NC_2010_Methodology_identification_intermittent_perennial_streams.pdf.

⁷³ North Carolina Department of Environment and Natural Resources, Division of Water, Neuse River Basin, Water Quality Plans, Cycle 4 - July 2009, at p. 360, available at <http://portal.ncdenr.org/web/wg/ps/bpu/basin/neuse>. See also, USGS, Scientific Investigations Report 2004-5123, Ionic Composition and Nitrate in Drainage Water From Fields Fertilized with Different Nitrogen Sources, Middle Swamp Watershed, North Carolina, August 2000 - August 2001 (2004), available at <http://pubs.usgs.gov/sir/2004/5123>.

- 6.304 Rather than labeling ditches as "waters of the U.S.," the agencies should rely on existing CWA programs which require permits for discharges to navigable waters and stormwater management systems rather than labeling ditches themselves as jurisdictional waters. Moreover, the agencies should clarify that point sources that are covered by NPDES permits are not waters of the U.S. The agencies should clarify that (1) on-site ditches associated with permitted activities; (2) roadside; and (3) agricultural ditches are not jurisdictional waters of the U.S. (p. 5)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The Technical Support Document Section I provides the legal framework under which a ditch could be considered both a point source and a water of the United States.

Citizens Campaign for the Environment (Doc. #14967)

- 6.305 While the proposal covers waters that have historically been covered by the Clean Water Act, it does not extend this coverage to new types of waters that have not historically been under the Act's jurisdiction, such as groundwater. This means that the rule does not expand coverage to any new ditches. In fact, upland drainage ditches with less than perennial water flow are explicitly excluded. The rule also does not cover any artificial lakes, ponds, and artificial ornamental waters in upland areas or water-filled depressions created as a result of construction activity. These areas are explicitly exempted by the rule. (p. 2)

Agency Response: The commenter is correct that under the final rule, ditches with less than perennial flow are excluded as waters of the United States, unless they are a relocated tributary or are excavated in a tributary, or are an intermittent ditch that drains wetlands. The final rule does not distinguish between roadside ditches and other ditches.

Anacostia Riverkeeper et al. (Doc. #15375)

- 6.306 With respect to ditches, EPA should refer to individual SAB member comments on this topic. Many commenters rightly point out that ditches, whether (where the ditch drains a publicly maintained road), and ditches with ephemeral flow (or less) not constructed in upland or some other type of landscape, can be significant sources of pollutants to downstream waters. See Members Comments, Allan at 14 (mentioning in particular, the delivery of significant nutrient pollutants to Lake Erie); Harvey at 22; Kolm at 49 and 50; and Rodewald at 78. During periods of snow-melt or significant rains, the amount of flow and pollutants they can carry can be very significant. Moreover, many ditches, including those in uplands, originally were developed as agricultural drainage are now used by stormwater managers in urbanizing areas. See e.g., Maryland Public Drainage http://mda.maryland.gov/resource_conservation/Pages/pda_pwa.aspx. As a result, those ditches are significant conduits for pollution and must be recognized as such. A municipality's discharge of stormwater to those ditches should not escape attention under the Clean Water Act. (p. 11)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Healthy Lakes Healthy Lives (Doc. #16368)

6.307 While the proposal covers waters that have historically been covered by the Clean Water Act, it does not extend this coverage to new types of waters that have not historically been under the Act's jurisdiction, such as groundwater. This means that the rule does not expand coverage to any new ditches. In fact, upland drainage ditches with less than perennial water flow are explicitly excluded. The rule also does not cover any artificial lakes, ponds, and artificial ornamental waters in upland areas or water-filled depressions created as excavated in a result of construction activity. These areas are explicitly exempted by the rule. For the sake of clarity, the rule also restates that agricultural practices are exempt under current law. The most common farming and ranching practices, including plowing, cultivating, seeding, minor drainage, harvesting for the production of food, fiber and forest products, are exempt under the CWA and that exemption is reiterated in the proposal. (p. 3-4)

Agency Response: The commenter is correct that the final rule does not expand CWA jurisdiction to groundwater, nor does the final rule alter existing statutory exemptions for normal farming, silviculture and ranching activities.

Upper Mississippi, Illinois, & Missouri Rivers Association (Doc. #19563)

6.308 The inclusion of ditches constitutes an impermissible expansion of jurisdiction.

Although the Proposed Rule would exclude two types of ditches from CWA jurisdiction,⁷⁴ ditches that do not meet the criteria for exclusion could be considered waters of the United States. The proposed definition of "tributary" could be interpreted to include man-made waters with artificial features, such as drainage ditches or artificial ponds. Also, ditches with perennial flow are not covered by the exemption, but it is not clear what the agencies believe is meant by "perennial flow."

The agencies seem to suggest that the exclusions from jurisdiction in the Proposed Rule show restraint. However, the narrowness of the exclusions only serve to demonstrate how broadly the Proposed Rule applies. This is especially apparent with respect to the two exemptions for ditches. The agencies exclude from jurisdiction those ditches that "are excavated wholly in uplands, drain only uplands, and have less than perennial flow," and those that "do not contribute flow, either directly or through another water," to various other categories of jurisdictional waters.⁷⁵ Those exclusions are categorical, but the categories are tiny. Water flows downhill; the water in an upland ditch is no exception. Further, even if the ditch drains to a feature that generally contains water in an upland area, such that it does not typically affect downstream waters, the agencies' "fill and spill" theory⁷⁶ means jurisdiction can be found on the basis of periodic overflow. How many ditches have the agencies identified that never, under any circumstances, contribute any amount of flow to downstream waters or wetlands?

⁷⁴ 79 Fed. Reg. at 22,263.

⁷⁵ 79 Fed. Reg. at 22,263.

⁷⁶ 79 Fed. Reg. at 22,208.

A reasonable reading of the Proposed Rule would lead to the conclusion that the very drainage ditches considered in *Rapanos*—the same ones, according to the court, that the agencies improperly brought within CWA jurisdiction—are jurisdictional. However, Justice Kennedy indicated that a ditch ought not to be jurisdictional where it is "located many miles from any navigable-in-fact water and carry only insubstantial flow towards it."⁷⁷ (p. 9-10)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The preamble and the Technical Support Document provide greater detail into the technical and legal underpinnings of the final rule.

Patrick E. Murphy, Member of Congress, Congress of the United States, House of Representatives (Doc. #15371.1)

6.309 **The Proposed Rule Will Subject Most Farm Ditches in Florida to Federal Regulation**

For decades, the Corps and EPA have stated that, as a general matter, they do not consider ditches to be “waters of the United States” subject to Clean Water Act regulation

- The ditch exclusions in the Proposed Rule will not exclude most farm ditches in Florida
 - The first proposed exclusion for “ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow” will not apply to most Florida farm ditches, which were excavated many years ago to drain areas for farming, and which are commonly wet year round due to our flat topography
 - The second proposed exclusion for “ditches that do not contribute flow, either directly or through another water, to a water [subject to Clean Water Act jurisdiction]” will not apply to most interconnected farm drainage systems in Florida
- Since drainage ditches crisscross most farmlands in Florida, this means that a federal Clean Water Act permit will be required for work on most Florida farms. (p. 1)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The agencies do not believe that the final rule will result in any additional regulatory burden on farmers or ranchers. See summary response in section 14.2.3 of the RTC regarding issues related to ongoing and normal farming.

Jason Smith, House of Representative, Congress of the United States (Doc. #17454)

6.310 WHEREAS, the draft rule provides that common road ditches and stormwater channels in this community, while non-navigable and only carry water on an intermittent basis, are

⁷⁷ *Rapanos*, 547 U.S. at 786

likely to be subject to the full range of federal oversight and regulation as though they were year-round naturally flowing streams or rivers with a developed eco-system; and

WHEREAS, the expansion of federal control over local activities within normally dry, man-made ground structures would significantly impact routine maintenance and repair of municipal infrastructure, including installation of traffic control and street signs, removal of storm debris, and even the removal of vegetation by mowing, and [...]

The City of Perryville opposes provisions contained in this rulemaking which unreasonably, and unnecessarily, restrict the ability of the City to maintain its roadside ditches and stormwater channels in order to protect the life, health, safety, property, and general welfare of its citizens and by virtue of this resolution forwards their objections to both federal agencies as part of the rulemaking process. (p. 3)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. All existing exemptions for the maintenance of drainage ditches remain in place and unaffected by the final rule. In fact, most ditches, including roadside ditches, are for the first time excluded as waters of the United States in the final rule. Finally, the final rule also explicitly excludes stormwater control features constructed to convey, treat or store stormwater that are created in dry land.

Ed Permuter and Mike Coffman, Member of Congress, Congress of the United State (Doc. #17456)

- 6.311 Colorado has a unique environment where waters must be regulated in a manner that responsibly protects its ecosystems. Of particular concern in the draft rulemaking is the exemption for certain ditches. The proposal includes an exemption for "upland ditches" with less than perennial flow. According to conversations with both the EPA and the Corps, traditional stormwater and roadside ditches should fall into this definition to be excluded from WOTUS, but after consulting with the State of Colorado and local stakeholders this is not explicitly stated in the draft rule. The term "upland ditches" is not a term of art which could be widely understood. As such, clarity is needed to ensure the intent of the exemption is properly interpreted. This exemption is critical to our state to ensure the protection of Colorado's water and to provide the certainty necessary for landowners. (p. 1)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Ditches, including roadside ditches, not otherwise excluded under paragraph (b) of the final rule must meet the definition of "tributary" in order to be a water of the United States. In addition, the final rule explicitly excludes stormwater control features constructed to convey, treat or store stormwater that are created in dry land.

Grace F. Napolitano, Ranking Member, Subcommittee on Water and Power, United States House of Representatives (Doc. #17474)

- 6.312 How, if at all, will the Clean Water Act (CWA) jurisdiction of upland drainage ditches with less than perennial flow be addressed under the proposed rule? How is this different from current practice authorized under the 2008 guidance? (p. 1)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

- 6.313 Does the proposed rule categorically assert CWA jurisdiction over all ditches "that ever carry any amount of water that eventually flows to navigable water?" If the proposed rule were to be finalized as currently drafted, would any category of ditches that are currently NOT covered by the 2008 guidance likely to be considered jurisdictional? Would the proposed rule change the jurisdiction of any category of ditches from the 2008 guidance? (p. 2)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule reduces the number of ditches considered jurisdictional, by for the first time explicitly excluding certain ditches that the agencies have previously generally not considered waters of the United States.

Whitman, Requardt & Associates, LLP (Doc. #1330)

- 6.314 The initial clarifications provided by the rulemaking will reduce confusion in the field, but I feel that more detail guidance should be developed. The terms "OWH" and "Bed and bank" can have widely varying interpretations in the field, and if more information could be developed to help guide field determination, there would be much less confusion, delays, and conflicts in the regulation of ditches. COE staff claim that the loose definitions allow for "flexibility", but in our experience it generates confusion. It's difficult to correctly delineate all jurisdictional tributaries on a project, if the definition of jurisdiction varies from regulator to regulator. Consistency is more important than Flexibility. (p. 1)

Agency Response: As discussed in the preamble, the final rule clarifies that the Corps' existing definition of ordinary high water mark (OHWM) is incorporated without change into EPA regulations, thus ensuring consistency between the agencies. In addition, the preamble also notes existing Corps field manuals for identifying OHWM. Finally, the preamble also provides a definition of bed and banks as it pertains to the final rule.

State of Iowa (Doc. #8377)

- 6.315 **Maintenance of ditches.** Ditch maintenance remains exempt in the proposed rule. We support this exemption due to the significant and on-going volume of ditch maintenance performed in Iowa each year. (p. 9)

Agency Response: See summary response regarding statutory exemptions under the Clean Water Act, which remain unchanged in this rule.

National Sustainable Agriculture Coalition (Doc. #16357.2)

- 6.316 The proposed rule would categorically regulate as “tributaries” virtually all ditches that ever carry any amount of water that eventually flows (over any distance and through any number of other ditches) to a navigable water. (p. 6)

Agency Response: See summary response regarding the jurisdiction of ditches as tributaries.

Metropolitan Water District of Southern California (Doc. #14637)

- 6.317 The Agencies should clarify the historical timeframe for assessing whether a ditch is in an upland.

For ditches excavated many years ago, before enactment of the CWA, the land around them may have changed over time. Metropolitan requests clarification on the timeframe that would be used to determine jurisdiction for ditches excavated in such conditions. For instance, if a ditch once crossed a water of the U.S. which no longer exists (that is, it was not excavated in an upland but it no longer crosses a water of the U.S.), which point in time should be used to determine jurisdiction? Will it be necessary to research whether a ditch actually crossed any waters at the time it was excavated, or would it be sufficient to use the current environmental setting for making this determination? Metropolitan requests that the current environmental setting be used to assess jurisdiction.

The Agencies should clarify what the phrase "ditches that drain only uplands" means for the arid west.

The term "upland" is not defined in the proposed rule, which adds uncertainty as to how to interpret the phrase "ditches that drain only to uplands." In addition, during large, infrequent storm events in the arid west, ditches could overflow, resulting in spillage into nearby ditches or other features that capture runoff from upstream wetlands during infrequent extreme storm events. Given these issues, Metropolitan would like to respond to the Agencies' question as to what type of flow regime should be used as a threshold for this ditch exclusion. Metropolitan requests that the flow regime in such ditches be less than perennial flow, to take into account precipitation regimes in the southwest and arid west. In addition, the Agencies should clarify that these types of ditches are still considered to be excluded in the proposed rule, even if there might be a shallow groundwater connection to other jurisdictional waters. (p. 15)

Agency Response: See summary response for a discussion of the revised exclusions for ditches in the final rule.

Airports Council International - North America (Doc. #16370)

- 6.318 How would ditch discharges that are pumped over levees be handled? If they have wet wells, would that be considered treatment? (p. 6)

Agency Response: See summary response. Many ditches are excluded from regulation as "waters of the U.S." under this rule; however such ditches may, nonetheless, be point source discharges and subject to regulation under the NPDES

program. The commenter did not provide enough information for the agencies to respond further to these scenarios.

6.1. FLOW

Agencies' Summary Response

As summarized previously in this response, ditches with certain flow regimes have historically been regulated under the Clean Water Act, and their regulation as tributaries is consistent with the conclusions of the Science Report regarding the connectivity and significant nexus of tributaries, including ditches, to downstream jurisdictional waters. In addition, the conclusion that tributaries, including ditches, in combination with other similarly situated tributaries in the watershed, have a significant nexus to downstream jurisdictional waters is consistent with the plurality opinion and Justice Kennedy's opinion for the *Rapanos* case. The agencies have therefore determined that when ditches meet the definition of tributary and contribute flow to a traditional navigable water, interstate water or the territorial seas, they have a significant nexus to the above referenced downstream waters and are themselves jurisdictional waters of the United States. Nonetheless, in order to codify longstanding policy of the agencies, the rule excludes certain ditches from being waters of the United States. The rule also leaves all existing statutory and regulatory exemptions for certain activities in ditches unchanged.

Flow has specifically been a consideration for determining the jurisdiction of ditches since the issuance of the 2008 *Rapanos* guidance, in which the agencies stated they generally would not assert jurisdiction over "[d]itches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water." The guidance further described waters with *relatively permanent flow* as "typically (e.g., except due to drought) flow[ing] year-round or waters that have a continuous flow at least seasonally (e.g., typically three months)." Thus, since 2008, the agencies have regulated at least some ditches that have a continuous flow for at least three months and were shown to have a significant nexus to downstream waters.

In the proposed rule, the agencies specifically identified two types of ditches that would be excluded as waters of the United States: (b)(3) ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow; and (b)(4) ditches that do not contribute flow, either directly or through another water, to a traditionally navigable water, interstate water, territorial sea or impoundment. The agencies sought comment on these exclusions, and specifically on the appropriate flow regime for an excluded ditch excavated wholly in uplands and draining only uplands.

Summary of public comments:

- Many commenters recommended that the flow regime "less than perennial" is the most appropriate standard for the excluded ditches in (b)(3) of the proposal.

- Many commenters stated that perennial flow is the flow regime that is the simplest to understand and document. Others requested a more specific definition of “perennial flow” and a more thorough explanation of the agencies’ use of the term.
- Several commenters requested that definitions of one or more of the flow regimes referenced in the exclusions be provided in the final rule.
- Some commenters requested clarification on whether the presence of standing or pooled water year-round in a ditch constitutes perennial flow.
- Some commenters felt that the exclusion for ditches in the proposed rule was too narrow because even ditches that are constructed in uplands and drain only uplands, and have less than perennial flow most often still contribute flow, either directly or indirectly, to a traditionally navigable water, interstate water, territorial seas or impoundment. Therefore, they stated that almost no ditches would be excluded from jurisdiction, greatly expanding regulation of ditches.
- A few commenters questioned the agencies’ legal ability to assert jurisdiction over ditches as tributaries.
- A number of commenters requested that the agencies clarify the differences between jurisdictional ephemeral streams and non-jurisdictional ephemeral features such as ephemeral ditches, gullies, rills, and non-wetland swales. Some requested definitions for one or more of these terms.
- Several commenters stated that ditches should not be treated differently than other tributaries for the purpose of jurisdiction because there is no scientific rationale to do so, and excluding ditches could further impair water quality in downstream waters. Some stated that if the agencies continue to exclude ditches, they should only exclude ephemeral ditches or those that contribute de minimis flow downstream.

Although most ditches function as part of the tributary system, the agencies have provided exclusions for certain ditches by rule for the first time, which were previously only addressed in preamble or guidance. In response to comments, the agencies have revised the exclusions for ditches in the proposed rule to provide greater clarity, including removal of the term “upland” and revisions to the minimum flow requirements. The revised ditch exclusion language in the final rule states that the following are not “Waters of the United States”: “(A) Ephemeral ditches that are not a relocated tributary or excavated in a tributary; (B) Intermittent ditches that are not a relocated tributary, excavated in a tributary, or drain wetlands; (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (a)(3) of this [rule].” A ditch that meets any one of these three conditions is not a water of the United States. Thus, a ditch that contributes flow under (C) would be exempt if it met the exclusion under (A) or (B). This responds to many commenters’ concerns that the proposed exclusion for ditches would be narrowly applied and would result in regulation of most ditches, based on contribution of flow to downstream waters. Further, the final rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(1) through (a)(8) of the rule.

The definition of “tributary” in the final rule retains the phrase “contributes flow, either directly or through another water.” This reflects scientific literature summarized in the Science Report, as well as in the rule preamble and Technical Support Document, about the connectivity among waters. The dendritic nature of the tributary system would make it virtually impossible to protect

the integrity of traditional navigable waters, interstate waters, or territorial seas if only the tributaries that flowed directly into those waters were jurisdictional waters of the United States. Science also supports the agencies' conclusion that ditches that are part of the tributary system provide connectivity and have a significant nexus to traditional navigable waters, interstate waters, or territorial seas.

The final rule does not require that the flow be contributed either directly or through waters that are themselves jurisdictional. For the reasons discussed above, and explored in further detail in the final rule preamble and Technical Support Document, waters contributed through non-jurisdictional features can have the same impact on the integrity of downstream waters as water contributed through jurisdictional waters. Note that a non-jurisdictional feature contributing a tributary's flow does not itself become jurisdictional as a result.

Many commenters requested that the exclusion for ditches include a minimum flow regime of perennial flow for jurisdiction, or that all man-made ditches and other man-made features be excluded entirely. In contrast, other commenters requested that the exclusion apply only to ephemeral ditches, or that exclusions for ditches be eliminated from the rule entirely. As stated in the summary above, the agencies recognize that ditches provide similar functions as other tributaries, and contribute water, sediment, nutrients, and other pollutants to downstream waters. However, in this rule the agencies codified the longstanding policy that certain ditches are not waters of the U.S. and believe the exclusions in the rule are generally consistent with the 1986 and 1988 preambles and 2008 *Rapanos* guidance. Taking into account the science, the CWA, relevant case law, stakeholder concerns, and the need for consistency and clarity regarding ditch jurisdiction, the agencies determined that ephemeral ditches should not generally be regulated as waters of the U.S. In addition, ditches with intermittent flow are excluded, except where they relocate or are excavated in a tributary or drain wetlands. These two exclusions will remove many roadside ditches from regulation. However, all ditches that relocate a natural tributary or are excavated in a tributary remain jurisdictional as tributaries under the rule, regardless of their flow regime.

Section IV(I) of the preamble of the final rule describes non-jurisdictional geographic features, such as excluded ditches, that may nonetheless serve as a hydrologic connection that the agencies would consider under a case-specific significant nexus analysis under paragraphs (a)(7) and (a)(8). While the non-jurisdictional feature itself will always be excluded from jurisdiction, the connection it provides between an adjacent wetland and a water of the United States is relevant for determining whether the wetland has a significant nexus to downstream traditional navigable waters, interstate waters, or the territorial seas.

Definitions for perennial, intermittent, and ephemeral flow are provided as follows in the preamble to the final rule, providing further clarity to the two exclusions for ditches which are based on minimum flow requirements. Longstanding agencies' practice considers perennial streams as those with flowing water year-round during a typical year, with groundwater or contributions of flow from higher in the stream or river network as primary sources of water for stream flow. Intermittent streams are those that have both precipitation and groundwater providing part of the stream's flow, and flow continuously only during certain times of the year (*e.g.*, during certain seasons such as the rainy season). Ephemeral streams have flowing water

only in response to precipitation events in a typical year, and are always above the water table. Precipitation can include rainfall as well as snowmelt. Several commenters confirmed the agencies' view that determination of these flow regimes are clear and implementable. In the absence or presence of flow at a given point in time, there are additional physical and biological field indicators that may be used to help determine the flow regime of a particular ditch.

Ditches excavated in low lying areas can intercept the shallow water table and consequently fill with groundwater. Just as stream baseflow, springs, seeps, and other surface expressions of groundwater can be jurisdictional waters of the United States, water standing in a ditch that intercepts the shallow water table may also be a jurisdictional water of the United States. The water level in the ditch may rise or fall solely in response to fluctuations in the water table with seasonal changes (e.g. snowmelt, shallow depth to the water table during the non-growing season, etc.) or annual variation in the distribution of rainfall. The pathways for delivery of groundwater to a ditch, as well as the variations in the volume of groundwater that is in the ditch, are effectively the same processes that contribute baseflow in natural streams. In both cases, shallow groundwater provides the low flow discharge in the stream (i.e. baseflow), and discrete rainfall events or snow melt drives the short term stormflow or elevated seasonal flows, respectively. Consequently, the agencies believe that permanent standing water in a ditch or other channel generally equates to perennial flow conditions for purposes of this rule.

However, the fundamental determination of jurisdiction for a ditch that is neither a relocated tributary or excavated in a tributary is based on the regularity with which the ditch discharges water either directly or through another water to the downstream traditional navigable water, interstate water, or the territorial sea. If, for example, a ditch characterized at least in part by discontinuous reaches of pooled water only discharges to a downstream water in direct response to rainfall, the ditch has an ephemeral flow regime despite that water is pooled in some portion of it year round. Similarly, if the same ditch discharges to downstream waters seasonally in response to annual or seasonal rainfall patterns, seasonal increases in groundwater discharges to the ditch, etc., then the ditch has an intermittent flow regime. And finally, if the ditch possesses standing water year-round that is consistently in contact with or discharging either directly or through another water to a downstream traditional navigable water, interstate water, or territorial sea, then the ditch has a perennial flow regime, even though the rate of discharge may vary significantly between seasons or in response to rainfall.

The agencies believe that perennial flow caused by agricultural irrigation is none the less perennial flow. Irrigation water that infiltrates the soil surface, percolates through the upper soil horizons and is eventually expressed as flow in an adjacent ditch or tributary allows that ditch or tributary to effectively function in a similar manner as perennial ditches or tributaries whose flow is supported by sources other than agricultural irrigation. Similarly, ditches that withdraw water from a tributary, deliver some or most of that water for various uses (e.g. irrigation), but return some or most of the water back to the tributary system remain subject to the jurisdictional evaluation as potential waters of the United States that is defined in the final rule. That is, the agencies believe that ditches that are part of the tributary system and meet the definition of tributary in the final rule, and are not otherwise excluded under paragraph (b) of the final rule, maintain connectivity to and have a significant nexus with traditional navigable waters, interstate waters, or territorial seas regardless of the source of water flowing in the ditches (e.g. water

derived from agricultural irrigation water, water withdrawn from tributaries, etc.). Such ditches are thereby considered by the agencies as jurisdictional waters of the United States under both current practice and the final rule.

The agencies have chosen not to provide definitions of the terms “ditch,” “gully,” “rill,” or “swale,” in the final rule, due in part to regional variations in the use of these terms. The agencies considered several options for addressing the definition of ditches, but ultimately concluded that a definition of ditch may increase rather than decrease potential confusion. Instead, the agencies will continue to rely their existing practice of addressing the regulatory status and requirements with respect to ditches on more case-specific basis. The agencies believe that relying on existing practice will better achieve the goal of clarity than introducing a new definition of ditch in the final rule.

However, the rule makes it clear that ditches are included in the definition of tributary and must have the physical features required of other jurisdictional tributaries, which are identified by the presence of bed and banks and an ordinary high water mark. Erosional features such as gullies, rills, and non-wetland swales, are distinguished from tributaries by a lack of bed and banks and ordinary high water mark, and are specifically excluded from waters of the United States under paragraph (b)(4)(F) of the rule. Note that the preamble makes it clear in Section III.B that gullies, rills, and non-wetland swales can be important conduits for moving water between jurisdictional waters, as the Science Report concludes. However, they are not jurisdictional waters themselves. See the summary response for Section 7.3.7 of the topic Features and Waters Not Jurisdictional for a discussion of these and other ephemeral features that are not jurisdictional. In addition, the summary response for Section 8.4 in the topic Tributaries, discusses distinguishing tributaries from non-jurisdictional erosional features. The agencies will continue to make efforts to help landowners distinguish between jurisdictional tributaries and non-jurisdictional features, including certain ditches and erosional features, during rule implementation and outreach.

Specific Comments

Oak Ridge National Laboratory (Doc. #14463)

- 6.319 In the preamble related to one type of ditch exception, the Agencies describe perennial flow to mean that water is present in a tributary year round when rainfall is normal or above normal(22219 col.2). The Agencies should address if this exception applies where water is present year-round independently of rainfall or runoff. (p. 2)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule. The agencies’ longstanding practice considers perennial streams as those with flowing water year-round during a typical year, with groundwater as a primary source of water for stream flow. The agencies do not distinguish among the remaining sources of water that contribute to perennial flow.

Missouri Department of Transportation (Doc. #3313)

- 6.320 Comments relating to the appropriate flow regime for ditches excavated wholly in uplands.

Proposed Requirement or Section Addressed: The federal register text solicits comment on the appropriate flow regime for a ditch excavated wholly in uplands and draining only uplands to be included in the exclusion paragraph (b) (3). (as referenced on page 22203 of the federal register).

Comment: MoDOT supports the proposed language for the exclusion qualification that the flow regime in such ditches should be less than perennial. Perennial flow is easy to understand and document, and thus makes it a much less controversial threshold. Making the factors as simple to evaluate and understand as possible, makes the regulator's job easier and provides the permittee with a much clearer perspective of how flow relates to jurisdiction.

Recommendation: For the purposes of clarity and ease of interpretation, we would recommend retaining the proposed language that exempts upland ditches with less than perennial flow. (p. 2)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule.

State of Iowa (Doc. #8377)

- 6.321 Preliminary review of the actual rule language indicates that most every stream is covered, including ephemeral streams (i.e., road, drainage, and upland ditches), wetlands, and ponds. The content of the proposed rule directly contradicts EPA's verbal explanations and the non-binding statements in the preamble of the rule. EPA historically has implemented the CWA in Iowa in a manner that treated ephemeral waters as non-jurisdictional, but this new rule strays considerably from that approach to vastly expand CWA jurisdiction into areas that are dry land a majority of the time. EPA approved the Iowa water quality standard which applies the CWA section 101(a)(2) rebuttable presumption only to perennial rivers and streams or intermittent streams with perennial pools. Because the rebuttable presumption applies to all "waters of the U.S.," this approval was a specific finding by EPA that intermittent streams without perennial pools are non-jurisdictional. A change in this position would have far reaching impacts. (p. 5)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, including many ephemeral and intermittent ditches. Also see summary response for Topic 8, Section 8.1.1 regarding the historical and proposed jurisdiction of ephemeral and intermittent streams, and the relevance of flow regime to the proposed definition of "tributary." Section 8.1.1 also addresses water quality standards for ephemeral and intermittent streams. Regulations addressing water quality standards for waters of the United States provide that states may modify standards for streams with natural ephemeral flow but may not declare an ephemeral stream non-jurisdictional altogether. See, e.g., 40 CFR § 131.10(g)(2).

In general, the rule does not change the implementation of regulations which cover "waters of the United States" and the implementation of those regulations is outside the scope of this rule. If a water does not meet the definition of "water of the United States," water quality standards will not apply.

Virginia Department of Transportation (Doc. #12756)

- 6.322 There are several references throughout the preamble to perennial, intermittent and ephemeral flow. For purposes of clarity, definitions should be provided for perennial, intermittent and ephemeral flow.

Adding jurisdictional ditches to the definition of "Tributary," by including "ditches not excluded in paragraph (b)(3) or (4) of this section" on p.22263 is also a concern. We reiterate our position that the vast majority of roadside ditches should not be regulated under the Clean Water Act. Also, agency staff should not have the ability to claim roadside ditches as jurisdictional by identifying these features as tributaries. The only instance when a roadside ditch should be considered jurisdictional is when a stream channel discharges directly into a ditch and shares the channel with the ditch. (p. 6)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, and the definitions of perennial, intermittent, and ephemeral flow. As the commenter notes, ditches constructed in the channel of a jurisdictional tributary, or that otherwise relocate a jurisdictional tributary, would be considered jurisdictional. Note that excluded ditches do not sever the jurisdiction of upstream and downstream waters of the U.S.

Texas Department of Transportation (Doc. #12757)

- 6.323 The preamble specifically requests comment on whether this exclusion should apply to ditches with "less than intermittent flow," rather than ditches with "less than perennial flow." We support this condition as written that this exclusion should pertain to ditches with less than perennial (rather than intermittent) flow, and also that ditches that have standing water, or standing water that only occasional flows, should not be considered perennial. (p. 3)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, and the treatment of perennial flow in the rule and preamble.

New Mexico Department of Agriculture (Doc. #13024)

- 6.324 Determining the perenniality of tributaries and ditches is a major component of making jurisdiction determinations for this category. The vagueness of this category and its corresponding definitions are confusing to the regulated public and should be revised for clarity.

In the Southwest many agricultural ditches connect to larger water bodies due to the lack of replenishing rainfall. According to the New Mexico Environment Department, there are about 2,727 miles of ditches and canals in New Mexico, which accounts for about 2.5

percent of the total stream miles in the state.⁷⁸ Many of these ditches may be classified as tributaries due to the possibility of contributions of flow to a water identified in paragraph s (s) (I) through (4). However, most of these ditches in New Mexico are not perennial and are, therefore, connected only a few months out of the year, particularly during irrigation season. NMDA requests clarification on how perennality will be determined. Specifically, we would like to know if the public will be given the opportunity to be involved in the determination process and how conflicting determinations will be mediated. (p. 5)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, and the meaning of the term “perennial flow” in the rule and preamble. The agencies believe that determination of perennial flow is clear and implementable, but approved jurisdictional determinations can be appealed through the USACE administrative appeals process. Implementation issues related to the jurisdictional determination process are further addressed in Topic 12 of the response to comments document, under Section 12.4.4.

Texas Commission on Environmental Quality (Doc. #14279.1)

- 6.325 Intermittent ditches constructed entirely in uplands are considered non-jurisdictional in the proposed rule 133 CFR §328.3(b)(3)]. An intermittent ditch should be non-jurisdictional unless it is constructed directly in or on a water of the United States. (p. 8)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule.

Tennessee Department of Environment and Conservation (Doc. #15135)

- 6.326 Ditches that are excavated wholly in uplands and drain only uplands, by their description, should not have a connection to a traditionally jurisdictional water; therefore, it is not clear why the additional qualification of having “less than perennial flow” is necessary. We request EPA and the Corps either remove the flow component for this exemption or explain why retaining it is necessary. Also, although the agencies indicate that this exemption is meant to apply to roadside ditches, if the ditch, when created, is done within a water of the U.S. and/or a water of the U.S. is relocated to the ditch, then the exemption does not apply. As both of these practices are widespread in road construction, it appears that this exemption will have limited application. (p. 28-29)

Agency Response: Many ditches constructed in uplands eventually flow to a water described in paragraphs (a)(1) through (a)(3) of the rule. Under these circumstances, ditches with certain flow regimes are excluded, as described in paragraph (b)(3) of the rule. Therefore, it is necessary to consider the flow regime of a ditch in determining if it is excluded, unless the ditch does not flow to an (a)(1)

⁷⁸ New Mexico Environment Department. “WQCC Draft 2014-2016 State of New Mexico CWA Section 303(d)l305(b) Integrated Report.” September 9, 2014. Available at: <http://www.nmenv.state.nm.us/swgb/303d-305b/2014-2016>.

through (a)(3) water. Ditches constructed in waters of the U.S. are generally considered jurisdictional under current regulations and guidance, and ditches that are constructed in or relocate a tributary are jurisdictional under the final rule.

Ohio Department of Natural Resources, et al., State of Ohio (Doc. #15421)

- 6.327 Ohio EPA has found that the term perennial flow is not universally understood nor easily applied as is discussed in the preamble language cited above. The Stream Stat tool available from USGS provides one means of estimating various stream flow characteristics including zero low flow streams. This tool often has a high degree of uncertainty and may not yield data that is consistent with other sources. (p. 23)

Agency Response: See summary response for an explanation of the term “perennial flow” as used in the rule and preamble. The agencies do not recommend the exclusive use of a particular tool for estimating stream flow, but there may be various data and tools available to assist with such determinations, in addition to field evidence of flow regime that can be observed at the site.

Office of the Governor, State of Utah (Doc. #16534)

- 6.328 The preamble to the proposed rule explains that "Perennial flow means that water is present in a tributary year round when rainfall is normal or above normal."⁷⁹ It also states that "Under this exclusion, water that only stands or pools in a ditch is not considered perennial flow and, therefore, any such upland ditch would not be subject to regulation."⁸⁰ The state is concerned that this explanation leaves significant ambiguities about the meaning of "perennial flow" in the exclusion for road side ditches. The description of "perennial flow" implies that the mere presence of water - even standing water - could be considered "flow." The second sentence attempts to address that concern by noting that "water that only stands or pools" is not perennial flow (emphasis added). This statement is troubling as it implies that the year-round presence of water will be considered "perennial flow" unless it can be established that the water "only stands or pools" throughout the year. In other words, the preamble suggests that year-round presence of water is "perennial flow," unless the water never flows at all.

EPA should clarify that "less than perennial flow" means intermittent and ephemeral flow. Under this approach, a ditch with intermittent or ephemeral flow would qualify for the exclusion if it is excavated in uplands and drains only uplands. This clarification is consistent with the intent of the proposed regulation. It also is consistent with the 2008 EPA/Army Corps Guidance Memorandum on CWA Jurisdiction, which stated that the agencies generally would not assert jurisdiction over "ditches (including roadside ditches) excavated wholly in and draining only upland s and that do not carry a relatively permanent flow of water."⁸¹ (p. 7-8)

⁷⁹ See 79 Fed. Reg. 22203.

⁸⁰ See 79 Fed. Reg. 22203.

⁸¹ Environmental Protection Agency/Army Corps., Clean Water Act Jurisdiction Memorandum, I, issued Dec. 2, 2008, available at

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, and the treatment of perennial flow and standing or pooled water in the rule and preamble. Relatively permanent flow can include various flow regimes and include features that flow seasonally; however, the agencies have clarified in the final rule language that “less than perennial flow” means intermittent or ephemeral flow.

City of Chesapeake (Doc. #9615)

- 6.329 Most of the stormwater ditches within the City of Chesapeake are ephemeral or intermittent and many of them have bed and bank and contribute flow to a WOUS during rain events; therefore, under the proposed Rule, most of Chesapeake's stormwater ditches could be considered WOUS and subject to regulatory oversight under the CWA. These are the same stormwater ditches that require preventative maintenance and retrofitting to comply with the City's MS4 permit under Section 402 of the CWA. If stormwater management ditches become WOUS, would they then become subject to TMDL requirements? Would the EPA propose a TMDL for an impaired ditch? Would the Virginia Department of Environmental Quality (DEQ) then need to develop water quality standards for a ditch?

The Rule states that ditches that are perennial generally have water present year round when rainfall is normal or above normal; however, ditches that contain water that only stands or pools would not be considered perennial flow, thus would be exempt to regulatory oversight under the CWA. Due to an abundant seasonally high water table throughout the City of Chesapeake, many of the City's ditches intercept the groundwater for some portion of the year, and thus may contain standing water. Generally, the water within these ditches only flows during storm events. Are ditches that intercept the groundwater table during a portion of the year considered exempt or would these features be jurisdictional?

The City believes that all ditches that contain less than perennial flow, which would include ditches that intercept the groundwater table during a portion of the year should be exempt to regulatory oversight under the CWA. (p. 3) The Rule states that ephemeral features located on agricultural lands that do not possess a bed and banks are not tributaries, even though they may contribute flow during some rain events. The City of Chesapeake supports this position on agricultural ditches, but how will ephemeral, intermittent and/or perennial ditches that may contain a bed and bank and contribute flow to a TNW during rain events be assessed on prior-converted croplands? Since prior-converted croplands are exempt to regulatory oversight under the CWA, will all agricultural ditches, no matter their hydrologic regime or geomorphic nature also be exempt to regulatory oversight under the CWA? Furthermore, the Rule only exempts ephemeral ditches located on agricultural lands, and all ephemeral features including, but not limited to ditches, dry swales, dry detention ponds and rain gardens, which may

http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/cwa_juris_2dec08.pdf (accessed 11/10/2014).

contribute flow during rain events should not be categorized as WOUS under the proposed Rule. (p. 6)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, and the treatment of perennial flow and standing or pooled water in the rule and preamble. The final rule states that ditches with ephemeral flow not excavated in or relocating a tributary, and intermittent ditches that are not a relocated tributary, excavated in a tributary, or draining wetlands, are not waters of the United States, even where they otherwise meet the terms of an (a)(1) to (a)(8) water. Note that all existing statutory exemptions, including those for the maintenance of existing irrigation and stormwater ditches, remain in place and are unaffected by the final rule. See summary 6.0 and summary 6.6 for discussion of jurisdiction and maintenance of stormwater ditches, including components of MS4s. Exclusions for other features, including erosional features and many stormwater conveyances constructed in dry land are found in section (b) of the rule. These features are further discussed in Section 7.3 and 7.4 of the response to comments.

This rule does not change the implementation of regulations which cover “waters of the United States,” and the implementation of those regulations, including the TMDL program and development of water quality standards, is outside the scope of this rule. If a water does not meet the definition of “water of the United States” water quality standards will not apply.

Prior converted cropland is defined by the NRCS (Section 512.15 of the National Food Security Act Manual, August 1988) as “wetlands which were both manipulated (drained or otherwise physically altered to remove excess water from the land) and cropped before 23 December 1985.” The jurisdictional status of irrigation and drainage ditches on agriculture lands will be evaluated according to the criteria and exclusions outlined in the final rule. For more information, see summary response for Topic 7.2.

Kendall County Board, Illinois (Doc. #10965)

6.330 We object to the potential for jurisdiction to be extended to ditches that are ephemeral or intermittent. (p. 2)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule.

Brown County (Doc. #13603)

6.331 We disagree with your attempt to include all of a reach of an ephemeral channel as waters of the US. Following an ephemeral channel up the watershed it eventually becomes an erosion feature that rarely carries water, and when it does the water quality is predominantly based on the quality of the water reaching the channel and physical, biological and chemical processes in the channel are minimal due to contact time so there is no significant nexus to downstream water quality. The proposed regulations based on

this faulty study made a giant leap to all tributaries, because they treated the tributary as an undividable unit rather than a linear system. There was no scientifically valid threshold determined where along a tributary there is a significant nexus to downstream water quality. (p. 2)

Agency Response: See summary response for Topic 8, Section 8.1.1 regarding the historical and proposed jurisdiction of ephemeral streams, and the relevance of flow regime to the proposed definition of “tributary.” Erosional features lack the flow adequate to create and maintain the physical characteristics of tributaries, including bed and banks and ordinary high water mark, and are specifically excluded from waters of the U.S. under paragraph (b)(4)(F) of the final rule.

National Association of Counties (Doc. #15081)

- 6.332 Under the proposed rule, if dry ditches eventually connect, directly or indirectly, to a “water of the U.S.,” will the length of the ditch be considered jurisdictional waters? Or will portions of a dry ditch be considered exempt, even though the ditch’s physical structure interconnects with a jurisdictional river or stream?

The exclusion also states that ditches that do not “contribute to flow,” directly or indirectly to “waters of the U.S.,” will be exempt. The definition is problematic because to take advantage of the exemption, ditches must demonstrate “no flow” to a river, stream, lake or ocean. Most ditches, by their nature, have some sort of flow in rain events, even if those ditches are dry most of the year. Since the proposed rule indicates that perennial, intermittent or ephemeral flows could be jurisdictional, the agencies need to further explain this exclusion.⁸² Otherwise, there will be no difference between a stream and a publicly-owned ditch that protects public safety. (p. 13)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule. Some ditches may be jurisdictional waters of the U.S. as tributaries, but only if they do meet any of the exclusions in (b) of the final rule. Specifically, ephemeral ditches that flow in response to precipitation events or snowmelt are excluded from waters of the U.S. unless they are relocating or excavated in a natural tributary.

Agency Response: It is possible for the jurisdictional status of a ditch to change along the ditch’s length. For example, where an otherwise excluded ditch is excavated in or relocates a tributary, only the segment(s) of the ditch actually excavated in or relocating the jurisdictional tributary would be considered jurisdictional. If an excluded ephemeral ditch flows into a water of the U.S., the ditch remains excluded under part (A) of the ditch exclusion.

Agency Response: Note that the preamble makes it clear in Section III(B) that gullies, rills, and non-wetland swales can be important conduits for moving water between jurisdictional waters. Section IV(I) of the preamble of the final rule describes non-jurisdictional geographic features, such as excluded ditches, that may nonetheless serve as a hydrologic connection that the agencies would consider under

⁸² See, 33 CFR 232.4(a)(3) & 40 CFR 202.3(c)(3).

a case-specific significant nexus analysis under paragraphs (a)(7) and (a)(8). While the non-jurisdictional feature itself will always be excluded from jurisdiction, the connection it provides between an adjacent wetland and a water of the United States is relevant for determining whether the wetland has a significant nexus to downstream traditional navigable waters, interstate waters, or the territorial seas.

Contra Costa County Public Works Department, et al. (Doc. #15634)

- 6.333 Language should be added to the ditch exemption clarifying that the term "perennial flow" means containing water at all times except during extreme drought conditions. CCCPWD and CCCFCD support the proposed language of "less than perennial" flow, rather than "less than intermittent" flow. (p. 2)

Agency Response: See summary response for a discussion of the final ditch exclusion language, and the meaning of the term “perennial flow” as used in the final rule and preamble.

Southern California Water Committee (Doc. #16170)

- 6.334 Ditches that have perennial flow, or that contribute flow to a traditional navigable water, interstate water, the territorial seas, or an impoundment of a jurisdictional water are not excluded. First, with respect to the issue of perennial flow, the Proposed Rule does not determine how much flow is necessary in a ditch to be considered perennial flow. Rather, the Proposed Rule states that perennial flow would mean that flow in the ditch occurs year-round under normal circumstances. (79 Fed. Reg. 22188, 22219 (April 21, 2014).) Further, the Proposed Rule is specifically requesting comment on the flow regime that should be identified for the ditch to be excluded from being a WOTUS, and suggests that perhaps the flow regime should be less than intermittent. Regardless of the flow regime distinction, stormwater conveyance channels and ditches that convey persistent dry weather urban runoff, or that convey comingled flow from urban areas and other land uses during dry weather (e.g., tile drain discharge, naturally occurring groundwater, or agricultural runoff) could be considered WOTUS under the Proposed Rule. (p. 8)

Agency Response: See summary response for a discussion of the final ditch exclusion language, and the meaning of the term “perennial flow” as used in the final rule and preamble. Many stormwater conveyances constructed in dry land are excluded from waters of the U.S. in section (b)(6) of the rule. However, as described in the summary response, ditches with perennial flow that carry stormwater flows and meet the definition of tributary would remain jurisdictional. See summary 7.4.4 regarding jurisdiction of stormwater management features. See summary 6.0 and summary 6.6, for discussion of jurisdiction and maintenance of stormwater conveyance ditches, including components of MS4s. Groundwater, including groundwater drained through subsurface drainage systems, are excluded from waters of the United States in paragraph (b)(5) of the final rule.

San Bernadino County, California (Doc. #16489)

- 6.335 The language is confusing because the ditches may simultaneously be constructed in uplands, drain only uplands, and have less than perennial flow, yet still contribute flow, either directly or indirectly, to a TNW, interstate water, territorial seas or impoundment. The way the rule is written, most ditches, including roadside ditches would be considered "tributaries" and "jurisdictional by rule". Such a determination is contrary to those exclusions outlined by Justice Scalia's plurality opinion in *Rapanos*.⁸³ Similarly, Justice Kennedy, suggests that a "trickle, if continuous", even though relatively permanent or perennial may not have a significant nexus to downstream jurisdictional waters.⁸⁴

It should also be noted that many natural first-order streams drain uplands, but under the proposed Rule, satisfy significant nexus (in the aggregate), and would therefore be considered "jurisdictional by rule". (p. 19)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, including roadside ditches. If a ditch meets any one of the exclusions in (b) of the final rule, it is excluded from waters of the United States. The agencies have determined that the physical characteristics of tributaries, including ditches, indicate that they have flow that is adequate to constitute a significant nexus to the downstream waters that they flow to.

Hidalgo Soil and Water Conservation District, Lordsburg, New Mexico (Doc. #19450)

- 6.336 The exclusion requirements for ditches rests upon the term uplands, the definition of which is not found anywhere in the proposed rule. The Hidalgo SWCD also requests the removal of language that would allow for ephemeral ditches to be claimed as jurisdictional Waters of the U.S. (p. 1)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, including ephemeral ditches that are not excavated in or relocating a tributary. The term "upland" has been removed from the exclusions. See summary response 6.3.

North Dakota Water Resource Districts Association (Doc. #5596)

- 6.337 The agencies' exclusion for ditches raises more concerns. The exclusion applies to ditches insofar as no flow is contributed (directly or indirectly) to another water. However ditches are designed to move water toward water, which may result in a ditch, individually or as a group of "Waters", being found to be under the authority of the agencies.

Ditches with perennial flow are proposed to be considered a jurisdictional tributary, and "perennial flow" is defined by the agencies as meaning water being present when rainfall is "normal or above normal." We ask, how far "above normal?" In an "above-normal"

⁸³ *Rapanos*, 547 U.S. at 735-736 (2006).

⁸⁴ *Rapanos*, 547 U.S. at 769 (2006).

rainfall year, water may be present in a ditch all year, therefore making that ditch a jurisdictional tributary. This discretionary language is troublesome and the Association recommends exempting ditches from "tributary" status and removing Federal authority over the same. Further, an ephemeral upland ditch, though excluded as a "tributary" may also serve as a confined surface connection between an adjacent wetland and a Water, as anticipated in the agencies' "adjacent waters" discussion. (p. 2)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, and the meaning of the term “perennial flow” as used in the final rule and preamble. Perennial ditches will have groundwater as a primary source of flow, in addition to rainfall, runoff, and other sources of flow. Section IV(I) of the preamble of the final rule describes non-jurisdictional geographic features, such as excluded ditches, that may nonetheless serve as a hydrologic connection that the agencies would consider under a case-specific significant nexus analysis under paragraphs (a)(7) and (a)(8). While the non-jurisdictional feature itself will always be excluded from jurisdiction, the connection it provides between an adjacent wetland and a water of the United States is relevant for determining whether the wetland has a significant nexus to downstream traditional navigable waters, interstates waters, or the territorial seas.

Virginia Association of Counties (Doc. #15175)

6.338 County officials have raised questions about the meaning of "less than perennial flow" since "less than perennial flow" is one of the required conditions for a ditch to be excluded from the definition of a "water of the United States." It is important for there to be a clear definition and understanding of what "less than perennial flow" means. The preamble to the proposed rule provides a reasonable definition that would be appropriate to incorporate into the regulatory text with only minor revision.

Recommendation: The term perennial flow means that water flows in a ditch year round (365 days per year except during drought conditions) when rainfall is normal. Water that only stands or pools in a ditch is not considered perennial flow." (p. 3)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, as well as an explanation of standing or pooled water and its relationship to flow regime. The language for the exclusions in the final rule clarifies that “less than perennial flow” means intermittent or ephemeral flow. The preamble provides further explanation of the flow regimes referenced in the rule.

Institute of Scrap Recycling Industries, Inc. (Doc. #15041)

6.339 Remedies for the proposed definition include [...] adding a definition for “perennial flow” to provide greater clarity and regulatory certainty about the related ditch exclusion [...]. (p. 1)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule. The language for the exclusions in the final rule clarifies that “less than perennial flow” means

intermittent or ephemeral flow. The preamble provides further explanation of the flow regimes referenced in the rule, including perennial flow.

- 6.340 With regard to “Tributary”, its sub-definition would specifically allow for a ditch to be a tributary if the two proposed exclusions addressing ditches were not applicable. The fourth exclusion would not apply because the ditch would contribute flow to waters of the U.S. The third exclusion requires more analysis because it is not clear that the ditch would meet all three criteria of “excavated wholly in uplands, drain[ing] only uplands, and having less than perennial flow”. Because the preamble implies that “uplands” and “wetlands or other types of water” are mutually exclusive (22203), the ditch here would be “excavated wholly in uplands”. The ditch would also likely drain only uplands; however, would it be necessary to document “drain[ing] only uplands”—that no non-uplands water would ever enter the ditch—to meet this part of the exclusion? Notwithstanding the need to document, in that case, the ditch would need to “have less than perennial flow” to meet the exclusion. (p. 6)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule. If a ditch meets any one of the exclusions, it is excluded from waters of the United States.

- 6.341 While not defined in the proposed definition, “perennial flow” is described in the preamble of the Proposed Rule as follows:

- 1) *“The scientific concept of perennial flow is a widely accepted and well understood hydrologic characteristic of tributaries. Perennial flow means that water is present in a tributary year round when rainfall is normal or above normal” (22203).*
- 2) *“Streams are hydrologically connected to downstream waters via channels that convey surface and subsurface water year-round (perennial flow), weekly to seasonally (intermittent flow), or only in direct response to precipitation (ephemeral flow)” (22224).*

With reference to 1) above, another important scientific aspect of perennial flow, which is not mentioned in the preamble, is that “[g]enerally, the water table is located above the streambed for most of the year and groundwater is the primary source for stream flow”⁸⁵. With reference to 2), it seems that “less than perennial flow” would necessarily mean “intermittent flow”, but it is unclear at what flow intermittent flow would give way to perennial flow. That threshold flow could be so low that “less than perennial flow” would not be as substantial as EPA and the Corps intend or the regulated community expects. For example, “[t]he State of Idaho defines intermittent and ephemeral streams, but not perennial streams, in its water quality rules. Intermittent waters are defined as ‘a

⁸⁵ Virginia Department of Conservation & Recreation. “Determinations of Water Bodies with Perennial Flow: Guidance on the Chesapeake Bay Preservation Area Designation and Management Regulations”. September 2003; Revised December 10, 2007 and June 21, 2010.

stream, reach, or water body which naturally has a period of zero flow for at least 1 week during most years’”⁸⁶.

Based on the above, it seems possible that a ditch used to convey stormwater discharges could fail to meet the fourth exclusion because it would have “perennial flow” (i.e., its flow is greater than intermittent flow). In this case, the ditch would not be “*excluded [by the third or fourth exclusion] of this definition*” and thus would be a tributary. Therefore, the ditch would be “waters of the U.S.” by the fifth inclusion.

While this outcome would probably be uncommon and is probably not what Congress intended, this unintended outcome for ditches could be eliminated by including a sub-definition for “perennial flow” in the proposed definition to make the applicability of this ditch exclusion clearer and more certain—notwithstanding any need to document that the ditch “*drain[s] only uplands*”. The sub-definition should specify that “*perennial flow means that water is present in a tributary year round when rainfall is normal or above normal*” and that “*generally, the water table is located above the streambed for most of the year and groundwater is the primary source for stream flow*”. (p. 6-7)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule. The language has been clarified from the proposed rule, and the preamble clarifies that groundwater is the primary source for perennial flow. Some ditches will be regulated as waters of the U.S., but many stormwater conveyance ditches constructed in dry land are excluded in (b)(6), and would also qualify for the exclusions in (b)(3) based on their flow regime. However, the agencies do not expect the scope of ditches excluded to be different under (b)(3) and (b)(6). See summary 7.4.4 regarding jurisdiction of stormwater management features.

Landmark Legal Foundation (Doc. #15364)

6.342 "Ephemeral" means "lasting a very short time." Merriam-Webster.com. Merriam-Webster, 2014 Web. Nov. 5, 2014. EPA and the Corps, therefore, will have authority to compel property owners to submit to an expensive and time-consuming permit process should their land have the barest connection to traditional waterways. Property owners who have shallow ditches, that may periodically drain into small tributaries that, in turn, may drain into larger, traditional waterways, are subject to regulation. (p.9-10)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, including ephemeral ditches that are not excavated in a tributary or relocating a tributary. Ephemeral flow refers to flow that solely occurs as a result of precipitation events or snowmelt with no flow contributed by groundwater, as clarified in the preamble to the final rule.

⁸⁶ U.S. Geological Survey. Scientific Investigations Report 2009-50 15. "Estimating Locations of Perennial Streams in Idaho Using a Generalized Least-Squares Regression Model of 7-Day, 2-Year Low Flows. Viewed at <http://pubs.usgs.gov/sir/2009/5015/index.html>.

Indiana Manufacturers Association (Doc. #15704)

- 6.343 EPA should also make it clear that only ditches with perennial flow or which provide base flow for significant periods of the year are jurisdictional. (p. 2)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule.

American Society of Civil Engineers (Doc. #19572)

- 6.344 Our members expressed concern that the definition of “perennial flow” may apply to ditches in the arid West. Specifically, there is concern of jurisdictional reach to ditches dug wholly uplands with perennial standing water (but not perennially flowing) due to groundwater intersection/seepage, but which only flow into a jurisdictional tributary during rain events. Put another way there is a question about the jurisdiction of standing water, not perennially flowing, but only flowing after a storm event.

Another member inquired about dry weather urban runoff, such as excessive residential irrigation. Is this type of runoff considered perennial flow? (p. 9)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, as well as an explanation of standing or pooled water and its relationship to flow regime. The preamble provides further explanation of the flow regimes referenced in the rule.

Texas Mining and Reclamation Association (Doc. #10750)

- 6.345 A. Ephemeral Waters that are Not Tributaries Should be Expressly Excluded from Jurisdiction

TMRA understands the Agencies have indicated that if ephemeral water does not meet the definition for “tributary” contained in the rule, it is excluded from CWA jurisdiction. In other words, if an ephemeral stream is not a tributary, it cannot be brought in as jurisdictional under an “adjacency” or “other waters” “significant nexus” determination.

While TMRA supports this position, the Agencies must revise several currently ambiguous sections of the proposed rule to reflect that intent. The highlighted language in the paragraphs below needs to be clarified to explicitly state that ephemeral waters not meeting the definition of “tributary” cannot be jurisdictional under other sections of the proposed rule, including those pertaining to “adjacency” and “other waters”:

P. 22204 (emphasis added) —

Waters that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of the proposed regulation are not considered jurisdictional as tributaries under the CWA. **However, even if such waters are not “tributaries,” they may be jurisdictional under other paragraphs of the proposed rule.**

Pgs. 22,211 and 22,212 (emphasis added) —

Of additional concern was that the existing descriptive list of types of "other waters" includes some waters that would be jurisdictional under one of the proposed categories of "waters of the United States" that would be jurisdictional by rule such as tributary streams. The agencies want to avoid questions of whether an intermittent stream that meets the definition of tributary also needs a separate significant nexus analysis. Under the proposed rule, that tributary stream does not require the significant nexus analysis. Removing the list of water types does not imply that any of the waters listed in the existing regulation are never jurisdictional under the proposed rule. **When one of the waters on the current enumerated list does not fall under a proposed category for jurisdiction (for example, adjacent waters under (a)(6) or tributaries under (a)(5)), those waters would be jurisdictional if found to have a significant nexus under proposed paragraph (a)(7) on a case-specific basis.**

Appendix A (emphasis added) —

Where waters are not considered tributaries (e.g. waters in a solely intrastate closed basin that does not contain a traditional navigable water, interstate water, or a territorial sea, or a connection thereto) or where waters, including wetlands, do not meet the proposed regulatory definition of adjacent, they should be evaluated to determine whether they are (a)(7) waters. (p. 20-21)

Agency Response: The agencies have revised language in the final rule to increase clarity in the definitions of many terms, including “tributaries” and “neighboring,” and descriptions of several categories of jurisdictional waters. The language of concern cited by the commenter is no longer included in the final rule and preamble. The final rule establishes jurisdiction in three basic categories: water that are jurisdictional in all instances, waters that are jurisdictional but only if they meet specific definitions in the rule, and a narrowed category of waters subject to case-specific analysis. The final rule also includes more specific exclusions for waters and features that are not waters of the U.S. For more information about the definition and jurisdiction of tributaries, see summary responses for Topic 8, preamble section IV.F, and Technical Support Document (TSD) section VII. For further information about adjacent waters, see summary responses for Topic 3, preamble section IV.G, and TSD section VIII.

6.346 Additional Language is Needed to Clearly Differentiate Between Jurisdictional Ephemeral Tributaries and Non-Jurisdictional Ephemeral Features

In addition to clarifying that ephemeral features not meeting the definition of "tributary" are not jurisdictional under the rule, the Agencies should also include additional considerations for distinguishing between ephemeral tributary streams and non-jurisdictional ephemeral features. Specifically, in light of the admitted difficulties in differentiating between tributaries and, for example, gullies and rills, TMRA recommends that the Agencies require the presence of at least two of the three indicators from the 2014 Corps OHWM Guidance, as well as the continuity of these indicators from the confluence of the ephemeral tributary and intermittent or perennial channel back up to its delineated upstream boundary, to assert federal jurisdiction over an ephemeral stream. Pursuant to the Agencies' express request for comment on this issue, this approach would

help exclude gullies, rills, and non-wetland swales from inappropriate jurisdictional designations as contemplated by the proposed rule.

The primary indicator of a jurisdictional ephemeral tributary is the presence of an OHWM. As the Corps itself admits, however, OHWM determinations are already complex and difficult with respect to perennial channels, and are even more challenging in the context of inherently unstable ephemeral channels, as OHWM indicators rely on a certain amount of geomorphic stability. As such, a rigorous set of criteria is needed to provide consistency in such determinations where, as is the case in the proposed rule, such determinations are central to establishing federal CWA jurisdiction.

In the context of ephemeral channels, to help minimize subjectivity in making OHWM determinations and thus increase the clarity and regulatory certainty that the rule aims to provide, at least two of the three primary OHWM indicators proposed by the Corps — namely, 1) a break in slope; 2) a change in bed sediment; and 3) vegetation patterns — must be present in a continuous fashion from the confluence of the ephemeral and seasonally inundated channels back up to the ephemeral channel's upstream boundary. Without the presence of these indicators, it is unclear how the Agencies would distinguish between the most dynamic and episodic landscape features, including gullies and rills, and actual tributaries with an established landscape position. Additionally, as compared to current regulatory practice, if, as suggested in the OHWM Guidance, if only one — or even no — primary indicator is required to establish an OHWM, jurisdiction would drastically expand, which the Agencies repeatedly state is not the intent of the rule. (p. 21-22)

Agency Response: The final rule identifies all erosional features, including gullies and rills, as non-jurisdictional features except where they meet the definition of tributary. Erosional features would not generally meet the definition of tributary. Tributaries can be distinguished from erosional features by the presence of bed and banks and an ordinary high water mark, both of which are required by the final rule. Additional information about ordinary high water mark is found in the summary response for Topic 8, Section 8.1.2. See summary response for Topic 7.3.7 for a discussion of gullies, rills, and other ephemeral features that are not jurisdictional. Also see summary response for Topic 8.4 for a discussion of distinguishing tributaries from non-jurisdictional erosional features. Concentrated surface runoff can occur within erosional features without creating the permanent physical characteristics associated with bed and banks and ordinary high water mark. The Technical Support Document provides additional discussion on this topic.

Enefit American Oil (Doc. #13438)

6.347 Ephemeral drainages have historically been outside CWA jurisdiction under direction from the U.S. Supreme Court⁸⁷ and the USACE itself³itself³, and rightly so – they flow

⁸⁷ Justice Scalia, writing for the plurality in *Rapanos et ux., et al. v. United States*, concluded, “The phrase ‘the waters of the United States’ includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams,’ ‘oceans, rivers, [and]

only rarely, during and immediately following significant precipitation events, and even more rarely in quantities that could affect other more permanent or significant waterbodies. In the proposed rule, the agencies find that puddles, which “form[] immediately after a rainstorm, snow melt, or similar event...cannot reasonably be considered a water body or aquatic feature at all, because usually [they] exist[] for only a brief period of time before the water in the puddle evaporates or sinks into the ground.” By this same rationale, ephemeral drainages should not be categorically classified as tributaries, and therefore WoUS. The agencies need to apply logic consistently throughout the proposed rule, rather than selectively to meet their desired regulatory goal. (p. 4)

Agency Response: See summary response for Topic 8, Section 8.1.1 regarding the historical and proposed jurisdiction of ephemeral streams, and the relevance of flow regime to the proposed definition of “tributary.” Ephemeral tributaries are waters that are connected and contribute flow to waters identified in (a)(1) through (a)(3) of the rule, unlike a puddle, which is commonly considered a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar precipitation event, and is not connected to waters of the U.S. in any significant way.

Newmont Mining Corporation (Doc. #13596)

6.348 [T]he Agencies need to amend the Proposal to make plain that ephemeral and intermittent drainages that do not constitute “tributaries” are per se nonjurisdictional. Specifically, the Agencies should modify the Proposal to conform to their stated understanding and amend Subsection (b) to incorporate a new categorical exclusion for: “Ephemeral and intermittent drainages and streams that are not tributaries.”

In addition, any final rule should also categorically exempt from jurisdictional water status all ephemeral drainages and intermittent streams that are located in areas where annual evaporation exceeds annual precipitation and that do not contribute flow via a confined surface hydrology to a TNW or tributary system of a TNW at least in some regular fashion, e.g., three weeks per year averaged over 10 years. No such drainages can be deemed to significantly affect a TNW. This can be accomplished by incorporating a new categorical exception in subsection (b) of the Proposal for “Ephemeral and intermittent drainages and streams that: (1) are located in areas where the annual evaporation rate exceeds the precipitation rate; and (2) contribute flow to a water identified in paragraphs (a)(1) through (a)(4) of this section for less than three weeks per year averaged over ten years.”

If the Agency does not incorporate such an exclusion into the rule, it should at least amend the definitions of “tributary” and “similarly situated” in subsection (c) of the Proposal and the “other waters” provision in (a)(7) to make clear that the jurisdictional status of an ephemeral or intermittent drainage should be based on whether the particular drainage in question – without regard to any “similarly situated” drainage in the area –

lakes,’...and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”

significantly affects the chemical, physical, and biological integrity of a downstream TNW, taking into account the types of factors listed in the 2008 Guidance. (p. 38-39)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, including many ephemeral and intermittent ditches. Also see summary response for Topic 8.1, for a discussion of the definition of jurisdictional tributaries, including ephemeral and intermittent streams, based on the presence of certain required physical features that indicate flow of a sufficient volume, duration, and frequency to create and maintain these features. The significant nexus for tributaries, including jurisdictional ditches, has been determined by rule, based on the functions provided by all tributaries in combination with other similarly situated tributaries in the region. See preamble section III.C and IV.F and Technical Support Document section VII.B for a discussion. However, again, many ephemeral and intermittent drainages are excluded from waters of the U.S. in the final rule.

American Exploration & Mining Association (Doc. #13616)

- 6.349 The Proposed Rule Provides No Basis for Distinguishing Between Erosional Features and Small Ephemeral Features.

The agencies propose to regulate ephemeral drainages, but exclude gullies, rills, and non-wetland swales while failing to define any of these key terms. 79 Fed. Reg. at 22,219. Instead, the agencies seek comment on “how to distinguish between erosional features, such as gullies, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional.” Id. The different treatment of these predominantly dry features appears to be arbitrary and the agencies do not provide any scientific basis for distinguishing between them.

The proposed approach stands to cause chaos in the field resulting in confusion and delay as regulators struggle to distinguish between ephemeral drainages subject to regulation and unregulated gullies, rills, and non-wetland swales. Indeed, if these features are so similar, why are erosional features categorically excluded and ephemeral drainages are categorically jurisdictional? The agencies should exclude ephemeral drainages from jurisdiction as well as erosional features like gullies, rills, and non-wetland swales. (p. 9)

Agency Response: The final rule identifies all erosional features, including gullies and rills, as non-jurisdictional features except where they meet the definition of tributary. Erosional features would not generally meet the definition of tributary. Tributaries can be distinguished from erosional features by the presence of bed and banks and an ordinary high water mark, both of which are required by the final rule. See summary responses for Topic 7.3.7 of the response to comments for a discussion of these and other ephemeral features that are not jurisdictional. Concentrated surface runoff can occur within erosional features without creating the permanent physical characteristics associated with bed and banks and ordinary high water mark. The Technical Support Document provides additional discussion.

Arizona Mining Association (Doc. #13951.1)

- 6.350 If it occurs at all, aquatic biological connectivity in ephemeral streams of the arid Southwest is infrequent and rare, not constant, as with perennial and many intermittent streams. In several sections of US EPA (2013) aquatic biological connectivity is presumed to occur in ephemeral streams of the arid Southwest, but virtually no data are presented to support those presumptions.

Section 4.5, Page 4-29: “Because biological connectivity often results from passive transport of organisms or organism parts with water flow, these connections often depend on hydrologic connectivity (see Section 4.3.1). Many living organisms, however, can also actively move with or against water flow; others disperse actively or passively over land by walking, flying, drifting, or “hitchhiking.” All of these organism-mediated connections form the basis of biological connectivity between headwater tributaries and downstream waters.” No data, however, are presented in this section on aquatic biological connectivity in ephemeral streams of the arid Southwest.

Section 4.8.1, Page 4-56: “Several studies found that native fishes and invertebrates are well adapted to the variable flow regimes common in rivers of the Southwest and are heavily influenced by ephemeral tributary streams (Turner and List, 2007).” Turner and List (2007), *Habitat Mapping and Conservation Analysis to Identify Critical Streams for Arizona’s Native Fish*, however, did not discuss invertebrates, only fish, and apparently all of the studies on fish were in perennial or intermittent streams, not ephemeral streams.

Section 4.8.4, Page 4-66: “In summary, ephemeral tributary streams have strong physical and chemical connections to the San Pedro River. The river ecosystem, including its abiotic and biotic components, depends on the influences exerted by the ephemeral tributary streams on the river environment.” Again, no data are presented on aquatic biological connectivity between ephemeral streams and the San Pedro River, AZ, which is the case study in US EPA (2013) for the arid Southwest.

For perennial streams, the hydrological and, therefore, aquatic biological connectivity to downstream waters is, by definition, constant and never uninterrupted. Water is flowing constantly downstream and this hydrological connection provides a pathway for a constant aquatic biological connection for fish, invertebrates and plants.

In contrast, in a temporally ephemeral stream, aquatic biological connectivity is not likely to be present when surface water is not present. If no surface water is present, then no aquatic community is present, except for possibly some desiccation-resistant life forms, which are immobile. Even the presence of such desiccation-resistant life forms, however, is highly uncertain. For example, Parametrix (1991) investigated the potential presence of desiccation resistant aquatic invertebrates in dry ephemeral streams. Parametrix personnel collected sediments from two dry ephemeral stream channels near Tucson, AZ, and then immersed the sediment samples in water for two weeks. No aquatic invertebrate emergences were observed at any time during the two week incubation period. Parametrix (1991) concluded that these results indicated that the majority of aquatic invertebrates may be introduced into ephemeral streams with surface flow by colonization and dispersion, rather than having life cycles that include dormant desiccation during dry periods and reemergence when surface flow is present. The

potential for aquatic biological connectivity, therefore, is only present when surface water is present.

The connection of surface water in ephemeral streams to downstream surface waters is not constant; it is infrequent and of short-duration. Figures 1-4 are hydrographs for four ephemeral washes in Arizona from three different river basins, the Santa Cruz River Basin (Figures 1 and 2), the San Pedro River Basin (Figure 3) and the Lower Gila River Basin (Figure 4), which illustrate the infrequent potential for biological connectivity in ephemeral streams in the arid Southwest. Zero discharge is present in all four washes for the vast majority of time. When discharge is present, typically it is of large magnitude and short duration. (p. 4-5)

Agency Response: See Topic 9: Scientific Evidence Supporting the Rule. The final Science Report has an entire section devoted to Biological Connections in the Case Study on Southwestern Intermittent and Ephemeral Streams, in section B.5.5.3. In addition, see the final Science Report page 3-37 for references to downstream transport of pathogens in ephemeral tributaries, page 3-38 for export of terrestrial invertebrates from ephemeral streams following channel rewetting, and page 3-39 for references that dry stream channels can facilitate the dispersal of aquatic insects by being dispersal corridors for terrestrial adult forms. There are many western streams that have intermittent or perennial headwater reaches that are separated from downstream perennial waters by stretches of ephemeral channels.

- 6.351 1. If it occurs at all, aquatic biological connectivity in ephemeral streams of the arid Southwest is infrequent and rare, not constant, in contrast to perennial streams and many intermittent streams.
2. In temporally ephemeral streams in the arid Southwest, aquatic biological connectivity is not likely to be present when surface water is not present. If no surface water is present, then no aquatic community is present, except for possibly some desiccation-resistant life forms, which are immobile.
3. In US EPA (2013), there is a virtual lack of data on aquatic life and aquatic biological connectivity in ephemeral streams in the arid Southwest.
4. A study by URS (2006) showed that, when surface flows appear in ephemeral streams in the arid Southwest, the streams are briefly colonized by a variety of invertebrates and a few vertebrates, which disappear when the stream dries up.
5. Neither US EPA (2013) nor URS (2006) provided any data showing that significant aquatic biological connectivity occurs between ephemeral streams and downstream waters in the arid Southwest.
6. US EPA (2013) presents no data showing that aquatic life in ephemeral waters of the arid Southwest have any ecological roles or functions in downstream waters.
7. Desiccation is the most important environmental stressor for aquatic life in ephemeral streams in the arid Southwest. When ephemeral streams are dry, which occurs the vast majority of the time, aquatic biological connectivity is precluded.

8. During periods of high stream flows in ephemeral streams, high turbulence, high sediment load and scouring are likely to preclude any significant biological connectivity between ephemeral streams and downstream waters.

9. Because thresholds exist below or above which aquatic biological connectivity does not occur in ephemeral waters in the arid Southwest, scientific criteria would have to be developed with appropriate methods and metrics for determining if significant aquatic biological connectivity is occurring in ephemeral streams. However, it is not likely that such criteria could be developed given the lack of data on aquatic life in ephemeral drainages. (p. 12)

Agency Response: See agencies' response to comment 6.353 (Arizona Mining Association (Doc. #13951.1)), above.

National Stone, Sand and Gravel Association (Doc. #14412)

6.352 Categorically excluding "ephemeral" waters as indistinguishable from "gullies rills and non-wetland swales" that are already excluded under the proposed rule. Ephemeral Waters under the Corps definition are located above groundwater year round and only flow for short duration after precipitation events in a typical year. As such, their connection to TNWs are simply too remote and fleeting and therefore does not meet Justice Kennedy's understanding of significant nexus in Rapanos. (p. 56)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, including ephemeral ditches that are not excavated in or relocating a tributary. Also see summary response for Topic 8, Section 8.1.1 regarding the historical and proposed jurisdiction of ephemeral streams, and the relevance of flow regime to the proposed definition of "tributary." See summary response for Topic 7.3.7 for a discussion of erosional features that are not jurisdictional. Also see summary response for Topic 8.4, for a discussion of distinguishing tributaries from these non-jurisdictional erosional features.

Virginia Coal and Energy Alliance and Virginia Mining Issues Group (Doc. #14619)

6.353 Extending Jurisdiction to Ephemeral Streams is an Impermissible Expansion of Federal Jurisdiction

Under the Proposal, all tributaries - perennial, intermittent and ephemeral- are deemed to be per se jurisdictional. But this is a flawed position that deviates from binding Supreme Court precedent established in Rapanos v. United States, 547 U.S. 715 (2006) and that rests on the unsupported scientific and legal assumption that all tributaries are important to the chemical, physical and biological integrity of traditional navigable waters, interstate waters and the territorial seas. See Proposed Rule at 22201. Historically, only ephemeral streams with an ordinary high water mark ("OHWM") have been deemed jurisdictional. See 65 Fed. Reg. 12823 (2000) and GAO-04-297 Report "Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction; see also EPA and USACE, Questions and Answers for Rapanos and Carabell Decision, June 5, 2007, at pg. 11 (" ... some ephemeral tributaries

and their adjacent wetlands will **not** be jurisdictional under the CWA.") (emphasis added).⁸⁸ Yet now, without justification, the Agencies are seeking to abandon this past practice and instead assert blanket jurisdiction over all tributaries, including ephemeral streams.

At the same time, this move to automatically capture ephemeral streams as jurisdictional would directly contravene the "significant nexus" test that Justice Kennedy set forth in *Rapanos* ("This standard presumably provides a rough measure of the volume and regularity of flow. Assuming it is subject to reasonably consistent application.. It may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act. ") (quoting J. Kennedy) (*Rapanos* at 781-782). Justice Kennedy's significant nexus test does **not** support a broad and unlimited assertion of jurisdiction over all tributaries without regard to their connection to downstream waters.

Ephemeral streams and drainages are a common feature across the SVC landscape. Most of these ephemeral streams are long distances from traditionally navigable waters ("TNWs") and have not been determined to be jurisdictional in the past. Under the Proposal, they would now become jurisdictional.

Given the wide-reaching and dynamic nature of mining operations, ephemeral streams are frequently encountered during active mining throughout the SVC. If Virginia's mine operators were forced to obtain a permit before impacting these features, the cost of additional permitting and associated delays could be enormous. In addition, given the confusion in the Proposal over which features are in (e.g., ephemeral tributaries) and which ones are out (e.g., gullies, rills and non-wetland swales), mine operators will be forced to incur substantial expense just to determine whether or not a permit is required. Even the Agencies themselves acknowledge in the Preamble (see Proposed Rule at 22218-19) and elsewhere⁸⁹ that drawing this line can be exceedingly difficult. This is compounded by the fact that mine operators already have to meet numerous requirements when impacting ephemeral streams under SMCRA.

In sum, what the Agencies have proposed with respect to ephemeral streams is both legally deficient and unworkable in practice, particularly for Virginia's coal mining industry. (p. 4-5)

Agency Response: See summary response for Topic 8, Section 8.1.1 regarding the historical and proposed jurisdiction of ephemeral streams, and the relevance of flow regime to the proposed definition of "tributary." The significant nexus for tributaries, including jurisdictional ditches, has been determined by rule, based on the functions provided by all tributaries in combination with other similarly situated tributaries in the region. See Technical Support Document sections II and VII.B, and preamble section III and VII for a discussion. In addition, see summary

⁸⁸ Available at http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/rapanos_qa_06-05-07.pdf

⁸⁹ Engineer Research & Development Center, U.S. Army Corps of Engineers, "A Guide to Ordinary High Water Mark (OHWM) Delineation for Non-Perennial Streams in the Western Mountains, Valleys, and Coast Region of the United States," at I (August 2014).

response for Topic 7.3.7 for a discussion of erosional features that are not jurisdictional. Also see summary response for Topic 8.4, for a discussion of distinguishing tributaries from these non-jurisdictional erosional features.

Montana Mining Association (Doc. #14763)

- 6.354 At a minimum, the Agencies should clarify, as they have suggested they would during outreach meetings, that a ditch that is excavated in uplands drains only uplands, and has less than perennial flow is nevertheless excluded even if it contributes flow to a water of the U.S. because the two ditch exclusions are independent of one another. The Agencies should also clarify that the upland ditch exclusion applies to all reaches of a ditch system that are upstream of the point of intersection with a "water of the United States." Third, the Agencies should indicate in the preamble that the mere presence of groundwater in a ditch does not, by itself, convert an upland ditch into a jurisdictional tributary, so long as the ditch does not flow perennially as a result of the groundwater connection. Finally, the Agencies should not narrow the upland ditch exclusion by imposing a requirement that the ditch has less than intermittent flow.⁹⁰ Many ditches on mine sites do, in fact, carry flow and contain water intermittently, but should not be subject to jurisdiction as federally protected waters as explained above. (p. 5)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, as well as an explanation of standing or pooled water and its relationship to flow regime.

Devon Energy Corporation (Doc. #14916)

- 6.355 Ephemeral drainage should not be per se jurisdictional. These features were historically outside CWA jurisdiction and the science does not demonstrate that treating ephemeral features as WOTUS will have benefits for downstream waters.⁹¹ A reasonable interpretation of a tributary based on the Rapanos plurality opinion would define a non-navigable tributary as jurisdictional only if has relatively permanent flow into a navigable water. "Relative permanent" in this context means the continuous presence of water for at least three continuous month of the year during years of typical precipitation. (p. 5)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, Many ephemeral ditches are excluded from waters of the U.S. under paragraph (b)(3) of the final rule. See summary response for Topic 8, Section 8.1.1 regarding the historical and proposed jurisdiction of ephemeral streams, and the relevance of flow regime to the proposed definition of "tributary."

⁹⁰ See 79 Fed. Reg. at 22,203.

⁹¹ Corps, "Final Rule for Regulatory Programs of the Corps of Engineers", 51 Fed. Reg. 41,206, 41,217 (Nov 13, 1986); EPA, "Clean Water Act Section 404 Program Definitions and Permit Exemptions: Section 404 State Program Regulations", 53 Fed. Reg. 20764, 20765 (June 6, 1988).

Nevada Mining Association (Doc. #14930)

- 6.356 The Agencies' Proposal with respect to ephemeral and intermittent drainages, if adopted in its current form, could also wreak havoc with hardrock mining companies' day-to-day operations. The properties of hardrock mining companies in Nevada are crisscrossed with dozens of ephemeral and intermittent drainages. The map of Streams and Waterbodies in Nevada recently submitted by EPA to the House of Representatives Committee on Science, Space and Technology shows how extensive such drainages are in northern Nevada, and in fact all of the State.

Most of the drainages on many NvMA members property are ephemeral, in that the only waters that flow in them are from precipitation - normally snow melt or rain during the spring run-off season. Some of these drainages are fed occasionally by seeps or springs (and are therefore considered intermittent by the Corps and EPA), and they flow more frequently although still ordinarily for only a matter of days or weeks per year. Flow in these ephemeral and intermittent drainages does not typically reach another surface water. There are at times wetlands abutting these intermittent drainages fed by the seeps or springs, but the wetlands do not impact or affect any "waters" other than the intermittent stream segments to which they are adjacent.

The ephemeral drainages on many mining properties in Nevada rarely have water in them, much less flow. The upper reaches might typically flow once every few years and the lower reaches once every 10 years. Flow normally occurs only when there is a very heavy snow pack during the winter that melts in the spring or during very heavy rainfall. Even intermittent streams are normally dry. Flow in these intermittent streams, as in the ephemeral drainages, rarely occurs every year.

Ephemeral drainages typically flow only for the duration of a given storm event - usually for a matter of hours to a day or two. Most of the water in these drainages and streams evaporates; rarely, if ever, would the waters connect to downstream surface waters by means of a confined surface connection. Generally, the ephemeral drainages and intermittent streams on NvMA members' properties fan out and lose definition (including losing a definable bed and bank and ordinary high water mark) before they reach another surface water. (p. 16-17)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, Many ephemeral and intermittent ditches are excluded from waters of the U.S. under paragraphs (b)(3) of the final rule. See also summary response for Topic 8, Section 8.1.1 regarding the historical and proposed jurisdiction of ephemeral and intermittent streams, and the relevance of flow regime to the proposed definition of "tributary." If a tributary does not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (3) of the rule, it is not jurisdictional.

- 6.357 Status of Ephemeral Drainages and Intermittent Streams under the Agencies' Proposal
- The Agencies' Proposal, if finalized in current form, could change things dramatically. Under the Agencies' Proposal, virtually every, if not in fact every, of the dozens of

ephemeral drainages and intermittent streams crisscrossing mine properties could potentially be deemed jurisdictional waters. (p. 17)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, Many ephemeral and intermittent ditches are excluded from waters of the U.S. under paragraphs (b)(3) of the final rule. See also summary response for Topic 8, Section 8.1.1 regarding the historical and proposed jurisdiction of ephemeral and intermittent streams, and the relevance of flow regime to the proposed definition of “tributary.”

- 6.358 As discussed above, the Agencies need to amend the Proposal to make plain that ephemeral and intermittent drainages that do not constitute "tributaries" are per se nonjurisdictional. Specifically, the Agencies should modify the Proposal to conform to their stated understanding and amend Subsection (b) to incorporate a new categorical exclusion for: "Ephemeral and Intermittent drainages and streams that are not tributaries."

In addition, any final rule should also categorically exempt from jurisdictional water status all ephemeral drainages and intermittent streams that are located in areas where annual evaporation exceeds annual precipitation and that do not connect via a confined surface hydrology to a TNW or tributary system of a TNW at least in some regular fashion, e.g. , three weeks per year averaged over 10 years. No such drainages can be deemed to significantly affect a TNW. This can be accomplished by incorporating a new categorical exclusion in subsection (b) of the Proposal for "Ephemeral and Intermittent drainages and streams that: (1) are located in areas where the evaporation rate exceeds the precipitation rate ; and (2) contribute flow to a water identified in paragraphs (a)(1) through (a)(4) of this section for less than three weeks per year averaged over ten years."

If the Agency does not incorporate such an exclusion into the rule, it should at least amend the definitions of "tributary "and "similarly situated" in subsection (c) of the Proposal and the "other waters" provision in (a)(7) to make clear that the jurisdictional status of an ephemeral or intermittent drainage should be based on whether the particular drainage in question without regard to any "similarly situated" drainage in the area - significantly affects the chemical, physical, and biological integrity of a downstream TNW, taking into account the types of factors listed in the 2008 Guidance. (p. 21-22)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, including many ephemeral and intermittent ditches. Also see summary response for Topic 8.1, for a discussion of the definition of jurisdictional tributaries, including ephemeral and intermittent streams, based on the presence of certain required physical features that indicate flow of a sufficient volume, duration, and frequency to create and maintain these features. The significant nexus for tributaries, including jurisdictional ditches, has been determined by rule, based on the functions provided by all tributaries in combination with other similarly situated tributaries in the region. See Technical Support Document sections II and VII.B, and preamble section III and VII for a discussion. However, again, many ephemeral and intermittent drainages are excluded from waters of the U.S. in the final rule.

National Sustainable Agriculture Coalition (Doc. #15403)

6.359 The preamble to the proposed rule states that, “The flow in the tributary may be ephemeral, intermittent or perennial, but the tributary must drain, or be part of a network of tributaries that drain, into an (a)(1) through (a)(4) water under today’s proposed rule.”⁹² Including ephemeral and intermittent streams as potential tributaries while failing to define these terms has been a source of confusion in the rule and remains a significant barrier to achieving the agencies’ goals of greater regulatory clarity. Ephemeral and intermittent streams can have a significant impact on the water quality of downstream water bodies, but the regulated community needs assurance that this language will not be used to declare insignificant, precipitation-induced water features jurisdictional. The preamble later states that, “ephemeral features located on agricultural lands that do not possess a bed and bank are not tributaries.”⁹³ The EPA and the Corps should clarify that features like a bed, banks, and an OHWM take years to form, and should consider including definitions of ephemeral and intermittent flow in the final rule.

Recommendation: Clarify that features like a bed, banks, and ordinary high water mark take years to form, and consider providing definitions for key terms like ephemeral and intermittent streams and flow in the final rule. (p. 4)

Agency Response: See summary response for Topic 8, Section 8.1 for a discussion of the physical features used to define “tributaries.” The summary also contains an explanation of the flow regimes used in the rule language, as clarified in the preamble to the final rule. The agencies do not specifically address the period of time it may take for bed and banks and ordinary high water mark to form, but have determined that the presence of these physical features indicates flow of a sufficient volume, duration, and frequency to create and maintain these features. For further discussion of excluded erosional features, see summary response for Topic 7.3.7. Also see summary response for Topic 8.4, which discusses distinguishing tributaries from non-jurisdictional erosional features.

National Sustainable Agriculture Coalition (Doc. #15403)

6.360 The terms *upland* and *perennial* flow are key to determining exemptions for certain ditches in section (b) discussed above. The preamble to the proposed rule as well as the EPA’s Question and Answer document (from September 8, 2014)⁹⁴ address these concepts, but the rule does not provide clear definitions to either term. “Upland” should be defined as any area that is not a wetland, stream, lake, or other water body, and clarify that uplands can be located in floodplains⁹⁵ and that these areas are not jurisdictional.

Determining an appropriate flow regime standard for jurisdictional ditches is critical when it comes to providing clarity to the regulated community. We agree with the agencies that perennial flow is the appropriate standard for jurisdictional ditches, and not

⁹² Proposed Rule at 16.

⁹³ Proposed Rule at 18.

⁹⁴ Questions and Answers – Waters of the U.S. Proposal (September 8, 2014) (Hereinafter “WOTUS Q&A”)

⁹⁵ WOTUS Q&A at 6.

a more ambiguous standard like intermittent or ephemeral flow. Defining perennial flow is therefore essential to achieve the proposed rule's goal of clarity. The preamble states that perennial flow is characterized by the presence of flow year-round when rainfall is normal or above normal.⁹⁶ This language should be codified as a definition in the proposed rule.

Recommendation: Codify definitions addressed in the preamble and Question and Answer document for upland and perennial flow and develop a clear definition for ditch in section (c) of the proposed rule. (p. 8)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified in the final rule. In addition, the term “upland” was removed for the final rule.

Coeur Mining, Inc. (Doc. #16162)

6.361 The Proposed Rule Provides No Basis for Distinguishing Between Erosional Features and Small Ephemeral Features.

The Agencies propose to regulate ephemeral drainages, but excludes gullies, rills, and non-wetland swales while failing to define any of these key terms. 79 Fed. Reg. at 22,219. Instead, the Agencies seek comment on "how to distinguish between erosional features, such as gullies, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional." *Id.* The different treatment of these predominantly dry features appears to be arbitrary and the Agencies do not provide any scientific basis for distinguishing between them.

The proposed approach will cause chaos in the field and result in confusion and delay as regulators struggle to distinguish between regulated ephemeral drainages and unregulated gullies, rills, and non-wetland swales. Indeed, if these features are so similar, why are erosional features categorically excluded and ephemeral drainages are categorically jurisdictional? The Agencies should exclude ephemeral drainages from jurisdiction as well as erosional features like gullies, rills, and non-wetland swales. (p. 9)

Agency Response: The final rule identifies all erosional features, including gullies and rills, as non-jurisdictional features unless they meet the definition of tributary. Erosional features would not generally meet the definition of tributary. Tributaries can be distinguished from erosional features by the presence of bed and banks and an ordinary high water mark, both of which are required by the final rule. See summary responses for Topic 7.3.7 of the response to comments for a discussion of these and other ephemeral features that are not jurisdictional. Also see summary response for Topic 8.4, which discusses distinguishing tributaries from non-jurisdictional erosional features. Concentrated surface runoff can occur within erosional features without creating the permanent physical characteristics associated with bed and banks and ordinary high water mark. The Technical Support Document provides additional discussion on this topic.

⁹⁶ Proposed Rule at 17.

American Gas Association (Doc. #16173)

6.362 [T]he Proposed Rule's definitions do not speak at all to the frequency of water flow in that feature, it could encompass any land-locked area that has ephemeral, intermittent, or perennial water flows. Ignoring the frequency of flow, means that any minimal hydrologic connection could be deemed federal jurisdictional. This would include the hundreds of streams, ditches, potholes, dry streambeds, impoundments, and other natural and manmade depressions that natural gas pipelines and distribution mains cross—if any of them were to fill with water at any point in a year (or a period of years past), they could be regulated as WOTUS. (p. 8)

Agency Response: The preamble of the final rule, as well as the summary response in this topic, speak to flow regimes as they pertain to both tributaries and ditches. Longstanding practice dictates that wetlands are delineated in the field according to the criteria in the 1987 “Corps of Engineers Wetland Delineation Manual” and/or applicable geographic regional supplements to the Manual. Further, the final rule indicates that jurisdictional tributaries and ditches must flow either directly or through another water into a traditionally navigable water, interstate water or territorial sea in order to be a water of the United States.

National Sustainable Agriculture Coalition (Doc. #16357.1)

6.363 In response to the Agencies' request for comment: we do not support a ditch exclusion based on “less than intermittent flow.” Such a limitation would make the ditch exclusion even narrower than the already narrow proposed standard. For example, irrigation ditches carry flowing water to fields throughout the growing season as farmers and ranchers open and close irrigation gates to allow the water to reach particular fields. These irrigation ditches generally have flowing water as long as water is available for use. (p. 10)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule. The jurisdictional status of irrigation and drainage ditches on agriculture lands will be evaluated according to the criteria and exclusions outlined in the final rule.

Independent Petroleum Association of America (IPAA), et al (Doc. #18864)

6.364 Within the discussion of tributaries is included the awkward discussion of the regulatory management of ditches. For upland ditches the agencies reference past policies, but express concern over flow and what regime should be defined, perennial or intermittent. Pursuant to the proposed rule, non-jurisdictional ditches become tributaries if they have beds and banks and ordinary high water marks and contribute flow. The preamble discussion lists those ditches that may be deemed jurisdictional. Id. at 22203. The proposal discusses flow relative to downstream traditional navigable waters. This proposed regulatory discussion is, again, part of the expansion of the scope of “waters of the United States.” Rather than certainty, this regulation creates uncertainty as to current operations and future impacts on the status of ditches. It also represents significant expansion of the definition. (p. 31)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule. The agencies disagree with the commenter's assessment that under the proposed rule, non-jurisdictional ditches become tributaries if they have a bed and banks and ordinary high water mark and contribute flow. There are currently no specific exclusions for ditches, and many ditches are considered waters of the U.S. under the 2008 Rapanos guidance. Rather, the agencies have determined that ditches that meet the definition of tributary are jurisdictional, unless they are otherwise excluded by three specific exclusions for ditches in paragraph (b)(3) of the rule, or any other exclusion. These exclusions provide greater clarity and consistency for the jurisdiction of ditches.

Pershing County Water Conservation District (Doc. #12980)

- 6.365 The most alarming section of the rule is in the discussion related to the "significant nexus" test. The rule purports to include "Tributaries" which are connected to navigable waters. The comments go on to state that these tributaries include "perennial, intermittent, and ephemeral streams [which] are physically and chemically connected to downstream traditional navigable waters."⁹⁷ The rule itself expressly includes man-made canals and ditches as tributaries. Thus, if the EPA finds that the Districts' irrigation canals are not exempt under the prior discussed agricultural exemptions, they can assert jurisdiction over them even though the canals and ditches only hold water a few months out of the year. This of course goes directly against what the Supreme Court said in *Rapanos*. (p. 4)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, including an exclusion for ditches with ephemeral flow that are not excavated in a tributary and do not relocate a tributary, and intermittent ditches that are not a relocated tributary, excavated in a tributary, or draining wetlands. While some man-made features will remain jurisdictional, many are specifically excluded for the first time. The proposed exclusions are consistent with the Rapanos guidance, and are additional to the activity exemptions under CWA 404(f)(1)(A) for regular farming, ranching, and silviculture practices. 404(f)(1)(A) does not change the jurisdictional status of a water, but allows certain activities to be conducted without the need for a CWA 404 permit.

Walker River Irrigation District (Doc. #14562)

- 6.366 The Agencies seek comment on whether the flow regime in upland ditches should be less than intermittent flow, or whether the flow regime in such ditches should be less than perennial flow, as proposed. The proper distinction is perennial flow resulting from rainfall or melting snow. It should be made clear that perennial flow does not include water artificially diverted into a ditch from a river or stream. In addition, a ditch which returns water directly, or through another water, to the same source from which the water was artificially diverted should not be considered as "contributing flow" to that source. As noted at the outset, many ditches within the District have a year-round flow resulting

⁹⁷ Vol. 79, No. 76, Federal Register, April 21, 2014 at 22197

from diversions from the East, West and Walker Rivers for irrigation during the irrigation season, and for livestock watering during the non-irrigation season. Those flows should not result in ditches being considered tributaries, and unprotected by the exclusions in the proposed rule. (p. 5)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule. The agencies respectfully disagree with the commenter and believe that a ditch that returns water directly, or through another water, to the same source from which the water was diverted satisfies the definition of “tributary” in the final rule, so long as the ditch possesses a bed and bank and an ordinary high water mark. The agencies note however that all existing statutory exemptions, including but not limited to those at CWA section 404(f)(1)(C) for the maintenance of existing irrigation and drainage ditches, as well as the construction of new irrigation ditches, remain in place and unaffected by the final rule.

California Association of Winegrape Growers (Doc. #14593)

6.367 Specific examples of improper expansion of jurisdiction include:

Regulates all roadside and agricultural ditches that have a channel, have an ordinary high water mark, and can meet any of five listed characteristics. (p. 5)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule.

6.368 Agricultural water conveyance structures are “ditches, channels, conduits and the like.” (Ibid.) They are not streams, canals, moats, or other such systems. Any attempt in upcoming rulemaking to regulate all ditches and channels will not only be overly expansive, but also an improper expansion of federal authority. The Report should clearly acknowledge this limitation of federal jurisdiction. (p. 14)

Agency Response: As explained further in section IV.F of the preamble and Section I of the Technical Support Document, it is consistent with the Clean Water Act and *Rapanos* guidance to regulate certain ditches as waters of the U.S. However, the agencies have established specific exclusions that limit federal jurisdiction of ditches. See summary response for a discussion of revised exclusions for certain ditches in the final rule.

New York Farm Bureau (Doc. #16547)

6.369 In addition, the flow of the tributary may be ephemeral, intermittent or perennial-meeting a very low standard of “contributing flow.” Furthermore, the connection to a traditional navigable water must only be through another water or waters that eventually-even many miles away-flow to a traditional navigable water (79 Fed Reg 22202). [...] (p. 3)

Agency Response: See summary response for Topic 8.1, for a discussion of the definition the jurisdiction of ephemeral and intermittent streams, and the relevance of flow regime in the definition of “tributaries.” As the preamble discusses, covered tributaries, particularly headwaters, shape and maintain river channels by

accumulating and gradually or episodically releasing sediment and large woody debris into river channels. These effects occur even when the covered tributaries flow infrequently (such as ephemeral covered tributaries), and even when the covered tributaries are great distances from the traditional navigable water, interstate water, or the territorial sea (such as some headwater covered tributaries).

The Walker River Irrigation District (Doc. #16567)

- 6.370 The Agencies seek comment on whether the flow regime in upland ditches should be less than intermittent flow, or whether the flow regime in such ditches should be less than perennial flow, as proposed. The proper distinction is perennial flow resulting from rainfall or melting snow. It should be made clear that perennial flow does not include water artificially diverted into a ditch from a river or stream. In addition, a ditch which returns water directly, or through another water, to the same source from which the water was artificially diverted should not be considered as "contributing flow" to that source. As noted at the outset, many ditches within the District have a year-round flow resulting from diversions from the East, West and Walker Rivers for irrigation during the irrigation season, and for livestock watering during the non-irrigation season. Those flows should not result in ditches being considered tributaries, and unprotected by the exclusions in the proposed rule. (p. 5)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule. The agencies respectfully disagree with the commenter and believe that a ditch that returns water directly, or through another water, to the same source from which the water was diverted satisfies the definition of "tributary" in the final rule, so long as the ditch possesses a bed and bank and an ordinary high water mark. The agencies note however that all existing statutory exemptions, including but not limited to those at CWA section 404(f)(1)(C) for the maintenance of existing irrigation and drainage ditches, as well as the construction of new irrigation ditches, remain in place and unaffected by the final rule.

Lake Charles Harbor and Terminal District (Doc. #14448)

- 6.371 The District is also concerned with the term "contributes flow," as no distinction is made between perennial, intermittent or ephemeral flows. This represents a significant departure from the current "continuous surface connection" standard. Under the proposed definition, most, if not all, of a port's storm water collection infrastructure, consisting of open ditches and canals (representing perennial, intermittent and ephemeral storm flows), could be considered "waters" if they have a permeable bed and banks and an ordinary high water mark (OHWM). We recommend clarification of this definition so that such features are not included in the definition of "waters of the United States." (p. 2)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule. The language for ditch exclusions has been modified in the final rule to provide greater clarity about the jurisdictional status of ditches. Many stormwater conveyances constructed in dry land are excluded from waters of the U.S. in section (b)(6) of the

rule. See summary response for Topic 7.4.4 for more information about the jurisdiction of stormwater management features.

Charlotte-Mecklenburg Storm Water Services (Doc. #3431)

- 6.372 This comment pertains to Section 328.3 Definitions, (b)(4), Federal Register page 22263. The term “flow” is not clearly defined. Even ephemeral ditches contribute flow during wet weather. Given the topography in Charlotte and the Piedmont physiographic region, it is very rare to have a ditch that doesn’t eventually contribute flow to a downstream jurisdictional water. Furthermore, exempting ditches that “do not contribute flow” to downstream waters implies that ditches that contribute ephemeral or storm flows would be “waters of the United States”. CMSWS recommends defining flow as at least intermittent flow, per previous comment. (p. 1-2)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, including ephemeral ditches that are not excavated in a tributary and do not relocate a tributary. Many stormwater conveyances constructed in dry land are excluded from waters of the U.S. in section (b)(6) of the rule. See summary response for Topic 7.4.4 for more information about the jurisdiction of stormwater management features.

Department of Public Works, City of Chesapeake, Virginia (Doc. #5612.1)

- 6.373 The Rule states that ephemeral features located on agricultural lands that do not possess a bed and banks are not tributaries, even though they may contribute flow during some rain events. The City of Chesapeake supports this position on agricultural ditches, but how will ephemeral, intermittent and/or perennial ditches that may contain a bed and bank and contribute flow to a TNW during rain events be assessed on prior-converted croplands? Since prior-converted croplands are exempt to regulatory oversight under the CWA, will all agricultural ditches, no matter their hydrologic regime or geomorphic nature also be exempt to regulatory oversight under the CWA? Furthermore, the Rule only exempts ephemeral ditches located on agricultural lands, and all ephemeral features including, but not limited to ditches, dry swales, dry detention ponds and rain gardens, which may contribute flow during rain events should not be categorized as WOUS under the proposed Rule. (p. 6)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, and response to comments Topic 7: Features and Waters Not Jurisdictional for a discussion of other ephemeral or specific features, such as erosional features. The jurisdictional status of irrigation and drainage ditches on agriculture lands will be evaluated according to the criteria and exclusions outlined in the final rule. “Prior converted cropland” is defined by the NRCS (Section 512.15 of the National Food Security Act Manual, August 1988) as “wetlands which were both manipulated (drained or otherwise physically altered to remove excess water from the land) and cropped before 23 December 1985.” For more information about prior converted cropland, see summary response for Topic 7.2.

Louisville and Jefferson County Metropolitan Sewer District (Doc. #15413)

- 6.374 **Perennial Flow:** In portions of Jefferson County , there are areas of perennial standing water (but not perennially flowing) due to groundwater intersection/seepage, but only flow into a jurisdictional tributary during rain events . Accordingly, there is a question about the jurisdiction of standing water, not perennially flowing, but only flowing after a storm event, and MSD request s that this definition be clarified. (p. 2)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule, as well as an explanation of standing or pooled water and its relationship to flow regime. The preamble provides further explanation of the flow regimes referenced in the rule.

Water Law (Doc. #13053)

- 6.375 There are practical and legal differences between (1) ditches east of the 100th meridian which drain or contribute flow to swampy areas, wetlands, and navigable waters in wetter climes, and (2) man-made water supply ditches bringing water from a river to beneficial use as occurs throughout the arid Western United States. The Agencies are not accurately using the Rapanos significant nexus test because the proposed Rule does not meld J. Kennedy’s test with the plurality’s permanence of flow and continuous surface connection to a navigable waterway test. Rather, the proposed Rule disregards the plurality’s test altogether. A proper reading of a plurality opinion balances the plurality and concurring opinions. The Rule consequently significantly broadens wetlands jurisdiction to ditches not now regulated. (p. 4)

Agency Response: For more detail on the agencies’ legal authority with respect to ditches, see Section I of the Technical Support Document.

North Dakota EmPower Commission (Doc. #13604)

- 6.376 Most ditches carry flow, contain standing water, and/or drain areas that have water. This standard, while more complicated than before, ultimately amounts to the same standard that was rejected by both the plurality and Justice Kennedy in Rapanos, namely anything that connects to a navigable water is jurisdictional. As such, EmPowerND urges the EPA and Corps to exclude ditches and revise the proposed rule to be consistent with the Rapanos decision. (...)

Under the language of the proposed rule, it is not clear what features will even distinguish a ditch relative to an ephemeral drainage or gully. The agencies have also not provided definitions for what constitutes an “upland” or how the agencies might consider “for the entire length.” The ambiguous nature of these narrow exclusions does not provide any assurances that the agencies would not find jurisdiction over the vast majority of ditches. (p. 5)

Agency Response: See summary response and the preamble of the final rule for discussions regarding how the ditch exclusions were edited and clarified for the final rule. For more detail on the agencies’ legal authority with respect to ditches, see Section I of the Technical Support Document. As explained in the preamble and the

Technical Support Document, ditches that are not excluded and that meet the definition of “tributary” are no different from other tributaries and have characteristics that constitute a significant nexus to downstream waters.

National Lime Association (Doc. #14428.1)

6.377 [N]one of these terms (“ditches,” “gullies,” “rills,” “swales,” and “upland”) has been defined in the regulatory text. This is a major flaw in the proposed rule. If an objective of this rulemaking is to provide clarity, then, for the additional reasons discussed below, it is essential that these key terms of the rulemaking be defined in the regulatory text, including with as many “bright-line” examples as appropriate.

3. “Ditches,” “Gullies,” and “Perennial Flow” Represent Examples of Words Which the Rule Needs to Define or of Definitions that are Unclear in the Proposed Rule.

a. “Ditch” versus “gully”: As a practical matter, few people know what the exact difference is between a “ditch” and a “gully,” or could distinguish one from the other were they were placed side-by-side. A “ditch,” according to the on-line Merriam-Webster Dictionary, is “a long narrow hole that is dug along a road, field, etc., and used to hold or move water.”⁹⁸ A Google search of the word provides a similar definition: “a narrow channel dug in the ground, typically used for drainage alongside a road or the edge of a field.”⁹⁹ The on-line Merriam-Webster Dictionary provides a very similar definition for “gully”: “a trench which was originally worn in the earth by running water and through which water often runs after rains.”¹⁰⁰ Not only are the two definitions quite similar, but according to the Google search, “gully” is, in fact, a synonym for “ditch.”¹⁰¹ The proposed rule’s failure to define both terms and provide clarity in distinguishing between the two is also not provided by the supplemental Q&A document. Answer 6 merely offers that “gullies” are “erosional features” and as such they are excluded. “Ditches” and “gullies” both need to be defined in the rule’s regulatory text.

b. “Perennial flow”: Additionally with respect to ditches, the proposed rule would exclude “[d]itches that are excavated wholly in uplands, drain only in uplands, and have less than perennial flow (emphasis supplied).”¹⁰² Even though the preamble discusses what “perennial flow” means at 79 Fed. Reg. 22203, the proposed regulatory text does not explain what “perennial flow” means, thereby leaving each source to decide for itself just how to interpret its meaning. This also needs to be corrected. (p. 4-5)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule. The preamble provides further explanation of the flow regimes referenced in the rule, including “perennial flow.” The rule makes it clear that ditches must meet the definition of

⁹⁸ See <http://www.merriam-webster.com/dictionary/ditch>.

⁹⁹ See <https://www.google.com/search?q=ditch+definition&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a&channel=sb>.

¹⁰⁰ See <http://www.merriam-webster.com/dictionary/gully>.

¹⁰¹ See link at n.8, supra.

¹⁰² See § 328.3(b)(3) and its counter-part sections in Parts 110, 112, 116, 117, 122, 230, 232, 300 and Appendix E to Part 300, 302, and 401.

tributary and have the physical features required of other jurisdictional tributaries in order to be considered waters of the United States. Although many ditches function as part of the tributary system, the agencies have provided exclusions for certain ditches by rule for the first time, which were previously only addressed in preamble or guidance. In addition erosional features that are neither tributaries nor excluded ditches, such as gullies and rills do not have the physical features of tributaries as defined by the rule, and are specifically excluded from waters of the U.S. under paragraph (b)(4)(F). See summary response for Topic 7.3.7 for a discussion of these and other ephemeral features that are not jurisdictional.

- 6.378 NLA recommends that a definition of “perennial flow” be codified in the regulatory text of the various C.F.R. parts affected by this rulemaking. The preamble offers the following definition: “[p]erennial flow means that water is present in a tributary year round when rainfall is normal or above normal (emphasis supplied).” Id. While NLA would conceptually support the adoption of the foregoing definition into the regulatory text, we have two concerns regarding the preamble’s definition that need to be addressed and clarified in the final rule beforehand.

Our first concern is the preamble definition’s apparent conflict with the “Jurisdictional Form Instruction Guidebook” published by the US Corp of Engineers in May, 2007 (hereafter referred to as the Corps’ “Guidebook”).¹⁰³ Whereas the preamble refers to “water [that] is present in a tributary year round,” (emphasis supplied), the Guidebook sets what appears to be a different standard that would require only “a relatively permanent flow of water generally.” As the Guidebook states more specifically on page 36:

Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry **a relatively permanent flow of water generally** are not jurisdictional under the CWA, because they are not tributaries or they do not have a significant nexus to TNWs. If a ditch has relatively permanent flow into waters of the U.S. or between two (or more) waters of the U.S., the ditch is jurisdictional under the CWA.

(Emphasis supplied.) As NLA reads the two, the preamble’s definition appears to be less restrictive and would therefore potentially exclude more ditches from being jurisdictional in contrast to the Guidebook’s wording.¹⁰⁴

Our second concern is that the preamble’s definition assumes that everyone knows what amount of rainfall is “normal.” Perhaps in years past this might have been a somewhat easier determination to make, but in light of the significant and lengthy drought being experienced in substantial portions of the country for several years now, and the excessive rainfall and snow being experienced in other parts of the country, serious questions can be raised concerning what is or should now be considered to be “normal.”

¹⁰³ The Corps’ Guidebook is dated May 30, 2007; a copy is included with these comments as Appendix E.

¹⁰⁴ Because the NPRM does not mention the Corp’s Guidebook, it is unclear whether the Corps is intending that the May 2007 Guidebook will continue being used post-final rule and, if so, whether modifications to the Guidebook will be necessary to address the ditch exclusion (and/or other differences between final rule and Guidebook), or the Guidebook will continue to be used “as is.”

That determination is no longer clear, and certainly not as clear as the preamble suggests. Thus what may have happened in the past might no longer serve as a reliable prologue for the future. EPA should seriously rethink directly linking this classification with a highly variable rain and snowfall estimate.

Moreover, the proposed rule is silent on just how one would decide what is “normal” and what criteria or measure is to be used. As currently written, therefore, the proposed rule promotes the likelihood that purely subjective and inconsistent determinations of “normality” will be made in this regard. Thus, NLA strongly disagrees with the preamble’s contention that “[i]dentifying upland ditches with perennial flow is straightforward and will provide consistent, predictable, and technically accurate determinations at any time of the year.” Id. Each of these problems needs to be addressed and clarified in the final rule. (p. 6)

Agency Response: The commenter is correct that the final rule excludes more ditches from being jurisdictional waters of the United States than current practice under the Rapanos Guidance. With regard to determining typical rainfall, average and annual rainfall data is widely available for most of the country and has been utilized since at least 1987 to inform the delineation of wetlands considered to be waters of the United States. The preamble provides further explanation of the flow regimes referenced in the rule, as they pertain to both tributaries and ditches.

- 6.379 The Agencies need to clarify and codify what the terms “perennial,” “intermittent” and “ephemeral” mean; especially if the proposed rule is intended to exclude ditches which do not flow “perennially.” (p. 7)

Agency Response: See summary response regarding the meaning of these flow regimes. The preamble provides further explanation of the flow regimes referenced in the rule.

- 6.380 [F]urther clarification on what an “upland” is (as opposed to what it is not), including what Answer 20’s term “other waterbody” means, is required. At least with respect to Answer 20’s reference to “other waterbody,” one option the Agencies should strongly consider is to delete the reference to “other waterbody” from the definition of “upland.” While the deletion of “other waterbody” would not eliminate the entirety of the definition’s ambiguity, at the very least it would begin to move the solution in the right direction. (p. 9)

Agency Response: The term “upland” has been removed from the ditch exclusions in the final rule. See summary response 6.3: “Upland and Definition of Upland” for further discussion of this revision.

Nucor Corp. (Doc. #14963)

- 6.381 [B]oth the Plurality and Justice Kennedy's concurrence require that there be something more than an "ephemeral", "intermittent" or "minor" flow in a ditch or the capacity to carry rainfall, regardless of location. In light of the Plurality's exclusion of ditches and Justice Kennedy's limit on extending jurisdiction to ditches and drains, the Agencies should not exert jurisdiction over ditches or drains, especially those with ephemeral, intermittent or minor flows or those primarily used for stormwater drainage. (p. 8)

Agency Response: For more detail on the agencies' legal authority with respect to ditches, see Section I of the Technical Support Document.

Aquatic Ecosystem Restoration Foundation (Doc. #15204)

6.382 The SAB Panel writes “Habitats that are seasonally dry or even dry for several years in a row can be critical to the biological integrity of downgradient waters because a wide range of species (e.g., fish, amphibians, reptiles, birds, mammals, and invertebrates) use them to complete certain annual or life-cycle stages (Falke and Fausch 2010).” This suggests that perennial flow is not the determining factor of whether a ditch contains “waters of the United States.” The SAB Panel believes “a substantial body of evidence unequivocally demonstrates connectivity above and below ground” and these “linkages and exchanges influence physical, chemical, and biological connectivity with downstream systems.” This information should determine the waters classification. (p. 5)

Agency Response: Determining which waters have a “significant nexus” to downstream traditionally navigable waters, interstate waters or the territorial seas requires the integration of science with policy judgment and legal interpretation. It is the agencies' task to determine where to draw the lines of jurisdiction under the CWA. The agencies believe that the final rule is practical to understand and implement and protects those waters that significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters or the territorial seas.

Cloud Peak Energy (Doc. #18010)

6.383 Ephemeral streams are common in the state of Wyoming and Montana and many surface mines traverse numerous ephemeral drainages throughout the life of a mine. Under the new tributary definition, ephemeral drainages are *per se* jurisdictional.¹⁰⁵ This is a huge shift from the current regulations as ephemeral drainages have historically been outside CWA jurisdiction¹⁰⁶ because they flow only infrequently and the flows are rarely in quantities that could affect other more permanent or significant water bodies. Neither the Connectivity Report nor Appendix A of the preamble demonstrate that all ephemeral features have significant chemical, physical and biological effects to TNW and therefore ephemeral drainages should not be considered jurisdictional in an all-inclusive manner. Note that according to the proposed rule “Approximately 59% of streams across the United States (excluding Alaska) flow intermittently or ephemeral...”¹⁰⁷ This proposed rule has the potential to drastically increase the number of streams currently considered jurisdictional if all ephemeral drainages become jurisdictional. The rule, for the first time,

¹⁰⁵ 79 Fed. Reg. at 22,218-19.

¹⁰⁶ See Missouri Department of Natural Resource, Regulatory Impact Report In Preparation for Proposing An Amendment to 10 CSR 20-7.031, Missouri Water Quality Standards at 4, 25 (Nov. 9, 2013), available at <http://www.dnr.mo.gov/env/wpp/docx/master-rir-wqs-112312.pdf> (Based on USGS study, “A Gap Analysis for Riverine Ecosystems of Missouri” (2005), Missouri decided to designate all perennial rivers and streams, intermittent streams with permanent pools, and those waters spatially represented by the 1:100,000 scale NHD, but no ephemeral waters.)

¹⁰⁷ 79 Fed. Reg. at 22,231.

calls out ditches, explicitly stating that "rivers, streams, lakes, ponds, impoundments, canals and ditches" are tributaries.¹⁰⁸ There is no documentation to support the conclusion that ditches should be considered as tributaries. In the past, ephemeral drainages, ditches and conveyances including stormwater conveyances have not been considered WOTUS nor do many of these waters have a significant impact on any TNW. (p. 3)

Agency Response: The commenter appears to use the word “drainage” to capture both streams and ditches. See summary response 6.0 and Section I of the Technical Support Document for a discussion of the historical regulation of ditches under the Clean Water Act, the revised and clarified exclusions for ditches in the final rule, and the scientific support for the agencies’ conclusion that many ditches function as tributaries. Also see summary response for Topic 8, Section 8.1.1 regarding the historical and proposed jurisdiction of ephemeral and intermittent streams, and the relevance of flow regime to the proposed definition of “tributary.” See summary response for Topic 7.4.4 for more information about the jurisdiction of stormwater management features.

Ducks Unlimited (Doc. #11014)

- 6.384 We accept the proposed definition and treatment of “upland ditches” as non-jurisdictional. This will help provide clarity and certainty to farmers, ranchers, and other landowners. We also agree that it is helpful to make it explicitly clear that, as the proposed rule states, excluded ditches cannot be “recaptured” under other provisions of the rule. Again in the interest of providing as much clarity and certainty as possible, we support the preamble’s explicit inclusion of statements such as, “ephemeral features located on agricultural lands that do not possess a bed and bank are not tributaries”, “such farm field features are not tributaries even though they may contribute flow during some rain events or snowmelt”, and “of importance with respect to tributaries is the exclusion of gullies, rills, non-wetland swales, and certain ditches.” (p. 14)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule. The agencies have included language in paragraph (b) of the rule to reinforce that excluded waters are not waters of the United States, even where they otherwise meet the terms of paragraphs (a)(1) through (8). The final rule also includes a specific exclusion for erosional features, including gullies and rills that do not meet the definition of tributary, as well as non-wetland swales and lawfully constructed grassed waterways. See summary response for Topic 7.3.7 for a discussion of these and other ephemeral features that are not jurisdictional.

National Wildlife Federation (Doc. #15020)

- 6.385 The perennial flow requirement is not consistent with the connectivity science and should be revisited.

¹⁰⁸ 79 Fed. Reg. at 22,263.

The agencies request comment on the question of the appropriate flow regime to support upland ditch exclusion from Clean Water Act protections. This proposed expansion of the ditch exemption based on perennial flow regime is not based on science and it will exclude from Clean Water Act protections ditches that function as tributaries, contributing pollutants downstream. As the agencies note with respect to tributary ditches, “tributaries of all flow regimes have a significant nexus to downstream (a)(1) through (a)(3) waters.” 79 Fed. Reg. 22206.¹⁰⁹ Instead, the agencies justify their perennial flow jurisdictional requirement on grounds that, “[i]dentifying upland ditches with perennial flow is straightforward and will provide for consistent, predictable, and technically accurate determinations at any time of year” should either limit this exemption to upland ditches with less than intermittent flow, or clearly demonstrate how and why upland ditches with less than perennial flow will not contribute water, sediment, nutrients, and other pollutants downstream.

In the interest of increased certainty and predictability, the proposed rule excludes from Clean Water Act jurisdiction many upland ditches that function as tributaries. The agencies have already heeded the calls from the regulated community to clarify and to expand Clean Water Act exemptions for ditches. Excluding even more tributary ditches from Clean Water Act regulation in the final rule will put the nation’s waters at increased risk. (p. 38)

With respect to ditches, it is critically important that the agencies stand by their proposed rule, existing guidance, legal and regulatory precedent, and the science and continue to regulate as tributaries ditches created by altering wetlands and streams that function as tributaries. With respect to “upland” ditches excluded by (b)(3), we question the proposal to exclude “upland” ditches that have less than year-round flow. The agencies acknowledge that this perennial flow regime is proposed because it is “familiar to the public and agency field personnel,” not because it is a scientifically sound jurisdictional line drawing. 79 Fed. Reg. at 22219. To satisfy the CWA objectives to maintain and restore the physical, chemical, and biological integrity of the nation’s waters, this ditch exclusion should properly be limited to upland ditches with less than intermittent flow. (p. 102)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule. The agencies agree that many ditches provide similar functions as tributaries, and contribute water, sediment, nutrients, and other pollutants to downstream waters. However, for the reasons explained in detail in the preamble and summary response 6.0 the agencies have decided to exclude ephemeral ditches that are not a relocated tributary or excavated in a tributary from waters of the U.S., consistent with longstanding practice. Ditches with intermittent flow will only be regulated as jurisdictional tributaries if 1) they meet the definition of tributary, 2) are a relocated tributary, excavated in a tributary, or drain wetlands, and 3) are not excluded

¹⁰⁹ See also Connectivity Report at 1-3 (“[a]ll tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported.”); SAB Connectivity Peer Review Report at 3 (affirming the Connectivity Report’s conclusion).

under any of the exclusions in paragraph (b). As a result, most ditches that drain a Federal, state, tribal, county, or municipal road are excluded.

6.386 ***Further clarification of excluded erosional features and other waters must not be at the expense of ephemeral streams and groundwater connections.***

We applaud the agencies' efforts at 79 Fed. Reg. 22218-19 to clearly distinguish between regulated tributaries on the one hand, and excluded ditches, gullies, and rills on the other. We support the agencies exclusions for and definitions of gullies, rills, and non-wetland swales, essentially as erosional features that lack an Ordinary High Water Mark (OHWM). We encourage the agencies to continue outreach to landowners to clarify these and related exclusions. We caution, however, that further clarification must be consistent with and not at the expense of the science and the goals of the CWA. Further clarification between excluded erosional features such as gullies and ephemeral streams must not be addressed by excluding ephemeral streams from CWA jurisdiction. (p. 102)

Agency Response: The final rule continues to distinguish between regulated tributaries and excluded ditches and erosional features such as gullies and rills. See summary responses for response to comments Topic 7: Features and Waters Not Jurisdictional for a discussion of these erosional features and other features that are not jurisdictional. The agencies will continue to regulate ephemeral streams as waters of the U.S. based on the conclusion that waters meeting the definition of “tributary” in a watershed are similarly situated and have a significant nexus alone or in combination with other tributaries, because they significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, or the territorial seas. This conclusion was informed and supported by the EPA’s Office of Research and Development (ORD) Science Report, a peer-reviewed compilation and analysis of published peer-reviewed scientific literature summarizing the current scientific understanding of the connectivity of streams and wetlands, singly or in combination, to downstream waters. The agencies will continue to make efforts to help landowners distinguish between jurisdictional tributaries and non-jurisdictional ditches and erosional features clear during rule implementation and outreach.

Center for Biological Diversity, Center for Food Safety, and Turtle Island Restoration Network (Doc. #15233)

6.387 With respect to upland ditches, you have sought comment “on the appropriate flow regime for a ditch excavated wholly in uplands and draining only uplands to be included in the exclusion of paragraph (b)(3).” 79 Fed. Reg. 22203. As indicated, the conservation groups do not believe it appropriate under the Act to exclude any water body with a significant nexus to a traditionally jurisdictional water body. That said, any such exclusion, should there be one, should be limited to upland ditches with flow regimes that are “less than intermittent,” namely, where there is truly de minimis flow, either directly or through one or more waters, including groundwater, to an (a)(1) through (4) traditionally jurisdictional water body. (p. 11)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule. Based on

long-standing practice and implementation needs for consistency and clarity, the agencies have excluded ephemeral and intermittent ditches that are not a relocated tributary or excavated in a tributary from waters of the U.S., and intermittent ditches that do not drain wetlands.

Natural Resources Defense Council et al. (Doc. #15437)

6.388 In the Federal Register notice accompanying the proposal, the agencies describe in some detail the criteria for what qualifies as an “upland ditch,” but without providing a scientific explanation for why such ditches should be exempted from Clean Water Act regulation. The Federal Register states: The proposed rule would exclude from jurisdiction upland ditches with less than perennial flow. The scientific concept of perennial flow is a widely accepted and well understood hydrologic characteristic of tributaries. Perennial flow means that water is present in a tributary year round when rainfall is normal or above normal. Identifying upland ditches with perennial flow is straightforward and will provide for consistent, predictable, and technically accurate determinations at any time of year. ... Site characteristics may also be present to inform the determination of whether the water body is a ditch, such as shape, sinuosity, flow indications, etc., as ditches are often created in a linear fashion with little sinuosity and may not connect to another “water of the United States.”¹¹⁰

While consistency and predictability are worthy goals, they cannot take precedence over the science. And the agencies do not provide a scientific rationale for this exemption in the Federal Register notice because, in fact, there is none. (p. 56-57)

Public Input about Waters that are not “Waters of the United States”

“The agencies specifically seek comment on the appropriate flow regime for a ditch excavated wholly in uplands and draining only uplands to be covered by the exclusion in paragraph (b)(3). In particular, the agencies seek comment on whether the flow regime in such ditches should be less than intermittent flow or whether the flow regime in such ditches should be less than perennial flow as proposed.”¹¹¹

As discussed above, we reject the premise that “ditches” should be treated specially under these rules. The decision to exclude some man-made tributaries without any scientific basis for distinguishing between them and other tributaries – rather than the particular flow regime that the exclusion uses – should be changed in the final rule. (p. 64-65)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule. Further, for a discussion of the science and the agencies’ final position, see the summary response for section 6.2 on excluded ditches, below. The agencies have sought to codify the longstanding practice of excluding certain ditches from waters of the U.S., and account for implementation needs for consistency and clarity, while still protecting the integrity of downstream waters. Therefore, the agencies have excluded ephemeral and intermittent ditches that are not a relocated tributary or excavated

¹¹⁰ 79 Fed. Reg. at 22,203.

¹¹¹ 79 Fed. Reg. at 22,219.

in a tributary from waters of the U.S., and intermittent ditches that do not drain wetlands.

Western Resource Advocates (Doc. #16460)

- 6.389 WRA agrees that it is appropriate for the Clean Water Act to protect water quality in ditches with relatively permanent flowing or standing water. Contrary to suggestions by opponents of the rule, this is not an expansion of the agencies' long standing interpretation of Clean Water Act jurisdiction.¹¹²

In the semi-arid west, with its vast system of irrigation infrastructure, ditches with direct or indirect (via tributaries) connections to navigable & interstate provide important aquatic habitat. There are cases throughout the West of native fish living in irrigation ditches in addition to, and in some cases in preference to, the river. For example, of the 25 species of fish, 11 native, found in Middle Rio Grande Irrigation District canals, the highly endangered silvery minnow in New Mexico represented over one third, and especially seemed to choose return flow ditches with "waste" water cooler than the river's flows.¹¹³ In 2012, researchers in Oregon's Willamette Valley discovered that 13 species of native fish lived in irrigation ditches and flooded fields during the winter season, returning to the Willamette River and its natural tributaries in the summer.¹¹⁴ (p. 13-14)

Agency Response: See summary response for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule. The agencies agree that certain ditches have historically been considered jurisdictional under the Clean Water Act and recognize that many ditches provide equivalent functions and habitat to other tributaries and often have a significant nexus to downstream waters.

Iowa Stormwater Education Program MS-4 (Doc. #14511)

- 6.390 The following is new revised rule language that we recommend be added to this rule. It is expressed in a format appropriate for the proposed revisions to Part 328, Section 328.3. We request that similar language, revised as appropriate, be added to each section included in this rule.

Roadside ditches. The term roadside ditches means common roadway features, typically with a bottom and side slopes, found along or near the side of a roadway, intentionally

¹¹² The agencies have long asserted jurisdiction over ditches with perennial flows, at least since 1977 when EPA asserted jurisdiction over the Arlington Canal, tributary to the Gila River in AZ. The Ninth Circuit, among others, has approved agency assertions of jurisdiction over ditches. *Headwaters Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001). Jon Devine, et al., *The Historical Scope of Clean Water Act Jurisdiction*, 29 ENV'L FORUM 57, 58-59 (2012), available at [http://www.nwf.org/pdf/Water/GOLDMAN-CARTER_FORUM_July-August%20\(2\).pdf](http://www.nwf.org/pdf/Water/GOLDMAN-CARTER_FORUM_July-August%20(2).pdf).

¹¹³ Rossana Sallenave, *Fishes in the Middle and Lower Rio Grande Irrigation Systems of New Mexico*, Circular 653 (N.M. State U., 2010), available at http://aces.nmsu.edu/pubs/_circulars/CR653/welcome.html.

¹¹⁴ PBS News Hour: Oregon Farmers Surprised to Find Fish in Fields (television broadcast Mar. 8, 2012), available at http://www.pbs.org/newshour/bb/science-jan-june12-ditchfish_03-08.

designed and constructed as an integral part of a roadway system to convey water away from or along the roadway, preserve the structural stability of the roadway, and/or to enhance public safety. Roadside ditches are an artificial and integral constructed part of a topography altered for the purpose of facilitating a roadway as a part of a larger transportation system. Roadside ditches serve defined purposes as a part of a transportation system. Many promote structural stability of the roadway by moving water along or away from the roadway. Some are constructed for the purposes of providing a physical barrier and landing areas of vehicles accidentally leaving a roadway. Others provide a buffer and catchment zone for falling rock or other hazards to the traveling public. Roadside ditches may be constructed for multiple purposes. Roadside ditches may or may not carry water. When present, flows within roadside ditches may be ephemeral, intermittent, or perennial. Flows of any type may be found in one part of a roadside ditch and not in another. (p. 1-2)

Agency Response: The agencies recognize the importance of roadside ditches to public safety, and have excluded many ephemeral and intermittent ditches from CWA regulation in the final rule, including many that may drain a Federal, state, tribal, county, or municipal road.

Consortium of Aquatic Scientific Societies (Doc. #14802)

- 6.391 **We strongly agree that is important to include some “ditches” as “Waters of the United States”.** We acknowledge it may be politically necessary to exclude “ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow” and ditches that do not contribute water to jurisdictional waters from “Waters of the United States” (but see our next comment). However, “ditches” that have perennial flow or that currently drain or formerly drained wetlands or lakes in many cases were built to modify or replace existing natural drainage features that would have qualified as “Waters of the United States”, and typically are well connected with downstream waters, thereby satisfying the “significant nexus” criterion.

We are concerned that the requirement for ditches excavated wholly in and draining only uplands to have perennial flow (p. 22203, 22219 of the Federal Register listing) is too restrictive. This requirement seems more restrictive than the guidance from Rapanos that ditches should have “relatively [emphasis added] permanent flow of water” to be included under “Waters of the United States”, and at odds with the scientifically supported recognition elsewhere in the proposed rule of the importance of tributaries having non-perennial flow. We suggest that ditches excavated wholly in and draining only uplands be included in “Waters of the United States” if they contain flowing water more than 75% of the time. (p. 1-2)

Agency Response: See summary response for a discussion of the revised exclusions for certain ditches with minimum flow requirements in the final rule. The agencies agree that certain ditches have historically been considered jurisdictional under the Clean Water Act and recognize that many ditches provide equivalent functions and habitat to other tributaries and often have a significant nexus to downstream waters.

Senators Jeff Flake and John McCain, United States Senate (Doc. #1377)

6.392 In Arizona, the vast majority of "waters" are desert washes that are part of ephemeral systems and often found at substantial distances from traditional navigable or interstate waters. Under this proposal, every small ephemeral system of limited function, remote from traditional navigable or interstate waters, and with no practical ability to influence the physical, chemical, or biological integrity of those downstream waters, would be regulated. These features are ubiquitous in the state" landscape and can apparently remain jurisdictional even if upstream of a natural or man-made break. (p. 1)

Agency Response: See summary response for Topic 8.1, for a discussion of the jurisdiction of ephemeral streams, and the relevance of flow regime in the definition of "tributaries." As the preamble discusses, covered tributaries, particularly headwaters, shape and maintain river channels by accumulating and gradually or episodically releasing sediment and large woody debris into river channels. These effects occur even when the covered tributaries flow infrequently (such as ephemeral covered tributaries), and even when the covered tributaries are great distances from the traditional navigable water, interstate water, or the territorial sea (such as some headwater covered tributaries). The final rule continues to allow for natural and man-made breaks in jurisdictional tributaries, so long as those waters have bed and banks and an ordinary high water mark upstream of the break. For more information, see preamble section IV(F)(1).

Pat Toomey, Chairman, et al., Senate Steering Committee, United States Senate (Doc. #1378)

6.393 [T]he rule continues to incorporate the Kennedy "sufficient nexus" test that arose out of *Rapanos v. United States* (547 U. S. 715 (2006)) without meaningfully addressing the Scalia test that also arose out of that ruling. Specifically, Justice Scalia called for jurisdictional waters to mean only **relatively permanent, standing or flowing bodies of water**, such as streams, rivers, lakes, and other bodies of water "forming geographic features."¹¹⁵ This definition leads him to exclude "channels containing merely intermittent or ephemeral flow."¹¹⁶ We feel there is no justification for EPA's failure to respond in detail to the equally important interpretation put forth by Justice Scalia. (p. 1)

Agency Response: See Section I of the Technical Support Document for a discussion of the legal framework for the regulation of ditches.

Jeff Flake and John McCain, Senators, United States Senate (Doc. #19305)

6.394 As you are aware, maps completed purportedly at the request of EPA by the United States Geological Survey (USGS) showing more than 8 million miles of perennial, intermittent, and ephemeral streams across the national landscape were recently made public.¹¹⁷ These maps are alarming evidence of the agency's apparent intent on ensuring

¹¹⁵ 547 U.S. at 732-33, emphasis added.

¹¹⁶ 547 U.S. at 733-34.

¹¹⁷ EPA State and National Maps of Waters and Wetlands. (n.d.). Retrieved October 15, 2014. From <http://science.house.gov/epa-maps-state-2013#overlay-context>.

that all perennial, intermittent, and ephemeral tributaries (with the exception of those tributaries that meet the "narrow ditch" exclusion) would categorically fall under federal regulatory control. In fact, they are in stark contrast to reports provided by states to EPA and Congress. Under Section 305(b) of the CWA, it is the role of individual state governments to submit "a description of the water quality of all navigable waters" in their state to the EPA Administrator on a biennial basis, and the Administrator in turn provides those reports to Congress. According to an analysis prepared by stakeholders likely to be impacted by an expansive regulatory definition,¹¹⁸ the latest National Water Quality Inventory Report to Congress indicated that there were only approximately 3.5 million miles of waters that the states considered subject to federal regulation.¹¹⁹

If the USGS maps created for EPA are a reasonable surrogate for the expanded scope of regulatory jurisdiction under the proposed rule and the latest inventory report an approximation of the current level of regulatory control, a comparison would point to a dramatic 130 percent increase in waters under federal control nationwide – or an additional 4.4 million miles of jurisdictional waters. The impact varies by state. With a 1,882 percent increase, Nevada would see the largest jump in jurisdictional waters. The miles of jurisdictional water in Arizona would increase by more than 200 percent. Yet, EPA asserts that the proposal does not expand jurisdiction.¹²⁰ We would appreciate the agency providing an explanation squaring their belief that the proposed rule fails to expand jurisdiction in light of the above analysis. (p. 1-2)

Agency Response: As a part of the process to evaluate the indirect costs and benefits associated with the proposed rule, the agencies assessed the estimated increase in new Clean Water Act permits that could reasonably be expected as a result of the proposed regulation. This analysis did not, and could not, quantify the potential change in the geographic scope of the CWA. Because the agencies generally only conduct jurisdictional determinations at the request of individual landowners, we do not have maps depicting the geographic scope of the CWA. Such maps do not exist and the costs associated with a national effort to develop them are cost prohibitive and would require access to private property across the country.

The U.S. Geological Survey and the U.S. Fish and Wildlife Service collect information on the extent and location of water resources across the country and use this information for many non-regulatory purposes, including characterizing the national status and trends of wetlands losses. This data is publicly available and EPA has relied on USGS and USFWS information to characterize qualitatively the location and types of national water resources. This information is depicted on

¹¹⁸ Letter from the Water Advocacy Coalition to U.S. Senators re: Support of H.R. 5078 (September 17, 2014), available at [https://www.uschamber.com/sites/default/files/9.17.14-coalition lettr supporting senate consideration of h.r. 5078 the wotus regulatory overreach protection act.pdf](https://www.uschamber.com/sites/default/files/9.17.14-coalition%20lettr%20supporting%20senate%20consideration%20of%20h.r.%205078%20the%20wotus%20regulatory%20overreach%20protection%20act.pdf).

¹¹⁹ U.S. Environmental Protection Agency, Office of Water, National Water Quality Inventory: Report to Congress (January 2009).

http://water.epa.gov/lawsregs/guidance/cwa/305b/upload/2009_01_22_305b_2004report_2004_305Breport.pdf.

¹²⁰ Questions and Answers about Water of the U.S. Proposal {n.d.}. Retrieved October 15, 2014 from http://www2.epa.gov/sites/production/files/2014-09/documents/wotus_qa_0.pdf.

maps but not for purposes of quantifying the extent of waters covered under CWA regulatory programs.

See the Preamble at Section III.C and the Significant Nexus Compendium, and Technical Support Document at Section VII for a more detailed discussion on the agencies' support for jurisdiction over waters that meet the definition of "tributary" as provided in the rule. In addition, see summary response 6.2 for a discussion of revised and clarified exclusions for certain ditches with minimum flow requirements in the final rule, and for a discussion of the science and the agencies' final position.

J. R. MacPherson (Doc. #3806)

6.395 Indeed the agency seeks comment on intermittent flow in ditches. How can comment be provided when the bounds of 'intermittent' are undefined? (p. 1)

Agency Response: See summary response for an explanation of the agencies' understanding of the flow regimes used in the rule.

6.2. EXCLUDED DITCHES

Agency Summary Response

Summary of comments:

- Many commenters expressed concerns that the exclusions for ditches in the proposed rule were difficult to interpret clearly and asked that the agencies define the term "upland".
- Many commenters stated that the proposed exclusions were overly narrow or effectively useless. These commenters believed that no ditch would be excavated wholly in uplands and drain only uplands, because there would be no purpose for such a ditch to be constructed in the first place. Similarly, many commenters stated all ditches flow eventually into another water, and consequently, the requirements for the second ditch exclusion proposed in the rule could not likely be satisfied.
- In contrast, some commenters objected to the proposed exclusions for ditches because they were too broad. These commenters stated that the agencies' lacked the scientific underpinnings necessary to justify excluding ditches as waters of the United States.
- Several commenters asked whether a ditch that was excavated primarily in uplands, but bisected even a single jurisdictional wetland or intersected a single other jurisdictional water would itself become jurisdictional throughout its length. Similarly, many commenters asked whether ditches would be segmented, whereby some parts of a ditch would be jurisdictional waters of the United States, but other parts of the same ditch would not be.
- Many commenters were concerned that ditches currently considered non-jurisdictional under the CWA would become jurisdictional under the proposed rule. Many of these commenters asked specifically about ditches used to convey or manage stormwater, irrigation water, drinking water or water wholly contained within industrial sites and used for industrial purposes.

- Many commenters suggested that all man-made ditches should be excluded from jurisdiction regardless of flow regime. Numerous additional commenters suggested that all roadside ditches should be excluded. Many of these commenters pointed out that ditches are included in the definition of “point source” subject to other CWA authorities and consequently that also classifying ditches as waters of the United States would create confusing, circular logic.
- Several commenters requested that the final rule define the terms “ditch” and “roadside ditch”. Many also sought clarification regarding the quantity or timing of flow from a ditch that would be required to satisfy the rule’s meaning of “contribute flow,” which is part of the definition of “tributary and tributaries”.
- Several commenters recommended creating a distance threshold from a traditionally navigable water, interstate water or territorial sea, beyond which a ditch could not be determined to be a water of the United States.
- Some commenters requested clarification whether otherwise excluded ditches would remain non-jurisdictional even if they developed wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) in the bottom of the ditches themselves.
- Several commenters were concerned with the Agencies’ assertion that non-jurisdictional geographic features (e.g. non-wetland swales, ephemeral ditches) could still be considered a connection between otherwise non-jurisdictional wetlands or waters with a traditional navigable water, interstate water or territorial sea.
- Many commenters stated that the rule would adversely impact the ability for farmers, ranchers, road departments, water utilities, etc. to maintain drainage ditches and other ditches. These commenters were concerned the proposed rule would make the jurisdictional status of ditches so confusing and uncertain that land owners would be compelled to first seek concurrence from the agencies before doing any work. Consequently, these commenters anticipated that the proposed rule would increase regulatory and economic burdens on the public and create potential safety concerns.
- Several commenters were concerned about the definition of “perennial flow” in the proposed rule. Many also asked how to determine the flow regime of a ditch. A number of commenters also raised questions regarding the agencies’ interpretation of standing or pooled water in a ditch and whether this would be considered “perennial flow.”
- Several commenters raised concerns about ditches that have perennial flow due to drainage from agricultural irrigation water. These commenters requested that such ditches be excluded as waters of the United States, because they would not have perennial flow if not for the irrigation.
- Numerous commenters asked the agencies to provide clear guidance for the public to differentiate jurisdictional ditches from non-jurisdictional ditches. Many of these commenters specifically recommended that such guidance recognize regional variation nationwide.

As summarized previously in this response (summary response 6.0), Congress confirmed that ditches were covered under the CWA when it amended the Federal Water Pollution Control Act in 1977, and the agencies clarified their policy to consider at least some ditches to be waters of the United States in 1986. In this final rule, the agencies reaffirm that some ditches, either alone or in combination with similarly situated ditches, significantly affect the chemical, physical and biological integrity of traditional navigable waters, interstate waters or the territorial seas. The agencies have therefore determined that when ditches meet the definition of tributary and contribute flow to a traditional navigable water, interstate water or the territorial seas, they have

a significant nexus to the above referenced downstream waters and are themselves jurisdictional waters of the United States. At the same time, the science is not definitive on whether ditches should be categorically excluded, and if so which ones. Specifically, science does not identify a threshold distance from traditional navigable waters, interstate waters or the territorial seas beyond which ditches cease functioning as tributaries when they are connected to the broader tributary system. Therefore, the final rule does not establish such a threshold. However, the rule provides, in effect, a functional threshold by establishing exclusions for ditches and other similar features that have minimal, if any, contribution to downstream waters, which also reflects longstanding practices of the agencies, and provides clarity and certainty for implementation. The careful balance struck in the rule --- between protection of ditches that replace or function as tributaries and exclusion of ditches that provide minimal, if any, tributary function and have not been historically regulated in practice --- is based on the science, the discretion provided by the statute, the direction provided by case law, and the overwhelming stakeholder desire for more effective and understandable rules to reduce the need for case-by-case jurisdictional determinations.

In response to comments, the agencies have revised the exclusions for ditches to more effectively reflect the agencies' intent and provide greater clarity and consistency. The agencies recognize that the term "upland" in the rule created concern, because "upland" itself was not explicitly defined. In order to increase clarity, the term "upland" has been removed. The revised ditch exclusion language states: "(A) ephemeral ditches that are not a relocated tributary or excavated in a tributary; (B) intermittent ditches that are not a relocated tributary or excavated in a tributary or drain wetlands; (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (a)(3) of this [rule]." A ditch that meets any one of these three conditions is not a water of the United States. These exclusions apply independently, so a ditch is excluded if it meets just one of these exclusions and even if it doesn't meet any of the others. The result of these exclusions, as well as the exclusions for similar features, means that most roadside ditches are excluded from regulation as a water of the US. Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(4) through (a)(8) of the rule. For example, an excluded ditch would not become a jurisdictional water of the United States if wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) developed in the bottom of the ditch.

The term "ditch" is not specifically defined in the rule. The agencies considered several options for addressing the definition of ditches but ultimately concluded that a definition of ditch may increase rather than decrease potential confusion. In reviewing the comments on the proposed rule, it is clear the term "ditch" does not have a common understanding and indeed the terminology surrounding ditches varies widely regionally. Instead, the agencies will continue to rely their existing practice of addressing the regulatory status and requirements with respect to ditches on more case-specific basis. The agencies have a wealth of experience addressing ditches in the context of the CWA 404(f) permitting exemptions and general programmatic implementation, such as Nationwide Permit 46 (Discharge in ditches). The agencies believe that relying on existing practice will better achieve the goal of clarity than introducing a new definition of ditch in the final rule.

The agencies' longstanding interpretation of the CWA has considered modified or artificial channels that contribute to and function as part of the tributary system as waters of the United States. Many such channels are commonly referred to as ditches, yet not all ditches are modified or artificial channels that contribute to and function as part of the tributary system. Thus, while this rule excludes specific types of constructed waters from jurisdiction, including some ditches, it continues to interpret constructed or modified tributaries and ditches that function as tributaries to be jurisdictional.

Ditches covered by the rule must meet the definition of tributary, having a bed and banks and an ordinary high water mark and “contributing flow” either directly or indirectly through another water to a traditional navigable water, interstate water, or the territorial seas. This latter provision alone would exclude, for example, distributary canals for drinking water if those canals carried water from a jurisdictional water of the United States and terminated in a drinking water treatment facility. Ditches that are not a relocated tributary or excavated in a tributary would only be jurisdictional waters of the United States if they also had an ordinary high water mark and bed and banks, as well as the minimum flow requirements stated in the final rule, and are not otherwise excluded under paragraph (b).

While no longer used in the ditch exclusions, the definition of “tributary” in the final rule retains the phrase “contributes flow, either directly or through another water.” This reflects scientific literature summarized in the Connectivity Report, as well as in the rule preamble and Technical Support Document, about the connectivity among waters. The dendritic nature of the tributary system would make it virtually impossible to protect the integrity of traditional navigable waters, interstate waters, or territorial seas if only the tributaries that flowed directly into those waters were jurisdictional waters of the United States.

Science also supports the agencies' conclusion that ditches that are part of the tributary system provide the connectivity and have a significant nexus to traditional navigable waters, interstate waters, or territorial seas. Ditches like other tributaries, export sediment, nutrients, and other materials downstream. Due to their often channelized nature, ditches are very effective at transporting water and these materials, including nitrogen, downstream. It is the agencies' position that ditches that meet the definition of tributary provide the same chemical, physical, and biological functions as other water bodies defined as tributaries under the final rule.

Determinations of whether a water “contributes flow” are expected to be done in a manner similar to what has been practiced in the field for decades. While precise measurements of flow volume and duration are not required, tools such as aerial photographs, topographic maps, flow gauges, and the like will be helpful in determining contribution of flow. The final rule preamble discusses this process in greater length in Section IV(F).

The final rule does not require that the flow be contributed either directly or through waters that are themselves jurisdictional. For the reasons discussed above, and explored in further detail in the final rule preamble and Technical Support Document, waters contributed through non-jurisdictional features can have the same impact on the integrity of downstream waters as water contributed through jurisdictional waters. Note that a non-jurisdictional feature contributing a tributary's flow does not itself become jurisdictional as a result.

Longstanding agencies' practice considers perennial flow to mean flowing water year-round during a typical year, with groundwater or streamflow from higher in the stream or river network as primary sources of water. Some commenters noted that this term is well-understood. Intermittent flow is provided by both precipitation and groundwater and occurs continuously only during certain times of the year (*e.g.*, during certain seasons such as the rainy season). Ephemeral flow occurs only in response to precipitation events in a typical year, and does not include inputs from groundwater.

Ditches excavated in low lying areas can intercept the shallow water table and consequently fill with groundwater. Just as stream baseflow, springs, seeps, and other surface expressions of groundwater can be jurisdictional waters of the United States, ditches that intercept the shallow water table and consequently have standing water in them may also be jurisdictional waters of the United States. The water level in such a ditch may rise or fall solely in response to fluctuations in the water table due to seasonal changes (*e.g.* seasonal variation in the distribution of rainfall, snowmelt, growing season versus non-growing season, etc.). The processes and pathways for delivery of groundwater to a ditch, as well as the variations in the volume of groundwater that is in the ditch, are effectively the same as those that contribute baseflow in natural streams. In both cases, shallow groundwater provides the low flow discharge in the stream (*i.e.* baseflow), and discrete rainfall events or snowmelt drives the short term stormflow or elevated seasonal flows, respectively. Consequently, the agencies believe that permanent standing water in a ditch or other channel generally equates to perennial flow conditions for purposes of this rule.

However, the fundamental determination of jurisdiction for a ditch that is neither a relocated tributary or excavated in a tributary is based on the regularity with which the ditch discharges water either directly or through another water to the downstream traditional navigable water, interstate water, or the territorial sea. If for example, a ditch characterized at least in part by standing or pooled water only discharges to a downstream water in direct response to rainfall, it is an ephemeral ditch despite that water may be pooled in some portion of it year round. Similarly, if the same ditch discharges to downstream waters seasonally in response to seasonal rainfall patterns, elevated groundwater discharges, etc., then it is an intermittent ditch. And finally, if the ditch possesses standing water year-round that is consistently discharging either directly or through another water to a downstream traditional navigable water, interstate water, or territorial sea, even though the rate of discharge may vary significantly between seasons or in response to rainfall, that is a perennial ditch.

The agencies believe that perennial flow caused by agricultural irrigation is none the less perennial flow. Irrigation water that infiltrates the soil surface, percolates through the upper soil horizons and is eventually expressed as flow in an adjacent ditch or tributary allows that ditch or tributary to effectively function in a similar manner as perennial ditches or tributaries whose flow is supported by sources other than agricultural irrigation. Similarly, ditches that withdraw water from a tributary, deliver some or most of that water for various uses (*e.g.* irrigation), but return some or most of the water back to the tributary system remain subject to the jurisdictional evaluation as potential waters of the United States that is defined in the final rule. That is, the agencies believe that ditches that are part of the tributary system and meet the definition of

tributary in the final rule, and are not otherwise excluded under paragraph (b) of the final rule, maintain connectivity to and have a significant nexus with traditional navigable waters, interstate waters, or territorial seas regardless of the source of water flowing in the ditches (e.g. water derived from agricultural irrigation water, water withdrawn from tributaries, etc.). Such ditches are thereby considered by the agencies as jurisdictional waters of the United States.

It is possible for the jurisdictional status of a ditch to change along the ditch's length. For example, where an otherwise excluded ditch is excavated in or relocates a tributary, only the segment(s) of the ditch actually excavated in or relocating the jurisdictional tributary would be considered jurisdictional. Similarly, if a ditch that is not excavated in or relocates a tributary has ephemeral flow it is non-jurisdictional under the exclusions in paragraph (b)(3)(A) of the final rule. However, if that ditch becomes characterized by, for example, perennial flow further down gradient, then only that section of the ditch with perennial flow is jurisdictional. The agencies believe that science demonstrates that ditches that contribute flow to the tributary system perform substantially similar functions as tributaries themselves, and thereby have a significant nexus to downstream waters.

As discussed in more detail in the Technical Support Document Section I, consistent with longstanding agency interpretation and practice, ditches can be considered both point sources and waters of the US. The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. For instance, certain activities and discharges are exempt as part of established, ongoing farming, ranching, and silviculture operations under CWA 404(f)(1)(A), which has not changed as a result of the rule. Additionally, the construction or maintenance of irrigation ditches, as well as the maintenance, but not construction, of drainage ditches are exempt activities under CWA 404(f)(1)(C). This rule has not changed these exemptions. Other ditch maintenance work may be covered by non-reporting Nationwide Permit 3. See Corps Regulatory Guidance Letter (RGL) 07-02 for more information. The rule also does not affect or modify existing statutory and regulatory exemptions from NPDES permitting requirements, such as those for return flows from irrigated agriculture (CWA 402(l)(1); 502(14)), stormwater runoff from oil, gas and mining operations (CWA 402(l)(2)), or agricultural stormwater discharges (CWA 502(14)). However, consistent with longstanding interpretation, these exempt activities do not change the jurisdictional status of the water body as a whole, or the potential need for CWA permits for non-exempted activities in these waters or non-exempted discharges to these waters.

This rule also does not change the longstanding regulatory exclusions for waste water treatment systems designed to meet the requirements of the CWA or prior converted cropland (40 CFR 232.2). In fact, exclusions have been expanded under the new rule and provide, for the first time, that certain ditches and other features that the agencies have long generally not considered to be waters of the United States are in fact expressly excluded as waters of the United States by rule. In addition to the ditch exclusions referenced previously in this response, the agencies have clarified stormwater related exclusions in response to numerous public comments.

Stormwater control features constructed to convey, treat or store stormwater that are created in dry land are expressly excluded as waters of the United States in the rule. As discussed in the preamble, stormwater control features are designed to address runoff that occurs during and

shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. The agencies do not expect the scope of ditches excluded to be different under (b)(3) and (b)(6), so there should be little practical need to distinguish between the two. This means that stormwater ditches that have perennial flow, e.g., because they intersect groundwater or are combined with other flows, would be jurisdictional if they meet the definition of tributary as explained above. Also, this exclusion does not change the agencies' longstanding practice of viewing some waters, such as channelized streams or piped streams, as jurisdictional even where used as part of stormwater management systems. Thus, stormwater control features that have been built in or excavated from jurisdictional waters continue to be jurisdictional waters of the United States. This is not a new agency policy. One additional exclusion in the rule also relevant to ditches covers wastewater recycling structures, including distributary canals constructed in dry land and used for wastewater recycling. As a result of the aforementioned changes, the agencies do not anticipate increased jurisdiction over ditches, including those at industrial sites, or an increase in jurisdictional determinations.

While non-jurisdictional geographic features listed in the rule's exclusions (e.g. non-wetland swales, non-jurisdictional ditches, etc) are never "waters of the United States," they may nonetheless serve as a hydrologic connection under a case-specific significant nexus evaluation. For example, a wetland may be directly hydrologically connected to, a jurisdictional tributary via flow through a non-jurisdictional ditch. While the ditch itself will always be excluded from jurisdiction, the connection of the wetland through the ditch to the tributary is relevant for determining whether the wetland has a significant nexus to downstream jurisdictional waters and should therefore be considered jurisdictional. In addition, non-jurisdictional geographic features may function as "point sources" under CWA section 502(14)), such that discharges of pollutants to jurisdictional waters through these non-jurisdictional features would be subject to other CWA regulations (e.g., CWA section 402). These are not new policies but reflect long-standing interpretations and applications of the CWA.

Section IV(F) of the preamble to the final rule and section VII of the Technical Support Document discuss other evidence, besides direct field observation, that may establish the presence of bed and banks and another indicator of OHWM. These same tools have been used by the agencies and practitioners for many years to help identify flows paths among waters. State, tribal and local governments have well-defined and longstanding working relationships with the Corps and EPA in implementing CWA programs. The final rule reflects the current state of the best available science and is guided by the need for clearer, more consistent and easily implementable standards to govern administration of the Act. The agencies will continue a transparent review of the science and learn from ongoing experience and expertise as the rule is implemented. The agencies plan to work with our regulatory partners on timely development of necessary training and guidance, as appropriate, to build upon existing working relationships, to inform stakeholders, and to ensure successful implementation of this rule.

Specific Comments

National Association of State Foresters (Doc. #14636)

- 6.396 Positively, we support the recognition and continuation in the rule of the historic exemption from WOTUS for prior-converted cropland. In this vein, and to promote consistency and to provide clarity going forward, we recommend adding “Prior-converted forestlands and associated legacy ditches” to this exclusion list. Without this provision added, there is concern that forestlands converted prior to July 1, 19771 could be recaptured by the newly proposed WOTUS rule as a result of the attempts to broadly define the terms tributary, adjacent, riparian area, floodplain, etc. (p. 2)

Agency Response: Prior converted cropland is defined by the U.S. Department of Agriculture at section 514.30 of the Food Security Act Manual (5th edition, 2010). Any changes to the Food Security Act Manual are beyond the scope of this rule. See summary response for section 6.2 above.

Committee on Space, Science and Technology (Doc. #16386)

- 6.397 EPA continues to claim that most ditches are excluded. However, the exemption is narrow because there is no minimum flow requirement, as was in the 2008 guidance. The Supreme Court specified that flow show be considered.
- a. Why has minimum flow not been included? Please provide a detailed legal rationale.
 - b. Why was the change made from the 2008 guidance?
 - c. How many miles of "waters" will the removal of a minimum flow requirement impact? Please include a detailed description of EPA's methodology in calculating this impact. (p. 13)

Agency Response: See summary response for section 6.2 above. See summary response 6.0 for a detailed discussion of the history of the regulation of ditches. The agencies expect that the exclusions will narrow the number of ditches regulated as waters of the US.

- 6.398 You testified at a recent House T&I hearing that virtually all highway ditches would be exempted because they are in uplands draining uplands, and that most ditches drain dry land, thereby qualifying for the exemption. However, ditches by their nature provide flood control and may often drain wet areas next to a road.
- a. Are ditches draining wet areas included or excluded?
 - b. Please provide maps of all covered roadside ditches.
 - c. Please provide maps delineating all "upland" areas for purposes of CWA jurisdiction. (p. 13)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The agencies do not have maps of all regulated ditches, but expect that most roadside ditches will be excluded.

6.399 In her July 1 blog, Acting Assistant Administrator Stoner said that "Ditches that are IN are generally those that are essentially human-altered streams, which feed the health and quality of larger downstream waters."

- a. Where specifically is this statement made in the rule?
- b. Please provide a detailed legal rationale explaining why EPA believes that the CWA only regulates ditches that are human altered streams that contribute flow to larger downstream waters. (p. 13-14)

Agency Response: The final rule does not include this specific statement verbatim. However, the rule does make clear at paragraph (b)(3) that ditches that are relocated tributaries or have been excavated in a tributary are generally waters of the United States. Some ditches that are not relocated tributaries or have not been excavated in a tributary may also be jurisdictional waters of the United States, unless they are excluded. For a fuller discussion of the agencies' legal rationale, see summary response for section 6.0 and Technical Support Document Section I.

48. The proposed rule includes two exclusions for ditches but both are very unclear. The first exclusion applies to ditches that are excavated in uplands and drain only uplands if they do not have water year round. But, your rule does not define the term "uplands."

- a. Does upland mean any higher elevation land?
- b. Does it mean all land that is not a wetland?
- c. A ditch may be excavated on dry land, but because it is intended to channel water, it may start to grow cattails. Are ditches that grow cattails still exempt?
- d. If a ditch is ultimately connected to a water of the U.S, disregarding all breaks in continuity in accordance with the proposed rule, does that mean that it is not excavated "wholly in uplands?"
- e. Is a ditch excluded only if it does not drain? (p. 14)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Missouri Department of Transportation (Doc. #3313)

6.400 Comments relating to ditches.

Proposed Requirement or Section Addressed: The proposed requirement that we are addressing clearly excludes two types of ditches from the definition of "waters of the U.S.", that might otherwise be evaluated as tributaries (as referenced on page 22203 of the federal register)

Comment: MoDOT supports the exclusion of both types of ditches from the definition of waters of the U.S., as proposed in the federal register reference. However, we feel that further clarification of the following reference is required to provide a clearer understanding of the meaning to the reader: "Ditches excavated wholly in uplands, drain only uplands, and have less than perennial flow."

Discussion: We believe the sole reference to uplands is a little misleading in the context of landscape position. The proposed citation could steer readers to believe that the ditch must be situated entirely in an upland landscape position, and no distinction is made between upland and lowland (floodplain). We believe the intent of the reference to upland ditches was meant to holistically exclude those ditches that originate in the uplands and traverse through the floodplain, as long as no jurisdictional waters (i.e., wetlands or streams) are intersected by the ditch along its course.

Recommendation: For the purposes of clarity, we would recommend adding the following to the definition: Ditches may traverse other landscape positions (i.e., floodplains), but cannot drain or intersect wetlands or other waters of the U.S. (p. 1)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Quapaw Tribe of Oklahoma (Doc. #7980)

- 6.401 Excluded ditches include those excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water (i.e., type 90 continuous days in a year). While the proposed rule broadens the scope of ditches that are explicitly excluded; in practice, the existing regulations provide the USACE with flexibility in dealing with ditches. Some USACE field offices have required that a ditch have a direct discharge to a downstream Water of the U.S. before they will consider it a jurisdictional ditch. **The proposed rule would take away this flexibility and will increase the number and types of ditches that are considered jurisdictional.** (p. 2-3)

Agency Response: Confusion and inconsistency in past or current practice is one of the reasons for this rule. Implementation of the rule will provide clarity so that landowners will have more certainty in identifying waters of the U.S. The agencies believe that as a whole, the number of regulated ditches will decrease as a result of the exclusions for ditches and similar features. The rule language does not use the term “relatively permanent” to describe the flow regime of ditches or tributaries. Also see summary response for section 6.3: Upland and Definition of Upland.

Florida Department of Agriculture and Consumer Services (Doc. #10260)

- 6.402 Section III.I of the Proposed Rule states that “...the agencies propose to clearly exempt from the definition of ‘waters of the United States’ two types of ditches: (1) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow, and (2) ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4).” Under the first type, in order for the ditch to be exempt, it must meet all three criteria. Section III.I clarifies that “ditches that are excavated wholly in uplands ... at no point along their length are excavated in a jurisdictional wetland (or other water).” Section III.I goes on to say that “[m]embers of the public should consider whether a wetland is jurisdictional before constructing a ditch that would drain the wetland and connect either directly or through other waters to an (a)(1) through (a)(3) water.”

The second type of exempt ditch would include ditches that do “...not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4).” However, Section III goes on to clarify that even if a ditch meets the exemption criteria stated above, it can still serve as a surface water connection for purposes of determining jurisdiction, based on adjacency under paragraph (a)(6) or a significant-nexus analysis under paragraph (a)(7). At the current time, most agricultural land owners consult with the NRCS to obtain preliminary or certified wetlands determinations, which delineate the areal extent of wetlands on their lands that meet the applicable wetland criteria. However, NRCS does not identify which wetlands would be considered jurisdictional under the CWA; this determination is made by the ACOE. Under the Proposed Rule, certain agricultural ditches constructed as part of the agricultural practices implemented on the land could become jurisdictional, or connect nonjurisdictional wetlands to jurisdictional “waters of the United States.” The Proposed Rule cautions land owners to consider this before constructing the ditch. However, in order to do so, agricultural land owners would need to consult with the ACOE to know which wetlands would be jurisdictional under the Proposed Rule. The time and expense to take this additional step would be an undue burden on agricultural producers in Florida. Additional cost may be incurred if, under ACOE permitting, a newly jurisdictional farm ditch or swale must be relocated under ACOE permitting, or if compensatory mitigation is required for a filled-in ditch or swale. (p. 47-48)

Agency Response: The commenter is correct that an NRCS wetland determination does not determine the need for a CWA 404 permit for certain activities in waters of the U.S. on the property. This current practice will not change as a result of the rule. The summary response for section 6.2 describes how the proposed exclusions for ditches were edited and clarified for the final rule. Whether a ditch bisects a wetland is not the only factor that determines whether that ditch is a water of the United States. As the summary response indicates, the determination is largely based on the flow regime of the ditch.

Virginia Department of Transportation (Doc. #12756)

- 6.403 The current language in the proposed rule identifies two scenarios for roadside ditches to be considered non-jurisdictional. The first exemption declares ditches nonjurisdictional that "are excavated wholly in uplands, drain only uplands, and have less than perennial flow," while the second exemption makes allowances for "ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4)", in which the waters referenced pertain to traditionally navigable waters.

On p. 22203, second column, the preamble describes two types of ditches that should be exempt from regulation as WOUS, including those that have less than perennial flow. VDOT contends that ditches that are excavated wholly within uplands and drain uplands, regardless of the flow regime, should not be regulated. By making this distinction, this opens other, non-jurisdictional areas to possible jurisdiction. Clearly, an upland ditch with perennial flow could flow into an isolated wetland and, under the proposed language in the proposed rule, potentially make the isolated wetland jurisdictional. The nature of flow in these features has nothing to do with its non-jurisdictional nature, as they were

created from upland, just as an impoundment in uplands which has water year round is not jurisdictional.

In the third column of p. 22203, the preamble goes on to say that "ditches that do not contribute flow to the tributary system of a traditional navigable water ... are not "waters of the United States," even if the ditch has perennial flow." While this attempts to address our concerns stated above, the definitions on page 22263 do not clearly address that exclusion, since the two definitions of ditches (paragraphs 7 (b)(3) and (b)(4)) contradict one another. Our concern, again, is that areas not currently jurisdictional will become so, as a result of the current wording. Efforts to document lack of connection to waters will prolong jurisdictional determinations on features that up to this point have been non-jurisdictional. For example, the Norfolk District Corps has been known to follow ditches downstream for miles to determine significant nexus. This language gives the Corps the ability to do the same to prove a ditch contributes flow indirectly. Also, EPA's Region III Stormwater Program has alleged that sheetflow is a point source discharge.

Under paragraph (b)(4) on p. 22263, the proposed rule states that a ditch may be exempt from jurisdiction if it does not contribute flow, either directly or through another water. This statement could be interpreted to imply that any roadside ditch that discharges into another conveyance could be considered jurisdictional, as properly functioning ditches typically direct stormwater to another surface water though it may be many miles away. If federal staff have the ability to interpret the exemption in this manner, VDOT would not be able to use this exemption except in cases where a roadside ditch is not functioning as intended or in a rare case when the ditch terminates without connecting to a water or a conveyance.

Finally, an exemption is provided for ditches with less than perennial flow. This should be clarified on p. 22263 to state that the exemption applies to ditches with intermittent or ephemeral flow, and that year-round presence of water in the ditch does not constitute perennial flow if the water is merely standing or pooling without actually flowing. This is currently stated in the preamble but should also be stated in the proposed rule itself.

We disagree that identifying "upland ditches with perennial flow is straightforward and will provide for consistent, predictable and technically accurate determinations at any time of the year." Depending upon the time of year in which an evaluation is made, or at times following rainfall events, a roadside ditch may appear to have perennial water flow; in the absence of firsthand knowledge of the long term hydrology of that ditch, an erroneous jurisdictional call could be made. Also, in Virginia, assessing the perennial nature of streams requires completion of a stream assessment form that ranks the physical, hydrologic, and biologic features associated with the channel, which requires more than a cursory review by an untrained eye to complete accurately. Jurisdictional evaluation of ditches would be no different. Although the Corps has previously identified some man-made waterbodies as jurisdictional, this distinction has been typically reserved for excavated, man-made waterbodies within wetlands, manmade online impoundments or those features that receive their hydrology from other surface waters. The effort to extend jurisdiction to upland features that don't intersect WOUS exceeds the authority of the Clean Water Act.

In summary, it is VDOT's position that the vast majority of roadside ditches should not be considered WOUS and should not be jurisdictional. For clarity, rewrite the language to clearly state that none of the following ditches are jurisdictional: 1) those excavated in uplands; 2) those that drain uplands; 3) with less than perennial flow; or 4) those not directly connected to WOUS. Exemptions for ditches should be carefully re-written so that agency staff does not have the ability to declare most roadside ditches as WOUS. It should also be made clear in the definition of WOUS that the ditch exemptions provided take precedence over the jurisdictional-by-rule provisions to avoid additional confusion. Without this clarity, the Corps will be required to make numerous jurisdictional determinations to determine if ditches are exempted or not, and the regulated public will need to spend significant time and money to demonstrate a ditch is not jurisdictional. This extra level of effort defeats the expectation of decreasing the number of jurisdictional determinations and reducing documentation requirements that is noted throughout the preamble, including p. 22194.

Further, we recommend that agencies clarify in the proposed rule that the existing exemption for "maintenance of ditches and transportation structures" in Section 404(t)(1)(B and C) of the Clean Water Act applies to roadside ditches as there is no guidance that clarifies that roadside ditches can be considered exempt, and acknowledge that the current definition of "drainage ditch" in Corps Regulatory Guidance Letter 07-02, "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of Clean Water Act (issued July 4, 2007) can apply to many roadside ditches. These recommended clarifications would allow VDOT to conduct needed routine ditch maintenance activities without having to pursue permits for features that should not be considered jurisdictional. (p. 2-5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The clarified and more definitive exclusions should prevent the prolonged jurisdictional determinations of concern to the commenter. In particular, most roadside ditches will be excluded. All existing statutory exemptions, including those for ditch maintenance under CWA 404(f), remain in effect and unchanged by the final rule. The rule also clarifies which wetlands and other waters would be jurisdictional waters of the United States. A ditch flowing to a non-jurisdictional wetland would not necessarily cause the wetland to become jurisdictional. The rule would not extend jurisdiction to upland features, as the commenter suggests.

International Erosion Control Association (Doc. #13174)

- 6.404 We believe the proposed definition will expand EPA's jurisdiction. While EPA has continued to note that the rule is meant to only clarify what is and is not considered Waters of the US and not to expand jurisdiction, the rule seems ambiguous in areas. For example, some features are exempt, and the way in which they are exempted could be interpreted that the contrary would then be true. Example: (4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section. Would it be true, then that all ditches that DO contribute flow to a water ARE WOTUS? (p. 1)

Agency Response: No, the exclusions apply independently, and not all ditches that contribute flow will be waters of the United States under the final rule. See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

WA Dept of Ecology (Doc. #13957)

6.405 Clarification Needed for Non-Agricultural Ditches

State agencies and local governments have expressed concern that the wording in the "water of the US" definition for excluding ditches from Section 328.3 (§ 328.3(b)(3) and (4)) is somewhat ambiguous. The exclusion should clearly identify that sections of roadside ditches and other drainage ditches excavated in uplands that drain only upland areas, are not jurisdictional upstream of the discharge point even if the ditch periodically "contributes flow" to a "water of the US." Clarifying these distinctions would eliminate much of the confusion. Roadside or other drainage ditches containing a perennial and intermittent channelized stream would be jurisdictional if it meets the definition of a tributary, as proposed in the rule. The rule should be amended to specifically clarify that ditches that contain tributaries are jurisdictional, and are not excluded simply because they flow through a ditch. (p. 5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Alabama Department of Transportation (Doc. #14116)

6.406 Situations occur as a result of construction of a roadside ditch that could cause a man-made, or constructed ditch to not meet the exemption tests and be considered jurisdictional. Examples include instances where the ground water table is penetrated creating perennial or intermittent flows where none existed prior to ditch excavation. There are also occasions where, due to maintenance frequency, vegetation and sediment buildup can cause water to stand in the flow line of a ditch, causing the ditch to exhibit wetland characteristics where wetlands did not exist prior to or immediately after the ditch was initially constructed. ALDOT requests that the rule exempt all ditches, or portions of ditches that were constructed in upland areas, regardless of the current state of flow.) (...)

Stormwater treatment is becoming more prevalent in municipal and roadside ditches due to space constraints. Capturing pollutants within and using State Waters and Waters of the United States for stormwater treatment is generally in violation of existing regulation. Should these features become jurisdictional, additional regulatory burdens and costs could be incurred by municipalities and departments of transportation. ALDOT requests that facilities created for the management of stormwater, whether in ditches or other types of green infrastructure, be specifically excluded as "Waters of the United States" and from regulatory jurisdiction.

The term ditch, while playing a large role in the definition of WOTUS, is not defined in the proposed rule. As our requests largely center on roadside ditches as an integral part of

a roadway and transportation system, we request that the term, roadside ditch, be defined in the rule. We offer the following definition:

Roadside Ditch - A common roadway feature, typically with a bottom and side slopes, found along or near the side of a roadway, intentionally designed and constructed, or that develops as an integral part of a roadway system to convey water away from or along the roadway, preserve the structural stability of the roadway, and/or to enhance public safety.¹²¹

The complexities associated with transportation facility drainage are significant. The environmental benefits, if any, of regulating roadside ditches as "Waters of the United States" are likely not worth the certain increase in regulatory burden to state departments of transportation in the areas of construction, maintenance, permitting, and recordkeeping. For greater clarity, and considering benefits to water quality versus the economic burden on municipalities and state departments of transportation, ALDOT respectfully requests that the rule clearly and specifically exclude ALL municipal conveyances and roadside ditches with less than perennial flow, and all stormwater treatment facilities, including green infrastructure, from being declared and regulated as "Waters of the United States." (p. 2-5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Also, with respect to the jurisdictional status of stormwater control features as waters of the U.S, please see Compendium 7 of this RTC, summary response at 7.4.4.

State of Oklahoma (Doc. #14625)

6.407 Equally confusing in the proposed rule are its somewhat incoherent list of exemptions, including the aforementioned narrow ditch exemption. These exemptions apply to a limited set of features excavated wholly on uplands, which is yet another critical term left undefined in the proposed rule. It is also noteworthy that in the rule's preamble, EPA and the Corps acknowledge the difficulty of distinguishing excluded "gullies and rills" from potentially regulated "ephemeral streams." (p. 1)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Section IV(I) of the preamble to the final rule and Compendium 7 of this RTC discuss the final rule's exclusions more broadly.

¹²¹ Rationale for- the proposed definition of roadside ditch:

1. Roadside ditches are an artificial and integral constructed part of a topography altered for the purpose of facilitating a roadway which is a part of a larger transportation system.
2. Roadside ditches serve defined purposes as a part of a transportation system. Many promote structural stability of the roadway by moving water along and away from the roadway. Some are constructed for the purposes of providing a physical barrier and landing areas of vehicles leaving a roadway. Others provide a buffer and catchment zone for falling rock or other hazards to the traveling public.
3. Roadside ditches may or may not carry water. When present, flows within ditches may be ephemeral, intermittent, or perennial. Flows of any type may be found in one part of a ditch and not in another.

North Carolina Department of Agriculture and Consumer Services (Doc. #14747)

- 6.408 One means to reduce confusion would be to incorporate the text provided in the recent (undated) "Questions and Answers about Waters of the U.S. Proposal" {FAQ document}. In the FAQ document, EPA provides several clues about the intent of the proposed rule; however, the current text of the proposal does not seem to match up. EPA should clarify the jurisdiction of ditches in the proposed rule using the text of the FAQ document in several locations:

Add a definition of " upland". In the FAQ document (see item No. 20) ,). EPA provides a potential definition as, " ... any area that is not a wetland, stream, lake or other waterbody. So, any ditch built in uplands that does not flow year round is excluded from CWA jurisdiction." Inclusion of this definition would help reduce confusion about ditches that are subject to regulation.

Limits of jurisdiction. In the FAQ document (see item No. 19), EPA states, "Simply put, if a ditch is not constructed through a wetland or stream, and if it doesn't flow year round, it would not be included in the jurisdiction of the CWA." This text is much more straightforward than the current exclusions in the proposed rule, and would greatly reduce confusion about jurisdictional ditches.

In eastern North Carolina (and other Southeastern states), ditches can contain perennial flow without draining wetlands, due to intercepting the water table, or simply because they do not drain well due to topography. Under the proposed exclusions, these ditches would appear to be jurisdictional, even though they do not fit the criteria outlined in item No. 19 of the FAQ document. The two revisions suggested above would clearly eliminate these ditches from jurisdiction, as intended by EPA and USACE. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule's ditch exclusion language is consistent with the FAQ referenced by the commenter.

Arizona Game and Fish Department (Doc. #14789)

- 6.409 The proposed Rule lacks clarity and consistency as to which ditches are categorically jurisdictional. Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow, or ditches that do not contribute flow to waters of the U.S. are not jurisdictional. 40 CFR 230.3 (t)(3) and (4). However, a ditch that delivers stream flow via a diversion and a water delivery ditch are not excluded from federal jurisdiction. The final Rule should define such ditches as non-jurisdictional, or further clarify the "significant nexus" of these ditches to waters of the U.S. (p. 1)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule; as explained there, diversions of water to drinking water facilities are excluded under the final rule. The rule further clarifies that ditches created in dry land that are constructed to convey wastewater for recycling are excluded from consideration as waters of the United States. If a diversion ditch or a water delivery ditch fails to flow, either directly or through another water, into a water identified in paragraphs

(a)(1) through (a)(3) of the final rule, then the ditch itself is not a water of the United States. If on the other hand, some of the water withdrawn from the stream is delivered back into the stream or another water of the United States by the ditch, then the ditch is subject to the same evaluation as a potential water of the United States as any other ditch.

Florida Department of Environmental Protection (Doc. #15080)

- 6.410 The federal agencies recognize that ditches may be created for a number of purposes, including water management or treatment and roadside drains. 79 Fed. Reg. at 22,203. The federal agencies propose to exclude from the definition of "waters of the United States" ditches that do not contribute flow to a core federal water and ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow. 79 Fed. Reg. 22,218.

The Department asks that the federal agencies clarify whether ditches excavated wholly in uplands that drain only uplands, and that have less than perennial flow, would be excluded from the definition of "waters of the United States" if they contribute flow to a core federal water. (p. 6-7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The ditch exclusions operate independently. That is, a ditch needs only to satisfy one of the three ditch exclusions in order to be non-jurisdictional.

Tennessee Department of Environment and Conservation (Doc. #15135)

- 6.411 The proposed rule includes exclusions not justified by science. There is a lack of scientific knowledge to determine if ditches should be categorically excluded. Although gullies, rills, and non-wetland swales are excluded, these features can be important conduits for moving water between jurisdictional waters, making them important with respect to hydrological and other forms of connectivity. (p. 13)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Section IV(I) of the preamble to the final rule and Compendium 7 of this RTC discuss the final rule's exclusions more broadly. The rule is consistent with the science by maintaining jurisdiction for ditches that are tributaries and excluding ditches and similar features that have not, at least by historical practice, been regulated and that have a minimal (if any) contribution to downstream waters. Science does not provide a bright line distinction between jurisdictional and non-jurisdictional ditches, but the agencies have used the flexibility provided by the statute and case law to provide clear functional exclusions in order to ensure consistency and efficient implementation.

- 6.412 The exemption for ditches that do not contribute flow, either directly or through another water, to a traditionally jurisdictional water appears to be an exemption with no application, particularly in wetter states. These would presumably be ditches outside of the upland areas and it is hard to conceptualize a ditch that would qualify for this

exemption in those areas. We request the agencies either include a flow component (even a minimal one) that would provide some potential application for this exemption or explain, using examples, what application the agencies believes would exist. (p. 29)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

North Dakota Office of the Governor, et al. (Doc. #15365)

6.413 The rule's supposed ditch exemptions are unrealistic and negate the purpose of ditches.

Section 328.3(b)(3) states, “[d]itches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow” would not be WOTUS. However section 328.3(b)(4) states, “[d]itches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a) (1) through (4) of this section” would also not be WOTUS. As written, paragraph three of the proposed rule excludes qualifying ditches yet, if those same ditches contribute flow, they would be not be exempt under paragraph four. These conflicting examples demonstrate the uncertainty of the proposed rule’s ditch exemptions.

In an effort to provide clarification, the rule explains that ditches are not jurisdictional if they are “excavated in uplands, rather than in wetlands or other types of waters, [and] for their entire length are not tributaries.”¹²² In North Dakota, there are very few ditches that would not intersect water at some point in their path due to our wide stretches of agricultural land and flat topography. This exclusion could be interpreted very literally, such that any downstream connection – no matter how miniscule or indirect – would prevent the exclusion from being applied. Ditches are designed to drain – this requirement makes the above exemptions useless, especially in an agriculture or transportation scenario.

In an agriculture scenario, if ditches cross between or within farm fields, pastures, or grazing lands, farmers could be forced into a situation where they need to get a CWA permit for insect and weed control or certain farm activities (left ambiguous by the poorly written Interpretive Rule)¹²³ if there is a discharge in or near an ephemeral drain, ditch, or low spot. In a transportation setting, all highway ditches that take stormwater runoff somewhere would potentially meet the definition of WOTUS under the proposed rule. If applied or interpreted in this manner, the permitting requirements for highway construction and maintenance activities would be unduly burdensome.

In addition, few ditches draining only uplands for any purpose are confined only to uplands. To do so floods other lands. Almost all drains go somewhere and release water to navigable streams at some point. Since they do, they would be included in the definition of a tributary, and therefore jurisdictional in the same sense as the navigable

¹²² 79 Fed. Reg. 22188, 22203

¹²³ North Dakota’s concerns with the Interpretive Rule and its effect on agriculture are explained in more detail in the comments from the North Dakota Department of Agriculture submitted to the Interpretive Rule docket on July 7, 2014.

water itself. As with wetlands discussed above, the presence of perennial flow is dependent on climate regime and fluctuations in normal rainfall. There are many drains with perennial flow now that were not perennial 25 years ago.

The effect of a drain on a navigable water is an area of possible legitimate federal jurisdiction. But the water within the drain above that confluence should not be. The drain should only be jurisdictional at the point of confluence with a navigable water and within a clearly defined set of standards. The drain itself should remain within state jurisdiction and should not be treated as a tributary. (p. 9-10)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The ditch exclusions operate independently. That is, a ditch needs only to satisfy one of the three ditch exclusions in order to be non-jurisdictional. . A “drain” needs to meet the definition of “tributary”, which requires physical indicators of a bed and banks and an ordinary high water mark, and not fall within one of the exclusions in paragraph (b) of the rule in order to be regulated as a water of the United States. Please also note that the Interpretive Rule was withdrawn on January 29, 2015.

Southern Ute Indian Tribe Growth Fund (Doc. #15386)

- 6.414 **Recommendation:** The appropriate flow regime for a ditch excavated wholly in uplands and draining only uplands should be less than perennial flow. (p. 7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

- 6.415 **Recommendation:** In order to clarify the exemption for ditches that are constructed in uplands and drain only uplands contribute flow, the wording of the first ditch exemption in paragraph (b)(3) could be modified as follows:

“Ditches that are excavated wholly in uplands, drains only uplands, and have less than perennial flow even if they contribute flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section.”

In addition, it is recommended that an exemption for drainage ditches that meet the definition of a tributary but were not formerly a natural streams, not excavated within a WOTUS, that do not have perennial flow and do not connect two or more WOTUS that are used for stormwater management or floodwater control is added to the Proposed Rule. With respect to ditches that were constructed in a WOTUS and contribute flow to a TNW, the Proposed Rule should clarify what portion of the ditch would be jurisdictional. (p.8-9)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. With respect to the jurisdictional status of stormwater control features as waters of the U.S, please see Compendium 7, summary response at 7.4.4.

Ohio Department of Natural Resources, et al., State of Ohio (Doc. #15421)

6.416 In addition, section (b)(3) indicates that a ditch would need to have perennial flow to be included in the definition of waters of the US. While it clearly states "perennial flow", and the Federal Register (page 22203) states that "water that stands or pools in a ditch is not considered perennial flow", ODOT would like it clarified in the proposed (b)(3) that the term "flow" means moving water and not pooled or standing water. Several of our drainage ditches may possess perennial standing water, due to the interception of the high groundwater table or a perched water table, but they do not "flow" perennially. While the water table may be located above the ditch bed for most of the year along portions of the ditch, resulting in visible water throughout most of the year, the ditch does not support the flow of water during dry periods. Clarification in (b)(3) would eliminate the question as to whether these types of ditches would be considered as having "less than perennial flow". While the proposed definition clearly indicates "Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" would be excluded from the definition of waters of the U.S." the Federal Register (page 22219) discusses how man-made wetland swales could be considered jurisdictional under proposed (a)(6) or (a)(7). It is unclear to ODOT what the distinction would be between a manmade swale that had been constructed in uplands and drains only uplands and has developed wetland criteria, and an ephemeral or intermittent constructed ditch that had been constructed in uplands and drains only uplands that has become fully vegetated with hydrophytes and has developed hydric soil characteristics. The lack of a clear distinction between ditches and man-made wetland swales could result in inconsistent characterization and regulation of ditches and swales.

It is possible that the USEPA and USACE are on the wrong path when attempting to exclude ditches from federal jurisdiction. Owners of ditches (primarily agriculture and transportation industries and agencies) are concerned about the implications of regulating ditches, while scientists and water resource agencies can find no defensible distinction between ephemeral or intermittent streams (which would have a significant nexus) and ephemeral or intermittent drainage ditches (which are proposed for exclusion from the definition of waters of the U.S. for policy reasons). What matters from the standpoint of the regulated community (or at least what should matter) are the practical implications of defining ditches as waters of the U.S., and not whether ditches are defined as waters of the U.S. The regulated community associated with dredge and fill activities does not want "construction" activities (as defined in USACE Regulatory Guidance letter 07-02) to be regulated on existing drainage ditches (as they currently are). Apparently the USEPA and USACE also do not want to regulate these activities, as the proposed rule is attempting to exclude ephemeral and intermittent drainage ditches from the definition of waters of the U.S. Perhaps the solution to this problem is not in excluding certain types of non-isolated drainage ditches from the definition of waters of the U.S., but rather modifying 404(f)(1)(c) of the CWA (as well as 33 CFR 323.4 (a)(3) and 40 CFR 232.3 (c)(3) Where applicable) to allow for the "construction" of drainage ditches without regulation under Section 404 (regardless of flow regime). This would be a necessary action beyond the exemptions for agriculture included in the interpretive rule regarding the applicability of CWA Section 404(f)(1)(A). The recapture provision in CWA Section 404 (f) that would allow for 404 regulation of activities "whose purpose would be to convert an area of

waters of the U.S. Into a use to which It was not previously subject" would remain applicable. preventing the draining of wetlands, However, portions of CWA 404 (f) and 33 C.F.R, 323.4 (c) would need to be modified to allow for an alteration of flow or circulation of waters of the U.S. as a result of drainage ditch construction activities, The presumption that "flow or circulation may be impaired" by alterations caused by construction activities, would need to be discounted as insignificant In Section 404 (f), Extending the exemption In 404(f)(1)(C) of the CWA to the construction of drainage ditches would allow for the relocation, lining, widening, deepening, placement of control structures, and piping of ditches without 404 regulation, while still potentially defining them as water of the U.S. This would allow, for example, a DOT to convert a roadside drainage ditch to a post-construction best management practice to comply with NPDES without the need for a 404 CWA permit, At a minimum, the exemption of drainage ditch construction activities would need to extend to ephemeral and intermittent drainage ditches to meet the spirit of the proposed rule (which as currently proposed would not even consider' these drainage ditches jurisdictional). (p. 5-6)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The agencies do not have the authority to revise or amend the exemptions established by the U.S. Congress in the statute itself, such as those found in section 404(f).

- 6.417 In order to avoid confusion regarding whether a ditch is jurisdictional or not, would recommend that the agency include a clear definition for "upland areas" since there are specific criteria for whether a ditch is located in an upland area and have less than perennial flow.

The Federal Register indicates that "Absolutely no uplands located in 'riparian areas' and 'floodplains' can never be 'waters of the United States' subject to jurisdiction of the CWA." However, upland ditches with perennial flow are jurisdictional [(h) (4) of the proposed regulation]. The apparent contradictory nature of these two policies should be explained or revised. Also, it is not certain, based on the above and other statements whether uplands outside of riparian or floodplain areas can be jurisdictional.

According to the Federal Register (FR), "A shallow subsurface hydrologic connection is lateral water flow through a shallow surface layer, such as can be found, for example, in steeply sloping forested areas with shallow soils . This could be interpreted as "upland areas". On Page 22208 of the FR. it is also stated "For purposes of this rule, confined surface connections consist of permanent, intermittent or ephemeral surface connections through directional flow paths, such as (but not limited to) swales, gullies, rills , and ditches . In some cases, these connections will be a result of "fill and spill" hydrology." Could the above features be located in upland areas? Again, a definition or clarification of "uplands" is needed; especially since the jurisdictional nature of ditches is impacted by location in an upland setting. Therefore, clarify whether shallow subsurface, confined surface, or biologic connections can be made to features located in upland areas.

As part of an active "mine environment" a series of ditches are installed in order to direct overland flows during rainfall or other storms events and to ensure that drainage within an active mine site is conveyed to approved water treatment facilities (ponds). At this time, these ditch features are not jurisdictional and this agency would be concerned if

there would be any interpretation that would otherwise require these man-made ditches as jurisdictional.

If a part of a "ditch" meets the exclusions of paragraph (b) and part of the ditch does not, then only a portion of that ditch would be considered jurisdictional. The proposed rule does not make this clear or apparent how that would be evaluated. (p. 12)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The rule does not change the longstanding exclusion for waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA, and in fact adds new exclusions specifically for stormwater control and wastewater recycling structures. While such systems, including stormwater control measures that are not constructed in waters of the United States remain non-jurisdictional, any waste treatment or stormwater control measures built in a "water of the United States" would need a CWA 404 permit to be constructed and a 402 permit for discharges into "waters of the United States." The rule does not change any of these existing policies. With respect to the jurisdictional status of stormwater control features as waters of the United States, please see Compendium 7, summary response at 7.4.4.

- 6.418 Excluding small ditches with limited drainage areas that are frequently dry is appropriate. However, Ohio EPA believes the proposed rule is confusing and the resulting exclusion could impact a substantial number of Ohio waters that are listed in the State's Water Quality Standards and waters that are named as receiving streams in NPDES permits.

Ohio and other mid-western States have drainage laws that provide for the construction and maintenance of extensive drainage infrastructure designed to remove excess water. Ditch construction under these laws that began as early as the late 19th century drained a landscape comprised of primarily hydric soils, wetlands, sloughs and low gradient streams. Therefore, at the time of original construction these ditches were not "excavated wholly in uplands". Today, landowners and public officials responsible for drainage maintenance consider this as an "upland landscape" that is being drained. In Ohio it is often difficult to discern those ditch segments that at one time followed a natural water course from ditches entirely excavated on flat ground.

The proposed rule does not define uplands so we cannot be sure how the agencies will view the situation. The following statements in the preamble fail to provide sufficient clarity:

- "Ditches that are excavated wholly in uplands means ditches that at no point along their length are excavated in a jurisdictional wetland (or other water)". (page 22219)
- Such jurisdictional ditches may include, but are not limited to, the following:
 - Natural streams that have been altered (e.g., channelized, straightened or relocated);
 - ditches that have been excavated in "waters of the United States," including jurisdictional wetlands;

- ditches that have perennial flow; and
- ditches that connect two or more "waters of the United States." (page 22203)
- Ditches created by altering natural waters would be considered "waters of the United States," so long as they contribute flow to another jurisdictional water. (page 22203)

Ohio EPA requests that the agencies clarify their intent relative to the scope of the ditch exclusion and give consideration to the potential impacts of removing waterways that are currently listed in State Water Quality Standards and have NPDES permitted discharges. (p. 22-23)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. As stated in the preamble to the final rule, States and tribes retain full authority to implement their own programs to more broadly and more fully protect the waters in their jurisdiction. Under section 510 of the CWA, unless expressly stated, nothing in the CWA precludes or denies the right of any state or tribe to establish more protective standards or limits than the Federal CWA. In addition, NPDES permits can be issued for discharges that travel through a non-jurisdictional feature before being discharged to a jurisdictional water, so the existence of an NPDES permit is not determinative of the jurisdictional status of the immediate receiving water. The final rule does not change the validity of existing NPDES permits.

Muckleshoot Indian Tribe Fisheries Division (Doc. #16369)

6.419 The proposed rule proposes to exclude "ditches created in uplands" that flowing intermittently from the definition of Waters of the US. This is a concern as intermittent ditches can support salmon habitat based on our experiences from the Green River; Sammamish River; and Enumclaw plateau areas in King County Washington. Also, we have found juvenile coho salmon in several roadside ditch areas that can go dry in normal and drought conditions which would now be excluded from Section 404 authorities if this rule is approved as proposed. Several of these areas were mapped and modeled in King Countys agricultural waterway classification system maps (see Attachments 1-3). These maps may not be 100% accurate but it highlights the connectivity that these waters have to larger streams and rivers. Further, there is scientific research showing that coho salmon use intermittent streams (see Attachment 4).

There is limited information regarding ditches or wetlands or other waters that are truly created from upland areas. All of these would be exempt from 404 authority without having to demonstrate first that these areas were truly created out of uplands. There are few projects that have sufficient as-built drawings from when their ditch networks were created and very limited information about diverted and channelized wetlands and streams that are now farm or roadside ditches. This is generally discussed in Collins and Sheikhs 2003 paper on reconstructing historical landscapes (see attached 5). (p. 1)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Indiana Department of Environmental Management (Doc. #16440)

6.420 The final rule must clarify the complete description of what portions of ditches are not jurisdictional.

Regarding the exclusion of "ditches that are excavated wholly in uplands, drain only u lands, and have less than perennial flow," the Agencies should clarify in the final rule that such ditches that drain u lands, but do eventually discharge to waters of the U.S. are not jurisdictional throughout the portion of the ditch that is u stream of the traditional waters of the United States defined in proposed (a)(1) through (a)(5). Additionally, a definition of u land should be included in the final rule that clarifies that u land is all land other than wetlands even when rainfall results in ponding of water in flat areas. Further, manmade drainage ditches that drain u lands only should not be jurisdictional regardless of the number of months it holds water. Finally, a landowner should be able to use a ditch to drain a non-jurisdictional water, such as a private pond or prior converted cropland, without turning that water body into a water of the U.S. (p. 4-5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Paragraph (b) of the final rule makes it clear that no feature excluded under that paragraph may subsequently be found jurisdictional under other provisions of the rule, even if it otherwise satisfies the criteria for "waters of the United States" under the rule. Thus, a drained non-jurisdictional water body is not subject to any additional regulation under this rule.

Tennessee Department of Transportation (Doc. #16470)

6.421 Exclusions for Roadside Ditches

The proposed rule would identify two types of roadside ditches as non-jurisdictional: "Ditches that are excavated wholly in uplands, drain only uplands , and have less than perennial flow" and "Ditches that do not contribute flow, either directly or through another water , to a water identified in paragraphs (a)(1) through (4)" - i.e , to traditionally navigable waters . TDOT supports the concept of excluding specific types of ditches from jurisdictional status. "Exclusions by rule" have the potential to reduce TDOT administrative burdens by reducing the need for case-by-case determinations of jurisdictional status. TDOT's concern with this aspect of the proposed rule involves the specific wording of the exclusions for ditches. TDOT recommends that additional clarification be provided to ensure that these exclusions are given full effect and are not prone to misinterpretation in the field. To ensure that the regulation is interpreted correctly, TDOT suggests clarifying in the final rule that each of these exclusions is to be applied separately - that is, a ditch is excluded from jurisdiction if it meets either ditch type. In particular, the final rule should clarify that, if a ditch is excavated wholly in uplands , drains only uplands , and has less than perennial flow, the ditch would be non-jurisdictional by rule - even if it directly or indirectly "contributes flow" to a water identified as "jurisdictional by rule" or traditionally navigable waters.

A. Roadside Ditches "excavated wholly in uplands". The preamble to the proposed rule explains that, in determining the applicability of this exclusion, "Historical evidence,

such as photographs, prior delineations, or topographic maps , may be used to determine whether a water body was excavated wholly in uplands and drains only uplands, and has less than perennial flow ." (79 Fed. Reg. 22203). This statement implies that the phrase "excavated wholly in uplands" refers to the conditions that existed at the time the ditch "was excavated" - i.e., when it was created. Elsewhere, however, the preamble is less clear. For example, in one place, the preamble states that "Ditches that are excavated wholly in uplands means ditches that at no point along their length are excavated in a jurisdictional wetland (or other water)." The use of present tense - "are excavated" - could be interpreted to refer to present conditions, rather than conditions at the time of construction. TOOT believes there is some risk that the phrase "excavated in" could be misinterpreted to refer to ditches located in wetlands at any point, including ditches in which the only wetlands are those that developed after the ditch was constructed. TOOT suggests that the final regulations should clearly state that "excavated wholly in uplands" means that the ditch was originally constructed entirely in uplands. Furthermore, TOOT suggests that the rule should also specifically state that the emergence of wetlands vegetation in a ditch following initial construction does not prevent a finding that the ditch was "excavated wholly in uplands."

B. Roadside Ditches "drain only uplands". It is unclear how the agencies will determine whether a ditch "drains only uplands." TOOT believes some clarification is needed regarding this requirement. TOOT suggests that the final rule should clarify that the exclusion can be applied to a ditch even when wetlands (or wetland-like features) are present in the ditch itself - for example, where wetlands emerged following the construction of the ditch

C. Roadside Ditches "have less than perennial flow". The preamble specifically requests comment on the appropriate flow regime to be used in this ditch exclusion - that is, whether the exclusion should apply to ditches with "less than perennial flow " or "less than intermittent flow ." TOOT strongly believes that this ditch exclusion should apply to ditches with less than perennial flow. As so believed, TOOT suggests that the final regulations should clearly state that "less than perennial flow" includes ditches with intermittent and ephemeral flow.

D. Roadside Ditches "do not contribute flow, either directly or through another water" The second exclusion for ditches applies to ditches that "do not contribute flow, either directly or through another water," to certain other jurisdictional waters. The proposed rule does not provide any explanation of how this exclusion will be interpreted.

TDOT is concerned that the exclusion could be interpreted very literally, such that any downstream connection - no matter how miniscule or indirect - would prevent the exclusion from being applied. TDOT suggests that the rule should be modified to include clarifying language that would better ensure a practical interpretation of this exclusion. Specifically, TDOT recommends clarifying in the final regulations that a "speculative or insubstantial" downstream connection or significant nexus does not prevent this exclusion from being applied. (p. 2-3)

Agency Response: EPA agrees that each exclusion applies independently of the others. See summary response for section 6.2 for a discussion of how the proposed

exclusions for ditches were edited and clarified for the final rule. Section IV(F) of the preamble to the final rule discusses the concept of “contribute flow.”

Office of the Governor, State of Montana (Doc. #16694)

6.422 The exceptions for "ditches" at proposed 40 CFR 230.3(t)(3) and (4) do not reflect the on the- ground reality and, as a result, fail to provide any meaningful protection to water transport for supply purposes. No irrigation ditch is wholly in uplands as a ditch must begin at the streamside or water source where the water is diverted. Further, most ditches cross a wetland area or stream as water is moved from the source to the place of use. Few, if any, water supply ditches do not contribute flow to a water body, as by their nature a supply ditch must carry enough water to serve the last user, including the carriage water. This carriage water is often returned to a stream or water body. Many water supply ditches discharge the full diversion into a natural stream for transmission to its final point of diversion. These water transfers are exempted from federal NPDES permit requirements under the water transfer rule at 40 CFR 122.3 (i).

The transmission of water for supply purposes should be exempted from the definition of "waters of the United States" with clear language: "Waters transmitted through ditches or other transmission conduits and returned in whole or part to a receiving water body are exempt." This will protect and support the current water transfer rule exemption while maintaining water quality protection, as point source discharges into water supply facilities would continue to be regulated. (p. 5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The exemption for water transfers from NPDES permit requirements that apply to “point sources” is outside the scope of this rule. See summary response at 12.3.

Nebraska Department of Roads (Doc. #16896)

6.423 **Jurisdiction of Roadside Ditches**

- b. ***Ditches excavated in uplands are not considered Waters of the US.*** NDOR supports this exemption, and feels it is appropriate to state this in rule rather than in guidance. The statement that these ditches have “less than perennial flow” could be worded more explicitly to either include ephemeral or intermittent flow or simply say that they do not carry a relatively permanent flow of water. In Nebraska, ditches are generally located in relatively flat terrain and are known to develop wetland characteristics due to the interception of groundwater from shallow aquifers and/or because the water does not drain until a designed rain event occurs to carry the flow down the flat grade. The preamble to the rule indicates these types of ditches would not be jurisdictional; it would be better to simply state this in the rule.
- c. ***Ditches that do not contribute flow to another water are not considered Waters of the US.*** NDOR supports this exemption. However, this wording could be broadly interpreted to mean any ditch in any system. What volume of water drained to a roadside ditch is considered to contribute flow? Clarification of the intent of this exemption would be appropriate to state in the rule rather than in the guidance. Clear

definition of what is considered to contribute flow is appropriate for consistency of jurisdictional determinations, and thus avoiding the potential for misapplication of the rule. This clarification would also aid in the avoidance and minimization processes in the planning and development of projects. (p. 1-2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Section IV(F) of the preamble to the final rule discusses the concept of “contribute flow.”

State of South Dakota (Doc. #16925)

- 6.424 **Exclusions for Roadside Ditches** - SDDOT supports the exclusion of specific types of ditches from jurisdictional status. Under paragraphs (b)(3) and (b)(4), the final rule should clarify that, if a ditch is excavated wholly in uplands, drains only uplands, and has less than perennial flow, the ditch is non-jurisdictional by rule. The final rule should clearly state that "less than perennial" includes ditches with intermittent and ephemeral flow and that ditches with less than perennial flow qualify for exclusion. It should clearly state that "excavated wholly in uplands" means that the ditch was originally constructed entirely in uplands and that emergence of wetlands vegetation in a ditch following initial construction does not preclude a finding that the ditch was "excavated wholly in uplands." The final rule should also specify that a "speculative or insubstantial" downstream connection does not prevent the exclusion "do not contribute flow, either directly or through another water" to certain jurisdictional waters from being applied for ditches that meet this criteria. (p. 4-5)

EPA Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

State of Nevada Department of Conservation et al (Doc. #16932)

- 6.425 A particular area of confusion is the treatment of ditches. As an example, the Executive Summary of the Proposed Rule states: “Those waters and features that would not be “waters of the United States” are:...Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.” However, section F.2. of the preamble says: “Non-jurisdictional geographic features (e.g. non-wetland swales, ephemeral upland ditches) may still serve as a confined surface hydrologic connection between an adjacent wetland or water and a traditional navigable water, interstate water or territorial sea...In addition, these geographic features may function as “point sources,” such that discharges of pollutants to waters through these features could be subject to other CWA authorities (e.g. CWA section 402 and its implementing regulations).” Such conflicting language erodes confidence in EPA’s stated exemptions and should be corrected. (p. 6)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Whether a feature is a “point source” subject to NPDES permitting is not dependent upon whether it is a water of the US under this rule.

Florida Department of Transportation (Doc. #18824)

6.426 Exclusions for Roadside Ditches

The FDOT is supportive of the exclusion of ditches as non-jurisdictional. However, the proposed exemption as discussed in the preamble requires that the ditch is 1) excavated wholly from uplands, 2) drains only uplands, and 3) has less than perennial flow. In order to clarify the "ditches" exemption, FDOT would like to see a specific exemption for roadside ditches that are part of existing or future transportation related conveyance structures and treatment systems regardless of whether they drain only uplands with less than perennial flow or do not contribute flow, either directly or through another water, to a water identified in 33 CFR Part 328 and 40 CFR Part 122, paragraphs (a)(1) through (4) of the proposed rule. 79 Fed. Reg. 22263; 22267 (April 21, 2014).

The first criterion of the ditch exemption requires the ditch to be "excavated wholly from uplands." Due to the relatively flat topography and high ground water table in much of Florida, flow in upland-cut ditches can be year-round due to the influence of ground water and would not meet the criteria for the ditch exemption as currently proposed. Also, many of these transportation ditches, conveyance structures and treatment systems may eventually take on the biological characteristics of a wetland that falls within the definition of WOTUS. Thus, these upland cut ditches would not meet the exemption. Maintenance of these systems would require additional permitting requirements from the federal agencies for routine maintenance activities.

The second criterion requires that the ditch "drain only uplands," however, the preamble does not explain how the agencies will make that determination. As stated above because of the relatively flat topography and high ground water table in much of Florida, flow in upland-cut ditches can be year-round due to the influence of ground water and would not meet the criteria for the ditch exemption requiring less than perennial flow. FDOT recommends the agencies provide clarification regarding this requirement. The rule should clarify that the exclusion can be applied to a transportation related ditch, swale, or conveyance structure even when wetland-like features are present in the ditch itself—for example, where wetland plants, or other wetland characteristics, emerged following the construction of the ditch, and where perennial flow exists.

The third criterion requires that ditches do not contribute flow to a WOTUS, either directly or indirectly. Due to the broad definitions of "adjacent", "floodplain" and "neighboring", an upland-cut ditch that is a roadside ditch could be determined to be a tributary or to contribute to a WOTUS, and thus not be exempt, especially with the inclusion of shallow subsurface flow to define jurisdictional waters. Although the exemption appears to be inclusive of roadside ditches, for the reasons stated above the jurisdictional status of transportation related ditches, canals, culverts and swales is still uncertain.

To address these concerns, the FDOT recommends the agencies include language from the 2008 Guidance of the Clean Water Act Jurisdiction Following the Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* (2008 Guidance). The 2008 Guidance clearly states that roadside ditches are non-jurisdictional. FDOT recommends the rule be clarified to specifically exempt transportation related ditches,

swales, conveyance structures and treatment systems from inclusion in the definition of WOTUS. (p. 2-3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The 2008 *Rapanos* Guidance indicated that “the agencies generally will not assert jurisdiction [over] ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.” By comparison, the final rule asserts for the first time by rule, that all ephemeral and intermittent ditches that are not relocated tributaries or excavated in a tributary (and for intermittent ditches do not drain wetlands) are categorically not waters of the United States.

State of Alaska (Doc. #19465)

6.427 The rule should exclude roadside ditches as non-jurisdictional.

The proposed rule also newly states that jurisdictional tributaries may be man-made or man-altered. The proposed rule states that “Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow” are not “waters of the U.S.” The proposed rule adds a second exclusion which states “(b)(4) ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section” are not Waters of the United States. This exclusion clarifies that a ditch is not jurisdictional (even if it has perennial flow) if it does not transport flow into another jurisdictional water. As outlined in section (c)(5) of the proposed rule, jurisdictional tributaries would include “ditches not excluded in paragraph (b)(3) or (b)(4).” Most if not all the roadside ditches within Alaska would be classified as jurisdictional because those ditches that would fall within the two exclusions are rare. Most if not all the roadside ditches contribute flow into a jurisdictional tributary (either directly, or through another water). All roadside ditches should be excluded from jurisdiction because a large portion of the nation’s public and private transportation infrastructure relies on drainage structures that transport water away from facilities. The federal agencies did not consider the significant confusion and workload that will occur with these changes. Water quality concerns from roadside ditches are already addressed in Section 402 permits and state Section 401 certifications of Section 404 permits. (p. 26)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule asserts for the first time by rule, that all ephemeral and intermittent ditches that are not relocated tributaries or excavated in a tributary (and for intermittent ditches do not drain wetlands) are categorically not waters of the United States. The agencies believe that these exclusions will include most of the nation’s roadside ditches.

6.428 Regarding the exclusion of “[d]itches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow,” the State requests that the agencies clarify in a newly proposed rule that such ditches that drain uplands but eventually discharge to waters of the U.S. are not jurisdictional throughout the portion of the ditch that was excavated in uplands. The agencies should also include detail in the newly proposed rule

that defines exactly where the line is between non-jurisdictional and jurisdictional sections of such ditches, as when a ditch does not contribute flow to a downstream navigable water, or when the flow will not contribute “significantly” to the water quality in a down-stream navigable water. (p. 31)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

California Department of Transportation, Division of Environmental Analysis (Doc. #19538)

6.429 Caltrans supports exclusions b(3) and b(4) for ditches as they are currently stated in the proposed rule. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Allen Boone Humphries Robinson LLP (Doc. #19614)

6.430 The agencies except those ditches that "are excavated wholly in uplands, drain only uplands, and have less than perennial flow," and those that "do not contribute flow, either directly or through another water," to various other categories of jurisdictional waters.¹²⁴ These exclusions are vague and inadequate. It is highly unlikely that any ditch would never, under any circumstances, **contribute** any amount of flow to downstream waters or wetlands. The term "perennial flow" is ambiguous, and "upland" is not defined in the Proposed Rule.¹²⁵ Landowners will be required to expend vast amounts of time and money to determine whether these exclusions apply. (p. 8)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Cecil County, Maryland (Doc. #2000)

6.431 My major concern is that the proposed definition broadens the definition to include man-made or man-altered ditches, such as roadside ditches, flood channels, and potentially others, thus making them subject to federal regulation under Section 404 of the CWA. Cecil County, like local governments across the nation, is responsible for maintaining roadside drainage ditches along over 600 centerline miles of County roads that we maintain. I believe that under the proposed definition, large swaths of those ditches and similar conveyances will now be considered "Waters of the United States" and require us to obtain federal permits before doing routine maintenance, upgrades, mitigation, or improvements. Obtaining such permits can be time consuming and costly. The definition should be revised to explicitly state that roadside and other man-made ditches are excluded from the definition of "Waters of the United States." (p. 1)

¹²⁴ 547 U.S. at 739 (Finding that the agencies' authority should extend only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters.).

¹²⁵ This term is especially important with respect to the jurisdictional determination of ditches and also with respect to the management of stormwater systems, including those presently covered by MS4 permits.

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Skamania County Board of Commissioners (Doc. #2469.1)

6.432 The proposed rule states that some ditches would not be considered "waters of the U.S." if the ditches are excavated wholly in uplands, drain only uplands and have less than perennial flow OR ditches that do not contribute flow either directly or through another water. How can a county prove its ditches do not "contribute to flow? How can exempt ditches be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S."? (p. 4)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Bonner County Board of Commissioners (Doc. #4879)

6.433 [...] It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S." A public infrastructure ditch system-roadside, flood or stormwater- is interconnected and can run for hundreds, if not thousands of miles. Ditches are not wholly in uplands nor do they strictly drain in uplands, since they are designed to convey overflow waters to an outlet. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

City of Holts Summit, State of Missouri (Doc. #5601)

6.434 We request that roadside ditches and stormwater channels which only carry water after rain or snow storms be added to the categorical exclusion from Waters of the United States. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. While the final rule does not categorically excluded all roadside ditches, the revised ditch exclusion will cover most roadside ditches, including those that have minimal, if any, contribution to downstream waters. The rule also contains an exclusion for stormwater conveyances created in dry land. See summary response at 7.4.4.

The Carroll County Department of Land Use, Planning & Development (Doc. #6266)

6.435 The definition of 'uplands' and 'contribute flow' are not defined, which creates lack of clarify for those ditches that are proposed to be excluded. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule ditch exclusion no longer uses the term "upland." For discussion of the term "contribute flow" see Agencies Summary Response in the Tributary Compendium, section 8.1.1: Relevance of Flow Regime, section IV.F.1 of the preamble and the Technical Support Document section VII.

Butler County, Pennsylvania (Doc. #6918.1)

6.436 How will currently exempt ditches be distinguished from jurisdictional ditches if they are near a "water of the U.S.?" How will the impacts of the "significant nexus test" for "other waters" effecting an entire project area (and existing ditches) be evaluated for potential physical, chemical or biological connections to waters flowing into "waters of the U.S.?" For example, the proposed rule states that. . .man-made conveyances, including ditches, are considered jurisdictional tributaries if they have a bed, bank and ordinary high water mark and flow directly or indirectly into a 'water of the U.S.' regardless of perennial, intermittent or ephemeral flow. Excluded are certain types of upland ditches with less than perennial flow or those ditches that do not contribute to a "water of the U.S." What is an indirect flow of water into a "water of the U.S.?" When reference is made to indirect flow, the interchangeable language is "flow through another water" provides no definite clarity on federal jurisdictional questions. What is an "adjacent wetland"? Despite the over analysis and consideration of terms in the CWA which have already been interpreted by the EPA and the Corps in the proposed rule, both agencies failed to apply the Supreme Court's discussion of "adjacent wetlands." (p. 10)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Section III of the preamble to the final rule, section II of the Technical Support Document and Topic 5 of this RTC address "significant nexus" determinations. Section IV(F) of the preamble discusses the concept of "indirect flow."

Murray County Board of Commissioners (Doc. #7528.1.1)

6.437 The proposed rule excludes from jurisdiction upland ditches with less than perennial flow. We support the exclusion of all drainage ditches with less than perennial flow from the definition of waters of the United States - not just upland drainage ditches. In Minnesota and many other states, development of the agricultural economy depended on drainage. Due to the nature of the landscape, very few drainage ditches and drainage tile systems solely traverse upland. Many, because of the landscape, were built through wetlands - not always for the purpose of draining the wetland but to allow for the efficient passage of water. These ditches do not have a perennial flow of water and should not be considered jurisdictional - especially if their inclusion will extend jurisdiction to wetland adjacent to such ditches. Further, we do not support lessening the flow standard to intermittent flow or anything less than perennial flow for any constructed ditch.

6.438 RECOMMENDATION: We recommend that the exclusion for ditches be strengthened to clarify that ditches that drain into or through wetlands are also excluded. (p. 9-10)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The agencies disagree that all ditches that drain into or through wetlands should be excluded. For the reasons provided in the summary response, the agencies have retained as waters of the US ditches that significantly affect the chemical, biological

or physical integrity of traditional navigable waters, interstate waters or the territorial seas.

City of San Diego, Transportation & Storm Water Department (Doc. #7950.2)

- 6.439 Terms like “uplands” and “contribute flow” are not defined. It is unclear how currently exempt channels will be distinguished from jurisdictional channels, especially if they are near a “water of the U.S.”

Recommendation: Clearly define uplands and contribute flow using scientifically defensible terms and definitions. (p. 1)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. These terms are no longer used in the ditch exclusions in the rule. Also note that an excluded ditch is excluded even if it otherwise meets the criteria for other categories of waters regulated under the rule (such as adjacent waters).

- 6.440 The proposed rule provides exemptions for two categories of ditches: (1) ditches that are excavated wholly in uplands drain only uplands (for their entire length) and have less than perennial flow, and (2) ditches that do not contribute flow. The exemption for certain “upland” ditches is vague, and the proposed rule does not explain what “upland” is and what it means to “drain only uplands.” This exemption might not cover the roadside ditches that exist throughout the U.S. Roadside ditches follow the road and are not restricted to upland areas that drain only uplands.

Recommendation: Clearly define using scientific terms and definitions as to what uplands are and define drainage of only uplands. (p. 1)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

- 6.441 A storm water permit is required for storm water discharges into waters of the United States. Under the proposed rule, any channelized features that contribute flow, including man-made features are jurisdictional tributaries. (79 Fed. Reg. at 22.263). Accordingly, MS4 ditches and other storm water conveyances could now be classified as WOTUS and therefore subject to water quality standards, which the states would have to set (an exercise that requires substantial time and money). In addition, routine maintenance on storm water conveyances could now require a section 404 permit.

Recommendation: Exempt MS4 and storm conveyance systems maintenance. (p.2 1)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule and the addition of an exclusion for stormwater conveyances

City of Phoenix, Arizona, Office of Environmental Programs (Doc. #7986)

- 6.442 The overly broad definition of “tributary” will also cause roadside ditches to be considered WOTUS, contrary to the current practice of excluding roadside ditches from §404 jurisdiction. Therefore, we respectfully request the inclusion of “roadside ditches” in the list of features identified as “not waters of the United States” in §328.3 (b). (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. While the final rule does not categorically exclude roadside ditches, most will meet the terms of the ditch exclusions. Those that remain waters of the US are those that are significantly contributing to downstream waters, such as ditches excavated in a tributary. Section VII of the Technical Support Document describes the agencies' determination that man-made or man-altered tributaries significantly affect the physical, chemical and biological integrity of (a)(1) through (a)(3) waters.

Moffat County Board of Commissioners, Moffat County, Colorado (Doc. #7987)

- 6.443 Moffat County requests the EPA and Army Corps exempt roadside ditches from waters of the U.S. classification and the proposed rule. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Board of Douglas County Commissioners, Castle Rock, CO (Doc. #8145)

- 6.444 Douglas County asserts that additional EPA scientific review to identify different types of conveyances, including ditches needs to be conducted to ensure that "ditch exemptions" are readily available to our County for routine public safety maintenance of stormwater infrastructure such as detention flood storage/water quality ponds, stormsewer culverts, and ditch maintenance activities. Douglas County requests these features be excluded from the Proposed Rule. (p. 15-16)

Agency Response: See summary response for section 6.2 regarding existing ditch maintenance exemptions, as well as exclusions for stormwater and wastewater recycling infrastructure that are not constructed in waters of the United States.

Del Norte County, California (Doc. #8376)

- 6.445 [K]ey terms like "uplands" and "contribute flow" are not defined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S." A public infrastructure ditch system-roadside, flood or stormwater- is interconnected and can run for hundreds, if not thousands of miles. Ditches are not wholly in uplands nor do they strictly drain in uplands, since they are designed to convey overflow waters to an outlet.

The proposed rule states that some ditches would not be considered "waters of the U.S." if the ditches are excavated wholly in uplands, drain only uplands and have less than perennial flow OR ditches that do not contribute flow either directly or through another water. How can a county prove its ditches do not "contribute to flow"? How can exempt ditches be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S."?

Additionally, how will the agency delineate how seasonal ditches will be regulated under the proposal? (p. 1)

Agency Response: See summary response for section 6.2. Regarding “seasonal ditches,” the agencies believe the commenter is referring to intermittent ditches, which are addressed under paragraph (b) of the final rule.

Olivenhain Municipal Water District (Doc. #8596)

6.446 It is uncertain how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near federal jurisdictional waters. (p. 1)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Franconia Township (Doc. #8661)

6.447 It is believed the agencies should specifically exempt all roadside ditches from CWA jurisdiction and ditches and drains constructed and maintained in association with agricultural uses. Section (b)(3) should be revised to strike "ditches wholly in the uplands" and replace with "upland ditches". Also, certain upland drains do have perennial flow due to the timing of agricultural return flows in the form of groundwater. If irrigation were to cease, these perennial flows would eventually cease. In the case of delayed agricultural runoff causing perennial flows in upland drains, these upland agricultural drains should be considered excluded from the definition of "waters of the U.S." as well. (p. 6)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Carroll County Board of Commissioners, Maryland (Doc. #8667)

6.448 The definition of uplands and "contribute flow" are not defined, which creates lack of clarity for those ditches that are proposed to be excluded (p. 2)

Agency Response: See summary response for section 6.2 a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Hamilton County Engineer's Office (Doc. #8669)

6.449 It is believed the agencies should specifically exempt all roadside ditches from CWA jurisdiction and ditches and drains constructed and maintained in association with agricultural uses. Section (b)(3) should be revised to strike "ditches wholly in the uplands" and replace with "upland ditches". Also, certain upland drains do have perennial flow due to the timing of agricultural return flows in the form of groundwater. If irrigation were to cease, these perennial flows would eventually cease. In the case of delayed agricultural runoff causing perennial flows in upland drains, these upland agricultural drains should be considered excluded from the definition of "waters of the U.S." as well. (p. 6)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

City of Chesapeake (Doc. #9615)

6.450 The Rule states that ditches that are perennial generally have water present year round when rainfall is normal or above normal; however, ditches that contain water that only stands or pools would not be considered perennial flow, thus would be exempt to regulatory oversight under the CWA. Due to an abundant seasonally high water table throughout the City of Chesapeake, many of the City's ditches intercept the groundwater for some portion of the year, and thus may contain standing water. Generally, the water within these ditches only flows during storm events. Are ditches that intercept the groundwater table during a portion of the year considered exempt or would these features be jurisdictional? (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Pike Peak Area Council of Governments (Doc. #9732)

6.451 The narrow scope of the proposed ditch exemption will mean that most ditches will be considered jurisdictional, as they are not excavated wholly in uplands and drain areas other than uplands. Hence, the proposal will increase the burdens associated with both meeting future water supply challenges and maintaining and replacing existing ditch structures. (p. 2-3)

Agency Response: EPA response. See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The summary response and the rule preamble also make clear that all existing statutory exemptions under CWA Sections 404, 402, and 502 remain in effect and have not been changed or modified in any way by this rule. These include CWA 404 exemptions for the maintenance of drainage ditches and structures in drainage ditches, such as siphons, pumps, headgates, wingwalls, wiers, diversion structures and other such facilities (CWA 404(f)(1)(3)).

Somerset County Commissioners, Somerset, Pennsylvania (Doc. #9734)

6.452 What differentiates exempt ditch from jurisdictional near waters of the US, excavated wholly in uplands, drains upland with less than perennial flow or ditches that don't contribute flow directly or indirectly through waters of the US? (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

6.453 [T]he definition of public infrastructure ditch waters subject to the proposed rule is unclear. The proposed rule states " that man-made conveyances, including ditches, are considered jurisdictional tributaries if they have a bed, bank, and ordinary high water mark (OHWM) and flow directly or indirectly into a "water of the U.S.", regardless of perennial, intermittent, or ephemeral. " The proposed rule excludes certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to the "water of the U.S." However, key terms like "uplands" and "contribute flow" are not defined. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Pleasant Vale Township, Pike County, Illinois (Doc. #10200)

- 6.454 It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S." A public infrastructure ditch system-roadside, flood, or stormwater- is interconnected and can run for many miles. Ditches are not wholly in uplands nor do they strictly drain in uplands, since they are designed to convey overflow waters to an outlet.

It is unclear how the agency will regulate seasonal ditches under the proposal? (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Regarding "seasonal ditches," the agencies believe the commenter is referring to intermittent ditches, which are addressed under paragraph (b) of the final rule.

Board of Supervisors, Imperial County (Doc. #10259)

- 6.455 The proposed rule should clarify that for a ditch to be exempt, it must meet only one or the other of the aforementioned exemptions, not both.

Furthermore, the second exemption for ditches referenced above should be expanded to state that: If the ditch does contribute flow, but was constructed for the purpose of transporting surface runoff and was not previously a Waters of the U.S., then it also qualifies for this exemption. (p. 5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Kendall County Board, Illinois (Doc. #10965)

- 6.456 Ditches traverse uplands as well as lowlands and often outlet to "waters of the US". How can a county prove its ditches do not "contribute to flow" when the expressed purpose of the ditch is to convey concentrated flow to an outlet? How can exempt ditches be distinguished from the proposed jurisdictional ditches if they are near a "waters of the U.S." or how non-perennial ditches will be regulated? (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Maryland Association of Counties (Doc. #11120)

- 6.457 MACo requests that local government road and drainage ditches not already subject to CWA requirements, including stormwater and ESD structures, be explicitly excluded from the proposed "waters of the US" definition. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. With

respect to the jurisdictional status of stormwater control features as waters of the U.S, please see Compendium 7, summary response at 7.4.4.

Iowa Drainage District Association (Doc. #11924)

6.458 While we applaud the ditch exemption put forth in the proposal, in reality, it is not an exemption at all. Drainage ditches at some point will contribute to downstream waters and thus, under a strict interpretation of the rule, would be jurisdictional. Ditch maintenance is also an exemption but again, is it really exempt under the wording of the rule? (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Hancock County Surveyor's Office and the Hancock County Drainage Board, Indiana, (Doc. #11979)

6.459 The definition should exclude ditches that are excavated wholly in uplands, drain only in uplands, and have less than perennial flow. It should be limited to a blue line on USGS map or at least have a size (width and depth). There should be an exception for maintenance of drains, normal farming operations, and minor tiling projects. It is our recommendation that these non-navigable waters remain under the state and local jurisdiction. (p. 1)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The agencies believe that the final rule reasonably balances the exclusions with the need to ensure that the significant functions provided by tributaries and ditches that function as tributaries are protected under the CWA.

Board of County Commissioners, Churchill County, Nevada (Doc. #12260)

6.460 The Federal Register states: "The rule does not affect longstanding permitting exemptions in the Clean Water Act (CWA) for farming, silviculture, ranching and other specified activities". According to the EPA website, one of the exemptions under the CWA Section 404 (f) is construction and maintenance of irrigation ditches. As the ditches of the Newlands Project do not carry water 365 days per year and are not considered perennial, and they are exempt from 404 permitting requirements, they should also be excluded from the definition of "waters of the United States" and would therefore not be jurisdictional waters. This would continue to allow the maintenance of the existing ditches and drains without the requirement of a 404 permit. (p. 1)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. As the summary response explains, the purpose of the statutory exemptions at CWA 404(f) is not to remove irrigation ditches from jurisdiction as waters of the United States, but rather to exempt certain activities taking place in those ditches from certain permitting requirements.

Urban Drainage and Flood Control District (Doc. #12263)

- 6.461 Excluded ditches include those excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water (typically 90 continuous days in a year). While the proposed rule broadens the scope of ditches that are explicitly excluded; however, in practice the existing regulations provide the USACE with flexibility in dealing with ditches. Some USACE field offices have required that a ditch have a direct discharge to a downstream Water of the U.S. before they will consider it a jurisdictional ditch. The proposed rule would take away this flexibility and will increase the number and types of ditches that are considered jurisdictional, bogging down the already-taxed permitting resources and delaying work to improve stormwater management. (p. 1)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. A rule, such as this one, that provides greater clarity and certainty to broad statutory terms necessarily removes some flexibility; however, at the same time, the additional clarity is intended to reduce transaction costs and ease implementation.

Weld County (Doc. #12343)

- 6.462 The rule change proposes to exclude “upland” ditches, but does not provide a sufficient definition of what qualifies as an upland ditch. Colorado has the highest average elevation of any state. In this sense, there is really no other place that can claim land that is “up” more than Colorado. However, it does not appear that mere elevation is the determining factor. The proposed rule does provide some guidance.

In an effort to distinguish ditches that are not “waters of the United States” from those that are “waters of the United States,” the proposal states that ditches with less than perennial flow that are excavated in uplands, rather than wetlands or other types of waters, for their entire length are not waters of the United states under the proposed rule. Fed. Reg. Vol. 79 No. 76 at 22203

[I]t appears that ditches which do not at any point traverse or come in contact with a wetland or other water are not jurisdictional waters. Given the arid nature of the Western landscape, most of the ditches in Weld County should therefore be exempt. These ditches are typically flowing for only a few months, and rarely ever through a wetland.

Given the lack of a clear definition of “uplands” this is a difficult rule to interpret. One interpretation is that as long as no part of a ditch runs through a wetland, the ditch does not drain into a wetland, and the ditch has less than a perennial flow, it would not be subject to the Clean Water Act. Under this definition, it is irrelevant whether the ditch has a bed, bank, and ordinary high water mark, as long as it does not drain into a wetland, flow through a wetland, and has less than a perennial flow. The second part of this definition that is troubling is the term “perennial flow.” (p. 7)

Agency Response: Although the term “upland” has been removed for the final rule, it was never the intent of the agencies for the term to refer to elevation. Paragraph (b) of the final rule clearly states that no feature excluded under paragraph (b) may be determined to be a “water of the United States” even if it otherwise satisfies the criteria for a water of the United States in paragraph (a). See

summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Elko County Board of Commissioners, Nevada (Doc. #12755)

- 6.463 The proposed rule excludes certain types of "upland ditches" with less than perennial flow or those ditches that do not contribute flow to a "water of the U.S." However, the terms like "uplands" and "contribute flow" are not defined. It is very unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S.". Not all ditches are wholly in uplands nor do they strictly drain in uplands, since they are designed, constructed and permitted through Nevada State Law to convey waters for irrigation and agricultural purposes to lowland areas many times adjacent to or in course with jurisdictional tributaries. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Association of California Water Agencies (Doc. #12978)

- 6.464 The proposed rule would exempt ditches that “are excavated wholly in uplands, drain only uplands, and have less than perennial flow” and ditches that “do not contribute flow either directly or through another water to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water” (Id. at 22193) from the definition of tributary. This approach of simultaneously classifying ditches as tributaries while carving out narrow exemptions would create unnecessary complexity and uncertainty. The exemptions are use-specific, while ditch uses are varied. Without clarity, tens-of-thousands of ditch miles would become jurisdictional under the proposed rule. ACWA requests the Agencies codify all existing ditch exemptions. If the Agencies develop new ditch exemptions, they must be clearly delineate and include readily observable features that will easily identify the ditches as exempt. (p. 10)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Milan Township Board of Trustees (Doc. #13044)

- 6.465 We believe all roadside ditches should be exempted from CWA jurisdiction, as well as ditches and drains constructed and maintained in association with agricultural uses. (p. 1)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Carson Water Subconservancy District, Carson City, NV (Doc. #13573)

- 6.466 Another concern about the proposed rule change is the potential impact on counties' and cities' drainage and flood facilities. The EPA and the Corps state that the purpose of the rule is to provide clarity in the jurisdictional process. However, the definition of public infrastructure ditch waters subject to the proposed rule is unclear. The proposed rule states "that man-made conveyances, including ditches, are considered jurisdictional

tributaries if they have a bed, bank, and ordinary high water mark (OHWA) and flow directly or indirectly into a "Waters of the U.S.", regardless of perennial, intermittent, or ephemeral." The proposed rule excludes certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to the "water of the U.S." However, key terms like "uplands" and "contribute flow" are not defined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a "Waters of the U.S." A public infrastructure ditch system-- roadside, flood, or stormwater--is interconnected and can run for several miles. How will this ambiguous language be interpreted and who will be doing the interpreting? (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Cincinnati Township (Doc. #13974)

- 6.467 It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a water of the U.S. A public infrastructure ditch system roadside, flood, or stormwater is interconnected and can run for many miles. Ditches are not wholly in uplands nor do they strictly drain in uplands, since they are designed to convey overflow waters to an outlet.

The proposed rule states that some ditches would not be considered waters of the U.S. if the ditches are excavated wholly in uplands, drain only uplands and have less than perennial flow or are ditches that do not contribute flow either directly or through another water body. How can a township prove its ditches do not contribute to flow? How can exempt ditches be distinguished from jurisdictional ditches, especially if they are near a water of the U.S.?

Additionally, how will the agency delineate how seasonal ditches will be regulated under the proposal? While, in theory, a maintenance exemption for cleaning vegetation and debris ditches exists, it is difficult for local governments to use the exemption. The federal jurisdictional process is not well understood and the determination process can be extremely cumbersome, time-consuming and expensive, leaving townships vulnerable to lawsuits if the federal permit process is not streamlined. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Regarding "seasonal ditches," the agencies believe the commenter is referring to intermittent ditches, which is addressed under paragraph (b) of the final rule. The rule is designed to clarify federal jurisdiction, thus reducing the need for lengthy jurisdictional determination processes.

The Board of County Commissioners of Otero County New Mexico (Doc. #14321)

- 6.468 Section (b) generally and the exemption for certain "ditches" specifically: Although on its face, the agencies' determination that the section (b) exemptions (i.e. waters that are not jurisdictional by rule) shall not be subject to any type of recapture provision is appropriate, as a practical matter, it will be of little help. As currently drafted the exemption in provision (b)(3) is too narrow. Most ditches will run through or empty into

some larger body, where there will certainly be a riparian area. Because the rule currently states the ditch must “drain only uplands” it is virtually impossible to envision when this exemption may be applicable. Accordingly, the agencies should explore ways to broaden the scope of the exemption, which might provide some relief to farmers and ranchers otherwise burdened by the Proposed Rule. (p. 17)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Delta Board of County Commissioners (Doc. #14405)

6.469 [T]he agencies exclusions under (b)(3) and (b)(4) are unclear and not adequate for the livestock industry and ranchers in Delta County, Colorado. As the proposal currently stands, Delta BoCC are not confident that any ditch can meet the current categories under (b)(3) and (b)(4). (p. 5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Jefferson Parish, Louisiana (Doc. #14574.1)

6.470 A. Except from regulation those roadside ditches "substantially" excavated in "non-wetlands", "fastlands" (leveed areas) or farmland, that have only rainwater, irrigation flow or state permitted discharges.

B. Except from regulation those drainage ditches that contribute only stormwater flow to other waters.

C. Exclude from regulation other manmade ditches unless they have substantial year-round flow of water and are directly connected to navigable waters of the United States.

D. Exclude non-navigable interstate waters from categorical coverage. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Interstate waters have been regulated as waters of the United States since before passage of the Clean Water Act in 1972. In fact, “interstate waters” were first defined in the 1948 Water Pollution Control Act as all rivers, lakes, and other waters that flow across, or form part of, State boundaries (Pub. L. No. 80-845, §10, 62 Stat. 1161). The agencies believe that Congress clearly intended for the federal regulation of interstate waters to continue under the CWA. See section IV of the Technical Support Document.

Harris County Flood Control District (Doc. #15049)

6.471 "Uplands," "perennial flow," and "contribute flow" are key terms in the exclusion but are not defined. It is unclear how currently exempt ditches will be distinguished from proposed jurisdictional ditches, especially if they are near a Water of the U.S. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. These terms are not in the final ditch exclusions.

Alameda County Flood Control and Water Conservation (Doc. #15074)

6.472 The District supports the ditch exemption, in the proposed rule which states: “ditches excavated in uplands, drains only uplands, have less than perennial flow, do not contribute flow either directly or through water to a traditional navigable water, interstate water, and territorial seas or impoundment of jurisdictional water”. Nonetheless, this definition is inconsistent with US Army Corps of Engineers Regulatory Guidance Letter (RGL) No.07-02: Exemptions for construction or Maintenance of Irrigation ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act (July 4 2007). Many local government agencies rely upon this RGL to maintain roadways and hill side slope ditches. District recommends maintaining the RGL. Existing Non-upland ditches should be grandfathered into the proposed rule. Further, the inclusion of ditches in the definition of tributaries conflicts with the exception identified in paragraph (b) (3) or (4) (pages 22199, 22201-22202). As proposed, the rule would, subject thousands of miles of road side ditches to Section 404 permitting contrary to the purported exemption stated above. District recommends eliminating ditches from the definition of tributary. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The rule will not affect any existing statutory exemptions for the maintenance of drainage ditches, nor will it affect the existing U.S. Army Corps of Engineers Regulatory Guidance Letter 07-02. There is no need for grandfathering under this rule because the rule largely either codifies existing practices or expands exclusions. There is no conflict between the ditch exclusions and the definition of “tributary” because an excluded ditch is not a water of the US and thus cannot be a tributary under the rule.

Lea Soil and Conservation District Board of Supervisors (Doc. #15144.1)

6.473 Section (b) generally and the exemption for certain “ditches” specifically: The Parties applaud and support the agencies’ determination that the section (b) exemptions (i.e. waters that are not jurisdictional by rule) shall not be subject to any type of recapture provision. The only other comment to this section concerns the provision in (b)(3). As currently drafted the exemption is too narrow. Most ditches will run through or empty into some larger body, where there will certainly be a riparian area. Because the rule currently states the ditch must “drain only uplands” it is virtually impossible to envision when this exemption may be applicable. Accordingly, the agencies should explore ways to broaden the scope of the exemption, which might provide some relief to farmers and ranchers otherwise burdened by the Proposed Rule. (p. 6)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

City of Poway, California (Doc. #15156)

6.474 The proposed rule states that man-made conveyances, including ditches, are considered jurisdictional tributaries if they have a bed, bank and Ordinary High Water Mark (OHWM) and flow directly or indirectly into a WOTUS regardless of perennial, intermittent or ephemeral flow. The proposed rule does exclude certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to a WOTUS. However, key terms like "upland" and "contribute flow" are not defined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a WOTUS. A public infrastructure ditch system is interconnected and can run for hundreds of miles. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Painesville Township, Ohio (Doc. #15183)

6.475 Excluded Waters and Exempted Activities: Ditches

- Under the proposal's broadened definition of a "tributary" that is considered a "water of the U.S.", certain farm or roadside "ditches" could qualify as a tributary and be subject to CWA regulation.
- The proposed rule is ambiguous enough that there is an uncomfortable possibility that the ditches and streams running through farms and ranches in lowlands could receive closer scrutiny if the rivers and lakes downstream from them rank as "polluted" under the CWA.
- Roadside ditches common in rural areas of the country could be brought under CWA regulation if they are determined to either flow to navigable waters (tributary) or are considered "adjacent" to a "water of the U.S." or have a "significant nexus" to those waters. If they are not clearly exempted, more ditches will fall under federal jurisdiction and certain maintenance activities might require a CWA Section 404 permit. This permitting process is very expensive and time consuming, creating legal vulnerabilities for communities like ours that are responsible for maintaining these rural roadways.
- We believe all roadside ditches should be exempted from CWA jurisdiction, as well as ditches and drains constructed and maintained in association with agricultural uses. Section (b)(3) should be revised to strike "ditches wholly in the uplands" and replace with "upland ditches." (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Carroll County Board of Commissioners (Doc. #15190)

6.476 Defining "ditches" as "tributaries", and subsequent associated implications, is of particular concern to us:

- The definition of uplands and "contribute flow" are not defined, which creates lack of clarity for those ditches that are proposed to be excluded. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

City of Greeley, Colorado, Water and Sewer Department (Doc. #15258)

- 6.477 [...] Greeley requests the Agencies to add a specific exclusion to 40 CFR §122.2(b) for: Irrigation ditches existing on the effective date of this rule that have less than perennial flow. This exclusion extends from the point of origin down to the point, if any, that the ditch intercepts or drains an (a)(1) through (5) Water (excluding wetlands established due to the presence of irrigation water).

Greeley further requests the Agencies to add the following definition to 40 CFR §122.2(c):

Irrigation ditch. The term *irrigation ditch* means a man-made feature constructed to either convey water to an ultimate irrigation use or place of use, or convey irrigation water (e.g., "run-off" from irrigation) and overland flow away from irrigated lands. Irrigation ditches include the distribution systems or their parts, consisting of man-made canals, laterals, ditches, siphons, pipes, pump systems, and seasonal equalizer reservoirs. (p. 4)

Agency Response: The construction and maintenance of irrigation ditches is already exempted under Section 404(f)(1)(C) of the CWA.

- 6.478 The Preamble states that ditches that connect two or more Waters of the United States are jurisdictional as tributaries.¹²⁶ Please clarify that this concept applies only where a ditch connects two separate waters, and not two parts of the same water.

Also, please clarify the jurisdictional status of ditches covered by the Water Transfer Rule ; ditches connecting two or more Waters of the United States can fall within the permitting exemption for water transfers, unless the water they convey is subject to an intervening industrial, municipal, or commercial use.¹²⁷ 7

If the Agencies believe that the second ditch exclusion¹²⁸ has function, please clarify such function, including specific examples of situations where it would apply. (p. 4)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

The water transfer rule is an NPDES permitting exemption; it does not define which waters are “waters of the US.” This rule does not impact that exemption. The second ditch exclusion clarifies the status of ditches that do not flow into a traditional navigable water, interstate water or territorial sea. Such ditches would also not be “tributaries” so the rule is a clarification of that point.

¹²⁶ 79 Fed. Reg. at 22203

¹²⁷ 40 CFR § 122.3(i)

¹²⁸ 79 Fed. Reg. at 22268 (to be codified at 40 CFR § 122.2(b)(4))

District of Columbia Water and Sewer Authority (Doc. #15379)

- 6.479 Exempt by definition ditches, swales, gulleys, ephemeral streams, and other features with merely intermittent or ephemeral flow, storm sewers and culverts, directional sheet flow during storm events, drain tiles, and man-made drainage ditches. (p. 6)

Agency Response: See summary response for section 6.2. With respect to the jurisdictional status of stormwater control features as waters of the U.S, please see Topic 7, summary response at 7.4.4.

Boulder County and the City of Boulder, Colorado (Doc. #15495)

- 6.480 **Ditch Exclusions** - The treatment of ditches under the proposed rule is confusing and will likely have a disproportionate impact on Colorado. The proposed rule includes ditches and canals that are not otherwise excluded in the definition of tributary and are jurisdictional per se. The proposed rule excludes (i) ditches that are excavated wholly in uplands, drain only uplands and have less than a perennial flow; and (ii) ditches that do not contribute flow indirectly or directly through other water bodies to a jurisdictional water. These exclusions would arguably not cover irrigation ditches or drainage ditches in Colorado as nearly every ditch diverts water from a jurisdictional water, crosses a jurisdictional water and/or returns water to a jurisdictional water at some point along its course.

As applied to Colorado, this would result in an expansion of CWA jurisdiction and have a major impact on local governments and other water service providers and water users. The new rule would complicate and increase the costs of projects for the repair and replacement of utility infrastructure including delivery systems, irrigation ditches, diversion structures, and stormwater management facilities. In addition to increasing costs for local governments that use ditches for water and stormwater conveyance, the rule will increase the regulatory burden on ditches and will impact farmers, ranchers, irrigation companies, and other water providers.

Recommendation: The final rule should exclude artificial ditches and canals that do not flow perennially and/or are lined with artificial materials to prevent leakage from the definition of tributary. Removing ditches from the definition of tributary is also consistent with the existing exemptions under Section 404(f) of the CWA. (p. 2-3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. As explained in the response, the final rule retains the regulation of ditches where they meet the definition of tributary and are not otherwise excluded. Such ditches serve the same ecological function as other tributaries. Because the rules contains explicit exclusions for some ditches and similar features, the rule should reduce the costs and burdens of CWA compliance overall.

Sacramento County, California (Doc. #15518)

- 6.481 The proposed rule states that some ditches would not be considered "waters of the U.S." if the ditches are excavated wholly in uplands, drain only uplands and have less than

perennial flow or ditches that do not contribute flow either directly or through another water. How can a county prove its ditches do not "contribute flow"? How can exempt ditches be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S."?

Additionally, how will the agency delineate how seasonal ditches will be regulated under the proposal? (p. 4)

Agency Response: See summary response for for section 6.2 a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Regarding "seasonal ditches," the agencies believe the commenter is referring to intermittent ditches, which is addressed under paragraph (b) of the final rule.

County of Los Angeles and Los Angeles County Flood Control District (LACFSD), California (Doc. #15620)

6.482 Section b(3) of the Proposed Rule excludes from WOTUS designation "[d]itches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow." 79 Fed. Reg. at 22219. This definition is somewhat vague as the Proposed Rule provides no definition of what constitutes an "upland" other than to state that upland ditches "at no point along their length are excavated in a jurisdictional wetland (or other water)." Id. The Proposed Rule suggests that some types of waterbodies, such as roadside drains, might qualify for this exclusion, but does not clearly indicate which waterbodies would qualify.

The County and LACFCD request that any final WOTUS rule define the term "upland" and set forth tangible examples of what types of waterbodies would qualify for the "upland ditch" exclusion. For example, if a ditch were created in a natural depression that, when storms occur, can fill with water but is otherwise dry, is that an "upland ditch"? The County and LACFCD request confirmation that roadside drainage ditches are considered to fall within this exclusion.

The Agencies also requested comment on whether the exclusion should apply to upland ditches without perennial flow, or to a different flow regime, such as less than intermittent flow. The County and LACFCD support the current language in the Proposed Rule, which uses an easily ascertainable standard of "less than perennial flow." Use of this standard enhances the clarity and thus usefulness of the Rule in determining the scope of WOTUS. (p. 12)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Contra Costa County Public Works Department, et al. (Doc. #15634)

6.483 The proposed rule specifically and clearly exempts ditches excavated in uplands that drain only uplands and have less than perennial flow. CCCPWD and CCCFCD support this exemption; however, there is no similar clear exemption for stormwater retention and treatment facilities excavated in uplands. CCCPWD and CCCFCD request clear language in the proposed rule that would exempt stormwater retention and water quality treatment features (e.g., settling basins, bioswales, artificial wetlands, etc.) constructed in uplands

from the definition of Waters of the U.S. These types of facilities are artificially created and will be subject to sediment accumulation and vegetation growth and will need to be periodically maintained. Defining these features as Waters of the U.S. subject to regulation will cause significant permitting effort and could obstruct the management and maintenance of these features, and may ultimately discourage their construction, an unfortunate outcome since these features have valuable clean water benefits. (p. 1)

Agency Response: See summary response for section 6.2 for a discussion of the stormwater exclusion, as well as the edits and clarification of the proposed exclusions for ditches in the final rule. The summary response at 7.4.4 discusses the jurisdictional status of stormwater control features.

Parish of Jefferson, Louisiana (Doc. #16459.1)

6.484 A. Except from regulation those roadside ditches "substantially" excavated in "nonwetlands", "fastlands" (leveed areas) or farmland, that have only rainwater, irrigation flow or state permitted discharges.

B. Except from regulation those drainage ditches that contribute only stormwater flow to other waters.

C. Exclude from regulation other manmade ditches unless they have substantial yearround flow of water and are directly connected to navigable waters of the United States. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The summary response at 7.4.4 discusses the jurisdictional status of stormwater control features in more detail

San Bernadino County, California (Doc. #16489)

6.485 To ensure that MS4 conveyance facilities that otherwise qualify as ditches are properly excluded, DPW recommends that a third category of "ditches" be added to the exclusions. Accordingly, we recommend the following category be added:

"Ditches that are created or maintained as part of a municipal separate storm sewer conveyance system and managed as part of a municipal separate storm sewer conveyance system subject to requirements under CWA §402(p)." (p. 19-20)

Agency Response: See summary response for section 6.2 for a discussion of the stormwater exclusion and how the proposed exclusions for ditches were edited and clarified for the final rule. The summary response at 7.4.4 discusses the jurisdictional status of stormwater control features in more detail.

City of Oceanside, California (Doc. #16509)

6.486 Considering the broad and expansive nature of the "other waters" category, it is imperative that the exclusions, discussed previously, specifically call out and include storm water facilities:

- To ensure that MS4 conveyance facilities that otherwise qualify as ditches are properly excluded, the City recommends that a third category of "ditches" be added to the exclusions. Accordingly, we recommend the following category be added: "Ditches that are created or maintained as part of a municipal separate storm sewer conveyance system and that are managed as part of a municipal separate storm sewer conveyance system subject to requirements under section 402(p) Of the CWA." (p. 5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The summary response at 7.4.4 discusses the jurisdictional status of stormwater control features in more detail.

Snowmass Water and Sanitation District (Doc. #16529)

6.487 Ditches and canals are common features throughout the western U.S. and their jurisdictional status is a concern to farmers, ranchers, irrigation companies, and water providers who must continually maintain, repair and upgrade the thousands of miles of these structures throughout the arid West. The proposed rule would include all canals and ditches, not otherwise specifically excluded, in the definition of an automatically jurisdictional "tributary." The proposed exclusions are exceedingly narrow: they would exclude only (a) "[d]itches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow," and (b) "[d]itches that do not contribute flow either directly or through another water" to a traditional navigable water, interstate water, the territorial seas, or an impoundment of a jurisdictional water.¹²⁹

We have the following concerns with this approach:

A. Many ditches and canals are parts of highly managed systems that are different from rivers and perennial streams. Water in most ditches and canals is controlled, many ditches and canals are lined, and vegetation along these systems is frequently managed through methods such as mowing and burning. These are typically part of a "working" infrastructure that would not be there but for "artificial" efforts and that requires periodic maintenance and improvement. As such, most ditches and canals are very different from typical rivers and perennial streams, and this difference should be recognized from a jurisdictional standpoint consistent with Justice Scalia's plurality opinion in *Rapanos*.¹³⁰ That opinion recognized that man-altered, highly artificial and controlled systems may not be jurisdictional notwithstanding the fact that they may perform some of the same ecologic functions as natural tributaries.

B. The proposed exclusions are too narrow. The exclusions for ditches are of limited utility in the West where many canals and ditches run for miles. Under the first exclusion, the potential for these types of structures to cross only uplands, and for the water entering the structures to flow only over uplands, is remote. Ditches in the arid West frequently

¹²⁹ Definition of "Waters of the United States" under the Clean Water Act, 79 Fed. Reg. at 22219 (proposed amendment to 33 C.F.R. § 328.3(b)(3)-(4)).

¹³⁰ See *Rapanos*, 547 U.S. at 736, n.7.

move water to fields for irrigation or to municipal intakes; these structures commence at a headgate on the stream, not in an upland. Further, these structures oftentimes provide return flows back to the stream after use. This undercuts the utility of the second exclusion with respect to the required lack of contribution of any flow to downstream waters.

C. It is not clear whether the proposed rule is using the terms "ditch" and "canal" interchangeably. The exclusion language refers only to ditches and does not include a reference to canals or other conduits. This needs to be clarified.

The proposed rule should be revised to expressly exclude man-made and controlled water structures (including ditches and other conduits) from the definition of "tributary" or other jurisdictional "waters of the U.S." Should the agencies choose to continue with the assertion of jurisdiction over these structures, we request that the exclusions be revised as follows:

- *The first exclusion from jurisdiction should apply to structures that are excavated in uplands and either drain only uplands or have less than perennial flow*
- *The second exclusion should apply to structures that do not contribute significant flow to downstream waters. It should also be clarified that the contribution of flow refers to surface flow, not subsurface or groundwater flow.*
- *The exclusions should be revised to clarify that they apply to canals and other conduits as well as ditches.*
- *The exclusions should be revised to clarify that portions of a structure meeting the exclusion criteria up-gradient of the point at which the structure becomes nonexempt will be regarded as non-jurisdictional. (p. 5-6)*

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Whether a feature is referred to as a “canal” or a “ditch” is not relevant for purposes of assigning jurisdiction under the CWA.

Kaweah and Tule Water Managers (Doc. #16544)

6.488 The Kaweah and Tule Commenters support a categorical exclusion for irrigation ditches and canals. However, as worded the proposed rule still requires an analysis of whether the ditch or ditch is wholly upland, drains only uplands and does not contribute flow. Because of these qualifications, this portion of the rule does not effectively create an exclusion; rather, it continues to place the burden on the owner or manager of the ditch or canal to prove that the specified conditions exist (or don’t exist, as the case may be). This simply continues the onerous status quo.

These ditches are currently exempted from NPDES permit requirements. [33 U.S.C. §1342(I)(1) and (p)(1)]. This means that, even if “jurisdictional” under the general definitions of the CWA, they need not seek NPDES permits. This is appropriate given the nature of these waterways as artificial, isolated, man-made, agricultural waterways. However, if they escape the exclusion and are therefore considered “jurisdictional” for

other purposes of the CWA, they will be subject to other permitting requirements. The most onerous of these is the requirement to obtain a “fill” permit under section 404 of the Act. This section was clearly designed to prevent the fill of the nation’s navigable waterways; it has no application whatsoever to ditches and canals, yet it constitutes the single biggest regulatory burden on owners of these waterways, as well as the agencies implementing the CWA. For example, even the construction of a simple culvert for road purposes or installation of a measuring weir would require a “fill” permit be obtained, absent a specific showing that this exclusion applies. This must be recognized as an absurdity that desperately needs correction.

The Kaweah and Tule Commenters propose that the qualifications in the exclusion for “irrigation ditches and canals” be removed, and that an assumption be established that irrigation ditches and canals are determined to be not subject to CWA jurisdiction unless there is a specific showing that the ditch or canal meets one of the (a)(1) through (a)(6) categories, with the burden on the agency to prove jurisdiction rather than on the waterway owner to prove non-jurisdiction. (p. 5-6)

Agency Response: The final rule is not proposing a categorical exclusion for irrigation ditches or canals, for reasons provided in the summary response for section 6.2. The summary response also explains that, in the final rule, any ditch that is a relocated tributary or was excavated in a tributary is a water of the United States (unless covered under another exclusion). Please see the preamble and the Technical Support Document for additional information. The commenter is correct that a CWA 404 permit is required in order to place dredged or fill material into a jurisdictional ditch. This is longstanding practice that is not changed or modified in any way by this rule. The rule also does not change existing exemptions from permitting for activities associated with ditch maintenance, as explained in the summary response for section 6.2.

Palm Beach County, Florida (Doc. #16647)

- 6.489 Ditches that develop wetland characteristics (as happens in South Florida as they are often wet and intended to collect water) should be explicitly exempted from jurisdiction.

Ditches that are part of federal or state permitted surface water or storm water management systems or that do not have continuous flow should be exempted from jurisdiction. (p. 14)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Hot Springs County Commissioners (Doc. #16676)

- 6.490 [T]he Hot Springs County Commission requests a specific and clear exclusion of man-made ditches and conveyances for purposes of mitigating snowmelt, even if the conveyance is a natural occurrence of raising the water table, and thus man-made, but not created by physically excavating a ditch. The Hot Springs County Commission believes that this exemption should also exist for all streams, and man-made conveyances that flow less than perennially regardless of the location of its eventual drainage. One possible

mechanism for clearly excluding ditches from the proposed rule is to clarify the definition of "uplands." A ditch or conveyance, manmade or otherwise, should be considered to exist in uplands and thus exempt from the rule if it flows less than perennially or drains anywhere but directly to a jurisdictional water defined by paragraphs a(1) through a(4) of the proposed rule. In other words, if a ditch drains less than perennially into an a(5) tributary as it is currently defined, it is considered an upland ditch or conveyance for purposes of the CWA. (p. 8)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The agencies are uncertain if the commenter is requesting that all ephemeral and intermittent streams should be excluded as waters of the United States. If, however, that is his intent, the agencies disagree. Science is clear that the chemical, physical and biological condition of small headwater channels largely determine the chemical, physical and biological condition of downstream traditional navigable waters and territorial seas. Also, please note that the final rule does not require a ditch to be “excavated” in order to be excluded.

City of Palo Alto, Office of the Mayor and City Council (Doc. #16799)

6.491 Ditches that are excavated in uplands, drain only uplands, and have less than perennial flow are exempt from the rule. However "upland" is not defined, nor is "perennial flow." It is unclear how an applicant would be able to prove that a ditch would warrant the exemption and whether the exemption is nullified if the ditch traverses a wet area. This is particularly important for municipalities that maintain roadside ditches. (p. 5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Beaverhead County Commissioners (Doc. #16892)

6.492 The proposed rule excludes certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to a “water of the U.S.”; however, key terms like “uplands” and “contribute flow” are not defined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a “water of the U.S.” Our roadside ditches are interconnected and can run for over a hundred miles. Ditches are not wholly in uplands nor do they strictly drain uplands, since they are designed to convey excess water to an outlet; it is unclear exactly what would be subject to permitting. How can we distinguish exempt ditches from jurisdictional ditches, especially if they are near a “water of the U.S.”, “and where would we delineate between the two? (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Department of Public Works, County of San Diego, California (Doc. #17920)

6.493 The rule should clarify that for a ditch to be exempt, it must only meet one or the other of the exemptions, not both. The rule contains two exemptions for ditches:

- a. Ditches that are excavated wholly in uplands. drain only uplands, and have less than perennial flow.
- b. Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or a jurisdictional impoundment.

The second exemption for ditches (" b" above) should be further expanded to state that:

- Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or a jurisdictional impoundment. If the ditch does contribute flow, but was constructed for the purpose of transporting surface runoff and was not previously a Waters of the US, then it also qualifies for this exemption.

The agencies should also add language to the exemption specifying that the term "perennial flow" will mean: containing water at all times except during extreme drought. These clarifications are essential to ensuring that the County, the public, and local regulators are on the same page with interpreting the exemptions and maintaining public infrastructure in a way that prioritizes safety. (p. 5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Mississippi Valley Flood Control Association (Doc. #19488)

6.494 The agencies exclude from jurisdiction those ditches that "are excavated wholly in uplands, drain only uplands, and have less than perennial flow," and those that "do not contribute flow, either directly or through another water," to various other categories of jurisdictional waters.¹³¹ Those exclusions are categorical, but the categories are tiny. Water flows downhill; the water in an upland ditch is no exception. Further, even if the ditch drains to a feature that generally contains water in an upland area, such that it does not typically affect downstream waters, the agencies' "fill and spill" theory¹³² means jurisdiction can be found on the basis of periodic overflow. How many ditches have the agencies identified that never, under any circumstances, contribute any amount of flow to downstream waters or wetlands? (p. 10)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Maui County (Doc. #19543)

- 6.495
1. The exemption for "roadside ditches" should be clarified.
 2. The proposed rule provides exceptions for ditches that are created in uplands and drain uplands, but it fails to define "upland" and fails to identify a limit to the exception in terms of ditch length. For example, would a roadside ditch constructed primarily in

¹³¹ 79 Fed. Reg. at 22,263

¹³² 79 Fed. Reg. at 22,208.

uplands be considered jurisdictional along its entire length if it intercepted flow from a natural tributary of a WOTUS? Or, would jurisdiction be asserted based on some other criteria [e.g., from the point of intercept and down gradient)?

3. A ditch that drains an upland region may also be characterized as a perennial tributary, and the proposed rule fails to address this circumstance by specific exclusion. (p. 6)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Butte County Administration, County of Butte, California (Doc. #19593)

6.496 We believe the agencies should specifically exempt all roadside ditches from CWA jurisdiction and ditches and drains constructed and maintained in association with agricultural uses. Section (b)(3) should be revised to strike “ditches wholly in the uplands” and replace with “upland ditches”. Also, certain upland drains do have perennial flow due to the timing of agricultural return flows in the form of groundwater. If irrigation were to cease, these perennial flows would eventually cease. In the case of delayed agricultural runoff causing perennial flows in upland drains, these upland agricultural drains should be considered excluded from the definition of “waters of the U.S.” as well. (p. 8)

Agency Response: See summary response for section 6.2.

Board of Supervisors, Sutter County, California (Doc. #19657)

6.497 The Proposed Rule states that the agencies recognize there have been "inconsistencies in practice implementing agency policy with respect to ditches and this proposed rule is designed to improve clarity, predictability, and consistency." 79 Fed.Reg. 22219. But the exceptions in the Proposed Rule, as written, do not adequately address the specific issues associated with rice fields and with the Corps Sacramento District's current practices described above. Thus, they will not fully achieve the agencies' stated goal of "increas[ing] clarity and certainty about the scope of 'waters of the United States.'" 79 Fed.Reg. 22218. In particular, the Proposed Rule does not make clear how the agencies or the regulated public are to determine whether a feature was excavated wholly in uplands and drains only uplands, or was created by excavating and/or diking dry land, when the feature in question was created prior to the enactment of the Clean Water Act and reliable evidence regarding circumstances at the time of its creation is unavailable. Likewise, the Proposed Rule does not clarify how to determine whether an artificially irrigated area would revert to uplands should irrigation cease. Finally, the exception for ditches that do not contribute flow to another water does not address the situation where flows are contributed only through mechanical pumping. To address these issues, we request that the agencies make the following changes and additions to the exceptions in the Proposed Rule.

- Add a definition for "excavated wholly in uplands," applicable to proposed 33 CF.R § 328.3(b)(3), which clarifies that features created before July 25, 1975-the date the Corps extended Section 404 jurisdiction beyond navigable waters-are deemed to have

been excavated in uplands without a factual showing by the applicant of conditions existing at the time of excavation. Suggested language: "Excavated wholly in uplands means that the land being excavated was not a water of the United States when the excavation occurred; the excavation was authorized by a section 404 permit; or the land was excavated before July 25, 1975."

- Add a definition for "drain only uplands," applicable to proposed 33 CF.R § 328.3(b){3}, that is consistent with the definition of "excavated wholly in uplands." Suggested language: "Drain only uplands means that the area drained by the ditch or other feature in question was not a water of the United States when the feature was constructed; construction of the feature was authorized by a section 404 permit; or the feature was constructed before July 25, 1975."
- Add language to proposed 33 CF.R § 328.3(b)(3) to clarify that "flows resulting from mechanical pumping of irrigation water or irrigation runoff are not considered in determining whether a ditch has "'less than perennial flow.'" [...]
- Add language to proposed 33 CF.R § 328.3(b)(4) to clarify that "a ditch does not contribute flow, either directly or indirectly, to a traditional navigable water, interstate water, territorial sea or impoundment if it discharges or drains into a water of the United States, if at all, exclusively as a result of mechanical pumping." (p. 4-5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. See summary response for section 7.3.1 for a discussion of the exclusion for artificially irrigated areas that would revert to upland should application of irrigation water to that area cease. In the same section, the agencies discuss the exclusion for rice fields that were constructed by excavating or diking dry land. This exclusion does not apply to cases where rice fields were created in wetlands. The agencies agree that waters and wetlands that were lawfully converted to dry land are no longer "waters of the United States" under the CWA. However, consistent with current practice, where the rice field was created in a wetland and retains wetlands characteristics, it may be considered jurisdictional where it meets the definitions in paragraph (a). In such cases, of course, permitting exemptions for normal farming activities would apply. The commenter also raises a number of scenarios ("issues associated with rice fields", "mechanical pumping") which the agencies would need additional information in order to address. The agencies expect that the preamble and final rule should clarify many of these issues; other issues will necessarily need to be addressed during implementation of the rule.

- 6.498 We believe the agencies should specifically exempt all roadside ditches from CWA jurisdiction and ditches and drains constructed and maintained in association with agricultural uses. Section (b)(3) should be revised to strike "ditches wholly in the uplands" and replace with "upland ditches". Also, certain upland drains do have perennial flow due to the timing of agricultural return flows in the form of groundwater. If irrigation were to cease, these perennial flows would eventually cease. In the case of delayed agricultural runoff causing perennial flows in upland drains, these upland agricultural drains should be considered excluded from the definition of "waters of the U.S." as well. (p. 10)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Missouri Association of Municipal Utilities (Doc. #7931)

6.499 On behalf of our member cities we would request that roadside ditches and stormwater channels which only carry water after rain or snow storms in the final rule be added to the categorical exclusion from the definition of ‘Waters of the United States’. Further we ask that both agencies carefully examine the impact of language in the draft rule to insure that it will not have significant impact on land use decisions within the city in ways already controlled by city governments, or in ways that neither EPA or USACOE have contemplated.

In the alternative, we ask for the following modifications to the specific language describing candidates that would be excluded from the definition of ‘Waters of the United States’:

1. “Ditches that ~~are excavated exist or are created wholly in uplands, drain only uplands,~~ and have less than perennial flow.”
2. “Ditches that do not contribute measurable flow more than 50% of the time, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water.”
3. “Ditches that exist solely within property already owned or leased by a governmental subdivision.” (p. 7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The agencies believe that government ownership of a water (e.g. stream, ditch, wetland, etc.) does not sever or otherwise affect the capacity of that water to affect the chemical, physical and biological integrity of traditional navigable waters, interstate waters or the territorial seas.

California State Association of Counties (Doc. #9692)

6.500 The rule should clarify that for a ditch to be exempt, it must only meet one or the other of the exempt ions, not both. The rule contains two exempt ions for ditches:

- a. Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.
- b. Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or a jurisdictional impoundment.

The second exemption for ditches ("b" above) should be further expanded to state that: (; Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or a jurisdictional impoundment. If the ditch does contribute flow, but was constructed for the purpose of transporting surface runoff and was not previously a Waters of the US, then it also qualifies for this exempt ion. (p. 6)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Colorado Stormwater Council (Doc. #12981)

6.501 Under the Proposed Rule, excluded ditches include those excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water (i.e., typically 90 continuous days in a year). While the Proposed Rule broadens the scope of ditches that are explicitly excluded; in practice, the existing regulations provide the USACE with more flexibility in dealing with ditches. Some USACE field offices have required that a ditch have a direct discharge to a downstream WOTUS before they will consider it a jurisdictional ditch. Additional EPA scientific review is required to identify different types of conveyances, including ditches, to ensure that "ditch exemptions" are readily available to our members for routine public safety maintenance of stormwater infrastructure such as detention flood storage/water quality ponds, storm sewer culverts, and ditch maintenance activities. **The CSC requests these features be excluded from the Proposed Rule.** (p. 3-4)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The summary response at 7.4.4 discusses the jurisdictional status of stormwater control features in more detail.

Association of Clean Water Administrators (Doc. #13069)

6.502 ACWA agrees that the specific exclusions listed in the Proposed Rule will provide increased clarity for regulators and the regulated community. This, in turn, may help streamline permitting by reducing the number of individual jurisdictional determinations that will have to be made. There are some exclusions, however, that need further clarification. Regarding the exclusion of "[d]itches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow", ACWA encourages the Agencies to clarify in the final rule that such ditches that drain uplands but eventually discharge to waters of the U.S. are not jurisdictional throughout the portion of the ditch that was excavated in uplands. The Agencies should also include detail in either the final rule or subsequent guidance on how to parse out exactly where the line is between nonjurisdictional and jurisdictional sections of such ditches, as well as how to determine that a ditch does not contribute flow to a downstream navigable water. (p. 3)

Agency Response: See summary response for section 6.2.

National Association of Flood & Stormwater Management Agencies (Doc. #13613)

6.503 The (b)(3) ditches exemption is also unclear. Strict interpretation would not exempt ditches that eventually drain to jurisdictional water as is often the case. Even if the ditch meets the exemption criteria of being excavated in uplands, drains only uplands, and has less than perennial flow, the exemption seems to be unclear since ditches eventually into jurisdictional water. Please clarify that upland ditches excavated wholly in uplands, draining only uplands, and having less than perennial flow are exempt, even if they drain

(eventually) to Traditional Navigable Waters. Furthermore, NAFSMA requests ditches that are wholly the result of human operations to also be exempt.

Many facilities meeting the ditches exemption criteria of being wholly excavated in uplands and draining only uplands sometimes have more frequent flows from sources other than rainfall. In urban areas of the nation, nuisance flow (urban runoff) often flows in facilities that would otherwise be ephemeral. We request the ditches exemption include ditches that may have less than perennial rainfall flows, but may have more frequent flows from non-rainfall sources such as urban runoff.

CWA Section 404(f)(1)(b) and (f)(1)(c) provide limited exemptions for maintenance activities. However, past EPA and USACE interpretation of the exemptions and of Section 404(f)(2), the “recapture clause” (recapturing the activity back under CWA regulations) has limited the application and utility of the maintenance exemptions. We believe Congress intended for routine maintenance to be exempt as indicated by Section 404(f) and did not intend the recapture clause to be so expansively interpreted. Implementing guidelines have established an extremely low threshold for triggering the recapture clause: “(w)here the proposed discharge will result in significant discernible alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.” The 404(f)(2) threshold may be applicable for construction of irrigation ditches, however, the threshold is rarely applicable to maintenance of drainage ditches. We strongly request the EPA to clarify the limits of the recapture clause on routine maintenance (not construction or modification) of drainage ditches as well as for canals. (p. 2-3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The agencies’ interpretation of the permitting exemption for ditch maintenance activities is not affected by this rule and is outside its scope.

Western Coalition of Arid States (Doc. #14407)

- 6.504 The proposed rule only offers two exemptions to ditch operators: (1) ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow, and (2) ditches that do not contribute flow, either directly or indirectly, to a TNW, interstate water, territorial sea, or impoundment of such waters. If a ditch does not meet one or both exclusions, it meets the definition of a tributary and is regulated as jurisdictional water.

There’s one significant problem with this exclusion—most transmission and distribution ditches are designed to contribute flow to another ditch company, discharge to a groundwater recharge basin, or return flow to jurisdictional receiving water. The proposed ditch exclusion may be applicable to individual irrigators who can control excess flows in tail water ponds excluded under (b)(5), but not very practical to the hundreds of large irrigation districts and federal reclamation projects across the arid West. While farming, silvicultural, and ranching exemptions to permitting will be retained in the rules, it is not clear how and under what types of circumstances they will be applied. Without clarity, tens-of-thousands of ditch miles will become jurisdictional under the proposed rule. (p. 14-15)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Ditches must meet the definition of “tributary” in the final rule and not be excluded at paragraph (b) of the final rule in order to be waters of the United States. The rule itself also now includes specific exclusions for stormwater control features and wastewater recycling structures created in dry land. Examples of the latter include percolation ponds that collect and store water that infiltrates into the groundwater. These features will not be considered waters of the United States. If a diversion ditch or a water delivery ditch fails to flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (a)(3) of the final rule, then the ditch itself is not a water of the United States. If on the other hand, some of the water withdrawn from the stream is delivered back into the stream or another water of the United States by the ditch, then the ditch may be a water of the United States depending upon whether it fits another one of the exclusions in paragraph (b) and meets the definition of “tributary.”

County Commissioners Association of Pennsylvania (Doc. #14579)

- 6.505 Roadside ditches common in rural areas could be brought under CWA regulation if they are determined to either flow to navigable waters (tributary) or are considered “adjacent” to a “water of the U.S.” or have a “significant nexus” to those waters, which would require a specific case-by-case determination by the agencies. These ditches typically do not have perennial flow and should be considered exempt from CWA jurisdiction. If they are not clearly exempted and are thus considered “waters of the U.S.”, more of these ditches will likely fall under federal jurisdiction and certain maintenance activities might require a CWA Section 404 permit. (p. 6)

Can jurisdiction change along the length of a ditch? The proposed definition creates a three-part test for ditches to be excluded – must be excavated wholly in uplands, drain only in uplands, and have less than perennial flow. Does this mean that a ditch that stretches for miles, which meets this definition in part but not in whole, would not be exempt? Or that parts of the ditch could be exempt while others are not? It seems that the entire ditch would be jurisdictional, as there is a reference on page 22203 that indicates ditches that meet these conditions for exclusion for their entire length are not tributaries nor are they Waters of the U.S, implying that those ditches that do not meet all three parts of the exclusion would be jurisdictional. Is this a correct interpretation?

What does the term “incidental to construction” mean? The proposed rule excludes “water-filled depressions created incidental to construction activity.” Many construction projects have such ditches or depressions for foundations or footers that do not appear or disappear overnight. How will “incidental” be determined to qualify for the exclusion? (p. 10)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The exclusions for ditches do not all have to be met in order for a ditch to qualify as exempt. Section IV(I) of the preamble to the final rule provides an overview of all of the exclusions in the final rule. Also see Topic 7 of this RTC for discussion of the

other exclusions mentioned. In general, all exclusions mentioned by the commenter have been agency practice for decades.

Western Urban Water Coalition (Doc. #15178.1)

- 6.506 Irrigation ditches and canals are common features throughout the western U.S. and their jurisdictional status is a concern to farmers, ranchers, irrigation companies, and water providers who must continually maintain, repair, and upgrade thousands of miles of ditches and canals throughout the western U.S. The proposed rule includes canals and ditches, not otherwise exempted, in the definition of “tributary.” The proposed rule would exempt “[d]itches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow” and “[d]itches that do not contribute flow either directly or through another water to a TNW, interstate water, the territorial seas or an impoundment of a jurisdictional water.”

It is unclear why ditches and canals that do not meet these exemptions would be considered jurisdictional given that other excluded waters and features include “artificially irrigated areas that would revert to upland should application of irrigation water to that area cease” and “artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.” Irrigation ditches and canals are also artificially irrigated, would likely be dry or nearly always dry without the efforts by humans to supply a source of water to them, and were created by excavation for agricultural purposes. If they were not supplied water during their seasonal use, ditches and canals would not continue to have a bed, banks, and OHWM. Large ditches and canals that are lined with concrete or other materials or enclosed to prevent leakage do not have an OHWM throughout their length.

Similarly, canals used to convey municipal water supplies are common features throughout the western U.S. and water providers must continually maintain, repair, and upgrade thousands of miles of ditches and canals. The proposed rule does not specifically discuss or exempt canals used to convey municipal water supplies. However, similar to irrigation canals and ditches, municipal canals are artificial structures and parts of highly managed systems. (p. 23-24)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Canals that carry municipal water supplies will be subject to the same evaluation under the final rule as other ditches/canals; as explained in the summary response, such canals may be excluded if they flow to a water treatment facility and not a water of the US. Ditches that meet the definition of “tributary” in the final rule and are not excluded at paragraph (b) of the final rule will be waters of the United States.

- 6.507 Irrigation canals and ditches are artificial structures and parts of highly managed systems used to convey water for multiple purposes. Most canals and ditches convey water seasonally, many are lined with concrete or riprap, and vegetation along canals and ditches is frequently controlled (e.g., mowing and burning). As such, most canals and ditches are very different from natural tributaries and this difference should be recognized

when determining jurisdiction. In practice, the proposed first exemption would not exempt most canals and ditches because very few ditches or canals meet all three criteria:

- Excavated wholly in uplands,
- Drain only uplands, and
- Have less than perennial flow.

Most irrigation canals begin with a diversion structure in a river or stream, and as such begin in lands that are not uplands, so the potential that they cross only uplands and that water enters the ditch or canal only over uplands via sheet flow to the ditch or canal is remote. It is also very unlikely that a ditch or canal would not contribute flow either directly or through another water to a WUS. Water flows downgradient, either as surface flow or ground water flow, and nearly always flows into a drainage, lake, or reservoir. Is the ditch or canal exempt only if that water is totally lost in route to application for irrigation, deep ground water, evaporation, or transpiration?

It is not clear if any portion of a ditch or canal that was excavated wholly in uplands or drains only uplands is not jurisdictional. Canals and ditches can be many miles long. It is unclear how the proposed rule would determine jurisdiction for a 20-mile-long canal that at mile 19 was constructed in a non-upland area, intercepts flow from a non-upland area, or flows perennially. Is the entire 20-mile canal jurisdictional or just the last mile? If the first 19 miles of the canal meet the exemption criteria and are up-gradient of the last mile determined to be jurisdictional, why would the entire canal be jurisdictional? (p. 25)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Ditches that meet the definition of “tributary” in the final rule and are not excluded at paragraph (b) of the final rule will be waters of the United States because they serve the same ecological function as other tributaries.

6.508 Preferred Solution:

The proposed rule needs to be clear on canals and ditches used to convey irrigation water and/or water for municipal supply. If the agencies want to exempt most artificial canals and ditches, they should consider the function (water supply for various purposes) of these features rather than the characteristics. The following simple modifications to the proposed rule would exempt most artificial ditches and canals, would meet the language in the proposed rule that states that “the rule does not affect longstanding exemptions in the CWA for farming, silviculture, ranching and other activities,” yet would afford protection to our waters where needed.

Do not define artificial ditches and canals as tributaries, and exclude from “waters of the United States” the entirety of all ditches, canals or similar such man-made surface water transport facilities designed and used for agricultural, municipal, domestic or industrial purposes; provided, however, that (i) such structures are not built within a traditional navigable water or jurisdictional tributary thereof and (ii) any point source discharge of pollutants into such structures shall be required to obtain a section 402 discharge permit if water carried in or transported through such structure is determined to reach waters identified in paragraphs (1)-(5).

Alternative Solution:

If the agencies are uncomfortable with the above-recommended modification, then the following modification is proposed:

Change the “and” in the first exemption in the proposed rule to “and/or,” “upland” should be defined, and it should be made clear that reaches of canals and ditches can be determined to be nonjurisdictional if they meet the exemptions (i.e., reaches of canals that meet exemption criteria and are up-gradient of a jurisdictional reach are nonjurisdictional).

Discussion:

The proposed solutions more closely reflect the current situation presented above that exclude most artificial ditches and canals from jurisdiction. The proposed solutions more closely reflect the current situation presented above that exclude most artificial ditches and canals from jurisdiction. (p. 26-27)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Ditches that meet the definition of “tributary” in the final rule and are not excluded at paragraph (b) of the final rule will be waters of the United States.

NC League of Municipalities (Doc. #15358)

- 6.509 An example of this lack of clarity is apparent in the proposed rule’s ditch exemption, in which the proposed rule states that man-made conveyances, including ditches, are considered jurisdictional tributaries if they have a bed, bank, ordinary high water mark, and flow directly or indirectly into a “water of the U.S.” regardless of perennial, intermittent or ephemeral flow. The proposed rule excludes certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to a “water of the U.S.” However, the proposed rule doesn’t define key terms like “uplands” and “contribute flow,” leaving it unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a “water of the U.S.” The League requests that EPA and the Corps clarify that man-made ditches are excluded from the definition of “waters of the U.S.” (p1-2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. With respect to the jurisdictional status of stormwater control features as waters of the U.S, please see Compendium 7, summary response at 7.4.4.

Wyoming County Commissioners Association (Doc. #15434)

- 6.510 [T]he WCCA requests a specific and clear exclusion of man-made, or man-altered ditches and conveyances for purposes of mitigating snowmelt, even if the conveyance is a natural occurrence of raising the water table, and thus man-made, but not created by physically excavating a ditch . The WCCA believes that this exemption should also exist for all streams, and man-made conveyances that flow less than perennially regardless of the location of its eventual drainage. One possible mechanism for clearly excluding

ditches from the proposed rule is to clarify the definition of "uplands." A ditch or conveyance, manmade or otherwise, should be considered to exist in uplands and thus exempt from the rule if it flows less than perennially or drains anywhere but directly to a jurisdictional water defined by paragraphs a(1) through a(4) of the proposed rule. In other words, if a ditch drains less than perennially into an a(5) tributary as it is currently defined, it should be considered an upland ditch or conveyance for purposes of the CWA. (p. 8)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The agencies are uncertain if the commenter is requesting that all ephemeral and intermittent streams and ditches should be excluded as waters of the United States. If, however, that is his intent, the agencies disagree. Science is clear that the chemical, physical and biological condition of small headwater channels largely determine the chemical, physical and biological condition of downstream traditional navigable waters and territorial seas.

Coalition of Local Governments (Doc. #15516)

6.511 The Proposed Rule does exclude ditches that are excavated wholly uplands, drain only uplands, and have less than perennial flow, and those ditches that do not contribute to the flow of a "water of the United States." 79 Fed. Reg. at 22203. However, this does not take into account the number of ditches and canals that are constructed across the arid West that transport and store water for agricultural, municipal, and industrial uses that would still be considered "waters of the United States." It also fails to exempt the thousands of miles of roads within the Counties that have drainage ditches associated with them. The local governments may be subject to the increased cost and delays of obtaining a Section 404 permit to complete routine ditch maintenance, such as replacing culverts. The Proposed Rule even recognizes that ditches created for irrigation, water management or treatment, and roadside drains may not be excluded from Section 404 permitting if they do not meet the two exclusions just discussed. Id. at 22203-22204. (p. 8)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

South Carolina Association of Counties (Doc. #15573)

6.512 [K]ey terms like "uplands" and "contribute flow" are not defined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S." The public infrastructure system, including roadside, flood or stormwater ditches, is interconnected and can run for hundreds, if not thousands of miles in each county. Ditches are not wholly in uplands nor do they strictly drain in uplands, since they are designed to convey overflow waters to an outlet. South Carolina's forty-six counties maintain nearly 100,000 miles of stormwater control channels and ditches. The proposed rule states that some ditches would not be considered "waters of the U.S." if the ditches are excavated wholly in uplands, drain only uplands and have less than perennial flow-or ditches that do not contribute flow either directly or through

another water. It will be difficult for the State's counties to prove their ditches do not "contribute to flow of jurisdictional water. The proposed regulations do not adequately explain how exempt ditches are to be distinguished from jurisdictional ditches, especially if they are near a jurisdictional "Water of the U.S." (p. 4)

Agency Response: See summary response for section 6.2.

The United States Conference of Mayors et al. (Doc. #15784)

6.513 The exemption for ditches in the proposed rule is so narrowly drawn that any city or county would be hard-pressed to claim the exemption. It is hard-if not impossible-to prove that a ditch is excavated wholly in uplands, drains only uplands and has less than perennial flow.

[We request the rule] provide a specific exemption for public safety ditches from the "waters of the U.S. definition. (p. 5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Rhode Island Rivers Council (Doc. #16367)

6.514 In regards to §328.3(b), to exclude those ditches that are excavated and drain wholly within uplands, it would be more clear to exclude these ditches if they exhibit more limited hydrology. One approach that could provide such clarity is to write subsection (b)(3) as follows: "Ditches that are excavated wholly in uplands, drain only uplands, and that carry flow only during storm events or snow melt." This would avoid the potential confusion of landowners trying to differentiating between these ditches and "tributaries", the proposed definition of which would seem to include man-made or man-altered intermittent or ephemeral streams, the flow of which is "less than perennial," but is frequent enough to provide flow that regularly contributes and could carry pollutants to "waters of the United States." (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

NC League of Municipalities (Doc. #17443)

6.515 An example of this lack of clarity is apparent in the proposed rule's ditch exemption, in which the proposed rule states that man-made conveyances, including ditches, are considered jurisdictional tributaries if they have a bed, bank, ordinary high water mark, and flow directly or indirectly into a "water of the U.S." regardless of perennial, intermittent or ephemeral flow. The proposed rule excludes certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to a "water of the U.S." However, the proposed rule doesn't define key terms like "uplands" and "contribute flow," leaving it unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S." The League requests that EPA and the Corps clarify that man-made ditches are excluded from the definition of "waters of the U.S." (p1-2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Virginia Municipal Stormwater Association (Doc. #19517)

6.516 Retain the Proposed Ditch Exclusions

Ditches form the backbone of many MS4 systems. MAMSA and VAMSA are pleased that the proposed rule would codify, for the first time, two commonsense exclusions for ditches. These proposed exclusions should be retained in their proposed form. The first of the two ditch exclusions applies to ditches that are constructed in uplands, drain only uplands, and have less than perennial flow. 79 Fed. Reg. at 22263 (to be codified at 33 C.F.R. § 328.3(b)(3)). The proposal specifically requests comments on whether perennial flow is the appropriate flow regime to reference for this exclusion. It is, and precisely for the reason cited in the proposal: “Identifying upland ditches with perennial flow is straightforward and will provide for consistent, predictable, and technically accurate determinations at any time of year.” 79 Fed. Reg. at 22203. Upland ditches conveying stormwater may have extended periods of flow following rain events, especially in cases where they are situated at the outfall of a BMP designed to detain peak stormwater flows. Also, some excavated ditches may have stretches where water typically pools and may remain standing for extended periods of time after rain events. The less than perennial flow standard provides an easily applied reference to determine whether ditches with these characteristics would be jurisdictional. This standard appropriately would exclude nearly all stormwater conveyance ditches excavated in and draining uplands. MAMSA and VAMSA recommend that this exclusion be retained in its present form.

The second ditch exclusion applies to ditches that do not contribute flow directly or through another water to certain waters of the United States. 79 Fed. Reg. at 22263 (to be codified at 33 C.F.R. § 328.3(b)(3)). MAMSA and VAMSA agree with this exclusion, but we believe its scope should be clarified in the final rule. On its face, this exclusion appears to apply only to ditches that do not contribute any flow directly or indirectly to a jurisdictional water. The only situation where that would appear to apply would be a ditch that has no hydrological connection to a jurisdictional water, and therefore would not be a jurisdictional water in any case. MAMSA and VAMSA do not believe that is the intent of the proposal. It appears that this exclusion is intended to apply to ditches that connect non-jurisdictional waters, which would be an important exclusion for MS4s that may use a series of ditches to convey water within the system. Such systems are appropriately regulated at their outfall with an NPDES permit—the ditches conveying water to the outfall should not be subject to regulation as a water of the United States, irrespective of the flow regime. We ask EPA and the Corps to confirm our understanding of this exclusion and include appropriate clarifying language in the final rule. (p. 3-4)

Agency Response: See summary response for section 6.2. The legal framework under which ditches are regulated as both a point source and a water of the US is addressed in Section I of the Technical Support Document. With respect to ditches associated with exempt artificial lakes and ponds, see Topic 7, summary response at 7.3.2, With respect to the jurisdictional status of stormwater control features as

waters of the U.S, please see response to comments Topic 7, summary response at 7.4.4.

Indiana Farm Bureau et al. (Doc. #14119)

- 6.517 [T]he exclusions for ditches are also unclear. According to the proposed rule, certain ditches are excluded from the definition of “waters of the United States.” 79 Fed. Reg. at 22263. Both (b)(3) and (4) purport to provide an exemption but are so narrowly defined that the exemptions provide little to no relief in a state such as Indiana in which ephemeral drainage is conducted via an extensive network of ditches in fields, between properties, along roadsides and ultimately leading to tributaries and jurisdictional waters. Few ditches can claim to be “excavated wholly in uplands, drain only uplands, and have less than perennial flow.” Additionally, it is rare for a ditch to “not contribute flow, either directly or through another water, to a water identified” as jurisdictional. From information which has been garnered from individuals within EPA and the exemption language itself, it would appear that the intent is to regulate ditches which have perennial flow. This would be consistent with the plurality opinion in *Rapanos* that recognized “relatively permanent, standing, or continuously flowing bodies of water.” 547 U.S. 715, 739 (2006). (p. 3-4)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Greater Houston Partnership (Doc. #14726)

- 6.518 The proposed rule exempts two types of ditches: those that are excavated wholly in uplands, drain only uplands, and have less than perennial flow; and those that do not contribute flow, either directly or through another water, to a jurisdictional water. The first ditch exemption, when reviewed in concert with the definition of tributary (which states that tributaries can be ditches that are not excluded by the rule), prompts a question: Is an exempt upland ditch with an ordinary high water mark, a bed, and defined banks jurisdictional? GHP believes it was not EPA's or USACE's intent to make an upland ditch jurisdictional even if it has an ordinary high water mark, a bed, and defined banks, however, the proposed rule does not provide clarity on this issue. GHP suggests that the rule be clarified to more clearly define the types of ditches that are exempt. This clarification is vital to the Houston region due to our flat terrain, high rainfall, and the extent of our MS4s. (p. 3-4)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Paragraph (b) of the final rule clearly states that no feature excluded under paragraph (b) may be determined to be a “water of the United States” even if it otherwise satisfies the criteria for a water of the United States in paragraph (a).

Institute of Scrap Recycling Industries, Inc. (Doc. #15041)

- 6.519 [T]he potential effect of the proposed definition on the facility from without (i.e., outside the facility) would be related to the conveyances that guide and direct stormwater

discharges from the facility and enable them to reach and flow into the receiving water. Also, to the extent that the receiving water is sufficiently remote from the facility, these conveyances would be the only path by which oil from an on-site oil release could possibly reach “navigable waters” (i.e., the receiving water). Because these conveyances are not part of a treatment system or a control measure, the first exclusion, whether as proposed or as modified (above), would not apply (if it did apply, then that would end the matter here). Such a conveyance could be a gully, rill, swale, ditch, pipe, or storm sewer, including an MS4, either alone or in combination (e.g., a pipe that discharges to a gully that leads to the receiving water). To the extent that a gully, rill, and swale are readily distinguishable from a ditch, especially one modified by flow events consisting of regulated stormwater discharges, the gully, rill, or swale would be excluded via the fifth exclusion’s seventh subexclusion, “[g]ullies and rills and non-wetland swales”. With those excluded, ditches, pipes, and storm sewers remain as potential “waters of the U.S.”.

The issue for ditches, pipes, and storm sewers is whether they¹³³ (1) are tributaries as defined in the subdefinition of “Tributary”, (2) meet the fifth inclusion, which addresses tributaries of the first four inclusions, and (3 and 4) meet the third and fourth exclusions, which address ditches—proposed as follows:

- 1) “Tributary. *The term tributary means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in [the first four inclusions] of this definition*¹³⁴. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in [the first three inclusions] of this definition. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded [by the third or fourth exclusion] of this definition.
- 2) “All tributaries of waters identified in [the first four inclusions] of this definition¹³⁵,”
- 3) “Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.”

¹³³ For ease of discussion with reference to “waters of the U.S.”, “ditch”, “pipe”, and “stormsewer” should be understood to mean or include the water potentially conveyed in or by it.

¹³⁴ In some repetitions of this proposed subdefinition (e.g., 22263, 22267, 22269), the word “section” appears in place of “definition”.

¹³⁵ In some repetitions of this proposed inclusion (e.g., 22262, 22267, 22269), the word “section” appears in place of “definition”.

- 4) *“Ditches that do not contribute flow, either directly or through another water, to a water identified in [the first four inclusions] of this definition¹³⁶.”* (p4-6)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

- 6.520 With regard to “Tributary”, its sub-definition would specifically allow for a ditch to be a tributary if the two proposed exclusions addressing ditches were not applicable. The fourth exclusion would not apply because the ditch would contribute flow to waters of the U.S. The third exclusion requires more analysis because it is not clear that the ditch would meet all three criteria of “excavated wholly in uplands, drain[ing] only uplands, and having less than perennial flow”. Because the preamble implies that “uplands” and “wetlands or other types of water” are mutually exclusive (22203), the ditch here would be “excavated wholly in uplands”. The ditch would also likely drain only uplands; however, would it be necessary to document “drain[ing] only uplands”—that no non-uplands water would ever enter the ditch—to meet this part of the exclusion? Notwithstanding the need to document, in that case, the ditch would need to “have less than perennial flow” to meet the exclusion. (p. 6)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

American Foundry Society (Doc. #15148)

- 6.521 The proposed rule does include certain exclusions from the definition of waters of the U.S., but these exclusions are too limited, ambiguous and are of little, or no, value to agricultural operations. For example, the proposed rule excludes “ditches that are excavated wholly in uplands, drain only uplands and have less than the perennial flow.” Unfortunately, the term, “uplands,” was not explained or clarified in the proposed rule. Similarly, the proposed rule also excludes “ditches that do not contribute flow either directly or through another water” to navigable waters or tributaries. To qualify for this exclusion a ditch must contribute zero flow (even indirectly) to any navigable water or tributaries. Because most ditches convey at least small flow indirectly to minor tributaries, this exclusion is a nonfactor for most industrial operations. The claims that exclusions provide some relief from the expanded CWA jurisdiction are shallow, meaningless, and simply cannot hold water. (p. 8)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Federal StormWater Association (Doc. #15161)

- 6.522 “[D]itches” have generally been excluded from CWA jurisdiction, but under the proposed rule, ditches will be considered tributaries and therefore waters of the U.S. unless they meet the terms of an exemption.

¹³⁶ In some repetitions of this proposed inclusion(e.g., 22263, 22266, 22267), the word "section" appears in place of "definition".

Under the proposed rule a ditch is exempt only if (1) it is excavated (not a natural feature such as an erosion feature) wholly in uplands and drains only uplands (uplands is not defined) and it has less than perennial flow (meaning that during normal years it does not hold water all 12 months of the year) or (2) the ditch does not contribute flow (it is not clear if this means surface flow only or if groundwater is included) to a water of the U.S., directly or indirectly. The agencies claim that with these exclusions for certain ditches, they have narrowed the definition of waters of the U.S.¹³⁷ This claim is not true. In fact, the proposed rule constitutes the first time that the regulatory definition has expressly included ditches – by including all ditches that are not exempt. This so-called “ditch exemption” has created significant uncertainty about the status of ditches because, under the structure of the proposed rule, all ditches that are not excluded are waters of the U.S. (p. 5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Dow Chemical Company. (Doc. #15408)

6.523 The proposed rule would allow the agencies to assert jurisdiction over non-excluded ditches if they have a bed, bank, and ordinary high water mark, and they contribute flow directly or indirectly through another waterbody. These include:

- natural streams that have been altered (e.g., channelized, straightened or relocated);
- ditches that have been excavated in “waters of the United States,” including jurisdictional wetlands;
- ditches that have perennial flow; and
- ditches that connect two or more “waters of the United States”

The proposed rule would allow the agencies to categorically assert jurisdiction over ditches that meet the above criteria without exclusion.

Dow uses ditches/channels to convey fresh water and cooling water for example from one water body to another. The proposed rule, as currently written could assert jurisdiction over these conveyance channels and ditches. Such an assertion could greatly increase the compliance obligations for some facilities without any impact on the chemical, physical and biological integrity of the receiving water, which is already addressed through the NPDES program. Dow has concerns with respect to maintenance,

¹³⁷ In a blog posted on EPA’s website, former Acting Assistant Administrator for Water, Nancy Stoner, says: “For the first time, the agencies are clarifying that all ditches that are constructed in dry lands, that drain only dry lands, and don’t flow all year, are not “waters of the U.S.” This includes many roadside ditches, and many ditches collecting runoff or drainage from crop fields. Ditches that are IN are generally those that are essentially human-altered streams, which feed the health and quality of larger downstream waters. The agencies have always regulated these types of ditches.” <http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/>. This statement does not accurately describe the history of the regulation of ditches (which included ditches only recently) or the scope of the proposed rule (which includes far more ditches than human-altered streams).

permitting and establishing designated uses for these conveyances as well as the conveyances mentioned above. (p. 6-7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Ditches conveying water between two non-jurisdictional waters are not themselves jurisdictional. The final rule contains exclusions for artificial lakes and ponds created in dry land and used primarily for such uses as irrigation, settling basins and cooling ponds.

National Association of Manufacturers (Doc. #15410)

6.524 The same inconsistency applies with regard to the proposed treatment of “ditches.” While some “ditches” are categorically deemed nonjurisdictional, those ditches that would drain even indirectly into a wetland or traditional navigable water are deemed a “water of the United States.” 79 Fed. Reg. at 22219. Yet such “ditches” are not fundamentally different than categorically exempted “gullies, rills, and nonwetland swails” that the proposed rule recognizes may also flow water into a traditional navigable water. Such “dissimilar treatment of evidently identical cases . . . [is] the quintessence of arbitrariness and caprice.” *Colo. Interstate Gas Co. v. FERC*, 850 F.2d 769, 774 (D.C. Cir. 1988). (p. 17)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. With respect to the comparison between ditches and excluded gullies, rills and non-wetland swales, the agencies believe that science clearly indicates that ditches that meet the definition of tributary can and often do function effectively the same as any other tributaries. As explained in the summary response, the agencies have balanced the hydrological contribution of specific kinds of ditches and other features with the weight of longstanding practice and the need for clarity in order to establish some “bright line” exclusions in the rule.

Idaho Association of Commerce & Industry (Doc. #15461)

6.525 [T]he excluded waters should clearly include ditches and other manmade water bodies. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

6.526 The current definition of “waters of the United States” does not include ditches as either a type of jurisdictional water or a type of excluded water. The Agencies’ proposed rule would exclude two very narrow subcategories of ditches: (1) ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow; and (2) ditches that do not contribute flow, either directly or through another water, to a traditional navigable water. By excluding only these types of ditches, the Agencies are implicitly including (and therefore regulating) all other ditches as jurisdictional waters if they fit the definition of “tributary” or “adjacent waters”. As noted above, this is an incorrect interpretation of the Congress’s intent, and the Agencies’ approach represents a significant expansion of jurisdiction that could include most ditches across the country.

The exclusion for ditches that are "excavated wholly in uplands, drain only uplands, and have less than perennial flow" is much narrower than the agencies' historic practice. Historically! the Corps took the consistent position that all "drainage ditches constructed entirely in upland areas generally are not considered to be waters of the United States." Under the proposed new exclusion, by contrast, the Agencies would regulate all ditches that drain wetlands and other non-upland areas, an extremely broad category of ditches that could be interpreted to include a majority of ditches across the country. The preamble to the proposed rule explains that the narrow exclusion applies only to those ditches that are excavated in "uplands" at all points "along their entire length."

Due to the inherent nature of ditches, very few ditches will meet this test, since the most logical places to dig ditches are at natural low points on the landscape. The vast majority of ditches, including "natural" ditches, man-altered ditches, and wholly man-made ditches, are located in lowlands. The purpose of most ditches is to drain water. In order to drain water, there must be an elevation differentiation, which typically defines the line between uplands and lowlands. In particular, most ditches in the western states have been constructed, out of necessity, in nonuplands areas. Many of these ditches are used to transport water from a river or stream (nonupland areas) to fields for irrigation.

Under the Agencies' proposed exclusion for ditches, if a ditch, at any time, has water flow and drains to a stream, river, or wetland (or potentially groundwater), it would be considered a jurisdictional water. Moreover, the "less than perennial flow" requirement would disqualify many ditches from the exclusion. The Agencies should reject this expansive approach and adopt a more reasonable exclusion for manmade features like ditches. Requiring CWA permits for and otherwise regulating most of the countless ditches across the country would vastly increase the Agencies' regulatory burden and would have far-reaching and negative impacts on a variety of trades, from farming to construction to infrastructure projects.

IACI asks the Agencies to explore alternative approaches to regulating ditches, such as categorically excluding all manmade ditches. Under this approach, the Agencies could clarify that point source discharges to such ditches that reach traditional navigable waters may still be regulated under the NPDES program. Alternatively, the Agencies could define a single, narrower category of ditches that are jurisdictional, which could include, for example, "natural" ditches created wholly from a natural stream or tributary.

If the Agencies insist on their current approach, however, they should at a minimum clarify what it means for a ditch to "drain only uplands." The rule does not address the very common situation where a ditch was originally excavated in uplands, and originally drained only uplands, but over time, the water flowing through that ditch ended up creating a wetland in the ditch or adjacent to the ditch. In this situation, the ditch would likely "drain" the artificially-created wetland that is now within or adjacent to the ditch, and the ditch would therefore be jurisdictional because it no longer falls within the proposed rule's exclusion for ditches.

The qualifications in the Agencies' narrow exclusion for ditches are of particular concern in light of the Agencies' proposal to evaluate connectivity via "shallow subsurface connections." The qualifications will not only have the substantive result that most ditches will ultimately be regulated, but they will also force the regulated public to

undertake difficult and costly site investigations to evaluate whether a particular ditch meets all of the qualifications. These due diligence evaluations could include, for example, a study of the groundwater flow surrounding a ditch. According to the proposed rule, such a study would need to evaluate the ditch along its "entire length." By requiring these types of investigations to determine whether a ditch even qualifies for the exclusion, the proposed rule is unduly burdensome.

As asserted by the Agencies, the primary goal of the rulemaking should be to clarify the scope of the Agencies' jurisdiction under the CWA. In particular, the agencies should make clear that irrigation canals, ditches and drains are not navigable waters, are not "waters of the United States" and are not "tributary" to waters of the United States, consistent with the 1975 and 1977 regulations.

The CWA specifically excludes "return flows from irrigated agriculture" from the definition of "point source." 33 U.S.C. Sec. 1362(14); CWA Sec. 502(14). The Act also exempts "return flows from irrigated agriculture" from the NPDES permit requirements. 33 U.S.C. 1342(1)(1); CWA Sec. 402(1)(1). Similarly, permits for dredged or fill material are not required "for the purpose of construction or maintenance of. . . irrigation ditches, or the maintenance of drainage ditches," 33 U.S.C. Sec. 1344(f)(1)(C); CWA Sec. 404(f)(1)(C).

The words chosen by Congress and the intent of the Act are clear: irrigation canals', ditches and drains were not meant to be regulated under the CWA. This was reflected in the 1975 and 1977 regulations, which provided that "manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States." 40 Fed. Reg. 31, 321 (1975); 33 CFR 323.2(a)(5)(1982). This is the only practical approach for irrigation canals, ditches and drains under the statutory scheme of the CWA.

Congress has not expanded the Agencies' jurisdiction under the CWA since the initial regulations were promulgated in the 1970s. As a result, the Agencies should implement Congress' determinations in their rulemaking, through the inclusion of an express exemption for irrigation canals, ditches and drains, from the definition of navigable waters, waters of the United States, and tributary waters.

The final rule should expressly provide that waters in irrigation canals, ditches, drains and other conveyance facilities are not navigable waters, waters of the United States, or tributary waters, and, therefore, are not subject to the federal agencies' jurisdiction under the CWA. This clarification is long overdue and we appreciate the federal agencies' willingness to tackle this important issue.

The proposed rule has significant impacts on irrigation facilities, particularly in the western states. The proposed rule could be interpreted to allow the Agencies or third parties to assert that features such as irrigation and drainage ditches, stormwater ditches, and water storage or treatment ponds and reservoirs are jurisdictional tributaries; which would put the burden on irrigation water purveyors} farmers and ranchers to prove that their facilities are exempt from CWA jurisdiction. (p. 5-7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

CLUB 20 (Doc. #15519)

6.527 Our members do not support the inclusion of ditches within the WOTUS regulatory framework at all. Ditches should be part of a broad-based exemption. The exemptions reflected in the proposed rule are confusing and appear more limited than under current practice and are inconsistent with US Supreme Court decisions. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

American Council of Engineering Companies (Doc. #15534)

6.528 The second step is to consider whether the ditch is specifically excluded. The exclusion for ditches is identified in §122.2(b)(3) as waters that are excavated wholly in uplands, drain only uplands and have less than perennial flow. It should be noted that the connecting word is "and", meaning that all three elements must apply. The word "uplands" has not been defined. This is critical for coastal Florida, where the flooding zones are expansive, and groundwater is close to, if not at, the surface. So, the unanswered question is, "is a ditch that flows only when it rains and within a currently defined and regulated floodplain (of any recurrence interval) considered waters of the US?" According to the definitions, even interpreted narrowly, the answer is yes. If this is the case, then every ditch within the coastal, or even inland, floodplain would be covered.

ACEC suggests EPA and USACE specifically clarify whether man-made ditches containing wetlands that formed within the channel subsequent to excavation activities in uplands, but without perennial flow, would still be considered to "drain only uplands." Due to the broad use of engineered drainage channels as best management practices in all regions of the U.S., the agencies should clearly describe under what conditions wetlands in the bottom of man-made ditches would be considered to have a significant nexus to waters of the U.S. as "other waters," when agency consultation would be required, and when they would be considered to be isolated wetlands. Additionally, guidelines should be established to allow project developers and engineers to clearly understand when excavated man-made ditches would be considered upland, non-jurisdictional features, and what characteristics could result in them subsequently being determined to be tributaries and waters of the U.S. (p. 4-5)

Agency Response: See summary response for section 6.2.

GBMC & Associates (Doc. #15770)

6.529 In paragraph (b)(3) of the proposed rule the Agencies (USACE and EPA) exclude ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow from being "waters of the United States". In certain instances, a ditch channel can develop into a wetland where downstream flow in the ditch may become impeded due to various influences. Would a ditch that has been excluded become a "water of the United States" following development of a wetland within the ditch channel? While the purpose and function of the ditch is to drain the upland it was created in, does the development of a wetland within the ditch channel constitute "draining a wetland"? This issue should be further clarified in the final rule. (p. 5-6)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Federal Water Quality Coalition (Doc. #15822.1)

6.530 Instead of being generally excluded, under the proposed rule ditches will be considered tributaries and therefore waters of the U.S. unless they meet the terms of an exemption. Under the proposed rule a ditch is exempt only if (1) it is excavated (not a natural feature such as an erosion feature) wholly in uplands, drains only uplands (uplands is not defined), and has less than perennial flow (meaning that during normal years it does not hold water all 12 months of the year); or (2) the ditch does not contribute flow to a water of the U.S., directly or indirectly. It is not clear if “contribute flow” means surface flow only or both surface flow and groundwater. The agencies claim that with these exclusions for certain ditches, they have narrowed the definition of waters of the U.S.¹³⁸ This claim is not true. In fact, the proposed rule constitutes the first time that the regulatory definition has expressly included ditches.

As discussed below, the ditch exemptions have created significant uncertainty about the status of ditches because, under the structure of the rule, all ditches that are not excluded are waters of the U.S. (p. 18-19)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Minnesota Chamber of Commerce (Doc. #16473)

6.531 [T]o qualify for the proposed ditch exclusion in section (b)(3) of the Proposed Rule, a mine owner would need to prove that its ditch was (a) excavated wholly in uplands, (b) drains only uplands, and (c) has less than perennial flow. This exclusion is problematic. First, it is entirely dependent upon the meaning of “uplands,” yet the term is undefined. Second, proving that a mine-site ditch was “excavated wholly” in uplands could be an arduous and expensive task, particularly for ditches that were constructed years or even decades ago. Third, in many cases mine-site roads and ditches must be constructed in pits that descend to depths below the surrounding water table, where the pits are kept dry through dewatering. Are the Agencies proposing that these type of ditches should be jurisdictional? Requiring a 404 permit to construct and maintain mine-pit ditches would significantly impede efficient operation of a mine site.

To meet the second ditch exclusion in section (b)(4) of the Proposed Rule, a ditch must not contribute flow, either directly or through another water, to a traditional jurisdictional

¹³⁸ In a blog posted on EPA’s website, former Acting Assistant Administrator for Water, Nancy Stoner, says: “For the first time, the agencies are clarifying that all ditches that are constructed in dry lands, that drain only dry lands, and don’t flow all year, are not “waters of the U.S.” This includes many roadside ditches, and many ditches collecting runoff or drainage from crop fields. Ditches that are IN are generally those that are essentially human-altered streams, which feed the health and quality of larger downstream waters. The agencies have always regulated these types of ditches.” <http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/>. This statement does not accurately describe the history of attempts to regulate ditches (which is recent) or the scope of the proposed rule (which includes far more ditches than human-altered streams).

water, listed in (a)(1) through (a)(4) of the Proposed Rule. This exclusion presents the same problem described above with the definition of "tributary": mine-site ditches function as part of an overall water-management system. Many of these ditches direct stormwater and other types of run-off to collection areas such as a holding/treatment pond, from where much of the water is discharged to offsite traditional jurisdictional waters. In this way, mine-site ditches could be seen as contributing flow "through another water" to traditional jurisdictional waters and thus be ineligible for the exclusion. And for a mine operator to gather the evidence to prove otherwise could again be burdensome and expensive.

Consider another example provided by a Minnesota mining company: precipitation falling on the company's spoil piles infiltrates the pile, collects contaminants, and then must be treated in a settling pond where the water seeps out at the foot of the pile. One way the company minimizes water contamination is to construct ditches on the surface of the spoil piles, which move the water quickly down the pile to avoid infiltration. However, these ditches—which again could potentially meet the broad definition of "tributary"—may not fall within the proposed (b)(3) or (4) exclusions. Because the ditches intersect the settling pond they may not be deemed to have been excavated "wholly in uplands" under (b)(3), and if the settling pond is itself a "water of the United States" or discharges to one, then the spoil-pile ditch would also be unlikely to qualify for the (b)(4) exception. As a result, the ongoing maintenance of the spoil-pile ditches could be subject to the section 404 permit requirements.

Finally, the Agencies' approach of broadly defining "tributary" to include most ditches, subject to narrow, ambiguous exclusions for ditches, creates a de facto presumption that ditches are jurisdictional. This approach inappropriately turns the current legal paradigm on its head: ditches are generally presumed non-jurisdictional unless they can be shown to meet the legal definition of a "Water of the United States." The Final Rule should reflect current law. (p. 3-4)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The ditch exclusions operate independently. That is, a ditch needs only to satisfy one of the three ditch exclusions in order to be non-jurisdictional. The agencies cannot be certain of the specific circumstances this commenter is describing in regard to mining. However, it appears that, at least in part, the commenter is describing ditches that are internal to a stormwater management program, in which case they may be excluded from jurisdiction under the final rule. See summary response at 7.4.4.

- 6.532 The Minnesota Chamber recommends that the Agencies draft the rule consistently with the text of the CWA and with Rapanos such that ditches are not "waters of the United States." The rule could then list exceptions for ditches that should be deemed "waters of the United States." This approach would also better reflect the practical reality that most ditches are not and should not be regulated as "waters of the United States." If ditches truly are "waters of the United States," they will fall into one of the traditional jurisdictional water categories; otherwise, if ditches are regulated at all under the CWA, they should be regulated as point sources, not as "waters of the United States,"

One approach the Agencies could take is to substitute the following general exception for ditches in place of the current exclusions in sections (b) (3) and (4):

(3) ditches, with the exception of the following:

(i) ditches that independently constitute a water identified in paragraphs (a)(1) through (4) of this definition

(ii) ditches that are excavated wholly or partially in a preexisting water identified in paragraphs (a)(1) through (7) of this definition

(iii) ditches that directly drain a water identified in paragraphs (a)(1) through (7) of this definition

(iv) ditches that have perennial flow

(v) ditches that contribute flow, directly or indirectly, to a water identified in paragraphs (a)(1) through (4) of this definition;

Provided, a ditch that would otherwise constitute a "water of the United States" under paragraphs (b) (3)(i), (ii) or (iii) of this definition is not a "water of the United States" if the ditch is part of a water management or waste treatment system at a mining, industrial or other facility subject to a state or federal water discharge permit, or if the ditch is a "point source." The Proposed Rule should also remove the reference to "ditches" in the final sentence of the "tributary" definition. (p. 4)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. See Section I of the Technical Support Document for the legal framework under which a ditch may be both a point source and a water of the US.

Water Advocacy Coalition (Doc. #17921.1)

6.533 The proposed ditch exclusions are much more limiting than the language the agencies rely on from the 1986 preamble, which excluded “non-tidal drainage and irrigation ditches excavated on dry land,” without limitation based on flow regime, whether the ditch drains only uplands, or whether the ditch contributes flow.¹³⁹

The ambiguous language of these exemptions leaves their implementation subject to broad agency discretion and subjectivity. The following key concepts affecting the scope and meaning of the exemptions are left undefined or unclear:

- **Ditch:** The agencies do not provide a definition of “ditch.” What features qualify as ditches? Any manmade or man-altered features with water in them? How is a ditch distinguished from an ephemeral drainage or a gully, rill, or swale?
- **Uplands:** To qualify for the first exemption, one must show that a ditch was excavated wholly in uplands for its entire length. The agencies have not provided a definition of “upland,” and various definitions of “upland” exist and have been

¹³⁹ See 79 Fed. Reg. at 22,219 (citing 51 Fed. Reg. 41,217 (Nov. 13, 1986)).

used by the agencies throughout this rulemaking process.¹⁴⁰ Is anything that does not qualify as a wetland considered an upland? What if there are wetlands nearby? Can floodplains and/or riparian areas be uplands?

- **For the entire length:** From the language of the proposed “tributary” definition, it appears that breaks in ditches do not segment them for purposes of analyzing whether they meet the upland ditch exclusion, but EPA has suggested otherwise in statements during their outreach.¹⁴¹ Could part of a ditch that crosses wetlands be jurisdictional while another part of the ditch excavated in uplands would be non-jurisdictional? What about a 100-mile ditch? If it crosses wetlands at any point, is the entire ditch jurisdictional, or only downstream of the wetland crossing?
- **Drains only uplands:** This is a new requirement. The preamble states, “Members of the public should consider whether a wetland is jurisdictional before constructing a ditch that would drain the wetland and connect to . . . an (a)(1) through (a)(3) water.” 79 Fed. Reg. at 22,219. But if a ditch was constructed under earlier exemptions (which did not have the limit about draining only uplands), how did the party have fair notice that the status of that drained area would be relevant? What if a ditch was constructed in wetlands but now drains only uplands (i.e., the ditch drained the wetland)?
- **Less than perennial flow:** This is a new requirement. The preamble states that “perennial flow” means that “the flow in the ditch occurs year-round under normal circumstances.” 79 Fed. Reg. at 22,219. Does this mean water must actually flow year round? Or does a ditch with the presence of water year round have “perennial flow”? For many ditches, particularly those in coastal plain, interior lowland, and coastal range areas of the United States where topography is flat, drainage may be poor resulting in presence of water, but not necessarily flow, in low-lying portions of roadside, railroad right-of-way, and stormwater management ditches. If ditches where water is merely present year round do not qualify as having “less than perennial flow,” large numbers of stormwater management ditches, roadside ditches, railroad right-of-way ditches, and MS4s would not qualify for the upland ditch exclusion and would therefore be jurisdictional.

¹⁴⁰ For example, the Connectivity Report defines “uplands” to mean: “(1) Higher elevation lands surrounding streams and their floodplains. (2) Within the wetland literature, specifically refers to any area that is Report at A-20-21. Yet, on stakeholder calls, the agencies have said uplands are anything that are not waters of the U.S. In EPA’s Watershed Protection Glossary, an upland is “an area of the terrestrial environment that does not have interaction with surface waters.” See

http://ofmpub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do;jsessionid=sDUeRbIYFjmmV3Wacx9opy1cw_6bZR0Hp44w22czO3EyxZb9vVGb!-325588870. And, in a September 2014 Q&A document, the agencies stated, “Under the rule, an ‘upland’ is any area that is not a wetland, stream, lake, or other waterbody. So, any ditch built in uplands that does not flow year-round is excluded from CWA jurisdiction.” EPA and U.S. Army Corps of Engineers, Questions and Answers – Waters of the U.S. Proposal at 5 (Sept. 9, 2014), http://www2.epa.gov/sites/production/files/2014-09/documents/q_a_wotus.pdf (“Sept. Q&A document”).

¹⁴¹ See, e.g. House Committee on Science, Space, and Technology, Navigating the Clean Water Act: Is Water Wet? (July 9, 2014), <http://science.house.gov/hearing/full-committee-hearing-navigating-clean-water-actwater-wet>.

6.534 How would “perennial flow” be evaluated in practice? Even long irrigation canals that only divert water seasonally, and thus could be considered intermittent, may intercept groundwater at some point along their length. This could result in a potentially perennial trickle of water even outside the active water diversion season. This situation could occur even if a long canal does not intercept any wetlands along its route.

- **Time of excavation/showing required:** What must a landowner show to demonstrate that their ditches were excavated in uplands? What about a ditch that was constructed in wetlands prior to the CWA’s enactment? The preamble mentions the use of historical evidence, 79 Fed. Reg. at 22,203, but historical evidence of what? For example, for a farm ditch constructed 40 years ago, must the farmer show that, when the ditch was excavated 40 years ago, the area that was excavated would not be considered wetlands under the agencies’ current wetland delineation standards? Or is the required showing that the excavated area would not have been considered wetlands under the wetlands standards in place at the time? And how can the prior conditions of water and land in the area be determined?

Aside from the ambiguous language, each of these exclusions is very narrow, and it is likely that very few ditches could actually meet these standards. Those that could would likely require a costly and lengthy study to establish they are exempt. With these exemptions, the burden is placed squarely on the applicant to prove that their ditch is not a water of the United States, which often would require analysis and data collection well beyond the applicant’s property. For the upland ditch exemption, the applicant would have to show through historical data (e.g., photographs or topographic maps) that the ditch was excavated wholly in uplands for its entire length and prove that the ditch drains only uplands. *Id.* But most ditches carry flow, contain standing water, and drain areas that have water because the purpose of ditches is to convey water away from a saturated or ponded area (e.g., field or roadway). Such a requirement would mean that a highway drainage ditch, even though constructed mostly through uplands, but perhaps impacting wetlands or streams along 1-2 percent of its length, would then be considered a “water of the United States.” Now, if ephemeral drains are also waters of the United States as proposed, one would be hard pressed to find a ditch that at no point, along its entire reach, includes waters of the United States.

Likewise, it will be nearly impossible to find a ditch that does not contribute flow (directly or indirectly) to a TNW, interstate water, territorial sea, or impoundment. Ditches, after all, are designed to control and manage flow. Indeed, water rights in the western United States often require that irrigation ditches/canals return specified amounts of water to streams after irrigation use.

Indeed, these exclusions are so narrow it is hard to believe that they are real. Can the agencies point to a ditch that is not a water of the United States under the proposed rule? If so, the agencies should provide examples of ditches that would qualify for the exclusions. Otherwise, we anticipate that the regulators will assume that all ditches are jurisdictional.

Hundreds of thousands of miles of rail, road, MS4, and other ditches that currently are not regulated will become waters of the United States under the proposed rule. The result will be litigation; a substantial number of new and revised/modified NPDES and section 404 permits; the need to revise and modify Storm Water Pollution Prevention Plans (“SWPPPs”) at substantial costs, expense, and uncertainty; extensive costs to mitigate any time any of the nation’s hundreds of thousands of miles of road, railway, and other drainage ditches are crossed or require relocation, expansion, or in some cases maintenance; and increased spill and emergency response expense and reporting. Such regulation will have no environmental benefit where such ditches receive spills due to roadway accidents because such spills already must be contained to avoid discharges to TNWs. But the proposed major increase in federal regulation will also substantially increase the associated regulatory burdens on both the regulated community and governmental agencies, in the form of increased study and permit requirements under the CWA and other federal statutes (e.g., when historic resource, protected species, and other consultation is required) for the simple prospect of crossing, moving, or constructing any of the nation’s hundreds of thousands of miles of ditches. (p. 52-53)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. For a further discussion of the CWA and state water rights, see the summary response for 1.1.2: Water Supply and Allocation.

- 6.535 **The exclusions for ditches are narrow and unhelpful.** As discussed in detail in section III.C.2., the two narrow exclusions for ditches are not clear, and in practice they are not likely to exclude many ditches from jurisdiction. The agencies should make clear that non-tidal ditches, including roadside, agricultural, industry site, railroad right-of-way, stormwater, process water, and wastewater ditches, are not jurisdictional waters of the United States. (p. 72)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches and similar features were edited and clarified for the final rule.

Virginia Manufacturers Association (Doc. #18821)

- 6.536 The exclusions in the Proposal do little to offset this concern (1) ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow and (2) ditches that do not contribute flow, either directly or through another water to traditionally navigable waters. See Proposed Rule at 22263. Yet given the overall lack of clarity, these "exclusions", in reality, are meaningless.

The first exclusion, for ditches that are excavated wholly in uplands, drain only uplands and have less than perennial flow, does not provide a definition for "uplands" or for "perennial flow." See Proposed Rule at 22263.

The second exemption, for ditches that do not "contribute flow," either directly or through another water to traditionally navigable water, is equally ambiguous. The

Proposal does not provide any scope for the phrase "contribute flow," particularly as it relates to contributing flow "through another water." (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Southpace Properties, Inc. (Doc. #6989.1)

6.537 The proposed rulemaking creates exemptions for certain ditches, but making the exemptions so narrow that few ditches can meet the criteria, and also allows for exempted features, such as groundwater, gullies, and rills to serve as connections that can render a feature a jurisdictional "adjacent water" or "other water." Ditches are constructed and used as part of the construction, operation, and maintenance of commercial properties. Drainage ditches play a major role in all of these activities, ensuring that stormwater is properly channeled away from facilities and land where it would otherwise pond, interfering with the intended use of the land and facilities. Ditches are also an integral part of creating a proper drainage system, which in turn prevents flooding. Use of drainage ditches offers a way to remove excess water from roads and vital urban spaces, without the erosion rates and pollution transport that result from direct surface runoff. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Land Improvement ContractorsContractors of America (Doc. #8541)

6.538 The WOTUS definition in the PR will significantly expand EPA's jurisdiction. While EPA has continued to note that the rule is meant to only clarify what is and is not considered WOTUS, and not to expand jurisdiction, the rule is ambiguous in many areas. For example, some features are exempt, and the way in which they are exempted could be interpreted that the contrary would then be true. Ex: (4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section. Would it be true then, that all ditches that DO contribute flow to a water ARE WOTUS? (p. 1)

Agency Response: The ditch exclusions operate independently. That is, a ditch needs only to satisfy one of the three ditch exclusions in order to be non-jurisdictional. See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Associated General Contractors of America (Doc. #14602)

6.539 AGC has serious concerns with the wording and potential implementation of the proposed ditch exemptions. In addition to shifting the burden of proof from the government to the public, the two narrow exclusions for ditches are not clear and, in practice, they are not likely to exclude many ditches from jurisdiction. The exclusions use terms that are undefined, which further adds to the confusion. The agencies' proposal does not give contractors sufficient clarity concerning ditches — so as to avoid retaining experts or engaging in time-consuming consultation with state or federal agencies.

The proposed rule’s categorical assertions of jurisdiction shift the burden of proof for permit decisions and jurisdictional determinations. Under current practice, the agencies must “document in the administrative record the available information regarding whether a tributary and its adjacent wetlands have a significant nexus,” including the physical indicators of flow and information regarding the functions of the tributary and any adjacent wetlands.¹⁴² The agencies must “explain their basis” for finding a significant nexus.¹⁴³ But, under the proposed rule with its categories of per se jurisdictional waters, the agencies do not have to make this showing. The proposed rule effectively shifts the burden of proof to the public to prove that the water or feature at issue does not meet the proposed rule’s broad “tributary” or “adjacent water” definitions or that it meets one of the narrow exclusions.

For example, a landowner who believes a ditch on his property is not a jurisdictional tributary will have to try to prove to the agencies that the ditch qualifies for one of the narrow ditch exemptions. He will have to show, through “[h]istorical evidence, such as photographs, prior delineations, or topographic maps,” that either: (1) the ditch was excavated wholly in uplands for its entire length, drains only uplands, and has less than perennial flow, or (2) the ditch does not contribute flow to a jurisdictional water.¹⁴⁴ Making such a showing will require significant cost and resources, and, in many cases, the necessary records or documents may not be available. The agencies do not acknowledge the burden this imposes on applicants in either the rule or the economic analysis. Indeed, the agencies have not provided any explanation or legal basis for shifting the burden of proof onto the public.

To make matters worse, the first proposed ditch exclusion includes terms like “wholly in uplands” and “less than perennial flow” that remain undefined in CWA regulations. Indeed, “uplands” itself remains undefined. In relatively flat terrain, it would be very difficult to discern between areas that fit these undefined terms and those that do not. The agencies’ proposal does not give contractors sufficient clarity concerning ditches — so as to avoid retaining experts or engaging in time-consuming consultation with state or federal agencies.

To qualify for the second exclusion, the ditch must contribute zero flow, even indirectly, to any tributary, which itself is defined explicitly to include ditches and ponds even if they themselves contribute only minimal, occasional flows via indirect routes to downstream waters. Ditches conveying very small flows indirectly to minor waters represent most of the ditches in the country. For that reason, this exclusion is virtually useless. (p. 5-9)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Please also refer to the preamble and the Technical Support Document for the agencies’ legal and scientific basis for the “categorical assertions of jurisdiction” in

¹⁴² 2008 Rapanos Guidance, at 11.

¹⁴³ 2008 Rapanos Guidance, at 11.

¹⁴⁴ See 79 Fed. Reg. at 22,203.

the final rule. The rule is not intended to shift or affect any burdens of proof, but to clarify jurisdictional waters to provide more certainty and reduce transaction costs.

Commercial Real Estate Development Association (Doc. #14621)

- 6.540 Excavated Ditches. The current proposal for excavated ditches is a clear expansion of WOTUS jurisdiction. It is also unworkable in practice without many challenges because:

Over time, some ditches may erode and intercept the groundwater table and become perennial, or an erosional head cut may move upstream or sediment disposition could occur - both changing the location of perennality.

Some ditches, in order to effectively achieve their desired purpose, must intercept the groundwater to provide gravity flow, and thus would be regulated.

The EPA and Corps, unlike some states, have not developed a protocol to identify visually perennial water bodies in a consistent and repeatable manner at all times of the year. While there is a definition (just like wetlands), there is no manual as to how to identify features that meet said definition - unlike wetlands (whose manual and related documents have been developed and is widely understood).

The following change is recommended: delete "and have less than perennial flow" and replace it with "and were not constructed to relocate a stream defined as a WOTUS in §328.3(a)." (p. 3)

Agency Response: See summary response for section 6.2.

El Dorado Holdings, Inc. (Doc. #14285)

- 6.541 The proposed ditch exemptions should be clarified: The agencies propose two ditch exemptions. The first would cover ditches excavated only in uplands, draining only uplands, and having less than perennial flow. See proposed 33 C.F.R. § 328.3(b)(3). The agencies should clarify that ditches meeting these criteria remain exempt even if they divert water into a regulated water. In that case, the ditch may qualify as a point source, but should not itself be considered a regulated water.

This is important because the second ditch exemption (for ditches that do not contribute flow directly or through another water, to a TNW, see proposed 33 C.F.R. § 328.3(b)(4)) could be interpreted as implying that ditches would be regulated as waters of the U.S. if they contribute flow (even if it is only flow from uplands) to downstream waters. The agencies should clarify that ditches failing to meet the second ditch exemption are those that connect regulated waters upstream and downstream of the ditch (i.e., those that divert otherwise regulated waters). In this scenario, the ditch would essentially become part of the regulated water.

Recommendation: The agencies should clarify that ditches that drain nonregulated areas and release that drainage into a regulated water do not thereby become themselves regulated as waters of the United States. In addition, the second ditch exemption ("do not contribute flow") should be reworded to focus on connection of upstream and downstream waters (i.e., "ditches that do not connect upstream and downstream waters identified in paragraphs (a)(1) through (4) of this section"). (p. 41)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Teichert Materials (Doc. #18866)

- 6.542 The exclusions in the proposed rule (particularly for ditches) do not provide clarity. While the proposed rule purports to exclude "drainage ditches," such ditches can be regulated if they perform as intended by conveying water away from a site even indirectly to a navigable water. Many existing drainage ditches would become subject to permitting and costly mitigation requirements. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Wesley Valley Planned Communities (Doc. #18906)

- 6.543 The exclusions in the proposed rule do not provide any real clarity. While the proposed rule purports to exclude "drainage ditches," such ditches can be regulated if they perform as intended by discharging into county flood control canals which ultimately discharge either directly or through a tributary, dry wash or arroyo into a traditionally navigable water or interstate water. Many existing drainage ditches would become subject to onerous permitting and costly mitigation requirements. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

CEMEX (Doc. #19470)

- 6.544 The exclusions in the proposed rule (particularly for ditches) do not provide any real clarity. While the proposed rule purports to exclude "drainage ditches," such ditches can be regulated if they perform as intended by conveying water away from a site even indirectly to a navigable water. Many existing drainage ditches would become subject to onerous permitting and costly mitigation requirements. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

National Association of Home Builders (Doc. #19540)

- 6.545 The Agencies have explicitly included ditches in the tributary definition within the proposed rule. That said, the proposed rule provides two exclusions whereby ditches would not be "waters of the United States": (1) ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow; and (2) ditches that do not contribute flow, either directly or through another water, to an (a)(1) through (4) water.¹⁴⁵ Contrary to the Agencies' statements about the proposed rule's treatment of ditches,

¹⁴⁵ 79 Fed. Reg. at 22,263.

however, the two exclusions are narrow in scope and lacking in clarity. Indeed, in practice, it is unlikely that these exclusions will release many ditches from jurisdiction.

The ambiguous language of these exemptions leaves their interpretation subject to the broad discretion and subjectivity of the Agencies. The following key concepts affecting the scope of the exemptions are left undefined or unclear:

- Ditch – The Agencies do not provide a definition of “ditch.” What features qualify as ditches? Are all man-made or man-altered features ditches? How is a ditch distinguished from an ephemeral drainage or gully? How is a ditch distinguished from a tributary, especially if it has a bed, bank, and OHWM?
- Uplands – To qualify for the first ditch exemption, one must show that a ditch was excavated wholly in uplands for its entire length. The Agencies have not provided a regulatory definition of “upland” while various definitions of “upland” exist.¹⁴⁶ Is anything that does not qualify as a wetland considered an upland? Are floodplain areas uplands?
- For the entire length – From the language of the proposed “tributary” definition, it appears that breaks, whether man-made or natural, along the length of ditches do not segment them for purposes of analyzing whether they meet the upland ditch definition. Could part of a ditch that crosses a wetland be jurisdictional while another part of the same ditch excavated in upland be excluded? What about a 100 mile long ditch? If it crosses one wetland over a length of several feet, is the entire ditch jurisdictional?
- Drains only upland – Because the Agencies have not provided a definition of “uplands,” this qualifier does not provide clarity. What if a ditch was constructed in wetlands but now drains only uplands (i.e., the ditch has drained the wetland)?
- Does not contribute flow – Ditches that do not contribute flow to an (a)(1) through (4) water qualify for exclusion (b)(4). What if a ditch contributes flow only during an extreme event? What if it contributes flow for only several hours a year?

Dr. Michael Josselyn of EPA’s SAB has voiced concerns about the limited ditch exclusions as well, stating, “[t]he exclusion for ditches seems quite narrow. If it is meant to exclude roadside ditches, for example, the ditch must be entirely constructed in uplands and drain only uplands. This could mean that a highway drainage ditch, even though constructed mostly through wetlands, but perhaps impacting wetlands or streams along 1-2% of its length would then be considered a ‘water of the US’. The Draft **Science** Report did not address this issue as it focused on natural streams and wetlands.”¹⁴⁷ SAB panelist Dr. Mark Murphy similarly expressed confusion regarding the ditch exclusions, commenting, “[i]t is not obvious why ditches that flow only in response to rainfall runoff,

¹⁴⁶ For instance, the Draft Connectivity Report defines “uplands” to mean: “(1) Higher elevation lands surrounding streams and their floodplains. (2) Within the wetland literature, specifically refers to any area that is not a water body and does not meet the Cowardin et al. (1979) three-attribute wetland definition.” Draft Connectivity Report at A-21. Yet, in the September 2014 Q & A at 6, the EPA stated, “Under the rule, an “upland” is any area that is not a wetland, stream, lake or other waterbody.” (p. 114-116)

¹⁴⁷ 8/14/14 SAB Panel Comments on the Proposed Rule at 29.

aka ephemeral ditches, are excluded by rule yet ephemeral streams are included by rule.”¹⁴⁸

Aside from the ambiguities, each of the ditch exclusions is very narrow and it is unlikely many ditches will actually meet these requirements. Moreover, with these exemptions, the burden is placed wholly on the applicant to prove that his/her ditch is not a “water of the United States.” For the upland ditch exclusion, the applicant will have to show through historical data (e.g., photographs, topographic maps, prior delineations) that the ditch was excavated wholly in uplands for its entire length and prove that the ditch drains only uplands.¹⁴⁹ But most ditches carry flow, contain standing water, and drain areas that have water because the very purpose of ditches is to convey water away from areas susceptible to ponding or saturation (e.g., farm fields, roadways, parking lots, etc.). NAHB expects that the likelihood of a ditch meeting the first exclusion would be low. Similarly, it will be nearly impossible to find a ditch that does not contribute flow to a traditional navigable water, interstate water, territorial sea, or impoundment. As noted by Dr. Mark Murphy of the SAB panel, “Given enough rain, all ditches have the potential to contribute flow to a downslope waterbody, even in a topographically closed basin. Thus it would be impossible to meet these criteria . . .”¹⁵⁰

Indeed, these exclusions are so narrow that it is hard to believe they are even real. Can the Agencies point to a ditch that is not a “water of the United States” under the proposed rule? If so, NAHB asks that they provide examples of ditches that would qualify for these exclusions. (p. 114-116)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

RiverStone Group, Inc. (Doc. #10742)

6.546 The exclusions in the proposed rule (particularly for ditches) do not provide any real clarity. While the proposed rule purports to exclude “drainage ditches,” such ditches can be regulated if they perform as intended by conveying water away from a site even indirectly to a navigable water. Many existing drainage ditches would become subject to onerous permitting and costly mitigation requirements. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Texas Mining and Reclamation Association (Doc. #10750)

6.547 The Proposed Ditch Exclusions Are Too Narrow, Resulting in an Unwarranted Expansion of Federal CWA Jurisdiction.

¹⁴⁸ 8/14/14 SAB Panel Comments on the Proposed Rule at 65.

¹⁴⁹ 79 Fed. Reg. at 22,203.

¹⁵⁰ 8/14/14 SAB Panel Comments on the Proposed Rule at 65.

Although the proposal attempts to exclude certain ditches from the definition of "waters of the United States," ¹⁵¹ the exclusions are too narrow and are unlikely in practice to exclude many ditches from CWA jurisdiction. TMRA shares concerns outlined by others regarding the proposed rule's treatment of ditches, including, among other things, the need to clarify: (i) whether the entire length of a ditch must be excavated in uplands and drain only uplands for the exclusion to apply or whether, in the case of a ditch that intersects a "water of the United States," the exclusion still applies to the portion of the ditch upstream from the intersection; (ii) what constitutes a "ditch" and how the Agencies intend to distinguish ditches from erosional features; (iii) the jurisdictional status of ditches that were excavated prior to the new requirement that ditches drain only uplands; and (iv) what showing is required for a landowner to invoke one of the ditch exclusions.

Mining companies, in particular, will face tremendous difficulty invoking the ditch exclusions. Given the scale of mining operations, which often span several thousands of acres, on-site ditches tend to be very long in comparison to ditches found on project sites in other industries and thus, it is more likely that, at some point, they will intersect a "water of the United States." Under the proposed rule, even if a ditch system on a mine site was excavated almost entirely in uplands and drains only uplands, the entire system could nevertheless be deemed jurisdictional based on a single intersection with a jurisdictional water, despite the fact that the ditch never discharges off-site except through an NPDES permit.

At a minimum, the Agencies should clarify, as they have suggested they would during outreach meetings, that a ditch that is excavated in uplands drains only uplands, and has less than perennial flow is nevertheless excluded even if it contributes flow to a water of the United States because the two ditch exclusions are independent of one another. The Agencies should also clarify that the upland ditch exclusion applies to all reaches of a ditch system that are upstream of the point of intersection with a "water of the United States." Third, the Agencies should indicate in the preamble that the mere presence of groundwater that has entered a ditch does not, by itself, convert an upland ditch into a jurisdictional tributary, so long as the ditch does not flow perennially as a result of the groundwater connection. Finally, the Agencies should not narrow the upland ditch exclusion by imposing a requirement that the ditch has less than intermittent flow.¹⁵² It goes without saying that a properly functioning ditch system on a mine site does, in fact, carry flow and contain water intermittently, but should not be subject to jurisdiction as federally protected waters simply because it is performing its intended function, as explained above. It should also be noted that it is not unusual that a ditch would not flow at all if not for the mining use associated with it. (p. 16-17)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The ditch exclusions operate independently. That is, a ditch needs only to satisfy one of the three ditch exclusions in order to be non-jurisdictional. The agencies cannot be certain of the specific circumstances this commenter is describing in regard to

¹⁵¹ See 79 Fed. Reg. at 22,203

¹⁵² See 79 Fed. Reg. at 22,203.

mining. However, it appears that, at least in part, the commenter is describing ditches that are internal to a stormwater management program, in which case they may be excluded from jurisdiction under the final rule. See summary response at 7.4.4.

Virginia Coal and Energy Alliance and Virginia Mining Issues Group (Doc. #14619)

6.548 The Ditch Exclusion Must Be Broadened and Clarified

The Proposal would for the first time expressly define certain ditches as jurisdictional tributaries. The Agencies attempt to balance this by offering to exclude from jurisdiction two specific types of ditches: (1) ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow and (2) ditches that do not contribute flow, either directly or through another water to traditionally navigable waters. See Proposed Rule at 22263. Yet given the overall lack of clarity, these "exclusions" as they are currently written may, in fact, be largely meaningless. For one, although the Agencies purport in the first instance to exclude ditches in uplands, the Proposal fails to offer any guidance on the regulatory meaning of "uplands." Adding to the uncertainty here is the fact that the term "perennial flow" is also wholly undefined, thereby leaving broad and subjective agency discretion over ditches, including those with water that may flow only one day a year. See *id.* The second ditch "exemption" suffers from even greater ambiguity. There are no reasonable bounds on what is meant by "contribute flow," especially "through another water," to TNW.

The net effect of the Proposal in its current form is a substantial broadening of jurisdiction over ditches. Altering the jurisdictional status of the many natural and man-made ditches that dominate the SVC landscape would subject mine operators to duplicative and unnecessary permitting obligations. Construction of surface mine bench ponds and sediment ponds is already generally subject to 404 permitting, and outfall s from the ditches draining them require NPDES permits under CWA section 402. The Proposed Rule would add an absurd and unworkable layer of complexity to this by making the drainage ditches themselves also subject to CWA jurisdiction (both 404 and 402). As noted above, these ditches must be frequently altered for maintenance or operational reasons or to ensure compliance under SMCRA. In fact, the federal SMCRA regulations specifically authorize and direct mine operators to divert flow from mined areas. These regulations require, for instance, that temporary diversions be removed promptly when no longer needed. See 30 C.F.R. § 816.43.

In order to avoid undue burden to coal miners, we urge the Agencies to restate the new ditch exclusion in clearer and broader terms that protect and preserve the historically nonjurisdictional nature of ditches on mine sites. (p. 6-7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The agencies cannot be certain of the specific circumstances this commenter is describing in regard to mining. However, it appears that, at least in part, the commenter describes ditches that are internal to a stormwater management program, in which case they may be excluded from jurisdiction under the final rule. See summary response at 7.4.4

National Mining Association (Doc. #15059)

6.549 In addition to clarifying that ditches that are part of waste treatment systems are excluded from being a “water of the United States,” the Agencies should clarify the following issues with respect to the ditch exclusions:

- a. State that, if a ditch intersects a “water of the United States,” the portion of the ditch upstream from the intersection that is excavated in uplands and drains only uplands is still excluded from jurisdiction.
- b. Clarify that a ditch that is excavated in uplands, drains only uplands, and has less than perennial flow is excluded from jurisdiction even if it contributes flow to a “water of the United States.”
- b. Include language in the preamble explaining that the mere presence of groundwater that has entered a ditch does not, by itself, convert an upland ditch into a jurisdictional tributary, so long as the ditch does not flow perennially as a result of the groundwater connection.
- c. Not narrow the upland ditch exclusion by imposing a requirement that a ditch has less than intermittent flow.
- d. Provide additional clarity with respect to: (1) how to distinguish a ditch from an erosional feature; (2) the status of currently non-jurisdictional ditches that were excavated prior to the new requirement that ditches drain only uplands; and (3) the showing required for a landowner to invoke one of the ditch exclusions. (p. 5)

Agency Response: See summary response for section 6.2.

American Petroleum Institute (Doc. #15115)

6.550 **The agencies’ exclusion for ditches is ambiguous.**

The 2014 Proposed Rule includes a narrow jurisdictional exception for two types of ditches: ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow; and ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (1)(i) through (iv) of the proposed rule.¹⁵³ The exclusions are vague and ambiguous, however, because many of the key terms (e.g., “ditch,” “uplands,” “wholly”) are undefined.¹⁵⁴ EPA representatives have stated publicly that EPA intends “upland” in this context to mean “not excavated in or through a water of the U.S.” This definition of upland, however, appears nowhere in the 2014 Proposed Rule. It is similarly unclear what burden of proof will be placed on the regulated party to establish the applicability of the exception, and what type of information must be provided to meet either of the two new ditch exemptions.

Examples of ditches that would not appear to come within the ditches exceptions in the 2014 Proposed Rule include:

¹⁵³ 2014 Proposed Rule, 79 Fed. Reg. at 22,273.

¹⁵⁴ 2014 Proposed Rule, 79 Fed. Reg. at 22,264.

- Ditches constructed to convey treated wastewaters from a wastewater treatment system to the point of discharge to a jurisdictional water. These ditches should be nonjurisdictional because they are an integral component of the treatment system. However, it is not clear from either of the ditch exclusions that the effluent conveyance to the discharge point is included in the upland ditch exclusion.
- Ditches that are used to convey storm water (either in MS4 systems or on private property including industrial plant sites) or that are used for agricultural drainage may be sufficiently deep that they intercept the saturated zone and accumulate standing water that is essentially perennial, even during periods of drought, but which do not have any measurable flow. Such ditches are common in areas with relatively impermeable soils. The 2014 Proposed Rule would potentially extend jurisdiction to these ditches, depending upon the interpretation of the assessor, even if such ditches do not have any measurable effects on the physical, chemical, or biological integrity of navigable waters. (p. 29-30)

Agency Response: See summary response for section 6.2.

Corporate Communications and Sustainability, Domtar Corporation (Doc. #15228)

6.551 [D]ue to the many requirements to qualify for the exemption, it would not exclude the categories of ditches that the agencies claim it would. The following changes are needed:

- Clarify in the final rule language that an area could still be an “upland” even if it lies within a broader area that qualifies as “adjacent” to a traditional navigable water or tributary due to the expansive definitions of tributary, adjacent, and neighboring. EPA should define “upland” as we recommend above.
- The exemption as proposed requires the ditch must also have “less than perennial flow,” which is not defined in the proposed rule, but the preamble states “[p]erennial flow means that the flow in the ditch occurs year-round under normal circumstances.” See 79 Fed. Reg. at 22219. EPA staff have clarified that ditches that do not carry water for 12 months a year and ditches that are dried out for at least a month during the year meet this requirement. This clarification needs to be include in any final rule language.
- EPA needs to state clearly that a ditch does not lose its exemption as “excavated wholly in uplands” just because the discharge end of the ditch is not in an upland. Without this clarification, the proposed ditch exemption would be (a) of very limited application, because it would predominantly be limited to ditches with no outlet (or whose only outlet is to another exempt water), and (b) would be redundant in many, if not all, cases with the other exemption for ditches “that do not contribute flow, either directly or through another water, to a” traditional navigable water (excluding tributaries and adjacent waters), in proposed section 122.2(b)(4). (p. 12)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Virginia Coal and Energy Alliance and Virginia Mining Issues Group (Doc. #18016)

6.552 **The Ditch Exclusion Must Be Broadened and Clarified.**

The Proposal would for the first time expressly define certain ditches as jurisdictional tributaries. The Agencies attempt to balance this by offering to exclude from jurisdiction two specific types of ditches: (1) ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow and (2) ditches that do not contribute flow, either directly or through another water to traditionally navigable waters. See Proposed Rule at 22263. Yet given the overall lack of clarity, these "exclusions" as they are currently written may, in fact, be largely meaningless. For one, although the Agencies purport in the first instance to exclude ditches in uplands, the Proposal fails to offer any guidance on the regulatory meaning of "uplands." Adding to the uncertainty here is the fact that the term "perennial flow" is also wholly undefined, thereby leaving broad and subjective agency discretion over ditches, including those with water that may flow only one day a year. See *id.* The second ditch "exemption" suffers from even greater ambiguity. There are no reasonable bounds on what is meant by "contribute flow," especially "through another water," to TNW. (p. 6)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Marcellus Shale Coalition (Doc. #18880)

6.553 Additional uncertainty is created to the oil and natural gas industry by:

- Creating exemptions for certain ditches, but making the exemptions so narrow that few, if any, ditches can meet the criteria. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

D. Warnock (Doc. #0984)

6.554 The two exclusions you have provided for ditches are not adequate to alleviate the enormous burden you just placed on the entire agriculture community. "Ditches" should not be waters of the U.S. Dry washes, dry streambeds, and ephemeral streams should not be waters of the U.S. (p. 1)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Dry washes, dry streambeds and ephemeral streams are waters of the US if they meet the definition of tributary and are not excluded under paragraph (b). For more discussion of tributaries, see Topic 8 of this RTC and section IV(F) of the preamble to the final rule.

Washington Farm Bureau (Doc. #3254.2)

6.555 The proposed rule would expand federal jurisdiction to all tributaries (not just to those that are relatively permanent), and to all waters (including wetlands) that are adjacent to

tributaries. The proposed rule's "tributary" definition is so vague and overly broad that virtually all ditches that carry any amount of water anywhere would be categorized as jurisdictional "tributaries." The proposed exclusion for "upland" ditches—ditches that are "excavated wholly in uplands" (uplands being an undefined term) and that "drain only uplands"—is the narrowest of exceptions. Few "upland only" ditches exist in the real world. Thus, under the proposed rule, the vast majority of even minor dry ditches would appear to be subject to regulation as "navigable waters." (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Montana Wool Growers Association (Doc. #5843.1)

6.556 1. Ditches have never been excluded from CWA regulation because they were never covered. As explained in Section II(C) of this comment letter, ditches are listed as point sources in the CWA. Even the Agencies' expansive current regulations only assert jurisdiction over water, not manmade structures. And even if current regulations would permit regulating ditches, the United States Supreme Court has never upheld the breadth of the current regulations.

2. Sections (b)(3) and (b)(4) provide exclusions for "ditches" that meet specific requirements. The language excludes the ditch itself rather than the water within it, implying concurrently that the water may not be excluded under the Proposed Rule and that non-excluded ditches will be regulated regardless of whether they carry water.

3. Section (b)(3)'s exclusion for upland ditches is narrow. Most ditches begin and/or end at a natural water body. Most natural water bodies have riparian zones. Therefore, very few ditches are "excavated wholly in uplands" and "drain only uplands." Of those ditches not excluded by (b)(3), most eventually contribute water to a water that directly or indirectly flows into an (a)(1) through (a)(4) water and therefore do not meet the (b)(4) exclusion either. In effect, the only ditches excluded under Section (b) would be some "roadside ditches" and "ditches collecting runoff or drainage from crop fields," as anticipated by the EPA in "Questions and Answers about Waters of the U.S." EPA, Questions and Answers about Waters of the U.S. 1, http://www2.epa.gov/sites/production/files/2014-07/documents/questions_and_answers_about_wotus_O.pdf (accessed Aug. 23, 2014). (p. 10-11)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. For the legal history of ditch regulation under the CWA, see summary response for section 6.0 and section I of the Technical Support Document.

National Farmers Union (Doc. #6249)

6.557 In section (b) of the proposed rule, the agencies list several categories of waters that are explicitly excluded from the definition of "waters of the United States," placing them outside the jurisdiction of the CWA. The proposed rule specifically excludes two types of ditches that otherwise would have been subject to a case-by-case determination,

increasing regulatory certainty and reducing the CWA's jurisdictional reach. The exclusion of these ditches increases certainty for the regulated community without impairing the agencies' ability to protect the nation's water resources.

Sections (b)(3) and (b)(4) explain the circumstances in which a "ditch" is not a "water of the United States." These sections exclude ditches that do not contribute flow, directly or through other waters, to a "water of the United States," and any ditches that are wholly within an upland and drain only uplands and are without perennial flow. These explicitly-stated exclusions do not interfere with the CWA's objective of protecting water resources because the ditches concerned are unlikely to impact the integrity of waters of the United States. The exclusions at (b)(3) and (b)(4) will give the regulated community added certainty, allowing them to conduct their business without fear of regulatory action. (p. 8-9)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The agencies agree that the rule will give the regulated community additional certainty.

Alameda County Cattlemen (Doc. #8674)

- 6.558 The agencies exclusions under (b)(3) and (b)(4) are unclear and not adequate for the livestock industry. It is impossible to determine how many ditches would even fall into these categories because, like so many other times throughout this proposed rule, the agencies have failed to carry out their duty to define key legal terms. Central to this point are the definitions of "ditches," "uplands" and "through another water." Neither of these important terms are even attempted to be explained in the proposed rule. Extraneous documents placed on the agencies' website outside of the proposed rule attempting to define uplands are not adequate nor legally binding. Any definitions the agencies create should be put out for public comment, before they are finalized. To not do so would be a violation of the APA.¹⁵⁵

First, the agency has failed in the first instance of providing the public with a clear description of a "ditch." Considering that some ditches will be jurisdictional while "gullies" and "rills," along with (b)(3) and (4) ditches are excluded, it is of utmost importance to have a clear indication of what the agencies would categorize a water feature as. At present, the proposed rule fails to provide such descriptions. The discussion of gullies and rills in the preamble is inadequate for a landowner to be capable of distinguishing the features.

Second, the agencies have claimed through the comment period that this proposed rule does not claim jurisdiction over any more ditches than previously asserted. ACCW disagree with this assertion. But even if that were true, livestock producers across the country have been under a false impression over the past 40 years. The backlash the agency has experienced over this proposed rule from the farming and ranching

¹⁵⁵ Rapanos, at 37 (J. Scalia, wetlands are waters of the United States if they bear the "significant nexus" of physical connection, which makes them as a practical matter indistinguishable from waters of the United States."), Supra Note 2.

community is a direct result of making it clear to our industry that the proposed rule will claim jurisdiction over almost every ditch across farm country. As the proposal currently stands, ACCW is confident that any ditch can meet the current categories under (b)(3) and (b)(4).

The livestock industry faces the same dilemma with the scope of the phrase “through another water.” The agencies use the phrase both with regard to the definition of “tributary” as well as with regard to excluded ditches under (b) (3) and (4). (Proposed Rule at 22201, (“The proposed rule defines “tributary” as a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4).” emphasis added.); (Proposed Rule at 22218). ACCW strongly suggest the agency withdraw the proposed rule, fill in the large gaps left in the proposed rule, and re-propose the rule to allow the public to comment on the definitions the agency has selected. (p. 22-23)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. As a result of these clarifications, re-proposal of the rule is not necessary. Section IV(F) of the preamble discusses the concept of “contributing flow through another water.”

- 6.559 In aiding the agencies’ development of such key terms, ACCW suggest the agencies consider an exclusion for “ditches” that includes “Ditches, whether natural or man-made, that do not contribute perennial flow, directly to a water identified in paragraphs (a)(1) through (4) of this section.” This definition, along with a definition of the term “ditches” itself, would provide the needed clarity for the livestock industry while also allow the agencies to focus resources on waters more likely to have the requisite significant nexus to larger downstream waters. (p. 23)

Agency Response: The summary response for section 6.2 describes how the proposed exclusions for ditches were edited and clarified for the final rule.

Michigan Farm Bureau, Lansing, Michigan (Doc. #10196)

- 6.560 The definition's exclusion of ditches that drain only uplands and do not contribute flow to waters of the United States in fact excludes so few features as to be useless as an exemption for farm or roadside ditches. The EPA and USACE's statement that ephemeral farm features are not tributaries similarly offers no relief as while they may not be tributaries under the rule, they can be considered jurisdictional any time they "connect" waters of the United States, including wetlands or other features across the landscape with the broad categorical inclusion the agencies use to regulate them. The exclusion additionally relies upon the judgment of field staff whether a feature on a field is ephemeral enough to be excluded from the rule, and gives the landowner no certainty as to when a farm's wet spot or ephemeral feature might at some point be reclassified as a tributary or connecting water feature. (p. 6)

Agency Response: The summary response for section 6.2 describes how the proposed exclusions for ditches were edited and clarified for the final rule.

Montana Farm Bureau Federation (Doc. #12715)

6.561 Perhaps the most obvious new inclusion to "Waters of the United States" under this proposed rule is ditches. Ditches have always been specifically excluded from "Waters of the United States." Rather, they have been defined as "point sources," or conveyances that may discharge to "Waters of the United States." See U.S.C. 1362(14). Even though the rule lays out certain exemptions and the Agencies have repeatedly insisted that ditches would not be included under the proposed rule, the plain language of the rule says otherwise. The proposed rule specifically define the term "tributary" to include ditches and canals, with only narrow and very specific exemptions. Specifically, the rule defined two narrowly defined exempted ditches. At 79 Fed. Reg. 22,263, the rule says that 1) ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow; as well as 2) ditches that do not contribute flow, either directly or through another water, to a water identified as navigable, as those with less than perennial flow, excavated wholly in uplands and drain only uplands, would be exempt from jurisdiction. Here in Montana, we have yet to identify such a ditch. First of all, the definition of "uplands" is unclear. Assuming uplands mean land that is at a higher elevation than jurisdictional waters, it makes little sense for a farmer to utilize such a ditch for irrigation. Furthermore, the second type of "exempt" ditch is hard to envision, considering that if a ditch is built to convey water to a field or drain excess water from a field, the water has to go somewhere, and does not simply disappear in the ditch. There are infinite varieties of ditches here in Montana. Many were built years ago and when they were excavated (often times with horses and antique equipment), the builders used abandoned channels from creeks or rivers. It simply made economic and logistical sense to build the ditches where less excavating had to be done and where water could easily be conveyed. Other ditches collect run off from fields or pastures when irrigation is under way, or during heavy rainfall, which may put them in jeopardy of the less than perennial flow requirement. Still others run through what may be determined to be wetlands. (p. 3)

Agency Response: The agencies respectfully disagree with the commenter's suggestion that ditches have always been excluded as "waters of the United States." The summary response for section 6.2 provides a brief description of the history of regulated ditches and also describes how the proposed exclusions for ditches were edited and clarified for the final rule. A detailed discussion of the history of ditch regulation is in Section I of the Technical Support Document.

Anderson-Cottonwood Irrigation District, Anderson California (Doc. #12734)

6.562 The proposed rule includes limited exemptions for ditches. Ditches that "are excavated wholly in uplands, drain only uplands, and have less than perennial flow" and ditches that "do not contribute flow either directly or through another water to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water" are excluded and not considered tributaries. This approach of simultaneously classifying ditches as tributaries while carving out narrow exemptions creates unnecessary complexity and uncertainty. The exemptions are use-specific, while ditch uses are varied. Without clarity, tens of thousands of ditch miles will become jurisdictional under the proposed rule.

Anderson-Cottonwood Irrigation District recommends that ditches should be excluded from the definition of tributary. Instead, ditches should continue to be regulated under existing CWA provisions where appropriate. Additionally, regulatory guidance letter RGL No. 07-02, "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches under Section 404 of the Clean Water Act" should be affirmed and retained. (p. 2)

Agency Response: The summary response for section 6.2 provides a brief description of the history of regulated ditches and also describes how the proposed exclusions for ditches were edited and clarified for the final rule.

Louisiana Cotton and Grain Association (Doc. #12752)

- 6.563 Ditches, for the first time, are explicitly included as jurisdictional under the tributary definition, with two very narrow exemptions: 1. Ditches excavated wholly in uplands for their entire length, drain only uplands, and have less than perennial flow; and 2. ditches that do not contribute flow, either directly or through another water, to a TNW, interstate water, territorial sea or tributary." How will federal representatives fairly and objectively designate exempted ditches without key definitions to the terms "ditches," "uplands" and "through another water?" How can farmers rely on an exemption that is so unclear? The very purpose of a ditch is to drain water away from a wet area, which will almost certainly require a non-"upland" area to be present at some point during the ditch's "entire length." Even if a ditch does qualify under the first narrow exemption, the second exemption that requires a ditch to not contribute flow "directly or through another water" will be essentially impossible to satisfy, as ditches almost always connect with other ditches that contribute flow, even in infinitesimal amounts, to a jurisdictional water. As a result, the proposed rule would categorically define as tributaries all ditches that ever carry any amount of water that eventually connects to a navigable water - regardless of volume, frequency and duration of flow and regardless of distance to those navigable waters. (p. 2)

Agency Response: The summary response for section 6.2 provides a brief description of the history of regulated ditches. It also describes how the proposed exclusions for ditches were edited and clarified for the final rule.

Nebraska Cattlemen (Doc. #13018)

- 6.564 **Uplands.** The term "uplands" appears throughout the proposed rule and is a very significant legal term, as indicated by EPA's statement "Absolutely no uplands located in "riparian areas" and "floodplains" can ever be "waters of the United States" subject to jurisdiction of the CWA." (Proposed rule at 22207). It is also legally significant as the term applies to the exclusion of ditches and ponds from CWA jurisdiction "clearly exclude[d] from the definition of "waters of the United States"...Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow." (proposed rule at 22203).

It is entirely inappropriate for EPA to propose such a significant regulation and fail to define "uplands," when two key exclusions from jurisdiction hinge on a determination of what constitutes "uplands."

Through Another Water. The phrase “through another water” is an essential component for determining whether certain types of ditches are excluded from CWA jurisdiction, “Ditches that do not contribute flow either directly or through another water [to a traditionally navigable water] are not “waters of the United States.” (Proposed rule at 22204). In addition, this phrase is significant for determining what waters qualify as tributaries under the CWA and are jurisdictional by rule “wetlands, lakes and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow either directly or through another water to a [traditionally navigable water].” (Proposed rule at 22263).

Again, it is wholly inappropriate for EPA to propose a rule and fail to provide a definition for such a significant regulatory phrase that can automatically include or exclude a water from jurisdiction. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Section IV(F) of the preamble discusses the concept of “contributing flow through another water.”

North American Meat Association and American Meat Institute (Doc. #13071)

- 6.565 Complicating the issue is the fact that the proposed exclusions for ditches are ambiguous and unlikely to exclude many ditches from the agencies’ jurisdiction. Specifically, ditches would be excluded in two situations: (1) ditches excavated wholly in uplands for their entire length, drain only uplands, and have less than perennial flow and (2) ditches that do not contribute flow, either directly or indirectly, to a traditional navigable water, interstate water, territorial sea, or tributary.¹⁵⁶ The proposed exclusions are more limiting than the agencies’ previous position, which excluded “[n]on-tidal drainage and irrigation ditches excavated on dry land,” without limitation based on flow regime, whether the ditch drains only uplands, or whether the ditch contributes flow.¹⁵⁷

The ambiguity leaves the implementation and administration of the exemptions vulnerable to tremendous subjectivity, leading to significant uncertainty for potentially regulated parties. In that regard, the proposed rule leaves unclear several important issues. First, although asserting jurisdiction over ditches, the agencies do not define “ditch.” Indeed, the proposal is silent regarding the features that would qualify something as a ditch. (p. 4)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

- 6.566 [I]nconsistencies between the proposed rule and EPA’s statements leave unclear whether part of a ditch that crosses wetlands would be jurisdictional while another part excavated in uplands would be non-jurisdictional.¹⁵⁸ Similarly, if a 100-mile ditch crosses wetlands

¹⁵⁶ 79 Fed. Reg. at 22,203.

¹⁵⁷ See 79 Fed. Reg. at 22,219 (citing 51 Fed. Reg. 41,217 (Nov. 13, 1986)).

¹⁵⁸ House Committee on Science, Space, and Technology, Navigating the Clean Water Act: Is Water Wet? (July 9, 2014)

at any point, is the entire ditch jurisdictional, or only downstream of the wetland crossing?

[T]he “drain only uplands” element is new to the exemptions. In the preamble the agencies assert that “Members of the public should consider whether a wetland is jurisdictional before constructing a ditch that would drain the wetland and connect to . . . an (a)(1) through (a)(3) water.”¹⁵⁹ It is unclear how ditches constructed under earlier exemptions will be treated.

[T]he less than perennial flow element also is new and not adequately defined. The agencies also state in the preamble that “perennial flow” means that “the flow in the ditch occurs year-round under normal circumstances.”¹⁶⁰ One seeking to qualify for an exemption knows whether water must flow year round or does a ditch with the presence of water year round have “perennial flow?” If ditches where water is merely present year round do not qualify as having “less than perennial flow,” large numbers of stormwater management ditches, roadside ditches, and railroad right-of-way ditches, would be jurisdictional.

[T]he exemptions are unclear regarding the evidentiary burden on a landowner to demonstrate that a ditch was excavated in uplands and whether a ditch constructed in wetlands prior to the CWA’s enactment is grandfathered. Although the preamble references historical evidence, there is no guidance regarding what terms mean, again raising the distinct possibility of subjective decision-making by regulators. (p. 5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

- 6.567 Among other ambiguities, the proposed rule fails to [...] define “upland,” “perennial flow,” and other key terms. (p. 12)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Iowa Corn Growers Association (Doc. #13269)

- 6.568 This rule would, for the first time ever, classify ditches as jurisdictional (unless excluded) under all CWA programs including roadside, irrigation, and stormwater ditches. The exclusions include ditches that are either: 1) “excavated wholly in uplands, drain only uplands, and have less than perennial flow,” or 2) those that “do not contribute flow, either directly or through another water.” The narrowness of this first exclusion only shows how broadly the proposed rule applies, as all 3 tests must be met in order to achieve an exemption. It is also unclear what the Agencies mean by perennial flow. This could be worded more explicitly to include ephemeral or intermittent flow or simply to say any ditch that doesn’t carry a relatively permanent flow of water. (p. 3)

¹⁵⁹ 79 Fed. Reg. at 22,219.

¹⁶⁰ 79 Fed. Reg. at 22,219

Agency Response: The summary response for section 6.2 provides a brief description of the history of regulated ditches and also describes how the proposed exclusions for ditches were edited and clarified for the final rule.

North Dakota Soybean Growers Association (Doc. #14121)

6.569 The agencies also propose to exclude “ditches that do not contribute flow, either directly or through another water,” to navigable waters, interstate waters, the territorial seas, or impoundments of those three waters or of tributaries. This exclusion is astoundingly narrow. To qualify for an exception, such a ditch must contribute zero flow, even indirectly, to any tributary, which itself is defined explicitly to include ditches and ponds even if they themselves only contribute minimal, occasional flows via indirect routes to downstream waters. Ditches indirectly conveying very small flows to minor waters represent most ditches in the country (and most ditches in North Dakota parallel road structures that would likely require permits for any number of activities). For that reason, the exclusion is virtually useless. (p. 7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Indiana Farm Bureau, Inc. (Doc. #14124)

6.570 We acknowledge the exclusion for ditches as well as one for gullies, rills and non-wetland swales. They are exclusions in name only. There are two exclusions for “ditches:” (1) “ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow,” and (2) “ditches that do not contribute flow, either directly or through another water, to a water identified” as jurisdictional. 79 Fed. Reg at 22,263. A “ditch” that will meet either of these definitions is extremely rare if it exists at all. (p. 1)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Sugar Cane Growers Cooperative of Florida (Doc. #14283)

6.571 Ditch exclusions in the proposed rule, by contrast, might prove under-inclusive. For example, irrigation ditches could suddenly become jurisdictional because they might contribute flow indirectly to jurisdictional waters. Others could become jurisdictional because parts of these ditches were once excavated in historic wetlands. And still others could become jurisdictional because, although they were excavated wholly in uplands and drain only uplands, they have groundwater inputs that give them constant flow. Concerns such as these could prove significant in Florida because the State experiences distinct wet and dry seasons, has a shallow water table that makes groundwater inputs significant and, prior to the Clean Water Act’s enactment, experienced significant alterations to its wetlands. Also, it is unclear whether the proposed rule would do as Florida does: exclude portions of ditches that are excavated in uplands or contain no flow from onerous mitigation requirements. It should. (p. 7)

Agency Response: The summary response for section 6.2 provides a brief description of the history of regulated ditches and also describes how the proposed exclusions for ditches were edited and clarified for the final rule.

Kansas Agriculture Alliance (Doc. #14424)

6.572 Many of the exceptions the agencies provide do not function or practically exist in the real world. Therefore, inclusion of these terms are of limited importance and provide no certainty. The first key exception that provides no protection is the exclusion of ditches. It is unclear whether the constraints on the term ditches found in paragraphs (b)(3) and (4) are to be applied together or separately.¹⁶¹ If the conditions must be applied in tandem, it is clear that no ditch can ever be excluded. The primary purpose of a ditch is to drain water. If a ditch must only exist in an upland, drain only uplands and never contribute flow, whether directly or indirectly to a TNW, it excludes all ditches from the exclusion. To say otherwise would defy the law of physics.

If the conditions in paragraphs (b)(3) and (4) are read separately, the exception could have some limited utility, but because there are no definitions of relevant terms, in reality the ditch exceptions still provide little to no assistance to farmers and ranchers. First, the term ditch is completely undefined. Does it mean man made or man altered, an erosional feature, or a natural feature that does not equate to a stream? Second, the term “upland” is left wholly undefined.¹⁶² The regulated community is only left to speculate and because the reach of the regulated water feature is broad and over inclusive, it places great liability on agriculture to guess as to what the agencies mean. In paragraph (b)(4) the constraint that a ditch cannot contribute flow, whether “directly or through another water” makes the exception non-functional because all ditches drain.¹⁶³ Compounding the problem is the failure of the agencies to define “through another water”. This term can easily be extrapolated by the agencies to include a ditch that indirectly contributes flow through anything wet, regardless of the wet areas’ status as a WOTUS. Therefore, by implication, all ditches would fall within WOTUS. Regulation of any ditch, let alone all ditches, is something that has, until now, been rejected by the agencies.¹⁶⁴ (p. 6-7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Section IV(F) of the preamble discusses the concept of “contributing flow through another water.”

North American Meat Association and American Meat Institute (Doc. #14454)

6.573 The proposed exclusions are more limiting than the agencies’ previous position, which excluded “[n]on-tidal drainage and irrigation ditches excavated on dry land,” without

¹⁶¹ 79 Fed. Reg. at 22263.

¹⁶² 79 Fed. Reg. at 22263.

¹⁶³ 79 Fed. Reg. at 22263.

¹⁶⁴ 40 Fed. Reg. 31320-21 (July 25, 1975) (stating that “drainage and irrigation ditches have been excluded” from jurisdiction under the CWA).

limitation based on flow regime, whether the ditch drains only uplands, or whether the ditch contributes flow.¹⁶⁵

The ambiguity leaves the implementation and administration of the exemptions vulnerable to tremendous subjectivity, leading to significant uncertainty for potentially regulated parties. In that regard, the proposed rule leaves unclear several important issues. First, although asserting jurisdiction over ditches, the agencies do not define “ditch.” Indeed, the proposal is silent regarding the features that would qualify something as a ditch.

Second, to qualify for one of the exemptions, one must show that a ditch was excavated wholly in uplands for its entire length. But the agencies have not defined “upland” and several definitions of “upland” have been used by the agencies throughout this rulemaking process.¹⁶⁶ (p. 4)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

- 6.574 [I]nconsistencies between the proposed rule and EPA’s statements leave unclear whether part of a ditch that crosses wetlands would be jurisdictional while another part excavated in uplands would be non-jurisdictional.¹⁶⁷ Similarly, if a 100-mile ditch crosses wetlands at any point, is the entire ditch jurisdictional, or only downstream of the wetland crossing?

[T]he “drain only uplands” element is new to the exemptions. In the preamble the agencies assert that “Members of the public should consider whether a wetland is jurisdictional before constructing a ditch that would drain the wetland and connect to . . . an (a)(1) through (a)(3) water.”¹⁶⁸ It is unclear how ditches constructed under earlier exemptions will be treated.

[T]he less than perennial flow element also is new and not adequately defined. The agencies also state in the preamble that “perennial flow” means that “the flow in the ditch occurs year-round under normal circumstances.”¹⁶⁹ One seeking to qualify for an exemption knows whether water must flow year round or does a ditch with the presence

¹⁶⁵ See 79 Fed. Reg. at 22,219 (citing 51 Fed. Reg. 41,217 (Nov. 13, 1986)).

¹⁶⁶ For example, the Connectivity Report defines “uplands” to mean: “(1) higher elevation lands surrounding streams and their floodplains. (2) Within the wetland literature, specifically refers to any area that is not a water body and does not meet the Cowardin et al. (1979) three-attribute wetland definition.” Connectivity Report at A-21. Yet, on stakeholder calls, the agencies have said uplands are anything that are not waters of the U.S. In EPA’s Watershed Protection Glossary, an upland is “an area of the terrestrial environment that does not have interaction with surface waters.” See

http://ofmpub.epa.gov/sor_internet/registry/termreg/searchandretrieve/glossariesandkeywordlists/search.do;jsessionid=sDUeRbIYFjmmV3Wacx9opy1cw_6bZR0Hp44w22czO3EyxZb9vVGB!-325588870. And, in a September 2014 Q&A document, the agencies stated, “Under the rule, an ‘upland’ is any area that is not a wetland, stream, lake, or other waterbody. So, any ditch built in uplands that does not flow year-round is excluded from CWA jurisdiction.” EPA and U.S. Army Corps of Engineers, Questions and Answers – Waters of the U.S. Proposal at 5 (Sept. 9, 2014), http://www2.epa.gov/sites/production/files/2014-09/documents/q_a_wotus.pdf (hereinafter, Sept. Q&A document).

¹⁶⁷ See, e.g. House Committee on Science, Space, and Technology, Navigating the Clean Water Act: Is Water Wet? (July 9, 2014)

¹⁶⁸ 79 Fed. Reg. at 22,219.

¹⁶⁹ 79 Fed. Reg. at 22,219

of water year round have “perennial flow?” If ditches where water is merely present year round do not qualify as having “less than perennial flow,” large numbers of stormwater management ditches, roadside ditches, and railroad right-of-way ditches, would be jurisdictional.

[T]he exemptions are unclear regarding the evidentiary burden on a landowner to demonstrate that a ditch was excavated in uplands and whether a ditch constructed in wetlands prior to the CWA’s enactment is grandfathered. Although the preamble references historical evidence, there is no guidance regarding what terms mean, again raising the distinct possibility of subjective decision-making by regulators. (p. 5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

National Chicken Council; National Turkey Federation; and U.S. Poultry & Egg Association (Doc. #14469)

- 6.575 The proposed rule does include certain exclusions from the definition of waters of the U.S., but these exclusions are too limited, ambiguous and are of little, or no, value to agricultural operations. For example, the proposed rule excludes “ditches that are excavated wholly in uplands, drain only uplands and have less than the perennial flow.” Unfortunately, the term, “uplands,” was not explained or clarified in the proposed rule.

Similarly, the proposed rule also excludes “ditches that do not contribute flow either directly or through another water” to navigable waters or tributaries. To qualify for this exclusion a ditch must contribute zero flow (even indirectly) to any navigable water or tributaries. Because most ditches convey at least small flow indirectly to minor tributaries, this exclusion is a nonfactor for agricultural operations. The agencies’ claims that exclusions provide some relief from the expanded CWA jurisdiction are meaningless, cannot withstand close scrutiny and do not provide poultry and egg farmers with the benefits the agencies assert. (p. 8)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

North Dakota Soybean Growers Association (Doc. #14594)

- 6.576 The Agencies proposal includes ditches within the definition of “tributary.” However, the jurisdictional coverage of ditches is unclear, like many other aspects of the proposal. It provides, in part, that: “[a] tributary This is precisely why a ditch exists in the first place, to carry water away from the site to drain elsewhere. Therefore, despite the Agencies assurances of Agriculture’s exceptions, most ditches ultimately would not be excluded or exempted from CWA permitting requirements . . . or some exasperating process to guarantee their permanent exception status.

The Agencies also propose to exclude “ditches that do not contribute flow, either directly or through another water,” to navigable waters, interstate waters, the territorial seas or impoundments of those three waters or of tributaries. This exclusion is astoundingly narrow. To qualify, such a ditch must contribute zero flow, even indirectly, to any tributary, which itself is defined explicitly to include ditches and ponds even if they

themselves contribute only minimal, occasional flows via indirect routes to downstream waters. Ditches conveying very small flows indirectly to minor waters represent most of the ditches in the country (and most in ND parallel road structures that would likely require (p. 10)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

The Mosaic Company (Doc. #14640)

6.577 Most ditches, particularly in Florida, will not fall within [the] narrow exclusions, and therefore, under the proposed rule, many ditches will be regulated as tributaries regardless of their function, flow volume and duration, or distance from traditional navigable waters. Most ditches, particularly in Florida, will not fall within these narrow exclusions, and therefore, under the proposed rule, many ditches will be regulated as tributaries regardless of their function, flow volume and duration, or distance from traditional navigable waters. (p. 14)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

National Corn Growers Association (Doc. #14968)

6.578 Portions of Ditches with Wetland Characteristics—The proposed rule excludes from jurisdiction ditches excavated wholly in uplands, draining only uplands and flowing less than permanently. While upland is not defined in the rule, assuming that at a minimum it means areas that are not wetland, what are the jurisdictional implications if a portion of an upland ditch develops wetland characteristics? Does that mean the ditch is draining a non-upland area and is therefore WOTUS along its entire length? Also, does that mean that any subsequent ditch downgradient from this initial ditch is also categorically WOTUS as they are part of a system of ditches draining WOTUS? (p. 13)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

National Pork Producers Council (Doc. #15023)

6.579 Ditches, having a bed, bank and an OHWM, are considered to be tributaries and, therefore, categorically WOTUS, with two exceptions. The ditches that are WOTUS may have water in them ephemerally, intermittently or perennially. The classes of excluded ditches are (1) those excavated wholly in uplands, drain only uplands and that have flowing water in them less than permanently, and (2) those that do not contribute flow, either directly or indirectly, to a downstream WOTUS. Relative to the first exclusion, the term upland is not defined in the rule. (p. 5-6)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

6.580 **Farm drainage features.** We recommend that upland drainage features be excluded from being treated as WOTUS, though the Agencies can retain the ability to deem a

feature WOTUS on an individual case-by-case basis, following on-farm visits and review of relevant data using the improved version of significant nexus as discussed above. In doing so, there should be a clear regulatory presumption that the drainage feature is excluded. If an individualized delineation determines that the farm drainage feature is indeed WOTUS, there should be no reach back to penalize actions and activities with regard to the drainage that were otherwise reasonable and undertaken prior to a delineation as WOTUS.

Farmed wetlands and wet areas. If upland and farmed drainage features are dealt with as above, the issue of possible farmed wetlands and wet areas in fields being WOTUS via adjacency is addressed. (p. 21)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Klamath Water Users Association (Doc. #15063)

- 6.581 KWUA strongly recommends that the agencies specifically exempt ditches and drains constructed and maintained in association with agricultural irrigation uses from CWA jurisdiction. The exemption for ditches found in subsection (b)(3) should be revised to strike “ditches excavated wholly in uplands, and have less than perennial flow” and replace with “all ditches and drains used for agricultural irrigation regardless of perennial flow.” Certain drains and other irrigation conveyances that drain agricultural lands do have perennial flow, mostly due to the timing of agricultural drainage, and should be excluded as well. If irrigation were to cease, these perennial flows would eventually cease. In the case of delayed agricultural runoff causing perennial flows in agricultural drains, these drains should be considered excluded from the definition of “waters of the U.S.” (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches and similar features were edited and clarified for the final rule.

Beet Sugar Development Foundation (Doc. #15368)

- 6.582 All Aspects of the Proposed Definition of Tributaries

BSDF recommends that the agencies add additional exemptions for ditches and canals from categorical jurisdiction as tributaries. The current exemptions for upland ditches and ditches not contributing flow to “waters of the United States,” do not adequately exempt BSDF processing members’ drainage and stormwater ditches that are designed to treat discharge before it reaches the traditionally jurisdictional waters. As discussed above in regard to stormwater best management practices, the proposed rule too broadly subjects unnecessary operations to CWA jurisdiction. (p. 17)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches and other similar features were edited and clarified for the final rule.

Pennsylvania Farm Bureau (Doc. #15508)

6.583 While it is also true that the proposed rule would expressly recognize a category of excluded ditches in the regulatory provisions, the exclusions to be recognized are of little legal or practical significance. The exclusions are so narrowly defined that many farm ditches will not fall within the two categories of excluded ditches. EPA and ACOE limit excluded ditches that have less than perennial flow and are excavated wholly in uplands and drain only uplands. In reality, few ditches will qualify for this exclusion because most ditches will be excavated in a (now) jurisdictional ephemeral, will contain wetlands somewhere along their length, or will during large rainfall events receive flow from a wetland or other water. And federal officials should have easily known—and most likely did know—that when the proposed rule was drafted.

EPA and ACOE will not look only at the ditch (or, as the agencies call it, a “water body”) as it currently exists, but also to “[h]istorical evidence, such as photographs, prior delineations, or topographical maps, that may be used to determine whether a water body was excavated wholly in uplands and drains only uplands, and has less than perennial flow.” This approach is confusing. To give an example, if EPA and ACOE determine that a ditch on a farm is a “navigable water,” but through historical inquiries discover that the ditch was constructed to drain a wetland prior to 1985, will the ditch still be classified as a prior converted cropland?

Even if farmers have a ditch that only drains upland areas of their property, it does not necessarily follow that the ditch will be excluded from federal jurisdiction under the proposed rule. The fine print contained within the rule’s regulatory provisions only allows for the exclusion to apply to those ditches that are excavated in uplands (the term uplands is not defined in the proposed rule, but presumably means not waters or wetlands) at all points “along their entire length.” Ditches can run for miles, and farmers generally have no idea of what types of jurisdictional waters (wetlands and ephemeral drainages in particular) connect to the ditch outside of their own property. Moreover, ditch segments are connected via pipes and other conveyances. At what point would one ditch be considered to have “ended” and another ditch “begun?” Or, do the agencies believe that the “entire” length of a ditch begins when the water is first diverted from its original source of water? None of these questions are answered in the proposal, yet they are the questions that must be answered before anyone can determine the boundaries of these so-called “navigable waters” under the proposed rule. Farmers would be hard pressed find a ditch that does not have an ephemeral water or wetland *at any point along its entire length*. [...]

PFB does not support a ditch exclusion based on “less than intermittent flow.” Such a limitation would make the ditch exclusions even narrower than the already narrow proposed standard. To use an example, irrigation ditches carry flowing water to fields throughout the growing season as farmers open and close irrigation gates to allow the water to reach particular fields. These irrigation ditches generally have flowing water as long as water is available for use. Farmers routinely conduct maintenance activities on these ditches located on their property (maintenance currently not subject to federal restrictions under Sections 402 or 404 of the Clean Water Act). In arid sections of the nation, these irrigation ditches, and the valuable surface water that flows through them,

are highly regulated by state authorities that allocate water based on vested water rights and permit systems. If EPA and ACOE further restrict the ditch exclusion, many of these irrigation ditches with seasonal flow would become jurisdictional intermittent tributaries. Under that standard, the ditch exclusion would have no practical meaning to farmers. It would interfere with state regulation of these ditches and the rights to the water they contain and would seriously impede the ability of farmers to move water to fields. (p. 10-11)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Where a ditch is draining prior converted cropland, it would not be considered to be draining a wetland; however, unless the ditch itself is cropped, it is unlikely it could be itself considered PCC. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. For a further discussion of the CWA and state water rights, see the summary response for 1.1.2: Water Supply and Allocation.

National Sustainable Agriculture Coalition (Doc. #16357.2)

6.584 The only excluded ditches would be a narrowly defined (one might say mythical) category of ditches “excavated wholly in uplands,” draining only uplands, and with less than perennial flow.¹⁷⁰ The preamble explains that this exclusion applies only to those ditches that are excavated in uplands (the term uplands is not defined in the proposed rule, but presumably means not waters or wetlands) at all points “along their entire length.” 79 Fed. Reg. at 22,203.

The exception is essentially meaningless. One would be hard pressed to find a ditch that at no point along its entire length includes waters or wetlands.

- First, over the last several decades, the agencies have expanded their regulatory footprint by broadening the criteria for classifying land as “wetland” (e.g. expanding the list of wetland vegetation). In many cases, low spots on the landscape that were not considered wetlands in the ‘70s and ‘80s would certainly be considered wetlands today. Since the purpose of ditches is to carry water, many ditches will tend to develop “wetland” characteristics and therefore not be “wholly in uplands.”
- Second, because the purpose of a ditch is to carry water, few ditches are excavated along the tops of ridges. The most logical places to dig stormwater ditches are at natural low points on the landscape. Clearly, most ditches will have some section that was excavated in a natural ephemeral drain or a low area with wetland characteristics. Such ditches will not qualify for the proposed exclusion for “wholly upland” ditches.
- Third, the “less than perennial flow” requirement will likely disqualify many irrigation ditches from the exclusion. Irrigation ditches do not just carry stormwater;

¹⁷⁰ The rule would articulate an additional “exclusion” for ditches that “do not contribute flow” of any amount to actual navigable waters. However, such ditches would not meet the expansive “tributary” definition anyway. Further, such ditches are presumably quite rare, as the primary purpose of most (if not all) ditches is to carry water.

they carry flowing water to fields throughout the growing season as farmers and ranchers open and close irrigation gates to allow the water to reach particular fields. These irrigation ditches are typically close to larger sources of water, irrigation canals or actual navigable waters that are the source of irrigation water—and they channel return flows to those source waters. In arid sections of the nation, these irrigation ditches, and the valuable surface water that flows through them, are highly regulated by state authorities that appropriate water based on vested water rights and permit systems. Under the proposed rule, such irrigation ditches will also be federally regulated as “tributaries.” (p. 6-7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. For a further discussion of the CWA and state water rights, see the summary response for 1.1.2: Water Supply and Allocation.

North Dakota Farmers Union (Doc. #16390)

- 6.585 Section (b) of the proposed rule lists several categories of waters that are excluded from the definition of “waters of the U.S.”, and not jurisdictional under the CWA. Two types of ditches are excluded that, in the past, would have been exempt or potentially subject to case-by-case determinations. Sections (b)(3) and (4) exclude ditches that are constructed “wholly in the uplands and that drain only uplands”, and that do not contribute flow, directly or through other waters, to a “water of the U.S.”

The Kaweah and Tule Commenters support an categorical exclusion for irrigation ditches and canals. However, as worded the proposed rule still requires an analysis of whether the ditch or ditch is wholly upland, drains only uplands and does not contribute flow. Because of these qualifications, this portion of the rule does not effectively create an exclusion; rather, it continues to place the burden on the owner or manager of the ditch or canal to prove that the specified conditions exist (or don’t exist, as the case may be). This simply continues the onerous status quo. [...]

The Kaweah and Tule Commenters propose that the qualifications in the exclusion for “irrigation ditches and canals” be removed, and that an assumption be established that irrigation ditches and canals are determined to be not subject to CWA jurisdiction unless there is a specific showing that the ditch or canal meets one of the (a)(1) through (a)(6) categories, with the burden on the agency to prove jurisdiction rather than on the waterway owner to prove non-jurisdiction. (p. 5-6)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The intent of the revised definition is not to shift or affect any burdens of proof, but to provide clear and self-implementing rules for regulators and the public to understand which waters are jurisdictional under the CWA.

Utah Farm Bureau Federation (Doc. #16542.1)

6.586 For farmers and ranchers, uncertainty is increased through overly broad or nebulous terms in the proposed rule including:

- c. creating exemptions for certain ditches, but making the exemptions so narrow that few ditches can meet the criteria. (p7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

New York Farm Bureau (Doc. #16547)

6.587 There are exemptions for ditches spelled out in the rule: those that are "excavated wholly in uplands, drain only uplands and have less than perennial flow" and those that "do not contribute flow, either directly or through another water" to a traditional navigable water. However, given that these circumstances will not often be met-given that ditches are built to collect and carry water and usually are directed toward a spot where water already naturally collects-these exemptions will provide limited relief to farmers. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Glenn-Colusa Irrigation District (Doc. #16635)

6.588 Ditches that have perennial flow, or that contribute flow to a traditional navigable water, interstate water, the territorial seas, or an impoundment of a jurisdictional water are not excluded. First, with respect to the issue of perennial flow, the Proposed Rule does not determine how much flow is necessary in a ditch to be considered perennial flow. Rather, the Proposed Rule states that perennial flow would mean that flow in the ditch occurs year-round under normal circumstances.¹⁷¹ Further, the Proposed Rule is specifically requesting comment on the flow regime that should be identified for the ditch to be excluded from being a WOTUS, and suggests that perhaps the flow regime should be less than intermittent. Regardless of the flow regime distinction, agricultural ditches that convey irrigation or drainage water could be considered WOTUS under the Proposed Rule.

Second, with respect to the issue of connectivity, to fall within the ditch exclusions, a ditch could not contribute flow directly or indirectly to the tributary system of a traditional navigable water. This would mean that an agricultural ditch that meets the definition of ditch in all other aspects would not be excluded if somewhere it connects, even arguably through a controlled weir or gate, to a tributary of a traditional navigable water.

To ensure that agricultural ditches that otherwise qualify as ditches are properly excluded, GCID recommends that a third category of "ditches" be added to the exclusions. Accordingly, we recommend the following category be added:

¹⁷¹ 79 Fed. Reg. 22188, 22219.

- 6.589 Ditches that are created or maintained as part of a conveyance or drainage system to carry agricultural irrigation water. (p. 8)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Florida Crystals Corporation (Doc. #16652)

- 6.590 The exclusions for certain ditches contained in the Proposed Rule will not protect most farmers in Florida. The first exclusion, for "[d]itches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow," does not clearly exclude ditches excavated before passage of the CWA which drained the surrounding areas to make them suitable for farming or urban development. While today the construction of such ditches would require a CWA permit, prior to 1972 this was an entirely legal and normal way in Florida to make the land usable and habitable. The way this exclusion is worded, it apparently may not apply to such pre-1972 ditches which are located in most farming areas in Florida or in many residential areas of Southeast Florida.

The second exclusion, for "[d]itches that do not contribute flow, either directly or through another water, to a water [otherwise regulated under the CWA]," would not exclude any ditch that is connected to offsite water management systems. It is rare in Florida to have ditches which are not connected to some offsite water system which is ultimately connected to a large body of water or the ocean. This means that this exclusion will not save most farm ditches from federal regulation under the CWA. (p. 4)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Montana Stockgrowers Association (Doc. #16937)

- 6.591 The second exclusion is for ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water. This exclusion must be broadened or the agencies must provide clarity on the extent or degree of separation meant by "or through another water." The use of this phrase could remove all ditches from the excluded categories and make them jurisdictional because most will be connected eventually, leading to some other jurisdictional water. Many irrigators must necessarily divert more water into their ditches than will actually be applied to create the force necessary for water to reach the last turnout on the ditch. This means the ditch will drain return flow directly back into the stream the water was diverted from or another stream. Many irrigators down the line rely on such return flow and this is important for in stream fish, wildlife and recreational purposes as well. Our prior appropriation system of water use in Montana and most of the West requires that water not be wasted and any excess water be returned to the stream so others may use it.

Making ditches jurisdictional would place great economic burdens on Montana ranchers and farmers by requiring permits to conduct many routine activities potentially no longer exempt under different sections of the CWA due to the agencies' new interpretation of the 404(f)(1)(A) exemption for "normal farming, silviculture and ranching activities."

It is our recommendation that ditches should not be per se jurisdictional tributaries. (p. 8)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Anderson-Cottonwood Irrigation District (Doc. #17085)

6.592 The proposed rule includes limited exemptions for ditches. Ditches that "are excavated wholly in uplands, drain only uplands, and have less than perennial flow" and ditches that "do not contribute flow either directly or through another water to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water" are excluded and not considered tributaries. This approach of simultaneously classifying ditches as tributaries while carving out narrow exemptions creates unnecessary complexity and uncertainty. The exemptions are use-specific, while ditch uses are varied. Without clarity, tens of thousands of ditch miles will become jurisdictional under the proposed rule. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

New Mexico Cattle Growers Association et al. (Doc. #19595)

6.593 **Section (b) generally and the exemption for certain “ditches” specifically:** The Parties applaud and support the agencies’ determination that the section (b) exemptions (i.e. waters that are not jurisdictional by rule) shall not be subject to any type of recapture provision. The only other comment to this section concerns the provision in (b)(3). As currently drafted the exemption is too narrow. Most ditches will run through or empty into some larger body, where there will certainly be a riparian area. Because the rule currently states the ditch must “drain only uplands” it is virtually impossible to envision when this exemption may be applicable. Accordingly, the agencies should explore ways to broaden the scope of the exemption, which might provide some relief to farmers and ranchers otherwise burdened by the Proposed Rule. (p. 14)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Kittson County (Doc. #1244)

6.594 Extremely narrow exemptions - (t)(3) & t(4) - the scope of the exemption for ditches is so narrow that its applicability is, extremely limited and frankly it is unclear what EPA intended this to cover. The rule excludes I two types of ditches: those that are excavated wholly in uplands, drain only uplands and have less than perennial flow, and ditches that do not contribute flow to a downstream water. In the uplands, most ditches are not excavated by man, which severely limits its scope and we are unaware of any ditch that will not eventually contribute flow downstream at some point in time. Translating these two exemptions into the specifics of an individual ditch or farm is I extremely difficult. This is incredibly confusing terminology. (p. 7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Minnesota County Engineers Association (Doc. #6996.2)

6.595 Ambiguous problematic language: Several terms used in the definitions are very problematic in developing a workable definition. Referencing the attached proposed definition:

(t) 3) "ditches excavated wholly in uplands, drain only uplands." Roadway ditches, in order to perpetuate the normal surface water drainage patterns, must drain to low areas. We are concerned nearly all roadway ditches could therefore be interpreted as being wetlands.

(t) (4) "ditches that do not contribute flow, either directly or indirectly or through another water," here again, road way ditches perpetuate normal surface water drainage patterns and will therefore often be contributing flow to low areas. We are concerned nearly all roadway ditches could therefore be interpreted as being WOUS. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

New Salem Township (Doc. #8365)

6.596 The proposed rule excludes certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to a "water of the U.S."

However, key terms like "uplands" and "contribute flow" are not defined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S." A public infrastructure ditch system--roadside, flood, or stormwater—is interconnected and can run for many miles . Ditches are not wholly in uplands nor do they strictly drain in uplands, since they are designed to convey overflow waters to an outlet.

The proposed rule states that some ditches would not be considered "waters of the U.S." if the ditches are excavated wholly in uplands, drain only uplands and have less than perennial flow or are ditches that do not contribute flow either directly or through another water body. How can a township prove its ditches do not "contribute to flow? How can exempt ditches be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S.?" (p. 1-2)

Agency Response: See summary response for section 6.2.

Georgia Department of Transportation (Doc. #14282.1)

6.597 Exclusions for roadside ditches. The proposed rule would identify two types of roadside ditches as non-jurisdictional: "Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" and "Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4)" - i.e., to traditionally navigable waters. We support the concept of excluding specific types of ditches from jurisdictional status. "Exclusions by rule" have the potential to reduce administrative burdens on State DOTs, the Corps, and other agencies by reducing the need for case-by-case determinations of jurisdictional status. Our concerns with this aspect of the proposed rule involve the specific wording of the exclusions for ditches. We

recommend several clarifications, as described below, to ensure that these exclusions are given full effect and are not prone to misinterpretation in the field.

Independent consideration of each exclusion. The preamble states that "under paragraphs (b)(3) and (b)(4), the agencies propose to clearly exempt from the definition of 'waters of the United States' two types of ditches ³ We interpret this statement to mean that the rule creates two separate exclusions, each of which is to be considered independently. However, we are concerned that some practitioners could incorrectly interpret the rule to mean that a ditch must satisfy both (b)(3) and (b)(4) in order to be deemed non-jurisdictional by rule. Recommendation: To ensure that the regulation is interpreted correctly, we suggest clarifying in the final rule that each of these exclusions is to be applied separately - that is, a ditch is excluded from jurisdiction if it meets either the criteria in (b)(3) or the criteria in (b)(4). In particular, the final rule should clarify that, if a ditch is excavated wholly in uplands, drains only uplands, and has less than perennial flow, the ditch would be non-jurisdictional by rule - even if it directly or indirectly "contributes flow" to a water identified in paragraphs (a)(1) through (a)(4) of the rule . (p. 2-3)

Agency Response: See summary response for section 6.2 a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Lake County Division of Transportation, Lake County, Illinois (Doc. #14743)

6.598 Due to the number of wetlands in Lake County, at most locations the exclusions for ditches in the proposed rule would not apply, resulting in a significant number of county-owned ditches being placed under federal jurisdiction. Although these road ditches are non-navigable and carry water only during storm events, they would be subject to the full range of federal oversight and regulations as though they were naturally flowing streams or rivers. Once this occurs, routine maintenance and repair activities such as installation of signs, replacement of culverts, removal of storm debris, cleaning of ditches, mowing, and invasive species control may require a Section 404 permit. This process can be time consuming and expensive, increasing the cost to the County and its citizens. The proposed rule should specifically exclude constructed roadside ditches from federal jurisdiction. (p. 1)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

National Association of County Engineers (Doc. #14981)

6.599 The rule must be modified to clarify that ditches that do not have continuous flow and are directly connected to waters of the U.S. are not jurisdictional. This would be consistent with what we have been told the intent is. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Association of American Railroads (Doc. #15018.1)

- 6.600 The Agencies must remove “ditch” from the definition of Waters of the United States. The proposed rule includes any “ditch” with “presence” of water even during an “above normal” rainfall year. The proposal will potentially subject hundreds of thousands of miles of ditches to CWA jurisdiction. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

- 6.601 Proposed Ditch Exclusions are Meaningless and Establish Jurisdiction over Ditches that are not Waters of the United States

The Agencies propose to exclude ditches “that do not contribute flow” to other waters, or “that are excavated wholly in uplands, and have less than perennial flow.” 79 Fed. Reg. at 22,262-22,274. AAR supports exclusions for ditches. However, the proposed exclusion is meaningless because: (1) most, if not all, ditches are designed to contribute flow of water downstream¹⁷² and therefore no ditches will qualify for this exclusion; (2) “perennial” is defined as “presence” of water “at any time” including “above normal” precipitation years; and (3) the Agencies have not defined “upland” leaving the regulated community without notice and meaningful guidelines. As a result, the ditch exclusion would cover few ditches.

(a) The Exclusion for Ditches “that do not contribute flow, either directly or indirectly” is Meaningless as Virtually All Ditches Contribute Flow

Because there are very few ditches that do not, during some qualifying precipitation event, contribute flow either directly or indirectly to another water body, the proposed rule’s exclusion for ditches not contributing flow is virtually meaningless.

Further, Corps’ guidance describes a drainage ditch as a feature that “conveys water (other than irrigation related flows) from one place to another.” Regulatory Guidance Letter 07-02 (July 4, 2007). Additionally, identifying ditches that contribute flow as Waters of the United States not only defies common sense, but is contrary to longstanding court decisions. As the Supreme Court noted, lower courts have not found conduits to and from Waters of the United States to be Waters of the United States themselves by virtue of their flow. See, *Rapanos*, 547 U.S. at 744. Thus, the concept that contribution of flow qualifies a ditch as a Water of the United States under the CWA has already been rejected by the Supreme Court and cannot form the basis of the proposed rule.

¹⁷² Including infiltration trenches which must, by engineering standards, account for outlet of water during precipitation events exceeding design criteria.

It is clear from Agency guidance, court decisions, and legal positions taken by the Agencies that ditches that contribute flow do not constitute Waters of the United States.¹⁷³

(b) Because “Perennial Flow” is Defined as “Presence” of Water Even During an “Above Normal” Precipitation Year, the Exclusion is Meaningless

The proposed rule identifies ditches with the “presence” of water as “perennial” and therefore jurisdictional. 79 Fed. Reg. at 22,203. By stating that water need only be “present” the Agencies are creating a new definition of perennial stream, expanding the reach of the CWA. The term perennial normally indicates presence of a stream with flow year round (which is typically measured in units such as cubic feet per second¹⁷⁴ or in the case of the EPA Connectivity Report cubic meters per second). Even the EPA Connectivity Report specifies there must be flow each day of 365 days to constitute “perennial.” The Report states, “[p]erennial clearly requires establishment of flow, not mere presence of water...a single day observation of presence of water in a ditch, or tributary, is inadequate to constitute perennial flow.” Thus, the proposed rule and Connectivity Report conflict.

Further, defining perennial as the “presence” of water is not supported by science. The United States Geological Service (USGS) has developed models that result in an equation which can only correctly predict the transition point from an intermittent to perennial stream (e.g. the ‘break point’) in natural systems about 75 percent of the time.¹⁷⁵ Thus, the USGS models can only achieve a 75 percent level of accuracy in predicting a perennial stream in a natural setting. The proposed rule would designate a ditch as perennial if it had presence of water (not necessarily flow), even during an “above normal” precipitation year. This position is clearly not supported by science.

(c) The Agencies Have Not Defined ‘Upland’ and Therefore the Ditch Exclusion is Ambiguous

To qualify for the ditch exclusion, a ditch must be excavated wholly in uplands for its entire length. The agencies have not provided a definition of “upland” and even though various definitions of “upland” exist.¹⁷⁶ The EPA Connectivity Report references “uplands” as higher elevation lands surrounding streams and their floodplains, or any area that is not a water body and does not meet the Cowardin three-attribute wetland definition. Connectivity Report at A-21. The terms “higher lands,” “surrounding streams” and “floodplains” are ambiguous and violate Due Process and Fair Notice principles because there is no ability for the regulated community to determine what constitutes a ditch excavated in an upland area.

¹⁷³ See, e.g. *Ohio Valley Environmental Coalition v. Aracoma Coal*, Mem. Op., Civ. Action No. 3:05-0784 (S.D.W.Va. June 13, 2007), rev’d, vacated and remanded sub nom. at *Ohio Valley Environmental Coalition v. Aracoma Coal*, 556 F.3d 177 (4th Cir. 2009).

¹⁷⁴ See, e.g. U.S. Army Corps of Engineers, defining headwaters as those areas with less than 5 cubic feet per second (cfs) flow. See also 56 Fed. Reg. 59,112 (November 22, 1991).

¹⁷⁵ *Strategies for Stream Classification Using GIS*, Restrepo et al., SAIC –USGS EROS Data Center (accessed at http://edna.usgs.gov/Edna/pubs/Stream_Classification_Strategies_Paper.pdf, September 2014).

¹⁷⁶ On stakeholder calls, the agencies have said uplands are anything that are not waters of the U.S.

(d) The Requirement That a Ditch Drain only Uplands and be Excavated Only in Upland is Impossible for Rail Ditches

Additionally, the proposed rule would require excavation of a ditch in upland “for its entire length.” This requirement is impossible to meet for railroad ditches, which span thousands of miles and cross numerous states and often receive drainage from large areas.

Including “Ditches” as Waters of the United States Vastly and Impermissibly Expands the CWA to Include Hundreds of Thousands of Human-Made Ditches

The Agencies justification for identifying ditches is that ditches provide the same chemical, physical, and biological functions as other water bodies defined as tributaries under the proposed rule. See, 79 Fed. Reg. at 22,206. This is not correct with respect to rail ditches, however.

Rail ditches do not “provide the same chemical, physical, and biological functions as other water bodies” for several reasons. First, rail ditches are designed to manage stormwater and therefore receive flashy and unpredictable volumes of storm water, not suitable for establishment of a chemical, physical, and biological goal as contemplated by the CWA.

Second, rail ditch substrata consists of excavated material and in many cases rock or ballast. These ditches are also designed to protect the rail line by collecting soil, dirt, rock and other man-made and natural materials. Accordingly, they do not have the type of chemical, physical, and biological habitat contemplated and protected by the CWA. Vegetation may come to be temporarily located in rail ditches, but these are of poor quality and often invasive.

Third, ditch contours and configuration are mandated by engineering criteria and consist of straight, narrow channels, sometimes lined with rock, and without the complexes (riffle, pool) found in tributaries and the natural “S” shape found in ecosystems. Rail ditches exhibit none of the features of natural systems and cannot even be assessed under typical scientific assessment criteria (e.g. Rosgen scale).

Fourth, rail ditches are required by engineering standards and regulatory criteria to be regularly disturbed for maintenance and other purposes. As a result of their design and maintenance, rail ditches do not have the biological habitat contemplated and protected by the CWA. (p. 7-10)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. For a discussion of the legal history of regulations of ditches under the CWA, please see summary response 6.0 and Section I of the Technical Support Document. To be a water of the US under the final rule, a ditch must meet the definition of tributary and not be excluded under paragraph (b). The kinds of rail ditches described by the commenter would be non-jurisdictional under the final rule if they fail to meet the definition of tributary and fall within one of the exclusions in paragraph (b) of the final rule. The agencies were not able to locate the quote from the Connectivity Report cited by the commenter. The report defines “perennial” on page 2-14: “Perennial streams or stream reaches (Figure 2-7A) typically flow year-round. They

are maintained by local or regional ground-water discharge or streamflow from higher in the stream or river network.”

6.602 Conduits, Channels, and Ditches Fall within the Waste Treatment Exception and Must be Identified in the Proposed Rule

Despite the reference to only treatment ponds or lagoons, the Agencies have made clear that the waste treatment exception includes swales and conduits managing water and storm water.¹⁷⁷ The Supreme Court also noted that “the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from ‘navigable waters’ by including them in the definition of ‘point source.’”¹⁷⁸

An important part of the waste treatment exception is to ensure that storm water management, flood control, as well as environmental enhancement and restoration features and activities, is not erroneously considered jurisdictional. Since adjustments are being made to address cooling water ponds, the Agencies should also include language clarifying that the waste treatment exception applies to channels, conveyances, and conduits, including storm water management systems. (p. 13-14)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches and similar features were edited and clarified for the final rule. With respect to the jurisdictional status of stormwater control measures as waters of the U.S., please see summary response at 7.4.4.

Airports Council International - North America (Doc. #16370)

- 6.603 Under the proposed rule a ditch is exempt only if (1) it is excavated (not a natural feature such as an erosion feature) wholly in uplands and drains only uplands (uplands is not defined) and it has less than perennial flow (meaning that during normal years it does not hold water all 12 months of the year) or (2) the ditch does not contribute flow (it is not clear if this means surface flow only or if groundwater is included) to a water of the U.S., directly or indirectly. The agencies claim that with these exclusions for certain ditches, they have narrowed the definition of waters of the U.S. This claim is not true. In fact, the proposed rule constitutes the first time that the regulatory definition has expressly included ditches – by including all ditches that are not exempt. This so-called “ditch exemption” has created significant uncertainty about the status of ditches because, under the structure of the proposed rule, all ditches that are not excluded are waters of the U.S. (p.5-6)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

¹⁷⁷ Ohio Valley Environmental Coalition v. Aracoma Coal Corp., Mem. Op., Civ. Action No. 3:05-0 784 (S.D.W.Va. June 13, 2007), rev'd, vacated and remanded sub nom at Ohio Valley Environmental Coalition v. Aracoma Coal, 556 F.3d 177 (4th Cir. 2009). In Aracoma, the Agencies filed briefs with the Court supporting application of the waste treatment exception to intervening conduits and conveyances. This included former intermittent streams that connected waste treatment ponds.

¹⁷⁸ Rapanos, 547 U.S. at 735.

Charlotte-Mecklenburg Storm Water Services (Doc. #3431)

- 6.604 This comment pertains to Section 328.3 Definitions, (b)(3), Federal Register page 22263. Proving that a ditch was excavated wholly in uplands may be problematic, especially in low gradient areas and areas with a high ground water table. Burden of proof aside, ditches established by digging below the water table that exhibit intermittent or perennial flow provide habitat for aquatic life, convey pollutants and process pollutants. Therefore they should be regulated as streams. In the absence of evidence to the contrary, we would likely consider these ditches to be jurisdictional. CMSWS recommends (a) clarifying the information required to prove a ditch was excavated wholly in uplands and (b) including ditches that contribute at least intermittent flow to the list of jurisdictional waters. (p. 1)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. With respect to the jurisdictional status of stormwater control measures as waters of the U.S., please see summary response at 7.4.4.

Red River Joint Water Resource District (Doc. #4227)

- 6.605 [T]he articulated exclusions identified in the proposed rule are unnerving. For example, ditches that do not contribute flow to any jurisdictional waters are not subject to the CWA; however, every ditch in the Red River Valley ultimately contributes to the Red River watershed, and the District is concerned a very narrow interpretation of the ditch exclusion could render every single ditch in the Valley jurisdictional. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Nye County Water District Governing Board (Doc. #5486)

- 6.606 Although certain “upland” ditches or those ditches that do not contribute flow to “waters of the U,S” would be excluded under the proposed changes, the key terms "upland" and “contribute” flow" are undefined. This ambiguity creates uncertainty for the County and other potentially affected agencies, and could potentially leave the EPA and USACE open for legal challenges. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Department of Public Works, City of Chesapeake, Virginia (Doc. #5612.1)

- 6.607 The City of Chesapeake supports the proposed exemption for ditches that have less than perennial flow. To characterize exempted ditches with "less than intermittent" flow could be too restrictive on the City's roadway and drainage maintenance and retrofitting activities. Perennial flow hydrology is an appropriate threshold most perennial streams, at least within the River watershed are the are already regulated by the Chesapeake Bay Preservation Act (CBPA) and the Virginia Marine Resources Commission (VMRC).

The Rule states that ditches that are perennial generally have water present year round when rainfall is normal or above normal; however, ditches that contain water that only

stands or pools would not be considered perennial flow, thus would be exempt to regulatory oversight under the CWA. Due to an abundant seasonally high water table throughout the City of Chesapeake, many of the City's ditches intercept the groundwater for some portion of the year, and thus may contain standing water. Generally, the water within these ditches only flows during storm events. Are ditches that intercept the groundwater table during a portion of the year considered exempt or would these features be jurisdictional? The City believes that all ditches that contain less than perennial flow, which would include ditches that intercept the groundwater table during a portion of the year should be exempt to regulatory oversight under the CWA. (p. 2-3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Beaufort County Stormwater Utility (Doc. #7326.1)

6.608 Ditches are excluded if they are built in uplands, drain uplands and have less than perennial flow. In coastal areas, there are many ditches that are built in and drain uplands but have significant groundwater inputs due to high water tables. Since they have constant water, they may be considered WOTUS even if constructed in uplands. The preamble to the proposed rule explains that “Perennial flow means that water is present in a tributary year round when rainfall is normal or above normal.” It also states that “Under this exclusion, water that only stands or pools in a ditch is not considered perennial flow and, therefore, any such upland ditch would not be subject to regulation.”

There are potential ambiguities about the meaning of “perennial flow” in the exclusion for ditches. The first sentence quoted above implies that the mere presence of water, even standing water, could be considered “flow.” The second sentence attempts to address that concern by noting that “water that only stands or pools” is not perennial flow. But that sentence actually heightens our concerns by implying that the year-round presence of water will be considered “perennial flow” unless it can be established that the water “only stands or pools” throughout the year. This suggests that year-round presence of water is “perennial flow,” unless the water never flows at all.

Recommendation: The final regulations should clearly state that “less than perennial” includes ditches with intermittent and ephemeral flow. Under this approach, a ditch with intermittent or ephemeral flow would qualify for the exclusion if it is excavated in uplands and drains only uplands. In addition, differences in regional conditions and hydrologic processes/patterns should be recognized and regional guidance should be developed and published. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

JE A (Doc. #10747)

6.609 The draft proposal raises a number of questions, such as:

- Perennial flow is defined as having water present in a tributary year round when rainfall is normal or above normal. The elevated ground water table present in much of Florida and other coastal areas results in small roadside drainage ditches

that routinely contain water year round even in the absence of normal or above normal precipitation. Do these ditches now become jurisdictional?

- Does the undefined term "uplands" include all areas that are not wetlands or could some floodplain areas fail to meet the definition of an upland?
- If a ditch is many miles long and a small portion of it is excavated in an area that is not an upland, does the entire length of the ditch then fail to meet the requirement that it be "excavated wholly in uplands?"
- How does one show that a ditch fails to contribute any indirect flow to a water of the U.S.?

If the goal of this rule proposal is to clarify the scope of regulatory authority, the Agencies should clearly answer these questions and do so based on the text of the Clean Water Act and applicable U.S. Supreme Court precedent. In answering these questions, JEA requests that the Agencies consider whether the assertion of authority would create environmental benefits, particularly in states such as Florida that have extensive state environmental permitting requirements governing the construction, operation, and maintenance of stormwater management systems. JEA is concerned that as presently drafted the ditch "exclusion" will actually bring water management systems under the gambit of federal jurisdiction but will not create environmental benefits beyond those of existing delegated programs and Florida's extensive stormwater regulations. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. With respect to the jurisdictional status of stormwater control measures as waters of the U.S., please see summary response at 7.4.4. Section IV(F) of the preamble discusses the concept of "indirect flow."

Minnesota Cities Stormwater Coalition (Doc. #14647)

- 6.610 The second exclusion in the proposed draft rule for ditches ("Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section.") is inadequate. The definition for the term "tributary" in the proposed draft rule includes very broad language defining possible connections between waters and to WOTUS. Based on this language, only a very small portion of the millions of miles of roadside ditches in the United States would be covered under this exclusion. This is unmanageable and unacceptable. The new recommended revised rule language proposed here is intended to address this deficiency. (p. 5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

County of San Diego (Doc. #14782)

- 6.611 Clarify the exemptions for ditches

The rule should clarify that for a ditch to be exempt, it must only meet one or the other of the exemptions, not both. The rule contains two exemptions for ditches:

- a. Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.
- b. Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or a jurisdictional impoundment.

The second exemption for ditches ("b" above) should be further expanded to state that:

- Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or a jurisdictional impoundment. **If the ditch does contribute flow, but was constructed for the purpose of transporting surface runoff and was not previously a Waters of the US, then it also qualifies for this exemption.**

The agencies should also add language to the exemption specifying that the term "perennial flow" will mean: containing water at all times except during extreme drought. These clarifications are essential to ensuring that the County, the public, and local regulators are on the same page with interpreting the exemptions and maintaining public infrastructure in a way that prioritizes safety.

A third exemption for ditches should be added to state that:

- Ditches that are maintained as part of an MS4 conveyance system and permitted under Section 402 of the CWA should be exempt.

Stormwater conveyance channels that transport urban runoff could be considered Waters of the U.S. under the proposed rule. Based on the proposed rule, a storm water conveyance channel that meets the definition of ditch in all other aspects would not be excluded from Waters of the U.S. if it eventually connects to traditional navigable waters. However, storm water conveyance channels are considered "point sources"1 under the CWA, and their discharges to Waters of the U.S. are regulated under Section 402. Because these channels are already otherwise regulated under Section 402, placing them additionally under Waters of the US would overlap current regulation and create confusion. The added delays and costly permitting requirements may also obstruct maintenance of these features, which could compromise public safety.

EXAMPLE: The County maintains approximately 2,000 miles of roadways, many with ditches and conveyance features found on either side of the street. There is concern that the expanded definition would obstruct the management of these features. The ditches and features provide a means of transporting surface runoff and keeping the roadway safe for motorists, bicyclists and adjacent pedestrians. The channels, including road ditches, which are constructed as part of development to transport surface runoff, should be considered in relation to life and safety, ensuring that stormwater drains appropriately off roadways. Ongoing maintenance and operations to keep these features clean and safe should not be hindered by administrative burdens and lengthy permitting processes. (p. 5-6)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. With

respect to the jurisdictional status of stormwater control measures as waters of the U.S., please see summary response at 7.4.4.

Department of Public Works, City of Northglenn, Colorado (Doc. #14990)

6.612 Under the Proposed Rule, excluded ditches include those excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water (i.e., typically 90 continuous days in a year). While the Proposed Rule broadens the scope of ditches that are explicitly excluded; in practice, the existing regulations provide the USACE with more flexibility in dealing with ditches. Some USACE field offices have required that a ditch have a direct discharge to a downstream WOTUS before they will consider it a jurisdictional ditch. Additional EPA scientific review is required to identify different types of conveyances, including ditches, to ensure that "ditch exemptions" are readily available to us for routine public safety maintenance of stormwater infrastructure such as detention flood storage/water quality ponds, storm sewer culverts, and ditch maintenance activities.

The City of Northglenn requests these features be excluded from the Proposed Rule. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. With respect to the jurisdictional status of stormwater control measures as waters of the U.S., please see summary response at 7.4.4.

Albuquerque Metropolitan Arroyo Flood Control Authority (Doc. #15221)

6.613 Under Section III.F.1, the proposed rule provides that while certain specified ditches would not be jurisdictional, ditches created by altering natural waters would be considered waters of the U.S. so long as they contribute flow to another jurisdictional water. From this, it is unclear what is meant by a "natural water" and whether dry arroyos would meet this definition. In addition, it is unclear what amount of contributed flow is sufficient to bring the ditch within CWA jurisdiction.

Some AMAFCA facilities track naturally occurring arroyos, some of which did historically discharge into the river. However, these arroyos were and are dry except during rain events, and flows do not always reach the river. Yet under the current proposed explanation set forth in the rule, it is conceivable that as little as one storm event a year conveyed to the Rio Grande River would be sufficient to establish a jurisdictional connection. Flow from a single storm event is too insubstantial to result in a significant nexus. Furthermore, because of the nature of an MS4, numerous conveyance channels flow into each other before discharging from a single convergence point. Under the proposed rule, these otherwise non-jurisdictional ditches would be jurisdictional simply because another channel within the system tracked a naturally occurring arroyo that historically discharged into the river. This would be true under the proposed definition no matter how remote or insubstantial the non-jurisdictional ditch was to the natural arroyo. Such an insubstantial connection is not enough to establish a significant nexus and therefore runs counter to the principles of the Rapanos decision. As a result, further guidance on ditches should be provided. (p. 6-7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Louisville and Jefferson County Metropolitan Sewer District (Doc. #15413)

- 6.614 Uplands: MSD is concerned as to whether an uplands conveyance ditch constructed to remove treated effluent from a wastewater treatment facility, pursuant to a NPDES/KPDES permit is excluded from jurisdiction under the wastewater treatment exemption found at (b)(1) since it creates a perennial flow and requests clarification. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Lake County Stormwater Management Commission (Doc. #16893)

- 6.615 The exclusion for ditches as proposed in §328(b)(3) and §328(b)(4) is unclear. As currently proposed, we believe many miles of constructed roadside ditches and similar drainage ditches along railroad lines, trail systems, etc., in Lake County would not be excluded from WOUS, which would result in a dramatic increase in the number of activities in ditches requiring a permit from the USACE. We suggest simplified language to clarify this important exclusion, such as: “Non-tidal drainage and irrigation ditches that are excavated in uplands and have less than perennial flow.” (p. 1-2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Sacramento Stormwater Quality Partnership (Doc. #17005)

- 6.616 To ensure that M54 conveyance facilities that otherwise qualify as ditches are properly excluded, the Partnership recommends that a third category of "ditches" be added to the exclusions. Accordingly, we recommend the following category be added:

Swales Exclusion

The Proposed Rule includes an exclusion for "gullies and rills, and non-wetland swales." Within the narrative, the Proposed Rule states further that, “[n]on-wetland natural and man-made swales would not be ‘waters of the United States . . .’” (79 Fed. Reg. 22188, 22219 (April 21, 2014)). The Proposed Rule then appears to limit the stated exclusion by indicating that wetland swales could be jurisdictional under the adjacent or other waters categories. (Ibid.) To avoid uncertainty, and to ensure clarity with respect to the status of man-made swales, the Partnership recommends that the exclusion be revised as follows:

Gullies and rills, and non-wetland and man-made swales. (p. 8-9)

Agency Response: See summary response for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The clarification sought by the commenter lies in the fact that “non-wetland swales” are not waters of the United States, while “wetland swales” may be waters of the United States. These two features are not synonymous. With respect to the jurisdictional status of

stormwater control measures as waters of the U.S., which could include man-made swales, please see summary response at 7.4.4.

Clearwater Watershed District; et al (Doc. #9560.1)

- 6.617 The proposed rule excludes from jurisdiction upland ditches with less than perennial flow.

We support the exclusion of all drainage ditches with less than perennial flow from the definition of waters of the United States - not just upland drainage ditches. In Minnesota and many other states, development of the agricultural economy depended on drainage. Due to the nature of the landscape, very few drainage ditches and drainage tile systems solely traverse upland. Many, because of the landscape, were built through wetlands - not always for the purpose of draining the wetland but to allow for the efficient passage of water. These ditches do not have a perennial flow of water and should not be considered jurisdictional - especially if their inclusion will extend jurisdiction to wetland adjacent to such ditches. Further, we do not support lessening the flow standard to intermittent flow or anything less than perennial flow for any constructed ditch.

RECOMMENDATION: We recommend that the exclusion for ditches be strengthened to clarify that ditches that drain into or through wetlands are also excluded. (p. 10)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The agencies disagree that all ditches that drain into or through wetlands should be excluded. The agencies believe that the final rule reasonably balances the exclusions with the need to ensure that the significant functions provided by tributaries and ditches that function as tributaries are protected under the CWA.

Northwest Colorado Council of Governments Water Quality/ Quantity Committee (Doc. #10187)

- 6.618 QQ supports the proposed categorical exemptions for ditches located wholly in uplands and ditches that do not contribute flow to traditionally navigable waters. We believe these proposed exemptions complement and simplify existing exemptions in the Clean Water Act and are consistent with court cases. (p. 7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and further clarified for the final rule.

- 6.619 The two proposed categorical exemptions are consistent with these existing ditch exemptions. Any activity on the proposed exempted ditches will not significantly affect navigable waters and therefore will never be part of any activity with a purpose to bring an area of navigable waters into a new use. The proposed categorical exemptions will eliminate the need for the case-by-case determination currently required under the existing ditch exemptions. The proposed exemptions for ditches are also consistent with case law, as any activities on these types of ditches will not have a significant nexus to traditionally navigable waters. Removing “ditches” from the definition of tributary also is consistent with existing exemptions under Section 404(f) of the Clean Water Act.

Because of the importance of these existing exemptions and the considerable concern over the proposed rule's affect on the existing exemptions, the proposed rule should be explicit that the proposed rule would not change these exemptions in any way as the proposed rule does for ranching, farming and silviculture exemptions. (p. 8)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Duke Energy (Doc. #13029)

6.620 Additional uncertainty is created by:

- not including definitions for other key terms, such as "uplands"
- creating exemptions for certain ditches, but making the exemptions so narrow that few ditches can meet the criteria (p. 10)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

6.621 The proposed rule excludes ditches in two very specific and narrow situations: (1) ditches that are excavated wholly in uplands for their entire length, drain only uplands, and have less than perennial flow; and (2) ditches that do not contribute flow, either directly or indirectly, to a TNW, interstate water, territorial sea, or tributary.⁴³ Again, the agencies are under the impression that by providing these two exclusions, they have narrowed the jurisdictional reach. Unfortunately, the exclusions are not clear, and, in practice, are not likely to exclude many ditches from jurisdiction due to the broad and ambiguous nature of the exclusions. (p. 29)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

6.622 [T]he language in the exclusions is so narrow that very few ditches would meet these standards. A typical infrastructure ditch systems – roadside, stormwater or flood – is interconnected and can run for hundreds, if not thousands, of miles. Most ditches carry flow, contain standing water, and drain areas that have water because the purpose of ditches is to convey water away from a saturated or ponded area (e.g., field or roadway). These ditches are not wholly in uplands nor do they strictly drain only in uplands, since they are designed to convey overflow waters to “waters of the United States.” A ditch that drains only dry land is an unnecessary ditch. In most cases, it will be difficult to prove that they meet these strict requirements for their entire length. Also, since the second exemption requires that ditches not contribute flow either directly or indirectly, to an (a)(1) through (a)(4) water, it could be difficult to prove that a ditch does not provide flow indirectly through any number of avenues, such as through adjacent waters, other waters or through a shallow subsurface connection.

With these exemptions, the burden to prove an exclusion applies is placed squarely on the applicant. For the upland ditch exemption, the applicant will have to show through historical data (e.g., photographs or topographic maps) that the ditch was excavated

wholly in uplands for its entire length and prove that the ditch drains only uplands¹⁷⁹. (p. 30)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Water Law (Doc. #13053)

6.623 It is unclear what functions and goals the Agencies seek to protect over man-made wetlands along man-made irrigation ditches. [...]

[W]e suggest the following proposed text to categorically exclude man-made water supply ditches from waters of the United States definition:

Man-made ditches constructed for purposes of diversion and delivery of water to beneficial use under state law are not waters of the United States. Provided however, nothing herein exempts these structures from any regulation to prevent the introduction of pollutants as a point source at the point at which water is discharged to waters of the United States. (p. 10)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Murray Energy Corporation (Doc. #13954)

6.624 We find the Agencies' proposed revisions regarding jurisdiction over ditches to be similarly inappropriate and inconsistent with established practice and controlling law. (...) [T]hough the Agencies purport to exclude "ditches that are excavated wholly in uplands and have less than perennial flow," the Proposal fails to define "perennial flow," thereby leaving broad and subjective agency discretion over ditches, including those with water that may flow only one day a year. See *id.* And the second "exemption" is plagued by even greater ambiguity. The Agencies make no attempt to place reasonable bounds on what is meant by "contribute flow," especially "through another water," to a TNW. Under the Proposal "another water" could be interpreted broadly to include any movement of water, even surface sheet flow or groundwater. Under such an interpretation, essentially all water features could be said to "contribute flow" to TNWs sooner or later. Thus, in reality, this second "exemption" is even more illusory than the first. (p. 12)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Southern Nevada Water Authority (Doc. #14580)

6.625 SNWA supports the proposed exclusion of ditches, and recommends the requirement for less than perennial flow be removed. If the ditch is located wholly in uplands and drains only uplands, it would not be connected to a WOTUS, thus the frequency of water flow

¹⁷⁹ 79 Fed. Reg. 22,203

in the ditch is irrelevant. SNWA also recommends the term "uplands" be defined in the Proposed Rule. (p. 5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Santa Clara Valley Water District (Doc. #14776)

6.626 Ditches Used For Groundwater Recharge Should Be Excluded

The District operates several ditches whose function is to percolate surface water down to the groundwater basin for storage and later re-use. The Corps' preamble to the existing rule explained that "[n]on-tidal drainage and irrigation ditches excavated on dry land" were excluded. (51 Fed.Reg. 41206, 41217 (1986).) That language was broad enough to cover ditches used for groundwater recharge. But the new Proposed Rule narrows the ditch exclusion. To qualify, the ditch must be "excavated wholly in uplands, drain only uplands, and have less than perennial flow", or "not contribute, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) " (79 Fed. Reg. 22263.) This provision may fall short of excluding some of the District's groundwater-recharge ditches because the District would like the operational flexibility to operate these ditches year-round, and because some of the groundwater recharged by these ditches may percolate back to surface waters.

Groundwater-recharge ditches should be excluded by amending sub-paragraph (b)(3) as follows to add the underlined language: "Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow, or ditches that are used for groundwater recharge." (p. 7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Groundwater recharge basins are excluded under the final rule.

Nucor Corp. (Doc. #14963)

6.627 Many process water systems, for example, flow year-round as the process is continual. These conveyances would not be covered under the proposed exclusion and would be jurisdictional waters. In addition, it may be impossible to demonstrate that stormwater ditches were constructed in uplands and drain only uplands when originally constructed, especially in light of the fact that the term "uplands" is not defined. Further, because the rule extends jurisdiction by recapturing "adjacent waters" and "other waters" located in floodplains, the "upland" exclusion for certain ditches becomes even more meaningless. (p. 10)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches and similar features were edited and clarified for the final rule. It is difficult for the agencies to fully understand the specific situation the commenter is referencing in regard to "process water systems." If, however, ditches in such systems flow into a manufacturing or industrial processing facility, they would not be flowing into a water of the United States, and would consequently not be considered a water of the United States themselves. In

addition, the final rule contains a new exclusion for stormwater control features built in dry land. See summary response at 7.4.4.

American Public Power Association (Doc. #15008)

- 6.628 The agencies attempted to exempt certain ditches from the proposed rule, but created more confusion by so doing. The proposed rule states that ditches are not a WOTUS if they are “excavated wholly in uplands, drain only uplands, and have less than perennial flow.” Still, it is likely that this exclusion will have a very narrow application because it will likely be difficult to prove that a ditch was excavated in uplands or drains only uplands. Further, the proposed rule does not provide a definition of “uplands.”

Additionally the rule adds the criteria that these ditches must be “excavated” ditches. While it is true that some ditches have been excavated, in other cases ditches are created by the addition of landfill on either side of a proposed drainage way, such as in multi-lane road construction. APPA believes that ditches created by means other than excavation should also be excluded.

The other exclusion for ditches states that they are not considered a WOTUS if ditches “do not contribute flow, either directly or through another water,” to a traditional navigable water, interstate waters, territorial seas, or impoundments. It will be difficult to prove that a ditch does not contribute flow to another jurisdictional water body. Therefore, under the draft rule, very few, if any, ditches would likely be exempt from CWA jurisdiction under these exclusions. (p. 9)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule does not require an excluded ditch to be “excavated.”

Utility Water Act Group (Doc. #15016)

- 6.629 It is likely to be difficult to prove that a ditch drains only uplands, especially if viewed as a continuous “tributary” despite man-made or natural breaks; indeed, the Proposed Rule does not even provide a definition of “uplands.” Nor does it explain what is meant by “less than perennial flow.” With regard to the second exclusion, it may be equally difficult to prove that a ditch contributes no flow, even indirectly, to a TNW, interstate water, territorial sea, or impoundment.

With key terms affecting the scope and meaning of these exclusions (e.g., “perennial flow” and “contribute flow” and “through another water”) undefined, these exclusions would be subject to broad agency discretion and field-level subjectivity and, thus, inconsistency, as well as over-broad regulation. This continuation of discretion-based jurisdictional determination provides the potential for the Agencies’ unfair, and unlawful, practice of treating features inconsistently to continue. See supra pp. 25-26, 44-45. Regulatory uncertainty would certainly be the expected outcome, contrary to the Agencies’ alleged desire to provide for “less complicated and more efficient” jurisdictional determinations. 79 Fed. Reg. at 22,190 col. 3. Together, the overly broad definition of “tributaries” and the exceedingly narrow exclusions for ditches allow for a

potentially substantial expansion in jurisdiction over previously unregulated ditches (e.g., roadside ditches, natural or man-made stormwater drainages, etc.). (p. 60-61)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Colorado River Water Conservation District (Doc. #15070)

6.630 [W]e believe that there is a desperate need for additional clarification on ditches and other man-made conveyance structures.

- We are concerned with the disqualifying condition if a ditch "contribute(s) flow, either directly or through another water," to navigable waters. Ditches may contribute very limited flow only during significant storm events or may spill only occasionally. These non-typical and temporary connections of a ditch to waters of the United States should not automatically disqualify the ditch from the exclusion. Additionally, the rule needs to clarify that connections "through another water" do not include groundwater migration (through which nearly every ditch, lined or unlined, may, at least occasionally, contribute to waters of the U.S.).
- A clear definition of "uplands" is required
- The proposed rule should explain how the agencies will determine if a ditch is "wholly" in uplands; many ditches are part of linked systems that may run for hundreds of miles. Does transit of the ditch into a single gully, rill, or swale disqualify the entire ditch or ditch system?
- It is not clear if the exemptions for ditches are limited to ditches used exclusively for agricultural activities. We believe ditches that have multiple uses, or that are used exclusively for non-agricultural purposes, should be similarly excluded from jurisdictional waters because there is no identified reason related to protection of waters of the U.S. to exempt irrigation use but no other uses. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Cleco Corporation (Doc. #15077)

6.631 The proposed exclusions for ditches are much more limiting than the language the agencies rely on from the 1986 preamble, which excluded "[n]on-tidal drainage and irrigation ditches 'excavated on dry land,' without limitation based on flow regime, whether the ditch drains only uplands, or whether the ditch contributes flow. The ambiguous language of these proposed exemptions leaves their implementation subject to broad agency discretion and subjectivity. The key words and concepts affecting the scope and meaning of the exemptions are left undefined or unclear. It is likely that very few ditches could actually meet these standards. Those that could would likely require a costly and lengthy study to establish that they are exempt. (p. 4)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Northern Colorado Water Conservancy District (Northern Water), Berthoud, Colorado (Doc. #15114)

6.632 The proposed rule should be revised to expressly exclude man-made and controlled water structures (including ditches and canals) from the definition of "tributary" or other jurisdictional "waters of the U.S." Should the agencies choose to continue with the assertion of jurisdiction over these structures, we request that the exclusions be revised as follows:

- The first exclusion from jurisdiction should apply to structures that are excavated in uplands and either drain only uplands or have less than perennial flow.
- The second exclusion should apply to structures that do not contribute significant flow to downstream waters. It should also be clarified that the contribution of flow refers to surface flow, not subsurface or groundwater flow.
- The exclusions should be revised to clarify that they apply to canals as well as ditches.
- The exclusions should be revised to clarify that portions of a structure meeting the exclusion criteria up-gradient of the point at which the structure becomes non-exempt will be regarded as non-jurisdictional. (p. 6-7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

JEA (Doc. #15194)

6.633 Perennial flow is defined as having water present in a tributary year round when rainfall is normal or above normal. The elevated ground water table present in much of Florida and other coastal areas results in small roadside drainage ditches that routinely contain water year round even in the absence of normal or above normal precipitation. Do these ditches now become jurisdictional?

- Does a ditch include gullies or other features associated with erosion patterns?
- Does the undefined term "uplands" include all areas that are not wetlands or could some floodplain areas fail to meet the definition of an upland?
- If a ditch is many miles long and a small portion of it is excavated in an area that is not an upland, does the entire length of the ditch then fail to meet the requirement that it be "excavated wholly in uplands?"
- How does one show that a ditch fails to contribute any indirect flow to a water of the U.S.? (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Section IV(F) of the preamble discusses the concept of "indirect flow."

Oregon Water Resources Congress (Doc. #15488)

6.634 Currently, ditches are not included as either a categorical jurisdictional water or non-jurisdictional water under the CWA, as the agencies tend to make a determination on a case-by-case basis. The proposed exclusion for ditches under the CWA is far too restrictive, including only “ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow,” and “ditches that do not contribute to flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section.” By excluding two specific types of ditches from jurisdiction, it can be interpreted that all other types of ditches would be jurisdictional by default. To address this lack of clarity, we recommend that EPA and ACOE revise the proposed rule’s exclusion for ditches to include “irrigation ditch” as defined in current ACOE guidance (RGL No. 07-02). That definition of irrigation ditch is as follows:

“A man-made feature and/or an upland swale that either conveys water to an ultimate irrigation use or place of use, or that moves and/or conveys irrigation water (e.g. “run-off” from irrigation) away from irrigated lands. Irrigation ditches may include the distribution system or parts thereof, consisting of manmade canals, laterals, ditches, siphons, and/or pipes, or pump systems. If a ditch carries only irrigation water, irrigation return flows, and overland flow (precipitation and/or snowmelt) that moves from an irrigated field either to or away from an area subject to irrigated agriculture (e.g. an irrigated field), that ditch would be considered an irrigation ditch...” (p. 2-3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Washington County Water Conservancy District (Doc. #15536)

6.635 ***The Agencies’ proposed list of excluded waters is too narrow and should be clarified in several respects.***

The Proposed Rule explicitly excludes certain waters from the definition of jurisdictional waters.¹⁸⁰ In general, the rule purports to maintain the Agencies’ position that many artificial ditches, swales, canals, and other manmade areas should be regulated in the same manner as natural water bodies.¹⁸¹ Assuming that this is truly consistent with the Agencies’ historic position (which is unclear), the WWG asks the Agencies to revisit this position in light of the Supreme Court’s decisions in SWANCC and Rapanos. These decisions support a broader approach to CWA exclusions that would recognize the Act’s plain language and its goal of preserving local authority over land and water use.

¹⁸⁰ These exclusions are based in part on the Agencies’ historic agency interpretation and practice, but in some areas, the Proposed Rule’s exclusions are even narrower than historic interpretation and practice.

¹⁸¹ See, e.g., Proposed Rule, 79 Fed. Reg. at 22,202, 22,209, 22,250, 22,263 (33 C.F.R. § 328.3(c)(5) (proposed) (stating that “[a] tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (b)(3) or (4) of this section”; 33 C.F.R. § 328.3(c)(6) (definition for wetlands, which does not exclude manmade wetlands))). “Longstanding agency practice has identified tributaries as including ‘natural, man-altered or manmade’ water bodies.” Proposed Rule, 79 Fed. Reg. at 22,202

Because the primary goal of this rulemaking (as stated repeatedly by the Agencies) is to clarify the scope of their jurisdiction under the CWA, in particular the Agencies should make clear that irrigation canals, ditches, and drains are not navigable waters, are not “waters of the United States,” and similarly are not “tributaries” to waters of the United States, consistent with the 1975 and 1977 regulations. In those regulations, the CWA specifically excludes “return flows from irrigated agriculture” from the definition of “point source.”¹⁸² The Act also exempts “return flows from irrigated agriculture” from NPDES permit requirements.¹⁸³ Similarly, permits for dredged or fill material are not required “for the purpose of construction or maintenance of irrigation ditches, or the maintenance of drainage ditches.”¹⁸⁴

The words chosen by Congress and the intent of the Act are clear: irrigation canals, ditches, and drains were not meant to be regulated under the CWA. This was reflected in the 1975 and 1977 regulations, which provided that “manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States.”¹⁸⁵ This is the only practical and legal approach for the treatment of irrigation canals, ditches, and drains under the statutory scheme of the Act. Congress has not expanded the federal agencies’ jurisdiction under the CWA since the initial regulations were promulgated in the 1970s. The Agencies should implement Congress’ determinations in their rulemaking, through the inclusion of an express exemption for irrigation canals, ditches, and drains, from the definition of navigable waters, waters of the United States, and tributary waters.

In spite of this legislative and regulatory history, the Agencies suggest that their regulation of manmade features under the CWA is appropriate because, in the Agencies’ view, “man-made and man-altered tributaries perform many of the same functions as natural tributaries, especially the conveyance of water that carries nutrients, pollutants, and other substances to traditional navigable waters, interstate waters, or the territorial seas.”¹⁸⁶ This statement reflects a fundamentally flawed interpretation of Supreme Court precedent. Under the Agencies’ flawed interpretation, the scope of jurisdiction would always depend on the Agencies’ ecological judgments regarding effects on traditional navigable waters. This interpretation is not supported by the Court’s decisions. In particular, SWANCC rejected the notion that the ecological considerations that justified the Army Corps’ jurisdiction over the adjacent wetlands in Riverside Bayview provided an independent basis for regulating physically isolated waters, finding that such ecological considerations were irrelevant outside the limited context of adjacent wetlands.¹⁸⁷

The Agencies should not consider ecological factors in determining whether manmade water bodies are jurisdictional “waters of the United States.” Instead, as the Supreme

¹⁸² 33 U.S.C. § 1362(14); CWA § 502(14).

¹⁸³ 33 U.S.C. § 1342(l)(1); CWA § 402(l)(1).

¹⁸⁴ 33 U.S.C. § 1344(f)(1)(C); CWA § 404(f)(1)(C).

¹⁸⁵ Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320, 31,321 (1975); 33 C.F.R. §323.2(a)(5) (1982).

¹⁸⁶ Proposed Rule, 79 Fed. Reg. at 22,206.

¹⁸⁷ SWANCC, 531 at 170-71.

Court has stated, the Agencies should consider the plain language of the CWA, giving real consideration to the Act’s explicit policy to preserve local authority over land and water use, and giving at least some meaning to the term “navigable.” Based on the Act’s plain language and the Supreme Court’s decisions, the Agencies should take this opportunity to reverse its historic position that manmade water bodies are jurisdictional “waters of the United States” and amend the rule’s exclusions to more broadly exclude most types of artificial water bodies, such as irrigation and drainage ditches, grass-lined swales, canals, detention facilities, water facilities, farm ponds, and landscape amenities. Similar to the rationale for exempting wastewater facilities, excluding most artificial water bodies would be consistent with the term “navigable” and with the Act’s policy of preserving local authority, allowing local authorities to draw the appropriate lines between federally regulated water bodies and manmade features not regulated under the CWA.¹⁸⁸

For these reasons, the Agencies should revise the Proposed Rule to expressly provide that waters in irrigation canals, ditches, drains, and other similar manmade conveyance facilities are not jurisdictional. At a minimum, however, if the Agencies maintain their flawed position that they may assert jurisdiction over manmade water bodies because of ecological factors, the Agencies should expand the Proposed Rule’s narrow exclusions for ditches and other artificial features for policy reasons. These artificial features represent critical components of the nation’s water, energy, and transportation infrastructure. As described in Section V below, the regulation of these features under the CWA will have significant adverse impacts on the ability of water purveyors, public utilities, and other service providers to operate and maintain their existing infrastructure. The Agencies have acknowledged their authority to exclude “certain waters and features” from regulation for policy reasons, even if the Agency has the authority to assert jurisdiction over such “waters and features.”¹⁸⁹ The Agencies should exercise this authority to clarify that most wholly-manmade ditches and canals and other artificially-wet features are not jurisdictional waters under the CWA. (p. 23-25)

Agency Response: See summary response for section 6.2 for a brief description of the CWA’s regulatory history regarding ditches. The preamble and section I of the Technical Support Document provide additional information on this subject. The summary response also discusses how the agencies edited and clarified the proposed exclusions for ditches for the final rule.

- 6.636 The proposed exclusion for ditches that are “excavated wholly in uplands, drain only uplands, and have less than perennial flow”¹⁹⁰ is much narrower than the Agencies’ historic practice. Historically, the Army Corps took the position that “non-tidal drainage and irrigation ditches excavated on dry land” are not jurisdictional, and that “drainage ditches constructed entirely in upland areas generally are not considered to be waters of

¹⁸⁸ For example, under Washington State law, wetlands “do not include those artificial wetlands intentionally created from non-wetland sites.” RCW 90.58.030(2)(h) (2014).

¹⁸⁹ Proposed Rule, 79 Fed. Reg. at 22,189.

¹⁹⁰ Proposed Rule, 79 Fed. Reg. at 22,218.

the United States.”¹⁹¹ By contrast, under the proposed new exclusion, the Agencies would regulate all ditches that drain wetlands and other non-upland areas, as well as all ditches with perennial flow or greater (regardless of whether they drain non-upland areas). This is an extremely broad category of ditches that could be interpreted to include a majority of ditches across the country. The preamble to the Proposed Rule explains that the narrow exclusion applies only to those ditches that are excavated in “uplands”¹⁹² at all points “along their entire length,” which further narrows the application of the proposed exclusion.¹⁹³

Due to the inherent nature of ditches, very few ditches will meet this test, since the most logical places to dig ditches are at natural low points on the landscape. The vast majority of ditches, including “natural” ditches, man-altered ditches, and wholly man-made ditches, are located in lowlands. The purpose of most ditches is to drain water. In order to drain water, there must be an elevation differentiation, which typically defines the line between uplands and lowlands. In particular, most ditches in the western states have been constructed, out of necessity, in non-uplands areas. Many of these ditches are used to transport water from a river or stream (non-upland areas) to fields for irrigation.

Under the Agencies’ proposed exclusion for ditches, if a ditch, at any time, has water flow and drains to a stream, river, or wetland, it would be considered jurisdictional water. Moreover, the “less than perennial flow” requirement would disqualify many ditches from the exclusion. The Agencies should reject this expansive approach and adopt a more reasonable exclusion for manmade features like ditches. Requiring CWA permits for and otherwise regulating most of the countless ditches across the country would vastly increase the Agencies’ regulatory burden and would have far-reaching and negative impacts on a variety of trades, from farming to construction to infrastructure projects.

The WWG asks the Agencies to explore alternative approaches to regulating ditches, such as categorically excluding all manmade ditches. Under this approach, the Agencies could clarify that discharges to such ditches that reach TNWs may still be regulated under the NPDES program. Alternatively, the Agencies could define a single, narrower category of ditches that are jurisdictional, which could include, for example, “natural” ditches created wholly from a natural stream or tributary.

If the Agencies insist on their current approach, however, they should at a minimum clarify what it means for a ditch to “drain only uplands.” The rule does not address the very common situation where a ditch was originally excavated in uplands, and originally drained only uplands, but over time, the water flowing through that ditch ended up

¹⁹¹ Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12,818, 12,824 (Mar. 9, 2000)); Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (“[W]e generally do not consider the following waters to be ‘Waters of the United States’ . . . (a) Non-tidal drainage and irrigation ditches excavated on dry land.”). Similarly, an approved Army Corps’ Jurisdictional Determination Form has indicated that the Army Corps considers “non-tidal drainage and irrigation ditches excavated on dry land” to be non-jurisdictional; see Approved Jurisdictional Determination Form (Sept. 27, 2011), available at <http://www.spk.usace.army.mil/Portals/12/documents/regulatory/jd/2011/October/SPK-2011-00927.pdf>.

¹⁹² The Agencies should define the term “uplands.” The Proposed Rule says that “uplands” are areas that are not “wetlands or other types of waters,” but the rule offers no any other guidance about what types of areas would constitute “uplands.” Proposed Rule, 79 Fed. Reg. at 22,203.

¹⁹³ Id.

creating a wetland in the ditch or adjacent to the ditch. In this situation, the ditch would likely “drain” the artificially created wetland that is now within or adjacent to the ditch, and the ditch would therefore be jurisdictional because it no longer falls within the Proposed Rule’s exclusion for ditches.¹⁹⁴ (p. 25-26)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

San Luis & Delta-Mendota Water Authority (Doc. #15645)

6.637 The Agencies should make clear that man-made conveyance systems, irrigation canals, ditches, and drains are not navigable waters, are not “waters of the U.S.,” are not “tributary” to waters of the United States, and are not subject to CWA jurisdiction. This approach is would be consistent with Army Corps Regulatory Guidance Letter 07-02, Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act. In addition, the Agencies should clarify their exclusion of artificial features to exempt artificially irrigated areas and irrigation ponds. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches and similar features were edited and clarified for the final rule.

Tri-State Generation and Transmission Association, Inc. (Doc. #16392)

6.638 [A]t a minimum, the Agencies should clarify, as they have suggested they would during outreach meetings, that a ditch that is excavated in uplands, drains only uplands, and has less than perennial flow is nevertheless excluded even if it contributes flow to a water of the United States because the two ditch exclusions are independent of one another.¹⁹⁵ The Agencies should also clarify that the upland ditch exclusion applies to all reaches of a ditch system that are upstream of the point of intersection with a WOTUS. Third, the Agencies should indicate in the preamble that the mere presence of groundwater, or wetland vegetation that developed in the ditch bottom due to the interception of groundwater, in a ditch does not, by itself, convert an upland ditch into a jurisdictional tributary. Finally, the Agencies should not narrow the upland ditch exclusion by imposing a requirement that the ditch has less than intermittent flow, as described in an alternative proposal.¹⁹⁶

Regarding the proposed ditch exclusions, the Agencies should re-visit one of their main goals of the proposed rule which was to reduce the level of effort required to make

¹⁹⁴ The Proposed Rule suggests that water bodies that are specifically excluded under the rule will not be regulated “even if they would otherwise satisfy the regulatory definition,” *id.* at 22,193, of waters of the United States, but this statement does not address the situation in which the creation of artificially-created wetlands or other features may have the effect of disqualifying a ditch or other water from an exclusion. The Agencies should revise the rule to clarify the meaning of the phrase “drain only uplands” and the effect of artificially-created waters on the rule’s exclusions.

¹⁹⁵ NMA comments at page 18.

¹⁹⁶ 79 FR 22203.

jurisdictional determinations (JDs). Tri-State suspects that much of the administrative burden under the current rule and case law is due to jurisdictional decisions on small, isolated, and intermittent/ephemeral waters, including ditches. Given the prevalence of man-made ditches, particularly in the Western U.S., the proposed ditch exclusion language has great potential to instead increase the Agencies' administrative burden for JDs in the future. Since the exclusion is not clear, it will beg case-by-case review. Many landowners will in practice continue to request a written decision regarding the applicability of jurisdiction to a particular ditch despite the rule's indication that certain ditches are per se non-jurisdictional. Such confirmation of nonjurisdiction from the Agencies will likely be sought as a risk management tool by landowners since they require certainty prior to acquiring property, constructing a new facility, or conducting land management actions. The proposed ditch exclusion language is too heavily conditioned and unclear to allow the regulated public to decide non-jurisdiction on their own, and will likely increase agency workload due to case-by-case reviews. The ditch exclusion should be simplified to focus on the concept that man-made ditches excavated in dry land (not including channelized natural streams) are not WOTUS. (p. 9)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Association of Electronic Companies of Texas, Inc. (Doc. #16433)

6.639 [T]he proposed Rule narrowly describes for the first time the types of "ditches" and other "features" that qualify for an exemption, which indicates that all other "ditches" and "features" are not exempt.¹⁹⁷ AECT is concerned that manes that all or part of any cooling water and wastewater system that does not meet the description of "ditch" or "feature" in the Proposed Rule would no longer be exempted. Even though EPA and the Corps state in the preamble to the Proposed Rule that "[w]here waters would be determined jurisdictional under the [P]roposed [R]ule, applicable exemptions of the CWA would continue to preclude application of CWA permitting requirements"¹⁹⁸ the actual language of the Proposed Rule does not provide the same assurances. (p. 4-5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. See summary response at 7.1 regarding the waste treatment system exclusion.

South Metro Water Supply Authority, Colorado (Doc. #16481)

6.640 Additional clarity is required for the following concerns:

¹⁹⁷ 79 Fed.Reg. 22263 (proposing to add new 33 C.F.R. 328.3(b)(3)-(5), or proposed section (b)(3)-(5)). The Proposed Rule would codify in the C.F.R. the same language defining navigable waters or WOTUS for purposes of 10 separate regulatory programs. For purposes of citing to particular proposed language, only the reference to 33 C.F.R. Pan 328 will be utilized, although the same language is proposed to be included in 40 C.F.R. Pans 110, 112, 116, 117, 122, 230, 232, 300,302, 401.

¹⁹⁸ 79 Fed.Reg. 22 193.

- How will the agencies treat "upland" ditches (or portions of ditches) that happen to have standing water present after rainfall events or due to other natural conditions at such times as irrigation water is not being introduced
- If a ditch starts at a jurisdictional water or ultimately drains to such a water is it categorically jurisdictional. (p. 3-4)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Southern Nevada Water Authority (Doc. #16507)

- 6.641 SNWA supports the proposed exclusion of ditches, and recommends the requirement for less than perennial flow be removed. If the ditch is located wholly in uplands and drains only uplands, it would not be connected to a WOTUS, thus the frequency of water flow in the ditch is irrelevant. SNWA also recommends the term "uplands" be defined in the Proposed Rule. (p. 5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Northern California Association (Doc. #17444)

- 6.642 NCWA's concerns are centered on the proposed rule's jurisdiction over man-made irrigation ditches and drains under the CWA. While the proposal excludes ditches "excavated wholly in the uplands" and drains "draining only uplands" from being categorized as "waters of the U.S.," these exclusions may raise more questions than answers in a jurisdictional dispute. The words "wholly" and "only" may imply a "zero tolerance" for any disturbance in the past of a newly defined tributary or wetland. There is no clear determination that artificially created wetlands (as a result of irrigation in the uplands) are also excluded as "waters of the U.S." Finally, the term "uplands" is not defined and could be subject to dispute when determining placement or drainage if forced into using either "wholly" or "only" as the applicable factors for exclusion (or not). (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

National Waterways Conference, Inc. (Doc. #12979)

- 6.643 The inclusion of ditches constitutes an impermissible expansion of jurisdiction.

Although the Proposed Rule would exclude two types of ditches from CWA jurisdiction,¹⁹⁹ ditches that do not meet the criteria for exclusion could be considered waters of the United States. The proposed definition of "tributary" could be interpreted to include man-made waters with artificial features, such as drainage ditches or artificial ponds. Also, ditches with perennial flow are not covered by the exemption, but it is not clear what the agencies believe is meant by "perennial flow."

¹⁹⁹ 79 Fed. Reg. at 22,263.

The agencies seem to suggest that the exclusions from jurisdiction in the Proposed Rule show restraint. However, the narrowness of the exclusions only serves to demonstrate how broadly the Proposed Rule applies. This is especially apparent with respect to the two exemptions for ditches. The agencies exclude from jurisdiction those ditches that “are excavated wholly in uplands, drain only uplands, and have less than perennial flow,” and those that “do not contribute flow, either directly or through another water,” to various other categories of jurisdictional waters.²⁰⁰ Those exclusions are categorical, but the categories are tiny. Water flows downhill; the water in an upland ditch is no exception. Further, even if the ditch drains to a feature that generally contains water in an upland area, such that it does not typically affect downstream waters, the agencies’ “fill and spill” theory²⁰¹ means jurisdiction can be found on the basis of periodic overflow. How many ditches have the agencies identified that never, under any circumstances, contribute any amount of flow to downstream waters or wetlands?

A reasonable reading of the Proposed Rule would lead to the conclusion that the very drainage ditches considered in *Rapanos*—the same ones, according to the Court, that the agencies improperly brought within CWA jurisdiction—are jurisdictional. However, Justice Kennedy indicated that a ditch ought not to be jurisdictional where it is “located many miles from any navigable-in-fact water and carry only insubstantial flow towards it.”²⁰² (p. 10)

Agency Response: See summary response for a brief description of the CWA’s regulatory history regarding ditches. The preamble and the Technical Support Document provide additional information on this subject. The summary response also discusses how the agencies edited and clarified the proposed exclusions for ditches for the final rule.

Southern Environmental Law Center et al. (Doc. #13610)

6.644 **Agency Comment Request:** The agencies specifically seek comment on the appropriate flow regime for a ditch excavated wholly in uplands and draining only uplands to be included in the exclusion of paragraph (b)(3). In particular, the agencies seek comment on whether the flow regime in such ditches should be less than intermittent flow or whether the flow regime in such ditches should be less than perennial flow as proposed.²⁰³

Comment: It is our understanding that in earlier drafts of the proposed rule, the flow regime proposed was intermittent flow. We believe that that is the correct flow regime for the final rule. Any ditch that is so deep that it uncovers the water table, even if only for part of the year, should not be exempted. Such ditches, depending on their location and orientation, could have a dramatic impact on the hydrologic regime in the area surrounding the ditch even if they are dug through uplands and only drain uplands.

²⁰⁰ 79 Fed. Reg. at 22,263.

²⁰¹ 79 Fed. Reg. at 22,263.

²⁰² *Rapanos*, 547 U.S. at 786.

²⁰³ 79 Fed. Reg. at 22,203.

Agency Comment Request: The agencies request comment on this formulation of the ditch exclusion. The agencies specifically seek comment on the appropriate flow regime for a ditch excavated wholly in uplands and draining only uplands to be covered by the exclusion in paragraph (b)(3). In particular, the agencies seek comment on whether the flow regime in such ditches should be less than intermittent flow or whether the flow regime in such ditches should be less than perennial flow as proposed.²⁰⁴

Comment: See the comment immediately above. (p. 40-41)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

- 6.645 **Agency Comment Request:** The agencies seek comment on whether the flow regime in [upland] ditches should be less than intermittent flow or whether the flow regime in such ditches should be less than perennial flow.

Comment: Although we agree that certain ditches should be excluded from jurisdiction, we feel the only ones that should be excluded are ephemeral ditches. Ditches with intermittent or perennial are designed not only to convey surface runoff, but also to lower the water table. Such ditches should not be excluded from CWA jurisdiction. (p. 49)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Potomac Riverkeeper, Inc. (Doc. #15013)

- 6.646 Strengthen definitional terms for ditches. Should the Agencies retain either of the categorical exemption for ditches in the proposed rule, it is critical that they better define "ditches" and "uplands" so as to avoid over-application of the categorical exemption. As the plurality in Rapanos pointed out, ditches that hold water permanently can be referred to as rivers, creeks, streams, moats or canals. We would hate to see actual rivers, creeks or streams excluded from regulation because they can be or have been referred to as ditches. (p. 4)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

National Wildlife Federation (Doc. #15020)

- 6.647 The Proposed Rule excludes from the definition of tributary many ditches and certain other features that are not considered tributaries.

In an effort to clearly define tributaries, the proposed rule excludes from the definitions of tributaries and "waters of the United States" gullies, rills, and non-wetland swales.²⁰⁵ As the preamble explains, "Of importance with respect to tributaries is the exclusion of gullies, rills, non-wetland swales, and certain ditches." 79 Fed. Reg. at 22204. The

²⁰⁴ 79 Fed. Reg. at 22217.

²⁰⁵ 33 CFR 328.3 (b)(5)(vii); 33 CFR 328.3(c)(5); 79 Fed. Reg. 22204; see also Id. at 22218-19.

agencies also explain that “ephemeral features located on agricultural lands that do not possess a bed and bank are not tributaries.” Id.

Importantly, in response to concerns from agriculture and local governments, the proposed rule clearly excludes from the definition of tributaries and the definition of “waters of the United States” two types of ditches that might otherwise be considered tributaries: 1) “ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow;” and 2) ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section.” See e.g., 33 CFR 328.3 (b)(3) and (4); 79 Fed. Reg. at 22203.

In doing so, the agencies not only codify these CWA ditch exemptions for the first time, but they propose to broaden the previously informal upland ditch exemption by excluding from jurisdiction upland ditches with less than perennial flow. Not only do the agencies require year round presence of water (under normal or above normal rainfall conditions), but the agencies require year round flow of water. Upland ditches that have year round water, but less than year round flowing water apparently do not qualify as tributaries under the proposed rule language, even if those flows are episodically torrential, sending flood waters, sediment, and pollutants downstream. Id. (p. 37-38)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

6.648 **[T]he proposed rule is expressly excluding many ditches and other water features from CWA jurisdiction.**

In the interest of increasing clarity and certainty about the scope of the Clean Water Act, we support the agencies’ proposed list of waters to be explicitly excluded from jurisdiction by rule. We support the agencies’ proposal to explicitly exclude erosional and artificial water features such as gullies, rills, non-wetland swales, small ornamental waters, water-filled depressions incidental to construction activity, among others. Expressly making these kinds of waters non-jurisdictional by rule should help convey clarity and address many of the concerns of important segments of the landowning public and, in particular, the farming and ranching communities.

Here, as the agencies note, they are clearly “drawing lines and concluding that certain waters and features are not subject to the jurisdiction of the Clean water Act. 79 Fed. Reg. at 22218. The proposed rule goes further in excluding waters than previous regulatory guidance has gone as set forth in the Corps’ 1986 preamble language at 51 Fed. Reg. 41206, 41217 (November 13, 1986) and the 1988 EPA preamble language at 53 Fed. Reg. 20764 (June 6, 1988). (p. 102)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Environmental Defense Fund (Doc. #15352)

6.649 EDF urges the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) (collectively referred to as the agencies) to:

- 6.650 5) Ensure that the final rule does not broaden the scope of exempted ditches beyond existing policy without a sound scientific basis. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

- 6.651 **The final rule should not broaden the scope of exempted ditches beyond current policy without a sound scientific basis.** The draft rule expands the scope of some existing agricultural exemptions by providing that many waters that the agencies have typically not regulated as a matter of policy will now be always exempt under section (b) of the rule, regardless of whether future science proves that these waters have a significant impact on and nexus with downstream waters. This extends beyond the scope of agency authority. The agencies may not bind what EPA and the Corps may do in the future in terms of reformulating these regulations if future scientific developments justify a revision(s) that is/are consistent with statutory mandates. Nor may they bind what a future Congress may do. Further, removing these waters permanently from Clean Water Act jurisdiction regardless of what future science may prove, frustrates the central goal of the Clean Water Act to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”

This is a particularly significant environmental concern with regard to drainage ditches. In many areas of the country, such as the Midwest, it can be difficult to discern the difference between ditches dug in uplands and channelized headwater streams. Moreover, the pertinent question from a Clean Water Act perspective should be whether the ditch or channelized stream has a significant nexus to downstream navigable waters, not whether it was excavated in uplands and receives only upland flow. The pertinent issue is the nature of the connection between the upland ditch and the downstream water, not whether the water came from upland flow.

This concern is further heightened by the shift in the proposed rule from current policy, which is generally to abstain from regulating ditches dug in uplands that receive less than intermittent flow, to the proposed rule language to abstain from regulating ditches dug in uplands that receive less than perennial (year round) flow.²⁰⁶ This is potentially an enormous expansion of the exemption. EDF has worked in many on the ground projects in the Midwest. In our experience, there are many small streams, channelized headwater streams and ditches that convey water much of the year but are dry or cease flowing in August. Dr. David Kovacic (University of Illinois), one of the nation’s foremost experts on the use of constructed wetlands to reduce nitrogen and phosphorus export from agricultural tile drainage²⁰⁷ reports:

“In the wet prairie region of the Midwest the landscape was characteristically wet in the spring (so wet that it required tile drainage to successfully farm the land) but extremely dry in the late summer and early fall. Nearly every year the headwater streams dry up and

²⁰⁶ 79 Fed. Reg. 2219.

²⁰⁷ See e.g., David A. Kovacic, David, M.B, Gentry, L.E, Starks, K.M., and Cooke, R.M., Effectiveness of Constructed Wetlands in Reducing Nitrogen and Phosphorus Export from Agricultural Tile Drainage, Journal of Environmental Quality Vol. 29, no.4 (July-August 2000).

become a series of more or less stagnant pools. Over the last 25 years this is a phenomenon that I have observed with regard to our wetland areas and adjacent headwater streams, only during the wettest summers do streams in the region flow all year. While I don't have specific data, I have seen headwater streams flow year round perhaps 3 out of 25 years.²⁰⁸

EDF staff and consultants have observed these conditions in late summer while working on our central Illinois, Mackinaw River Drinking Watersheds Project. Moreover, our colleague, Krista Kirkham, at The Illinois Chapter of The Nature Conservancy, noted her observations from her many years of experience monitoring and mapping subwatersheds of the Mackinaw River:

“[F]rom tromping around these tiled, headwater ditches for the last 11 years, it's very common for these creeks to run quite low in the summer/fall when the tiles stop running (typically sometime in late July, August-September, sometimes through October). It's rare that a stream would dry up completely; usually they stop flowing and become isolated pools of water that get fouled quickly with algae and other decaying things.²⁰⁹

She further reports that during drought years, the creeks had completely dried up due to lack of flow from the tiles. We urge the agencies to reject this expansion of the scope of this drainage exemption; it is unwarranted, unsupported by the science, and not in accordance with achieving the goals of the Clean Water Act.

Unlike the discussion in the preamble regarding the voluminous scientific record in support of protecting headwater streams, there is no discussion in the preamble to the proposed rule of any science supporting this potentially dramatic expansion of waters not protected by the CWA. (p. 6-7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule does not purport to bind future Administrations or Congress; the final rule can be amended in the future and, of course, would be amended to reflect any relevant changes to the statute.

American Rivers (Doc. #15372)

- 6.652 To avoid additional confusion and uncertainty, the Agencies should clarify the exclusion for “ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.”²¹⁰ The Agencies should more clearly define what constitutes “upland” as well as specify the types of waters that drain into those ditches. It is also unclear whether or not upland ditches drain into non-jurisdictional waters and we ask the Agencies to include the identity, and therefore jurisdictional status, of the receiving waters in the definition of upland ditches. If there is the potential for these ditches to flow into jurisdictional waters, they should only be excluded as “waters of the United States” if they do not demonstrate a significant nexus to downstream protected waters. (p. 28)

²⁰⁸ November 7, 2014 e-mail from Dr. David Kovacic.

²⁰⁹ November 6, 2014 e-mail from Krista Kirkham.

²¹⁰ Definition of WOTUS, 79 Fed. Reg. at 22203.

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Natural Resources Defense Council et al. (Doc. #15437)

6.653 The Rule Should Not Exempt Ditches Without a Scientific Basis

EPA and the Corps propose to exempt ditches from regulation as “waters of the United States” if they “are excavated wholly in uplands, drain only uplands, and have less than perennial flow.” The agencies propose this exemption despite the fact that they explicitly recognize elsewhere in the proposal that ditches often perform the same functions as tributaries – a class of waters that the agencies agree should be categorically protected because of their significant nexus to traditionally jurisdictional waters. Because the science does not demonstrate a functional difference between natural and manmade tributaries, or support the idea that upland ditches can never have a significant nexus to navigable waters, the wholesale exemption of upland ditches from ever being treated as “waters of the United States” is arbitrary and capricious. (p. 56)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Waterkeeper Alliance et al. (Doc. #16413)

6.654 Ditches Should Not Be Categorically Excluded from the Definition

The Proposed Definition also provides a categorical exclusion for certain defined ditches and we strongly object to this provision. There is no sound legal or scientific basis for categorically excluding ditches, and this is especially true when those ditches otherwise meet the definition of tributary or any other defined “water of the United States.” The Proposed Rule establishes, for the first time, a categorical exclusion for two types of ditches and states that they are not “waters of the United States” notwithstanding whether they would otherwise meet the requirements for being identified as a traditionally navigable water, interstate water, territorial sea, impoundment, tributary, adjacent water, or other water with a significant nexus.

Although the agencies state in the Preamble that they are simply codifying longstanding exemptions for waters over which the agencies “have generally not asserted CWA jurisdiction,”²¹¹ with regard to ditches, the proposed categorical exemption is not consistent with any longstanding exemption.²¹² Historically, ditches have commonly been protected under the CWA because they are actually streams that have been altered, transport pollutants to downstream waters, or have begun to serve ecological functions like natural tributaries. Ditches can and are required to be regulated under the CWA if they are man-made.²¹³ (p. 34)

²¹¹ 79 Fed. Reg. 22189.

²¹² See 2003 Guidance, 58 Fed. Reg. 1995, 1997; Jurisdiction Following *Rapanos v. United States* and *Carabell v. United States* supra note 49, pp. 1, 8.

²¹³ See, e.g., *Holland*, 373 F. Supp. at 673---74; *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F. 3d 526, 533---34 (9th Cir. 2001); *U.S. v. St. Bernard Parish*, 589 F.Supp. 617, 620 (E.D. La. 1984); *U.S. v. Gerke Excavating, Inc.*,

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

- 6.655 We are equally concerned that the agencies are proposing to adopt a categorical exemption for ditches, yet they did not define many of the key terms in the exemptions, including "ditches," "uplands," "perennial"⁹² or "through another water" which are subject to varying interpretations. While as stated previously, we object to any categorical exemption for ditches, we believe it is important to point out that the failure to define these key terms can have significant impacts on the ability of the agencies to protect water quality.

For example, as noted by the plurality in *Rapanos*, a "ditch" can mean different things in different contexts, but when ditches hold water permanently they are typically referred to as "rivers," "creeks," "streams," "moats," or "canals."⁹³ While we are not sure that this is always the case, the *Rapanos* Court's discussion of the issue illustrates the problem with the agencies' failure to define the term "ditches." For example, it seems apparent that the agencies would not intend to categorically exempt any water that may be equally referred to as either as ditch or as a ditch or a canal, river, creek, or stream. (p. 35-36)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Western Resource Advocates (Doc. #16460)

- 6.656 The 2008 joint guidance that the agencies formulated after digesting the Supreme Court's opinions in *Rapanos*, explicitly excepted "ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water."²¹⁴ By only excepting this limited type of ditch from jurisdiction, the 2008 guidance effectively continued the agencies' long standing practice of regulating as waters of the US many other irrigation ditches. The proposed rule, at 42 C.F.R. §122(b), puts forward a similar exclusion: "Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" are not waters of the US. In addition, the proposed rule would not consider, "Ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water" jurisdictional.²¹⁵

The proposed rule is thus similar to the 2008 guidance, and in fact excludes more ditches than did the 2008 guidance. Few irrigators objected to the 2008 guidance. However, today the American Farm Bureau and other agricultural organizations are objecting

412 F.3d 804, 805---06 (7th Cir. 2005) ("A stream can be a tributary; why not a ditch? A ditch can carry as much water as a stream, or more; many streams are tiny. It wouldn't make much sense to interpret the regulation as distinguishing between a stream and its man-made counterpart."), vacated 126 S.Ct. 2964 (2006), on remand 464 F.3d 723 (7th Cir. 2006) (remanding to district court to apply *Rapanos*), cert. denied 128 S.Ct. 45 (2007); *Community Assn. for Restoration of Env't v. Henry Bosma Dairy*, 305 F.3d 943, 954-955 (C.A.9 2002).

²¹⁴ Benjamin H. Grumbles, Assist. Admin. for Water, U.S. Env'tl. Pro. Agency & John Paul Woodley, Jr., U.S. Army Corps of Eng'rs, *Clean Water Act Jurisdiction Following Rapanos and Carabelle* (2008), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf

²¹⁵ 79 Fed. Reg. at 22193.

loudly to the proposed rule's treatment of ditches. This difference in level of opposition is not easily understood from a substantive basis. Under both the 2008 guidance and the proposed rule, the agencies consider jurisdictional ditches that flow relatively permanently, connect to jurisdictional tributaries and are excavated in, or drain, wetlands. Thus, the proposed rule does not represent a change – expansion or contraction – from the agencies' historical approach.

To the extent that the National Association of Counties also raises the concern that the proposed rule would increase the number of county-owned ditches under Clean Water Act jurisdiction, their concern is similarly misdirected.²¹⁶ In fact, given the explicit ditch exclusions the rule proposes,²¹⁷ the number of county-owned ditches affected would decrease, rather than increase, were the agencies to adopt the rule as proposed. (p. 14-15)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Association of State Floodplain Managers, Inc. (Doc. #19452)

6.657 There is widespread concern and uncertainty regarding the distinctions among unregulated or “upland” ditches, regulated tributaries, and activities that are (currently) exempted in ditches or tributaries. We strongly recommend additional clarification of these distinctions in the final rule and associated implementing guidance. Particularly that volume and flow need to be regulated if water routinely flows in the ditch following storm events. Roads are linear features that cut across wetlands, streams and other aquatic resources and sometimes become part of the overall stream system either through design or by accident. The phrase, “Ditches that do not contribute flow...” in the list of non-jurisdictional waters has raised the concern that channels that convey any amount of flow following storm events will be considered regulated. During final rulemaking, some exclusion for insignificant or de minimis flow may be considered. (p. 7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Pacific Legal Foundation (Doc. #14081)

6.658 Section I of the proposed rule speaks volumes. The limited scope of excluded waters is so narrow that by contrast the list serves to underscore just how broad the rule is. Those waters not included as “waters of the United States” are limited to “ditches that are excavated wholly in uplands, drain only in uplands, and have less than perennial flow.” 79 Fed. Reg. 22218. And, “ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas, or impoundment.” *Id.* The problem with this exclusion, is that such ditches probably do not exist. It is a meaningless exclusion. Moreover, the exclusion is made confusing by the

²¹⁶ National Association of Counties, Policy Brief, New “Waters of the United States” Definition Released (2014), available at <http://www.naco.org/legislation/Documents/Waters-of-the-US-County-Analysis.pdf>.

²¹⁷ 40 C.F.R. § 122(b)(2) and (3); 79 Fed. Reg. at 22263.

caveat that excluded ditches may nevertheless serve as conduits for other jurisdictional waters, such as wetlands, under the adjacency standard. See Id. (p. 14)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Earthjustice (Doc. #14564)

6.659 In addition to the wholesale exclusion of groundwater, the exclusions for certain ditches, and for swales, gullies and constructed ponds is problematic as it is broader than necessary, thereby exposing to pollution waters that should be protected. EPA also creates definitional problems by attempting to broadly exclude these categories of waters.

With respect to ditches, EPA should refer to individual SAB member comments on this topic. Many commenters rightly point out that ditches, whether constructed in upland or some other type of landscape, can be significant sources of pollutants to downstream waters. See Members Comments, Allan at 14 (mentioning, in particular, the delivery of significant nutrient pollutants to Lake Erie); Harvey at 22; Kolm at 49 and 50; and Rodewald at 78. During periods of snow-melt or significant rains, the amount of flow and pollutants they can carry can be very significant. Moreover, many ditches, including those in uplands, originally were developed as agricultural drainage are now used by stormwater managers in urbanizing areas. See, e.g., Maryland Public Drainage http://mda.maryland.gov/resource_conservation/Pages/pda_pwa.aspx. As a result, those ditches are significant conduits for pollution and must be recognized as such. A municipality's discharge of stormwater to those ditches should not escape attention under the Clean Water Act.

EPA also categorically excludes gullies, rills, and non-wetland swales. This is far too broad as noted by some members of the SAB. Gullies, rills, and swales are in many instances features on the landscape that carry significant flows and amounts of pollutants to downstream waters. Instead of categorically excluding these features and waters, it is more scientifically supportable to examine their role relative to connections to waters of the U.S. under the "other waters" category of subsection (s) and determine whether they should be protected on a case-by-case basis. See Members Comments, Kolm at 50; Sullivan at 89 ("to exclude these and other variable source areas (e.g., swales) from jurisdiction is not fully supported by the available science as they can be important components of integrated aquatic systems with measurable impacts to downstream systems. . .the agencies should maintain the right to classify specific gullies, rills, and swales (either separately or in the aggregate) as jurisdictional when warranted.")

Again, categorical exclusions are not warranted under the law or science and Earthjustice urges EPA to revise the proposed rule to ensure that waters that should be protected, at least on a case-by-case basis, are not automatically excluded from Clean Water Act protection. (p. 12-13)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Environmental Defense Fund (Doc. #14946)

- 6.660 The final rule should not broaden the scope of exempted ditches beyond current policy without a sound scientific basis.

The draft rule expands the scope of some existing agricultural exemptions by providing that many waters that the agencies have typically not regulated as a matter of policy will now be always exempt under section (b) of the rule regardless of whether future science proves that these waters have a significant impact on and nexus with downstream waters.

This is a particularly significant environmental concern with regard to drainage ditches. In many areas of the country, such as the Midwest, it can be difficult to discern the difference between ditches dug in uplands and channelized headwater streams. Moreover, the pertinent question from a Clean Water Act perspective should be whether the ditch or channelized stream has a significant nexus to downstream navigable waters, not whether it was excavated in uplands and receives only upland flow. The pertinent issue is where the water goes and what it carries with it, not whether the water came from upland flow.

This concern is further heightened by the shift in the proposed rule from current policy which is generally to abstain from regulating ditches dug in uplands that receive less than intermittent flow to abstain from regulating ditches dug in uplands that receive less than perennial (year round) flow. 79 Fed. Reg. 2219. This is potentially an enormous expansion of the exemption. EDF has worked in many on the ground projects in the Midwest. In our experience, there are many small streams, channelized headwater streams and ditches that convey water much of the year but are dry in August. (p. 5-6)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Protect Americans Board of Directors (Doc. #12726)

- 6.661 Section (b) generally and the exemption for certain “ditches” specifically

Although on its face, the agencies’ determination that the section (b) exemptions (i.e. waters that are not jurisdictional by rule) shall not be subject to any type of recapture provision is appropriate, as a practical matter, it will be of little help. As currently drafted the exemption in provision (b)(3) is too narrow. Most ditches will run through or empty into some larger body, where there will certainly be a riparian area. Because the rule currently states the ditch must “drain only uplands” it is virtually impossible to envision when this exemption may be applicable. Accordingly, the agencies should explore ways to broaden the scope of the exemption, which might provide some relief to farmers and ranchers otherwise burdened by the Proposed Rule. (p. 17)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Idaho Conservation League (Doc. #15053)

- 6.662 In addition to the wholesale exclusion of groundwater, the exclusions for certain ditches, and for swales, gullies and constructed ponds is problematic as it is broader than

necessary, thereby exposing to pollution waters that should be protected. EPA also creates definitional problems by attempting to broadly exclude these categories of waters.

With respect to ditches, EPA should refer to individual SAB member comments on this topic. Many commenters rightly point out that ditches, whether constructed in upland or some other type of landscape, can be significant sources of pollutants to downstream waters. See Members Comments, Allan at 14 (mentioning, in particular, the delivery of significant nutrient pollutants to Lake Erie); Harvey at 22; Kolm at 49 and 50; and Rodewald at 78. During periods of snow-melt or significant rains, the amount of flow and pollutants they can carry can be very significant. Moreover, many ditches, including those in uplands, originally were developed as agricultural drainage are now used by stormwater managers in urbanizing areas. See, e.g., Maryland Public Drainage http://mda.maryland.gov/resource_conservation/Pages/pda_pwa.aspx. As a result, those ditches are significant conduits for pollution and must be recognized as such. A municipality's discharge of stormwater to those ditches should not escape attention under the Clean Water Act. (p. 12-13)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Los Angeles Waterkeepers (Doc. #15060)

6.663 The Proposed Rule's (b)(3) Ditch Exemption Must Be Amended to Definitively Exclude Tributaries from the Exemption.

Channelized urban waterways present a unique set of conditions that the Proposed Rule's language fails to adequately consider. For instance, many natural waterways throughout the Los Angeles region have been heavily engineered, through channelization, straightening, and/or relocation, for flood control purposes. Although the preamble of the Proposed Rule clearly demonstrates the agencies' intent to classify such channelized, straightened, and relocated natural waterways as jurisdictional,²¹⁸ the Proposed Rule's ditch exemptions risk excluding them from coverage.

There is no sound legal or scientific basis for categorically excluding ditches, and this is especially true when those ditches otherwise meet the definition of tributary or any other defined "water of the United States." Ditches can and are required to be regulated under the Clean Water Act if they flow into other "waters of the United States" even when they are man-made.²¹⁹ As the 11th Circuit stated in the case of *U.S. v. Edison*, "[t]here is no reason to suspect that Congress intended to regulate only the natural tributaries of

²¹⁸ 79 Fed. Reg. 22,203 ("jurisdictional ditches may include . . . [n]atural streams that have been altered (e.g., channelized, straightened or relocated) . . .").

²¹⁹ See, e.g., *U.S. v. Holland*, 373 F. Supp. 665, 673-74 (M.D. Fla. 1974), *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533-34 (9th Cir. 2001); *U.S. v. St. Bernard Parish*, 589 F.Supp. 617, 620 (E.D. La. 1984); *U.S. v. Gerke Excavating, Inc.*, 412 F.3d 804, 805-06 (7th Cir. 2005) ("A stream can be a tributary; why not a ditch? A ditch can carry as much water as a stream, or more; many streams are tiny. It wouldn't make much sense to interpret the regulation as distinguishing between a stream and its man-made counterpart."), vacated 126 S.Ct. 2964 (2006), on remand 464 F.3d 723 (7th Cir. 2006) (remanding to district court to apply *Rapanos*), cert. denied 128 S.Ct. 45 (2007); *Community Assn. for Restoration of Environment v. Henry Bosma Dairy*, 305 F.3d 943, 954-955 (C.A.9 2002).

navigable waters. Pollutants are equally harmful to this country's water quality whether they travel along man-made or natural routes.”²²⁰ **Accordingly, ditches should be categorically included when they otherwise meet the definition of a “water of the United States,” including tributaries. Further, ditches should be protected when they meet either the “relatively permanent” or “significant nexus” test without regard to the agencies’ unspecified policy considerations.**²²¹

At a minimum, the agencies should amend the Proposed Rule’s (b)(3) ditch exemption language to ensure tributaries that have been channelized, straightened, and/or relocated but remain physically, chemically, and biologically connected to a water identified in paragraphs (a)(1) through (4) of the Proposed Rule. Specifically, the Proposed Rule’s (b)(3) exemption for ditches “that are excavated wholly in uplands, drain only uplands, and have less than perennial flow” must be amended to clarify the distinction between exempt ditches and regulated tributaries.

The (b)(3) ditch exemption could arguably encompass manmade tributaries that redirected and relocated the flow of a floodbasin's former natural waterways if the manmade tributaries were excavated entirely “in wholly upland areas.”²²² However, excluding manmade tributaries from jurisdiction under the Clean Water Act simply because those tributaries relocated the flow of natural tributaries would be directly contrary to the EPA’s scientific findings and the agencies’ intent as stated in the Proposed Rule’s preamble.²²³

To reconcile the Proposed Rule’s impact with the agencies’ intent and the EPA’s conclusions based on the available science, the agencies should, at a minimum, amend the Proposed Rule’s (b)(3) ditch exemption, and all other relevant sections, to read: “Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow, but not including natural streams, including ephemeral or intermittent streams, that have been altered (e.g., channelized, straightened or relocated).” (p. 4-5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Section IV(F) of the preamble to the final rule specifically refers to the Los Angeles

²²⁰ US. v. Edison, 109 F.3d 1336, 1342, (11th Cir. 1997) cert. denied, 522 U.S. 899 (1997).

²²¹ The agencies do not possess the authority to exclude waters that Congress intended to cover from the definition of “waters of the United States” for policy or any other agency administrative purpose. Conference Report, Senate Report No. 92-1236, Sept. 28, 1972, page 144, U.S.Code Cong. & Admin. News 1972, p. 3822; Reprinted in Legislative History, Committee on Public Works, Committee Print, 93rd Cong., 1st Sess., Legislative History of the Water Pollution Control Act Amendments of 1972, p. 327 (hereinafter “1972 Legislative History”); NRDC v. Callaway, 392 F.Supp. 685, 686 (D.D.C. 1975); Cf. Natural Res. Def. Council, Inc. v. Costle, 568 F.2d 1369, 1377 (D.C. Cir. 1977).

²²² See id. at 22,263 (§328.3(b)(3))

²²³ See id. at 22,201 (“Tributaries have a significant impact on the chemical, physical, and biological integrity of waters into which they eventually flow”); see also id. at 22,202 (“A tributary . . . can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (b)(3) or (4).”); see also id. 22,203 (“jurisdictional ditches may include . . . [n]atural streams that have been altered (e.g., channelized, straightened or relocated)”).

River as an example of a “water of the United States,” and in fact a traditional navigable water, even where it has been ditched, channelized and concreted.

Neuse Riverkeeper Foundation (Doc. #15095)

6.664 The EPA should ensure that the new rule COVERS DITCHES:

The new rule should not categorically exempt ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow; ditches that do not contribute flow, either directly or through another water, to a WOTUS; and ditches that would otherwise meet any other definition of WOTUS or have a significant nexus. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Tulane Environmental Law Clinic; and Tennessee Clean Water Network; et al (Doc. #15123)

6.665 **Upland Non-Perennially Flowing Ditches Should Not Be Excluded from the Definition of Waters of the United States**

We object to EPA and the Corps’ proposed exemption of certain ditches from regulation as “waters of the United States” if they “are excavated wholly in uplands, drain only uplands, and have less than perennial flow.”⁴⁷ This exemption has been proposed despite the fact that EPA and the Corps explicitly recognize elsewhere in the proposed Rule that ditches often perform the same functions as tributaries – a class of waters that the agencies agree should be categorically protected because of their significant nexus to traditionally jurisdictional waters. According to the proposed rule, a ditch would meet the definition of “tributary” if it has a bed and banks and an ordinary high water mark, and if it contributes flow to a traditionally jurisdictional water. If a ditch, regardless of being located in uplands or having perennial flow, functions as a tributary, then it should be regulated as a tributary.

Achieving the nation’s water quality goals critically depends on protecting waters as expansively as the Clean Water Act allows. Excluding waters without a scientific basis for doing so is unjustified and undermines the achievement of these goals. The proposed exemption for all upland ditches is overly broad: EPA and the Corps may not exempt ditches that function as tributaries. The agencies must reject this wholesale exemption and provide for upland ditches to be considered “waters of the United States” whenever they meet the definition of tributaries. Because the science does not demonstrate a functional difference between natural and manmade tributaries, or support the idea that upland ditches can never have a significant nexus to navigable waters, the wholesale exemption of upland ditches from ever being treated as “waters of the United States” is arbitrary, capricious, and an abuse of discretion. (p. 11-12)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Texas Agricultural Land Trust (Doc. #15188.1)

- 6.666 The two exclusions provided for ditches are not adequate to alleviate the enormous burden placed on the entire community. “Ditches” should not be jurisdictional. (p. 1-2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Hackensack Riverkeeper, Hudson Riverkeeper, Milwaukee Riverkeeper, NY/NJ Baykeeper and Raritan Riverkeeper (Doc. #15360)

- 6.667 [F]or the same reasons discussed above, §401.11(2)(iv) should read “Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (I)(1)(i) through (vii) of this section;” instead of the as-written limitation of this exemption to ditches that discharge to just waters identified in paragraphs (I)(1)(i) to (iv). As written, the definition may be read to exempt ditches that drain to tributaries, wetlands, or waters that have a significant nexus to the main waterways [e.g., ditches that discharge into (v), (vi) or (vii) waters]. We trust that such an exemption is not the Agencies’ intent, but there is no reason to invite confusion through the Agencies’ language. (p.15)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Louisiana Environmental Action Network (Doc. #15377)

- 6.668 **Upland Non-Perennially Flowing Ditches Should Not Be Excluded from the Definition of Waters of the United States.**

The Proposed Rule’s exemption of certain ditches from regulation as “waters of the United States” if they “are excavated wholly in uplands, drain only uplands, and have less than perennial flow” unlawfully narrows the jurisdiction of the Clean Water Act. See 79 Fed. Reg. at 22203. First, this exclusion is contrary to the Act’s broad jurisdictional intent because it precludes jurisdiction over waters that the Agencies explicitly recognize often perform the same functions as tributaries – a class of waters that the agencies agree should be categorically protected because of their significant nexus to traditionally jurisdictional waters. See, e.g., *id.* Moreover, EPA provides no scientific basis for categorically excluding these waters. If a ditch functions as a tributary, then it should be regulated as a tributary regardless of its location.

The practical implications of categorically excluding upland ditches will also lead to confusion, inefficiencies, and an enforcement quagmire, i.e. the opposite of the Agencies’ goal for the Proposed Rules. For example, while the Proposed Rules exclude upland ditches from being jurisdictional waters, they remain potential point sources under the law. See 33 U.S.C. § 1362(14) (“The term ‘point source’ means any discernable, confined, and discrete conveyance, including . . . any . . . ditch . . .”). Under current regulations, when a ditch is a tributary and so “waters of the United States,” each set of discharges into that ditch may be regulated at the point of entry. Under the Proposed Rule, however, a pollutant discharges into an upland ditch that is a tributary will not be

regulated until the point of entry into the next downstream tributary (unless it too is an upland ditch) or stream or lake. Such downstream regulation condones dilution, interferes with monitoring, and impedes enforcement. These shortcomings lead to additional questions such as: Who will be responsible for obtaining permits at points of entry into upland “waters of the United States?” How will agencies enforce prohibitions on dilution? See, e.g., 40 C.F.R. § 125.3(f).

In short, the proposed exclusion of all upland ditches is overly broad: EPA and the Corps may not exempt ditches that function as tributaries. The agencies must reject this wholesale exemption and provide for upland ditches to be considered “waters of the United States” whenever they meet the definition of tributaries. Because the science does not demonstrate a functional difference between natural and manmade tributaries, or support the idea that upland ditches can never have a significant nexus to navigable waters, the wholesale exemption of upland ditches from ever being treated as “waters of the United States” is arbitrary, capricious, and an abuse of discretion. (p. 5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Lake County, Illinois Stormwater Management Commission (Doc. #15381)

6.669 The exclusion for ditches as proposed in §328(b)(3) and §328 (b) (4) is unclear. As currently proposed, we believe many miles of constructed roadside ditches and similar drainage ditches along railroad lines, trail systems, etc., in Lake County would not be excluded from WOUS, which would result in a dramatic increase in the number of activities in ditches requiring a permit from the USACE. We suggest simplified language to clarify this important exclusion, such as: "Non-tidal drainage and irrigation ditches that are excavated in uplands and have less than perennial flow. (p. 1-2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Delaware Riverkeeper Network (Doc. #15383)

6.670 Ditches that are not tributaries or that are excavated wholly in uplands, drain only uplands, and have less than perennial flow may still have an effect on nutrient and sediment loading affecting drinking water, beach use, fishing, and other uses. These ditches can drain areas which are identified as wetlands under the Cowardin classification system²²⁴, can provide important services such as the attenuation of nonpoint source pollution, and may drain into jurisdictional waters. For these reasons ditches should not be excluded from jurisdiction. Additionally, the rule should not exclude ditches that commonly receive nutrient and pathogen discharges from non-point sources such as

²²⁴ The Cowardin Classification System is a system of classifying wetlands and deepwater habitats which was developed in 1979 for the Fish and Wildlife Service. More information on the system can be found here: <http://www.fws.gov/wetlands/Documents/classwet/index.html>.

Concentrated Animal Feeding Operations as these ditches act as major conduits for nutrients such as nitrogen and phosphorus.²²⁵ (p. 4)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Save the Illinois River, Inc. (Doc. #16462)

- 6.671 The exclusion in paragraph (t)(4) creates uncertainty, and seemingly could expand jurisdiction waters to embrace all ditches everywhere. By excluding ditches that do not contribute flow indirectly through another water to a jurisdictional water, it seems to imply that ditches that DO so contribute must otherwise be included as jurisdictional waters -- regardless of whether those ditches are adjacent to jurisdictional waters. It is not obvious in the real world whether a ditch might contribute flow directly to waters of the United States, and an indirect connection would be even more difficult to ascertain. We suggest this exemption be limited to only those ditches that do not contribute flow directly to navigable waters. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Tennessee Clean Water Network et al. (Doc. #16537)

- 6.672 **Upland, non-perennially flowing ditches should not be excluded from the definition of Waters of the United States**

We oppose EPA and the Corps' proposed exemption of certain ditches from regulation as "waters of the United States" if they "are excavated wholly in uplands, drain only uplands, and have less than perennial flow."²²⁶ This exemption has been proposed despite the fact EPA and the Corps explicitly recognize elsewhere in the proposed rule that ditches often perform the same functions as tributaries - a class of waters the agencies agree should be categorically protected because of their significant nexus to traditionally jurisdictional waters. According to the proposed rule, a ditch would meet the definition of "tributary" if it has a bed and banks and an ordinary high water mark, and if it contributes flow to a traditionally jurisdictional water. If a ditch, regardless of being located in uplands or having perennial flow, functions as a tributary, then it should be regulated as a tributary.

Achieving the nation's water quality goals critically depends on protecting waters as expansively as the Clean Water Act allows. Excluding waters without a scientific basis is unjustified and undermines the achievement of these goals. The proposed exemption for all upland ditches is overly broad: EPA and the Corps may not exempt ditches that function as tributaries. The agencies must reject this wholesale exemption and provide for upland ditches to be considered "waters of the United States" whenever they meet the

²²⁵ Kroger, R. et al., Nutrient Through Flow, Deposition and Assimilation in Agricultural Drainage Ditches: When and How do Nutrients Move? (2005) available at http://www.ars.usda.gov/research/publications/publications.htm?seq_no_115=185872.

²²⁶ 79 Fed. Reg. at 22, 203.

definition of tributaries. Because the science does not demonstrate a functional difference between natural and manmade tributaries or support the idea upland ditches can never have a significant nexus to navigable waters, the wholesale exemption of upland ditches from ever being treated as "waters of the United States" is arbitrary, capricious, and an abuse of discretion. (p. 4)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Kentucky Waterways Alliance (Doc. #16581)

6.673 KWA objects to EPA and the Corps proposed exemption of certain ditches from regulation as “waters of the United States” if they “are excavated wholly in uplands, drain only uplands, and have less than perennial flow.”²²⁷ This exemption has been proposed despite the fact that EPA and the Corps explicitly recognize elsewhere in the proposed Rule that ditches often perform the same functions as tributaries – a class of waters that the agencies agree should be categorically protected because of their significant nexus to traditionally jurisdictional waters. According to the proposed rule, a ditch would meet the definition of “tributary” if it has a bed and banks and an ordinary high water mark, and if it contributes flow to a traditionally jurisdictional water. If a ditch, regardless of being located in uplands or having perennial flow, functions as a tributary, then it should be regulated as a tributary.

Achieving the nation’s water quality goals critically depends on protecting waters as expansively as the Clean Water Act allows. Excluding waters without a scientific basis for doing so is unjustified and undermines the achievement of these goals. The proposed exemption for all upland ditches is overly broad: EPA and the Corps may not exempt ditches that function as tributaries. The agencies must reject this wholesale exemption and provide for upland ditches to be considered “waters of the United States” whenever they meet the definition of tributaries. Because the science does not demonstrate a functional difference between natural and manmade tributaries, or support the idea that upland ditches can never have a significant nexus to navigable waters, the wholesale exemption of upland ditches from ever being treated as “waters of the United States” is arbitrary, capricious, and an abuse of discretion.

Additionally, the federal register states that “the rule does not affect longstanding exemptions in the CWA for farming, silviculture, ranching and other activities.” EPA simultaneously issued an interpretive rule to clarify those longstanding exemptions, at Docket Id. No. EPA-HQ-OW-2013-0820. KWA disagrees with the proposed extension of these longstanding exemptions, given some of the practices commonly exempted can have substantial impacts to waterways and to water quality. KWA requests this portion of the rule be reconsidered, and that EPA, USDA, and the Corps develop a proposal that that continues to minimize farmers’ paperwork, while also sufficiently and appropriately protecting waters of the U.S. (p. 11-12)

²²⁷ 79 Fed. Reg. at 22, 203.

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The Interpretive Rule was withdrawn January 29, 2015.

George Washington University Regulatory Studies Center (Doc. #13563)

6.674 [D]itches that are excavated entirely in uplands, drain only uplands, and have less than perennial flow are excluded. No definition of “uplands” is provided, however. Ditches with no contribution of flow, directly or through another jurisdictional water, are also non-jurisdictional.²²⁸ (p. 7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Florida Stormwater Association, Inc. (Doc. #7965.1)

6.675 Ditches are excluded if they are built in uplands, drain uplands and have less than perennial flow. But in Florida’s coastal areas and most inland areas, there are many ditches that are built in and drain uplands but have significant groundwater inputs. Since they have constant flows, they may be WOTUS even if constructed in uplands. (p. 31)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Society for Freshwater Science (Doc. #11783)

6.676 SFS takes issue with the first group of excluded waters (ditches excavated wholly in uplands but connected to downstream waters). Constructing such ditches and connecting them to streams immediately makes them part of the tributary network and, therefore, able to carry and deliver contaminants/pollutants and to support aquatic life. Ditches that are disconnected from the tributary system are one matter, but those connected to the tributary system become tributaries and should have jurisdiction extended to them. It is, otherwise, unprotective and not scientifically defensible to exclude them. Moreover, in many regions, having to define where a headwater channel, channelized natural channel, and constructed ditch begin and end is logistically infeasible and ecologically meaningless, in our opinion. (p. 5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The agencies believe that the final rule’s exclusions are consistent with longstanding agency policy.

Iowa Stormwater Education Program MS-4 (Doc. #14511)

6.677 The following is new revised rule language that we recommend be added to this rule. It is expressed in a format appropriate for the proposed revisions to Part 328, Section 328.3.

²²⁸ 9 FR 22266.

We request that similar language, revised as appropriate, be added to each section included in this rule.

Added to PART 328—DEFINITION OF WATERS OF THE UNITED STATES § 328.3

(b) The following are not “waters of the United States” notwithstanding whether they meet the terms of paragraphs (a)(1) through (7) of this section - (5) The following features:” (and other similar sections)

(viii) Fully-constructed stormwater control measures.

(ix) Roadside ditches (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. With respect to the jurisdictional status of stormwater control measures as waters of the U.S., please see summary response at 7.4.4.

Florida Stormwater Association (Doc. #14613)

6.678 [I]n coastal and other low-lying areas where high groundwater tables exist, it is common for ditches that are built in and drain uplands to have significant groundwater inputs. Since they have constant flows, the exemption would not apply to these types of waters. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Water Environment Federation (Doc. #16584)

6.679 The proposed rule provides exceptions for ditches that are generally created in uplands and drain uplands, but it does not define upland. It gives specific exceptions but does not speak to the limits of those exceptions in terms of ditch length. For instance, roadside ditches often have characteristics of both perennial tributaries and of dry upland wet weather ditches along their sometimes very long lengths. The proposed rule promotes protection of water quality and addresses ditches, but it does not mention green infrastructure. Ditches that treat runoff are elements of green infrastructure. WEF’s position is that by not being clear on this issue, it may be inadvertently impacting the future adoption of green infrastructure activities as they relate to ditches. (p. 6)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Section IV(I) of the preamble to the final rule includes green infrastructure in its description of stormwater management features that may be excluded under paragraph (b) of the final rule.

California Stormwater Quality Association (Doc. #16606)

6.680 [W]ith respect to the issue of perennial flow, the Proposed Rule does not determine how much flow is necessary in a ditch to be considered perennial flow. Rather, the Proposed Rule states that perennial flow would mean that flow in the ditch occurs year-round under normal circumstances. (79 Fed. Reg. 22188, 22219 (April 21, 2014).) Further, the

Proposed Rule is specifically requesting comment on the flow regime that should be identified for the ditch to be excluded from being a WOTUS, and suggests that perhaps the flow regime should be less than intermittent. Regardless of the flow regime distinction, stormwater conveyance channels and ditches that convey persistent dry weather urban runoff, or that convey comingled flow from urban areas and other land uses during dry weather (e.g., tile drain discharge, naturally occurring groundwater, or agricultural runoff) could be considered WOTUS under the Proposed Rule.

[W]ith respect to the issue of connectivity, to fall within the ditch exclusions, a ditch could not contribute flow directly or indirectly to the tributary system of a traditional navigable water. This would mean that a stormwater conveyance channel that meets the definition of ditch in all other aspects would not be excluded if somewhere within the conveyance system it connects, even arguably through an “outfall,” to a tributary of a traditional navigable water. As discussed above, such an approach is nonsensical because stormwater conveyance channels are considered “point sources” under the CWA, and their discharges to WOTUS are permitted and regulated under CWA section 402.

To ensure that MS4 conveyance facilities that otherwise qualify as ditches are properly excluded, CASQA recommends that a third category of “ditches” be added to the exclusions. Accordingly, we recommend the following category be added:

6.681 **Ditches that are created or maintained as part of a municipal separate storm sewer conveyance system and that are managed as part of a municipal separate storm sewer conveyance system subject to requirements under section 402(p) of the CWA.** (p. 8)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. With respect to the jurisdictional status of stormwater control measures as waters of the U.S., please see summary response at 7.4.4.

National Association of Flood & Stormwater Management Agencies (Doc. #19599)

6.682 The (b)(3) Ditches exemption is also unclear. Strict interpretation would not exempt ditches that eventually drain to jurisdictional water as is often the case. Even if the ditch meets the exemption criteria of being excavated in uplands, drains only uplands, and has less than perennial flow, the exemption seems to be unclear since ditches eventually into jurisdictional water. Please clarify that upland ditches excavated wholly in uplands, draining only uplands, and having less than perennial flow are exempt, even if they drain (eventually) to Traditional Navigable Waters. Furthermore, NAFSMA requests ditches that are wholly the result of human operations to also be exempt. (p. 2-3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. With respect to the jurisdictional status of stormwater control measures as waters of the U.S., please see summary response at 7.4.4.

Jon Tester, Senator, United States Senate (Doc. #10625)

6.683 Farmers have also raised concerns regarding the treatment of upland ditches. The proposed jurisdictional rule states that upland ditches will be exempt from permitting but guidance on the EPA website defines those ditches as those "that are excavated wholly in uplands, drain only uplands, and have less than perennial flow." I believe this definition does not provide enough clarity for the agriculture community and urge you to work with stakeholders to ensure producers understand what constitutes an "upland ditch." (p. 1)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Patrick Leahy, et al, United States Senate (Doc. #19655)

6.684 Farm drainage and ditches also raise significant concerns. EPA and the Army Corps clearly state in the proposed rule that upland ditches are exempt from permitting. In a guidance document on the EPA website, it states that the agency intends to include ditches collecting runoff or drainage from crop fields as upland ditches. However, the rule itself mentions only "ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow." Many producers are concerned because their farms contain fields in floodplains. Because the ditches on these low-lying fields would not be considered upland ditches, they are concerned that these ditches are now jurisdictional. Can you please address this concern? (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

AES-US Services (Doc. #3242)

6.685 Need clarification re' exemption for ditches. (p. 1)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Wetland Science Applications, Inc. (Doc. #4958.2)

6.686 Regarding (3) "No ditches, other than those that are **channelized streams** should be regulated". They are defined as point sources in Section 502 of the CWA. However, if the Final Rule adopts these changes then I support the requirement that flow be perennial. In many instances it will be difficult if not impossible to establish that a ditch "drains only uplands." I suggest that the phrase be deleted and base the concept on whether or not the ditch is cut through something that was a water of the U.S. prior to excavation of the ditch. That will avoid having to do complex ellipse equation computations. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

K. Mantay (Doc. #15192.1)

6.687 **Concrete Ditches**

Comment: Corps and EPA employees have regulated concrete swales alongside highways as ephemeral streams, intermittent streams, and even federal wetlands ("other waters") in the past. Mitigation has been required to relocate these "resources," such as they are, in at least two states. EPA's claim that such judgments would not occur under the Proposed Rule do not take into account this history, or likely agency culture to continue to regulate concrete ditches, as they have been doing for the last 20 years.

Recommendation: Add language to the New Rule explicitly exempting from regulation "ephemeral ditches or channels whose hydrology is dominated by roadway runoff leading directly to the channel." Add specific language exempting swales whose base is covered in rip rap, cement, asphalt, gabion, or other placed structure, providing that such placement was done in accordance with CWA regulations in place at that time. (p. 4)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches and similar features were edited and clarified for the final rule.

O'NEIL LLP (Doc. #16559)

6.688 The Proposed Rule identifies a number of categories of waters that previously have not generally been regulated by the Corps. Two of these are: (1) "Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" and (2) "Ditches that do not contribute flow either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or impoundment." The Agencies must clarify that for the first category of ditches, those ditches excavated through wetlands or other waters prior to the enactment of the CWA meet the criteria of "being excavated wholly in uplands." Given that almost any ditch or canal excavated in some areas would likely have crossed some sort of jurisdictional water (historically), the Agencies must clarify that ditches excavated prior to regulation under the CWA of the areas where they exist meet this criterion. Also, it is important for the Agencies to clarify what is meant by "ditches that 'drain only upland.'" It is not unlikely that during large storm events, drainage courses could overflow, resulting in spillage into nearby ditches such that the ditches capture water from other than upland sources, even if only during extreme years. The Agencies should be clear that the Rule is not attempting to (and does not) include such ditches within the definition of waters of the United States.

As to the Agencies' question of the public as to the standard for the flow regime in such ditches to qualify for exclusion of regulation under the CWA, the standard should be "less than perennial flow" to qualify for the exclusion.

Also, the Agencies must provide clarification regarding the second category of ditches, ditches that "do not contribute flow, either directly or through another water, to traditional navigable waters". Given that the Agencies are proposing in this new Rule that other types of connectivity are sufficient to establish connectivity of waters, the Agencies need to clearly state that in this instance, connections such as "subsurface" connections or "biological" connections are not sufficient to established "connectivity" and therefore jurisdiction. (p. 7-8)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Section III of the preamble to the final rule and section II of the Technical Support Document describes the agencies' approach to applying the "significant nexus" standard.

Robert J. Goldstein & Associates (Doc. #16577)

- 6.689 **Ditches excavated in uplands, draining only uplands:** This exclusion could conceivably be applied to many channelized natural streams in developed upland areas, and also channelized streams or ditches through former wetlands that were converted to non-wetland by excessive drainage. Ditched and drained wetlands that no longer qualify as wetlands (due to lowered hydrology) occupy extensive areas throughout the Coastal Plain. Not all of these areas should be excluded from WOTUS, especially the ditches themselves, many of which are channelized natural streams and currently provide water quality and aquatic habitat values. (p. 1-2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

SC Chamber of Commerce Comments (Doc. #14535)

- 6.690 The exemption requires that the ditch also must have "less than perennial flow," which is not defined in the proposed rule, but the preamble states that "[p]erennial flow means that the flow in the ditch occurs year-round under normal circumstances." See 79 Fed. Reg. at 22219. It seems that the inclusion of ditches will still be an expansion of coverage because ditches are man-made structures and should be excluded regardless of flow regime. (...)

EPA needs to state clearly that a ditch does not lose its exemption as "excavated wholly in uplands" just because the discharge end of the ditch is not in an upland. Otherwise: (a) this exemption would be of very limited application, because it would predominantly be limited to ditches with no outlet (or whose only outlet is to another exempt water), and (b) the exemption would be redundant in many, if not all, cases with the other exemption for ditches "that do not contribute flow, either directly or through another water, to a" traditional navigable water (excluding tributaries and adjacent waters), in proposed section 122.2(b)(4). (p. 6-7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

6.2.1. *Ditches that are Excavated Wholly in Uplands, Drain only Uplands, and have Less than Perennial Flow*

Specific Comments

State of Iowa (Doc. #8377)

- 6.691 Upland Ditches are not considered "waters of the U.S." We support the intent of this exemption; however the wording in the rule should be revised in any future rule to

provide more clarity and less narrow conditions for meeting this exemption. A ditch meeting any of the listed conditions should be exempt, as opposed to having to simultaneously meet all three conditions listed in the rule in order to achieve exemption. The statement that these ditches have "less than perennial flow" could be worded more explicitly to include ephemeral or intermittent flow or simply say that they do not carry a relatively permanent flow of water. In Iowa, ditches located in relatively flat terrain are known to develop wetland characteristics simply because the water does not drain. The preamble to the rule indicates these types of ditches would not be jurisdictional; it would be better to clearly state this in the rule. (p. 8)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Texas Department of Transportation (Doc. #12757)

- 6.692 We are concerned with the term "wholly" in that it might imply that the full length of the ditch would become jurisdictional if only a part was excavated in jurisdictional waters. The application of this term could extend the boundaries of jurisdiction, contradicting the intent not to expand the current geographic boundaries of waters of the U.S.

The condition in this exclusion requiring that the ditch "drain only uplands" could be problematic in the field. It would appear that an analysis of the drainage area of a ditch would be required for this determination. This analysis could extend beyond the project site to include the upstream limits of the watershed. This analysis would not only add cost but could be the subject of extended deliberation during the permitting process. We are also concerned that this exclusion could be precluded by an offsite sheet-flow connection or a flood-condition connection to an upstream jurisdictional water. For example, when flooding occurs in a topographically flat area, hydrologic connections may occur that do not exist during normal conditions.

Additionally, applying the "drain only uplands" condition could result in ditch excavation in uplands (i.e., where there is no fill in waters of the U.S.) as a jurisdictional activity. Again, this could extend the boundaries of jurisdiction, contradicting the intent not to expand the current geographic boundaries of waters of the U.S.

Recommendation: We recommend deleting the terms "wholly" and "drain only uplands" for the reasons stated above. (p. 2-3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

New Mexico Department of Agriculture (Doc. #13024)

- 6.693 Upland Ditches - (t) (3). "Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow."

The exclusion requirements for ditches rests upon the term uplands, the definition of which is not found anywhere in the proposed rule. According to the proposed rule, ditches are excluded only if they "are excavated wholly in uplands, drain only upland s,

and have less than perennial flow." EPA has the responsibility to adequately describe criteria that is pertinent to classification.

In addition to the ambiguity resulting from lack of a definition, this clause is arbitrarily stringent. In the context of irrigated agriculture, a ditch's relationship to uplands and its flow perennality are not sufficient or even necessary conditions of a ditch.

How will agricultural producers know when ditches are excluded given the confusing nature of this exclusion? To provide consistency and clarity, NMDA requests a visual tool, perhaps in the form of a decision tree, to simplify what ditches are and are not jurisdictional. (p. 9)

Agency Response: See summary response for section 6.2.

Alabama Department of Transportation (Doc. #14116)

6.694 EPA and the Corps have requested comment on whether or not the first exemption should be for upland ditches with less than perennial flow or some lesser flow threshold. Due to the significant number of miles of roadside ditches with intermittent and ephemeral flows, and the high cost-to-benefit ratio potentially achieved by removing the exemption for these ditches, ALDOT recommends keeping the less-than-perennial threshold. Furthermore, the term, perennial, is widely accepted, understood, interpreted, and determined in the field. Intermittent and ephemeral flows are not as well understood or defined.

The term, upland, is not defined in the proposed rule. With this term playing such a critical role in the determination of exemption, it must be defined. ALDOT currently understands that the term generally means, an area that is not a wetland, stream, or lake, or other water body. This definition would be acceptable to ALDOT for inclusion in the rule.

It is unclear how jurisdiction will be determined when only a portion of a ditch meets the exclusion criteria. The term, wholly, in the first exclusion for ditches indicates that the entire length of ditch will be jurisdictional if a part meets the perennial threshold. ALDOT suggests that all portions of the ditch that meet the exclusion standard be excluded from jurisdiction, and only those parts of the ditch that meet the definition of "Waters of The United States" be considered jurisdictional. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

California State Water Resources Control Board (Doc. #15213)

6.695 Specific recommended changes to the proposed regulations are shown in strikeout/underline format.

Ditches segment segments of ditches that are excavated wholly in uplands, drain only uplands, WUS (and have less than perennial²²⁹ intermittent flow. (p. 5)

Agency Response: See summary response for section 6.2 a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Department of Public Health and Environment, State of Colorado (Doc. #16342)

6.696 In addition, one part of the uplands exclusion for ditches requires that the ditch "drain only uplands." There is confusion regarding whether this phrase is intended to mean (1) the ditch drains only into uplands areas, or (2) the ditch must have been constructed in order to drain upland areas to allow farming or construction. If EPA's intended meaning is the former, Colorado suggests that the agencies provide clarity by revising the language to read "drain only to uplands".

If the agencies' intended meaning is the latter, there is confusion regarding the outcome if a ditch had been constructed with the motivation to drain only an uplands area but over time drains other areas as well. Colorado would propose that the original motivation for the construction of the ditch should control, and therefore even if future conditions result in the ditch draining other areas as well the ditch does not become jurisdictional. The regulation should be modified to state "Ditches that are excavated wholly in uplands; and in order to drain ~~only~~ uplands, and have less than perennial flow." (p. 2-3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Office of the Governor, State of Utah (Doc. #16534)

6.697 The Proposed Rule identifies two types of roadside ditches as non-jurisdictional: "Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" and "Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4)" - i.e., to traditionally navigable waters. While aiming for clarity, EPA and Army fail to define the word "uplands" in either the proposed or current rule. The term needs to be defined or the wording should be changed to "terrestrial ecosystem" which is the terminology currently used by EPA.

The preamble to the Proposed Rule also provides "[h]istorical evidence, such as photographs, prior delineations, or topographic maps, may be used to determine whether a water body *was excavated* wholly in uplands and drains only uplands, and has less than

²²⁹ The distinction between ditches excluded under proposed (t)(3) and ditches that meet the proposed definition of "tributary" is not clear, because "tributary" includes man-made ditches. If the ditch is not connected to a water of the United States and is not abandoned, then the flow regime may not be relevant. For ditches that are connected to waters of the United States, if the intent of the proposed (t)(3) exclusion is to be consistent with the significant nexus test, then an intermittent flow regime would be more appropriate than a permanent flow regime, particularly for arid and semi-arid areas. Alternatively, the simplest approach may be to treat all ditches that are excavated wholly in uplands and drain only uplands as potential point sources, rather than waters of the United States, without regard to flow regime. This approach could be limited to ditches that are not abandoned, and would include the upland portions of municipal separate storm sewer systems.

perennial flow."²³⁰ (emphasis added). This implies that the determination of whether the ditch was "excavated wholly in uplands" looks at the conditions that existed at the time the ditch was created. However, the preamble contradicts itself by stating "Ditches that **are excavated** wholly in uplands means ditches that at no point along their length are excavated in a jurisdictional wetland (or other water)." The use of the present tense refers to present conditions, rather than conditions at the time of construction. The preamble should be changed to state explicitly that "excavated wholly in uplands" means that the ditch was *originally constructed entirely in uplands*.

The state is also concerned that the term "excavated in" could be interpreted broadly to mean any ditch that is currently *located in* wetlands at any point, even when the wetlands are confined to the ditch itself and formed after the ditch was initially constructed. This interpretation would be inconsistent with the plain meaning of "excavate" which refers to the act of removing or digging out.²³¹ Even so, the state is concerned that the phrase "excavated in" could be misinterpreted to refer to ditches located in wetlands at any point, including ditches that produce wetlands solely because the ditches are excavated. The preamble should specifically state that the emergence of wetlands and vegetation in a ditch following initial construction does not prevent a finding that the ditch was "excavated wholly in uplands." (p. 6-7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

City of Chesapeake (Doc. #9615)

6.698 The City of Chesapeake supports the proposed exemption for ditches that have less than perennial flow. To characterize exempted ditches with "less than intermittent" flow could be too restrictive on the City's roadway and drainage maintenance and retrofitting activities. Perennial flow hydrology is an appropriate threshold because most perennial streams, at least within the Elizabeth River watershed are already regulated by the Chesapeake Bay Preservation Act (CBPA) and the Virginia Marine Resources Commission (VMRC). (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Pasco County, Florida (Doc. #9697)

6.699 There are potential ambiguities about the meaning of "perennial flow" in the exclusion for ditches. The first sentence quoted above implies that the mere presence of water, even standing water, could be considered "flow." The second sentence attempts to address that concern by noting that "water that only stands or pools" is not perennial flow, but that sentence actually heightens our concerns by implying that the year-round presence of water will be considered "perennial flow" unless it can be established that the water "only

²³⁰ See 79 Fed. Reg. 22203.

²³¹ See "Excavate." Merriam-Webster.com (Accessed May 22,2014), available at <http://www.merriamwebster.com/dictionary/excavate>

stands or pools" throughout the year. This suggests that year-round presence of water is "perennial flow," unless the water never flows at all.

Recommendation: The final regulations should clearly state that "less than perennial" includes ditches with intermittent and ephemeral flow. Under this approach, a ditch with intermittent or ephemeral flow would qualify for the exclusion if it is excavated in uplands and drains-only uplands. Also, differences in regional conditions and hydrologic processes/patterns should be recognized, and regional guidance should be developed and published. (p. 4)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. While the rule aims to respect regional differences, its primary goal is to promote national consistency in the definition of jurisdictional waters of the United States.

Brown County (Doc. #13603)

- 6.700 Under the listing of what are not waters of the US item (iii) Ditches in uplands with less than perennial flow is somewhat vague as there is no definition for uplands. In the explanation it states that this means that "at no point along their length are excavated in a jurisdictional wetland (or other water)." We would propose to use the explanation statement rather than the term "uplands". We agree with the restriction of less than perennial flow, if there is perennial flow there would need to be a jurisdictional determination based on if the ditch had a significant nexus to downstream water quality. (p. 1)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

U.S. Chamber of Commerce (Doc. #14115)

- 6.701 The proposed rule would exclude "ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow." We presume that the term "uplands" refers to areas that are not waters or wetlands. However, limiting the exclusion to those ditches excavated wholly in uplands (along the entire length of the ditch) and draining only uplands will ensure that most ditches are categorically deemed to be tributaries. Given that the essential purpose of ditches is to carry water, ditches will tend to develop wetland characteristics at some point along their length. In addition, many ditches will be excavated at least in part in areas that could be classified as "wetland" or as an "ephemeral." These broad limitations on the so-called "upland ditch exclusion" render this exclusion meaningless. They also place an unacceptable burden on the regulated community to analyze the current and historical hydrology of the particular features in and around their property, and even beyond their own property line, in order to make an informed decision about the jurisdictional status of a ditch. (p. 34)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Kerr Environmental Services Corp. (Doc. #7937.1)

- 6.702 “Ditches that are excavated wholly in uplands, drain only uplands and have less than perennial flow.” Kerr Environmental Services has recently completed a jurisdictional determination and delineation involving over 58,000 linear feet of man-made ditches and channelized tributaries. We believe this item is defined consistently with how the USACE has evaluated man-made ditches historically and since the Rapanos rules. We recommend only one changes to this item, other than defining uplands (see below), and that is to add the following: “non-jurisdictional ditches include swales, sloughs and all other man-made conveyances of drainage other than those that contain perennial flow or have channelized natural tributaries. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. Paragraph (b) of the final rule excludes non-wetland swales and ditches with less than perennial flow, unless the ditch is a relocated tributary or was excavated in a tributary or unless the ditch drains a wetland and has at least intermittent flow. Section IV(I) of the preamble describes the final rule’s exclusions in general, and Topic 7 of this RTC is devoted exclusively to comments and responses regarding the exclusions.

Commercial Real Estate Development Association (Doc. #14621)

- 6.703 Definition of Upland Ditches and Uplands.

There is confusion as to what is meant by the term “upland ditches.”²³² To eliminate this confusion, we suggest the following definitions be added in §328.3(c): Uplands. The term uplands means those land area that are not below a waterbody (i.e., subaqueous) and not a wetlands.

Upland Ditches. The term uplands ditches means ditches that are excavated wholly in uplands and were not constructed to relocate a stream defined as a WOTUS in §328.3(a). (p. 7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule

Kennewick Irrigation District Kennewick, WA (Doc. #13571)

- 6.704 Due to the fact that most irrigation ditches and drains in the arid west that contain perennial flow only do so because of the artificial, intentional nature of irrigation operations and practices, the agencies should revise the proposed exemptions listed in paragraph (b) (3) for "ditches excavated wholly in uplands" to exclude irrigation and agricultural drainage ditches entirely, regardless of flow regime from the definition of "tributary," instead of the proposed flow regime of less than perennial flow. This small change in the rule would clearly exclude most irrigation ditches and canals from the definition of tributary, and would have a positive impact on the agricultural operations

²³² EPA’s Q&A #20 addressed part of this issue. Including these terms as definitions will end any confusion.

that are the foundation of economic development in many areas of the western United States. (p. 5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

North Carolina Farm Bureau Federation (Doc. #15078)

- 6.705 In response to the Agencies' request for comment: we do not support a ditch exclusion based on "less than intermittent flow." Such a limitation would make the ditch exclusion even narrower than the already narrow proposed exclusion. If the Agencies further restrict the ditch exclusion, even fewer ditches would qualify for the exclusion-and many ditches would become jurisdictional intermittent tributaries. This would interfere with even more activities on farm and forestland and would seriously impede the ability of farmers and forest landowners to reasonably manage their land to produce food and fiber. (p. 11)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

National Alliance of Forest Owners (Doc. #15247)

- 6.706 The scope of the first ditch exclusion is unclear because the proposed rule does not define "uplands," though it has been stated that upland is any area that is not a wetland. To improve clarity in the rule, we recommend that the Agencies add a definition of "upland" to the text of any final rule. We note that the "three parameter" classification system outlined in the Corps' 1987 Wetlands Delineation Manual requires that, for an area to be classified as a wetland, it must have three attributes: (i) prevalence of hydrophytic vegetation; (ii) hydric soils; and (iii) permanently or periodically inundated or soils saturated to the surface at some time during the growing season. Conversely, uplands are defined by the Corps in the same manual as an area where one or more of these three attributes is not present. (p. 21)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

- 6.707 The Agencies should also clarify that they intend to maintain the existing practice that all three "wetland" attributes must be met for delineation of a wetland and that the absence of any one of these attributes defines an upland, wherever it occurs.

Furthermore, the preamble to the proposal states that ditches must be excavated in uplands "for their entire length" for the exclusion to apply.²³³ But very few ditches can satisfy this requirement. Because ditches are designed to carry rainwater, they are typically excavated in lower lying areas at the end of their reach and thus, it is very likely that at some point along their length, the ditch will have been excavated in what the Agencies would consider to be an ephemeral tributary or a low area that could now be classified as a jurisdictional wetland. Moreover, it may be extremely difficult for forest

²³³ 79 Fed. Reg. 22,203

owners to prove that a ditch was excavated wholly in uplands for its entire length. The preamble to the proposed rule does not clearly explain what evidence a forest owner must point to when trying to prove excavation wholly in uplands. The vast majority of ditch systems in the forest would thus fail to meet the exclusion on this basis alone.

The first ditch exclusion also requires that the ditch drain only uplands, which presumably means that the ditch cannot receive flow, no matter how minimal, from any water of the United States. The “drains only uplands” requirement will further ensure that almost no ditches can meet the exclusion. The Agencies have steadily broadened their view of what constitutes a wetland by, among other things, expanding the types of wetland vegetation. A ditch that was excavated several decades ago on what was considered uplands at the time might now be characterized by the Agencies as a jurisdictional wetland. Moreover, some ditches may develop wetland characteristics over time as a result of conveying water. Finally, in hilly or mountainous forests, roadside ditch systems sometimes receive minimal flow from small, hillside streams. As the first ditch exclusion is currently drafted, it would not apply to any of the ditches under these three scenarios. (p. 22)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. The final rule does not change the delineation of wetlands in the field using the 1987 Wetland Delineation Manual and/or applicable regional supplements published by the U.S. Army Corps of Engineers.

Weyerhaeuser Company (Doc. #15392)

- 6.708 The first ditch exclusion also requires that the ditch drain only uplands, which presumably means that the ditch cannot receive flow, no matter how minimal, from any water of the United States. The “drains only uplands” requirement will further ensure that almost no ditches can meet the exclusion. The Agencies have steadily broadened their view of what constitutes a wetland by, among other things, expanding the types of wetland vegetation. A ditch that was excavated several decades ago on what was considered uplands at the time might now be characterized by the Agencies as a jurisdictional wetland. Moreover, some ditches may develop wetland characteristics over time as a result of conveying water. Finally, in hilly or mountainous forests, roadside ditch systems sometimes receive minimal flow from small, hillside seeps or streams. As the first ditch exclusion is currently drafted, it would not apply to any of the ditches under these three scenarios. [...]

[T]he Agencies should not require that ditches drain only uplands for their entire length. Rather, the Agencies should state that the exclusion still applies to all portions of the ditch system that are upstream of the point where the ditch drains a jurisdictional wetland. Moreover, the Agencies should allow the exclusion to apply to ditch systems that receive minimal flow at times from intermittent and ephemeral streams.

[T]o the extent a ditch system has varying flow characteristics (i.e., a portion flows perennially but the remainder does not), the Agencies should clarify that the upland ditch exclusion applies to any portions of the ditch system that have less than perennial flow. (p. 7-8)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

American Forest & Paper Association (Doc. #15420)

6.709 The exemption requires that the ditch also must have “less than perennial flow,” which is not defined in the proposed rule, but the preamble states that “[p]erennial flow means that the flow in the ditch occurs year-round under normal circumstances.” See 79 Fed. Reg. at 22219. EPA staff have clarified that ditches that do not carry water for 12 months a year and ditches that are dried out for at least a month during the year meet this requirement. This should be made clear in any final rule language.

Finally, EPA needs to state clearly that a ditch does not lose its exemption as “excavated wholly in uplands” just because the discharge end of the ditch is not in an upland. Otherwise: (a) this exemption would be of very limited application, because it would predominantly be limited to ditches with no outlet (or whose only outlet is to another exempt water), and (b) the exemption would be redundant in many, if not all, cases with the other exemption for ditches “that do not contribute flow, either directly or through another water, to a” traditional navigable water (excluding tributaries and adjacent waters), in proposed section 122.2(b)(4). (p. 10)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

National Sustainable Agriculture Coalition (Doc. #16357.1)

6.710 The Agencies limit excluded “upland” ditches to those with less than perennial flow and that are excavated wholly in uplands and drain only uplands.²³⁴ Relatively few ditches will qualify for this exclusion because most ditches will be excavated in a (now) jurisdictional ephemeral, will contain wetlands somewhere along their length, or will during large rainfall events receive overflow from some wetland or other waterbody. See 79 Fed. Reg. 22,203 (exclusion covers only ditches excavated in uplands rather than wetlands or other types of waters “for their entire length”). The Agencies will not look only at the ditch as it currently exists, but also to “[h]istorical evidence, such as photographs, prior delineations, or topographical maps, that may be used to determine whether a water body was excavated wholly in uplands and drains only uplands, and has less than perennial flow.” Id. (p. 9)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

²³⁴ The proposed rule articulates an additional “exclusion” for ditches that “do not contribute flow” of any amount to actual navigable waters. However, such ditches would not meet even the expansive “tributary” definition anyway. Further, such ditches are presumably quite rare, because the primary purpose of ditches is to carry water.

California Farm Bureau Federation (Doc. #16399)

6.711 Notwithstanding the concerns and flaws raised within, Farm Bureau presents the following concepts that may provide additional clarity within the Proposed Rule:

- d. Define the term “uplands.”
- e. Expand the Proposed Rule’s exclusions for ditches, and clarify the requirement that ditches must be excavated in uplands for the entire length in order to be deemed not to be tributaries or waters of the U.S. (p. 20)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Georgia Department of Transportation (Doc. #14282.1)

6.712 "Less than perennial flow"

The preamble to the proposed rule explains that "Perennial flow means that water is present in a tributary year round when rainfall is normal or above normal." It also states that "Under this exclusion, water that only stands or pools in a ditch is not considered perennial flow and, therefore, any such upland ditch would not be subject to regulation."

We are concerned that the explanation in the preamble leaves significant ambiguities about the meaning of "perennial flow" in the exclusion for roadside ditches. The first sentence quoted above implies that the mere presence of water - even standing water - could be considered "flow." The second sentence attempts to address that concern by noting that "water that only stands or pools" is not perennial flow (emphasis added). But that sentence actually heightens our concerns by implying that the year-round presence of water will be considered "perennial flow" unless it can be established that the water "only stands or pools" throughout the year. In other words, the preamble suggests that year round presence of water is "perennial flow," unless the water never flows at all.

Recommendation: The final regulations should clearly state that "less than perennial" includes ditches with intermittent and ephemeral flow. Under this approach, a ditch with intermittent or ephemeral flow would qualify for the exclusion if it is excavated in uplands and drains only uplands. We believe this clarification is consistent with the intent of the proposed regulation. It also is consistent with current guidance, issued in 2008, which stated that the agencies generally would not assert jurisdiction over "ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water." (2008 Guidance, p.1).⁶ Also, we note that the preamble specifically requests comment on the appropriate flow regime to be used in this exclusion - that is, whether the exclusion should apply to ditches with "less than perennial flow" or "less than intermittent flow." As our previous comments make clear, we strongly believe that this exclusion should apply to ditches with less than perennial flow.

"Excavated only in uplands"

The preamble to the proposed rule explains that, in determining the applicability of this exclusion, "Historical evidence, such as photographs, prior delineations, or topographic

maps, may be used to determine whether a water body was excavated wholly in uplands and drains only uplands, and has less than perennial flow." (79 Fed. Reg. 22203) (emphasis added). This statement implies that the phrase "excavated wholly in uplands" refers to the conditions that existed at the time the ditch "was excavated" - i.e., when it was created. Elsewhere, however, the preamble is less clear. For example, in one place, the preamble states that "Ditches that are excavated wholly in uplands means ditches that at no point along their length are excavated in a jurisdictional wetland (or other water)." The use of present tense - "are excavated" - could be interpreted to refer to present conditions, rather than conditions at the time of construction.

We are concerned that term "excavated in" could be interpreted broadly to mean any ditch that is currently located in wetlands at any point, even when the wetlands are confined to the ditch itself and formed after the ditch was initially constructed. We believe that interpretation would be inconsistent with the plain meaning of "excavate" - which refers to the act of removing or digging out.' Nonetheless, there is some risk that the phrase "excavated in" could be misinterpreted to refer to ditches located in wetlands at any point, including ditches in which the only wetlands are those that developed after the ditch was constructed.

Recommendation: The final regulations should clearly state that "excavated wholly in uplands" means that the ditch was originally constructed entirely in uplands. The rule also should specifically state that the emergence of wetlands vegetation in a ditch following initial construction does not prevent a finding that the ditch was "excavated wholly in uplands."

"Drains only uplands"

The preamble does not explain how the agencies will determine whether a ditch "drains only uplands." Recommendation: We believe some clarification is needed regarding this requirement. Specifically, the rule should clarify that the exclusion can be applied to a ditch even when wetlands (or wetland-like features) are present in the ditch itself - for example, where wetlands emerged following the construction of the ditch. (p. 3-4)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Central Massachusetts Regional Stormwater Coalition (Doc. #15443.1)

- 6.713 Proposed Rule, §328.3(b)(3). The definition in this section of the Proposed Rule would exclude ditches that "have less than perennial flow". We recommend a definition that affirmatively excludes ditches with limited hydrology and that convey flow only under limited conditions.

We offer wording more consistent with the MS4 program, such as:

6.714 "(3) Ditches that are excavated wholly in uplands, drain only uplands, and that carry flow only during storm events or snow melt."

This definition is inclusive of ditches that convey flow that could regularly contribute pollutants to a WOTUS but limits ephemeral and intermittent ditches from being considered a WOTUS. (p. 1)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. With respect to the jurisdictional status of stormwater control measures as waters of the U.S., please see summary response at 7.4.4.

Sacramento Stormwater Quality Partnership (Doc. #17005)

- 6.715 Ditches that have perennial flow, or that contribute flow to a traditional navigable water, interstate water, the territorial seas, or an impoundment of a jurisdictional water are not excluded. First, with respect to the issue of perennial flow, the Proposed Rule does not determine how much flow is necessary in a ditch to be considered perennial flow. Rather, the Proposed Rule states that perennial flow would mean that flow in the ditch occurs year-round under normal circumstances. (79 Fed. Reg. 22188, 22219 (April 21, 2014)). Further, the Proposed Rule is specifically requesting comment on the flow regime that should be identified for the ditch to be excluded from being a WOTUS, and suggests that perhaps the flow regime should be less than intermittent. Regardless of the flow regime distinction, stormwater conveyance channels that convey persistent dry weather urban runoff, or that convey comingled flow from urban areas and other land uses during dry weather (e.g., tile drain discharge or agricultural runoff) could be considered WOTUS under the Proposed Rule. (p. 8)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Wyoming State Engineer Office (Doc. #15496)

- 6.716 Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow and ditches that do not contribute flow, either directly or through another water to a water identified as "waters of the United States."

This exemption appears to mirror the rationale provided in the October 2014 Science Advisory Board Report "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of Scientific Evidence," which describes ditches as conveyance systems capable of connecting wetlands, rivers or streams systems. These connections demonstrate the physical, biological, and chemical criteria that establish the "significant nexus" for EPA to draft new rules extending broader reach of jurisdictional controls over ditches.

The problem with this proposed approach is that many ditches and canals, like those in Wyoming, commonly divert water from streams, lakes, reservoirs, and/or ponds from areas that may not be considered uplands. In more complex settings, ditches and canals transport irrigation water across water basins using a system of streams, reservoirs or lakes. Under the proposed rule, these ditch and related networks may be considered jurisdictional.

The proposed rule also defines perennial flow as "water present in a tributary year round when rainfall is normal or above normal." The exemption for ditches states that they must have less than perennial flow. This formulation fails to recognize how water originates in Wyoming ditches. Wyoming irrigation ditches receive water from diversion structures

situated in streams, lakes, rivers, ponds, or reservoirs and carry water during the irrigation season between May through September. The proposed definition of perennial flow therefore does not fit the field conditions in Wyoming. Rainfall is simply just one contributing factor that determines whether ditches contain water.

EPA's definition of exempt ditches clearly does not fit how irrigation ditches are used and constructed in Wyoming. If the proposed rule is finalized, farmers and ranchers will be faced with great uncertainty as to whether their ditches and canals might be considered jurisdictional. Wyoming also maintains that trans-basin ditch and canal systems do not alter, change, or modify the physical, biological and chemical properties of the receiving waters and therefore should be exempt from jurisdictional determination.

Adding to the confusion is the treatment of return flows under the CWA. Return flows from irrigated agriculture are exempted discharges under the CWA. Of course, the irrigation of most agriculture in semi-arid states like Wyoming is done through ditches. Return flows from this ditch-fed irrigation may find their way to a nearby water identified as "waters of the United States." Under the proposed rule, this connection could be construed as being a connection sufficient enough to classify the ditch as a jurisdictional water. This could be true even though the connection, the irrigation return flows, are exempted discharges. At a minimum, this added confusion is likely to breed inconsistent and arbitrary application and results. (p. 2)

Agency Response: The final rule does not affect any existing statutory exemptions under the CWA, including those under CWA section 404(f) for construction or maintenance of irrigation ditches and features that are functionally related to irrigation ditches (e.g. siphons, pumps, headgates, wingwalls, wiers, diversion structures, etc.).

Potomac Riverkeeper, Inc. (Doc. #15013)

6.717 Specifically, the Riverkeepers urge that the Agencies:

Not categorically exclude ditches in uplands with less than perennial flow. We object to the decision to categorically exclude ditches in uplands with less than perennial flow, even if they otherwise meet the definition of tributaries. Many of these ditches were once streams. In fact, nearly 20 percent of all streams in the Chesapeake Bay watershed where the Potomac and Shenandoah are situated have been ditched, channelized, or enclosed in pipes, concrete channels or culverts to accommodate development. There is, therefore, no actual difference between a large portion of these ditches and tributaries; there is a high likelihood in our region that they are identical. And upland ditches that contribute flow ephemerally, intermittently, or perennially can have substantial impacts on downstream water quality to the same extent as any other tributary. (p. 3-4)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Natural Resources Defense Council et al. (Doc. #15437)

6.718 Limiting the exemption to ditches with less than perennial flow does not save it, as the agencies have stated quite clearly that other types of ephemeral and intermittent

tributaries nonetheless have a significant nexus to traditional navigable waters. The agencies offer no evidence on which to conclude this is less true when the tributary takes the form of a manmade ditch.

From a legal perspective, many courts have recognized that ditches can be regulated as tributaries if they perform the same functions as tributaries – even if they are artificial.²³⁵ Many of these decisions were issued before SWANCC and Rapanos, but the ability to regulate ditches was unaffected by those two cases, which did not hold in any way that the law distinguishes between natural and manmade tributaries.²³⁶ In fact, Justice Kennedy’s opinion in Rapanos not only authorizes but compels the regulation of ditches that function as tributaries given the agencies’ finding that all tributaries have a significant nexus to navigable waters.

Achieving our water quality goals critically depends on protecting waters as expansively as the Clean Water Act allows. Excluding waters without a scientific basis for doing so is unjustified and undermines the achievement of these goals. The proposed exemption for all upland ditches is overly broad: EPA and the Corps may not exempt ditches that function as tributaries. The agencies must reject this wholesale exemption and provide for upland ditches to be considered “waters of the United States” whenever they meet the definition of tributaries. (p. 58)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Waterkeeper Alliance et al. (Doc. #16413)

6.719 Additionally, there is no sound scientific reason to categorical exclude upland ditches with less than perennial flow. Upland ditches that contribute flow ephemerally, intermittently or perennially can have substantial impacts on downstream water quality to the same extent as any other tributary. In fact, they can often have a more significant impact if they are very near a discharge point as they often serve to increase water flow downstream. As noted in the Connectivity Report, “[a]ll tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associates alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported.”²³⁷ This view is echoed in the comments from many individual SAB members:

²³⁵ See U.S. v. Holland, 373 F. Supp. 665, 673-74 (M.D. Fla. 1974), Headwaters, Inc. v. Talent Irrigation Dist., 243 F. 3d 526, 533-34 (9th Cir. 2001); Answering Brief of Defendants-Appellees, Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs, No. 10-5169 (D.C. Cir., June 10, 2011) at 42 (“a ditch may be a tributary if it contributes flow to a larger body of water”), 42-43 (collecting cases “that have upheld regulatory authority pursuant to the Clean Water Act over channels, canals, drains, and ditches”).

²³⁶ See generally Nat’l Assn. of Home Builders, 663 F.3d 470, 475 (D.C. Cir. 2011) (noting “the Corps’s persistent view that some upland ditches may be jurisdictional”); 2008 Rapanos Guidance at 1 (indicating that some upland ditches with seasonal or perennial flow would be jurisdictional); Jon Devine et al., The Historical Scope of Clean Water Act Jurisdiction, Natl. Wetlands Newsletter, Vol. 3, No. 6, at 13 (discussing historical protections for a variety of disputed features, including ditches) (enclosed in Appendix A).

²³⁷ Connectivity Report, supra note 3, pp. 1-3.

- "In response to the query, I suggest that the flow regime in identified ditches should be less than intermittent flow, rather than less than perennial flow as proposed, based on my familiarity with the science associated with the Connectivity Report. This would apply only to those ditches not excluded by the proposed regulation and that meet the proposed definition of tributary as 'waters of the United States:'"²³⁸
- "It is important to note, however, that even when not jurisdictional waters, these non-wetland swales, gullies, rills and specific types of ditches may still be a surface hydrologic connection for purposes of the proposed definition of adjacent under paragraph (a)(6) or for purposes of a significant nexus analysis under paragraph (a)(7). For example, a wetland may be a 'water of the United States,' meeting the proposed definition of 'neighboring' because it is connected to such a tributary by a non-jurisdictional ditch that does not meet the definition of a 'tributary: The entire concept of water body connectivity is that integrated ecological units comprised of aquatic systems distributed across the landscape are intimately linked through a suite of pathways. How is it consistent with this notion or in the spirit of the CWA that the ditch that connects two 'waters of the U.S.' is not jurisdictional? I am not convinced that the science currently exists to summarily exclude certain groups other waters including gullies, swales, artificial lakes and ponds, and ditches that do not contribute flow to a jurisdictional water body. These waters should be assessed along a gradient of connectivity on a case-specific basis until the science is available to make an appropriate determination for the respective class as a whole."²³⁹
- "Exclusion b(3) - 'ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow' - together, these three criteria may suffice, but the distinction between perennial and less-than-perennial flow may be a cause for concern. P 22203 states, 'Under this exclusion, water that only stands or pools in a ditch is not considered perennial flow and therefore any such upland ditch would not be subject to regulation.' In parts of southeast Michigan, Ohio and Indiana, topography is very flat and ditches flow primarily during times of heavy rain. Some ditches are sufficiently deep that they will pond water until the receiving river stage drops enough for water to flow from the ditch to the river. Yet such ditches commonly receive from surrounding lands, and episodically deliver, significant nutrients to downstream waters. In the aggregate, they are the source/conduit for the majority of contaminants reaching downstream waters ('most of the materials found in rivers originate outside of them.' P 22247). Indeed, this situation describes much of the drainage into western Lake Erie, where harmful algal blooms due to excessive nutrient loading have caused beach closings, and in August 2014 a three-day ban on drinking water for some 400,000 of the residents in and near Toledo, OH. In short, using the criterion of 'less-than-perennial' flow to exclude ditches may not be consistent with addressing nutrient and sediment loading that affects drinking water, beach use, fishing, and other uses."²⁴⁰ (p. 38-39)

²³⁸ Member Comments, supra note 72, Dr. Jennifer Tank Comments at 9

²³⁹ Member Comments, supra note 72, Dr. Mazeika Sullivan at 89-90.

²⁴⁰ Member Comments, supra note 72, Dr. David Allen at 14.

- See summary response.

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

6.2.2. *Ditches that do not Contribute Flow, either Directly or through another Water, to a TNW, Interstate Water, the Territorial Seas or an Impoundment of a Jurisdictional Water*

Specific Comments

State of Iowa (Doc. #8377)

6.720 Ditches that do not contribute flow to another water are not considered "waters of the U.S." We support the intent of this exemption, but it is highly unlikely that any ditch in Iowa does not contribute flow to downstream waters at some point, and as such this exemption is not truly an exemption at all. (p. 8)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule

Texas Department of Transportation (Doc. #12757)

6.721 The vast majority of roadside ditches do connect to a drainage feature that, even if not a tributary itself, most likely would eventually contribute flow to a traditional navigable water, even though indirectly and possibly miles away. This fact could effectively render this exclusion inapplicable to most roadside ditches.

Recommendation: This exclusion implies that a ditch that does contribute flow, directly or indirectly, to another water is jurisdictional. This interpretation would be problematic. We propose eliminating this exclusion on the basis that it could create conflicting exclusions by bringing back into jurisdiction those ditches that might otherwise be excluded by being excavated in upland. This interpretation could also extend the boundaries of jurisdiction further upstream to otherwise non-jurisdictional ditches, contradicting the intent not to expand the current geographic boundaries of waters of the U.S. (p. 2)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

New Mexico Department of Agriculture (Doc. #13024)

6.722 Disconnected Ditches - (t) (4). "Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (s) (1) through (4) of this section."

The proposed exemption is so narrow that it may not exclude many ditches. Waters may pass from a ditch through nonjurisdictional waters and still be jurisdictional according to the proposed rule's language, "[d]itches that do not contribute flow, either directly or

through another water, to a water identified in paragraphs (s) (1) through (4) of this section." NMDA requests the removal of language that would allow for ephemeral ditches to be claimed as jurisdictional Waters of the U.S. We recommend striking the qualifier "or through another water," and leaving the wording "Ditches that do not directly contribute flow to a water identified in paragraphs (s) (1) through (4) of this section." (p. 9)

Agency Response: See summary response for section 6.2.

Alabama Department of Transportation (Doc. #14116)

6.723 In the proposed definition published in 40CFR 230.3, (t)(4) states, "Ditches that do not contribute flow, either directly, or through another water, to a water identified in paragraphs (s)(1) through (4) of this section." The associated Federal Register dated Monday, April 21, 2014 discusses contribution of flow with similar language, but also describes contributions "...to a traditional navigable water, interstate water, the territorial seas or impoundment." Another statement in the federal register omits "impoundments" from a similar statement. Paragraph (s)(4) includes "(s)(1) through (3) and (5)" which includes impoundments of all tributaries of waters listed above. With the inconsistent language, it first appears that tributaries were not intended to be included in the exclusion reference. However, the Federal Register also discusses "... ditches that do not contribute to the tributary system" of jurisdictional waters. Interpretation could create a circular reference by declaring a ditch jurisdictional if it flows into another jurisdictional ditch, which would cause other contributing ditches to also be jurisdictional. ALDOT requests that the intent be clarified as to which type of receiving water would cause a ditch to become jurisdictional. ALDOT suggests that the language be clarified to omit the term, "wholly," and include paragraph (s) (1) through (4) waters only, specifically excluding (s)(5). (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Office of the Governor, State of Utah (Doc. #16534)

6.724 The second exclusion for ditches applies to ditches that "do not contribute flow, either directly or through another water," to certain other jurisdictional waters. The preamble does not provide any explanation of how this exclusion will be interpreted. The exclusion could be interpreted very literally, such that any downstream connection - no matter how miniscule or indirect - would prevent the exclusion from being applied. This is inconsistent with Justice Kennedy's concurrence in *Rapanos*.²⁴¹ The state recommends revising the preamble to clarify that a "speculative or insubstantial" downstream connection does not prevent this exclusion from being applied.²⁴² The intent of this

²⁴¹ When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters." *Rapanos*, 547 U.S. at 780.

²⁴² This phrase is adopted from the definition of "significant nexus" in the proposed rule. That definition states that "For an effect to be significant, it must be more than speculative or insubstantial." 79 Fed. Reg. 22263. The

change is to ensure that a ditch can qualify for this exclusion without needing to research and document potential indirect connections to waters that are tens or even hundreds of miles away from the ditch in question. (p. 7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Pasco County, Florida (Doc. #9697)

- 6.725 The second exclusion for ditches applies to ditches that "do not contribute flow, either directly or through another water" to certain other jurisdictional waters. The preamble does not provide any explanation of how this exclusion will be interpreted. The exclusion could be interpreted very literally, such that any downstream connection, no matter how small or indirect, would prevent the exclusion from being applied.

Recommendation: The Final Rule should be explicit that a tributary does not "contribute flow" to another water if its only connection to that water is "insubstantial or remote." (p. 4)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

U.S. Chamber of Commerce (Doc. #14115)

- 6.726 The Agencies also propose to exclude "ditches that do not contribute flow, either directly or through another water," to navigable waters, interstate waters, the territorial seas or impoundments of those three waters or of tributaries. This exclusion is astoundingly narrow. To qualify, such a ditch must contribute zero flow, even indirectly, to any tributary, which itself is defined explicitly to include ditches and ponds even if they themselves contribute only minimal, occasional flows via indirect routes to downstream waters. Ditches conveying very small flows indirectly to minor waters represent most of the ditches in the country. For that reason, this exclusion is virtually useless. (p. 34)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Kerr Environmental Services Corp. (Doc. #7937.1)

- 6.727 "Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs(a)(1) through (4)...." We recommend the following alternative language: "Ditches that do not contribute perennial flow, either directly or through one (1) other water, to a water identified in paragraphs" While we agree with the intent, the phrase "contributes flow" is undefined. Additionally, all conduits flow during rain events, so the current definition is far too broad and could be incorrectly argued to recapture ditches in item (b)(3). Additionally, the phrase "through another water" implies a connection through one (1) other water. (p. 3)

definition, in turn, borrows this phrase from Justice Kennedy's concurring opinion in *Rapanos v. United States*, 547 U.S. 715,780 (2006).

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Commercial Real Estate Development Association (Doc. #14621)

6.728 Contributing Ditches. This section, as written, creates confusion²⁴³ - as it recaptures (as jurisdictional WOTUS) certain ditches excluded in §328.3(b)(3).

It is also problematic since it means that any ditch that connects to a stream or waterbody becomes a WOTUS. Since most ditches (to achieve their purpose of drainage) must connect to such areas to allow water to flow via gravity, the proposed language expands the extents of the current WOTUS definition - contrary to the stated clarification purpose of the proposed rule.

Therefore, we request that you delete §328.3(b)(4) in its entirety. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

J.R. Simplot Company (Doc. #15062)

6.729 [A] dry ditch could be "waters of the U.S." under the proposed definition if it flows once per year but drains to a jurisdictional creek. Also, as shown in Example 6, ditches often interest ephemeral streams. Ranches and farms throughout the West have millions of these features; the purpose of such features is to drain; eventually most such drains will reach a TNW.

Example 6: If a man-made ditch intersects an ephemeral stream (water of the U.S.), under the proposed rule, the ditch is a water of the U.S. without the need to conduct a significant nexus determination in the ditch (the ditch meets the definition of the tributary, see Box 1)

EPA has made a number of statements since the publishing this draft rule that changes of "waters of the U.S." as related to agriculture are minor, but this statement is not true. The Agencies have tremendously underestimated how many ditches will be captured by the proposed definition of WOTUS. (p. 7)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

United Egg Producers (Doc. #15201)

6.730 The second exclusion is for ditches that do not contribute water, either directly or indirectly, to a water of the US. We support this exclusion as well, but the lack of definition for what it means to contribute water "indirectly" to a WOTUS concerns us.

²⁴³ Q&A #19 provided by EPA at http://www2.epa.gov/sites/production/files/2014-09/documents/q_a_wotus.pdf did not address this issue. It said that when a ditch is constructed through a wetland or stream and connects to navigable water it will be regulated as it is currently. It does not address when such ditches are constructed in uplands and connects to a water.

Settling basins are exempt, for example, and a ditch connecting them would be exempt as a result. But if the downgradient basin has some flow that eventually reaches a WOTUS, does that make the ditch between the two basins also WOTUS? If so, the word "indirectly" needs to be constrained to exclude such circumstances. Alternatively, if upland can be defined as suggested below, the issue would be addressed. (p. 3)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

National Alliance of Forest Owners (Doc. #15247)

- 6.731 The second ditch exclusion applies only if a ditch system does not contribute any flow, directly or indirectly, to any downstream jurisdictional water. Such a ditch, however, would not meet the definition of tributary in the first instance if it does not contribute flow. In any event, this exclusion appears tailored to closed system ditches that empty into on-site industrial or agricultural ponds. Within forest lands, there are very few, if any, ditches that empty into a truly isolated waterbody (to the extent any even exist under the proposed rule) or that empty into the forest floor such that there is no connection to any downstream jurisdictional water.

During outreach efforts, the Agencies proclaimed that they are not expanding jurisdiction over ditches. If that is indeed the case, the Agencies should, as noted above in Part II.B, exclude ditches from the tributary definition or at least adopt the following clarifications to ensure that presently non-jurisdictional ditches do not become jurisdictional under the proposed rule. First, the Agencies should make it clear that the upland ditch exclusion applies regardless of whether the ditch contributes flow, directly or indirectly, to a water of the United States. Although the Agencies have agreed during outreach meetings that the two ditch exclusions are independent of one another, the language in the proposed rule has generated a great deal of confusion on this point. NAFO members have extensive roadside ditch systems that periodically will add flow to a stream or an adjacent wetland. Those ditch systems should continue to be nonjurisdictional despite outflow to jurisdictional waters.

Second, the Agencies should not require that ditches drain only uplands for their entire length. Rather, the Agencies should state that the exclusion still applies to all portions of the ditch system that are upstream of the point where the ditch drains a jurisdictional wetland. Moreover, the Agencies should allow the exclusion to apply to ditch systems that receive minimal flow at times from intermittent and ephemeral streams.

Third, to the extent a ditch system has varying flow characteristics (i.e., a portion flows perennially but the remainder does not), the Agencies should clarify that the upland ditch exclusion applies to any portions of the ditch system that have less than perennial flow. (p. 22-23)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Weyerhaeuser Company (Doc. #15392)

6.732 The second ditch exclusion applies only if a ditch system does not contribute any flow, directly or indirectly, to any downstream jurisdictional water. Such a ditch, however, would not meet the definition of tributary in the first instance if it does not contribute flow. In any event, this exclusion appears tailored to closed system ditches that empty into on-site industrial or agricultural ponds. Within forest lands, there are very few, if any, ditches that empty into a truly isolated waterbody (to the extent any even exist under the proposed rule) or that empty into the forest floor such that there is no connection to any downstream jurisdictional water. (p. 8)

Agency Response: The commenter is exactly correct that a ditch system that does not contribute any flow, directly or indirectly, to any downstream jurisdictional water would not meet the definition of tributary. The intent of this exclusion, which is retained in the final rule, is to clarify within the ditch exclusions in the rule, that such ditches are not waters of the US. See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Georgia Department of Transportation (Doc. #14282.1)

6.733 "Do not contribute flow, either directly or through another water"

The second exclusion for ditches applies to ditches that "do not contribute flow, either directly or through another water," to certain other jurisdictional waters. The proposed rule does not provide any explanation of how this exclusion will be interpreted. We are concerned that the exclusion could be interpreted very literally, such that any downstream connection - no matter how miniscule or indirect - would prevent the exclusion from being applied. We don't believe that is the intent, and we are hopeful that in practice the agencies would not apply such an exclusion unreasonably.

Recommendation: The rule should be modified to include clarifying language that would better ensure a practical interpretation of this exclusion. Specifically, we recommend clarifying in the final regulations that a "speculative or insubstantial" downstream connection does not prevent this exclusion from being applied." The intent of this change is to ensure that a ditch can qualify for this exclusion without needing to research and document potential indirect connections to waters that are tens or even hundreds of miles away from the ditch in question. (p. 4-5)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches and similar features were edited and clarified for the final rule.

Sacramento Stormwater Quality Partnership (Doc. #17005)

6.734 [W]ith respect to the issue of connectivity, to fall within the ditch exclusions, a ditch could not contribute flow directly or indirectly to the tributary system of a traditional navigable water. This would mean that a stormwater conveyance channel that meets the definition of ditch in all other aspects would not be excluded if somewhere within the

conveyance system, it connects, even arguably through an "outfall," to a tributary of a traditional navigable water. As discussed above, such an approach nonsensical because stormwater conveyance channels are considered "point sources" under the CWA, and their discharges to WOTUS are permitted and regulated under CWA section 402. (p. 8)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule. With respect to the jurisdictional status of stormwater control measures as waters of the U.S., please see summary response at 7.4.4.

Center for Biological Diversity, Center for Food Safety, and Turtle Island Restoration Network (Doc. #15233)

- 6.735 Other problems arise from your drafting. Consider your proposed exclusion of a ditch that does not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4). 40 CFR 122.2 (b)(4). If, then, flow from a ditch travels to an adjacent wetland, and then to an (a)(1) through (4) water body by way of a not-shallow groundwater connection, is that ditch jurisdictional so that unpermitted discharges to it violate the Act? (p. 10)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

Waterkeeper Alliance et al. (Doc. #16413)

- 6.736 "On page 2203[sic], the EPA seeks guidance on the appropriate flow requirements for a ditch located wholly in uplands to be jurisdictional. In particular it would appear that ditches with intermittent flow would supply considerable water, sediment, nutrients, metals such as zinc from tire wear, etc. to downstream waters and there would appear to be no reason such features should not be considered jurisdictional."²⁴⁴

"Each of these types of human alterations affect connectivity and therefore can impact the chemical, physical, and biological integrity of the downgradient waters. As surface water features, ditches and canals function as either perennial or intermittent streams or tributaries and should be legally treated as such. Regardless of source, these ditches conveyor store water and chemical/physical/biological sediment and materials spatially on a temporal basis (rate, magnitude, and frequency). The water from ditches can leak to provide groundwater recharge to the sediments or bedrock beneath the ditch, or accumulate groundwater discharge in its flow (serve as a drain) or both. These functions can be temporal (seasonal) and spatial. In all, the ditch impacts many of the hydrologic systems in the vicinity of its location, and is connected ... Constructed ditches change the hydrologic flow paths of local and subregional hydrologic systems. Ditches are perennial, intermittent, or ephemeral water conveyors, and should be regulated as such."²⁴⁵ (p. 40)

Agency Response: See summary response for section 6.2 for a discussion of how the proposed exclusions for ditches were edited and clarified for the final rule.

²⁴⁴ Member Comments, supra note 72, Dr. Judson Harvey at 22.

²⁴⁵ Member Comments, supra note 72, Dr. Kenneth Kolm at 49-50.

6.3. UPLAND AND DEFINITION OF UPLAND

Agency Summary Response

The Proposed Rule identified two types of ditches that would be excluded as waters of the United States: (b)(3) ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow; and (b)(4) ditches that do not contribute flow, either directly or through another water, to a traditionally navigable water, interstate water, territorial sea or impoundment. The agencies sought comment on these exclusions, and specifically on the appropriate flow regime for an excluded ditch excavated wholly in uplands and draining only uplands.

Many public comments were received about the use of the term “uplands” and the definition of uplands in the Proposed Rule. The vast majority of commenters on this topic stated that using the term “uplands” in the ditch exclusion without providing a specific definition was confusing and ambiguous, and would prevent certainty in identifying ditches that are jurisdictional waters of the United States. Many commenters noted that there is not a common understanding of the term “uplands” among the regulated public and agency staff. Several of these commenters proposed various specific definitions of “uplands” for the agencies to adopt in the rule. A few commenters also noted that the exclusion for ditches is very narrow as it is phrased in the Proposed Rule, because most ditches intersect waters of the U.S. at some point along their reach, and therefore would not be constructed wholly in uplands or drain only uplands.

A few commenters also expressed concern about the use of the terms “uplands” and “dry land” in other exclusions within the rule, including those for artificially irrigated areas and artificial lakes and ponds. Finally, some commenters noted that a Q&A document released by the EPA on September 9, 2014 included an explanation or definition of “uplands” as “any area that is not a wetland, stream, lake, or other waterbody.” They stated that a Q&A document is an inappropriate means of providing a definition that was not otherwise included in the Proposed Rule, preamble, or the rulemaking docket, and that this did not comply with the Administrative Procedure Act.

In response to these comments, the agencies have revised the ditch exclusions. Most notably, the agencies have deleted the use of the term “uplands” in response to the confusion expressed by commenters, and have instead defined excluded ditches based on flow regimes, which are more commonly understood and further explained in the preamble. Although terms such as “upland” and “dry land” have been used in previous waters of the U.S. regulations, including the 1986 and 1988 preambles, and in language regarding ditches in the 2008 Rapanos guidance, the agencies have concluded that deleting the term “uplands” from the exclusions will improve clarity for landowners and simplify implementation of the rule. The final rule excludes from waters of the U.S. all ditches that have ephemeral flow that are not a relocated tributary or excavated in a tributary, all ditches that have intermittent flow that are not a relocated tributary or excavated in a tributary or drain wetlands, and all ditches that do not flow, either directly or through another water into a traditional navigable water. The summary response for section 6.2: Excluded Ditches includes a robust discussion of the exclusions for ditches in the final rule.

The term “dry land” is included in section (b) of the final rule to describe the location of certain constructed features that are excluded from waters of the U.S. The Preamble explains that “dry land” refers to areas of the geographic landscape that are not water features such as streams, rivers, wetlands, lakes, ponds and the like. However, it is important to note that a “water of the United States” is not considered “dry land” if it lacks water at a given time. Similarly, an area remains “dry land” even if it is wet after a rainfall event. Further explanation of features excluded from waters of the U.S., and particular language related to these exclusions, is provided in the summary responses for Topic 7: Features and Waters Not Jurisdictional.

Although the final rule language no longer references uplands with respect to the construction and drainage areas of ditches, the agencies note that the Clean Water Act regulates surface waters, and the agencies do not have authority to regulate any uplands, including uplands that may be found in a floodplain or riparian area. Finally, as the term “uplands” has been used for decades in regulatory history, the agencies did not intend to preclude meaningful comment by not including a definition of the term in the proposed regulatory text. In addition, the website, press, and social media messaging was written in a way to be quickly and easily understood without complex technical and legal language. These materials were not intended to represent actual definitions or rule text. Ultimately, the comments on lack of clarity resulting from the use of “uplands” in the proposal have resulted in the revised language for these exclusions in the final rule, as the rulemaking process and regulatory standards require.

Specific Comments

Tennessee Valley Association (Doc. #17470)

6.737 The Proposal also states that “rivers, streams, lakes, ponds, impoundments, man-made canals, and ditches” are tributaries. Although the Proposal exempts “upland” ditches and contains a number of other exemptions from jurisdiction, there are numerous qualifications and conditions which render the exemptions unclear. Notably, the proposed rule does not provide a definition of “uplands.” As a result, this exclusion will have a very narrow application because it will likely be difficult to determine and prove that a ditch was excavated in uplands or drains only uplands. (p. 3)

Agency Response: See summary responses for sections 6.3, Upland and Definition of Upland, and section 6.2: Excluded Ditches.

6.738 Department of Public Health and Environment, State of Colorado (Doc. #16342)

The agencies should provide more clarity regarding jurisdictional determinations for ditches. In particular, the proposed rule excludes ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow. Colorado believes that many of its roadside ditches would fall under this exclusion, but given the fact that the exclusion relies heavily on “uplands,” Colorado suggests that the agencies provide more clarity regarding what constitutes an “upland” so that Colorado and other states can better assess the impact of the rule. We understand that the Corps utilizes a three-part test to determine uplands, based on plant life, soils, and hydrology, and suggest that the agencies consider referencing this test in the rule in order to provide clarity to which ditches will be deemed jurisdictional. (p. 2)

Agency Response: See summary response for section 6.3.

- 6.739 EPA has indicated in public meetings that an "upland" is everything upstream of navigable waters and waters that have a bed and bank and ordinary high water mark. However, "bed, bank, and ordinary high water mark" are used to define what is a tributary and therefore a water of the United States. It is confusing and circular to define an exclusion from the rule by using the term "upland," and then define "upland" as what is not jurisdictional in the rule. When the agencies clarify the meaning of "uplands," they should do so in a way that does not use this circular reasoning.

While Colorado believes that modifications to these provisions is necessary, any modifications to the provisions that exclude ditches from being jurisdictional waters should be done in close consultation with the states to ensure that the revisions do not diminish the agricultural exemptions in any way. Clarifying which ditches are jurisdictional and which are not would be a very important improvement to the proposed rule. (p. 3)

Agency Response: See summary response for section 6.3.

New Mexico Environment Department (Doc. #16552)

- 6.740 Several parts of the proposed rule use the terms "uplands" and "dry lands" seemingly interchangeably without providing definitions for these terms. The Department requests that the Agencies provide clear and concise definitions for these terms as they are used in the proposed rule. The Department further requests that the Agencies clarify how these terms relate to other provisions in the proposed rule. For example, the proposed rule exempts "ponds created by excavating and/or diking dry land" but an ephemeral stream channel is arguably dry land and could be a jurisdictional tributary, and any impoundment of this water would be jurisdictional. See generally Proposed "Definition of 'Waters of the United States' Under the Clean Water Act" 40 CFR 230.3, 79 Fed. Reg. 22,180, 22,269-22,270 (proposed Apr. 21, 2014) (to be codified at 33 C.F.R. Part 110,40 C.F.R. 116,40 C.F.R. Part 117,40 C.F.R. Part 122,40 C.F.R. Part 230, 40 c.F.R. Part 232, 40 C.F.R. Part 300, 40 c.F.R. Part 302, 40 c.F.R. Part 401), remain available to the regulated public at http://www2.epa.gov/sites/production/files/2014-06/documents/proposed_regulatory_wus_text_40cfr230_0.pdf. There is potential conflict in the interpretation of the proposed rule and its various exemptions and definitions. Clarifying the terms used in the proposed rule's exemptions and definitions is particularly critical for categorizing certain waters such as man-made dikes, some of which are excluded in certain parts of the proposed rule but are tacitly included as jurisdictional waters in other parts, i.e., "tributary" and "adjacent waters." Id. (p. 12)

Agency Response: See summary response for section 6.3 and Topic 7 of this responses to comments. Also note that if a ditch or feature is excluded, it is not a water of the US even if it meets the definition of "tributary" or "adjacent" or any other water defined as a "water of the U.S." under paragraph (a) of the final rule.

Office of the Governor, State of Montana (Doc. #16694)

6.741 The State of Montana believes the CWA's current agricultural exemptions work and that the rule should not create unnecessary uncertainty or confusion about these exemptions. The State of Montana understands the rule is intended to preserve these agricultural exemptions; however, the rule and the related **interpretive rule** regarding exemptions under Section 404(f)(1) create confusion and uncertainty about the scope and applicability of the CWA's agricultural exemptions as well as their interaction with state water quality programs. For example, the proposed rule uses the term "upland" as it relates to both "ditches" and "artificially irrigated areas," but nowhere is "upland" defined in the proposed rule. (p. 4)

Agency Response: See summary response for section 6.3. In addition, the agencies have withdrawn the Interpretive Rule, as mandated by Congress in the 2015 Omnibus. See summary response 14.2. As the commenter states, the rule preserves existing agricultural exemptions found in Section 404(f)(1). For further information about the exclusion for “artificially irrigated areas” please see the summary responses for Topic 7: Features and Waters Not Jurisdictional.

Board of County Commissioners, Clermont County, Ohio (Doc. #4581)

6.742 The draft definition excludes ditches that are “excavated wholly in uplands, drain only uplands, and have less than perennial flow.” However, “uplands” is not defined, and needs to be to provide the desired clarification. Upland ditches are defined in the Federal Register Notice (Vol. 79, No. 76, Section II.I, page 2219) as “ditches that at no point along their length are excavated in a jurisdictional wetland or other water.” Clermont County recommends that this definition be directly included in the “Waters of the U.S” definition contained in 40 CFR Section 116. Alternatively, a direct exclusion should be added for ditches that have been designed and constructed for the purposes of providing drainage for roadways. (p. 1)

Agency Response: See summary response for section 6.3. In addition, the preamble to the final rule makes it clear that when an otherwise excluded ditch is excavated in or relocates a protected tributary, only the segment of the ditch actually excavated in or relocating the tributary would be considered jurisdictional. See summary response for section 6.2 for an explanation of excluded ditches.

City of Holts Summit, State of Missouri (Doc. #5601)

6.743 Further complicating our ability to evaluate this draft rule is that agencies have failed to provide any description or definition of the term "uplands". Based on plain language definitions, we can only surmise that most of the constructed ditches, and storm water channels in the City of Holts Summit would not be excluded from the jurisdictional definition of "Waters of the United States". Because of that we will subject to new legal mandates and operational requirements. (p. 1-2)

Agency Response: See summary response for section 6.3. The agencies do not anticipate an increase in jurisdictional ditches as a result of the rule. Instead, the rule proposes specific exclusions for many ditches, which have not explicitly been

excluded from jurisdiction by past regulation. In addition, the final rule includes an exclusion under section (b)(6) for stormwater control features that are created in dry land. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4.

Board of Supervisors (Doc. #6856)

6.744 While the proposed rule states that uplands are not "waters of the U.S." and upland ditches (wholly in uplands and drain only to uplands) will not be subject to regulation, uplands are not specifically defined. (p. 2)

Agency Response: See summary response for section 6.3.

Board of Supervisors, Imperial County (Doc. #10259)

6.745 The proposal exempts ditches cut into uplands from CWA jurisdiction but does not clearly state whether other features cut into uplands - including municipal and private storm drain systems – are similarly exempt. Additionally, the proposed rule does not include a definition of the term “upland,” though does provide new definitions for several other terms. (p. 5-6)

Agency Response: See summary response for section 6.3. The final rule includes an exclusion under section (b)(6) for stormwater control features that are created in dry land. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4.

City of Rockville, Maryland (Doc. #14126)

6.746 Rockville encourages the agencies to include even more specificity in the final rule to ensure that it is as clear as possible and reduce the possibility of further litigation. For example, the City recommends that a definition of "ditches draining uplands" be added to the final rule. (p. 1-2)

Agency Response: See summary response for section 6.3.

Bangor Area Storm Water Group, Hampden, Maine (Doc. #14543.1)

6.747 The inclusion of ditches under the rule’s definition of tributaries and consequently formally designating them as jurisdictional Waters of the US is a notable expansion of the existing rule. The EPA has argued that the proposed rule does not expand jurisdiction. The inclusion of ditches in the proposed rule has a huge impact on municipalities, one which has implications for municipal budgets, staffing and maintenance that are not practicable, especially under current economic conditions. Beyond the feasibility issue, the rule fails to define Ordinary High Water Mark, in ways that do not leave it to open interpretation. Other terms are also not defined, including the term “upland” creating unnecessary uncertainty and increasing the likelihood of legal contestations when the goal of the rule was to improve clarity and consistency.

Request: The BASWG requests that the definitions of the terms “ditches”, “uplands” and “ordinary high water mark” all be provided with clear definitions, with the opportunity for public comment on the definitions selected for use. (p. 2)

Agency Response: See summary response for section 6.3 and 6.2 (explaining the term “ditches”). “Ordinary high water mark” is defined in the final rule. The agencies do not anticipate an increase in jurisdictional ditches as a result of the rule. Instead, the rule proposes specific exclusions for many ditches which have not expressly been excluded from jurisdiction by past regulation. In addition, existing statutory exemptions for ditch maintenance under 404(f)(1)(C) will not change as a result of the rule. Finally, the agencies disagree that the rule language will result in additional litigation and reduced clarity. The rule will improve certainty for the regulated public as to which waters are water of the U.S. and improve clarity and efficiency in jurisdictional determinations. See the General Summary 6.0 for further discussion of these issues.

San Joaquin Tributaries Authority (Doc. #14992)

6.748 In addition, the Proposed Rule provides exemptions that are unclear and introduce new, undefined terms. The term "uplands," as used in the Proposed Rule, is ambiguous and causes confusion regarding which features are exempt from jurisdiction. The Proposed Rule uses the term "upland" in two sections—in the exception for "ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow," and the exception for "artificially irrigated areas that would revert to upland should application of irrigation water to that area cease." (See Proposed Rule, at (t)(3) and (t)(5)(i)). The use of the term "uplands" creates several problems, two of which include (a) the physical parameters of what constitutes "upland" are unclear; and (b) it is unclear how a hydrological feature could drain "upland." (p. 4)

Agency Response: See summary response for section 6.3.

National Association of Counties (Doc. #15081)

6.749 For counties that own and manage public safety infrastructure, the potential implication is that roadside ditches will be treated the same as rivers and streams, while the functions and purposes of both are significantly different. Public safety ditches should not be classified as tributaries. Further fleshing out the exemptions for certain types of ditches, which is discussed later in the letter, would be beneficial.

“**Uplands**”—The proposed rule recommends that “Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow” are exempt, however, the term “uplands” is undefined.²⁴⁶ This is problematic. County public safety ditch systems—roadside, flood, drainage, stormwater—can be complex. While they are generally dug in dry areas, they run through a transitional area before eventually connecting to “waters of the U.S.” It is important to define the term “uplands” to ensure the exemption is workable. (p. 9)

²⁴⁶ 79 Fed. Reg. 22199.

Agency Response: See summary response for section 6.3. In addition, the preamble to the final rule makes it clear that when an otherwise excluded ditch is excavated in or relocates a protected tributary, only the segment of the ditch actually excavated in or relocating the tributary would be considered jurisdictional. See summary response for section 6.2: Excluded Ditches, regarding revised and expanded exclusions for ditches in the final rule.

City of Stockton, California (Doc. #15125)

- 6.750 Ditches that are excavated in uplands, drain only uplands, and have less than perennial flow are exempt from the rule. However "upland" is not defined, nor is "perennial flow." It is unclear how an applicant would be able to prove that a ditch would warrant the exemption and whether the exemption is nullified if the ditch traverses a wet area. This is particularly important for municipalities that maintain roadside ditches. (p. 3)

Agency Response: See summary responses for sections 6.3 and 6.0. In addition, the preamble to the final rule makes it clear that when an otherwise excluded ditch is excavated in or relocates a protected tributary, only the segment of the ditch actually excavated in or relocating the tributary would be considered jurisdictional.

Fort Bend Flood Management Association (Doc. #15248)

- 6.751 Application of the proposed rule relies on understanding what “upland” means, a term not defined in the proposed rule. A questioning of agency regulatory officials yielded different interpretations. Some defined the term “upland” through physical characteristics that could be identified in the field. Others expressed its intent to mean “upland of” as in “beyond the limits of jurisdiction” of the CWA. This term is especially important with respect to the jurisdictional determination of ditches and also with respect to the management of stormwater systems, including those presently covered by MS4 permits. (p. 3)

Agency Response: See summary response for section 6.3. In addition, the final rule includes an exclusion under section (b)(6) for stormwater control features that are created in dry land. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4.

City of Greeley, Colorado, Water and Sewer Department (Doc. #15258)

- 6.752 The Agencies propose no definition of "upland", yet use this term as if its meaning is obvious. An understanding of its meaning is particularly relevant to applying the first ditch exclusion; it is highly doubtful that any irrigation ditch would ever qualify for this exclusion. (p. 2)

Agency Response: See summary response for section 6.3.

District of Columbia Water and Sewer Authority (Doc. #15379)

- 6.753 The proposed rule may appear to address this by excluding some upland ditches with less than perennial flow or those ditches that do not contribute flow to a "water of the U.S."

Nevertheless, it should be noted that the terms "uplands" and "contribute flow" are not defined under the proposed rule.' This leaves open the question about how determinations will be made and how ditches might be exempted and jurisdictional ditches identified. Uncertainty will result in continued expanded interpretation of "tributaries." (p. 3)

Agency Response: See summary response for section 6.3 and 6.2 (explaining “contributes flow”). The agencies do not anticipate an increase in jurisdictional ditches as a result of the rule. Instead, the rule proposes specific exclusions for many ditches, which have not explicitly been excluded from jurisdiction by past regulation.

Anderson County South Carolina (Doc. #15514)

- 6.754 The proposed rule excludes certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to a “water of the U.S.” However, key terms like ‘uplands’ and ‘contribute flow’ are undefined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a “water of the U.S.” (p. 1)

Agency Response: See summary responses for sections 6.3 and 6.2, for discussion of excluded ditches. In addition, the preamble to the final rule makes it clear that when an otherwise excluded ditch is excavated in or relocates a protected tributary, only the segment of the ditch actually excavated in or relocating the tributary would be considered jurisdictional. Note that excluded ditches will not be considered “adjacent” under the final rule.

Town of Shady Shores, Texas (Doc. #15709)

- 6.755 [...] The most concerning examples are the lack of definitions for the key terms "uplands" and "contribute flow" since their application can change the classification of currently exempt ditches to jurisdictional ditches. The proposed rule excludes certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to a "water of the U.S.". It should be noted that a public infrastructure ditch system (roadside, flood or stormwater) is interconnected and can run for hundreds, if not thousands of miles. Ditches are not wholly in uplands nor do they strictly drain in uplands, since they are designed to convey overflow waters to an outlet. It is unclear how a municipality can prove its ditches do not "contribute flow" to "waters of the U.S.", how to determine if a ditch is wholly contained in uplands since no definition is provided, and how to classify a ditch that runs through uplands in one part of the Town and "wetlands", "lowlands" or whatever term would be considered the antonym of uplands in another. (p. 2-3)

Agency Response: See summary response for section 6.3. In addition, the preamble to the final rule makes it clear that when an otherwise excluded ditch is excavated in or relocates a protected tributary, only the segment of the ditch actually excavated in or relocating the tributary would be considered jurisdictional. The term “contribute flow” does not appear in the final rule language for the ditch exclusion. See final ditch exclusion language in section (b)(3) of the rule, and summary responses for sections 6.0 and 6.2 for further explanation.

Palm Beach County, Florida (Doc. #16647)

6.756 However, under the proposal's broadened definition of a "tributary" that is considered a "water of the U.S.", certain roadside or stormwater "ditches" could qualify as a tributary and be subject to CWA regulation. EPA has said its proposal will not increase regulation of ditches that do not flow water to navigable waters or covered tributaries, but many ditches do flow water either directly or through other waters to a navigable water. Of particular concern for Palm Beach County and entities in South Florida is the lack of definition of "uplands" in the proposed rule. As described above, much of South Florida had been drained, channelized and diked well before the passage of the Clean Water Act, rendering it nearly impossible to determine whether ditches drain "uplands" or would be considered "tributaries" under the proposed rule. The current language of the rule grants the Corps expansive and arbitrary jurisdiction to regulate ditches under the Clean Water Act. A better approach would be to grant an additional exclusion for ditches incorporated as part of permitted stormwater management systems, in addition to retaining the current exclusion. (p. 9-10)

Agency Response: See summary response for section 6.3, as well as the summary responses for sections 6.0 and 6.2 for further information about what ditches would be jurisdictional under the rule. The final rule includes exclusions for some ephemeral and intermittent ditches, which will include many roadside ditches, as well as stormwater control features that are constructed in dry land. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. The agencies disagree that the rule would result in expansive and arbitrary jurisdiction of ditches. Instead, the rule proposes specific exclusions for many ditches, which have not explicitly been excluded from jurisdiction by past regulation.

6.757 Palm Beach County proposes the following amendments to the rule language:

Define "upland" as any land that is not wetland or open water. The agencies should also exclude all ditches that are excavated in uplands (p. 13-14)

Agency Response: See summary response for section 6.3.

Nevada County Board of Supervisors, State of California (Doc. #18894)

6.758 While the proposed rule states that uplands are not "waters of the U.S." and upland ditches (wholly in uplands and drain only to uplands) will not be subject to regulation, uplands are not specifically defined. (p. 2)

Agency Response: See summary response for section 6.3.

Missouri Association of Municipal Utilities (Doc. #7931)

6.759 Drafters have failed to include a definition of uplands that provides enough specificity to allow cities to determine whether a particular ditch would or would not qualify for exclusion. Uplands can be a well-defined technical term for certain generally accepted landforms. (see http://www.agry.purdue.edu/soils_judging/new_manual/ch2-landforms.html). However certain EPA staff members in presentations appear to use a

more generic description that refers to land that is higher than other land. If so, then the description is meaningless until EPA discovers a way to make water flow up hill in a ditch, because using that simplified definition, essentially all ditches in the U.S. would qualify for exclusion. We cannot believe that EPA would make a meaningless provision in a rule, which leaves us wondering what they really meant to regulate.

Assuming that EPA is using a generally accepted technical definition of 'uplands' then the drafters have another semantic problem because they have limited the definition of ditches subject to exclusion only to those that exist wholly within the uplands. In other words, only ditches that go nowhere and don't discharge can be excluded. Are they referencing the so-called 'losing streams' which characterize karst topography where stream water enters groundwater layers? (p. 2-3)

Agency Response: See summary responses for sections 6.3 and 6.2: Excluded Ditches. The modifications made to the final rule have provided improved clarity and applicability for the ditch exclusions.

California State Association of Counties (Doc. #9692)

- 6.760 The proposed rule exempts ditches cut into uplands from CWA jurisdiction, but does not clearly state whether other features cut into uplands, including municipal and private storm drain systems, are similarly exempt. Also, the proposed rule does not contain a definition of the term "upland," whereas it provides new definitions for several other key terms. (p. 1)

Agency Response: See summary response for section 6.3. There are additional waters excluded from waters of the U.S., including certain waters created in dry land, and storm water conveyances constructed in dry land. Additional information about these exclusions can be found in the Response to Comments for Topic 7: Features and Waters Not Jurisdictional.

County Commissioners Association of Pennsylvania (Doc. #14579)

- 6.761 What are uplands? In the Q&A document issued by EPA, the agency defines an "upland" as used in the proposed rule as any area that is not a wetland, stream, lake or other water body, and further explains that upland areas can exist in floodplains. On page 22207 of the proposed rule's explanation, there is a statement that absolutely no uplands located in riparian areas and floodplains can ever be WOTUS subject to jurisdiction of the CWA. We have difficulty finding where either of these concepts is detailed in the proposed definition or the explanation and recommend that a definition be provided in the rule to avoid future confusion. (p. 10)

Agency Response: See summary response for section 6.3. The CWA is a surface water act and the agencies do not have authority to regulate any uplands, including uplands that may be found in a floodplain or riparian area.

Virginia Association of Counties (Doc. #15175)

- 6.762 The term "upland" is not defined although it frequently appears in the proposed rule. County officials appreciate EPA's and COE's attempt to exclude from jurisdictional

waters "ditches that are excavated wholly in uplands." However, it is difficult for stakeholders to understand how the exclusion will be applied if a clear definition of "uplands" is absent. The exclusion of "ditches" can be beneficial to local governments if the proposed rule has language providing stakeholders with a clear idea of where a boundary exists between areas that are, and are not, located in uplands.

Recommendation: The term uplands means everything other than open waters or any area, including an area within a riparian area, floodplain, or prior converted cropland, that has not previously been regulated as a "water of the United States." (p. 2)

Agency Response: See summary response for section 6.3.

Water Advocacy Coalition (Doc. #7981)

6.763 The term "upland" is not defined in the proposed rule, but its meaning is critical to understanding whether a ditch is excluded from the definition of "waters of the United States" under the proposed rule. In stakeholder discussions throughout the comment period, the Agencies have acknowledged that they have not proposed a definition of "upland." Now, a recent Q&A document, issued by the Agencies on September 9, 2014, provides a new definition of "upland:" "Under the rule, an "upland" is any area that is not a wetland, stream, lake, or other waterbody. So, any ditch built in uplands that does not flow year-round is excluded from CWA jurisdiction." ²⁴⁷ This new definition of "upland" is not included in the preamble, proposed regulatory text, or anywhere else in the rulemaking docket. Is the public now to assume that this key definition is part of the rulemaking? Is the public responsible for tracking the Agencies' blog posts and ad hoc statements to piece together the meaning of key regulatory terms? ²⁴⁸ (p. 2)

Agency Response: See summary response for section 6.3.

United States Steel Corporation (Doc. #15450)

6.764 The rule does not provide clarity and indeed creates confusion. Definitions of numerous key terms and concepts, like "uplands" [...] are unclear. (p. 1)

Agency Response: See summary response for section 6.3.

American Society of Civil Engineers (Doc. #19572)

6.765 One of our members presented a situation where an uplands conveyance ditch was constructed - wholly uplands - to remove treated effluent from a wastewater treatment facility, pursuant to a NPDES permit. The effluent creates a perennial flow. Is this ditch

²⁴⁷ EPA and U.S. Army Corps of Engineers, Questions and Answers- Waters of the U.S. Proposal at 5 (Sept. 9, 2014), http://www2.epa.gov/sites/production/files/2014-09/documents/q_a_wotus.pdf (hereinafter, Sept. Q&A document).

²⁴⁸ Likewise, although the preamble defines "perennial flow" in terms of the presence of water ("water that is present in a tributary year round when rainfall is normal or above normal"), 79 Fed. Reg. at 22203, the Sept. Q&A document focuses on .flow ("flow[s] year-round"). Neither of these definitions provides the necessary clarity on "perennial" flow. And the conflicting information from the Agencies renders it impossible for the public to meaningfully comment

excluded from jurisdiction under the wastewater treatment exemption found at (b)(1)? ASCE believes these types of perennial flows should not be jurisdictional. (p. 8)

Agency Response: The exclusion for wastewater treatment systems is addressed in Topic 7: Features and Waters Not Jurisdictional.

Kerr Environmental Services Corp. (Doc. #7937.1)

6.766 “Uplands” and “Dry Land” should be defined and verified as synonymous with regards to USEPA/USACE guidance. We have recently experienced USACE staff calling into question whether agricultural land should be considered upland, not due to field conditions, but rather because they were located on relic hydric soils, and thus may have been drained and converted from wetland to cropland 100+ years ago. Their argument is that such areas while they may be non-jurisdictional today were not “dry land” or “uplands” prior to lawful ditching and draining. This then became the reason they gave for not verifying that the ditches in these clearly non-wetland fields were non-jurisdictional. They advised that the ditches may not be “wholly in uplands and draining only uplands.” We disagree with this argument which is also contrary to RGL 90-07.

We therefore propose the following definition: “Uplands” is synonymous with “dry lands” and are non-jurisdictional because of either natural conditions or because they were converted lawfully to a non-jurisdictional condition. Lawfully means there is no enforcement action outstanding on the land in question. (p. 5)

Agency Response: See summary response for section 6.3. Implementation of the rule will provide clarity so that landowners will have more certainty in identifying waters of the U.S.

Pennsylvania Coal Alliance (Doc. #13074)

6.767 Upland – How is upland defined and applied? An easily understood definition of this term would significantly increase the clarity of the Proposed Rule and eliminate confusion in its application. (p. 14)

Agency Response: See summary response for section 6.3.

Tennessee Mining Association (Doc. #14582)

6.768 In attempting to clarify waters that would not be subject to jurisdiction, the Agencies included ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow. The term “upland” is not defined in the Proposed Rule. While the Agencies issued a clarifying description in September 2014, such clarification was not part of the rulemaking process and likely invalidates the rulemaking procedure. Nevertheless, assuming uplands are water features that are not jurisdictional waters, then the question remains as to when an upland excavated ditch drains a jurisdictional feature. For example, a roadside ditch in certain areas of Tennessee may drain areas that could be wetlands or prior converted croplands, and contribute less than perennial flow to a jurisdictional water. Likewise an upland excavated ditch could drain an ephemeral stream with less than perennial flow to a jurisdictional water. In that event, it could mean that the entire drainage system takes on the jurisdictional component. (p. 12)

Agency Response: See summary response for section 6.3. In addition, there is an exclusion for certain ditches with intermittent flow in the final rule, and an exclusion for all ditches with ephemeral flow, so long as the ditches were not constructed in or relocating a tributary. If a ditch drains a jurisdictional feature, flows to another water, and does not meet one of the exclusions, it may be jurisdictional. However, if one part of a system is jurisdictional, that does not mean the whole drainage system is jurisdictional. See summary response 6.2: Excluded Ditches.

American Petroleum Institute (Doc. #15115)

6.769 [T]he meaning of the term “upland” is central to determining if a ditch is excluded from the Proposed Rule’s “Waters of the U.S.,” however, its definition is absent. EPA acknowledged this during multiple discussions in the comment period, but then a September 9 Q&A document issued by the Agencies offered a new definition of “upland:” “Under the rule, an ‘upland’ is any area that is not a wetland, stream, lake, or other waterbody. So any ditch built in uplands that does not flow year round is excluded from CWA jurisdiction.”²⁴⁹ This definition of “upland” remains wholly absent from the Proposed Rule’s preamble or regulatory text, as well as the rulemaking docket. (p. 52)

Agency Response: See summary response for section 6.3.

Corporate Communications and Sustainability, Domtar Corporation (Doc. #15228)

6.770 Agencies staff have indicated that including all waters in floodplain or riparian zones as WOTUS was not their intent. Agencies staff have also stated that waters located in “uplands” are not WOTUS. However these 2 clarifications of intent are not stated in the proposed rule text language. The agencies should add clear language to the rule text excluding such waters from qualifying as WOTUS.

Furthermore, “upland” is not defined in the Proposal, however in a Q&A document released by the agencies in September 2014, upland is described as an area that is not a wetland, stream, lake or other water body. Domtar suggests the agencies include language in the rule that identified an “upland” as a non-wetland and for an area to be classified as a wetland it must have all three of the traditional “wetland” attributes described in the Corps 1987 Wetlands Delineation Manual: (1) prevalence of hydrophytic vegetation; (2) hydric soils; and (3) permanently or periodically inundated or soils saturated to the surface at some time during the growing season. (p. 6)

Agency Response: See summary response for section 6.3. In addition, the agencies have defined which waters will be jurisdictional within the floodplain and riparian zone, either as adjacent (a)(6) waters or as (a)(7) or (a)(8) waters on a case-specific basis. Waters surrounded by uplands or that are part of an upland/wetland complex may still be jurisdictional, under several provisions of the rule. However, there are

²⁴⁹ EPA and U.S. Army Corps of Engineers, Question and Answers – Waters of the U.S. Proposal at 5 (Sept. 9, 2014), http://www2.theAgencies.gov/productionlfiles/2014-09/documents/q_a_wotus.pdf. (hereinafter September Q&A document).

exclusions in the rule for certain waters that are constructed in dry land. See the summary responses for Topic 7: Features and Waters Not Jurisdictional for further information about exclusions.

Edward Wisner Donation (Doc. #15438)

6.771 **There is no "uplands" definition.** Throughout the proposed rule, and EPA's attempts to quell concerns in the website through answers to FAQ's and other "talking points," there are repeated references to "uplands." Indeed, there are multiple explanations by EPA suggesting that there is no cause for concern, as the various definitions included in the proposed rule supposedly codify the existing test for "waters of the United States" under Supreme Court jurisprudence and agency guidance. These explanations include "ditches that are excavated wholly in uplands drain only uplands, and have less than perennial flow."²⁵⁰ Yet the term "uplands" is never defined. As there are numerous "ditches" throughout Wisner's property which may increase exponentially the "waters" and "wetlands" which are subject to these agencies' jurisdiction, Wisner wishes to have this term expressly defined in the final rule. (p. 4)

Agency Response: See summary response for section 6.3.

Pennsylvania Grade Crude Oil Coalition (Doc. #15773)

6.772 How is upland defined and applied? A clear definition of what is considered to be upland will significantly increase the clarity of the Proposed Rule and eliminate confusion in its application. (p. 10)

Agency Response: See summary response for section 6.3.

American Gas Association (Doc. #16173)

6.773 AGA notes that the Proposed Rule states that "[d]itches excavated wholly in uplands, drain only uplands, and have less than perennial flow" are not WOTUS. However, there is no proposed definition or conceptual description in the Proposed Rule regarding what an "upland" is, even though the exclusion is dependent on the term. On an EPA Office of Water stakeholders' webinar earlier this year, EPA staff was asked to explain why there was no definition of "upland" in the proposal. Staff responded by noting that the term "upland" is "used to distinguish those things that are not Waters of the U.S...or not wetlands."²⁵¹ This is a vague, circular standard (i.e., "if it is not a wetland it is a upland") which gives no real notice to regulated entities. On that same webinar, Office of Water staff noted that this definition will be addressed in the comment period and in the final regulation. Clearly, agency staff theorizing about a definition that appears nowhere in the public record for this proceeding is insufficient public notice, and requires the Agencies to issue a concrete proposed definition of "uplands." The Agencies' effort to provide regulatory relief for certain ditches, and exclusions for other upland features, would be wholly compromised if the Agencies do not take these steps. Therefore, AGA requests

²⁵⁰ 40 CFR 230.3(t)(3).

²⁵¹ Office of Water, and Wetlands Division, US EPA, Webinar (April 7, 2014).

that the Agencies define or describe the term “uplands” in a revised Proposed Rule. To the extent that the Agencies do not believe that the categories of ditches discussed above are WOTUS, the revised proposed rule should specifically list and define these exclusions. (p. 8-9)

Agency Response: See summary response for 6.3 and summary response for 6.2: Excluded Ditches.

Alameda County Cattlemen (Doc. #8674)

6.774 The term “uplands” is used throughout the proposed rule. It is a very significant legal term, especially as it applies to ditches and ponds, yet the agencies have failed to provide any sort of description of this important legal term. At one point, an EPA official, while looking at an ephemeral stream jumped on the bank of the stream and said “if it doesn’t jiggle, it’s an upland.” This is woefully inadequate. The legal description of an upland should already have been included in the proposed rule. ACCW would like the opportunity to comment on it, but the agencies have failed to provide it and therefore it is impossible to meaningfully comment.

ACCW strongly criticize the agencies for failing to notice such regulatory requirements. The regulated public cannot possibly be aware of their obligations if the agencies fail to define what they mean. This regulation is one of the largest in the history of the Office of Water. It is beyond comprehension how the definition of “uplands” along with others in this section were innocently “overlooked.” ACCW assert that the agencies must withdraw the proposed rule, provide the necessary legal definitions of terms and phrases throughout the proposal, and re-propose it to the public, so that we can meaningfully comment. As it stands, ACCW believe it is impossible for our members to understand the impacts of the proposed rule and therefore cannot provide the agencies with educated feedback. (p. 16) For example, the term upland can mean very different things to different people. In most farmer and ranchers’ minds it means up in the hills, far removed or of higher elevation than the nearest floodplains. Merriam-Webster dictionary provides a very similar definition, “ground elevated above the lowlands along rivers or between hills.”²⁵² EPA officials have asserted that the term means any area not in the “water of the U.S.” itself (i.e. everything outside the streambed or wetland is upland). This definition of upland clearly deviates from the common understanding, but the agencies have failed to provide it in the regulation. What was the reason for this? ACCW assert that the agencies should withdraw the proposed rule and propose a rule that includes the definition of such an important legal term, then allow public comment. (p. 23)

Agency Response: See summary response for section 6.3. Because the term has been deleted in the final rule, additional comment on its definition is unnecessary.

²⁵² “Upland,” Merriam-Webster Dictionary, available at <http://www.merriam-webster.com/dictionary/upland> (July 14, 2014).

Iowa Corn Growers Association (Doc. #13269)

6.775 [A]dditional definitions are needed – upland and ditch are used regularly throughout the rule without being defined. We understand that the Agencies have tried to clarify this through blog posts and other ad hoc statements, however this is not appropriate as stakeholders have no way to either comment on these clarifications or track any proposed changes that come through these informal forums. (p. 7)

Agency Response: See summary response for section 6.3 and 6.0 and 6.2 (explaining the term “ditch”).

Kennewick Irrigation District, Kennewick, WA (Doc. #13571)

6.776 While the rule lists some exemptions in paragraph (b)(3) to the definition of "tributary" that are potentially promising and reflect common sense, the language used to describe these exemptions is often vague and confusing, and needs to be better defined in the final version of the rule. For example:

- *"Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow."* The rule does not define "uplands" which will create confusion as to what sort of features are excluded. "Uplands" should be clearly defined to include the bottoms of gullies, rills, and dry washes that, prior to irrigation, may have conveyed overland flow on an inconsistent basis after extreme weather events and rapid snowmelt, but did not contain wetland habitat. The proposed rule notes that "historical evidence, such as photographs, prior delineations, or topographic maps may be used to determine whether a water body was excavated wholly in uplands, and drains only uplands, and has less than perennial flow." While this may be helpful to those who have these records, the wording of the rule does not provide an exemption for those ditches that is based upon having less than perennial flow in a natural condition if the ditch currently has perennial flow, even if said flow is artificial and the result of irrigation practices.
- *"Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease."* Again, the rule fails to define "upland." Plus, this rule should apply to any irrigation feature; in the arid western states, canals, drains, and ditches would presumably revert to "upland" if irrigation were to cease. Of course, this depends on what the actual definition of "upland" is. (p. 5)

Agency Response: See summary response for section 6.3. The agencies believe the commenter is requesting an exclusion for ditches with perennial flow, where that flow is the result of artificial means, such as irrigation. Perennial flow caused by agricultural irrigation is nonetheless perennial flow. Irrigation water that infiltrates the soil surface, percolates through the upper soil horizons and is eventually expressed as flow in an adjacent ditch or tributary allows that ditch or tributary to effectively function in a similar manner as perennial ditches or tributaries whose flow is supported by sources other than agricultural irrigation. Ditches such as these that are part of the tributary system and meet the definition of tributary, and are not otherwise excluded under paragraph (b) of the final rule, have a significant nexus with traditional navigable waters, interstate waters, or territorial seas,

regardless of the source of water flowing in the ditches. Such ditches are thereby jurisdictional waters of the U.S. under the final rule. The exclusion for artificially irrigated wetlands can be found in section (b)(4)(A) of the final rule, and further discussion within the response to comments summary responses in Topic 7: Features and Waters Not Jurisdictional.

Western Growers Association (Doc. #14130)

- 6.777 [W]hat constitutes an “upland” is unclear. The term is not defined but it may be surmised that it is anything not in the floodplain. However, there is concern that the construction of a ditch through hydric soils may eliminate the qualification of the ditch as one excavated wholly in uplands. Moreover, if the ditch has any stretches which have wetland characteristics, it would seem that the ditch may be labeled an “adjacent water” if it is not considered a “tributary.” (p. 1)

Agency Response: See summary response for section 6.3. In addition, uplands are often found in floodplain areas, along with waters and wetlands, but these uplands are not regulated under the CWA. The agencies have defined which waters will be jurisdictional within the floodplain and riparian zone, either as adjacent (a)(6) waters or as (a)(7) or (a)(8) waters on a case-specific basis. Under the final rule, a ditch may only be jurisdictional if it meets the definition of a tributary. Excluded ditches may not be recaptured and regulated as any other type of water even if the ditch attains the characteristics of a wetland; however, a wetland adjacent to a ditch may be jurisdictional in certain cases.

National Council of Farmer Cooperatives (Doc. #14597)

- 6.778 We support the ditch exclusions in the proposed rule, one for upland ditches and the other for ditches that do not connect to jurisdictional waters. We note that in the case of the upland ditch exclusion that the failure to define upland greatly diminishes the value of this exclusion and will lead to considerable confusion and uncertainty in the field. Several definitions of upland are possible. We would like to enter into a dialog with the Agencies and stakeholders about this term and how it should be best defined. We also support the other exclusions from jurisdiction named in the rule, including but not limited to the artificially wet areas, groundwater as well as gullies and other erosional features. (p. 3)

Agency Response: See summary response for section 6.3.

Monarch-Chesterfield Levee District, St. Louis, Missouri (Doc. #14904)

- 6.779 Application of the proposed rule relies on understanding what "upland" means, a term not defined in the proposed rule. A questioning of agency regulatory officials yielded different interpretations. Some defined the term "upland" through physical characteristics that could be identified in the field. Others expressed its intent to mean "upland of" as in "beyond the limits of jurisdiction" of the CWA. This term is especially important with respect to the jurisdictional determination of ditches and also with respect to the management of stormwater systems, including those presently covered by MS4 permits. (p. 3)

Agency Response: See summary response for section 6.3. In addition, the final rule includes an exclusion under section (b)(6) for stormwater control features that are created in dry land. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4.

National Corn Growers Association (Doc. #14968)

6.780 Definition of Upland—We strongly recommend that upland be defined as the parts of the landscape whose surface drainage system flows predominately in the event of wet weather. Such a system could have sheet flow over the landscape, or in features conveying concentrated flow of water. Such concentrated conveyances could have water in them ephemerally or intermittently, or with volumes of water that don't constitute a significant nexus, as discussed above. We strongly recommend that any drainage feature in an upland area not be found categorically to be a jurisdictional tributary. Such a feature could be found to be WOTUS, case-by-case, using a scientifically grounded, concrete and quantitative threshold for the degree of effects necessary to become "significant." (p. 22)

Agency Response: See summary response for section 6.3. Some surface drainage systems may actually be wetlands, like wetland swales, and others maybe non-jurisdictional ditches. See summary response 6.2 regarding revised and expanded ditch exclusions. Defining an upland in terms of the presence of water may serve to further reduce clarity. Some uplands may have surface flow on them or over them which may serve as hydrologic connections, such as confined surface connections, but these features may or may not be jurisdictional waters of the U.S. The agencies agree that such confined surface connections require a case-by-case analysis to determine whether they meet the terms of an exclusion in paragraph (b) of the rule, such as erosional features, and whether or not they are waters of the U.S. defined in paragraph (a) of the rule.

Georgia Paper & Forest Products Association (Doc. #14924)

6.781 The use of the undefined term "uplands" also creates uncertainty in making determinations about the numerous features that may or may not be "waters" under this proposal. This problem is easily solved by (i) eliminating the term "uplands", (ii) substituting the term "non-wetlands" to be defined as any land that is not "wetlands", and (iii) using the well-defined term "wetlands" as it is established in the 1987 USACOE guidance and has long been used in wetlands delineation work: land meeting all three wetlands tests, specifically, wetlands vegetation, soils and hydrology. EPA should revise the proposed language to use the terms "wetlands" and "non-wetlands" and eliminate the term "uplands" currently used to reference non-wetland areas. (p. 2)

Agency Response: See summary response for section 6.3.

Missouri Soybean Association (Doc. #14986)

6.782 'Upland' [is] undefined and used in significant context throughout the rule. (p. 6)

[T]he scope of the exemption for ditches is so narrow that its applicability is, extremely limited and frankly it is unclear what EPA intended this to cover. The rule excludes two types of ditches: those that are excavated wholly in 'uplands, drain only uplands and have less than perennial flow, and ditches that do not contribute flow to a downstream water. In the uplands, most ditches are not excavated by man, which severely limits its scope and we are unaware of any ditch that will not eventually contribute flow downstream at some point in time. Translating these two exemptions into the specifics of an individual ditch or farm is extremely difficult. This is incredibly confusing terminology. (p. 7)

Agency Response: See summary response for section 6.3. Additional explanation of excluded ditches can be found in the summary response for section 6.2.

National Pork Producers Council (Doc. #15023)

6.783 As discussed above, a host of problems with the proposed rule stem from the term “upland” not being defined. We recommend that upland be defined as the parts of the landscape from which water moves off predominately in the aftermath of wet weather. This water can move either as sheet flow or as concentrated flow through conveyances of some type. The key is that the water is flowing because of specific weather events. The water can flow ephemerally or seasonally as a result of weather. We fully support the proposed exclusion from jurisdiction of any upland ditch that flows less than permanently. (p. 21)

Agency Response: See summary response for section 6.3. Additional explanation of excluded ditches can be found in the summary response for section 6.2.

Colorado Agricultural Aviation Association (Doc. #15033)

6.784 The agencies' statement that no "uplands" located in "floodplains" can ever be "waters of the US" is not reassuring for "uplands" is not defined anywhere in the rule or preamble. (p. 4)

Agency Response: See summary response for section 6.3.

Klamath Water Users Association (Doc. #15063)

6.785 While these exclusions are directed at important concepts, as drafted they may raise more questions than answers. For example, the term “uplands” is not defined and dispute could additionally arise based on the use of the words “wholly” and “only” as the applicable factors for exclusion. There is also no clear determination that artificially created wetlands (as a result of irrigation in the uplands) will be excluded as “waters of the U.S.” (p. 2)

Agency Response: See summary response for section 6.3. The exclusion for artificially irrigated wetlands can be found in section (b)(4)(A) of the final rule. See summary responses for Topic 7: Features and Waters not Jurisdictional, for a discussion.

National Alliance of Forest Owners (Doc. #15247)

6.786 [T]he Agencies should define uplands as follows:

Upland(s). The term upland(s) means any area that does not qualify as a wetland because the associated hydrologic regime is not sufficiently wet to elicit development of each of the vegetation, soils, and hydrologic characteristics that must be present to delineate a wetland.²⁵³ (p. 21-22)

Agency Response: See summary response for section 6.3.

American Forest & Paper Association (Doc. #15420)

6.787 The Proposal also does not define “upland,” although it has been stated that an upland is any area that is not a wetland. To improve clarity in the rule, we recommend that EPA include a definition of “upland” in any final rule. We note that the “three parameter” classification system outlined in the Corps 1987 Wetlands Delineation Manual (33 CFR 328.3(b); USACE 1987) requires that in order for an area to be classified as a wetland it must have three attributes: (1) prevalence of hydrophytic vegetation; (2) hydric soils; and (3) permanently or periodically inundated or soils saturated to the surface at some time during the growing season. Conversely, uplands are defined by the Corps in the same manual (USACE 1987) as an area where one or more of these three attributes is not present. Therefore, we recommend that the agencies define uplands as follows: “Uplands. The term uplands means any area that does not qualify as a wetland because the associated hydrologic regime is not sufficiently wet to elicit development of each of the vegetation, soils, and hydrologic characteristics that must be present to delineate a wetland.” Further, EPA and the Corps should make clear their intent to maintain existing practice that all three of the “wetland” attributes must be met for delineation of a wetland; and that the absence of any one of these attributes defines an upland, wherever it occurs. (p. 4-5)

Agency Response: See summary response for section 6.3.

United Egg Producers (Doc. #15201)

6.788 We strongly recommend that upland be defined as the parts of the landscape whose surface drainage system flows predominately in the event of wet weather. Such a system could have sheet flow over the landscape, or in features conveying concentrated flow of water. Such concentrated conveyances could have water in them ephemerally or intermittently, or with limited volumes of water as guided by an objective threshold for a significant nexus determination, as discussed above. We strongly recommend that any drainage feature in an upland area not be categorically a jurisdictional tributary. Such a feature (except for the two classes of excluded ditches as discussed above) could be

²⁵³ The preamble appears to use “upland” and “uplands” interchangeably when discussing the first ditch exclusion. See 79 Fed. Reg. at 22,203. The proposed definition of “upland(s)” would thus apply to all discussions in the preamble that mention “upland” or “uplands.”

found to be WOTUS, case-by-case, using a scientifically grounded, concrete and quantitative threshold for the degree of effects necessary to become "significant." (p. 3)

Agency Response: See summary response for section 6.3. Additional information about excluded ditches can be found in the summary response for section 6.2. Some surface drainage systems may actually be wetlands, like wetland swales, and others may be non-jurisdictional ditches. The agencies agree that such confined surface connections require a case-by-case analysis to determine whether they meet the terms of an exclusion in paragraph (b) of the rule, such as erosional features, and whether or not they are waters of the U.S., defined in paragraph (a) of the rule.

Riverport Levee District (Doc. #15655)

6.789 Application of the proposed rule relies on understanding what "upland" means, a term not defined in the proposed rule. A questioning of agency regulatory officials yielded different interpretations. Some defined the term "upland" through physical characteristics that could be identified in the field. Others expressed its intent to mean "upland of" as in "beyond the limits of jurisdiction" of the CWA. This term is especially important with respect to the jurisdictional determination of ditches and also with respect to the management of stormwater systems, including those presently covered by MS4 permits. Outside of the rulemaking process and the requirements of the APA a definition of "upland" has been supplied by the Agencies in a Q&A document. While the Q&A sheet, should one happen upon it, may be seen to supply a definition for this key term, "upland" is not defined by the proposed rule, it is not included in the preamble, proposed regulatory text, or anywhere else in the rulemaking docket. Just as the public cannot reasonably rely on a Q&A sheet as an authoritative source for defining a key term used in rulemaking, nor can the Agencies use a Q&A sheet in place of the requirements of rulemaking as intended by the APA. (p.2-3)

Agency Response: See summary response for section 6.3. In addition, the final rule includes an exclusion under section (b)(6) for stormwater control features that are created in dry land. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4.

Georgia Paper & Forest Products Association (Doc. #15657)

6.790 The use of the undefined term "uplands" also creates uncertainty in making determinations about the numerous features that may or may not be "waters" under this proposal. This problem is easily solved by (i) eliminating the term "uplands", (ii) substituting the term "non-wetlands" to be defined as any land that is not "wetlands", and (iii) using the well-defined term "wetlands" as it is established in the 1987 USACOE guidance and has long been used in wetlands delineation work: land meeting all three wetlands tests, specifically, wetlands vegetation, soils and hydrology. EPA should revise the proposed language to use the terms "wetlands" and "non-wetlands" and eliminate the term "uplands" currently used to reference non-wetland areas. (p. 2)

Agency Response: See summary response for section 6.3.

Western Landowners Alliance (Doc. #16553)

- 6.791 **Define Upland and Other Terms** - We understand the interpretation of "upland" is, basically, not water or wetland. So, an irrigation ditch excavated "wholly in upland" can still have its diversion works in a jurisdictional water, and not be jurisdictional unless it discharges to a jurisdictional water. This is a somewhat different interpretation than scientists or lay people use, which might consider "upland" to be above the riparian zone or floodplain. The WOTUS definition should include the "non-water, non-wetland" definition of "upland" to avoid confusion. Further definitional clarification is also needed for "dry land", "through another water", "erosional feature", and others. See the National Cattlemen's Beef Association/Public Land s Council input for details on definitional needs. (p.2)

Agency Response: See summary response for section 6.3. See summary response 14.3: Terms suggested for definition. Also, the preamble to the final rule includes important clarifications of many terms, as requested by commenters.

Montana Stockgrowers Association (Doc. #16937)

- 6.792 The term "uplands" is used throughout the proposed rule. It is a very significant legal term, especially as it applies to ditches and ponds, yet the agencies have failed to provide an adequate description of this important legal term within the proposed definition itself. We recommend the agencies provide this definition and allow additional comment to be included from the public. (p. 9)

Agency Response: See summary response for section 6.3.

Earth City Levee District (Doc. #18910)

- 6.793 **Key terms necessary to understanding the "definition of Waters of the U.S." and applying the proposed rule are not supplied.**

Application of the proposed rule relies on understanding what "upland" means, a term not defined in the proposed rule. A questioning of agency regulatory officials yielded different interpretations. Some defined the term "upland" through physical characteristics that could be identified in the field. Others expressed its intent to mean "upland of" as in "beyond the limits of jurisdiction" of the CWA. This term is especially important with respect to the jurisdictional determination of ditches and also with respect to the management of stormwater systems, including those presently covered by MS4 permits. Outside of the rulemaking process and the requirements of the APA a definition of "upland" has been supplied by the Agencies in a Q&A document. While the Q&A sheet, should one happen upon it, may be seen to supply a definition for this key term, "upland" is not defined by the proposed rule, it is not included in the preamble, proposed regulatory text, or anywhere else in the rulemaking docket. Just as the public cannot reasonably rely on a Q&A sheet as an authoritative source for defining a key term used in rulemaking, nor can the Agencies use a Q&A sheet in place of the requirements of rulemaking as intended by the APA. (p. 2-3)

Agency Response: See summary response for section 6.3. In addition, the final rule includes an exclusion under section (b)(6) for stormwater control features that are created in dry land. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4.

National Association of County Engineers (Doc. #14981)

- 6.794 Uplands – Uplands must be clearly defined. The term has different meanings depending on whether it is used on a watershed scale or stream-system scale. We believe the intent is to use the term to define areas outside the stream channel. The suggested definition is “Uplands are defined as any area outside the natural channel cross section.” It is important to exclude “floodplains” when defining uplands because, in many areas, ditches are constructed in floodplains but do not have continuous flow and, therefore, should not be regulated. (p. 2)

Agency Response: See summary response for section 6.3.

Department of Public Works, City of Harrisonville, Missouri (Doc. #4038)

- 6.795 Further complicating our ability to evaluate this draft rule is that agencies have failed to provide any description or definition of the term “uplands”. Based on plain language definitions, we can only surmise that most of the constructed ditches, and stormwater channels in the city of Harrisonville would not be excluded from the jurisdictional definition of “Waters of the United States”. Because of that we will subject to new legal mandates and operational requirements. (p. 1)

Agency Response: See summary response for section 6.3. In addition, the final rule includes an exclusion under section (b)(6) for stormwater control features that are created in dry land. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4.

Northwest Colorado Council of Governments Water Quality/ Quantity Committee (Doc. #10187)

- 6.796 QQ recommends that the rule explain how EPA or the Corp will determine if a ditch is “wholly” in uplands; many public infrastructure ditches are part of linked systems that may run for hundreds of miles. (p. 7)

Agency Response: See summary response for section 6.3.

Duke Energy (Doc. #13029)

- 6.797 [T]he proposed rule does not define key terms, such as “ditch” or “upland” needed to understand the process for qualifying for an exclusion. Since a definition for the term “ditch” was not provided, it is not clear how certain ditches would differ from ephemeral drainages or erosional features, such as a gullies. The proposed rule also does not define an “upland,” which is core to the first exclusion. Various definitions for uplands exist,

however they have different meanings. For instance, the Connectivity Report defines “uplands” to mean “higher elevation lands surrounding streams and their floodplains,”²⁵⁴ therefore, anything in the floodplain would not be considered an upland. But the wetlands literature that they cite within the report refers to any area that is not a water body and does not meet the Cowardin et al. (1979) three-attribute “wetland definition.”²⁵⁵ However, on stakeholder calls, when asked about a definition for uplands it was stated that “all it actually means is it is not a water”²⁵⁶ or uplands are anything that are not “waters of the United States.” However, this can result in additional confusion and regulatory subjectivity and inconsistency. (p. 29)

Agency Response: See summary response for section 6.3. Ephemeral streams are those waters with ephemeral flow that meet the definition of a tributary found in (c)(3) and are not otherwise excluded ditches under (b)(3). Ephemeral erosional features are excluded from waters of the U.S. under (b)(4)(F). For further information, see the summary for section 6.2: Excluded Ditches, and the summary responses in Topic 7: Features and Waters Not Jurisdictional.

Nucor Corp. (Doc. #14963)

6.798 [T]he preamble states that “absolutely no uplands located in ‘riparian areas’ and ‘floodplains’ can ever be ‘waters of the United States’ subject to jurisdiction of the CWA.” Id. at 22207.²⁵⁷ Nowhere in the proposed rule is the term “upland” defined. The lack of a definition fails to provide clarity concerning the exemption for upland ditches and leaves the exemption open to interpretation. (p. 11)

Agency Response: See summary response for section 6.3.

Beaver Water District (Doc. #15405)

6.799 Definitions for additional, commonly-used terms, such as “uplands,” should be included in the rule. (p. 2)

Agency Response: See summary response for section 6.3.

Eagle River Water & Sanitation District (Doc. #15116)

6.800 Also with respect to the proposed inclusion of riparian areas and waters in floodplains in the definition-by-rule portion of waters of the United States, we request clarification of the definition of “upland.” Upland has been variously interpreted (under Section 404) to mean anything that is not a water of the U.S. (including wetlands) and/or anything that is above the OHWM. This definition is now confused by the addition of riparian areas and the floodplain (with an undefined flood frequency). Traditional uplands may not be what

²⁵⁴ Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (EPA/600/R-11/098B) September 2013, Page A-20.

²⁵⁵ Id. at Pages A-20 & A-21

²⁵⁶ EPA Acting Administrator, Nancy Stoner, Ditch the Myth webinar (July 16, 2014)

²⁵⁷ If it is the position of the Agencies that uplands in riparian areas and floodplains should not be subject to consideration, this position should be set forth in the language of the rule.

they once were, and this apparent discrepancy should be addressed in the proposed rule. (p. 6)

Agency Response: See summary response for section 6.3.

Pennsylvania Independent Oil and Gas Association (Doc. #15167)

6.801 How is upland defined and applied? A clear definition of what is considered to be upland will significantly increase the clarity of the Proposed Rule and eliminate confusion in its application. (p. 16)

Agency Response: See summary response for section 6.3.

Packaging Corporation of America (Doc. #15515)

6.802 The term "uplands" is frequently used interchangeably with the concept of a non-wetland in the proposal but is not specifically defined. Consistent with the stated goal of the EPA and Corps that the rule would not significantly increase the number of jurisdictional waters, the term uplands should be defined in the proposed rule. The term should be defined consistent with current USACE guidance (1987 Corps Wetlands Delineation Manual) wherein the three parameter classification system requiring that all three wetlands tests be met, namely, vegetation, soils, and hydrology. EPA and the Corps should make clear that absence of any of the three criteria for a wetland defines an upland, wherever it occurs. (p. 3)

Agency Response: See summary response for section 6.3.

Washington County Water Conservancy District (Doc. #15536)

6.803 If the Agencies refuse to expand their exclusion of artificial features as proposed in this letter, the Agencies should clarify the meaning of these exceptions as follows:

- The Agencies should define the term “upland,”²⁵⁸ explain the intended meaning of the phrase “revert to upland,” and specify the timeframe for evaluating whether an area has “reverted” to upland (e.g., how long the irrigation would be required to cease).

The Agencies should define the term “dry land” to clarify whether that term is synonymous with the term “uplands,” and explain what it means for an artificial lake or pond to be “used exclusively for stock watering, irrigation, settling basins, or rice growing” (i.e., this criteria would be met if such a lake or pond were unintentionally used for some other purpose, such as use by migratory birds or other animals). (p. 27)

Agency Response: See summary response for 6.3. In addition, the preamble to the final rule explains additional key terms, as requested by commenters. The term “exclusively” was replaced with “primarily” in the exclusion for artificial lakes and ponds in the final rule to address the concerns expressed by the commenter.

²⁵⁸ As noted above, the Agencies’ indirect definition for “uplands” is unhelpful.

National Council for Air and Stream Improvement. Inc. (Doc. #13627)

- 6.804 The Proposed Rule uses the term "uplands" though no formal definition is provided. Improved clarity could be brought to the rule if it provides a definition of "uplands."

The "three parameter" classification system outlined in the Corps 1987 Wetlands Delineation Manual (33 CFR 328.3(b); USACE 1987) requires that in order for an area to be classified as a wetland it must have three attributes: (1) prevalence of hydrophytic vegetation; (2) hydric soils; and (3) permanently or periodically inundated or soils saturated to the surface at some time during the growing season. Conversely, uplands are defined by the Corps in the same manual as an area where one or more of these three attributes is not present (USACE 1987). To improve clarity in the rule, we recommend that EPA define uplands as follows: "The term uplands means any area that does not qualify as a wetland because the associated hydrologic regime is not sufficiently wet to elicit development of each of the vegetation, soils, and hydrologic characteristics that must be present to delineate a wetland." Further, EPA and the Corps should make clear their intent to maintain existing practice that all three of the "wetland" attributes must be met for delineation of a wetland; and that the absence of anyone of these attributes defines an upland, wherever it occurs. (p. 6)

Agency Response: See summary response for section 6.3.

The Wildlife Society (Doc. #14899)

- 6.805 Because the terms "upland" and "ditch" have a high potential for ambiguity and therefore variety in interpretation, we suggest that adding definitions will provide further clarity. (p. 6)

Agency Response: See summary response for section 6.3. See summary responses 6.0 and 6.2 regarding the agencies' understanding of the term "ditch."

Potomac Riverkeeper, Inc. (Doc. #15013)

- 6.806 [T]he failure to define "upland" could be said to leave what qualifies for the categorical exemption at (t)(3) ambiguous. (p. 4)

Agency Response: See summary response for section 6.3.

Western Landowners Alliance (Doc. #15380)

- 6.807 Define Upland and Other Terms - We understand the interpretation of "upland" is, basically, not water or wetland. So, an irrigation ditch excavated "wholly in upland" can still have its diversion works in a jurisdictional water, and not be jurisdictional unless it discharges to a jurisdictional water. This is a somewhat different interpretation than scientists or lay people use, which might consider "upland" to be above the riparian zone or floodplain. The WOTUS definition should include the "non-water, non-wetland" definition of "upland" to avoid confusion. Further definitional clarification is also needed. Further definitional clarification is also needed for "dry land", "through another water", "erosional feature", and others. See the National Cattlemen's Beef Association/Public Lands Council input for details on definitional needs. (p. 2)

Agency Response: See summary response for section 6.3. See summary response 14.3: Terms suggested for definition. Also, the preamble to the final rule includes important clarifications of many terms, as requested by commenters.

Society of American Foresters (Doc. #15075)

6.808 The Proposal uses the term “uplands” though no formal definition is provided. The “three parameter” classification system outlined in the ACE 1987 Wetlands Delineation Manual (33 CFR 328.3(b); USACE 1987) requires that in order for an area to be classified as a wetland it must have three attributes: (1) prevalence of hydrophytic vegetation; (2) hydric soils; and (3) permanently or periodically inundated or soils saturated to the surface at some time during the growing season. Conversely, uplands are defined by the ACE in the same manual as an area where one or more of these three attributes is not present (USACE 1987). To improve clarity in the Proposal, we recommend that EPA define uplands as follows: “The term uplands means any area that does not qualify as a wetland because the associated hydrologic regime is not sufficiently wet to elicit development of each of the vegetation, soils, and hydrologic characteristics that must be present to delineate a wetland.” Further, EPA and the ACE should make clear their intent to maintain existing practice that all three of the “wetland” attributes must be met for delineation of a wetland; and that the absence of any one of these attributes defines an upland, wherever it occurs. (p. 4)

Agency Response: See summary response for section 6.3.

AES-US Services (Doc. #3242)

Please provide a definition of “upland”. (p. 1)

Agency Response: See summary response for section 6.3.

SC Chamber of Commerce Comments (Doc. #14535)

6.809 EPA should include in final rule language its clarification that an area could still be an “upland” even if it lies within a broader area that qualifies as “adjacent” to a traditional navigable water or tributary due to the expansive definitions of tributary, adjacent, and neighboring.

EPA should also define “upland.” Uplands should include areas with high groundwater tables that do not otherwise exhibit characteristics of wetlands (e.g. plant species and soil types) and exclude from the definition of “wetlands” and “waters”, ditches constructed in such lands that retain water due to elevated groundwater levels. (p. 6)

Agency Response: See summary response for section 6.3. In addition, the final rule does clarify that an excluded ditch or feature is not a water of the US even if it meets the definition of “tributary” or “adjacent.”

Areas with high groundwater tables may demonstrate surface water in certain areas where the high groundwater table intersects the surface. Those areas may be ponded waters or inundated wetlands or tributaries with intermittent or perennial flow. Some areas with high groundwater tables below surface may be a wetland;

however, wetlands must have the required three parameters of hydrology, prevalence of hydrophytic vegetation, and hydric soils, per the 1987 Manual and Regional Supplements. Therefore, areas without required plant species and hydric soils would not be defined as a wetland. Such areas may be an upland if the area also does not have any other water features present. Ditches that are constructed in areas with elevated groundwater levels and have perennial flow may be waters of the U.S., so the agencies do not agree with such a definition of upland.

6.4. ALTERNATIVE APPROACHES TO DITCH JURISDICTION

Agency Summary Response

The comments in this section recommended alternative approaches to ditch jurisdiction, which were not put forth by the agencies in the Proposed Rule, and which differ from current regulations and guidance for determining the jurisdictional status of ditches.

Reliance on Existing Clean Water Act Programs to Regulate Ditches

Many of these commenters recommended relying on existing Clean Water Act programs, specifically the CWA §402 National Pollutant Discharge Elimination System (NPDES) permit program, rather than asserting jurisdiction over ditches themselves. However, multiple CWA programs rely on the definition of waters of the U.S., including the CWA §404 permit program for discharge of dredged or fill material, and the CWA §311 program for oil spill prevention and clean-up, in addition to the CWA §402 program. The agencies note that the existing CWA programs regulate and require permits for discharges to waters of the U.S. of pollutants or dredge and fill material only apply to waters of the U.S., which are under federal jurisdiction. Therefore, it is important and necessary for the agencies to clarify which waters, including ditches, fall under federal jurisdiction. For example, although not all point sources are waters of the U.S. themselves, they may be discharged into waters of the U.S., therefore requiring an NPDES permit. As discussed in Topic 7.4.4 (MS4s and other stormwater management features), regulations under §402 and §404 of the Act do not provide redundant protections; these permitting programs are not interchangeable in how they protect surface waters.

Point Sources and MS4 Components as Waters of the United States

Under the CWA 402 program, Municipal Separate Storm Sewer Systems (MS4) are authorized to discharge stormwater under either individual or general National Pollutant Discharge Elimination System (NPDES) permits, and generally include many point source outfalls. Permits for regulated MS4s are usually written on a system-wide or jurisdiction-wide basis. Many of the commenters asked that the agencies clarify that point sources that are covered by NPDES permits are not waters of the U.S., and a number of commenters expressed concern that ditches, including components of a permitted MS4, could be viewed as both a point source and a water of the U.S. However, the approach that some ditches may be considered both a point source and a water of the U.S. reflects the CWA itself as well as longstanding agency policy. The legal framework for this is discussed in the Technical Support Document at Section I. MS4s are regulated under the §404 program when the owners/operators undertake activities resulting in the

discharge of dredged or fill material to jurisdictional waters that form part of their drainage networks. Some activities, such as ditch maintenance may be exempt from 404 permit requirements under CWA 404(f)(1). Other activities may be covered by a Nationwide General Permit issued by the U.S. Army Corps of Engineers, e.g., NWP 43 for stormwater control structures.

MS4s often are made up of a combination of jurisdictional waters and non-jurisdictional features and the agencies believe the final rule clarifies which components are jurisdictional and which are not. If a ditch, which may be part of an MS4, meets the definition of tributary and is not otherwise excluded, it is a water of the U.S. However, stormwater control features constructed to convey, treat, or store stormwater that are created in dry land are excluded from jurisdiction; please see summary response at 7.4.4. This exclusion does not cover transportation ditches even when such ditches are also regulated under an MS4 program; those ditches are addressed under paragraph (b)(3) of the rule. The exclusion in paragraph (b)(6) is intended to address engineered stormwater control structures in municipal or urban environments. Stormwater control features are designed to address runoff that occurs during and shortly after precipitation events; as a result, stormwater features that convey runoff are expected to only carry ephemeral or intermittent flow. The agencies do not expect the scope of ditches excluded to be different under (b)(3) and (b)(6), so there should be little practical need to distinguish between the two. Ditches that carry perennial flow are not excluded under either (b)(3) or (b)(6).

Categories of Excluded Ditches

Commenters also proposed a number of different types of ditches for exclusion from jurisdiction as a category, such as roadside ditches, on-site ditches associated with permitted activities, and agricultural ditches. The agencies have considered the recommendations and concerns of stakeholders, and have modified and clarified the exclusions for certain types of ditches in the final rule. These exclusions are described in greater detail in summary response 6.2 for Excluded Ditches.

Some individual commenters recommended novel approaches to ditch jurisdiction which are individually addressed within this section.

Specific Comments

National Association of Conservation Districts (Doc. #12349)

6.810 The difference between streams and ditches under the definition of tributary is incredibly important in agriculture. As stated in NACD's comments on the EPA Connectivity Report, EPA is underemphasizing this distinction. For example, farm ditches and other drainage features are critical to farming and ranching operations. In many instances, farm ditches or drainage features are dry unless it rains. As a result, they do not have enough water in them for a long enough time to merit consideration as a waterway under the federal CWA. The proposed rule must clarify when, where and how there might be a significant nexus between remote drainage features or isolated waters and downstream navigable waters, given the limited jurisdiction of the CWA.

As drafted, the proposal raises legitimate concerns about the potential regulation of on-farm ditches, ponds, and isolated wetlands that are located in a natural stream or have a hydrologic connection to a downstream jurisdictional water body. This creates the very real potential for the regulation of on-farm water features not regulated since Solid Waste Agency of Northern Cook County (SWANCC), regardless of intended use.

EPA has the option to consider intended use, which may provide a way to limit the scope of jurisdiction around the problem of discharges or fill and dredge activities affecting such features that may require a 402 or 404 permit. NACD encourages the use of local input to ascertain and develop local parameters, criteria and defined standards regarding the relevance of tributaries to traditional navigable WOTUS. (p. 4-5)

Agency Response: The final rule includes revised and expanded exclusions for ditches, including many ephemeral and intermittent ditches. See summary response for 6.2: Excluded Ditches. However, ditches that are constructed in or relocate a natural stream remain jurisdictional. A number of regular farming and ranching activities are exempt from needing a permit under CWA Section 404(f)(1), if they are part of an ongoing agricultural practice. Furthermore, the rule clarifies that the waters subject to the activities Congress exempted under Section 404(f)(1) are not jurisdictional by rule as “adjacent.” See summary responses for Topic 3, Adjacent Waters, for a discussion on the revised adjacent definition. While waters subject to normal farming, silviculture, or ranching practices may be determined to significantly affect the chemical, physical, or biological integrity of downstream navigable waters, the agencies believe that such determination should be made based on a case-specific basis, instead of by rule. The agencies also recognize that waters subject to normal farming, silviculture, or ranching practices are often associated with modifications and alterations including drainage, changes to vegetation, and other disturbances the agencies believe should be specifically considered in making a significant nexus determination. See summary responses 14.2: Interpretive Rule and 14.2.3: Ongoing Farming.

The preamble makes it clear that artificial ponds or lakes created in dry land for one purpose may have other beneficial purposes, such as wildlife habitat or water retention, which would not change its jurisdictional status or coverage under an exclusion. The agencies have taken into account input from local and state stakeholders, as well as the latest scientific conclusions about the connectivity of waters, including tributaries, to develop a rule that can be consistently applied nationwide. See the preamble at Section III.C and IV.F, summary responses for Topic 5, Significant Nexus, and Topic 8, Tributaries, and Technical Support Document at Section VII for a more detailed discussion on the agencies support for jurisdiction over waters that meet the definition of “tributary” as provided in the rule.

Texas Commission on Environmental Quality (Doc. #14279.1)

- 6.811 We are not certain that the full impacts on local jurisdictions have been fully considered. Therefore, we might suggest a dry season evaluation of all the County ditchlines and outfall channels be undertaken by the EPA, which may include extensive coordination,

with Maryland Department of the Environment and the Corps of Engineers. The purpose of this updated mapping effort would be to determine the extent to which ditches would be deemed both perennial and jurisdictional under the proposed rule. Once published, the mapping would provide a visual representation of the potential impacts of the new rule and serve as an operational/developmental guideline similar to the federal blue line stream and flood plain mapping that has already been performed. (p. 1)

Agency Response: It would be cost-prohibitive to survey and map all ditches nationwide. However, the agencies believe clarity provided by rule will allow for an operational guideline for landowners to determine whether there are waters of the U.S. on their property. In addition, the agencies make assessments and site visits for jurisdictional determinations when requested by the landowner. Please refer to the RTC summary response for Topic 11: Costs/Benefits, for additional information about potential impact of the rule on the scope of CWA jurisdiction and impacts on local jurisdictions.

State of Wyoming (Doc. #14584)

- 6.812 In the western United States, a great number of streams and ditches can be legally managed at the discretion of the water right holder to prevent return flows. Ditches carry appropriated water to those with the right to beneficially use that water, and they are regulated by the states. Flows, level of input, and therefore connectivity to waters of the United States are controlled by state law. These waters are not (and should not be considered) "waters of the United States" subject to federal management. The proposed rule is an inappropriate effort to take these waters under federal control. (p. 3)

Agency Response: Neither the CWA nor the rule impairs the authorities of States to allocate quantities of water. Instead, the CWA and the rule serve to enhance the quality of the water that the States allocate. For a further discussion of the CWA and state water rights, see the summary response for 1.1.2: Water Supply and Allocation.

Mesa County, Colorado Board of County Commissioners (Doc. #12713)

- 6.813 Under the Proposed Rule, a number of ditch features would appear to be considered WOUS. To be considered WOUS under current practice, requires a finding of "significant nexus" to a downstream Traditional Navigable Waters (TNW). Under the proposed rule any ditch that intersects an ephemeral tributary and eventually connects to a TNW would be WOUS. The proposed rule removes the requirement to determine a "significant nexus." This will constitute a significant expansion in the number of ditches that are considered Waters of the U.S., many of which could be part of managed MS4 facilities.

Mesa County requests that the Proposed Rule require that a "significant nexus" must be established for a roadside ditch to be considered WOUS. (p. 2)

Agency Response: See Agency Summary Response for 6.4. Under 2008 *Rapanos* guidance, ditches excavated in uplands, draining only uplands, with less than relatively permanent flow are generally not considered Waters of the U.S. Under

the rule, ditches that are not excluded and that meet the definition of tributary have a significant nexus, based on the functions of tributaries and their connectivity, to downstream (a)(1) through (3) waters. Therefore, the significant nexus requirement for ditches that are not excluded under section (b) has been determined by rule. However the final rule contains a revised and expanded exclusion for ditches. See summary response 6.2: Excluded Ditches.

Department of Public Works & Engineering, City of Cookeville, Tennessee (Doc. #19619)

6.814 Certain categories of waters need to be specifically excluded from WOTUS status:

- f. Upland ditches within a regulated MS4 that ultimately drain to a tributary should be determined not to be a WOTUS because they are actually a stormwater conveyance for the MS4 and are regulated through the MS4 permit. (p. 2)

Agency Response: See summary response for section 6.4.

Golf Course Superintendents Association of America et al. (Doc. #14902)

6.815 Rather than labeling ditches as WOTUS, the Agencies should rely on existing CWA programs which require permits for discharges to navigable waters and stormwater management systems rather than labeling ditches themselves as jurisdictional waters. Moreover, the Agencies should clarify that point sources that are covered by NPDES permits are not WOTUS. (p. 14-15)

Agency Response: See summary response for section 6.4.

Association of Equipment Manufacturers (Doc. #16901)

6.816 Rather than labeling ditches as "waters of the U.S.," the agencies should rely on existing CWA programs which require permits for discharges to navigable waters and stormwater management systems rather than labeling ditches themselves as jurisdictional waters. Moreover, the agencies should clarify that point sources that are covered by NPDES permits are not waters of the U.S. The agencies should clarify that (1) on-site ditches associated with permitted activities; (2) roadside; and (3) agricultural ditches are not jurisdictional waters of the U.S. (p. 5)

Agency Response: See summary response for section 6.4.

Water Advocacy Coalition (Doc. #17921.1)

6.817 Rather than labeling ditches as "waters of the United States," the agencies should rely on existing 402 permit requirements for discharges to navigable waters and to or by stormwater management systems. Moreover, the agencies should clarify that point sources, such as MS4s, that are covered by NPDES permits are not waters of the United States. Indeed, the proposed rule's "strong intent to provide as much certainty to the regulated public and the regulators" requires clarification on the jurisdictional status of MS4s. Moreover, while EPA's recent "Ditch the Myth" campaign states that the proposed rule "cuts through the red tape" to offer greater certainty and consistency on "waters of the United States" determinations – with an emphasis on ditches – nowhere

does EPA specifically address ditches that are components in permitted MS4s. Respectfully, this is a glaring omission in the agencies' otherwise exhaustive proposed treatment of "waters of the United States" matters. The Coalition recommends that the agencies make clear that non-tidal ditches, including roadside, agricultural, industry-site, railroad right-of-way, and other stormwater, process water, and wastewater ditches, are not jurisdictional waters of the United States. (p. 58)

Agency Response: See summary response for section 6.4.

Farris Law Group PLLC (Doc. #10199)

6.818 Rather than labeling ditches as "waters of the U.S.," the agencies should rely on existing CWA programs which require permits for discharges to navigable waters and stormwater management systems rather than labeling ditches themselves as jurisdictional waters. In addition to their necessary function to channel water away from dry features on commercial properties, ditches are a common component in Municipal Separate Stormwater Systems (MS4s). The proposed rule suggests that some ditches are excluded from WOTUS coverage, while other ditches are "tributaries" and thus within CWA jurisdiction. To the extent that ditches (and other system components) are mapped and identified as part of an MS4, and subject to a National Pollutant Discharge Elimination System (NPDES) permit governing the MS4 of which they are a part, then such ditches (and components) should not be WOTUS. (p. 2-3)

Agency Response: See summary response for section 6.4.

Newmont Mining Corporation (Doc. #13596)

6.819 .Ditches and Other Constructed Channels that Convey Wastewaters, Solutions, Stormwater and Groundwater to Mining Artificial Ponds.

While most of the flow to Newmont's artificial ponds is by pipe, and not in open channels or ditches, some of the flow into Newmont's stormwater retention ponds and quench ponds is by constructed ditches. These ditches divert stormwater, and also at times mine water, around or away from disturbed areas. If mining artificial ponds are deemed jurisdictional waters under the Proposal, then so too must any constructed channels or waters that convey solutions, wastewaters, groundwater, or other liquids to these ponds, because these constructed channels would arguably be tributaries to such jurisdictional waters. See, e.g., paragraph (a)(5) at 79 Fed. Reg. 22263. Nor would these constructed channels fall within either of the "ditch exceptions" in the Proposal. They could not be deemed ditches that are excavated only in uplands under the first ditch exception, because they would drain into a jurisdictional water (i.e., the artificial pond). See, e.g., paragraph (b)(3) at 79 Fed. Reg. 22263. Nor would they be exempted under the second ditch exemption because, again, they would "contribute flow" to a jurisdictional water (i.e., the artificial ponds). See, e.g., paragraph (b)(4) at 79 Fed. Reg. 22263.

As in the case of the ponds themselves, any constructed channels conveying waters to or from these ponds are encompassed within Newmont's State WPCA permits, and they are designed and constructed to ensure that there is no discharge to surface water. Just as it makes no sense to regulate the artificial ponds themselves as jurisdictional waters, so too

would it make no sense that the constructed channels conveying wastewaters, solutions, groundwater, or process waters to these artificial ponds be deemed jurisdictional waters. The reason, of course, is that these channels could not by any stretch of the imagination be deemed to affect, or to have the potential to affect, the chemical, physical, or biological integrity of any TNW. And again, the “science” on which the Agencies’ Proposal is based does not establish, or support, the proposition that such isolated channels or ditches could have an impact, much less a significant impact, on a downstream TNW. Finally, given the isolated nature of the mining artificial pond/channel system, the Agencies’ assertion of jurisdiction over such channels would be flatly contrary to SWANCC. (p. 23-24)

Agency Response: See summary response for section 6.4 and for 6.2: Excluded Ditches. The agencies agree that certain features described in the comment should not be jurisdictional and have made changes in the final rule to reflect exclusions for waste treatment systems, mining ponds, other artificial ponds, stormwater system components, and wastewater recycling/reuse features constructed in dry land. These exclusions are further discussed in summary response 7.0: Features and Waters Not Jurisdictional.

American Exploration & Mining Association (Doc. #13616)

6.820 Specifically, AEMA members construct different types of ditches and conveyances throughout exploration and mine sites to serve a variety of functions. For example, explorers and mine operators construct and maintain temporary and permanent diversion ditches and channels to manage stormwater runoff and keep water away from disturbed areas within the exploration or mine site. Some ditches collect and discharge stormwater runoff directly to downstream waters pursuant to NPDES permits. Others carry water to ponds within the exploration or mine site, where solids can settle out, and water is subsequently reused in drilling or mining processes or discharged from the mine site to downstream waters pursuant to an NPDES permit. Mine operators also sometimes rely on on-site water conveyances to carry wastewater to treatment facilities. Simply put, ditches are found everywhere on exploration and mine sites nationwide, and due to the dynamic nature of mining, mining companies constantly have to maintain, modify, move, or reclaim them.

Rather than labeling ditches as “waters of the U.S.,” the agencies should rely on existing CWA programs which require permits for discharges to navigable waters and stormwater management systems rather than labeling ditches themselves as jurisdictional waters. Moreover, the agencies should clarify that point sources which are covered by NPDES permits are not waters of the U.S. The agencies should clarify that (1) on-site ditches associated with permitted activities; (2) roadside; and (3) agricultural ditches are not jurisdictional waters of the U.S. (p. 6-7)

Agency Response: See summary response for section 6.4.

Montana Mining Association (Doc. #14763)

6.821 Specifically, MMA members construct different types of ditches and conveyances throughout exploration and mine sites to serve a variety of functions. For example,

explorers and mine operators construct and maintain temporary and permanent diversion ditches and channels to manage stormwater runoff and keep water away from disturbed areas within the exploration or mine site. Some ditches collect and discharge stormwater runoff directly to downstream waters pursuant to NPDES permits. Others carry water to ponds within the exploration or mine site, where solids can settle out, and water is subsequently reused in drilling or mining processes or discharged from the mine site to downstream waters pursuant to an NPDES permit. Mine operators also sometimes rely on on-site water conveyances to carry wastewater to treatment facilities. Simply put, ditches are found everywhere on exploration and mine sites nationwide, and due to the dynamic nature of mining, mining companies constantly have to maintain, modify, move, or reclaim them.

Mine operators also rely on a broad range of ponds and impoundments (e.g., sediment ponds, heap leach ponds, tailings ponds, slurry impoundments, etc.) to support mining operations. Like ditches and conveyances, mine operators depend on these features to manage, store, treat, and reuse water within the mine site. One of the main purposes of on-site ponds and impoundments is to promote the settling of solids. After solid particles settle to the bottom of the water column, those solids are removed for disposal or further treatment, and the water can be evaporated, reused in mining processes, or \ discharged from the mine site pursuant to an NPDES permit.

Many on-site water management features are actually mandated by federal or state law and also are implemented as best management practices within the mining industry. Among other things, on-site water management features are designed to ensure that, if there are any surface discharges from a mine site into downstream navigable waters, those discharges are covered under an NPDES permit and as such do not cause or contribute to violations of water quality standards. Moreover, to the extent these on-site water features might pose a risk to groundwater, such features are permitted in accordance with state groundwater protection laws. In fact, many water management features within mine sites are designed to be zero discharge. At those sites, water that is collected and managed is either reused in mining processes or it evaporates; it is not discharged to downstream waters.

Rather than labeling ditches as "waters of the U.S.," the agencies should rely on existing CWA programs which require permits for discharges to navigable waters and stormwater management systems rather ~ than labeling ditches themselves as jurisdictional waters. Moreover, the agencies should clarify that point sources which are covered by NPDES permits are not waters of the U.S. The agencies should clarify that (1) on-site ditches associated with permitted activities; (2) roadside; and (3) agricultural ditches are not jurisdictional waters of the U.S. (p. 5-6)

Agency Response: See summary response for section 6.4. Also, with respect to the jurisdictional status of stormwater control features and waste treatment systems as waters of the U.S, please see Compendium 7 of this RTC, summary responses at 7.4.4 and 7.1, respectively.

Nevada Mining Association (Doc. #14930)

6.822 Status under the Current Regulations

Some, but certainly not most, of the ephemeral drainages and intermittent streams on NvMA member companies' properties have been deemed jurisdictional by the Corps. In determining the jurisdictional status of these streams, in recent years, the Corps has relied on the framework set forth in the 2008 Guidance. Pursuant to that Guidance, streams that flow for less than three months per year (which would include most of the ephemeral drainages and intermittent streams on member companies' properties) are not considered per se jurisdictional. Rather, the Corps must determine on a case-by-case basis whether these streams, considered alone (and not in combination with other "similarly situated" streams in the area), have a significant impact on the chemical, physical, and biological integrity of a TNW. In making this determination, the Corps looks at the frequency and duration of flow of the drainage in question, the distance to the nearest TNW, evaporation and precipitation rates in the area, and other factors potentially relevant to whether the drainage in question significantly impacts a TNW. Importantly, pursuant to the 2008 Guidance, "small washes characterized by low flow, infrequent, or short duration of flow," would generally not be deemed jurisdictional waters. This describes to a tee the vast majority of the ephemeral and intermittent drainages on many NvMA members' properties. (p. 17)

Agency Response: This comment does not have substantive content related to the rule. It describes the commenter's understanding of the significant nexus determination process and jurisdictional status of streams and certain ephemeral features under current regulations. See summary responses for 8: Tributaries, 7: Features and Waters Not Jurisdictional, and 5: Significant Nexus.

North American Meat Association and American Meat Institute (Doc. #13071)

- 6.823 Regulating ditches as proposed would deviate from historical and current practice and would impinge on State and local authority over water and land use. Because ditches are regulated in other ways under the CWA (e.g., as point sources) there is no need to categorize them as "waters of the U.S." to ensure the protection of downstream waters. (p. 4)

Agency Response: See summary response for section 6.4. The agencies disagree that regulating ditches deviates from historical and current practice. See the summary response 6.0 for further explanation. Lastly, see the Preamble at Section VI.E for a discussion of Federalism and states' role.

North American Meat Association and American Meat Institute (Doc. #14454)

- 6.824 Regulating ditches as proposed would deviate from historical and current practice and would impinge on State and local authority over water and land use. Because ditches are regulated in other ways under the CWA (e.g., as point sources) there is no need to categorize them as "waters of the U.S." to ensure the protection of downstream waters. (p. 4)

Agency Response: See summary response for section 6.4. The agencies disagree that regulating ditches deviates from historical and current practice. See summary response for section 6.0 for further explanation.

Browns Valley Irrigation District (Doc. #14908)

- 6.825 The Browns Valley Irrigation District recommends ditches should be excluded from the definition of tributary. Instead ditches should continue to be regulated under existing CWA provisions where appropriate. Additionally, regulatory guidance RGL No. 07-02, "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches under Section 404 of the Clean Water Act" should be affirmed and retained. (p. 2)

Agency Response: See summary response for section 6.4. The agencies do not agree that ditches should be excluded from the definition of tributary. Many ditches function as tributaries and have a significant nexus to downstream waters, playing an important role in the physical, chemical, and biological integrity of these waters. Certain ditches are nonetheless excluded from waters of the U.S. under section (b)(3) for the reasons provided in the preamble and summary responses 6.0 and 6.2. The agencies are not proposing any changes to the statutory language and exemptions found in the CWA, including 404(f)(1)(C) regarding certain activities for ditches. RGL 07-02 has not been modified and will be implemented when applicable.

Northwest Colorado Council of Governments Water Quality/ Quantity Committee (Doc. #10187)

- 6.826 How EPA addresses ditches under the CWA is so important to local governments, agricultural interests, and others who rely on ditches for water supply and irrigation, QQ recommends combining into one place all sections of the proposed rule pertaining to ditches. As currently proposed, jurisdictional ditches are addressed in the definition of “tributary,” while ditch exemptions are intermingled with the other proposed exemptions. Presenting these in one place may serve to clarify that these sections are not in conflict and alleviate some of the anxiety about the interplay between ditches as “tributaries” and the proposed ditch exemptions. (p. 8)

Agency Response: The agencies recognize the importance of ditches to local governments, agricultural interests, and others. The rule is organized in a comprehensive manner to represent continuity from previous regulations. All jurisdictional waters are included in one paragraph, while the two other paragraphs discuss the exclusions and the definitions. As some ditches may be jurisdictional as tributaries while many others will fall under the exclusions, the agencies believe it is appropriate to address ditches in multiple places of the rule.

Berkshire Hathaway Energy Company (Doc. #14650)

- 6.827 Rather than labeling ditches as “waters of the U.S.,” the Agencies should rely on existing programs which require permits for discharges to navigable waters and stormwater management systems rather than labeling ditches themselves as jurisdictional waters. The Agencies should clarify that on-site ditches associated with permitted activities, roadside, and agricultural ditches are not jurisdictional waters of the U.S. In addition, the Agencies could provide further clarification through including definitions for additional terms, such

as “uplands,” which could assist regulated entities in understanding the types of ditches that may be considered jurisdictional (p. 6)

Agency Response: See summary response for section 6.4. In addition, see the summary for section 6.3 regarding the use of “uplands” in the ditch exclusion.

Salt River Project Agricultural and Power District and the Salt River Valley Water Users Association (Doc. #14928)

6.828 [T]he agencies should rely upon existing CWA §402 permit programs to regulate the discharge of pollutants into ditches that are connected to jurisdictional waters. These are mature regulations and have established inspection, monitoring and enforcement programs at the municipal, county and state agency levels. Excluding some ditches, while including others as jurisdictional, will only create confusion among permitting agencies and the field personnel responsible for regulating pollutant discharges. (p. 16)

Agency Response: See summary response for section 6.4. The agencies have modified language in the final rule to provide greater clarity about the jurisdictional status of ditches.

American Public Power Association (Doc. #15008)

6.829 Rather than labeling ditches as jurisdictional waters, the agencies should rely on existing CWA programs that require permits for discharges to navigable waters and storm water management systems. Moreover, the agencies should clarify that “point sources” that are covered by NPDES permits are not WOTUS. Unfortunately, the proposed rule could cause unnecessary permit delays, an increased risk of third party litigation, and decreased flexibility in regulation at the state level. (p. 9)

Agency Response: See summary response for section 6.4. The agencies believe that the rule, as clarified in its final version, will reduce transaction costs and litigation. See summary response for Topic 11 (Economic Impacts).

Cleco Corporation (Doc. #15077)

6.830 Cleco believes that rather than labeling ditches as “waters of the United States,” the Agencies should rely on existing 402 permit requirements for discharges to navigable waters and stormwater management systems. (p. 4)

Agency Response: See summary response for section 6.4. The final rule treats ditches as “water of the United States” only when they perform similar functions as tributaries and meet the definition of “tributary.”

Bella Vista Water District (Doc. #15149)

6.831 Bella Vista Water District recommends ditches should be excluded from the definition of tributary. Instead ditches should continue to be regulated under existing CWA provisions where appropriate. Additionally, regulatory guidance RGL No . 07-02 , “Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches under Section 404 of the Clean Water Act” should be affirmed and retained. (p. 2)

Agency Response: See summary response for section 6.4.

Wisconsin Electric Power Company and Wisconsin Gas LLC (Doc. #15407)

6.832 Rather than treating ditches as “waters of the United States,” the agencies should rely on existing CWA programs that require permits for discharges from ditches to navigable waters and storm water management systems rather than labeling ditches themselves as jurisdictional waters. See 33 U.S.C. § 1362(14) (including “ditch” in definition of “point source”). Instead, the proposed rule conflates agency jurisdiction with the CWA’s regulation of pollution control. Moreover, the agencies should clarify that point sources covered by NPDES permits are not waters of the United States. The agencies should clarify that (1) on-site ditches associated with permitted activities; (2) roadside ditches; and (3) agricultural ditches are not jurisdictional waters of the United States. (p. 4-5)

Agency Response: See summary response for section 6.4.

Lower Colorado River Authority (Doc. #16332)

6.833 Instead of potentially labeling ditches necessary to support electric utility operations and other industrial facilities as jurisdictional waters, LCRA believes the Agencies should rely on existing CWA programs that already require permits for discharges to navigable waters and stormwater management systems. LCRA also requests that the Agencies clarify that point sources that are covered by the National Pollutant Discharge Elimination System (NPDES) permits are not considered waters of the United States. (p. 6)

Agency Response: See summary response for section 6.4.

Western Resource Advocates (Doc. #16460)

6.834 Finally, as noted above, the proposed rule’s treatment of “ditches” is consistent with most states’ definitions of waters of the state; Arizona, Nevada and Utah expressly include irrigation systems in their definitions of waters of the state. (p. 15)

Agency Response: The agencies agree that some irrigation systems may contain waters of the U.S., and these waters may also be consistent with the definition of waters of the state in certain states. Certain irrigation ditches, such as most ephemeral ditches, may be excluded under section (b)(3). In addition, there is a statutory exemption for construction and maintenance of irrigation ditches under CWA Section 404(f)(1)(C).

Center for Regulatory Reasonableness (Doc. #14416)

6.835 A question of narrower scope involves specifically roadside ditches. CWA Section 404 (f)(1)(B) discusses permitting for dredging or filling operations and states:

Except as provided in paragraph (2) of this subsection, the discharge of dredge or fill material -

[...] for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

[...] is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

In *June v. Town of Westfield*, 370 F.3d 255, 258 (2d Cir. 2004), the Town of Westfield used cement, dirt, gravel, and other fill material to shore up an eroded road embankment and shoulder that protected drivers from an adjacent steep gully and maintained the stability of the road. Michael June claimed in the process, Westfield had violated CWA Section 404 for discharging fill to a water of the US without a permit. The Court decided that Westfield's action was exempt from Section 404 permitting because:

[...] the scope of the terms in this context is clear: An embankment supporting a road for transit by motor vehicles is a "transportation structure." To treat a thoroughfare like Mt. Baldy Road otherwise would be to thwart the apparent purpose of the provision: to permit routine government maintenance of transportation, public water-supply, and similar facilities without the expense, consumption of time, and consequent danger to people and facilities that would inhere in a requirement for a prior permit.²⁵⁹ (p. 5-6)

Agency Response: This is descriptive and not a substantive comment about the rule.

W. F. Hansen, P.H. (Doc. #5570)

6.836 Where there are ditches flowing from former isolated wetlands to jurisdictional streams, the landowner should be given to the opportunity to restore the hydrology by plugging the ditch connections that drain the wetland so it can managed as an isolated wetland. Some of these isolated wetland habitats are very critical.

Ditches that drain road surfaces into the forest or onto the land, well outside reasonable stream buffers such as BMPs should not be waters of the US as there are limited if any nexuses. However road ditches for example which are extremely long water conveyances that do not utilize opportunity for periodic relief of water and sediment on the land and that tie directly into the stream network or have enough flow to reach streams probably should qualify as a nexus contributor. In some instances with deeply entrenched, legacy roads, we have gone to extraordinary measures to break the connections by excavating a ditch through the entrenched road bank so it can drain back onto the land as it should. I would suggest that you allow those with nexus ditches, gullies or similar hydroecological modifications the opportunity to restore and remove these artificial nexuses to a more natural functioning system, and also install appropriate BMPs as an option to claiming jurisdiction. (p. 2)

²⁵⁹ *June v. Town of Westfield*, 370 F.3d 255, 258 (2d Cir. 2004).

Agency Response: See summary response for section 6.4. The final rule includes an exclusion for certain ephemeral and intermittent ditches as well as ditches that do not flow to an (a)(1) through (3) water. However, the agencies have determined that perennial ditches, which train to the tributary system and meet the definition of tributary, have a significant nexus and are tributaries under the rule. See summary response 6.2: Excluded Ditches. Meanwhile, gullies are non-jurisdictional erosional features under (b)(4) of the rule. Restoration of natural systems can be looked upon favorably by the agencies, depending on the nature of the work. The commenter should be advised that such actions may require a permit. A number of general permits are available for restoration projects in waters of the U.S. However, removing a water from jurisdictional status without authorization may result in a violation of the CWA.

SC Chamber of Commerce Comments (Doc. #14535)

6.837 In place of the inclusion of "ditches" broadly, EPA should propose language to address the particular situation of concern. It seems reasonable to believe that the desired outcome is regulatory jurisdiction over streams and other water courses that have been "converted" into ditches by past human activities. These "ditches" are in reality streams that may have been relocated by historic site development activities. Under current practice, such water courses are subject to jurisdiction if the historic USGS documentation exists to demonstrate that the water course was historically a natural water course, there exists a groundwater or surface water source that continually feeds the system, and soils and plants are indicative of wetland characteristics. If this is indeed the underlying intention for this change this should be made clear in any final rule language. (p. 7)

Agency Response: The final rule language for exclusions reflects that they do not apply to ditches that are constructed in or relocate natural tributaries. See summary response 6.2 for additional discussion of excluded ditches.

6.5. INDICATORS FOR DISTINGUISHING DITCHES FROM TRIBUTARIES IN THE FIELD

The agencies did not identify substantive comments that addressed this topic.

6.6. MAINTENANCE OF DITCHES AND STORMWATER CONTROL FEATURES

Agency Summary Response

Jurisdiction of Ditches under the Proposed Rule and Final Rule

As discussed in the General Summary in 6.0 above, the final rule contains exclusions in paragraph (b)(3) for certain types of ditches, which have been revised from the exclusions in the proposed rule in response to comments and stakeholder concerns, and to provide increased clarity and consistency in implementation. Certain ditches have been regulated as waters of the

U.S. throughout the history of the CWA, including under the 2008 Rapanos guidance. The agencies do not intend to increase the number of ditches that are jurisdictional under the rule. By clarifying and expanding the specific exclusions for ditches the agencies anticipate that more ditches will be clearly excluded in comparison to previous regulations and guidance related to waters of the U.S.

The revised ditch exclusion language states: “(A) Ephemeral ditches that are not a relocated tributary or excavated in a tributary; (B) Intermittent ditches that are not a relocated tributary or excavated in a tributary, or drain wetlands; (C) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (a)(3) of this [rule].” A ditch that meets any one of these three conditions is not a water of the United States. The exclusions for many ephemeral and intermittent ditches should particularly reduce the universe of jurisdictional ditches, and provide clarity to landowners, and departments of transportation and local authorities responsible for maintaining roadside ditches and other public infrastructure related to drainage.

Maintenance of Drainage Ditches, Including Components of MS4s

Most commenters in this section were concerned with the ability to maintain drainage ditches, including roadside ditches and ditches that may be part of a Municipal Separate Storm Sewer System (MS4), particularly due to anticipation that the rule would result in an increase in the number of jurisdictional ditches. Many comments asserted that many, if not all, roadside ditches should be non-jurisdictional in light of their importance to highway safety and the need to not discourage maintenance of roadside ditches by requiring federal approval to conduct maintenance and other activities in these ditches. There was also widespread concern about the ability to meet the requirements of an MS4 permit should authorization of maintenance activities in jurisdictional ditches within an MS4 be delayed or not granted. As discussed above, the agencies do not anticipate an increase in the number of jurisdictional ditches as a result of the rule. In fact, the exclusions that cover both ephemeral and intermittent ditches in the final rule should reduce the universe of jurisdictional ditches in comparison to the 2008 Rapanos guidance by excluding certain ditches that may otherwise have been subject to a case-by-case analysis as a potential tributary. In addition, the statutory exemptions for maintenance, discussed below, allow for the maintenance of non-excluded irrigation and drainage ditches without permitting requirements.

Statutory Exemptions for Maintenance under Clean Water Act Sections 404, 402, and 502

The rule does not affect or modify in any way the many existing statutory exemptions under CWA Sections 404, 402, and 502. The CWA Section 404(f)(1)(C) includes a statutory exemption for construction and maintenance of irrigation ditches and maintenance of drainage ditches, which will continue to apply under appropriate circumstances, and which is not modified or restricted in any way by the rule. More information about this exemption can be found in the U.S. Army Corps of Engineers Regulatory Guidance Letter (RGL) 07-02: "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches under Section 404 of Clean Water Act." The CWA Section 404(f)(1)(B) exempts additional dredge

and fill activities “for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures.” Other types of maintenance activities in waters of the U.S. may also be authorized by a non-reporting Nationwide Permit 3.

Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land, are excluded from waters of the U.S. in section (b)(6) of the rule. There are also a number of statutory and regulatory exemptions from NPDES permitting requirements, such as those for return flows from irrigated agriculture (CWA 402(l)(1); 502(14)), stormwater runoff from oil, gas and mining operations (CWA 402(l)(2)), or agricultural stormwater discharges (CWA 502(14)). However, consistent with longstanding practice, these exempt activities do not change the jurisdictional status of the water body as a whole, or the potential need for CWA permits for non-exempted activities in these waters or non-exempted discharges to these waters. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4.

Request for an Interpretive Rule or Guidance for the 404(f)(1)(C) Ditch Maintenance Exemption

Several commenters requested that the agencies develop an interpretive rule or additional guidance to make it clearer that the ditch maintenance exemption can apply to roadside ditches, and not only agricultural ditches. Several other commenters stated that the existing 404(f)(1)(C) exemption is too narrow, or inconsistently applied by Corps districts throughout the country, and that they are required to obtain 404 permits for activities they believe should be covered by the exemption. The statutory exemptions are beyond the scope of the rulemaking for the definition of Waters of the U.S. The agencies do not plan to modify the RGL 07-02, or issue an interpretive rule or further guidance for the 404(f)(1)(C) exemption at this time. This exemption has historically applied to all drainage ditches, including drainage ditches adjacent to roads. In the RGL 07-02, “drainage ditch” is broadly defined as “a ditch that conveys water (other than irrigation related flows) from one place to another.” This definition is applicable to most, if not all, roadside ditches. In addition, the final rule contains a clearer exclusion for many ephemeral and intermittent ditches under section (b)(3).

Application of Pesticides, Herbicides and Fertilizers

A few commenters asked about the effect of the rule on the ability of landowners to apply pesticides, herbicides, or fertilizers either directly to vegetation in ditches for maintenance purposes, or as part of normal farming activity. Commenters stated that the activity exemptions for normal farming activities under 404(f)(1)(A) do not include application or discharge of pesticides in a water of the United States. The proposed rule would not change existing CWA permitting requirements regarding the application of pesticides or fertilizer. Discharges from the application of pesticides, which includes applications of herbicides, into irrigation ditches, canals, and other waterbodies that are themselves waters of the U.S., are not exempt as irrigation return flows or agricultural stormwater, and do require NPDES permit coverage. The EPA has a pesticides general permit (PGP) that covers many discharges for areas in which EPA is the NPDES permitting authority. In addition, all states with permitting authority have a PGP.

However, the final rule includes exclusions for many ditches and certain other waters that may be components of irrigation or drainage systems, or commonly located on farmland. For further discussion of these exclusions, see summary responses for 6.2: Excluded Ditches and 7: Features and Waters Not Jurisdictional. Discharges to features that are not waters of the U.S. would not require NPDES permit coverage.

The agencies believe the exclusions for certain ditches and stormwater control features included in the rule, along with the existing statutory exemptions, address concerns of commenters about the ability to maintain ditches without additional burden, while still protecting the physical, biological, and chemical integrity of the nation's waters.

Specific Comments

International Erosion Control Association (Doc. #13174)

6.838 The ability of local governments covered by MS4 permits to maintain their drainage systems and post construction stormwater BMPs will be significantly hampered by the expanded definition. Under the proposed new rule, ditches that have been routinely maintained to promote positive drainage and/or prevent flooding will be subject to federal and state permitting, similar to current permits and restrictions placed upon streams.

In addition, where maintenance of stormwater quality and quantity measures is hampered or where permits to maintain the measures are denied by federal agencies, the stormwater measures may fail to function as designed. Flood control structures will lose flood storage, and infiltration BMPs installed for water quality will fail to treat runoff as designed, which could in turn cause MS4s to be out of compliance with their MS4 permits. (p. 1)

Agency Response: See summary response for section 6.6.

Texas Commission on Environmental Quality (Doc. #14279.1)

6.839 Although the proposed rule does not specifically make it clear how existing roadside/outfall ditches will be considered, it is our understanding that under Section 404 F.1.C of the Clean Water Act, that the "maintenance of drainage ditches" is exempt. This exemption would apply to the maintenance of existing roadside ditches and outfalls even if they are determined to be "Waters of the U.S." under the new rule. Nonetheless, there still remains a potential that there could be a significant increase in the number of county-owned ditches and outfall channels that would require additional permitting if upgrades/alterations are required as a part of our ongoing roadside maintenance programs. The impacts of the proposed rule will extend beyond local government-owned facilities and may result in additional costs and burdens to businesses, farmers, and private property owners. (p. 1)

Agency Response: See summary response for section 6.6. The agencies have responded to such concerns by including an exclusion for certain ditches with ephemeral or intermittent flow in the rule. However, for ditches that fall under CWA jurisdiction, the existing statutory exemption in 404(F)(1)(C) for maintenance

of irrigation and drainage ditches, including roadside drainage ditches, remains unchanged. However, this exemption allows a permit holder to maintain ditches to permitted dimensions. A permit modification would still be required for significant alterations to the dimensions or location of a roadside ditch.

Tennessee Department of Transportation (Doc. #16470)

- 6.840 The preamble to the proposed rule recognizes that the rule "does not affect longstanding exemptions in the CWA for farming, silvicultural, ranching and other activities," including "maintenance of drainage ditches." (79 Fed. Reg. 22193-22194). The proposed rule is accompanied by an "interpretive rule" that clarifies the exemption for certain agricultural, silvicultural, and ranching practices under Section 404(f)(1)(A) of the Clean Water Act. (79 Fed. Reg. 22276). The USACE and EPA do not propose to issue any new guidance regarding the applicability of the exclusion for ditch maintenance under Section 404(f)(1)(C) of the Act.

Currently, the exemption for ditch maintenance under Section 404(f)(1)(C) is addressed in the Corps' Regulatory Guidance Letter 07-02, "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of Clean Water Act." (issued July 4, 2007). This exemption includes the following definition of "drainage ditch":

For purposes of this RGL, a drainage ditch is a ditch that conveys water (other than irrigation related flows) from one place to another. Where a ditch would have the effect of more than minor drainage of wetlands (other than wetlands established due to the presence of irrigation water), the ditch would be considered a drainage ditch, not an irrigation ditch, even if used for irrigation. However, a ditch that diverts water from an open body of water (e.g., stream, lake, or reservoir) for irrigation purposes is an irrigation ditch, even if a substantial portion of the flow or volume is diverted.

By its own terms, this definition encompasses many roadside ditches. Yet, because the exemption is included in a guidance document that also addresses irrigation ditches, it may be misunderstood to apply only in an agricultural context. To date, there is no published guidance that specifically recognizes the applicability of this exemption to roadside ditches.

To ensure that this exemption is properly applied, TDOT requests that the USACE and EPA issue an interpretive rule or other appropriate guidance clarifying that the exemption for "maintenance of ditches" in Section 404(f)(1)(C) of the Clean Water Act applies to roadside ditches. In combination with the exclusion for some ditches in the proposed rule, this clarification would help to ensure that routine ditch maintenance activities can be conducted without undue regulatory burdens. (p. 7-8)

Agency Response: See summary response for section 6.6.

Office of the Governor, State of Utah (Doc. #16534)

6.841 The preamble to the proposed rule recognizes that the rule "does not affect longstanding exemptions in the CWA for farming, silvicultural, ranching and other activities," including "maintenance of drainage ditches."²⁶⁰ Recently, EPA and Army released an "interpretive rule" that clarifies the exemption for certain agricultural, silvicultural, and ranching practices under Section 404(f)(1)(A) of the Clean Water Act.²⁶¹ The Army and EPA do not propose to issue any new guidance regarding the applicability of the exclusion for ditch maintenance under Section 404(f)(1)(C) of the Act.

Currently, the exemption for ditch maintenance under Section 404(f)(1)(C) is addressed in the Army's Regulatory Guidance Letter 07-02, "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of Clean Water Act." (issued July 4, 2007). This exemption includes the following definition of "drainage ditch":

For purposes of this RGL, a drainage ditch is a ditch that conveys water (other than irrigation related flows) from one place to another. Where a ditch would have the effect of more than minor drainage of wetlands (other than wetlands established due to the presence of irrigation water), the ditch would be considered a drainage ditch, not an irrigation ditch, even if used for irrigation. However, a ditch that diverts water from an open body of water (e.g., stream, lake, or reservoir) for irrigation purposes is an irrigation ditch, even if a substantial portion of the flow or volume is diverted.

By its own terms, this definition encompasses many roadside ditches. Yet, because the exemption is included in a guidance document that also addresses irrigation ditches, it may be misunderstood to apply only in an agricultural context. To date, there is no published guidance that specifically recognizes the applicability of this exemption to roadside ditches.

To ensure that this exemption is properly applied, we request that the Army and EPA issue an interpretive rule or other appropriate guidance clarifying that the exemption for "maintenance of ditches" in Section 404(f)(1)(C) of the Clean Water Act applies to roadside ditches. In combination with the exclusion for some ditches in the proposed rule, this clarification would help to ensure that routine ditch maintenance activities can be conducted without undue regulatory burdens. (p.16-17)

Agency Response: See summary response for section 6.6.

Nebraska Department of Roads (Doc. #16896)

6.842 Jurisdiction of Roadside Ditches

- a. **Maintenance of ditches.** Ditch maintenance remains exempt in the proposed rules. NDOR has approximately 20,000 miles of roadside ditches that need to be maintained on a regular basis. NDOR continues to support this exemption due to the significant

²⁶⁰ See 79 Fed. Reg. 22193, 22194.

²⁶¹ See 79 Fed. Reg. 22276.

and on-going volume of ditch maintenance performed by NDOR district maintenance and contractors on projects for our program each year (p. 1)

Agency Response: See summary response for section 6.6.

State of South Dakota (Doc. #16925)

6.843 **Exemption for "Maintenance of Ditches"** - The agencies do not propose to issue any new guidance regarding the applicability of the exclusion for ditch maintenance under Section 404(f)(1)(C) of the Clean Water Act. Currently, the exemption for ditch maintenance under Section 404(f)(1)(C) is addressed in the Corps' Regulatory Guidance Letter 07-02, "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act." This exemption includes the definition of "drainage ditch", which seems to include roadside ditches. However, the guidance document includes irrigation and drainage ditches and there is no published guidance specifically recognizing the applicability of this exemption to roadside ditches. It could be interpreted to only address agricultural applications. The SDDOT recommends the Corps or EPA issue guidance clarifying the exemption for "maintenance of ditches" in Section 404(f)(1)(C) of the Clean Water Act applies to roadside ditches so that routine ditch maintenance activities can be conducted without undue regulatory burdens. (p.6)

Agency Response: See summary response for section 6.6.

Florida Department of Transportation (Doc. #18824)

6.844 **Exemption for "Maintenance of Ditches"**

Routine maintenance of ditches and other stormwater management facilities is important to retain proper operational functions of these systems. Currently, most transportation maintenance activities that must be done on stormwater management systems to maintain their function and safety do not require federal permits. Through time, these roadside ditches, swales, and conveyance structures may retain water and wetland plants may emerge from the ditch thus developing wetland-like features. Under the proposed rule, these ditches would become jurisdictional and add an additional regulatory burden for FDOT for routine maintenance activities. To address this concern, the rule should specifically exempt maintenance and retrofit of existing transportation related ditches, swales, conveyance structures and other associated components of stormwater management systems from WOTUS jurisdiction. (p. 3)

Agency Response: See summary response for section 6.6. In addition, RGL 07-02 states that "If a drainage ditch has not been serving a drainage function for an extended period of time, drainage ditch re-establishment would be considered construction, not maintenance, and would thus be ineligible for the exemption." However, it makes it clear that if a ditch requires little maintenance to continue to function, this periodic lack of maintenance would not prevent continued use of the exemption. Further, the rule also clearly states that exclusions for certain ditches apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States, at paragraph (a)(1) through (a)(8) of the rule. For example, an excluded ditch would not become a

jurisdictional water of the United States if wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) developed in the bottom of the ditch.

Delaware Township Board of Supervisors (Doc. #3308)

6.845 If the change is approved, townships may not be able to perform routine maintenance on road ditches and may not be able to quickly resolve potential safety issues without having to first obtain a federal permit for such work. The cost for permits, engineering and legal fees would have a significant impact on our township's taxpayers. (p. 1)\

Agency Response: See summary response for section 6.6.

Phillips County Board of County Commissioners, Colorado (Doc. #4713.2)

6.846 Our primary concern with the proposed rule change is the maintenance of county-owned barrow ditches. [...] If the new wording ties our road ditches into requiring federal permits, our entire maintenance effort could come to a standstill when repairs or roadway rebuilding is needed. (p. 1)

Agency Response: See summary response for section 6.6.

North Centre Township (Doc. #5142.2)

6.847 Because of the need to obtain federal approval and permits before we can begin these tasks, we see these changes as hindering our ability to perform routine maintenance on road ditches and impeding us from quickly resolving potential safety issues caused when these ditches get backed up. (p. 1)

Agency Response: See summary response for section 6.6.

Board of Supervisors, Amity Township (Doc. #5603)

6.848 Having to obtain federal approval and permits will hinder our ability to perform routine maintenance on road ditches and impede us from quickly resolving potential safety issues caused when these ditches get backed up. (p. 1)

Agency Response: See summary response for section 6.6.

Board of Supervisors, Dingman Township (Doc. #5604)

6.849 Because of the need to obtain federal approval and permits before we can begin these tasks, we see these changes as hindering our ability to perform routine maintenance on road ditches and impeding us from quickly resolving potential safety issues caused when these ditches get backed up. (p. 1)

Agency Response: See summary response for section 6.6.

Baldwin County Commission (Doc. #7940)

6.850 [M]ore County-owned ditches would fall under federal oversight. Once a ditch is under federal jurisdiction, a Section 404 permit is required for maintenance. The process to

acquire a Section 404 permit can be extremely cumbersome, time-consuming, and expensive. Maintenance delays due to permitting may lead to flooded property, flooded roads creating a hazard to the traveling public, and potential road failure due to improper drainage. (p. 1)

Agency Response: See summary response for section 6.6.

Board of Douglas County Commissioners, Castle Rock, CO (Doc. #8145)

6.851 The Proposed Rule may also impact Douglas County on pesticide/herbicide permit-required operations. The EPA is moving forward with a pesticide/herbicide permit for all WOUS within threshold guidelines. This means anytime a pesticide/herbicide is applied on or near WOUS, a permit will be required. This permit includes stringent documentation requirements for communities of over 10,000. Douglas County uses herbicide and pesticides in a number of ways, including, but not limited to, treatment of weeds in ditches on the side of the road and treatment of mosquitoes and other pests. Under the Proposed Rule, more ditches, flood control, and water quality ponds will be declared WOUS, thereby requiring those counties who have WOUS ditches to follow strict programs and paperwork requirements for pesticide use in addition to the Federal, Insecticide, Fungicide, and Rodenticide Act (FIFRA). The increased time and expenses to reduce noxious weeds required by weed control programs under the Colorado Noxious Weed Act Title 35, Article 5.5 is unclear at this time. (p. 10)

Agency Response: See summary response for section 6.6.

Pasco County, Florida (Doc. #9697)

6.852 Currently, the exemption for ditch maintenance under Section 404(f)(1)(C) is addressed in the USACE Regulatory Guidance Letter 07-02, "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act." Because the exemption is included in a guidance document that also addresses irrigation ditches, it may be misunderstood to apply only in an agricultural context.

Recommendation: To ensure that this exemption is properly applied, it is recommended that the USACE and EPA issue an interpretive rule or other appropriate guidance clarifying that the exemption for "maintenance of ditches" in Section 404(f)(1)(C) of the CWA applies to roadside ditches and permitted stormwater management conveyances. This clarification would help to ensure that routine ditch maintenance activities can be conducted without undue regulatory burdens. (p. 4)

Agency Response: See summary response for section 6.6.

Cherrytree Township Board of Supervisors, Titusville, PA (Doc. #10958)

6.853 A large part of rural road maintenance consists of cleaning ditches. The administrative burden that this proposed change would put on our township is unacceptable. By adding more administrative requirements, you will be putting a financial burden on our township, which, most likely, will result in a reduction of services for our property owners and/or higher property taxes.

Please oppose amending the definition of "Waters of the U.S." to include ditches along rural roadways. We simply cannot afford to be weighed down by more federal government regulations. (p. 1)

Agency Response: See summary response for section 6.6.

Kendall County Board, Illinois (Doc. #10965)

6.854 We are concerned that the number of county-owned and maintained ditches will fall under the jurisdiction of the Clean Water Act.

Agency Response: See summary response for section 6.6.

Mesa County, Colorado Board of County Commissioners (Doc. #12713)

6.855 Mesa County believes that additional EPA scientific review and associated changes to identify different types of conveyances, including ditches, must be conducted to ensure that "ditch exemptions" are readily available to our County to perform routine public safety maintenance of stormwater infrastructure (such as detention flood storage and water quality ponds, storm drains, and ditch maintenance activities). (p. 4)

Agency Response: See summary response for section 6.6. Stormwater control features constructed in dry land may also be excluded from waters of the U.S. under section (b)(6) of the rule. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4.

City of Palo Alto, California (Doc. #12714)

6.856 Ditches that are excavated in uplands, drain only uplands, and have less than perennial flow are exempt from the rule. However "upland" is not defined, nor is "perennial flow." It is unclear how an applicant would be able to prove that a ditch would warrant the exemption and whether the exemption is nullified if the ditch traverses a wet area. This is particularly important for municipalities that maintain roadside ditches. (p. 5)

Agency Response: See summary response for section 6.6., as well as summary responses for section 6.3: Upland and Definition of Upland and 6.2: Excluded Ditches.

Association of California Water Agencies (Doc. #12978)

6.857 Nowhere in the proposed rule do the Agencies discuss continuance of existing policy or guidance. Irrigation operators currently rely upon existing Agency guidance to routinely maintain, repair, and operate their ditch systems. One guidance document in particular, the U.S. Army Corps of Engineers, Regulatory Guidance Letter (RGL) No. 07-02: Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act (July 4, 2007), is frequently used to perform such work. ACWA requests the Agencies reaffirm that the operations, maintenance, repair and rehabilitation of man-made ditches, canals, and spreading basins is not subject to 404 jurisdiction. (p. 10)

Agency Response: See summary response for section 6.6.

Harris County Flood Control District (Doc. #15049)

- 6.858 We continue to strongly recommend that maintenance activities of existing storm water management facilities, such as channels, detention basins, and ditches, be exempt from repetitive Section 404 permitting every time maintenance activities are necessary. (p. 3)

Agency Response: See summary response for section 6.6.

National Association of Counties (Doc. #15081)

- 6.859 Some Corps districts give a blanket exemption for maintenance activities. In other districts, the ditch maintenance exemption is very difficult to obtain, with narrow conditions governing the types maintenance activities that are considered exempt. Additionally, a number of Corps districts are using the “recapture provision” to override the exemption.²⁶² Under the “recapture clause,” previously exempt ditches are “recaptured,” and must comply for the Section 404 permitting process for maintenance activities.²⁶³ Additionally, Corps districts may require documentation to original specifications of the ditch showing original scope, measurements, etc.²⁶⁴ Many of these ditches were hand-dug decades ago and historical documentation of this type does not exist. (p. 13)

Agency Response: See summary response for section 6.6. The 404(f)(1)(C) exemption is intended to exempt all routine maintenance of drainage and irrigation ditches, which would not significantly modify the dimensions of the ditch or impair the functions of waters of the U.S. Per the RGL 07-02, it is appropriate to use the recapture provision when the activity results in a change of use within an area of waters of the U.S., and the activity impairs flow or circulation of waters of the U.S. or reduces their reach. Such activities would not qualify for the maintenance exemption.

Boulder County and the City of Boulder, Colorado (Doc. #15495)

- 6.860 **Ditch Maintenance** - The preamble to the proposed rule recognizes that the rule "does not affect longstanding exemptions [under Section 404(f)] in the CWA for farming, silvicultural, ranching and other activities," including construction or maintenance of irrigation ditches and "maintenance of drainage ditches." (79 FR 22193-22194). The proposed rule is accompanied by an "interpretive rule" that clarifies the exemption for certain agricultural, silvicultural, and ranching practices under Section 404(f)(1)(A) of the Clean Water Act. (79 FR 22276). USACE and EPA do not propose to issue any new guidance regarding the applicability of the exclusion for ditch maintenance under Section 404(f)(1)(C) of the Act.

²⁶² U.S. Army Corps of Eng’r, Regulatory Guidance Letter: Exemption for Construction or Maintenance of Irrigation Ditches & Maint. of Drainage Ditches Under Section 404 of the Clean Water Act (July 4, 2007).

²⁶³ Id.

²⁶⁴ Id. at 4.

Currently, the exemption for ditch maintenance under Section 404(f)(1)(C) is addressed in the Corps' Regulatory Guidance Letter 07-02, "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of Clean Water Act." Because the exemption is included in a guidance document that also addresses irrigation ditches, it may be misunderstood to apply only in an agricultural context.

Recommendation: To ensure that this exemption is properly applied, it is recommended that the Corps and EPA issue an interpretive rule or other appropriate guidance clarifying that the exemption for "maintenance of ditches" in Section 404(f)(1)(C) of the Clean Water Act applies to roadside ditches and stormwater management conveyances. This clarification would help to ensure that routine ditch and stormwater management facilities maintenance activities can be conducted without undue regulatory burdens. (p. 2)

Agency Response: See summary response for section 6.6.

Department of Public Works, County of San Diego, California (Doc. #17920)

- 6.861 A third exemption for ditches should be added to state that: [d]itches that are maintained as part of an MS4 conveyance system and permitted under Section 402 of the CWA should be exempt.

Stormwater conveyance channels that transport urban runoff could be considered Waters of the U.S. under the proposed rule. Based on the proposed rule, a storm water conveyance channel that meets the definition of ditch in all other aspects would not be excluded from Waters of the U.S, if it eventually connects to traditional navigable waters. However, storm water conveyance channels are considered "point sources" under the CWA, and their discharges to Waters of the U.S. are regulated under Section 402. Because these channels are already otherwise regulated under Section 402, placing them additionally under Waters of the US would overlap current regulation and create confusion. The added delays and costly permitting requirements may also obstruct maintenance of these features, which could compromise public safety.

EXAMPLE: The County maintains approximately 2,000 miles of roadways, many with ditches and conveyance features found on either side of the street. There is concern that the expanded definition would obstruct the management of these features. The ditches and features provide a means of transporting surface runoff and keeping the roadway safe for motorists, bicyclists and adjacent pedestrians. The channels, including road ditches, which are constructed as part of development to transport surface runoff, should be considered in relation to life and safety, ensuring that stormwater drains appropriately off roadways. Ongoing maintenance and operations to keep these features clean and safe should not be hindered by administrative burdens and lengthy permitting processes. (p. 5-6)

Agency Response: See summary response for section 6.6. In addition, see summary response for section 6.4 regarding the jurisdiction of ditches used for stormwater conveyance, including those within MS4s.

Missouri Association of Municipal Utilities (Doc. #7931)

6.862 Cities in the Midwest, and I cannot speak for other parts of the nation, have traditionally viewed road-side ditches, constructed stormwater conveyances, and natural rainfall drainageways (swales or rills) as not meeting the definition of either ‘Waters of the United States’ or ‘Navigable Waters’. As a result they have not routinely sought a variety of permits that would be required if ‘ditches’ are considered a ‘Water of the United States’. Routine maintenance tasks where cities and towns physically enter ditches with manpower and equipment (and now ‘Waters of the United States’) to make repairs to the ditch structure or to maintain existing or desired structures include:

Mowing

Installation of traffic signs or street signs

Removal of storm debris after heavy rains to promote drainage and reduce damage from flooding

Re-contouring of ditch bank profiles to reduce erosion

Replacement of utility poles and even some traffic control devices when the contour and placement of the existing street structure prohibits the placement of the base in an area outside the ‘ditch’

Installation of concrete reinforcement/butresses of storm-drain entrances to reduce erosion.

Installation of rip-rap to reduce development of erosion

Removal of vehicles resulting either from traffic accidents or from major flooding

Widening of ditches to absorb additional water flows as the result of development even with required state land disturbance permits.

Routine maintenance of wastewater manholes which are often located within the bank-side structure for topographic reasons to reduce discharge of untreated sewerage.

And if we include such structures as curb and gutter streets in the definition of jurisdictional waters which also appear to meet the definition of ‘ditch’, then a task as simple as street sweeping may require the issuance of a permit because small stones and other natural materials may be removed from the ‘bottom’ of the ‘ditch’.

Rather than adding a comfort zone certainty to city activities, the draft rule adds a bevy of legal liabilities and regulatory uncertainties. Anything that a city would be prohibited from doing in a conventional navigable river, they could not do within a conventional ditch structure without the appropriate permits. (p. 3-4)

Agency Response: See summary response for section 6.6. Many ditches, including some roadside ditches and stormwater conveyances constructed in dry land, are excluded from waters of the U.S. under the rule. Many of the listed activities will continue to be exempt from permitting under CWA Section 404(f)(1)(B) and (C), or covered by a non-reporting Nationwide Permit 3 for maintenance. However, some construction activities, including changing the dimensions of a ditch that is a water of the U.S., would likely require additional permits or permit modifications.

U.S. Chamber of Commerce (Doc. #14115)

6.863 When it rains heavily, water ponds in the vacant areas next to the facility and may runoff into ditches. If these areas can be classified as “waters” (which the agencies have not proposed to define, but which could be stretched to include “ephemeral ponds” or “ephemeral pools”), the proposed rule would regulate them as “adjacent” waters or “other” waters subject to the Clean Water Act. Water (or other liquids, dust, soil, ash, etc.) moving from the facility onto these areas can trigger the requirement to get a section 402 or 404 permit; water quality standards under section 303 could apply, as well as more stringent spill control requirements under section 311. Also, the facility owner would have to get a section 404 permit to develop these vacant areas. (...)

The ditches at the facility are likely to be regulated as “tributaries,” “adjacent waters,” or “other waters.” Maintaining these ditches, including clearing vegetation, removing silt, and stabilizing banks, will require a section 404 permit. Stormwater discharges into the ditches may require section 402 permitting or, in combination with other discharges, trigger area-wide TMDL requirements under section 303. (p. 10)

Agency Response: Waters of the U.S. will be identified under the final rule based on the criteria in paragraph (a) and the definitions in paragraph (c). If a water is excluded in paragraph (b), it is not subject to CWA regulations. The agencies have modified several categories, exclusions and definitions in the final rule in response to comments, providing additional clarity. See summary response for section 6.6., regarding the exemptions for maintenance of irrigation and drainage ditches, as well as summary response for 6.2, regarding excluded ditches. If a water, such as a ditch, is excluded, it cannot be recaptured under another waters of the U.S. category.

Indiana Cast Metals Association (Doc. #14895.1)

6.864 Because the proposed rule would make most ditches into “tributaries” subject to jurisdiction under the CWA, routine maintenance and process activities in ditches, on-site ponds, and impoundments could trigger expensive federal permits. In addition, these permitting requirements could impose addition, unnecessary environmental reviews that could add years and significant costs to finalize ordinary projects at or near the facility. Furthermore, even if a facility can secure the necessary permit approval, metal casting operations may be required to “mitigate” potential environmental impacts with expensive restoration or prevention projects. These significant regulatory costs and burdens would be imposed on metal casting operations with little, or no, meaningful human health and environmental benefits. (p. 3)

Agency Response: See summary response for section 6.6, as well as the summary response for section 6.2: Excluded Ditches. The agencies believe fewer ditches will be considered waters of the U.S. under the rule by providing several specific exclusions in (b)(3), as well as exclusions for stormwater control features, wastewater recycling features, and water recycling structures created in dry land. If impacts occur in waters of the U.S. and a 404 permit is issued, compensatory mitigation may be required to offset unavoidable impacts to aquatic resources.

Council for Quality Growth (Doc. #15147.1)

6.865 [...] Section 404 permits have been required for ditch maintenance activities, such as cleaning out vegetation and debris. While, in theory, a maintenance exemption for ditches exists, it is difficult for local governments to use the exemption. The federal jurisdictional process is not well understood and the determination process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to lawsuits. (p. 2)

Agency Response: See summary response for section 6.6. It is not clear from the comment why the commenter has found the existing exemption for ditch maintenance difficult for local governments to use. However, the agencies have intended to make the jurisdiction of ditches clearer by including specific exclusions for many ditches under (b)(3) of the rule.

Pennsylvania Coal Alliance (Doc. #13074)

6.866 Typically, diversion ditches are installed around mines and haul roads in Pennsylvania to divert water from coming onto the mine site. Diversion ditches can be hundreds of yards long. They typically flow to settling basins and sediment ponds before discharging to a jurisdictional water. These ditches may require frequent cleaning to maintain sufficient capacity for conveyance. Collection ditches are also installed downgradient from the mine site to capture groundwater flowing through, and surface water flowing over, the mined area. These collection ditches, which can also be quite long, flow to treatment ponds prior to discharging to a jurisdictional water under an NPDES permit. Both types of ditches are typically moved during the course of mining. (p. 9)

Agency Response: There agencies find no substantive comment on the rule. The summary response for section 6.6 addresses the existing exemptions in the CWA for maintenance.

National Sustainable Agriculture Coalition (Doc. #16357.45)

6.867 [V]ery few so-called “ephemeral streams” (that flow only when it rains), ditches, or isolated wetlands (not adjacent to navigable waters) have ever been subjected to Clean Water Act jurisdiction.²⁶⁵ (p. 2)

Agency Response: Ephemeral ditches are excluded from waters of the U.S. in both the proposed and final rules. For a discussion of the jurisdiction of ephemeral streams, see summary response 8.0: Tributaries. For a discussion of non-adjacent wetlands, see summary response 4.0: Other Waters.

²⁶⁵ Because most ditches, ephemeral streams, and isolated wetlands are not jurisdictional, you can mow grass, spray for weeds, or dig a fence post in them without a Clean Water Act permit. If activity in or around those features affects the quality of downstream waters, those effects are addressed through a variety of non-regulatory programs that give the states more power to decide how to protect water quality. 33 U.S.C. § 1288 (area-wide waste treatment management), § 1313(d) (water quality standards and total maximum daily loads), § 1313(e) (continuing planning process), § 1329 (non-point source management programs), § 1341 (water quality certification) to name a few.

- 6.868 [T]he normal farming exemption only applies to dredge and fill activities authorized under section 404, such as plowing and moving dirt. It does not apply to “discharges” of other materials, like fertilizer or pesticides that may fall into farmed ephemeral drains or wetlands or nearby ditches. If any amount of these materials is applied into, or falls into, jurisdictional features as part of ordinary farming activity, the farmer will be in violation of the Clean Water Act unless he or she has obtained a Clean Water Act section 402 discharge permit.²⁶⁶ Again, this is true even if the feature is not carrying water at the time fertilizer or pesticide is being applied. (p. 4)

Agency Response: See summary response for section 6.6.

Elmore County Highway Department, Wetumpka, Alabama (Doc. #14072)

- 6.869 In recent years, Section 404 permits have been required for ditch maintenance activities such as cleaning out vegetation and debris. While, in theory, a maintenance exemption for ditches exists, it is difficult for local governments to use the exemption. The federal jurisdictional process is not well understood and the determination process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to lawsuits if the federal permit process is not streamlined.

Additionally, ditches are pervasive in counties across the nation and, until recently, were never considered to be jurisdictional by the Corps. We are concerned that regional Corps offices sometimes require Section 404 permits for maintenance activities on public safety infrastructure conveyances. While a maintenance exemption for ditches exists on paper, in practice it is narrowly crafted. Whether or not a ditch is regulated under Section 404 has significant financial implications for our county. (p. 4-5)

Agency Response: See summary response for section 6.6. It is not entirely clear why the existing exemption for ditch maintenance has been difficult for local governments to use. However, the agencies have intended to make the jurisdiction of ditches clearer by including specific exclusions for many ditches under (b)(3) of the rule. See summary response for 6.2: Excluded Ditches.

Georgia Department of Transportation (Doc. #14282.1)

- 6.870 “Exemption for “Maintenance of Ditches”

The preamble to the proposed rule recognizes that the rule “does not affect longstanding exemptions in the CWA for farming, silvicultural, ranching and other activities,” including “maintenance of drainage ditches.” (79 Fed. Reg. 22193-22194). The proposed rule is accompanied by an “interpretive rule” that clarifies the exemption for certain agricultural, silvicultural, and ranching practices under Section 404(f)(1)(A) of the Clean Water Act. (79 Fed. Reg. 22276). The Corps and EPA do not propose to issue any new guidance regarding the applicability of the exclusion for ditch maintenance under Section 404(f)(1)(C) of the Act.

²⁶⁶ See *National Cotton Council v. EPA*, 553 F.3d 927 (6th Cir. 2009); *Waterkeeper Alliance v. EPA* F.3d 486 (2nd Cir. 2005).

Currently the exemption for ditch maintenance under Section 404(f)(1)(C) is addressed in the Corps' Regulatory Guidance Letter 07-02, "Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of Clean Water Act." (issued July 4, 2007). This exemption includes the following definition of "drainage ditch":

For purposes of this RGL, a drainage ditch is a ditch that conveys water (other than irrigation related flows) from one place to another. Where a ditch would have the effect of more than minor drainage of wetlands (other than wetlands established due to the presence of irrigation water), the ditch would be considered a drainage ditch, not an irrigation ditch, even if used for irrigation. However, a ditch that diverts water from an open body of water (e.g., stream, lake, or reservoir) for irrigation purposes is an irrigation ditch, even if a substantial portion of the flow or volume is diverted.

By its own terms, this definition encompasses many roadside ditches. Yet, because the exemption is included in a guidance document that also addresses irrigation ditches, it may be misunderstood to apply only in an agricultural context. To date, there is no published guidance that specifically recognizes the applicability of this exemption to roadside ditches.

Recommendation: To ensure that this exemption is properly applied, we request that the Corps and EPA issue an interpretive rule or other appropriate guidance clarifying that the exemption for "maintenance of ditches" in Section 404(f)(1)(C) of the Clean Water Act applies to roadside ditches. In combination with the exclusion for some ditches in the proposed rule, this clarification would help to ensure that routine ditch maintenance activities can be conducted without undue regulatory burdens. (p. 10-11)

Agency Response: See summary response for section 6.6.

Association of American Railroads (Doc. #15018.1)

- 6.871 Maintenance of ditches is critical to safe rail transportation. Identifying rail ditches as Waters of the United States would create regulatory hurdles that would make it almost impossible for railroads to perform prompt rail ditch maintenance, leading to less safe rail transportation. (p. 2)

Agency Response: See summary response for section 6.6, and the summary response for 6.2: Excluded Ditches. Some rail ditches may be waters of the U.S. if not excluded by (b)(3) of the rule. However, the maintenance exemption under 404(f)(1)(C) would continue to apply to many maintenance activities conducted in rail ditches.

- 6.872 **Impacts of the Proposed Rule on Rail Ditches, Rail Safety, Rail Operations**

Identifying rail ditches as Waters of the United States would restrict railroads' ability to maintain ditches for safe operations, adjust ditch capacity or flow to manage the previously referenced stormwater encroachments, and would result in extensive permitting delay and expense should a ditch need to be removed or significantly altered. For example, herbicide use for the maintenance of rail ditches could be prohibited even in the absence of water in the ditch. In *Nat'l Cotton Council of Am. v. U.S. E.P.A.*, 553 F.3d 927, 940 (6th Cir. 2009), the 6th Circuit held that pesticide residues that enter a Water of

the United States are “pollutants” entering a water from a “point source” and are subject to CWA regulations. Many herbicides leave residues, and are potentially subject to NPDES regulation. Therefore, if ditches are classified as Waters of the United States, a release of pesticides to a rail ditch—even one without water at the time of release—could become a reportable event subject to penalties under Section 311 of the CWA, because the residues would “enter” a jurisdictional water during a storm or other event.

The exclusions to the proposed rule are so narrow that hundreds of thousands of miles of rail, road, MS4s, and other ditches currently unregulated will become Waters of the United States. The result will be (1) a substantial number of new and revised/modified NPDES and Section 404 permits, (2) the need to change SWPPPs at substantial costs, expense and uncertainty, (3) extensive costs to mitigate any time any of the nation’s hundreds of thousands of miles of road, railway, and other drainage ditches require relocation, expansion, or in some cases maintenance, and (4) a large increase in associated regulatory burdens on both the regulated community and governmental agencies because historic resource, protected species, and other consultation would be required before moving or construction on any rail ditch. (p. 10)

Agency Response: See summary response for section 6.6, and the summary response for 6.2: Excluded Ditches, for a discussion of changes made to these exclusions in the final rule. The rule provides greater clarity and consistency by clearly excluding certain ditches from jurisdiction by rule for the first time. Some activities involving substantial modifications to existing ditches or relocation of ditches that are waters of the U.S. themselves or that would impact other waters of the U.S. would require a general or individual permit or permit modification. Such activities are not considered routine maintenance covered by the 404(f)(1)(C) exemption under current practice, and the rule does not change the scope of statutory exemptions.

Nye County Water District Governing Board (Doc. #5486)

- 6.873 Expansion of waters, under Federal jurisdiction to include intermittent streams, county-maintained ditches, and flood channels. If designated as “waters of the US”, ditches currently maintained by the County would come under Federal jurisdiction and require CWA Section 404 permits to be obtained from USACE prior to continued maintenance. This would certainly add unnecessary time, expense, and liability to the County's maintenance process. (...)

It is not clear how the proposed changes will impact the pesticide general permit program, which is used to control weeds and vegetation around ditches, among other things. As commented above, additional permitting requirements will add unnecessary time and cost to the maintenance of ditches and control of weeds. (p. 1-2)

Agency Response: See summary response for section 6.6., as well as the summary response for 6.2: Excluded Ditches.

Northwest Colorado Council of Governments Water Quality/ Quantity Committee (Doc. #10187)

6.874 The proposed rule does not change (and in fact cannot change) exemptions for activities listed in Section 404(d) of the Clean Water Act. Currently and under the proposed rule, the discharge of dredged or fill material associated with construction or maintenance of irrigation ditches or the maintenance (but not construction) of drainage ditches does not require a Section 404 permit.²⁶⁷ These types of discharges are exempt as long as a case-by-case determination establishes that the discharge is not part of “any activity having as its purpose bringing an area of navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced...”²⁶⁸ Local governments own and operate ditches such as water supply, flood control channels, drainage conveyances, stormwater, and irrigation ditches for parks and other public facilities, and these exemptions are essential for local governments to fulfill these responsibilities. (p. 7-8)

Agency Response: There does not appear to be a substantive comment related to the rule, but the summary response for section 6.6 discusses the continued applicability of the statutory exemptions under CWA 404(f)(1)(C).

Water Law (Doc. #13053)

6.875 [I]f the design, custom, and statutory obligation of a ditch owner mandates that the deposited silt be removed and wetland vegetation be eradicated, what function and value does the Rule seek to protect along the course of a ditch? Second, if a ditch user must now be compelled each and every time they clean or make improvements to their ditch to obtain permitting, the rule becomes an excessive burden²⁶⁹ for both the public and the Corps. Further, including ditches within the definition of tributary is not compatible with the Act’s written exemption in section 404(f)(1)(C), which specifically exempts construction or maintenance of irrigation ditches. Water supply ditches which deliver water for multiple uses, including irrigation and uses which are not considered “traditional farming”, impact water quality to no greater degree. (p. 6)

Agency Response: See summary response for section 6.6. Even if maintained, a ditch performs many of the same functions as a tributary, including carrying sediments, nutrients, and pollutants to downstream waters, often with more efficiency than a stream, due to linear nature and design of these features. Congress did not exclude ditches from the CWA, and the activity exemption reflects that Congress intended that some ditches should be waters of the U.S. A ditch that is not excluded in (b) of the rule and is a tributary is a water of the U.S., but the exemptions under 404(f)(1)(C) apply to maintenance activities within ditches that

²⁶⁷ 404(f)(1)(C) of the CWA (see also 33 CFR 323.4(a)(3) and 40 CFR 232.3(c)(3)).

²⁶⁸ Section 404(f)(2); see also 40 CFR 232.3(b).

²⁶⁹ The Justices have addressed the extent of these burdens with stark reality: “The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915 –not counting costs of mitigation or design changes.” *Rapanos v. United States*, 547 US at 719.

are considered waters of the U.S. The rule contains an additional exclusion in (b)(7) for wastewater recycling structures that are constructed in dry land. If water supply ditches meet the definition of “tributary” and are not otherwise excluded, they are jurisdictional waters.

Salt River Project Agricultural and Power District and the Salt River Valley Water Users Association (Doc. #14928)

6.876 If the agencies insist on proceeding with issuing a final rule, we recommend the following [action] be taken:

Retain RGL No. 07-02, Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of the Clean Water Act {July 4, 2007}, and all valid agency jurisdictional determinations. (p. 16)

Agency Response: See summary response for section 6.6. See responses in 12.4.1: Transition Process for Final Rule for implementation of JDs after the issuance of the final rule.

Northern California Association (Doc. #17444)

6.877 We believe the agencies should specifically exempt ditches and drains constructed and maintained in association with agricultural irrigation uses, and all lowland stormwater drainage ditches from CWA jurisdiction. Section (b)(3) should be revised to strike "ditches wholly in the uplands" and replace with "upland ditches". Also, certain drains that drain uplands do have perennial flow, mostly due to the timing of agricultural return flows in the form of groundwater, and should be excluded as well. If irrigation were to cease, these perennial flows would eventually cease. In the case of delayed agricultural runoff causing perennial flows in upland drains, these upland agricultural drains should be considered excluded from the definition of "waters of the U.S." as well. Finally, maintenance of agricultural drains located in or flowing through the floodplain that essentially drain upland irrigated lands should be excluded from CWA jurisdiction, or at the very least be exempted from CWA permitting requirements provided in the Corps/EPA Regulatory Guidance Letter (RGL) 07-02. (p. 9)

Agency Response: See summary response for section 6.6., and summary response for 6.2: Excluded Ditches. Perennial flow caused by agricultural irrigation is none the less perennial flow. Irrigation water that infiltrates the soil surface, percolates through the upper soil horizons and is eventually expressed as flow in an adjacent ditch or tributary allows that ditch or tributary to effectively function in a similar manner as perennial ditches or tributaries whose flow is supported by sources other than agricultural irrigation.

Center for Regulatory Reasonableness (Doc. #14416)

6.878 Roadside ditches are structures generally designed, constructed, and maintained by departments of transportation to prevent flooding and convey water away from roadways. The routine maintenance of roadside ditches can include dredging.

- Are roadside ditches considered transportation structures and therefore, always exempt from Section 404 permitting? If not, under what circumstances are such maintenance activities required to be approved and decision criteria apply to such permit actions? (p. 6)

Agency Response: See summary response for section 6.6. Some roadside ditches, such as those that are perennial or relocated tributaries, may be waters of the U.S. and require 404 permitting. See summary response summary response for 6.2: Excluded Ditches.

Senator Jon Tester, Senator, United States Senate (Doc. #10625)

6.879 The agriculture community has also raised important concerns regarding farm drainage and irrigation ditches. Montana has hundreds of miles of ditches so this concern is of particular relevance to my state. It is my understanding that, under the proposed jurisdictional rule, ditches that do not contribute flow to a water of the United States would not be considered jurisdictional. However, we have many ditches that contribute some flow back to a stream, like through carriage water for farm ditches. The final rule should make clear what, if any, permits would be required for these ditches and how that determination would be made. The final rule also must clarify if maintenance activities, such as removing overgrowth from a riparian area, would be exempt from the permitting process. (p. 1)

Agency Response: See summary response for section 6.6 regarding ditch maintenance, and summary response for 6.2: Excluded Ditches. The rule has provided clarity and certainty to landowners and the regulated public about which waters are waters of the U.S.

6.7. SUPPLEMENTAL COMMENTS ON DITCHES

Specific Comments

Jackson County Board of Supervisors (Doc. #1449)

6.880 The proposed rule excludes certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to a "water of the US." However, under the proposed rule, key terms like 'uplands' and 'contribute flow' are undefined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near to a "water of the U.S." (p. 3)

Agency Response: See Agency Summary Responses for section 6.3: Upland and Definition of Upland and 6.2: Excluded Ditches. For discussion of the term "contribute flow" see Agencies Summary Response in the Tributary Compendium, section 8.1.2: Relevance of Flow Regime, section IV.F.1 of the preamble and the Technical Support Document section VII.

6.881 The Jackson County Board of Supervisors and Jackson County Secondary Roads department cannot support more federal rules and regulations that cause delay and undue

expense on county government responsibilities. They ask that the federal government clarify that local streets, gutters, and human-made (county road) ditches are excluded from the definition of “waters of the US.” (p. 4)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Response for section 6.2: Excluded Ditches. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see agency summary response at 7.4.4.

Medina County Commissioners (Doc. #2718)

6.882 As we understand it, the proposed rule would broaden the number of county maintained ditches-roadside, flood channels and potentially others- that would require Clean Water Act (CWA) Section 404 federal permits. Counties use public infrastructure ditches to direct water away from low lying roads, properties and businesses to prevent accidents and flooding. Ultimately, our county would be liable for maintaining the integrity of our ditches, even if federal permits are not approved by the federal agencies in a timely manner. At the very least, the new regulations should clarify that local streets, gutters, and human-made ditches are excluded from the definition of 'waters of the U.S.' (p. 1)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Response for section 6.2: Excluded Ditches. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see agency summary response at 7.4.4.

City of Pittsfield (Doc. #7629)

6.883 At a minimum, the rule should include the following provisions that are priority concerns for local governments:

(...) Ditches, streams and other drainage features that protect and ensure the operation of public infrastructure shall not be considered waters of the U.S. (p. 1)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Response for section 6.2: Excluded Ditches. Streams that meet the definition of “tributary” are jurisdictional under the final rule. See Agency Summary Response 8.1: Tributaries; Definition for a discussion. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see agency summary response at 7.4.4.

Anonymous (Doc. #11304)

6.884 Though I understand the complicated relationship between environmental regulation and Big Agriculture in the U.S., the language and conclusions surrounding the controversial ditch inclusions and exclusions could definitely be written more clearly. How the EPA could determine such a low or non-existent impact these new rules would have on companies who dump pollutants into ditches, primarily via runoff from their land, is beyond me. The center of gravity around this issue does not seem to be that the EPA

desires to control more water entities, but that there are sometimes instances of unregulated dumping of pollutants that have drastic impacts on public and environmental health, such as the situation in Toledo, Ohio. I imagine these new proposed rules could have a huge impact on anyone who uses pollutants near these water entities. Whether or not that is something that we need to cry about is another matter. However, the claim that this will not have a significant impact on future regulation seems to me to be untruthful, or perhaps strategic, especially when the EPA supposes the waters under regulation will increase by 3%. (p. 2)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Response for section 6.2: Excluded Ditches.

Anonymous (Doc. #11350)

6.885 The proposed rule clarifies the types of ditches that are excluded from jurisdiction; however, it is possible that ditches currently identify as non-jurisdictional may in the future be found jurisdictional waters of the U.S. under the proposed rule. In the same respect, man-made drainage canals that are currently not considered jurisdictional could be considered jurisdictional under these rules. We request clarification as to the application of these rules on these ditches and canals given the proposed definitions of tributaries, adjacent waters, other waters and traditional navigable waterways. (p. 1)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Response for section 6.2: Excluded Ditches. In addition, see Agency Summary Response 6.0 regarding the historical and proposed jurisdiction of ditches. The definition of “tributary” in (c)(3) of the rule clearly includes man-made features that have the requisite physical indicators of tributaries and are not otherwise excluded in paragraph (b) of the rule.

6.886 Request clarification on what it means to contribute flow. (p. 1)

Agency Response: The term “contribute flow” does not appear in the final rule language for the ditch exclusion. See final ditch exclusion language in section (b)(3) of the rule, and Agency Summary Responses for sections 6.0 and 6.2 for further explanation. For discussion of the term “contribute flow” see Agency Summary Response in the Tributary Compendium, section 8.1.1: Relevance of Flow Regime, section IV.F.1 of the preamble and the Technical Support Document section VII.

Anonymous (Doc. #11378)

6.887 The first item of clarification is found in Part 328.3 (b) which defines what are not considered waters of the United States. Paragraph (b)(3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow appears somewhat inconsistent with paragraph (b)(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. Does the flow referenced in (b)(4) refer to perennial flow as referenced in (b)(3)? That is should (b)(4) read Ditches that does not contribute perennial flow, either

directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section.

The term another water found in (b)(4) is ambiguous. Is another water limited to waters of the United States, those waters found in (a)(1) through (7), or does another water included non-jurisdictional waters such as other upland ditches, swales, or other waters without a defined bed and banks?

The vast majority of ditches constructed along highways would meet the definition of paragraph (b)(3). Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow. However, one could argue that all roadway ditches as well as all gullies, rills and non-wetland swales will eventually contribute some flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4). Further defining flow and another water in (b)(4) would greatly clarify the rule. (p. 1)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Response for section 6.2: Excluded Ditches. Regarding ditches (and tributaries) which flow “through another water” into a water identified in paragraphs (a)(1) through (3) of the rule, the preamble clarifies that a water meets the definition of tributary if it contributes flow through an excluded feature. However, the excluded feature itself does not become jurisdictional. See Agency Summary Response for section 6.0 in the Ditches Compendium, Agency Summary Response in the Tributary Compendium, section 8.1.1: Relevance of Flow Regime, section IV.F.1 of the preamble, and the Technical Support Document section VII. In addition, it is important to note that the ditch exclusions are independent. If a ditch is excluded under (b)(3)(A) it does not matter whether it flows into a regulated water under (b)(3)(C).

Norton County Road & Bridge (Doc. #11746)

6.888 Ditches in uplands:

Under the listing of what are not waters of the US item (iii) Ditches in uplands with less than perennial flow is somewhat vague as there is no definition for uplands. In the explanation it states that this means that at no point along their length are excavated in a jurisdictional wetland (or other water). We would propose to use the explanation statement rather than the term uplands. We agree with the restriction of less than perennial flow, if there is perennial flow there would need to be a jurisdictional determination based on if the ditch had a significant nexus to downstream water quality. (p. 1)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Responses for section 6.2: Excluded Ditches and 6.3: Upland and Definition of Upland. Perennial ditches that are not excluded under (b)(3) are jurisdictional as tributaries, which have been determined to categorically have a significant nexus to downstream (a)(1) through (3) waters, either individually or in combination with other similarly situated waters. See Agency Summary Response for section 6.0 in the Ditches Compendium, Agency Summary Response for section 8.1: Definition in the

Tributary Compendium, section IV.F of the preamble, and the Technical Support Document section VII.

Office of the Board Attorney, Board of Supervisors Jackson County, Mississippi (Doc. #12262)

6.889 While the proposed rule contains a number of exclusions, many of the key terms relating to ditches are vague and undefined. The rule would exclude two types of ditches:

- "Upland" ditches with "less than perennial flow;" and
- "Ditches that do not contribute flow either directly or indirectly" to a water of the United States.

E.g., 79 Fed. Reg. at 22199. However, the rule does not define critical terms in those exclusions, such as "upland," "less than perennial flow," or "contribute flow." For example, if the Agencies intend "less than perennial flow" to mean flow on less than 365 days a year, they should say so. Rather than providing clarity, the proposed rule, at best, would cause uncertainty as to whether a particular ditch is excluded or not excluded. If the Agencies really want to provide clarity, they should do so by providing the specific exclusions requested herein.

Further, the proposed rule states that non-jurisdictional ditches may be a point source. This disturbing interpretation of the Clean Water Act would essentially result in regulation of ditches regardless of whether they are non-jurisdictional or jurisdictional, essentially nullifying current exclusions for non-jurisdictional ditches. (p. 2)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Responses for sections 6.1, regarding flow and ditches, 6.2, regarding the ditch exclusions, 6.3, regarding the definition of upland, and 6.4, regarding ditches as point sources.

6.890 **Regulation of ditches would be unnecessary, unduly complex, time-consuming, and counter-productive**

Classifying ditches as "waters of the United States" could subject the County to a myriad of cumbersome and impractical CWA regulatory schemes. Counties use ditches and their related infrastructure to capture and convey water away from low-lying roads, properties, and businesses to prevent accidents (such as traffic accidents on low-lying roadways), protect public safety, and limit flooding and the damage flooding causes. These ditches require maintenance, such as cleaning out vegetation and debris, as well as repairs and modifications. The proposed rule could require Section 404 permits for these basic ditch maintenance activities. See 33 U.S.C. § 1344 (requiring permits for "discharge of dredged or fill material").

The jurisdictional determination process for such permits entails lengthy and resource intensive delays. And often, as part of the approval process, the permit requires applicants to "mitigate" the environmental impacts of proposed projects and attach special conditions on maintenance activities. Further, the proposed rule would not be limited to Section 404. Rather, it could subject County ditches to many other CWA programs, such as:

- Section 402 National Pollution Discharge Elimination System (NPDES) program, which regulates a range of activities such as storm-water drainage, green infrastructure, and pesticide use. 33 U.S.C. § 1342 (requiring permits for "discharge of any pollutant, or any combination of pollutants"); and
- Section 303 Water Quality Standards (WQS) program, which establish ambient water quality standards and effluent limitations for designated "waters of the United States." 33 U.S.C. § 1313.

79 Fed. Reg. at 22268-69 (changing definition of "waters of the United States" for "all sections of the Clean Water Act"). And, once jurisdictional, a project could then trigger a multitude of other federal regulatory requirements created by the National Environmental Policy Act ("NEPA"), the Endangered Species Act, etc. These programs involve studies and public comment periods, all of which cost additional time and money. Each of these steps would impose significant expenses and time delays on counties with limited resources such as ours, preventing activities necessary to maintain public health and safety.

At its heart, the proposed rule and its practical impacts are directly at odds with the fundamental purpose of drainage ditches, which is to protect and promote public safety by expeditiously and efficiently capturing and conveying water away from roadways, appurtenances, and nearby residences and businesses. Time-consuming regulatory delays place an enormous obstacle in the way of a county's ability to carry out such responsibilities effectively. Not only does this new burden create risks for the safety of citizens, but it could also inflict additional liability on a county or other government in the form of citizen suits. Ultimately, a state or local government may be found liable for maintaining the integrity of its ditches, even if needed federal wetland and other permits are not approved in a timely manner. For example, in *Arreola v Monterey*, a state court found a county liable for not maintaining a levee that failed due to overgrowth of vegetation, even though the county argued that the Corps permitting process did not allow for timely approvals. *Arreola v. Cnty. of Monterey*, 99 Cal. App. 4th 722, 122 Cal. Rptr. 2d 38 (2002).

Additionally, a number of types of high-importance local governmental projects are not explicitly exempt under the proposed rule:

- *Municipal Separate Storm Sewer System (MS4)* ditches could now be classified as a "water of the United States." Some counties and cities own MS4 infrastructure including ditches, channels, pipes, and gutters that may flow into "waters of the United States" and are therefore regulated under the NPDES program. If their storm water becomes "a water of the United States," these programs could be subject to additional water quality standards. Not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well.
- Governments use Green Infrastructure as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils, and natural processes.

The proposed rule could inadvertently require Section 404 permits for non-MS4 and MS4 green infrastructure projects.

Even if agencies do not initially plan to regulate these projects as "waters of the United States," the governments may be forced to treat them as such due to exposure to possible CWA citizen suits, unless an explicit exemption is provided. These unnecessary risks should take precedence over the EPA and the Corps' desire to regulate ditches indiscriminately under the CWA. (p. 3 – 4)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Response for section 6.2: Excluded Ditches. See Agency Summary Responses for section 7.4.4, regarding the jurisdiction of ditches within MS4s, and section 6.6, regarding maintenance of ditches.

- 6.891 Given the similarity between this proposed language and the arguments made by the government and rejected by the Supreme Court in *Rapanos*, the Agencies should avoid such an expansive jurisdictional overreach. Specifically, the Agencies should include in the final rule a reasonable and specific exclusion for streets, gutters, roadside and drainage ditches, and flood channels. (p. 5 – 6)

Agency Response: Regarding legal issues related to the rule, see Technical Support Document section I and Legal Compendium (Topic 10). With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see agency summary response at 7.4.4.

Missouri Agribusiness Association (Doc. #13025)

- 6.892 The proposed rule states that ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow are excluded and are not WOTUS (all proposed rule quotes in italics). If “uplands” can be generally defined as not a floodplain, then, the definition of a floodplain becomes crucial. The rule states the term floodplain means an area bordering inland or coastal waters . . . inundated during periods of moderate to high water flows.

The proposed rule leaves it to the agencies’ “best professional judgment” to make determinations as to what flood interval to use for determining floodplains and for determining ‘less than perennial flow.’ Attempts to clarify when a ditch is a WOTUS simply brings more matters into question. Examples include: “*Historical evidence, such as photographs, prior delineations, or topographic maps, may be used to determine whether a water body was excavated wholly in uplands*” and “*Site characteristics may also be present to inform the determination of whether the water body is a ditch, such as shape, sinuosity, flow indications*”. The proposed rule further states “*that even when not jurisdictional waters, ditches may still be a surface hydrologic connection for purposes of a significant nexus analysis.*” “Other waters” may be WOTUS if a significant nexus can be established. Again, the agencies rely on the ‘best professional judgment’ which will defeat any hope of regulatory certainty due to the variability in the factors that the various professionals will have to consider in their decision making. For example, the proposed rule states there is *variability in the size of the floodplain, which is dependent on factors such as the flooding frequency being considered, size of the tributary, and topography.* As

a general matter, large tributaries in low gradient topography will generally have large floodplains (e.g., the lower Mississippi Delta) whereas small headwater streams located in steep gradients will have the smallest floodplains. It may thus be appropriate for the agencies to consider a floodplain associated with a lower frequency flood when determining adjacency for a smaller stream, and to consider a floodplain associated with a higher frequency flood when determining adjacency for a larger stream. (p. 3-4)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Response for section 6.2: Excluded Ditches. The term “upland” has been removed from the exclusion for ditches, as discussed in the Agency Summary Response for section 6.3. A variety of resources may be used to determine the historical presence of tributaries, as discussed in section IV.F.1 of the preamble. Agency Summary Response for section 6.0 of the Ditches Compendium, section IV.F.1 of the preamble, and the Technical Support Document section VII clarify that ditches and other non-jurisdictional waters and features may serve as hydrologic connections between jurisdictional waters. However, the excluded feature itself does not become jurisdictional.

The final rule contains a revised definition for “neighboring” that provides clearer parameters for identifying adjacent waters. However, waters within 4000 feet of the high tide line or ordinary high water mark of a water identified in (a)(1) through (5) of the rule may still be jurisdictional under (a)(8) if they are determined to have a significant nexus on a case-specific basis. It is appropriate to take into account site-specific information when performing a significant nexus analysis, and the definition in (c)(5) outlines functions that are relevant to the significant nexus evaluation. See responses in Adjacency Compendium with respect to floodplains, the Other Waters Compendium, section IV.H of the preamble, and Technical Support Document Section IX.

Anonymous (Doc. #13463)

- 6.893 The EPA has stated in public webinars that they do not intend to define road side ditches waters of the United States. However in 328.3(b) the lists of not waters of the United States explicitly excludes ditches that contribute flow to waters of the United States. Since it is rare for a ditch to not contribute flow, either directly or through another water, to a water body identified as waters of the United States, this exclusion expands the jurisdiction of the CWA to nearly every ditch in the nation without having to show that the ditch has a significant nexus to waters of the United States. This will mean that any municipality that wants to do maintenance on its ditches is impacting waters of the United States and will have to get a Nationwide Permit. Municipalities that have a Municipal Separate Storm Sewer System (MS4) are already permitted through the National Pollution Discharge Elimination System (NPDES) and should not be subject to additional requirements brought about by these proposed changes, unless part of its MS4 is currently determined to be waters of the United States. In order to remedy these burdensome requirements, the definition should exempt all permitted MS4 ditches from this expansion of jurisdictional waters. This can be completed by changing 328.3(b)(4) to the text below.

328.3(b)(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section, unless permitted as part of a Municipal Separate Storm Sewer System (MS4). (p. 1)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Response for section 6.2: Excluded Ditches. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4.

PennAg Industries Association (Doc. #13594)

6.894 We have concerns regarding wet weather conveyance. It is not uncommon that water will temporarily "pool" in low areas (i.e, depressions) during rain events and snow melt. This may last for a day or two at most — will this now be considered a Water of the United States? Based upon the proposed rulemaking, one could make that argument. That is not acceptable to our membership. (p. 2)

Agency Response: “Puddles” are specifically excluded from waters of the U.S. in section (b) of the rule. A puddle is commonly considered a very small, shallow, and highly transitory pool of water that forms on pavement or uplands during or immediately after a rainstorm or similar precipitation event. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4.

D. Fleming (Doc. #13654)

6.895 Ditches in uplands:

Under the listing of what are not waters of the US item (iii) Ditches in uplands with less than perennial flow is somewhat vague as there is no definition for uplands. In the explanation it states that this means that at no point along their length are excavated in a jurisdictional wetland (or other water). We would propose to use the explanation statement rather than the term uplands. We agree with the restriction of less than perennial flow, if there is perennial flow there would need to be a jurisdictional determination based on if the ditch had a significant nexus to downstream water quality. (p. 1)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Responses for section 6.2: Excluded Ditches and 6.3: Upland and Definition of Upland. Perennial ditches that are not excluded under (b)(3) are jurisdictional as tributaries, which have been determined to categorically have a significant nexus to downstream (a)(1) through (3) waters, either individually or in combination with other similarly situated waters. See Agency Summary Response for section 6.0 in the Ditches Compendium, Agency Summary Response for section 8.1 in the Tributary Compendium, section IV.F of the preamble, and the Technical Support Document section VII.

M. Smith (Doc. #14022)

6.896 However, key terms like uplands and contribute flow are not defined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a water of the U.S. A public infrastructure ditch system roadside, flood, or stormwater is interconnected and can run for many miles. Ditches are not wholly in uplands nor do they strictly drain in uplands, since they are designed to convey overflow waters to an outlet.

The proposed rule states that some ditches would not be considered waters of the U.S. if the ditches are excavated wholly in uplands, drain only uplands and have less than perennial flow or are ditches that do not contribute flow either directly or through another water body. How can a township prove its ditches do not contribute to flow? How can exempt ditches be distinguished from jurisdictional ditches, especially if they are near a water of the U.S.?

Additionally, how will the agency delineate how seasonal ditches will be regulated under the proposal?

While, in theory, a maintenance exemption for cleaning vegetation and debris ditches exists, it is difficult for local governments to use the exemption. The federal jurisdictional process is not well understood and the determination process can be extremely cumbersome, time-consuming and expensive, leaving townships vulnerable to lawsuits if the federal permit process is not streamlined. (p. 2)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Response for section 6.2: Excluded Ditches. The term “upland” has been removed from the ditch exclusion. See Agency Summary Responses 6.3: Upland and Definition of Upland.

The term “contribute flow” does not appear in the final rule language for the ditch exclusion. See final ditch exclusion language in section (b)(3) of the rule, and Agency Summary Responses for sections 6.0 and 6.2 for further explanation. For discussion of the term “contribute flow” see Agency Summary Response in the Tributary Compendium, section 8.1.1: Relevance of Flow Regime, section IV.F.1 of the preamble and the Technical Support Document section VII.

Regarding ditch maintenance concerns, see Agency Summary Response 6.6.

Cochise County Board of Supervisors (Doc. #14541)

6.897 The County recommends that the criteria used for the flow regime in ditches should be “less than perennial flow” as proposed. (p. 3)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Responses for sections 6.1: Flow and 6.2: Excluded Ditches.

P. Buck (Doc. #14825)

6.898 As an example, you now have included my agricultural ditches into the category “tributaries?” This is inappropriate. The two exclusions you have provided for ditches are not adequate to alleviate the enormous burden you just placed on the entire agriculture community. (p. 1)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Response for section 6.2: Excluded Ditches.

Clean Water Action (Doc. #15015)

6.899 **Ditches**

Comment request: *The agency’s request comment on this formulation of the ditch exclusion. The agencies specifically seek comment on the appropriate flow regime for a ditch excavated wholly in uplands and draining only uplands to be covered by the exclusion in paragraph (b)(3). In particular, the agencies seek comment on whether the flow regime in such ditches should be less than intermittent flow or whether the flow regime in such ditches should be less than perennial flow as proposed.*²⁷⁰

We oppose the agencies excluding any ditches from CWA jurisdiction without compelling scientific evidence. There is sufficient scientific evidence that ditches commonly function as tributaries, moving water and pollutants downstream. In fact, many ditches are streams that have been channelized or otherwise altered by human activities. Regardless of whether a ditch flows perennially, intermittently or ephemeral, if it functions like a tributary and has an impact on navigable waters, it should be subject to CWA protections. The SAB panel reviewing the rule also expressed concern over the agencies’ proposal to exclude certain ditches from CWA protections. Panelists stated that “exclusion of ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow may be problematic because many such ditches now drain areas that previously would have been identified as wetlands such ditches now drain uplands and may not experience perennial flow.”²⁷¹

Many of these ditches exist in the Midwestern region of the U.S. where agricultural runoff containing high concentrations of nutrients, pesticides and sediments impact downstream drinking water sources. Excluding these ditches from CWA protections is inconsistent with efforts to protect public sources of drinking water and other downstream uses, such as fishing and recreation. When commenting on how these types of ditches function in the Midwest landscape, one SAB panelist stated, “this situation describes much of the drainage into western Lake Erie, where harmful algal blooms due to excessive nutrient loading have caused beach closings, and in August 2014, a three day ban on drinking water for some 400,000 residents in and near Toledo, OH.”²⁷² For more information on how a strong CWA rule can better protect drinking water sources, please

²⁷⁰ 79 Fed. Reg. at 22217 (April 21, 2014).

²⁷¹ SAB Review Memo at 7.

²⁷² SAB Review Memo at 14.

see Clean Water Action's whitepaper, "Putting Drinking Water First: Clarifying the Definition of Waters of the United States Under the Clean Water Act," which was submitted to the docket along with this comment letter. (p. 11)

Agency Response: See Agency Summary Response 6.2 for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule. The agencies have sought to codify the longstanding practice of excluding certain ditches from waters of the U.S., and account for implementation needs for consistency and clarity, while still protecting the integrity of downstream waters. Therefore, the agencies have excluded ephemeral and intermittent ditches that are not a relocated tributary or excavated in a tributary from waters of the U.S., and intermittent ditches that do not drain wetlands.

William Schock (Doc. #15394)

6.900 All recent presentations by the EPA have included statements that uplands will not be affected by the implementation of the draft rule. One count of the word "upland" in the rule yields 48 uses of either upland or uplands yet no definition of the word or term exists in the rule. Webster's defines upland as high land especially at some distance from the sea and as ground elevated above the lowlands along rivers or between hills. Does this mean that all rain water falling on those areas not in seas or in rivers or between hills are exempt from federal control? Or do the EPA and USCOE intend to interpret this at a later date to the detriment to those affected? Their definition of a regulated stream as one that has a bed with evidence of a high water mark, while perhaps relevant in climates with 40 or more inches of rainfall per year is ludicrous in the west where nearly all small swales or tributaries will meet that definition but never see running water except for a few minutes or hours in a year or two time period. This definition is an attempt, in Arizona at least, to redefine land as water. (p. 2)

Agency Response: The term "upland" has been removed from the ditch exclusion. See Agency Summary Responses 6.3: Upland and Definition of Upland. The rule will only regulate waters that meet the criteria in section (a) of the rule, which are not otherwise excluded in section (b). See the Preamble at Section III.C and IV.F, Agency Summary Responses within the Tributaries and Significant Nexus Compendiums, and Technical Support Document at Section VII for detailed discussion on the agencies' support for jurisdiction over waters that meet the definition of "tributary" as provided in the rule. See Agency Summary Response for 8.4 in the Tributaries Compendium for a discussion of non-jurisdictional erosional features as distinguished from ephemeral tributaries, and its relevance to the arid west.

City of Jackson, Mississippi (Doc. #15766)

6.901 The proposed rule, however, does not define terms critical to those exclusions, such as "upland," "less than perennial flow," or "contribute flow." If, for example, the Agencies intend "less than perennial flow" to mean flow on less than 365 days a year, they should state so. Rather than providing clarity, the proposed rule, at best, would cause uncertainty as to whether a particular ditch or structure is excluded or not excluded. If the Agencies

really want to provide clarity, they should do so by providing the specific exclusions requested herein. (p. 2)

Agency Response: The term “upland” has been removed from the ditch exclusion. See Agency Summary Responses 6.3: Upland and Definition of Upland.

The term “contribute flow” does not appear in the final rule language for the ditch exclusion. See final ditch exclusion language in section (b)(3) of the rule, and Agency Summary Responses for sections 6.0 and 6.2 for further explanation. For discussion of the term “contribute flow” see Agency Summary Response in the Tributary Compendium, section 8.1.1: Relevance of Flow Regime, section IV.F.1 of the preamble and the Technical Support Document section VII. The flow regimes used in rule language, including ephemeral, intermittent and perennial have been clarified in the preamble to the final rule in section IV.F.1.

The final rule contains revised and clarified exclusions and definitions including revised ditch exclusion in (b)(3) of the rule.

Clark County Regional Flood Control District, Nevada (Doc. #15772)

- 6.902 Under the proposed rule, ephemeral washes that have a bed and bank and ordinary high water mark would by rule be jurisdictional waters. However, a ditch that 1) is excavated wholly in uplands; 2) drains only uplands; and 3) has less than perennial flow would be exempt from the definition of "waters of the United States" and not subject to regulation under the Clean Water Act. Ephemeral washes in the desert southwest, excavated by infrequent flow in response to highly localized and very intense rainfall, largely meet the definition of the excluded ditches.

Similarly, puddles are not "waters of the United States" subject to Clean Water Act jurisdiction. As presented by the Agencies, a commonly understood meaning of "puddle" is a relatively small, temporary (body) of water that forms on pavement or uplands immediately following a rainstorm, snow melt, or similar event. It cannot be reasonably considered to be a water body or aquatic feature at all because it exists only for a brief period of time before the water evaporates or sinks into the ground. Again, this description in large part applies to ephemeral washes in the desert southwest.

The Agencies also exclude rills and gullies from the definition of "waters of the United States" but have difficulty in distinguishing them from "ephemeral tributaries".

We recommend that the Agencies recognize that ephemeral washes in the desert southwest are landforms over and through which infrequent flows have eroded the land surface, and which only rarely convey water to downstream jurisdictional "waters". The Agencies should by rule exclude ephemeral washes in certain Level III ecoregions, including ecoregions 13 Central Basin & Range and 14 Mojave Basin & Range and perhaps other ecoregions, from the definition of "waters of the United States". (p. 2-3)

Agency Response: The agencies recognize that ephemeral, intermittent and perennial tributaries in the arid West are characterized by a gradient of hydrologic connectivity. The Science Report is based on a review of more than 1,200 publications from the peer-reviewed literature, including publications relevant to the full range of hydrological and hydraulic characteristics of arid West tributaries.

The agencies also solicited local, regional expertise from staff with expertise in arid West tributaries in the development of the rule. EPA's Science Advisory Board (SAB) conducted a comprehensive technical review of the Science Report and reviewed the adequacy of the scientific and technical basis of the proposed rule, including the scientific basis for defining "tributaries". The scientific literature unequivocally demonstrates that streams, individually or in aggregate, exert a strong influence on the chemical, physical and biological integrity of downstream waters.

See the Preamble at Section III.C and IV.F, Agency Summary Responses within the Tributaries and Significant Nexus Compendiums, and Technical Support Document at Section VII for detailed discussion on the agencies' support for jurisdiction over waters that meet the definition of "tributary" as provided in the rule. Excluded erosional features such as gullies and rills are distinguished from jurisdictional ephemeral streams by a lack of the physical indicators used to define tributaries. See Agency Summary Response for 8.4 in the Tributaries Compendium for a discussion.

Pershing County Water Conservation District (Doc. #16519)

- 6.903 The most alarming section of the rule is in the discussion related to the "significant nexus" test. The rule purports to include "Tributaries" which are connected to navigable waters. The comments go on to state that these tributaries include "perennial, intermittent, and ephemeral streams [which] are physically and chemically connected to downstream traditional navigable waters."9 The rule itself expressly includes man-made canals and ditches as tributaries. Thus, if the EPA finds that the Districts' irrigation canals are not exempt under the prior discussed agricultural exemptions, they can assert jurisdiction over them even though the canals and ditches only hold water a few months out of the year. This of course goes directly against what the Supreme Court said in *Rapanos*. (p. 4)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Response for section 6.2: Excluded Ditches.

See the Preamble at Section III.C, the Significant Nexus Compendium, and Technical Support Document at Section VII for a more detailed discussion on the agencies support for jurisdiction over waters that meet the definition of "tributary" as provided in the rule. The rule does not change or affect the statutory exemptions for activities related to ongoing and normal farming under CWA 404(f)(1)(A), but these exemptions do not change the jurisdictional status of a water, and certain discharges to these waters may still require permits.

Judy Petersen (Doc. #16580)

- 6.904 For the same reasons outlined above in regards to NPS pollution role in our waterways, upland non-perennially flowing ditches should not be excluded from the definition of Waters of the US. (p. 1)

Agency Response: See Agency Summary Response 6.2 for a discussion of revised exclusions for certain ditches with minimum flow requirements in the final rule. The

agencies have sought to codify the longstanding practice of excluding certain ditches from waters of the U.S., and account for implementation needs for consistency and clarity, while still protecting the integrity of downstream waters. Therefore, the agencies have excluded ephemeral and intermittent ditches that are not a relocated tributary or excavated in a tributary from waters of the U.S., and intermittent ditches that do not drain wetlands.

D. Gillham (Doc. #16906)

6.905 1. Ditch:

A. If not grandfathered by the previous rule, please define the difference between Ditch and Canal clearly and understandably.

B. Will discharge or the agricultural exemption control in the case of agricultural irrigation? To the extreme, routine maintenance could be regulated just because the ditch system discharges back to the river system. If the rule can be interpreted differently in the future, a ditch that is initially exempt might then be regulated. The proposed rule must be clarified so there is consistency throughout the Agencies and over time. Examples of normal discharge that should not be regulated:

i. Most irrig. ditches in CO discharge tailwater. To have sufficient flow for users at the lower end of the ditch, some water must flow out the end of the ditch into some receiving channel (a tributary, another ditch, or the river or creek from which the water was diverted in the first place).

ii. Many irrig. ditches discharge near the diversion point to regulate the net flow in the ditch to the amount to which the ditch is entitled, and/or to flush sand and silt.

iii. Many CO irrig. ditches have augmentation stations which deliver a portion of the flow in the ditch to the against other depletions, for both CO water rights owners and for interstate compact administration. The source and receiving stream are usually the same.

iv. The arid West has many diversions of nontributary water. Denver is in the South Platte basin, a WOUS. Denver and its suburbs also import water from other major river basins and deep aquifers that are not tributary to the South Platte. Nontributary water is usually discharged into a natural stream for conveyance to its final point of diversion. Runoff from lawns and treated sewage flow into the South Platte River following uses of such water.

v. Perennial Flow: Many irrig. ditches have low spots that hold standing water all winter, even though the ditch is not diverting. Ditches/canals also intercept intermittent or ephemeral drainages that only contribute flow during storm events. Finally, some ditches fill reservoirs in the winter and divert water directly to irrigated fields in the summer, so there is flow in the ditch most of the year. The first two examples are not significant or perennial flow; the third is solely man-induced. stream for water rights reasons. (p. 1 – 2)

Agency Response: The agencies do not agree that all of the situations described by the commenter should be excluded from the definition of “waters of the US.” The

definition of tributary includes natural, undisturbed waters and those that have been man-altered or constructed, but which science shows function the same as a natural tributary. The rule does not specifically distinguish between the terms ditch and canal. However, the agencies longstanding interpretation of the CWA has considered ditches to be modified or artificial channels that contribute to and function the tributary system as waters of the U.S. Thus, while this rule excludes specific types of constructed waters from jurisdiction, including some ditches, it continues to interpret constructed or modified tributaries and ditches that function as tributaries to be jurisdictional. See Agency Summary Response for section 6.0 in the Ditches Compendium.

The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Response for section 6.2: Excluded Ditches. For further discussion of the agencies' general approach to ditch jurisdiction, and specific issues relevant to irrigation ditches, see Agency Summary Response 6.0 in the Ditches Compendium.

The rule does not change or affect the statutory exemptions for activities related to ongoing and normal farming under CWA 404(f)(1)(A), or for ditch maintenance under 404(f)(1)(C), but these exemptions do not change the jurisdictional status of a water, and certain discharges to these waters may still require permits.

W. Stevens (Doc. #17663)

- 6.906 Man-made ditches, formerly excluded, are now included as jurisdictional waters, with two exceptions so limited that few real-world ditches will qualify. This may significantly impact members of the Texas Alliance. If it now requires Federal permits to maintain, fill-in or change ditches on our properties, this will make it much more complicated and costly to conduct routine operations and expand or decommission wells and facilities. (p. 2)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Response for section 6.2: Excluded Ditches.

C. Stallone (Doc. #17995)

- 6.907 1. Within Appendix G of the Army Corps of Engineers Standard Operating Procedures for the Regulatory Program dated October 15, 1999 it states "The preamble to 33 CFR Part 328 states that features excavated from uplands are not considered waters of the United States. For example, a drainage ditch excavated in the uplands, and/or located along a roadway, runway, or railroad that only carries water from upland areas, is not considered jurisdictional, even if it supports hydrophytic vegetation."

Why is this language "even it if supports hydrophytic vegetation" not carried through and explicitly stated in the new proposed rule? I believe to further reduce confusion regarding delineations of drainage ditches as linear wetlands that the statement "even if it supports hydrophytic vegetation" which is found in Appendix G of the Army Corps of Engineers

Standard Operating Procedures for the Regulatory Program dated October 15, 1999, be included in paragraph (t)(3) of the proposed rule:

"(3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow, even if they support hydrophytic vegetation." (p. 1)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Response for section 6.2: Excluded Ditches.

Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(4) through (a)(8) of the rule. For example, an excluded ditch would not become a jurisdictional water of the United States if wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) developed in the bottom of the ditch.

- 6.908 2. Within the Questions and Answers - Waters of the U.S. Proposal it states under question/answer 19: "Where a ditch is constructed though a wetland or a stream and connects to a navigable water, it will be treated the exact same way it was treated before this proposal"

I would prefer clarification as to how it will be treated as I have worked with many USCAE agents and have been directed by them to permit these in different ways from one another. From the terminology used within the supporting documents of this proposed rule, "ditches that do not have the features of tributaries", It does indeed refer to ditches in terms of streams. If this is correct, will we be adding jurisdictional ditch impacts to the stream impacts of the DOA permits, or will a new line for jurisdictional ditch impacts be added to the permit form? (p. 1)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. However, ephemeral and intermittent ditches that are excavated in or relocate a natural tributary, and intermittent ditches that drain wetlands are not excluded. See Agency Summary Response for section 6.2: Excluded Ditches. Specific implementation processes and concerns are beyond the scope of the final rule. However, the agencies will continue to work with our regulatory partners on timely development of necessary training and guidance, including the process for documentation of jurisdictional waters, as appropriate, to build upon existing working relationships, to inform stakeholders, and to ensure successful implementation of this rule.

Donald Shawcroft (Doc. #18569)

- 6.909 informally interpreted those regulations to sometimes include ditches as "tributaries" on a case-by-case basis. In their marketing campaign, the Agencies repeatedly insist that the rule does not expand jurisdiction over ditches, that most ditches will not be regulated, that ditches are excluded, and that the Agencies do not intend to regulate ditches. A careful reading of the proposal's fine print, combined with a basic knowledge of how ditches serve agriculture, however, shows that the Agencies do in fact intend to regulate many ditches. Lost in the denials is the fact that, for the first time ever, the text of the Agencies'

regulations will specifically define the term “tributary” to include “ditches” and “canals.” The proposed rule would categorically regulate as “tributaries” virtually all ditches that ever carry any amount of water that eventually flows (over any distance and through any number of other ditches) to a navigable water.

Even if farmers or ranchers have a ditch that at least on their property only drains uplands, that does not mean the ditch is excluded from federal jurisdiction. The proposal’s fine print also limits the exclusion only to those ditches that are excavated in uplands (the term uplands is not defined in the proposed rule) at all points “along their entire length.” *Id.* at 22,203. Ditches can run for miles, and farmers or ranchers generally have no idea of what types jurisdictional waters (wetlands and ephemeral drainages in particular) connect to the ditch outside of their own property. Moreover, ditch

segments are connected via pipes and other conveyances. At what point does one ditch start and another ditch begin? Or, do the Agencies believe that the “entire” length of a ditch begins when the water is first diverted from its original source of water? None of these questions are answered in the proposal, yet they are the questions that must be answered before anyone can determine the boundaries of these so-called “navigable waters” under the proposed rule. Farmers and ranchers would be hard pressed find a ditch that does not have an ephemeral water or wetland at any point along its entire length.

This problem is exacerbated because over the last several decades, the Agencies have broadened the criteria for classifying land as “wetland” (e.g., expanding the list of wetland vegetation). In many cases, low spots on the landscape that were not considered wetlands in the ‘70s and ‘80s would be considered wetlands today. Because the purpose of ditches is to carry water, many ditches will tend to develop “wetland” characteristics and therefore will not be “wholly in uplands.”

Moreover, because the purpose of a ditch is to carry water, few ditches are excavated along the tops of ridges that could never have contact with “navigable waters.” The most logical places to dig stormwater ditches are at natural low points on the landscape to act as drains. Clearly, most ditches will have some section that was excavated in a natural ephemeral drainage or a low area with wetland characteristics. Such ditches will not qualify for the proposed exclusion for “wholly upland” ditches.

Yet another requirement of the upland ditch exclusion is that ditches must have “less than perennial flow.” That requirement will likely disqualify many ditches from the exclusion, particularly in wet areas of the country where ditches move water away from fields year round. (p. 3 – 4)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Response for section 6.2: Excluded Ditches. For a discussion of perennial irrigation ditches, see Agency Summary Response 6.0 in the Ditches Compendium.

Previous definitions of “waters of the United States” regulated all tributaries without qualification. The same regulation stated that non-tidal drainage and irrigation ditches excavated on dry land are generally not considered waters of the U.S., but the Corps and EPA reserve the right to determine on a case-by-case basis if any of these waters are waters of the U.S. The final rule clearly defines tributary

with qualifications about the physical indicators required for tributaries to be waters of the U.S. In addition, the agencies included clear exclusions for certain ditches in (b)(3). As a result, the agencies anticipate more efficient and consistent implementation of the rule with respect to tributaries, including ditches. Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(4) through (a)(8) of the rule. For example, an excluded ditch would not become a jurisdictional water of the United States if wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) developed in the bottom of the ditch.

For the present, wetlands will continue to be identified and delineated according to the criteria in the 1987 “Corps of Engineers Wetland Delineation Manual” and/or applicable geographic regional supplements to the Manual. However, technical manuals and guidance are likely to continue to be developed and revised, and delineation processes and these documents are outside the scope of the rule.

City of Olathe Kansas (Doc. #18982)

6.910 The proposed rule exempts ditches excavated in uplands; however, no definition of uplands is provided. The Questions and Answers sheet provided by EPA defines “upland” as any area that is not a wetland, stream, lake or other water body. The City of Olathe recommends including this definition in the final rule. (p. 2)

Agency Response: The term “upland” has been removed from the ditch exclusion. See Agency Summary Responses 6.3: Upland and Definition of Upland.

Kevin and Nicole Keegan (Doc. #19128)

6.911 From the two-page paper titled "proposed Definition of Waters of the United States under the Clean Water Act" the following definitions would affect us and we oppose:

- (...) "Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" AND "Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section."
 - Too narrow of an exclusion, private property ditches are still affected. (p. 2)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Response for section 6.2: Excluded Ditches.

J. R. Dorney (Doc. #19235)

6.912 The proposed rule states that "identifying upland ditches with perennial flow is straightforward..." (pg. 22203). Our experience in MC is that this identification is not always straightforward. The agencies need to clarify how this determination would be made. In NC, the presence of long-lived aquatic species is often used to determine if a channel is perennial but this is not always accurate in ditches since water quality

problems can limit aquatic life. In any event, the agencies should provide some narrative discussion of how this decision will be made. (p. 2)

Agency Response: As clarified in the preamble to the final rule in section IV.F.1, longstanding agencies' practice considers perennial streams as those with flowing water year-round during a typical year, with groundwater or contributions of flow from higher in the stream or river network as primary sources of water for stream flow. Other commenters confirmed the agencies' view that determination of these flow regimes generally is straightforward. In the absence or presence of flow at a given point in time, there are additional physical and biological field indicators that may be used to help determine the flow regime of a particular ditch. While specific implementation processes and concerns are beyond the scope of the final rule, the agencies will continue to work with our regulatory partners on timely development of necessary training and guidance, including the process for documentation of jurisdictional waters, as appropriate, to build upon existing working relationships, to inform stakeholders, and to ensure successful implementation of this rule.

Alpine County Board of Supervisors, County of Alpine, California (Doc. #20492)

6.913 **The proposed rule will hinder the ability of counties to manage public infrastructure ditch systems and impact public safety**

The expansion of the definition of Waters of the U.S., as drafted, will also force counties to seek Section 404 permits for the now-routine maintenance of such "waterways" as roadside ditches and storm water drains. Public infrastructure ditch systems can stretch for hundreds of miles across local jurisdictions, and it is unclear how these systems will be classified under the rule. This is particularly onerous for rural counties as many are already struggling with tough budgeting decisions in the face of diminishing funding from the state and decreased public appetite for approving new taxes to cover such costs. It also could dramatically interfere with the ability of counties to properly maintain roadways to keep them safe and accessible to rural residents, particularly since the U.S. Army Corps of Engineers (Corps) is already significantly backlogged in evaluating and processing of 404 permits.

Moreover, water conveyance systems for flood control purposes may also fall under the new definitions, which could ultimately hinder counties from ensuring public safety in extreme storm events. In the face of possible climate adaptation issues from sea level rise, the need to seek permits for maintenance of such systems would be a nearly insurmountable obstacle to developing effective adaptation strategies in emergency situations, and runs counter to the Administration's recent climate adaptation policies and calls to action. (p. 2)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Response for section 6.2: Excluded Ditches. Regarding the maintenance of ditches, see Agency Summary Response for section 6.6. Finally, with respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4.

6.914 **The rule must clarify the impacts on MS4 permits to avoid double regulation of permitted entities**

As it stands, the proposed rule provides no clarification on ditches used as conveyance for runoff in municipal storm water activities. Ditches are commonly used by municipalities for storm water discharge under the Municipal Separate Stormwater Sewer Systems (MS4) program, and such activities are already regulated as waste treatment systems under Section 402(p) of the CWA. The proposed rule would reclassify those ditches as Waters of the U.S., whereby the applicable control standard would no longer be maximum extent practicable under Section 402(p), but the attainment of water quality standards thereby requiring the imposition of numeric effluent limits. (p. 2)

Agency Response: See Agency Summary Response for section 6.4 in the Ditches Compendium. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4.

Empire District Electric Company (Doc. #20501)

6.915 For example, when siting transmission lines, it is easiest to use existing rights of way. These often can be along or adjacent to ditches along a road. These ditches receive runoff from the road and from adjacent land. The ditch may begin to exhibit wetland characteristics. A ditch should remain exempt from being jurisdictional even if it turns into a wetland, but the proposed rule is not clear on this point. (p. 5)

Agency Response: The final rule includes revised and expanded exclusions for many ephemeral and intermittent ditches. See Agency Summary Response for section 6.2: Excluded Ditches.

Further, the rule also clearly states that these exclusions apply even if the ditch otherwise meets the terms describing jurisdictional waters of the United States at paragraphs (a)(4) through (a)(8) of the rule. For example, an excluded ditch would not become a jurisdictional water of the United States if wetland characteristics (e.g. hydric soils, hydrophytic plant communities, etc.) developed in the bottom of the ditch.

ATTACHMENTS AND REFERENCES

Comments included above in this document discuss the Proposed Rule, and some include citations to various attachments and references, which are listed below. The agencies do not respond to the attachments or references themselves, rather the agencies have responded to the substantive comments themselves above, as well as in other locations in the administrative record for this rule (e.g., the preamble to the final rule, the TSD, the Legal Compendium). In doing so, the agencies have responded to the commenters' reference or citation to the report or document listed below as it was used to support the commenters' comment. Relevant comment attachments include the following:

Collins, B.D., Montgomery, D.R., and A.J. Sheikh. *Reconstructing the Historical Riverine Landscape of the Puget Lowland*, p.79-128. (Doc. #16369.5)

King County, 2012a: Sammamish Agricultural Waterway Classification. Department of Natural Resources and Parks, Water and Land Division, King County. (Doc. #16369.1)

King County, 2012b. Map of Enumclaw Plateau and Upper Green Agricultural Waterway Classification. Department of Natural Resources and Parks, Water and Land Division, King County. (Doc. #16369.2)

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In addition, commenters submitted the following relevant references. These are copied into this document as they were submitted by commenters. The agencies have not verified the references, or the validity of hyperlinks.

30 C.F.R. Part 816 (Oct. 9, 1985). (Doc. #15059, p. 9)

33 C.F.R 232.4(a)(3). (Doc. #15081, p. 13)

33 C.F.R 323.4 (a)(3). (Doc. #15421, p. 5; Doc. #15536, p. 23)

33 C.F.R. Part 328. (Doc. #16433, p. 4)

33 U.S.C 1329 (Doc #16652, p. 9)

33 U.S.C. 1342(l)(1). (Doc. #15536, p. 23)

33 U.S.C. 1344 (Doc. #15536, p. 2; Doc. # 5143.2, p. 43)

33 U.S.C. 1362(12). (Doc. #15016, p. 59)

40 C.F.R 122.2. (Doc. #15233, p. 10; #15258 p. 4; Doc. #15016, p. 59; #15018.1, p. 5; Doc. #17921.1, p. 57; Doc. #17005, p. 4; Doc. #15258, p. 4)

40 C.F.R 202.3(c)(3). (Doc. #15081, p. 13)

40 C.F.R 230.3(t)(3). ((Doc. #15438, p.4; Doc. #15525, p.3)

40 C.F.R 232.3 (c)(3) . (Doc. #15421, p. 5)

40 C.F.R. 125.3(f). (Doc. #15377, p.5)

40 C.F.R. Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, 401. (Doc. #16433, p. 4)

49 C.F.R 213.33. (Doc. #15254, p. 19; Doc. #15018.1, p. 4; Doc. #17921.1, p. 55)

42 U.S.C 1362(7). (Doc. #15018.1, p. 5)

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