Clean Water Rule Comment Compendium
Topic 7: Features and Waters Not Jurisdictional

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 Features and Waters Not Jurisdictional 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 7. FEATURES AND WATERS NOT JURISDICTIONAL

Summary Response

In the final rule, the agencies have provided clarified information regarding features that are not considered "waters of the United States", even where those features would otherwise meet the criteria for jurisdiction under paragraphs (a)(4) though (a)(8). Collectively referred to as "exclusions", this portion of the rule reflects the agencies' long-standing practice and technical judgment that certain waters and features are not subject to the CWA. The exclusions are an important aspect of the agencies' policy goal of providing clarity and certainty. Just as the categorical assertions of jurisdiction over tributaries and adjacent waters, as defined, simplify the jurisdiction issue, the categorical exclusions will likewise simplify the process, and they reflect the agencies' determinations of the lines of jurisdiction based on science, the case law and the agencies' experience and expertise.

The agencies received numerous comments on the exclusions contained in the proposed rule from the public, potentially regulated entities, and the Science Advisory Board. Many commenters felt that the proposed language regarding exclusions was not specific enough or did not define important terms used. In response to these comments, the agencies have broadened the preamble discussion of this section and expanded the number of exclusions listed in order to increase clarity regarding the agencies' intent. Some commenters stated the exclusions should not apply where a water has a significant nexus or meets one of the categories in paragraph (a). The agencies disagree with these suggestions and believe it is a reasonable approach for the rule to clearly identify what waters are and are not jurisdictional. The Science Advisory Board and several other commenters stated that the proposed exclusions did not reflect the scientific record or lacked adequate scientific justification. The agencies' determination that certain features are not "waters of the United States" is not solely a scientific conclusion. Although guided by the available scientific information, exclusions are also guided by Supreme Court cases, statutory language and regulatory policies, and the agencies' technical expertise and experience. Thus, just as a significant nexus determination is not a purely scientific inquiry, the exclusions reflect a determination by the agencies that the features detailed should not be considered "waters of the United States," based on an evaluation of the law, science, and functions provided by these features. The agencies believe the exclusions contained in the final rule provide a balance between protection and clarity that is reasonable and consistent with the statute's goals and objectives.

It is important to note the difference between features not considered to be "waters of the United States" (exclusions) and activities covered under CWA section 404(f), also known as "exemptions." Recognizing the vital role of farmers in providing the nation with food and fiber, the Clean Water Act in Section 404(f)(1) (33 U.S.C. § 1344(f)(1)) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, silviculture, and ranching is clarified in the agencies' implementing regulations (40 C.F.R § 232.3(c)(1)) to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. 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. Nothing in this rule changes the exemptions covered in 404(f) or current agency implementation of the exemptions.

In the final rule all existing exclusions from the definition of "waters of the United States" are retained, and several exclusions reflecting longstanding agency practice are added to the regulation for the first time. Prior converted cropland and waste treatment systems have been excluded from the definition of "waters of the United States" definition since 1992 and 1979 respectively, and only ministerial changes are made. These two exclusions remain substantively and operationally unchanged. The agencies add exclusions for waters and features previously identified as generally exempt in preamble language from *Federal Register* notices by the Corps on November 13, 1986, and by EPA on June 6, 1988. This is the first time these exclusions have been established by rule. The agencies for the first time also establish by rule that certain ditches are excluded from jurisdiction. The agencies add exclusions for groundwater and erosional features, as well as exclusions for some waters that were identified in public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies' intent, such as stormwater control features constructed to convey, treat, or store stormwater, and cooling ponds that are created in dry land. Artificial lakes and ponds subject to this exclusion are created in dry land to hold or store water for uses where isolation from downstream waters for the duration of the associated activity is essential. Conveyances created in dry land that are physically connected to and are a part of these artificial lakes and ponds created in dry land are also excluded from jurisdiction under this provision. These artificial features work together as a system, and it is appropriate to treat them as one functional unit. These exclusions reflect current agencies' practice, and their inclusion in the rule as specifically excluded furthers the agencies' goal of providing greater clarity over what waters are and are not protected under the CWA. Waters and features that are excluded under paragraph (b) of the final rule cannot be determined to be jurisdictional under paragraphs (a)(4) through (a)(8).

Many commenters stated that all "man-made" facilities and features should be added to the list of exclusions. The agencies do not feel that this addition would be appropriate, as the term "man-made" would potentially apply to a large number of aquatic features, without regard to the potential for significant nexus to traditional navigable waters, interstate waters, or territorial seas. Given the extensive human modification of watercourses and hydrologic systems throughout the country, it is often difficult to distinguish between natural watercourses and watercourses that are wholly or partly modified or constructed. Many features that potentially convey waters and/or pollutants to (a)(1)-(a)(3) waters have been historically created or altered, such as channelized streams and impounded areas, and to add a broad exclusion for these waters to the list of excluded features would not improve regulatory clarity, nor be consistent with the goals of the statute. The agencies believe the expanded exclusions for cooling ponds, stormwater control features, and wastewater recycling structures created in dry land, as well as certain types of

ditches, provide clarity regarding many of the features that prompted these comments, as well as the necessary environmental safeguards.

Overall the agencies received many comments related to the jurisdictional status of ditches. 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' approach to ditches in the final rule balances the protection of ditches that replace or function as tributaries with the exclusion of ditches that provide minimal, if any, tributary function and have not been historically regulated in practice. Thus, the treatment of ditches in the final rule 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. The revised ditch language excludes:

> "(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. Compendium 6 of this RTC focuses on "Ditches," and section 6.2 of that compendium is specifically centered on the exclusions for ditches in the final rule.

For more information on the exclusion specific to waste treatment systems, see the summary response included in the section titled "*Waste Treatment System (WTSE)*" below. For more information on the exclusion specific to prior converted cropland, see the summary response included in the section titled "*Prior Converted Cropland (PCC)*" below. For information regarding Municipal Separate Storm Sewer Systems (MS4) and other stormwater control features, see the summary response included in the section titled "*MS4s and other stormwater management features*" below. The essays and individual responses throughout this compendium further respond to the individual issues raised in this section.

Several commenters also expressed concerns that features listed in the exclusions as not considered "waters of the United States" could serve as a jurisdictional connection for other waters under the proposed rule. The science overwhelmingly supports the conclusion that waters can remain strongly connected even where the connection is through a non-jurisdictional feature. See Technical Support Document Sections II and IX. There is no basis in the statute or caselaw to ignore the significant effects a water has on downstream waters simply because the connection exists through a non-jurisdictional feature. In response to these and other comments, however, the agencies have made several clarifications in the final rule. For tributaries, some excluded features, such as waste treatment systems or lawfully constructed grassed waterways, may occur within a covered tributary segment; while the water above and below the excluded feature is jurisdictional if it meets the definition of tributary, the excluded feature does not become jurisdictional. In the same way, the excluded feature does not render the upstream portion of the

covered tributary excluded, recognizing that the upstream portion retains its significant nexus to downstream waters. For purposes of determining adjacent waters, the agencies are defining limits for "neighboring" primarily based on the reliance of a 100-year floodplain, as recommended by the public and based on science. By establishing a distance-based threshold for adjacency, the agencies have removed the possibility that a water could be determined to be categorically jurisdictional solely because of the presence of a hydrologic connection through an excluded feature. For waters considered under (a)(7) or (a)(8), the presence of a hydrologic connection from an excluded feature may be an important factor in evaluating a case-specific significant nexus, but does not on its own demonstrate that a significant nexus is present.

In addition, it is important to note that the features discussed under exclusions may function as "point sources" under CWA section 502(14)), such that discharges of pollutants to waters through these features would be subject to other CWA regulations (e.g., CWA section 402).

Specific Comments

Gila River Indian Community (Doc. #13619)

7.1 One area of the Proposed Rule that the Community supports is the Agencies' decision to promulgate, in a formal regulation, waterways that the Corps had been excluding from jurisdiction as a matter of policy. It has been the Agencies' policy not to extend jurisdiction over certain waterways and water features identified in the Proposed Rule, but the Corps had reserved the right to assert jurisdiction over them on a case-by-case basis. The Agencies clearly intend that these categorical exemptions add clarity for landowners. While this should be the case, it is important that the Final Rule address some of the related ambiguities included in the Proposed Rule. For example, what is a "ditch excavated in a wholly upland region?" Moreover, while these categorical exemptions might provide some regulatory relief, the Proposed Rule does not make clear who has the burden of proving that an exemption applies.

As another example, would a series of detention basins within a drainage channel that slowly release storm water downstream into a waterway that eventually flows into a jurisdictional water qualify as non-jurisdictional "artificial ponds"? Categorical exemptions should be clearly defined and clarified, especially in light of the proposed elimination of the Wetlands Delineation Manual, which provided guidance to the regulated community. (p. 7-8)

Agency Response: See summary response above and the summary response at 7.4.4. It is the Government's burden to demonstrate that a water is a "water of the United States."

Texas Commission on Environmental Quality (Doc. #14279.1)

7.2 Additional categories should be added to provide more examples of waters that will never be identified as jurisdictional waters. In 33 CRF §328.3(b), various categories of water bodies are listed as non jurisdictional. This new section is potentially helpful, but additional categories should be added to help address the uncertainty that is currently associated with the proposed provision for "other waters" in 38 CFR §328.3(a)(7). (p. 8)

Agency Response: **See summary response above.**

Commonwealth Pennsylvania Department of Agriculture (Doc. #14465)

7.3 The proposed rule as drafted creates more confusion than it clarifies. PDA is disappointed in the proposed rule's lack of clarity due to ambiguous or undefined terms and phrases. Terms and phrases throughout the proposal are left undefined, or the definition is left so ambiguous that farmers will be left wondering, with no possible way of determining, whether waters on their property will be jurisdictional or not. The proposed rule only increases confusion…

allowing for exempted features, such as groundwater, gullies, and rills to serve as connections that can render a feature jurisdictional "adjacent water" or "other water." (p. 4)

Agency Response: **See summary response above.**

State of Oklahoma (Doc. #14625)

7.4 **III. Exemptions Further Clarified or Removed Altogether**

While the Agencies' efforts to exempt certain water features and activities from CWA jurisdiction are noble, in many cases it has arguably led to erosion of exemptions we believe were already well established prior to this proposal. Though embodied in a separate document outside this proposed rule to define WOTUS, the Agencies' proposed *Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A)* ("Interpretive Rule") provides an excellent example of such unintended consequences. The effect of the proposed Interpretive Rule is to narrow the scope of agricultural activities exempt from CWA jurisdiction despite the Agencies' stated intent otherwise. We reiterate our request to withdraw the proposed Interpretive Rule and suggest that the exemptions for ditches and some other features proposed within the WOTUS rule suffer from the same unintended consequences without significant clarification. (p. 4)

Agency Response: **See summary response above. While not relevant to the this rule, the Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A) was withdrawn on January 29, 2015.**

Tennessee Department of Environment and Conservation (Doc. #15135)

7.5 The CWA exclusions of groundwater and certain other exclusions listed in the proposed rule and the current regulation do not have scientific justification. The available science shows that groundwater connections, particularly via shallow flow paths in confined aquifers, can be critical in supporting the hydrology and biogeochemical functions of wetlands and other waters. (p. 12)

Agency Response: **See summary response above and summary response at 7.3.6. The agencies include an exclusion for groundwater, including groundwater drained through subsurface drainage systems. As discussed in the preamble to the proposed rule, the agencies have never interpreted "waters of the United States" to include groundwater. The exclusion does not apply to surface expressions of groundwater,**

as some commenters requested, such as where groundwater emerges on the surface and becomes baseflow in streams or spring fed ponds.

7.6 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. Although excluded from jurisdiction, artificial lakes or ponds, or reflections pools, created by excavation, diking or construction can be directly connected to jurisdictional waters by groundwater, which may be shallow as well as deep groundwater in unconfined aquifers. (p. 13)

Agency Response: **See summary response above.**

Southern Ute Indian Tribe Growth Fund (Doc. #15386)

7.7 **9. Comments on the exclusion of manmade structures**

With respect to the exclusion in the Proposed Rule of several manmade structures, i.e., artificial lakes or ponds, artificial reflecting pools or swimming pools, and small ornamental waters which are "created by excavating and/or diking dry land" from jurisdictional status, it is recommended that a definition is provided for "dry land."

Recommendations:

A definition for dry land should be provided in the Proposed Rule… (p. 9)

Agency Response: **As stated in the preamble, the phrase "dry land" appears in the 1986 and 1988 preambles, and the agencies believe the term is well understood based on the more than 30 years of practice and implementation. But in keeping with the goal of providing greater clarity, the agencies clarify 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.**

Pike Peak Area Council of Governments, Colorado (Doc. #9732)

7.8 The proposed language is so broadly drafted that without modifications it will most likely encompass, and subject to further permit scrutiny, what can be characterized as "beneficial" infrastructure activities. These activities include: (1) the construction and operation of ponds and lagoons associated with water" delivery/treatment systems (there is a "wastewater" system exemption, but no comparable water system exemption); (2) the construction and operation of recharge and reuse facilities being employed in response to climate variability; and (3) the construction and maintenance of stormwater control facilities, including "green infrastructure" projects. To unnecessarily erect additional barriers to the completion of such activities is unwarranted. (p. 3)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies**

recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water.

The exclusion also covers water distributary structures that are built in dry land for water recycling. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, 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 have not in practice asserted jurisdiction over these types of features when created in dry land. The exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial.

Northwest Florida Utility Managers Council (Doc. #14573)

7.9 In their proposed rule, EPA provides numerous exclusions. But the exclusions are just as confusing as the rest of the rule. For instance wastewater treatment plants are excluded but what happens if it discharges to a non-jurisdictional water that is suddenly rendered jurisdictional? In addition groundwater is excluded but what happens if that groundwater discharges to a traditional jurisdictional water and that groundwater contains a high level of nitrogen or phosphorus. EPA will most certainly want to take action if they find the source of the N/P comes from a farm or a treatment facility or any number of sources of those nutrients. (p. 2)

Agency Response: With respect to what happens with NPDES permits when jurisdictional status changes as a result of the final rule, please see summary responses at 7.4.4 and 12.3. Nothing in the final rule changes the legal requirements regarding discharges of pollutants which require a permit. As the preamble notes, the exclusion for groundwater does not apply to surface expressions of groundwater, such as where groundwater emerges on the surface and becomes baseflow in streams or spring fed ponds, or where groundwater is pumped and discharged into

surface waters of the United States. The final rule does not change existing statutory exemptions, such as for discharges of agricultural stormwater.

Broward County, Florida (Doc. #15395)

7.10 The Board…supports legislation that:

Clarifies that CWA jurisdiction does not include isolated, intrastate, or non-navigable waters such as isolated ponds, ditches, and other channels containing intermittent or ephemeral water flows occurring during less than three months of the year as "navigable waters" or "waters of the United States. Broward County finds that the proposed rule specifically excludes from jurisdiction waste treatment ponds and artificial ponds; upland ditches with less than perennial flow; and ditches that do not contribute flow to a recognized water of the US. In addition, the proposed rule clarifies jurisdiction further by adding a definition for "tributaries" (undefined in the current regulations) which excludes intermittent and ephemeral streams that do not contribute flow to a recognized water of the US. (p. 2)

Agency Response: See summary response above. The agencies have modified the definition of tributary in the final rule, see preamble sections IV.F and G and Technical Support Document sections VII and VIII for more information on tributaries and adjacent waters.

Public Works, Ramsey County, Minnesota (Doc. #16665)

7.11 ***Comments related to explicit exclusions*** - Ramsey County supports the LGAC report recommendation that man-made components of a MS4 permitted stormwater conveyance system be excluded from WOTUS including manmade green infrastructure and manmade conveyance components such as manmade gutters, manmade ditches, manmade drains, and manmade ponds. Natural conveyance components should be included in WOTUS including natural wetlands and modifications to natural wetlands. Similarly, MCSG proposes a specific exclusion from WOTUS for fully-constructed stormwater control measures Including constructed stormwater ponds, constructed stormwater wetlands, rain gardens, infiltration devices and structures, swales, Low Impact Development structures and BMPs, pipes, streets, curbs, gutters, roadside ditches, man-made ditches, man-made channels, storm drains, and other constructed stormwater control and conveyance structures, devices, and features. MCSC [Minnesota Cities Stormwater Coalition] identifies three specific exceptions to the exclusion for fully-constructed stormwater control measures. These exceptions are included in WOTUS and include 1) stormwater control measures constructed at the approximate location of similar types of natural waters; 2) natural water resources with stormwater conveyance pipes discharging to them and with constructed outlets; and 3) stormwater control measures subject to the ebb and flow of the tide. The LGAC report recommends the EPA Identify regional areas where regional jurisdictional determination as WOTUS could be problematic In terms of sea level rise and fall, or where groundwater and surface water flow are intermixed. For these areas, the EPA should develop region-specific criteria for determining WOTUS jurisdiction. The rule should explicitly specify when ditches are WOTUS jurisdictional. Ramsey County supports recommended language by Alabama DOT to exclude roadside

ditches from WOTUS, defined as "excavated channels adjacent to roadways with less than perennial flow constructed for transportation and stormwater conveyance". (p. 1-2)

Agency Response: See summary response above. The final rule applies nationwide; any case-specific evaluation of jurisdiction could consider site-specific and region-specific information.

Board of Supervisors, Amador County, California (Doc. #17450)

7.12 We concur that categorizing waters that will "never" be subject to CWA jurisdiction will be helpful. We encourage the agencies to define the category…clarifying water bodies that will always be subject to the CWA jurisdiction. We note in particular that "interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, and adjacent wetlands" as currently defined in the regulations do not appear anywhere in the CWA. We urge the agencies to incorporate those interstate waters, all other waters, impoundments of waters, tributaries and adjacent wetlands in the category of "never subject to the CWA", where a significant nexus to "navigable waters" as explained above is unlikely…we urge the agencies to explicitly classify the following as waters that will never be subject to the CWA jurisdiction.

- Waters from water reuse facilities
- Roadside ditches designed as part of the road drainage structure
- Ditches used to convey municipal storm water discharge under the Municipal Separate Storm Water Sewer System (MS4) program
- Water conveyance systems for flood control purposes (p. 3)

Agency Response: See summary response above and Technical Support Document. With respect to water reuse facilities, please see summary responses at 7.4 and 7.4.2; with regard to ditches, flood control structures, and MS4s, also see the compendium on ditches (topic 6) and the summary response at 7.4.4, respectively.

Colorado Clean Water Coalition (Doc. #3533)

7.13 We appreciate the outline list of exclusions identified in the proposed rule such as artificial lakes, ponds created by excavating, water filled depressions created incidental to construction activity, and ditches; however, we are concerned with the inconsistency of language when referring to "All Tributaries" and "Nexus" as these examples listed in the proposal could clearly be considered tributary waters. Industry education is a very important aspect of successful regulation and such language not considered industry standard or scientific in nature will cause confusion regarding implementation of the new regulation. (p. 2)

Agency Response: The agencies believe the final provides clarity on waters that are and are not jurisdictional but agree industry education is important.

Great Lakes Indian Fish and Wildlife Commission (Doc. #15454)

7.14 Staff also understand that certain waters are not “waters of the US.” However, if some of these features are abandoned, they may over time acquire the characteristics of a water of

the US. While clarity in regulation is desirable, it may be important to leave some flexibility in the rule so that certain of these features could become a water of the US under appropriate circumstances. For example, rice paddies that have been long abandoned should be considered waters of the US if they meet the criteria identified in the proposed rule. (p. 2)

Agency Response: **See summary response above.**

League of California Cities (Doc. #16442.1)

7.15 **Exemptions to the proposed rule are important**. The proposed rule needs to provide greater understanding of what is and what is not a Water of the United States. Manmade stormwater and flood control infrastructure such as ditches, drains, culverts, and green infrastructure should be clearly exempted from the proposed rule. (p. 1)

Agency Response: **See summary responses above and at 7.4.4.**

Federal StormWater Association (Doc. #15161)

7.16 The proposed rule includes exemptions from the existing regulations and exemptions that are based on clarifications of the scope of federal jurisdiction in those prior rulemaking preambles. But these exemptions are related to different underlying rules and are not always directly applicable to the proposed rule, making those exemptions and how they apply to the proposed expanded jurisdiction equally confusing… (p. 5)

Agency Response: **The example provided in the comment relates to ditches and the definition of "tributary." That definition has been modified in the final rule; see summary response above and Sections IV.F and IV.I of the preamble**.

Idaho Association of Commerce & Industry (Doc. #15461)

7.17 Notwithstanding the foregoing, any proposed rule must recognize that not all water bodies are subject to the jurisdiction of the CWA. In addition, any proposed rule should provide specific examples of water body features that are not within the scope of the CWA regulation. We acknowledge and appreciate the exempted waters in the proposed rule but they fall short of specifically exempting various waters that should not be jurisdictional waters. The limited exemptions provided in the proposed rule appear to be another effort to circumvent the current language of the law as well as the intent that has twice been upheld by the U.S. Supreme Court. (p. 3)

Agency Response: **The agencies disagree, and believe the final rule, and exclusions contained within, provide a balance between protection and clarity that is reasonable with the statute's goals and objectives. With regard to the Supreme Court decisions, see the Technical Support Document, section I.**

Association of Nebraska Ethanol Producers (Doc. #15512)

7.18 One of the more significant changes advanced by the proposed definition is the inclusion of several listed exemptions for coverage under WOTUS at 40 CFR 230.3(t). While listing those waters not designated as WOTUS is a step in the right direction, the specific language of the current rulemaking proposal appears to suggest that only those waters covered by one or more of the listed exemptions are in fact exempt from coverage as

jurisdictional waters. Any waters that do not meet one or more of the specific exemptions listed could in fact become WOTUS under the USEPA proposed definition as written. USEPA guidance clearly indicates that the exemptions listed in Paragraph (t) are intended to be examples of the types of waters that are expected to be non-jurisdictional. However, USEPA's proposed regulatory language falls short of carrying those concepts clearly into the rulemaking and could result in intermittent streams, run-on from low-lying agricultural areas, and water discharges from similar lands being reclassified as jurisdictional.

Assuming that the WOTUS rulemaking goes forward, we would recommend adding specific language in the rule that the exemption list in 40 CFR 230.3(t) is intended to represent examples of non-jurisdictional waters, but does not in fact represent an all-inclusive list of exempt waters. In addition, the final rule could be improved by adding a "catch-all" category under Paragraph (t) that would otherwise exempt all waters not otherwise qualifying as WOTUS because they do not otherwise drain or connect to jurisdictional waters. These changes would help ensure that any rulemaking clearly implements the concepts USEPA says that it is trying to advance through the WOTUS rulemaking. (p. 2-3)

Agency Response: **The agencies do not believe it is necessary to add a "catch-all" exclusion for all waters not determined to be jurisdictional, and do not agree that it would provide clarity regarding the categories of waters that are covered. The final rule interprets the CWA to covers those waters that require protection in order to restore and maintain the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas. The final rule clarifies categories of waters that are jurisdiction by rule, a limited subset of waters that may be jurisdictional based on a case-specific analysis, and categories of waters not considered "waters of the United States." See summary response above.**
The agencies disagree that intermittent streams are currently not considered jurisdictional. See Section IV.F of the preamble for a discussion of stream flow regime. The agencies are unclear what the commenter is referring to in the statement "…run-on from low-lying agricultural areas, and water discharges from similar lands being reclassified as jurisdictional." See summary response and list of exclusions.

FMC Corporation (Doc. #15533)

7.19 Definition of Waters of the United States: We agree with the language in the proposed rule that excludes waste treatment systems and groundwater, including groundwater drained through subsurface drainage systems, However, we are concerned that EPA, through other language in the proposed rule would on a "case-by-case basis" determine whether a significant nexus exists and use this authority to circumvent these exemptions, groundwater protection systems and permitting rules already in place would be confounded by any attempt to add additional layers of permitting. We urge EPA to recognize that exiting waste treatment systems, and other ponds and water storage facilities are excluded from any implementation of a significant nexus test. (p. 2)

Agency Response: **The final rule clarifies that the exclusions listed are not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(4) though (8).**

Federal Water Quality Coalition (Doc. #15822.1)

7.20 The agencies have proposed to recodify exemptions from the current regulations and to codify additional exemptions drawn from language in the preambles of prior rulemakings. However, whether the exemptions were stated previously in rule language or preamble language, they are now exemptions from a new underlying rule that is vastly different from the current regulatory definitions of waters of the U.S. This fact has led to confusion regarding what waters are covered by the exemptions.

For example, the proposed exemptions drawn from prior rulemaking preambles describe features that the prior definitions of waters of the U.S. did not reach, because the features did not qualify as jurisdictional water under the terms of the prior definitions. However, but for an exemption, the proposed rule would regulate most water features. Thus, the proposed exemptions likely will be interpreted narrowly and will apply only to the features described in each exemption. Further, no explanation for the exemptions is provided other than "longstanding practice" and the observation in the plurality opinion in *Rapanos* that there were certain features that were not primarily the focus of the CWA (citing 547 U.S. at 734). 79 Fed. Reg. at 22218. Unfortunately, the explanations from the preambles of prior rules may no longer be relevant because the agencies have changed the underlying definition of waters of the U.S. We agree that there are many waters that are not the primary focus of the CWA. The agencies should articulate a clear rationale for distinguishing between waters that are federally regulated and waters that are left to state jurisdiction and expand the exemptions based on that rationale. Their failure to do so has led to significant uncertainty. (p. 17-18)

Agency Response: **The agencies have expanded and clarified the discussion of features not considered to be "waters of the United States" in the final rule. See the summary response above and Section IV.I of the preamble.**

7.21 Based on their understanding of connectivity, some members of the Panel who reviewed the proposed rule recommended against the exclusions for groundwater, ditches, rills, gullies, nonwetland swales, and artificial lakes and ponds.[1]

Others Panel members observed that the agencies did not provide a rationale for the exclusions, creating confusion:

> Panel members commented that the manner in which decisions would be made about excluding other manmade features was not clearly explained in the preamble of the proposed rule. Members noted, for example, that it was not clear whether the proposed rule would exclude: artificial lakes and ponds that have connections to downstream waters, underground stormwater drainage, natural versus artificial swales, roadside ditches, stormwater quality basins, bioswales, detention basins, industrial water processing and/or treatment facilities,

[1] Rodewald Memorandum, at 6-8.

desalination brine storage basins, cooling systems, oil and gas tank basins, fish farms, and rice paddies.[2] (p. 53)

Agency Response: **See summary response above.**

Water Advocacy Coalition (Doc. #17921.1)

7.22 **The Proposed Exclusions from the Waters of the United States Definition Are Ambiguous and Wholly Inadequate.**

Although we support the agencies' listing of types of waters that are categorically not jurisdictional and the clarification that these excluded waters cannot be recaptured if they satisfy the rule's other provisions, the exclusions contained in the proposed rule are unclear and wholly inadequate. We support the proposal to maintain the exclusions for waste treatment systems and prior converted croplands, but it is disappointing that the agencies have not taken this opportunity to provide some much needed clarity on the applicability of those exclusions. Of the new exclusions, some are so narrow as to be nearly impossible to satisfy. Others are not defined or are unclear. Moreover, the exclusion of these waters rings somewhat hollow when the preamble asserts that these excluded features can serve as links that can render connected features jurisdictional under the "adjacent waters" or "other waters" categories of the proposed "waters of the United States" definition. Notably, the suggestion that non-jurisdictional waters can provide the nexus from a pollutant discharge to a jurisdictional water is directly opposed to Justice Kennedy's *Rapanos* concurrence. There, he provided the admonition that a seasonal drainage is not transformed into a "water of the United States" merely because it provides an intermittent or ephemeral hydrologic connection to TNWs. *See Rapanos*, 547 U.S. at 778-79 (Kennedy, J., concurring). Practically speaking, these exclusions provide little relief from the broad reach of the proposed rule's (a)(1) through (7) categories. (p. 70)

Agency Response: **See summary response above and Technical Support Document.**

7.23 **The agencies must revisit these exclusions to provide clarification.**

In sum, although we support the listing of certain waters that are categorically excluded from the "waters of the United States" definition, the agencies must revisit these exclusions and provide more clarity on their applicability and fewer qualifiers on their application. Waters and features that are categorically excluded from jurisdiction should not be used to establish jurisdiction over connected waters as "adjacent waters" or "other waters." (p. 74)

Agency Response: **See summary response above and Technical Support Document.**

[2] cite

FMC Corporation (Doc. #16505)

7.24 **Definition of Waters of the United States**: We agree with the language in the proposed rule that excludes waste treatment systems and groundwater, including groundwater drained through subsurface drainage systems. However, we are concerned that EPA, through other language in the proposed rule would on a "case-by-case basis" determine whether a significant nexus exists and use this authority to circumvent these exemptions. Groundwater protection systems and permitting rules already in place would be confounded by any attempt to add additional layers of permitting. We urge EPA to recognize that exiting waste treatment systems, and other ponds and water storage facilities are excluded from any implementation of a significant nexus test. (p. 2)

Agency Response: The final rule clarifies that the exclusions listed are not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(4) though (8).

Kentucky Oil and Gas Association (Doc. #16527)

7.25 The breadth and lack of definition is further illustrated by the agencies belief that they must explicitly exclude manmade features. The rule states, "Those waters and features that would not be 'waters of the United States' are: … artificial reflecting pools or swimming pools … small ornamental waters …."(p. 22193) It should be clear and require no explanation that manmade features used for recreation or decoration are not under the jurisdiction of the federal government for Clean Water Act purposes. The necessity to include these exclusions points to the significant overreach and lack of clarity in the overall policy. (p. 3)

Agency Response: These additions are intended to codify longstanding agencies practices and provide clarity to the public. To that end, the agencies propose not simply that these features and waters are ''generally'' not ''waters of the United States,'' but that they are expressly not ''waters of the United States'' by rule.

Vulcan Materials Company (Doc. #16566)

7.26 The proposed rule's inclusion of man-altered, or man-made water and ponds, impoundments, canals and ditches as tributaries is problematical. This inclusion raises the potential for water management systems employed by facilities to be subject to full CWA jurisdiction. These engineered systems manage stormwater runoff, collect and treat water prior to discharge, and provide a means for water re-use and recycling thereby minimizing the consumption of surface and groundwater resources. As previously stated, the management of stormwater and process water at aggregate mining operations is already subject to regulation under the NPDES program or federally authorized and equivalent state or local programs and additional regulation under the CWA is therefore not necessary. (p. 2)

Agency Response: The definition of tributary has been modified in the final 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. The rule does not impose any regulatory requirements.

7.27 Recommendations Regarding Future Actions

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

> c. The exemptions from CWA jurisdiction currently provided by the USEPA and USCOE under the CWA should be listed in the proposed rule, specifically the exemption for excavations and pits at aggregate mining operations, and the water treatment system exemption. The scope of these exemptions needs to be clearly stated and consistent with the historic use and application of the exemptions.
>
> h. Remove the inclusion of impoundments, ponds, and ditches located in upland areas from consideration as jurisdictional.
>
> i. …water management systems associated with zero discharge facilities should be clearly exempted from jurisdictional status. (p. 3, 4, 5)

Agency Response: The agencies have expanded and clarified the features not considered to be "waters of the United States" under the Clean Water Act. See summary response above.

Irvine Ranch Water District (Doc. #14774)

7.28 For those categories of waters that would be absolutely excluded as WOTUS, the draft rule states that these features may function as point sources under CWA Section 402. This statement should be removed. If Section 402 applies to any features, it should be defined in that code section. (p. 6)

Agency Response: The rule does not affect the requirements of the Section 402 permit program. The statement reflects the agencies' longstanding view that a water feature may be a "point source" that discharges pollutants (whether dredged or fill material under Section 404 or others pollutants under Section 402) and thus requires a CWA permit. The statement does not change how the Agencies have interpreted the CWA and was intended to describe how features are regulated under the CWA. See Technical Support Document section I.

Missouri Soybean Association (Doc. #14986)

7.29 General Concern #3 - The proposed does not provide farmers any clarity or certainty.

EPA has routinely claimed their primary goal with this rule is to bring clarity to the regulatory process and to reduce uncertainty on the farm. While this is a shared goal we support, this rule is far from hitting that mark. The proposed rule has delivered farmers far more questions than answers creating uncertainties and real-world questions in farm fields whether literally millions of features on farms are now under federal jurisdiction. In the rule, EPA has left many important terms undefined as well as used ambiguous and subjective terminology and phrases. In addition, the rule overreaches by narrowing the intent of the exemptions to the point that we are unsure how they would ever apply in a meaningful way, rendering them nearly useless in the real world. It is our position that the exemptions should apply broadly to agriculture, without exceptions or strings attached to them. (p. 5)

Agency Response: See summary response above.

Utah Farm Bureau Federation (Doc. #16542.1)

7.30 For farmers and ranchers, uncertainty is increased through overly broad or nebulas terms in the proposed rule including:

- allowing 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." (p. 7)

Agency Response: **See summary response above.**

Florida Crystals Corporation (Doc. #16652)

7.31 The exclusions in the Proposed Rule will exclude few such waters in Florida from CWA jurisdiction. The exclusion for "[a]rtificial 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," likely will apply only to the few lakes and ponds which weredoes not excavated from wetlands (either pre-CWA or pursuant to a CWA permit). As shown in Figure 1, vast areaschange any of agricultural and urban land in South Florida are located on converted wetlands, which indicates that this exception apparently will not apply. Even if it did apply in those areas, this exception will only exclude lakes and ponds which are used in four specific ways. Similarly, the exclusions for "[a]rtificia1reflecting pools or swimming pools crated by excavating and/or diking dry land" and "[s]mall ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons," will not apply to ponds excavated from wetlands.

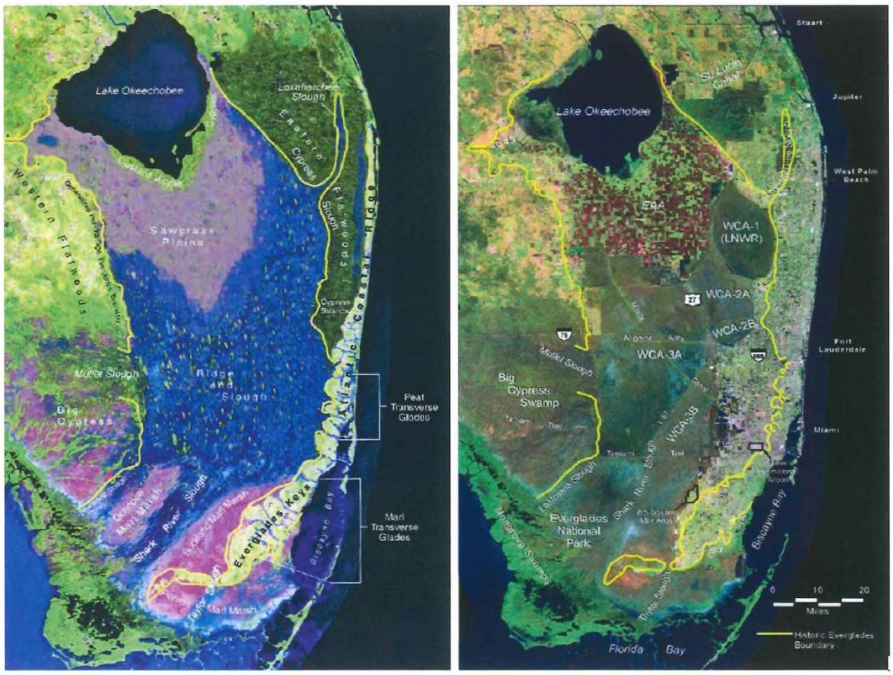

Figure 1: Historical and Current Topography of South Florida (Source: U.S. Geological Survey).

(p. 2, 6)

Agency Response: **In the final rule's exclusion for artificial lakes or ponds, the agencies have changed "exclusively" to "primarily" in describing the uses, and the list of uses is illustrative. See summary response above.**

Union Pacific Railroad Company (Doc. #15254)

7.32 The narrow exclusions under the Proposed Rule are not likely to provide relief from CWA the permitting requirements for ditch, culvert, bridge, causeway, and other rail infrastructure maintenance, alteration and construction activities, given the breadth of the definition of "perennial flow," the bed, bank and OHWM criteria, and the potential for adjacent waters, shallow subsurface groundwater migration and "other waters." The availability of Nationwide Permits for certain maintenance activities under Section exemptions listed in 404 provides little relief since they do not cover all rail-related operations and, where they do apply, coverage is strictly limited in acreage and linear feet.[3] (p. 23)(f).

Agency Response: **See summary response above.**

West Bay Sanitary District, Novato Sanitary District, West County Wastewater District, Union Sanitary District and West Valley Sanitation District, California (Doc. #16610)

7.33 The Rule Contains Arbitrarily Narrow Exclusions that should be More Comprehensive.

The most specific example of the proposed rule's arbitrarily narrow exclusions is for "small ornamental waters created by excavating and/or diking dry land." No explanation exists why this exclusion should be included for only "small" ornamental waters. Does this mean that all large ornamental waters are *de facto* WOTUS? What is the definition of small? Is there a certain dimension or gallon value to define what waters would be small? Without such definitions, the fountains outside the Bellagio Hotel in Las Vegas would be deemed to be WOTUS even though created by excavating land in the middle of a desert.

The fact that these types of exclusions are necessary confirms the unreasonable overbreadth of the proposed WOTUS definition. If swimming pools need to be excluded from waters that might be deemed a federal waterway, then the definition is far too expansive. (p. 9)

Agency Response: **See summary response above. These additions are intended to codify longstanding agencies practices and provide clarity to the public. To that end, the agencies propose not simply that these features and waters are ''generally'' not ''waters of the United States,'' but that they are expressly not ''waters of the United States'' by rule.**

Western States Water Council (Doc. #9842)

7.34 WSWC Policy #369 sets forth the unanimous, consensus position of the western states regarding federal efforts to clarify or redefine CWA jurisdiction. The WSWC urges EPA and the Corps to review this policy carefully and to incorporate its recommendations. Specifically, the WSWC urges EPA and the Corps to ensure that the rule:

[3] *See* Nationwide Permits 3 and 14, 77 CFR at 10,269-10,273.

…E. Specifically excludes water and features generally considered to be outside the scope of CWA jurisdiction, including:

1. Groundwater;
2. Farm ponds, stock ponds, irrigation ditches, and the maintenance of drainage ditches, as currently excluded under the CWA's agricultural exemption;
3. Man-made dugouts and ponds used for stockwatering or irrigation in upland areas that are not connected to surface waters;
4. Dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement; and
5. Prairie potholes and playa lakes. (p. 2)

Agency Response: See summary response above for points 1 – 4; also see summary response at 7.3.2, with regard to fire control ponds. See Section IV.H of the preamble regarding coverage of prairie potholes and playa lakes; also see Sections II and IX of the Technical Support Document.

Duke Energy (Doc. #13029)

7.35 One…concern relates to the proposed rule's provisions that certain "excluded" water features, such as groundwater or erosional features (assuming these could be distinguished from tributaries), can still be used to establish a connection to another water feature for the purposes of determining adjacency. If these features are beyond the scope of the CWA, then it seems illogical that they be used to establish jurisdiction. (p. 37)

Agency Response: See summary response above.

The Clean Energy Group Waters Initiative (Doc. #14616)

7.36 *Clarification of Exemptions from WOTUS Provided by the Rule*

We are also concerned that the regulatory text may cause some confusion as to whether the intended exemptions from WOTUS are negated in the proposed definitions. The preamble states that "[w]aters and features that are determined to be excluded under section (b) of the proposed rule will not be jurisdictional under any of the categories in the proposed rule under section (a)(2) and thus there should be no recapture of any excluded waters or features as a result of the new defined terms. However, we recommend that EPA further clarify the nature of the exclusions relative to the proposed definitions in the regulatory text for "adjacent," "neighboring," "riparian area," "floodplain," "tributary," "wetlands," and "significant nexus" in order to avoid confusion concerning WOTUS jurisdiction relative to the exempt waters and features. (p. 3)

Agency Response: See summary response above. The final rule clarifies that the exclusions listed are not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(4) though (8).

Santa Clara Valley Water District (Doc. #14776)

7.37 The Definitions In Paragraph (c) Of The Proposed Rule Should Clarify That They Do Not Include Waters Excluded From The Proposed Rule By Paragraph (b)

The definitions in paragraph (c) of the Proposed Rule are broad enough to include waters that would be excluded from the Proposed Rule by paragraph (b). For example, groundwater would be excluded by paragraph (b)(5)(vi), but waters with a "shallow subsurface hydrologic connection" to a water of the United States is included within the definition of a "neighboring" water by paragraph (c)(2). Yet some groundwater does have a shallow subsurface hydrologic connection to waters of the United States. While paragraph (b) would except certain waters from the definition of waters of the United States, "notwithstanding whether they meet the terms of paragraphs (a)(1) through (7)" (79 Fed. Reg. 22263), this point could stand to be clarified in paragraph (c).

Paragraph (c) should be amended as follows to add the underlined language: "(c) Definitions. The following definitions apply, except that they do not apply to waters that meet the terms of any of the subparagraphs of paragraph (b) of this section-" (p. 8-9)

Agency Response: See summary response above. The final rule clarifies that the exclusions listed are not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(4) though (8). As explained in the final rule, the agencies have removed shallow subsurface connection from the definition of "neighboring." See also the compendium on adjacency (topic 3).

Utility Water Act Group (Doc. #15016)

7.38 Before proceeding further, the Agencies must evaluate the potential impact of the Proposed Rule on industrial water features and ensure that all such features are clearly excluded from the definition of waters of the United States. (p. 20)

Agency Response: The agencies disagree that all industrial water features should be excluded from jurisdiction. The agencies believe the exclusions contained in the final rule provide a balance between protection and clarity that is reasonable with the statute's goals and objectives. See summary response above.

Colorado River Water Conservation District (Doc. #15070)

7.39 Strong, declarative statements and a list of exclusions, both those waters and wetlands that are currently excluded as well as new exclusions, if any, under the proposed rule, would help stem some of concern about the arguable expansion of federal jurisdiction. (p. 3)

Agency Response: See summary response above. The agencies agree listing features not considered "waters of the United States" will increase clarity regarding the scope of jurisdiction.

Michigan Manufacturers Association (Doc. #15170)

7.40 …uncertainty is created by:

- allowing 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." (p. 3)

Agency Response: See summary response above.

Tri-State Generation and Transmission Association, Inc. (Doc. #16392)

7.41 Tri-State strongly supports the provisions in the proposed rule that identify categories of waters that are per se excluded from the definition of WOTUS and the "no recapture" clause in the regulatory text that makes it clear that an exclusion controls even if the waters might otherwise meet the rule's definition of WOTUS.[4] Tri-State also strongly supports the Agencies' exclusion of groundwater from CWA jurisdiction. As noted below, however, Tri-State urges the Agencies to revise certain proposed exclusions to ensure that on-site water management features at power generation facilities, transmission facilities, mines, and agricultural sites that are currently non-jurisdictional remain excluded from the definition of "waters of the United States." As currently drafted, the exclusions are not sufficiently clear to effectuate that result. (p. 6)

Agency Response: See summary response above.

National Wildlife Federation (Doc. #15020)

7.42 In addition, we support the overall decision to include a new section (b) excluding specific waters from the definition of "waters of the United States." Importantly, we do have concerns with the breadth and vagueness of both the waste treatment system exclusion and the prior converted cropland exclusion. Both of these exclusions have created significant loopholes leading to inconsistencies in application and the destruction of ecologically important water bodies. However, it is our view that revisions to these two existing exclusions warrant special attention is separate rulemakings. (p. 24)

Agency Response: See summary response at 7.2 regarding prior converted cropland and summary response at 7.1 regarding the waste treatment system exclusion.

Center for Biological Diversity, Center for Food Safety, and Turtle Island Restoration Network (Doc. #15233)

7.43 Unfortunately, while the draft rule recognizes this fundamental principle it fails to fully stand on science and instead attempts "to draw lines" and conclude categorically "that certain waters and features are not subject to the jurisdiction of the Clean Water Act," 79 Fed. Reg. 22218. In these instances, the draft rule departs from the Act's clear mandate "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). As the Supreme Court has recognized, protection of aquatic ecosystems requires "broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source'." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985) (citing to S. Rep. No. 92-414, p. 77 (1972), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3742).

Accordingly, and for reasons that we further delineate below, it is essential that you revise your rule so as not to foreclose CWA jurisdiction with respect to entire categories of water bodies to which the unpermitted discharge of pollutants may, either alone or in

[4] 79 Federal Register (FR) 22263 and 22217.

combination with other water bodies in the region, "significantly affect the chemical, physical and biological integrity of other covered waters. . . ." *Rapanos*, 126 S. Ct. at 2248 (Kennedy concurrence).

We believe this central recommendation is fully in accord with advice that you have already received from EPA's Science Advisory Board (hereinafter, "SAB"). See Rodewald, Comments to the chartered SAB on the Adequacy of the Scientific and Technical Basis of the Proposed Rule Titled "Definition of 'Waters of the United States' Under the Clean Water Act (September 2, 2014) (hereinafter, SAB Sept. 2) and David Allen et al., Science Advisory Board (SAB) Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's proposed rule titled Definition of Waters of the United States Under the Clean Water Act (Draft of September 17, 2014) (hereinafter, SAB Sept. 17).

The science is consistent with the Clean Water Act's overall intent. It was the intent of Congress to give the Act's jurisdictional scope "the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 92-1236, p.144 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3776, 3822, 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell); *see also Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525-526 (1941) (construing the Flood Control Act of 1938; flood control is now covered in 33 U.S.C. § 1252(a)). (p. 1-2)

Agency Response: See summary response above and the Technical Support Document Section II with regard to the significant nexus analysis.

Pacific Legal Foundation (Doc. #14081)

7.44 Aside from this improbable ditch exclusion, the rule proposes excluding certain artificially irrigated uplands, ponds, pools and ornamental waters so long as they were excavated or diked on dry land. *Id*. This is hardly a concession because it implies that virtually all other waters are covered by the Act.

…the proposed rule would exclude "water-filled depressions created incidental to construction activity" and "groundwater, including groundwater drained through subsurface drainage systems" and "gullies and rills and non-wetland swales." *Id*. But here again, the message is mixed, even schizophrenic, because the Corps and EPA would regulate "adjacent waters" with "shallow subsurface connections" to other covered waters. See 79 Fed. Reg. 22207. So, is groundwater covered or not?

Strangely, the Corps and EPA could not bring themselves to expressly exclude "puddles" claiming the term is too ambiguous. But that didn't stop the agencies from relying on even more ambiguous terms such as "adjacent," "wetland," "riparian," "floodplain," "significant nexus," "neighboring," "perennial," "ephemeral," "impoundment," "non-wetland swale," "high water mark," etc. The exclusions are, therefore, too narrow or too uncertain to provide any meaningful limitation on federal authority.

It is also difficult for the public to rely on these exclusions given the agencies' hostility towards the other exemptions under the Act. For example, the Corps and EPA have routinely limited the section 4(f) farm exemption to those ordinary farming practices employed on a particular farm rather than those farming practices common to the

industry, as a plain reading of the Act requires. And, the agencies have attempted to limit the "prior converted cropland" exemption (which covers approximately 53 million acres)[5] through "internal policy changes," like the so-called Stockton Rules, that the courts have invalidated. See *New Hope Power Company v. Corps of Engineers*, 746 F. Supp. 2d. 1272 (SD Florida, 2010) (Holding change in policy constituted new legislative and substantive rules but are improper because they were not subject to notice and comment). Limiting exemptions and exclusions is standard practice for these agencies, making the exclusions contained in the proposed rule of little value. (p. 14-15)

Agency Response: **See summary response above.**

Trout Unlimited (Doc. #18015)

7.45 TU supports language in the proposal to clarify what waters are NOT covered. The proposal also seeks to clarify what waters are not jurisdictional. The proposed rule and preamble reiterates all existing exemptions from Clean Water Act jurisdiction, including many farming, ranching, \ and forestry activities. These exemptions include activities associated with irrigation and drainage ditches, as well as sediment basins on construction sites. Moreover, for the first time, the proposed rule codifies specific exempt waters, including many upland drainage ditches, artificial lakes and stock watering ponds, and water filled areas created by construction activity. As highlighted above, TU works with farmers, ranchers, and other landowners across the nation to protect and restore trout and salmon habitat. We have a keen interest in ensuring that the proposal works well for landowners on the ground. (p. 3)

Agency Response: **See summary response above. The agencies have further clarified the exclusions in the final rule.**

Earthjustice (Doc. #14564)

7.46 EARTHJUSTICE OBJECTS TO EPA'S PROPOSAL TO CATEGORICALLY EXCLUDE CERTAIN WATERS FROM THE PROTECTIONS OF THE CLEAN WATER ACT.

Earthjustice objects to EPA's proposal to exclude whole categories of water from receiving Clean Water Act protections. Such a result is not dictated by Supreme Court case law nor the language of the Clean Water Act. While some members of the Supreme Court expressed concern over ensuring that certain waters, specifically wetlands, had a connection to waters of the U.S., at no time has the Court addressed wholesale exclusion of certain types of waters. While EPA may desire to categorically exclude some waters for the sake of convenience, such a result is not driven by case law. Because it is also contrary to the intent and purpose of the Clean Water Act, categorically excluding certain types of waters on the basis of administrative convenience would fail both tests under Chevron: it would violate clearly expressed congressional intent under Step One, and it is an unreasonable and impermissible interpretation of the Act under Step Two. Moreover,

[5] U.S. Department of Agriculture, Natural Resources Conservation Service, RCA Issue Brief #8, "Wetlands Programs and Partnerships" (Jan. 1996).

such an exclusion would not constitute reasoned decision making supported by the record. (p. 10-11)

Agency Response: See summary response above and the Technical Support Document Section I regarding the legal basis for the rule.

7.47 Earthjustice supports a broad, science-based definition of the waters of the U.S. and urges EPA to heed the advice and comments of the SAB to strengthen the rule to ensure full protection of the nation's waters. Further, Earthjustice requests that the EPA revise the rule to remove most of the categorical exclusions, most especially the exclusion of groundwater, from the definition of waters of the U.S., preserving the ability to more fully protect our nation's waters, again consistent with the advice and counsel of the SAB. (p. 17)

Agency Response: See summary response above.

Nebraska Wildlife Federation (Doc. #15034)

7.48 We recognize that the proposed rule would preserve longstanding Clean Water Act exemptions for farmers and foresters that encourage wise stewardship of land and water resources. It would also, for the first time, explicitly exclude many upland water features important for farming and forestry, such as

- upland drainage ditches with no more than ephemeral water flows;
- artificially irrigated areas that would revert to upland should irrigation cease;
- artificial lakes or ponds used for purposes such as stock watering;
- artificial ornamental waters created for primarily aesthetic reasons; and
- water-filled depressions created as a result of construction activity

We support these existing and new exemptions, and believe they should make the rules very workable for most farmers and ranchers. (p. 2-3)

Agency Response: See summary response. The agencies have further clarified the exclusions in the final rule.

Neuse Riverkeeper Foundation (Doc. #15095)

7.49 …we are greatly concerned by, among other things,…the additional of new categorical exclusions for waters that have been covered historically and can have a significant impact on downstream water quality.

The EPA should ensure that the new rule:

NOT INCLUDE A CATEGORICAL EXCLUSION FOR GROUNDWATER AND WASTE TREAMENT SYSTEMS. Categorical exclusion of groundwater will lead to regulatory confusion and is not supported by sound science as described by numerous members of the SAB. Further, EPA lacks the authority to exempt waste treatment system impoundments that are otherwise waters of the U.S. from coverage under the CWA and EPA is doing so in violation of the Administrative Procedures Act. (p. 2, 3)

Agency Response: See summary response above.

Texas Agricultural Land Trust (Doc. #15188.2)

7.50 … Farm ponds should not be jurisdictional. Dry washes, dry streambeds, and ephemeral streams should not be jurisdictional. Such far-reaching jurisdiction over features far from navigable waters and carrying only minor volumes of flow was not what Congress intended and goes far beyond even the broadest interpretation of recent Supreme Court decisions. (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) and Rapanos v. United States, 547 U.S. 715 (2006). (p. 1)

Agency Response: See summary response above. Also see the Technical Support Document Sections I.C and VII with regard to the Supreme Court decisions and rationale for asserting jurisdiction over tributaries.

Hackensack Riverkeeper, Hudson Riverkeeper, Milwaukee Riverkeeper, NY/NJ Baykeeper and Raritan Riverkeeper (Doc. #15360)

7.51 Subsection (2) Must be Rewritten to Ensure Jurisdictional Waters are Not Needlessly Excluded

We recognize that there are parts of the United States that are not and should not be definitional Waters of the United States. No one believes that swimming pools or public fountains are Waters of the United States - though they may be point sources under certain circumstances. We therefore support the some of the exclusions under subsection (2), but we are concerned that, as written, as written, other exclusions may remove jurisdiction from waters that should clearly be deemed jurisdictional.

First, the Agencies should strike "**notwithstanding whether** they meet the terms" of the definition of included Waters of the United States at §401.11(2) and replace it with "unless they meet the terms" of the definition of included Waters of the United States. If a groundwater feature, wastewater pool or impoundment, or ditch meets the definition of a Water of the United States [as defined, Waters (i) to (vii)], it should be covered by the Clean Water Act as a Water of the United States… (p. 14-15)

Agency Response: See summary response above

Louisiana Environmental Action Network (Doc. #15377)

7.52 However, Proposed Rule ***may not*** categorically exclude waters when those waters may have a significant nexus. Given Congress' broad intent, the Agencies have no authority to narrow the application of Clean Water Act. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Accordingly, the Agencies must revise several changes in the Proposed Rule that may have an unsupportable narrowing effect on the scope of the Act's jurisdiction. For examples, the Proposed Rule:

- categorically removes from jurisdiction certain ditches and other waters that the Clean Water Act now expressly includes as "waters of the United States" when there is a significant nexus – a connection the Proposed Rule recognizes may be present for such waters. *See infra* § (3).

- precludes any opportunity to recapture waters that are or become excluded from the definition of "waters of the United States," regardless of whether qualification in the exclude category is temporary. *See infra* § (4).
- categorically removes "groundwater, including groundwater drained through subsurface drainage systems" from Clean Water Act jurisdiction – a preclusion not included in current law and contrary to evidence of a significant nexus cited in the Proposed Rule. *See, e.g.*, 79 Fed. Reg. at 22196-97 (summary of significant nexus conclusions); *id*. at 22209 ("While they may provide the connection establishing jurisdiction, these shallow subsurface flows are not "waters of the United States."); *id*. at 22224 ("The ability of streams to keep flowing even during dry periods typically depends on the delayed (lagged) release of local groundwater, also referred to as shallow groundwater . . . .").
- fails to reinstate, or even address, suspended language clarifying the narrow application of the waste treatment system exemption. *See infra* § (2). (p. 2-3)

Agency Response: **See summary response above and the Technical Support Document Section II with regard to significant nexus analysis.**

7.53 **The Proposed Rule Must Provide an Opportunity for Waters Excluded from the Definition of "water of the United States" to Become or Revert to "waters of the United States."**

The Proposed Rule's absolute no re-capture of excluded waters is unsupported by science, contrary to the purpose and intent of the Clean Water Act, and outside the Agencies' authority. Although the Agencies state "there is no recapture provision for these excluded waters in the proposal," they fail to support the permanency of these exclusions with science. *See* 79 Fed. Reg. at 22189. While the Agencies state that the exclusions are for "certain waters and features over which the agencies have as a policy matter generally not asserted CWA jurisdiction," they do not provide factual support that these are "longstanding practices." *Id*. Moreover, the statement that jurisdiction is "generally not asserted" does not support a categorical exclusion with "no recapture provision." On the contrary, because the term "generally" indicates exceptions to the policy, the Agencies' position can only support, at most, categorical exclusions when there is a recapture provision.

Moreover, changing landscapes and the law support providing for recapture of waters into the Act's jurisdiction in the final rule. For example, the Proposed Rule states "Absolutely no .uplands located in 'riparian areas' and 'flood plains' can ever be 'waters of the United States' subject to jurisdiction of the CWA." 79 Fed. Reg. at 22207. But such uplands may erode naturally and become wetlands that would otherwise be jurisdictional wetlands. In another example, the current exception to the limited scope of the wastewater treatment systems exclusion, see supra § (2), is only supportable (if at all) based on its temporary nature. *See Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177,215 (4th Cir. 2009) (noting the waste water treatment system exclusion may apply to natural streams when the Corps "exercises its § 404 authority. .. [and] allowed the ***temporary removal*** of these waters from the definition of 'waters of the United States' . . .") (emphasis added).

In short, while LEAN appreciates the Agencies' effort towards simplicity, the Proposed Rule's failure to include a recapture provision for waters excluded from the definition of "waters of the United States" under subsection (b) is arbitrary and capricious, without support of evidence, an abuse of discretion, contrary to the purpose and broad jurisdictional intent of the Clean Water Act, and outside the Agencies' authority. (p. 6)

Agency Response: **See summary response above.**

Delaware Riverkeeper Network (Doc. #15383)

7.54 While we generally support EPA's attempt to clarify which waters are subject to jurisdiction under the CWA, science does not support some of the listed exclusions and the exclusion of some water bodies because they do not fall under the proposed definitions. (p. 2)

Agency Response: **See summary response above.**

7.55 **Comment 8: Exclusions: Section 328.3(b)**

The exclusions listed in the proposed rule have weak scientific justification and reflect profit-driven stakeholder concerns that have little or no relationship to protecting water quality. The following exclusions should not be included in the finalized rule since all of these will promote pollution of the hydrologic cycle and thus the science-based waters of the United States. (p. 4)

Agency Response: **See summary response above.**

7.56 …when determining whether water bodies should be excluded from the definition of Waters of the United States, the Agencies should bear in mind the Clean Water Act's goals of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. When considering these goals the Agencies will see that the proposed rule in its current format is inadequate for restoring and maintaining the integrity of our Nation's waters. (p. 5)

Agency Response: **See summary response above.**

Wisconsin Wetlands Association (Doc. #15629)

7.57 *The science does not support excluding groups of "other waters" or subcategories thereof.*

Any decisions related to the categorical exclusion of other waters must withstand the same level of scientific review as waters considered for categorical inclusion. This means that the effects on downstream waters must be thoroughly investigated based on the potential for hydrologic exchange, and on the consideration of downstream effects related to isolation (i.e., reducing the erosive force of floods). Evidence weighed must be based on direct or applied peer reviewed science.

Given that scientific understanding of watershed dynamics is continually evolving, we oppose categorically excluding other waters under this rule unless there is *definitive* science to support it. (p. 5)

Agency Response: **See summary response above.**

AES-US Services (Doc. #3242)

7.58 Please clarify if the following are excluded from the definition of "waters of the US" based on the proposed rule if located in 1.) floodplain/riparian area, or 2.) non-floodplain/riparian area, and/or 3.) contiguous/adjacent to jurisdictional waters and/or defined as a tributary:

> Puddles;
> Wastewater treatment system seeps;
> Surface Impoundments seeps;
> Stormwater retention ponds;
> Stormwater detention ponds used for settling/treatment;
> General facility Stormwater conveyance systems such as ditches, swales that are not jurisdictional wetlands;
> Ditches transferring wastewater between treatment systems;
> Discharge canals that receive water from a tributary;
> Pipe trenching (trenches located underneath;
> Sheet flow;
> Secondary containment devices such as above-ground tank containment structures;
> Cooling tower basins;
> Non-wetland strip pits;
> Roadside ditches which do not meet proposed exemptions;
> Ponds which serve as part of facility's wastewater treatment system;
> Temporary Stormwater construction ponds;
> Pond rills, gullies, non-wetland swales;
> Trenches associated with wastewater treatment systems; and
> Standing water in industrial activity areas such as coal piles. (p. 1)

Agency Response: See summary response above and Section IV.I of the preamble. The final rule and preamble also discuss several changes the agencies made to "adjacency." See also compendium on adjacent waters (topic 3).

The Property Which Water Occupies (Doc. #8610)

7.59 **The Exemptions Prove the Rules are in Excess of Authority**

The overreach of such broadly purported jurisdiction becomes evident in the extensive list of 'exceptions' to these proposed Rules. The need to list mud puddles or basic farming practices as exceptions to the Rules, indicate the Rules themselves exceed the scope of statutory authority- the stated purpose of the CWA was never agricultural and drainage oversight. The interpretation of such broad authority beyond navigable waters expands the domain of Federal Agencies and therefore is a clear abuse of agency discretion.[6]

[6] *Decker v. Northwestern Defense Ctr*. 133 S. Ct. 1326, 1341 (2013) ("there is surely no congressional implication that the agency can resolve ambiguities in its own regulations. For that would violate a fundamental principle of separation of powers — that the power to write a law and the power to interpret it cannot rest in the same hands.")

Exemptions for particular land-use activities, which would otherwise invoke CWA jurisdiction would be illegal if such exemptions were short of statutory obligations. (i.e. potentially pose any threat to navigable waters). The EPA cannot propose Rules which exempt potential violations of the CWA, else they fall short of their statutory obligation. Therefore the land-use exemptions -defined by the Rules- would only be legal if the jurisdictional scope defined by these same Rules was in excess of statutory authority as delegated by Congress. Federal Agencies are not given discretion to exempt activities that would otherwise result in a Clean Waters Act violation as outlined by Congress.[7] These arbitrary exemptions for 'favored' activities could as easily be revoked by the agency, or through a judicial challenge. The exemptions appear to be added to quell objections to the expansive jurisdiction claimed under the Rules…

…The proposed Rules fail to recognize that CWA jurisdiction over private land is limited to the protection of the water quality for downstream public waters. Federal agencies do not have the authority to exempt activities which would otherwise fall under their statutory obligation to enforce the CWA. Such Rules ignores congressional intent in violation of law. 5 USC 706. The extensive list of exemptions to the Rules simply highlight an error in the Rules interpretation of CWA jurisdiction beyond navigable waters. Jurisdiction under the Clean Waters Act must be based on threats to the quality of public waters and not the existence of water molecules. The Act is not a land zoning instrument to be arbitrarily invoked under the auspice of protecting water. (p. 11, 12)

Agency Response: See summary response above. The additional exclusions are intended to codify longstanding agencies practices and provide clarity to the public. To that end, the agencies propose not simply that these features and waters are ''generally'' not ''waters of the United States,'' but that they are expressly not ''waters of the United States'' by rule.

7.60 …actions which threaten water quality, rather then exemptions to the Rules, should be listed by the Rules in order to prevent the Rules from being in excess of authority and not be short of any statutory obligations. Maintaining a catch-all phrase in the Rules like: "the EPA maintains the discretionary authority to invoke the CWA when actions on private property present a real and significant threat to the navigable waters." Will allow for the protection of clean water whenever necessary and evidence is provided. Where jurisdiction of the CWA ends is not a choice between drinking Clean Water, or green glowing citizens as portrayed by misguided advocates for this expansion of the CWA. Because jurisdiction beyond navigable waters can only pertain to water quality, the scope of CWA jurisdiction can only be invoked when a tangible threat to water quality exists. Jurisdiction cannot be invoked simply because rain which falls onto private land must then drain based on the laws of gravity. (p. 16-17)

Agency Response: See summary response above and section I of the Technical Support Document.

[7] *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1377.

7.1. WASTE TREATMENT SYSTEM (WTSE)

Summary Response

This response addresses comments regarding the waste treatment system exclusion, regardless of where such comments appear in the Response to Comments document.

Summary of Comments and Response

The Agencies' Clean Water Rule makes no changes to the waste treatment system exclusion. The definition of "waters of the United States" has excluded waste treatment systems since 1979, and only ministerial changes are made in the proposed and final rules; it remains substantively and operationally unchanged. While the Agencies received over 200 comments on the waste treatment system exclusion, the comments are beyond the scope of the rulemaking. In some instances, the agencies have provided information that maybe useful to a commenter, but this does not alter the scope of the rulemaking. In addition, some issues that commenters raised are related to other exclusions identified under paragraph (b), and commenters should see those essays and responses for more detail.

The existing waste treatment system exclusion moves to paragraph (b)(1) of the final rule with no substantive changes. The existing waste treatment system exclusion reads, "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 C.F.R. 423.11(m) which also meet the criteria of this definition) are not waters of the United States." The Agencies made a ministerial change to delete the parenthetical cross-reference to 40 C.F.R. 423.11(m), an EPA regulation that no longer exists. Because the agencies are not addressing the substance of the exclusion, the agencies do not make conforming changes to ensure that each of the existing definitions of the "waters of the United States" for the various CWA programs have the exact same language with respect to the waste treatment system exclusion, with the exception of deleting the cross-reference.

In the proposed rule, the waste treatment system exclusion read, "Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Act are not waters of the United States." Many commenters expressed concern about whether the agencies' insertion of a comma after the word "lagoons" in the course of making ministerial changes unintentionally narrowed the exclusion such that all excluded waste treatment systems must be designed to meet the requirements of the Clean Water Act. The agencies have deleted this comma in response to comments. Continuing current practice, any waste treatment system would need to comply with the Clean Water Act by obtaining a section 404 permit if constructed in waters of the United States, and a section 402 permit for discharges from the waste treatment system into waters of the United States.

The agencies received comments on whether certain stormwater conveyances could be excluded from the definition of waters of the United States because they are waste treatment systems. For clarity, the agencies have added an exclusion for certain stormwater control features in paragraph (b)(6) of the final rule. See response sections on stormwater for further clarification.

Many comments offered suggestions on the kinds of structures and processes that should be considered excluded from definition of waters of the United States as waste treatment systems, and asked the agencies to clarify the jurisdictional status of features that are no longer functioning as waste treatment systems. Some commenters expressed concern that the waste treatment system exclusion should not exist as a tool to take waters out of CWA jurisdiction, and that waters of the United States should not be used for waste treatment. Conversely, some commenters stated that providing the exclusion is providing a way to discharge mine tailings and other wastes into waters of the United States without a permit, and that the agencies should revise the waste treatment system exclusion and the definitions of "fill material" and "discharge of fill material." Because the agencies are not making any substantive changes to the waste treatment system and these comments are outside the scope of the proposed rule, the final rule does not reflect changes made in public comments. Comments on the definitions of "fill material" and "discharge of fill material" are also outside the scope of the proposed rule and the final rule does not reflect any changes made in response to these comments.

Specific Comments

Quapaw Tribe of Oklahoma (the O-Gah-Pah) (Doc. #7980)

7.61 4. Excluded Waste Treatment Facilities. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act, are not Waters of the U.S. Language in the 2012 Nationwide Permits clarifies that stormwater management facilities that are determined to be waste treatment systems under current regulations are not Waters of the U.S. The proposed rule does not significantly change the language regarding the excluded waste treatment facilities. Additional clarification is required to identify types of facilities that qualify for this exclusion. Any facility designed and operated to treat stormwater runoff to meet the requirements of the Clean Water Act should be included in this exclusion. (p. 3)

Agency Response: See summary responses at 7.1 and 7.4.4.

Navajo Nation Environmental Protection Agency (Doc. #10117)

7.62 The Navajo Nation EPA Water Quality Program generally agrees with the proposal to retain the existing regulatory exclusions and longstanding permitting exemptions. However, we are concerned that by codifying the exemption for waste treatment systems, the rule may inadvertently be excluding from the definition of "waters of the United States" impoundments of headwater streams used for draining runoff from surface coal mining. The rule should clarify that these sediment pond impoundments are not considered "waste treatment systems" that are excluded from the definition. (p. 2)

Agency Response: See summary response at 7.1. The agencies are not changing current practice related to implementation of the waste treatment system exclusion. Under current practice and under the proposed rule, where appropriate permits are received, such impoundments may be considered excluded as waste treatment systems.

Texas Department of Transportation (Doc. #12757)

7.63 We are concerned that if a "natural feature that is constructed to receive and treat stormwater run-off is itself treated as a jurisdictional water, State DOTs (and other public agencies) would be in the paradoxical position of needing to obtain Section 404 permits to discharge stormwater into facilities constructed to satisfy stormwater permit requirements under Section 402 of the Clean Water Act."

Recommendation: We recommend that the final rule "should clarify the circumstances under which the exclusion for waste treatment systems, including treatment ponds or lagoons applies to storm water treatment systems constructed as part of transportation facilities." We would also request that if a ditch is regulated as a water of the U.S., it should not also be regulated as a point source discharge under Section 402 of the CWA. (p. 4)

Agency Response: The agencies have clarified the circumstances under which a stormwater conveyance feature would be non-jurisdictional. See summary responses at 7.1 and 7.4.4.

Earthworks et al. (Doc. #15173)

7.64 While we appreciate that if finalized in its current form, this new policy will restore protections to most streams, regardless of size or frequency of flow, and to all wetlands inside of floodplains. But, some waters will still be at risk because of two loopholes in the Clean Water Act that allow mining waste to be dumped directly into streams, rivers and lakes. We respectfully ask that you expand this rule to close the "fill" loophole to clarify that mining waste cannot be used to fill in waters of the United States, and the "waste treatment system" loophole that simply allows mining companies to rename water a "waste treatment system" to escape Clean Water Act regulations. The drafters of the Clean Water Act intended for all waters to be protected, even those impacted by mining operations. (p. 2)

Agency Response: See summary response at 7.1. Comments on the definition of "fill material" are outside the scope of the proposed and final rule.

California State Water Resources Control Board (Doc. #15213)

7.65 The following specific comments are provided by the California State Water Resources Control Board and the nine California regional water quality control boards (collectively, the "Water Boards ") staff regarding the proposed "Definition of 'Waters of the United States' Under the Clean Water Act" (Proposed Rule) for 40 CFR 230.3. Specific recommended changes to the proposed regulations are shown in ~~strikeout~~/underline format. Additional comments are presented as endnotes [footnotes here].

> (1) Waste treatment systems, including treatment ponds~~, or~~ lagoons, and storm water detention basins,[8] designed and used[9] to meet the requirements of the Clean Water Act and not constructed in a waters of the United States.[10] (p. 5)

[8] Stormwater detention basins and other constructed water -dependent stormwater treatment systems should also qualify for this exclusion.

Agency Response: **The agencies have clarified the circumstances under which a stormwater conveyance feature would be non-jurisdictional. See summary responses at 7.1 and 7.4.4.**

National Tribal Water Council (Doc. # 18922)

7.66 On May 19, 1980, the Environmental Protection Agency (EPA) revised its regulations defining waters of the United States, providing an exclusion for "waste treatment systems" as follows:

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.

According to EPA, the intent of the final sentence of the exclusion was to "ensure that dischargers did not escape treatment requirements by impounding waters of the United States and claiming the impoundment was a "waste treatment system", or by discharging wastes into wetlands. This clarification of the waste treatment system (WTS) exclusion was later suspended by EPA without public notice or comment. 45 Fed. Reg. 48620 (July 21, 1980). The Corps adopted the WTS exclusion without the explicit manmade waters limitation in 1986. 33 C.F.R.§ 328.3(a)(8).

When legally challenged in the late 1980's by the West Virginia coal mining industry, EPA maintained that "under current EPA regulations, discharges into these instream impoundments continue to be discharges into waters of the U.S., and, therefore, NPDES permit limitations must be met prior to treatment in the impoundment, rather than after. EPA then proposed an "alternative approach" in which the Corps would review impoundments of waters pursuant to section 404, and EPA would revise its regulations so that "where such a review has been conducted and section 404 criteria have been met, a 402 permit will only be required for discharges from the instream impoundment, not into it.

In 1992, EPA adopted this alternative approach, specifically for the AJ and Kensington gold mines in Alaska which had proposed impounding wetlands and streams behind earthen dams for purposes of tailings disposal. EPA and the Corps agreed that as long as the Corps approved the construction of the tailings impoundment under section 404, the waters within the impoundment would no longer be considered waters of the United States, and tailings discharges would not require either a section 402 or 404 permit. EPA

[9] If a waste treatment system is abandoned or otherwise ceases to serve the treatment function it was designed for, it should not continue to qualify for the exclusion.

[10] Generally, waste treatment systems that are constructed within a water of the United States should not qualify for this exclusion. There may be some existing waste treatment systems that were constructed within a water of the United States that the Agencies affirmatively determined ceased to be a water of the United States; those determinations should remain in effect.

and the Corps subsequently relied on a similar rationale to authorize tailings disposal for the Fort Knox open pit gold mine near Fairbanks, other Alaska hard rock mines, and ferrous mines in Minnesota's Mesabi Iron Range.

Regarding the second 'loophole', under the Clean Water Act, a person who discharges "fill material" into waters of the U.S. must obtain a section 404 permit from the Corps. Anyone who wants to discharge other pollutants must obtain a section 402 permit from the EPA or a state that has been delegated authority to issue such permits. In 1982, EPA adopted a zero discharge standard under section 402 for new copper and gold mines using froth-flotation, cyanidation, and similar processes. EPA found that mines operating in the early 1980s were *already achieving zero discharge* and that it was therefore practicable for new mines to operate without discharging untreated waste into natural waters.

Prior to 2002, EPA and the Corps had different definitions for this type of pollutant. The Corps, defined fill as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a water body. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act. Under this definition, tailings and other mining wastes were not fill material because they were not used for the primary purpose of replacing an aquatic area with dry land. Pollutants discharged into waters primarily as a form of waste disposal were explicitly regulated under the more rigorous section 402 program. All this changed in 2002 when EPA and the Corps adopted identical definitions of fill material to include discharges that have the effect of either replacing any portion of a water body with dry land or changing the bottom elevation of any portion of a water. The regulatory examples included overburden from mining.

The new fill definition was the subject of a U.S. Supreme Court decision finding that EPA and the Corps had acted lawfully in authorizing the Kensington mine in southeast Alaska to use Lower Slate Lake as a tailings reservoir in which it could discharge slurry and other wastes. Relying upon the 2002 regulation redefining fill material, the agencies concluded that these discharges should be treated as fill under section 404, rather than waste under section 402, because they would change the bottom elevation of Lower Slate Lake. The decision means that as long as the current definition of fill material is in effect, mine wastes discharged into waters of the U.S. are regulated under section 404 where permits are approved more than 99% of the time instead of under section 402 with its strict pollution standards.

Hardrock mining would be a far less destructive industry if section 402's discharge limitations were strictly applied. Mines produce huge quantities of chemically-treated wastes, and the cheapest places to store these wastes are valleys and other low-lying areas near the mine sites. But these are also the places where the wetlands, rivers, and lakes protected by the CWA are found. As a result of a change in the definition of fill material, mining companies are currently able to avoid complying with section 402's rigorous pollution limitations and use waters of the U.S. as industrial waste dumps.

As we are all well aware, mining impacts in Indian Country and throughout the United States have had a profound negative effect on water quality. Proportionally, native villages and Indian Tribes bear the brunt of these impacts because many mines are located within tribal homelands and Tribal members rely, to a greater degree, on using

natural resources for their subsistence. Although this is true, it does not discount the fact that the general population as a whole is also subjected to mining pollution. The NTWC recognizes that many of the problems we currently face are the result of "legacy" mining pollution and were done in a time when technology was far less refined, scientific understanding of ecosystem function and the effects of mining wastes were unknown, and regulations were absent. These legacy impacts will continue to plague our nation and will need to be addressed for decades, if not centuries. EPA is well aware of this, since a large part of their Superfund program is devoted to remediation at such sites.

These two loopholes have allowed mining companies to continue to directly discharge pollution into our nation's waters as they have been doing for over a century. To redefine a lake or a river as a "waste treatment system" is shameful, an abomination of the natural order of things, and a giant step back in time. The NTWC believes that these loopholes have resulted from industry politics and a lack of oversight by EPA in the protection of our nation's waters. Therefore, the NTWC urges EPA to reconsider their position and explicitly limit the waste treatment system exclusion to only manmade waters and to revise the 2002 definition of "fill" to exclude waste disposal. (p. 1-3)

Agency Response: See summary response at 7.1. Comments on the definition of "fill material" are outside the scope of the proposed and final rule.

Allen Boone Humphries Robinson, LLP (Doc. # 19614)

7.67 "Waste Treatment Systems"

The Proposed Rule also excludes "waste treatment systems," including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act. What is unclear is whether the exclusion would include multiple-use impoundments. Industrial facility impoundments frequently are utilized for important health and safety projects, such as storm water treatment, and water supply for dust suppression, firefighting, irrigation, etc. This exclusion is vague, and creates needless ambiguity. For example, it is unclear whether the exclusion will apply to treatment ponds that have infrequent discharges, or treatment ponds that were originally designed to meet CWA requirements but later converted to other uses. Likewise, many treatment systems include both retention features and conveyance features, and the Proposed Rule provides no clarity on whether these systems would be excluded. (p. 9)

Agency Response: See summary response at 7.1. Also see summary response at 7.3.2.

Bard of Douglas County Commissioners, Colorado (Doc. #8145)

7.68 Codify and Clarify the Waste Treatment Exclusion

The existing regulations include exclusions for waste treatment facilities that are constructed to meet CWA requirements and are constructed in uplands. Currently, this exclusion is inconsistently implemented or misinterpreted by USACE and EPA staff at the national offices and regional regulatory field offices level. Clearly, additional language is necessary to restore the intent of this exclusion. Douglas County requests that language be included in the Proposed Rule to state that treatment of stormwater runoff

from rural and urban settings conforms to the exclusion and that the exclusion applies to all necessary and constructed components of the waste treatment system. (p. 16)

Agency Response: **See summary response at 7.1.**

City of Palo Alto, California (Doc. #12714)

7.69 The wastewater treatment exemption has a history of legal challenge. Its application to water reuse facilities and storm water features must be clearly defined. (p. 5)

Agency Response: **See summary response at 7.1. See also summary responses at 7.4 regarding new exclusions for certain stormwater and wastewater recycling features.**

Waters of the United States Coalition (Doc. #14589)

7.70 Treatment wetlands provide a substantial benefit to the environment. They improve water quality and provide habitat for a range of wildlife. Indeed, (as cited throughout the preamble to the Proposed Rule) the Supreme Court has noted the beneficial role that wetlands can play by treating water before it enters traditional navigable waters or preventing it from getting there in the first place. (*Rapanos* at 786) Public agencies look to treatment wetlands to attain compliance with their own Clean Water Act National Pollutant Discharge Elimination System ("NPDES") requirements and to benefit the environment as a whole.

Public agencies build treatment wetlands in several instances. The first is when a project will impact or take existing wetlands and new ones are constructed as mitigation. The second instance is when an existing storm drain or other stormwater point source discharges into a traditional navigable water. The agency may consider constructing a wetland at the point of discharge (but outside of the waters of the United States) or upstream in the storm drain to provide treatment to dry weather and other flows before they discharge into the traditional navigable waters.

The third instance involves wetlands created as green infrastructure upstream of a traditional navigable water to reduce pollutant discharges from areas of new construction. These swales and other wetlands serve a treatment purpose in precisely the same manner as a constructed wetland at the point of discharge. They trap sediment, hydrocarbons, metals and other pollutants before they reach the storm drain system and long before they enter a traditional navigable water. EPA and most state water quality agencies have been encouraging this type of infrastructure for over a decade.

Lastly, water purveyor and waste treatment operators have played crucial roles creating wetlands to provide additional treatment for their POTW discharges. This includes constructing wetlands and other ponds as part of the treatment system. While there is currently an exemption for wetlands that are deemed part of the treatment system, that exemption needs to be clarified and reiterated to ensure that constructed wetlands that are part of a treatment system are not capture by the Proposed Rule. Coalition members therefore request that the EPA and ACOE provide an explanation in the preamble to the Proposed Rule clarifying the scope of the waste treatment exclusion. (p. 11-12)

Agency Response: **See summary response at 7.1.**

7.71 ***Treatment works with ponds in close proximity to a tributary or traditional navigable water could be classified as "adjacent."*** Waste treatment systems frequently rely on percolation ponds and basins as a critical part of the sewage treatment process. Many waste treatment systems are developing wetland type treatment systems to reduce nutrient and other pollutant levels in the final effluent discharged from the system. These ponds and wetlands are almost always connected to traditional navigable waters or their tributaries because the effluent needs somewhere to go. In many cases the effluent must be returned to a surface stream so that it can contribute to overall stream flow and be used by downstream water rights holders.

By nature of their location and function these ponds could be classified as waters of the United States under the Proposed Rule. The Proposed Rule needs to very clearly exempt all aspects of the waste treatment system, including "back end" ponds and treatment wetlands to ensure that the existing exemption is carried forward and to avoid infringing on operation of this critical infrastructure. (p. 40)

Agency Response: See summary response at 7.1. See also Adjacent Waters, compendium 3.

7.72 Because federal regulations prohibit "waste treatment" to be a designated use for the purposes of water quality standards, reclassification of a water body under the Proposed Rule will hinder many projects that would benefit the environment. This is because many states including California will not allow waters of the United States to be converted into treatment systems even if it would be beneficial to the water body as a whole. Similarly, reclassification of existing facilities will prevent them from being used for their intended purpose. (p. 43)

Agency Response: See summary response at 7.1. See also summary response at 7.4.4 regarding the agencies' creation of an exclusion for certain stormwater control features.

National Association of Counties (Doc. #15081)

7.73 "Waste Treatment Systems"—Water treatment refers to the process of taking waste water and making it suitable to discharge back to the environment. The term "waste treatment" can be confusing because it is often linked to wastewater or sewage treatment. However, this can also include water runoff from landscape irrigation, flushing hydrants, stormwater runoff from roads, parking lots and rooftops.

The proposal states that "waste treatment systems,"—including treatment ponds or lagoons, designed to meet the requirements of the CWA—are exempt.43 In recent years, local governments and other entities have moved toward a holistic approach in treating stormwater by using ponds, swales and wetlands. Traditionally, such systems have been exempt from CWA, but due to the broad nature of the proposed rule, we believe the agencies should also exempt other constructed wetland and treatment facilities which may be included under the proposed rule. This would include, but not be limited to, water and water reuse, recycling, treatment lagoons, setting basins, ponds, artificially constructed wetlands (i.e. green infrastructure) and artificially constructed groundwater recharge basins.

It is important that all constructed features built for the purpose of water quality treatment or runoff control be exempt, whether or not it was built for CWA compliance. Otherwise, this sets off a chain reaction and discourages further investment which will ultimately hurt the goals of the CWA.

Recommendations:

- **The proposed rule should expand the exemption for waste treatment systems if they are designed to meet any water quality requirements, not just the requirements of the CWA.** (p. 14)

Agency Response: See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins, wastewater recycling features, groundwater recharge basins, and stormwater control features.

City of Stockton, California (Doc. #15125)

7.74 The wastewater treatment exemption has a history of legal challenge. Its application to water reuse facilities and storm water features must be clearly defined. (p. 3)

Agency Response: See summary response at 7.1. See also summary responses at 7.4 regarding new exclusions for certain stormwater and wastewater recycling features.

City of Beaverton, Oregon (Doc. #16466)

7.75 We recognize that EPA and the Corps may claim these outcomes are unanticipated. However, there is so much gray area in the proposed rule that the rise of third-party citizen suits are likely to define all these described waters as WOTUS. The agency's so-called intent will not matter, because where there is gray, there will be a lawyer to file a lawsuit. Ultimately, the aggressive reach of this rule and its ambiguous provisions and terminology introduces uncertainty, requires more agency analysis and intervention, and will create increased litigation.

With that in mind, the rule must include the following provisions that are priority concerns for local governments:

…

- Wastewater treatment systems and all associated infrastructure shall not be considered waters of the U.S. (p. 2-3)

Agency Response: See summary response at 7.1. See also summary response at 7.4.4 regarding the agencies' creation of an exclusion for certain stormwater control features.

Las Vegas Valley Watershed Advisory Committee (Doc. #16504)

7.76 The EPA and Corps did not propose any changes to the existing exclusion from jurisdiction for waste treatment systems designed consistent with the requirements of the CWA. However, the LVVWAC is concerned that the broad definition of "tributaries" under the Proposed Rule would result in man-made ditches, canals, and off-river storage ponds that are located on water and wastewater facility sites, but may not formally be part

of waste treatment systems, to be subject to regulation as WOUS. This additional regulation would be unnecessarily burdensome, and affect LVVWAC members' ability to conduct timely maintenance of those features.

The EPA and Corps specifically excluded certain waters from its definition of WOUS under the Proposed Rule. The LVVWAC supports the intent of these exclusions, and requests that a clear exemption also be provided for all water management features that are located within water and wastewater facility sites. The LVVWAC requests the following exclusion be added to the Proposed Rule:

- Ditches, canals, ponds, and other man-made features used in the operation of water or wastewater treatment and supply systems. (p. 2)

Agency Response: See summary response at 7.1. See also summary responses at 7.4.2 and 7.4.4 regarding the agencies' creation of exclusions for certain wastewater recycling and stormwater control features.

Department of Public Works, County of San Diego, California (Doc. #17920)

7.77 The existing exemption language for "waste treatment systems" must be strengthened. The Federal Register posting asserts that there will be no change to the exclusion for waste treatment systems. The rule should be expanded to specifically exempt facilities that are designed and installed to meet any water quality requirements, including individual state or local water quality regulatory requirements (for example, the Porter-Cologne Act in California). CFR Part 328.3 (7) states that *waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA are not waters of the United States*. Although the agencies specifically state that they are not seeking comment on this section, the County strongly urges the agencies to strengthen and expand this vaguely written exemption, or otherwise explicitly exempt all water quality treatment facilities. Currently, the regulations ("a" and "b" below) appear to only vaguely exempt "waste treatment systems" (which presumably apply to permanent BMPs such as: detention basins, retention basins, bioswales, etc.) that are designed to meet the requirements of the CWA:

> a. Nationwide Permit (NWP) 43 has language that states: "Note that stormwater management facilities that are determined to be waste treatment systems under 33 CFR 328.3(a)(8) are not waters of the United States, and maintenance of these waste treatment systems generally does not require a section 404 permit."
>
> b. Then 33 CFR 328.3(a)(8) states the following : 'Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States."

EXAMPLE: Regulators could potentially allow use of the above NWP 43 or the language in 33 CFR 328.3(a)(8) to exempt maintenance of water quality treatment systems from requiring section 401 and 404 perm its. However, since NWPs are renewed every five years they are not guaranteed to be in existence. In addition, the language in 33 CFR 328.3(a)(8) is vague and does not specifically exempt water quality treatment so individual regulators may not apply this exemption uniformly to water quality treatment

facilities . Therefore, the rule should be clarified to specifically exempt maintenance of these water quality treatment facilities. (p. 4-5)

Agency Response: See summary response at 7.1. See also summary responses at 7.4.2 and 7.4.4 regarding the agencies' creation of exclusions for certain wastewater recycling and stormwater control features.

Department of Public Works & Engineering, City of Cookeville, Tennessee (Doc. #19619)

7.78 Certain categories of waters need to be specifically excluded from WOTUS status:

- Constructed wetlands (constructed in uplands) are a waste treatment facility and should not be considered WOTUS. (p. 2)

Agency Response: See summary response at 7.1. See also summary response at 7.4.4 regarding the agencies' creation of an exclusion for certain stormwater control features.

Rural County Representatives of California (Doc. #5537)

7.79 …even though your agencies have maintained that there is no intent to impact water reuse facilities, the rule does not clearly address reuse facilities associated with wastewater treatment systems. Reuse facilities were constructed to augment water supply for irrigation and sometimes drinking water, and were not designed with the objective to meet the parameters of the CWA. The rule needs to clearly state your agencies' intent for water reuse facilities. (p. 2)

Agency Response: See summary response at 7.1. See also summary responses at 7.4.2 and 7.4.3 regarding the agencies' creation of exclusions for certain wastewater recycling features.

California State Association of Counties (Doc. #9692)

7.80 Waste Treatment Systems: The proposed rule should expand the exemption for waste treatment systems if they are designed to meet *any water* quality requirements, not just the requirements of the CWA. This exemption should also apply to individual state or local water quality regulatory requirements (for example, the Porter-Cologne Act in California). CFR Part 328.3 (7) states that *waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA are not waters of the United States*. CEAC strongly urges the agencies to strengthen and expand this vaguely written exemption, or otherwise explicitly exempt all water quality treatment facilities. Current federal regulations (see "a" and "b" below) appear to only vaguely exempt "waste treatment systems" (which presumably apply to permanent BMPs such as: detention basins, retention basins, bioswales, etc.) that are designed to meet the requirements of only the CWA:

a. Nationwide Permit (NWP) 43 has language that states: "Note that stormwater management facilities that are determined to be waste treatment systems under 33 CFR 328.3(a)(8) are not waters of the United States, and maintenance of these waste treatment systems generally does not require a section 404 permit."

b. Then 33 CFR 328.3(a)(8) states the following : "Waste treatment systems, l including treatment ponds or lagoons designed to meet the requirements of CWA 1 (other than cooling ponds as defined in 40 CFR 423 .11(m) which also meet the criteria of this definition) are not waters of the United States."

As an example, NWPs are renewed every five years and their continued existence or continuation of their conditions are not guaranteed. The rule should therefore be clarified to exempt maintenance of these facilities. CSAC believes such exemptions are consistent with the agencies' past approach of not inhibiting, and in fact encouraging state and local entities' efforts to further protect the environment. (p. 7)

Agency Response: See summary response at 7.1. See also summary responses at 7.4.2 and 7.4.4 regarding the agencies' creation of exclusions for certain wastewater recycling and stormwater control features.

California Association of Sanitation Agencies (Doc. #12832)

7.81 As the proposed rule and existing practice acknowledge, waste treatment systems designed to meet the requirements of the Clean Water Act are not waters of the U.S., and CASA wants to ensure that as part of these proposed amendments spreading grounds/basins, treatment ponds/lagoons, and constructed treatment wetlands used as part of the wastewater process are subject to the same exemption. Since these facilities are clearly part of the treatment process, providing additional treatment, residence and settling prior to discharge, these facilities should be expressly recognized in the rule as falling under the Waste Treatment Exception. (p. 3)

Agency Response: See summary response at 7.1. See also summary responses at 7.4.2 and 7.4.4 regarding the agencies' creation of exclusions for certain wastewater recycling and stormwater control features.

Oregon Association of Clean Water Agencies (Oregon ACWA) (Doc. #16613)

7.82 Beneficial reuse projects and treatment wetlands should be encouraged.

Another concern is that the proposed rule does not address recycled water projects or innovative treatment technologies. Oregon is a leader in utilizing treatment wetlands to provide additional treatment and cool wastewater treatment plant discharges. These beneficial treatment wetlands are permitted through the NPDES program and serve as part of the wastewater treatment plant operations. The proposed rule expressly excludes wastewater treatment systems "*designed to meet the requirements of the Clean Water Act.*" These treatment wetlands and other recycled water projects may be intended to fall under this exclusion, but the final rule should specifically state that intent. (p. 2)

Agency Response: See summary response at 7.1. See also summary response at 7.4.2 and 7.4.4 regarding the agencies' creation of an exclusion for certain wastewater recycling features.

Virginia Association of Counties (Doc. #16796)

7.83 **Recommendation:** For purposes of clarification, VACo proposes that the language under (t)(1) be amended as follows: "Waste treatment systems, including treatment ponds, or

lagoons, or alternative onsite sewage treatment systems designed to meet the requirements of the Clean Water Act." (p. 2)

Agency Response: See summary response at 7.1. See also summary responses at 7.4.2 and 7.4.4 regarding the agencies' creation of an exclusion for certain wastewater recycling features.

Iowa League of Cities (Doc. #18823)

7.84 The League is also concerned about any potential impact to wastewater systems and the NPDES permitting related to these systems. Because of the exclusion language, the Agency did not seem to analyze the impact to wastewater systems but some cities have raised questions whether some part of combined sewer systems or other aspects of a wastewater treatment systems would be considered within the jurisdiction of the EPA based upon the proposed rule.

We also have a current issue in Iowa where several cities are having some difficulty getting approval of certain components of a wastewater treatment system from the engineers at IDNR. Some cities are concerned that this situation could lead to a portion of a system that has not been approved by IDNR being considered a "water of the U.S." under the proposed rule. Even though the activities fall within the permit, cities are concerned that not getting sign off from engineers at IDNR would move those portions outside of the exemption. Request for EPA Response: Does the EPA anticipate that wastewater systems could be impacted by this rule?

Request for EPA Response: Would a project, such as an equalization basin, be exempted or included as a "water of the United States" if a state agency that operates their NPDES permitting has not signed off on this portion of a system as being part of the design of the wastewater treatment plant? (p. 6-7)

Agency Response: See summary response at 7.1.

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

7.85 The proposed rule excludes "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act."[11] The agencies state that they do not propose any substantive changes to the exclusion for waste treatment systems,[12] but the proposed exclusion includes a punctuation change (the insertion of a comma after "lagoons") that could be interpreted—or misinterpreted—as narrowing the scope of the exclusion. Equally important, the Agencies have missed an opportunity to delete long-suspended language included only in the NPDES version of the exclusion, and bring greater clarity and certainty to the interpretation and application of the exclusion.

[11] 79 Fed. Reg. at 22,263.

[12] *Id.* at 22,217. The Agencies propose to make one ministerial change to delete a cross-reference to an EPA regulation for cooling ponds that is no longer in the Code of Federal Regulations. The undersigned groups support this ministerial change, for the reasons the Agencies have acknowledged and explained.

First, although the exclusion itself is fairly straightforward, it has not always been applied consistently. As a result, the same type of feature may be treated as an excluded "waste treatment system" in one instance, but treated as a jurisdictional "water of the U.S." in another instance.

Second, by adding a comma after the word "lagoons," the proposed rule could be read to narrow the scope of the exclusion by requiring that all "waste treatment systems," not just "treatment ponds or lagoons," as under the current rules, be "designed to meet the requirements of the CWA" to qualify for the exclusion. This could be interpreted to mean, for instance, that features that were constructed for waste treatment prior to the CWA's enactment in 1972 do not qualify for the waste treatment exclusion. This creates new interpretive issues, as "designed to meet the requirements of the CWA" can be construed narrowly or broadly. For example, features that were constructed for waste treatment prior to the CWA's amendment in 1972 could not have been designed with CWA compliance in mind. Yet these features often play an important role in achieving compliance with current CWA requirements, and are now commonly excluded from regulation by virtue of the waste treatment system exclusion. The Agencies should avoid this interpretative minefield by deleting the new comma. If they decline to do so, they must acknowledge the change, explain their intentions, and provide public notice and an opportunity for comment.

Third, the agencies retain, in 40 C.F.R. § 122.2, "suspended" language limiting the applicability of the exclusion. Although the suspended language has no legal effect, retaining this language simply adds confusion rather than the certainty the Agencies say is their overarching goal.

In sum, despite the Agencies' assurances that the waste treatment exclusion is unaffected by the proposal, the proposed punctuation change, in combination with a lengthy history of inconsistent application, would create significant new confusion and uncertainty for the regulated community. (p. 33-34)

Agency Response: **See summary response at 7.1.**

Indiana Farm Bureau et al. (Doc. #14119)

7.86 This proposed regulation excludes "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act." 79 Fed. Reg. at 22,263. Unfortunately, the proposal does not make clear what is intended to be included within the phrase "waste treatment system". By leaving this important provision unclear in the definition, the agency has left open the opportunity to expansion of what will be regulated in the future. (p. 3)

Agency Response: **See summary response at 7.1. See also summary responses at 7.4.2 and 7.4.4 regarding the agencies' creation of exclusions for certain wastewater recycling and stormwater control features.**

Pennsylvania Chamber of Commerce and Industry (Doc. #14401)

7.87 The existing regulatory structure for wastewater treatment ponds at electric generation should also be preserved. (p. 4)

Agency Response: **See summary response at 7.1.**

South Carolina Chamber of Commerce (Doc. #14535)

7.88 …there is no definition for the term "waters" which leaves open the possibility for both uncertainty and complexity in application of the term. Of specific concern to our members is the potential for industrial holding ponds or components thereof, such as stormwater treatment ponds, cooling water ponds or wastewater treatment ponds, to fall within the jurisdiction of this program. We believe that the definition of waters should be such that man-made structures used for commercial or industrial purposes are clearly excluded. (p. 2)

Agency Response: **See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding the exclusions for certain cooling ponds and wastewater recycling and stormwater control features.**

7.89 There should be no question that any stormwater management facilities that are part of an industrial stormwater pollution prevention plan under a 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… (p. 4)

Agency Response: **See summary response at 7.1. See also summary response at 7.4.4 regarding the agencies' creation of an exclusion for certain stormwater control features.**

7.90 **Waste Treatment Systems:**

The proposed rule inserts a subtle punctuation change in the waste treatment system exclusion that could be misinterpreted to narrow the exclusion (a result the Agencies have said they do not intend). The current rule excludes: "Waste treatment systems, including ponds or lagoons designed to meet the requirements of the Clean Water Act." With this punctuation, the qualifier "designed to meet the requirements of the Clean Water Act" modifies only the phrase "ponds and lagoons." The Proposed Rule would add a comma after "lagoons," thus excluding "[w]aste treatment systems, including ponds or lagoons, designed to meet the requirements of the Clean Water Act." This punctuation change could be interpreted to change the reach of the qualifying language by applying it to all waste treatment systems. Under this reading, all systems, not just "ponds and lagoons" to which the qualification currently applies, would have to be "designed to meet the requirements of the Clean Water Act" in order to fall within the exemption.

This creates new interpretative issues, as "designed to meet" could be construed narrowly or broadly. For example, features that were constructed for waste treatment prior to the CWA's enactment in 1972 could not have been designed with CWA compliance in mind, yet such features often play an essential role in achieving compliance with current CWA requirements and are commonly excluded from regulation by virtue of the waste treatment system exclusion. The Agencies should avoid this interpretative minefield by deleting the new comma. (p. 8)

Agency Response: **See summary response at 7.1.**

Institute of Scrap Recycling Industries, Inc. (Doc. #15041)

7.91 Potential Effects Originating On-Site

First, the potential effect of the proposed definition on the facility from within (i.e., on-site) would seem to be negated by the first exclusion: "(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.…".[13] This exclusion exists in the current definition and importantly predates the 1987 CWA amendments that gave rise to NPDES permits for certain stormwater-only discharges. While the intent of this exclusion is laudable and appropriate—to prevent non-waters of the U.S. that are collected or present in structures created for CWA compliance from newly becoming themselves "waters of the U.S." that would require additional CWA compliance—the exclusion is arguably insufficient to exclude on-site control measures for industrial stormwater because the exclusion uses the term "waste treatment systems".

In the CWA,[14] as amended, the term "waste treatment system" appears only three times (once in the plural), and "waste" is not defined. "Waste treatment system" is most closely connected to "the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature", and if there is any connection between "waste treatment systems" and stormwater, it is via the following phrase farther down in the same paragraph:

> *"…; and any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste, including storm water runoff, or industrial waste, including waste in combined storm water and sanitary sewer systems;"* (Title II, §218).

Elsewhere, CWA grants for research and development address separately "storm water or both storm water and pollutants" and "advanced waste treatment and water purification methods [omitted parenthetical], or new or improved methods of joint treatment systems for municipal and industrial wastes" (Title I, §105(a)). Similarly, CWA grants for the construction of treatment works may be applied to "the necessary waste water collection and urban storm water runoff systems" (Title I, §208(b)(2)). These examples support the existence of a distinction between "waste water" and "storm water".

Based on the above, it seems clear that industrial stormwater (runoff) is not waste; therefore, this proposed exclusion's reliance on "waste treatment systems" is inadequate to fulfill its laudable and appropriate intent. To make this exclusion sufficiently expansive to cover the current scope of NPDES permits, which includes discharges of both industrial wastewater and industrial stormwater, and to meet its laudable and appropriate intent, this exclusion could be revised as follows: "(1) Treatment systems and control measures, including but not limited to treatment ponds or lagoons for wastewater

[13] Only in 40 CPR§122 docs this exclusion further include the following suspended requirement: "*This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States".*

[14] Federal Water Pollution Control A CI (33 U.S.C. 125 1 et seq.), as amended through P.L. 107-303, November 27, 2002, as rendered in http://www.epw.senate.gov/water.pdf and accessed via http://www2.epa.gov/laws-regulations/summary-clean-water-act.

and retention ponds for stormwater, designed to meet the requirements of the Clean Water Act". (p. 3-4)

Agency Response: See summary response at 7.1. See also summary response at 7.4.4 regarding the agencies' creation of an exclusion for certain stormwater control features.

American Council of Engineering Companies (Doc. #15534)

7.92 §122.2(b)(2) "Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act."

This regulation appears to be an obvious reference to wastewater treatment ponds and lagoons, but may refer to stormwater ponds as well. However, if the stormwater pond is to be excluded, it must be designed for the purposes of storm water treatment. If the storm water pond is for the purpose of estimating and managing attenuation volume only, it is not excluded.

Since the regulations are jointly issued by EPA and USACE, there are two consequences to the designation of man-made ditches and storm water ponds as regulated waters of the U.S. First, water quality standards must be met, including water quality criteria and antidegradation requirements, Second, USACE dredge and fill requirements would be applicable. Therefore, stormwater attenuation ponds (with no water quality treatment) and drainage ditches that are in the floodplain would be required to meet water quality standards and jurisdictional requirements - even during routine maintenance activities, This results in a significant change in what has been considered regulated waters, especially in coastal communities. (p. 5)

Agency Response: See summary response at 7.1. See also summary response at 7.4.4 regarding the agencies' creation of an exclusion for certain stormwater control features.

Federal Water Quality Coalition (Doc. #15822.1)

7.93 **Waste Treatment Systems and Prior Converted Cropland.**

Current regulations include exemptions for waste treatment systems, including impoundments "designed to meet the requirements of the Clean Water Act," and for prior converted croplands. While the words of the wastewater treatment exemption are not being changed, the agencies are proposing to add a comma before the "designed to" clause, potentially applying that clause to all waste treatment systems, not just impoundments. This change would create significant uncertainty about the scope of the long-standing waste treatment system exemption. (p. 18)

Agency Response: See summary response at 7.1.

Water Advocacy Coalition (Doc. #17921.1)

7.94 **The exclusion for waste treatment systems fails to provide clarity.**

The proposed rule excludes "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act." 79 Fed. Reg. at 22,263. Instead of taking this rulemaking as an opportunity to clarify longstanding

confusion on the waste treatment exclusion, the agencies have decided to avoid the issue all together. The agencies state that they do not propose any changes to the exclusion for waste treatment systems, *id*. at 22,217, but we have several concerns with the agencies' handling of this exclusion.

First, the applicability of this exclusion has been anything but clear.[15] In the experience of Coalition members, there is not a uniform understanding of what the agencies consider to be a "waste treatment system," and, as a result, the exclusion has been implemented inconsistently in the field. The same feature may be treated as an excluded "waste treatment system" in one instance, but treated as a jurisdictional "water of the United States" in another instance.

Second, the addition of a comma in the regulatory text changes the meaning of the waste treatment exclusion. Under the existing regulations, the phrase "designed to meet the requirements of the CWA" modifies the examples of "treatment ponds or lagoons." 33 C.F.R. § 328.3(a). The proposed rule's addition of a comma after "treatment ponds and lagoons" narrows the scope of the exclusion by requiring that all "waste treatment systems," not just "treatment ponds or lagoons," be "designed to meet the requirements of the CWA" to qualify for the exclusion. This could be interpreted to mean, for instance, that features that were constructed for waste treatment prior to the CWA's enactment in 1972 do not qualify for the waste treatment exclusion. Although the agencies say that they only propose "ministerial" changes to the waste treatment exclusion, 79 Fed. Reg. at 22,217, the addition of this comma is a substantive change that would have significant implications for many existing waste treatment systems. The agencies should remove the new comma from the proposed regulatory text.

Third, the agencies improperly retain, in 40 C.F.R. § 122.2, both: (1) the sentence proclaiming that the waste treatment exclusion "applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States," and (2) the accompanying footnote explaining that EPA suspended the sentence in question in 1980. *See* 79 Fed. Reg. at 22,268. The suspended sentence would have drastically limited the scope of the waste treatment exclusion. Although this language was suspended in 1980, courts have struggled with this issue, and in some instances have erroneously applied the suspended language.[16] Retaining this suspended language simply adds confusion to an already confusing exclusion. To provide clarity, the agencies should delete the suspended sentence and accompanying footnote from 40 C.F.R. § 122.2. (p. 71)

Agency Response: **See summary response at 7.1.**

[15] Other groups, including the Utility Waters Act Group ("UWAG"), National Mining Association ("NMA"), and Edison Electric Institute ("EEI"), have submitted comments that more fully address the history of the waste treatment exclusion and the confusion surrounding its application. The Coalition urges the agencies to respond to the concerns raised in these groups' comments on this issue.

[16] *See, e.g., West Virginia Coal Ass'n v. Reilly*, 728 F. Supp. 1276, 1290 (S.D. W. Va. 1989); *United States v. TGR Corp.*, 171 F.3d 762, 765 (2d Cir. 1999); *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 2007 WL 2200686 (S.D. W.Va. June 13, 2007), rev'd, 556 F.3d 177 (4th Cir. 2009).

Virginia Manufacturers Association (Doc. #18821)

7.95 Despite the Agencies' claims that the exclusion for waste treatment systems has been preserved, the Proposal includes an apparent clerical error that could have the effect of narrowing the exclusion. The Proposal adds a comma after "lagoons" in the exclusion. This change could be construed to make all waste treatment systems subject to the "designed to meet" standard. This is problematic because many waste treatment systems were installed well before the Clean Water Act and thus could not have been "designed to meet" the requirements of the statute. Virginia's "surface waters" definition, modeled on the federal standard, does not include a comma after "lagoons." *See* 9 VAC 25-31-10. VMA requests that the Agencies delete the comma, consistent with the traditional federal language and the Virginia regulations, so that the exemption provision is retained as, "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act." (p. 3)

Agency Response: **See summary response at 7.1.**

National Association of Home Builders (Doc. #19540)

7.96 **The Waste Treatment Systems Exclusion is Unclear and has been Unpredictable in Practice.**

Today's proposal excludes "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act."[17] The Agencies state that they do not propose any changes to this exclusion and in fact are not even accepting comments on it, but its applicability has been anything but clear.[18] The following are just a sample of some of the ambiguities associated with the waste treatment systems exclusion:

- Waste treatment system – What do the Agencies consider to be a waste treatment system? Does the exclusion include ditches and conveyances that connect to treatment ponds? Does it include features that manage or store but do not treat water? Does it include stormwater retention basins? The Agencies must define "waste treatment systems." They should also clarify that all on-site maintenance of water, including transport, storage, treatment, and use, are non-jurisdictional. Indeed, any discharges into waters of the United States that result from these activities are already covered under CWA Section 402.
- "Designed to meet the requirements of the Clean Water Act" – Is the exclusion limited to waste treatment units that were specifically designed to satisfy CWA obligations? Does the exclusion extend to waste treatment systems that were created before the enactment of the CWA? What if the system was installed before the CWA but was modified later to ensure the facility was able to comply with its NPDES permit? What if a feature was designed and used for treatment, but the owner has now ceased to use it for that purpose? What if the feature was

[17] 79 Fed. Reg. at 22,263.

[18] Id. at 22,190 ("Because the agencies do not address the exclusions from the definition of 'waters of the United States' for waste treatment systems and prior converted cropland or the existing definition of 'wetlands' in this proposed rule the agencies do not seek comment on these existing regulatory provisions").

installed to meet the requirements of a local or state ordinance and not the CWA? Because of the confusion and limits the phrase "meet the requirements of the Clean Water Act" places on the waste treatment system exclusion, the phrase should be removed.

- Man-made basins or ponds – Man-made basins and ponds serve a myriad of environmental and process purposes and do so in an environmentally responsible manner (e.g., fracking ponds). To render theses systems "waters of the United States" would make them prohibitively expensive and would altogether eliminate their viability. The waste treatment system exclusion should extend to man-made basins.

In the context of the CWA, the waste treatment exclusion makes imminent sense, but the value and practicalities of the exclusion could be quickly lost. NAHB urges the Agencies to engage with stakeholders who rely on the waste treatment exclusion to understand the confusion and unpredictability that surrounds it. After having these critical stakeholder discussions, the Agencies should propose a revised rule that addresses the waste treatment systems exclusion and provides much needed clarity for regulators and the regulated community. (p. 105)

Agency Response: See summary response at 7.1. See also summary responses at 7.4.2 and 7.4.4 regarding the agencies' creation of exclusions for certain wastewater recycling and stormwater control features.

Vulcan Materials Company (Doc. #14642)

7.97 The exemptions from CWA jurisdiction currently provided by the USEPA and USCOE under the CWA should be listed in the proposed rule, specifically the exemption for excavations and pits at aggregate mining operations, and the water treatment system exemption. The scope of these exemptions needs to be clearly stated and consistent with the historic use and application of the exemptions. (p. 4)

Agency Response: See summary response at 7.1. See also summary response at 7.3.5 regarding the agencies' exclusion for certain aggregate mining pits.

Texas Mining and Reclamation Association (Doc. #10750)

7.98 **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.

Notably, mining operations are required to obtain all appropriate environmental licenses and permits in advance of any land disturbance, including CWA Sections 404, 402, and 401 permits and certifications. By way of one example, under Section 404 of the CWA, mining operations are typically required to mitigate the disturbance of onsite "waters of the United States" through the creation of off-site and on-site wetlands and streams. If the rule is not clarified to exclude these on-site operational water management features from the definition of "waters of the United States," the mining industry will be forced to obtain permits and provide mitigation in a never ending regulatory loop to meet other performance standards and requirements, including those required under the CWA, SMCRA, Mine Safety and Health Act, etc.

As such, TMRA urges the Agencies to revise the proposal to clarify that on-site water management features, including all structures – natural and man-made - that contain, convey, and, as necessary, chemically or physically treat on-site water associated with mining operations, continue to not constitute "waters of the United States." Failure to do so will have serious implications on the mining industry in Texas, possibly rendering some mining operations unfeasible.

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

Mining operations take place over vast stretches of land—typically several square miles – and generally include complex process water systems. Mining operations are also dynamic, with different phases of activities such as construction, extraction and removal, and reclamation occurring at varying times and in different areas throughout the mine site. Mining companies depend on a variety of water management features within their mine sites to, for example, manage stormwater runoff from disturbed areas, recycle water for reuse such as for dust suppression, or convey water to ponds or basins where solids are settled out prior to reuse or discharge. Some water management features are created on dry lands, while others are created by impounding or modifying existing waters of the United States pursuant to Section 404 permits. 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 storm water management systems.[19] Under SMCRA, these features are considered components of required water diversion and drainage systems.

…Mine operators also rely on a broad range of ponds and impoundments (typically, sediment ponds in Texas) to support mining operations. Like ditches and conveyances,

[19] *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).
450 Fed. Reg. 41296, 41303 (Oct. 9, 1985).

mine operators depend on these features to manage, store, and treat water within the mine site. According to EPA, these ponds and impoundments are considered to be a treatment method because they physically remove suspended solids and metals.[20]…

On-site water management features are highly regulated during the life of the mining operation. Among other things, these systems are designed to ensure that any surface discharges from a mine site into navigable waters is covered by an NPDES permit and as such will not cause or contribute to violations of water quality standards. Some water management features within mine sites are designed to be zero discharge systems. At those sites, water that is collected and managed is either reused in mining processes or it evaporates; it is not discharged to navigable or other state waters. Declaring these required water management and treatment systems to be "waters of the United States" would eliminate their entire purpose of ensuring that water and wastes associated with mining operations are properly managed and treated before leaving the site, and would upend the entire CWA regulatory scheme that has existed for over forty years…

As Currently Written, the Definitions in the Proposed Rule Could Inappropriately Extend CWA Jurisdiction to On-Site Water Management Features at Mine Sites.

On-site water features in the mining industry historically have not been considered "waters of the United States" under the existing regulatory framework. The Agencies have generally not attempted to assert jurisdiction over ditches on mine sites,[21] and in those rare instances where the Corps has asserted jurisdiction, it has done so on a case-by-case basis. Most on-site waters fall within the scope of the waste treatment system exclusion, as the Agencies have recognized in prior guidance documents and practice.[22] However, the application and scope of the regulatory exemption has not always been consistently applied in the courts and has been misconstrued by mining opponents. Consequently, mining permittees have had to undergo costly jurisdictional determinations and defend against citizen lawsuits.

For example, in *Ohio Valley Envtl. Coal. v. Aracoma Coal Co*., citizen groups challenged the scope of the exclusion by alleging that coal mine operators had to obtain a CWA

[20] 50 Fed. Reg. 41296, 41303 (Oct. 9, 1985).

[21] During the first decade or so after the passage of the CWA, EPA and the Corps took the position that drainage ditches are excluded from CWA jurisdiction. See, e.g., 40 Fed. Reg. 31,320, 31,321 (July 25, 1975). The Agencies have since taken the position that some non-tidal drainage and irrigation ditches could be "waters of the United States" on a case-specific basis. See, e.g., 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986); 53 Fed. Reg. 20,764, 20,765 (June 6, 1988).

[22] See, Wilcher, LaJuana S., Memorandum to EPA Director Region X EPA CWA Regulation of Mine Tailings Disposal (Oct. 2, 1992)(clarifying discharge of mine tailing for disposal/treatment into impounded waters for the purpose of containing and treating those materials does not require a permit under the CWA but that any discharge from the waste treatment system requires a 402 permit); Regas, Diane, et al., to EPA Director Region X CWA Regulation of Mine Tailings (May 17, 2002)(affirming revised definition of fill and discharge of fill material did not alter EPA's interpretation of waste treatment system exclusion from CWA regulation); Grumbles, Benjamin H., Memorandum to Hon. John Paul Woodley Assistant Secretary of the Army (Civil Works) (Mar. 1, 2006) (recognizing that some segment of the stream must be used to convey water from the fill to the sediment pond and that such stream segment is an unavoidable and necessary component of the treatment system because it is required to convey water and because it also provides initial treatment by settling some fraction of suspended sediments in the flow and clarifying that the entire system contributes to ensuring that the discharge from the sediment pond meets the requirements of the CWA and is exempt from CWA regulation).

Section 402 permit for discharges from stream segments used to convey on-site, non-process runoff water to sediment ponds. Contrary to the citizen groups' claims, however, the Fourth Circuit upheld the Corps' application of the waste treatment system exclusion to in-stream sediment ponds and stream segments flowing into those ponds within a coal mining site.[23] In so holding, the Court drew upon discussions from Agency guidance documents explaining that stream segments are a necessary component of treatment systems because they are required to convey water and provide initial treatment by settling suspended sediment, and because the entire system contributes to ensuring that the discharge from the sediment ponds meets the requirements of the CWA. Importantly, the court emphasized the Agencies' "consistent administrative practice."[24]

CWA regulations also clearly contemplate that the scope of the wastewater treatment system includes all structures, channels, ponds[25] and other water treatment components.[26] Furthermore, in developing effluent limitations for the mining sectors, EPA incorporated the use of settling ponds for pre-treatment prior to recycle/reuse or discharge and the use of stormwater diversion ditches for keeping non-contaminated water from commingling with process wastewater as best practicable control technology currently available." Similarly, environmental standards pursuant to SMCRA also consider use of ditches and sediment ponds as best technology currently available for preventing additional contributions of suspended solids to stream flow or runoff outside the permit area, as well as for compliance with State and federal water quality standards.[27]

Economic analyses associated with these effluent guideline development efforts were based on the assumption that such "treatment facilities" and "treatment systems" would be used to meet water quality requirements.[28] Those guidelines define the term "treatment system" to include "all structures which contain, convey, and as necessary, chemically or physically treat coal mine drainage, coal preparation plant process wastewater, or drainage from coal preparation plant associated areas, which remove pollutants...from such waters. This includes all pipes, channels, ponds, basins, tanks and all other equipment serving such structures."[29] The Agencies should therefore clarify that waste treatment systems include all these components that together ensure that any discharges from the system meet the requirements of the CWA... (p. 4-8)

Agency Response: **See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins and wastewater recycling and stormwater control features.**

[23] 556 F.3d 177, 212-216 (4th Cir. 2009).
[24] *Id*. It should also be noted that, in the context of surface coal mining, features such as on-site ponds and conveyances are regulated under SMCRA.
[25] On-site ponds that incidentally manage water, but which were constructed for other purposes, should also be excluded from jurisdiction. These ponds can include emergency cooling water ponds, emergency firewater ponds, ponds used for dust suppression water, evaporation ponds, and water recycle ponds.
[26] See 40 C.F.R. Part 434 (o).
[27] 30 U.S.C. Section 1265(b) (10).
[28] 50 Fed. Reg. 41296, 41306 (Oct. 9, 1985); 42 Fed. Reg. 35843, 35846 (Jul. 12, 1977).
[29] Id.

7.99 **The Agencies Should Revise Certain Exclusions in the Proposed Rule to Ensure that Previously Non-jurisdictional On-Site Water Features at Mine Sites Remain Outside of the Definition of "Waters of the United States."**

TMRA strongly supports the provisions in the proposed rule that identify categories of waters that are per se excluded from the definition of "waters of the United States" and the "no recapture" clause in the regulatory text that makes it clear that an exclusion controls even if the waters might otherwise meet the rule's definition of "waters of the United States."[30] TMRA also strongly supports the Agencies' exclusion of groundwater from CWA Jurisdiction. TMRA, however, urges the Agencies to revise certain proposed exclusions to ensure that on-site water management features used to contain, convey, or treat water at mines are excluded from the definition of "waters of the United States." As currently drafted, the exclusions are not sufficiently clear to effectuate that result.

The Scope of the Waste Treatment Systems Exclusion Must be Clearly Defined

The preamble to the proposed rule indicates that the Agencies propose only "ministerial actions" with respect to the waste treatment system exclusion and that the Agencies "do not propose to address the substance of the waste treatment system exclusion."[31] The proposed "ministerial actions" have, however, narrowed the scope of the exclusion. Moreover, given the potential for additional litigation over the scope of the existing exclusion, the Agencies should take this opportunity to provide much needed clarity.

The proposed "ministerial changes" to the existing exclusion include the deletion of a cross reference to an EPA regulation (40 C.F.R. § 423.1 1(m)) that is no longer in the Code of Federal Regulations and the addition of a comma before the term "designed." In proposing these changes, EPA has significantly narrowed the exclusion by requiring that all waste treatment systems be "designed to meet the requirements of the CWA." Under the existing regulations, the phrase "designed to meet the requirements of CWA" modifies the examples of "treatment ponds or lagoons."[32] The proposed language, however, excludes all waste treatment systems that were not designed to meet the requirements of the CWA, which could include, for instance, those that were constructed before 1972 or those that were designed to be zero discharge or to meet SMCRA's environmental protection standards internal to an approved mining permit area. By mandating that all waste treatment systems be designed to meet the requirements of the CWA, the Agencies' "ministerial" change will have the unintended consequence of potentially denying application of the exclusion to many existing waste treatment systems, including pursuant to citizen suits. It is important to note that there has been litigation over multiple facets of this particular exclusion, and as such even the most minor of grammatical changes could easily incite more court challenges. Because the Agencies' proposal is not intended to "address the substance" of or narrow this exclusion, the Agencies should remove the new comma from the regulatory text.

Furthermore, in declining to address the substance of the exclusion, the Agencies have sidestepped several ambiguities that have caused a great deal of confusion over the past

[30] *See* 79 Fed. Reg. at 22,263, 22,217.
[31] 79 Fed. Reg. at 22,217.
[32] *See, e.g.*, 33 C.F.R. § 328.3(a).

several decades. In light of the fact that, as explained above, the language in the proposal - particularly the definitions of "tributary" and "adjacency," and the application of the aggregation concept could be misread to bring on-site waters under jurisdiction unless they are specifically excluded, despite the contrary intention of the Agencies, there is an increased need for clarification under this rule.

First, the proposed revision to 40 C.F.R. § 122.2[33] needlessly retains both (i) the sentence proclaiming that "[t]his exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States"; and (ii) the accompanying footnote explaining that EPA suspended the sentence in question since July 21, 1980.[34] The suspended sentence would have limited the scope of the waste treatment system exclusion substantially, as many waste treatment systems within the mining industry, as well as in other industries, incorporate waters of the United States. Even though EPA suspended the sentence attempting to limit the waste treatment system exclusion back in July 1980, the limitation has been erroneously applied since that time, even by some federal courts.[35] To avoid future erroneous attempts to revive the suspended language and to ensure uniformity across all regulatory programs under the CWA, the Agencies should delete the suspended sentence and accompanying footnote 1 from 40 C.F.R. § 122.2.

Deletion of the suspended sentence and accompanying footnote 1 would also help clarify that waste treatment systems resulting from the impoundment of jurisdictional waters are excluded from the definition of "waters of the United States." In the past, the Agencies have recognized that the waste treatment system exclusion encompasses those systems that are created in jurisdictional waters or that result from the impoundment of jurisdictional waters."[36] But that interpretation and recognition is not reflected in the Code of Federal Regulations so long as the suspended language remains in place. The preamble further adds to the uncertainty by declaring that "as a legal matter an impoundment of a 'water of the United States' remains a 'water of the United States[.]",[37] The Agencies can resolve this uncertainty by deleting the suspended sentence and accompanying footnote and replacing it with regulatory text that leaves no doubt that the waste treatment system exclusion applies to those systems with impoundments of jurisdictional waters, such as "This exclusion applies to waste treatment systems created in waters of the U.S. or with impounded waters of the U.S. where the impoundment was constructed for the purpose of serving as part of the waste treatment system. In the case of an impoundment or fill whose construction pre-dated the CWA requirement to obtain a section 404 permit, it must be demonstrated to the satisfaction of the permitting authority that the impoundment is being or will be used for the purposes of being part of a waste treatment system."

[33] *See* 79 Fed. Reg. at 22,268.
[34] 40 C.F.R. § 122.2 is the only provision defining "waters of the United States" that contains this limiting sentence and footnote.
[35] *See, e.g., United States v. TGR Corp.*, 171 FJd 762, 765 (2d Cir. 1999); *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 2007 WL 2200686 (S.D. W.Va. June 13,2007), rev'd by 556 F.3d 177 (4th Cir. 2009).
[36] *See OVEC*, 556 FJd at 212-216 (citing agency guidance documents).
[37] 79 Fed. Reg. at 22,201.

Second, the Agencies should also clarify, in the preamble and the regulatory text, that the term "treatment" for purposes of the waste treatment system exclusion includes, but is not limited to, methods such as wastewater and stormwater retention, concentration (evaporation), settling, and active and passive treatments (in-situ or in-process) to remove or reduce pollutants. Mining companies uniformly rely on these forms of treatment to· support their operations and ensure that, if there are any downstream discharges, they meet all applicable NPDES effluent limits. Waste treatment does not necessarily require the addition of chemicals or the use of complex technologies like ion exchange or reverse osmosis. Natural processes such as detention over time, evaporation, or pollutant uptake by aquatic vegetation can effectively help solids settle out and even remove pollutants as in the case of neutralization and/or geochemical transformations in pipeline mixing. Collecting and retaining wastewater and stormwater runoff in on-site water management features is a widely used form of waste treatment in many industries, including mining, and as discussed above is widely recognized by EPA and SMCRA authorities.

Finally, the Agencies should explicitly recognize, as they have in prior practice,[38] that channels, diversions, ditches, feeder streams, wetlands, and other on-site features carrying flow to and from ponds and impoundments used to treat wastewater and stormwater are part and parcel of water treatment systems at mine sites. Such features are necessary to convey and manage wastewater and stormwater within the mine site, and they help sediment and other pollutants settle out before any water is released to downstream waters of the United States. Water that is conveyed from the mine site to downstream jurisdictional waters requires an NPDES permit and, not surprisingly, NPDES permitting authorities have typically agreed that it would be senseless to require additional permits above the point of discharge to downstream jurisdictional waters. Nevertheless, to avoid any potential confusion in the field concerning the scope of the waste treatment system exclusion, the Agencies should make it clear that the exclusion encompasses all components of the treatment system, including but not limited to ponds/impoundments and the related flowing waters within a mining project site that are necessary to convey waters to and from those ponds and impoundments. (p. 13-16)

Agency Response: **See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins, cooling ponds, and wastewater recycling and stormwater control features.**

Pennsylvania Coal Alliance (Doc. #13074)

7.100 **The PCA does not support proposed revisions to the waste treatment system exclusion, but does support other revisions to clarify the applicability of the exclusion.**

As more fully discussed in NMA's [National Mining Association] comments, onsite water features associated with the mining industry have not historically been considered "waters of the United States." Courts have held that the waste treatment system exclusion applies to in-stream sediment ponds and stream segments flowing to those ponds from

[38] *See* fn. 7.

coal mines.[39] Similarly, treatment ponds used in mining activities have also traditionally fallen under the wastewater treatment pond exclusion under the current definition of "waters of the United States." The PCA supports NMA's comments that the Proposed Rule should not be changed, as proposed, to ensure that its language does not, intentionally or unintentionally, narrow or eliminate the waste treatment system exclusion.

The PCA also supports NMA's comments that the Proposed Rule should be revised to clarify that: (1) the waste treatment systems exclusion applies to impoundments of jurisdictional waters where the impoundment was constructed for the purpose of serving as part of the waste treatment system, (2) "treatment," for the purposes of the waste treatment system exclusion includes evaporation, wastewater and stormwater retention, settling and active and passive treatment, (3) the exclusion extends to the ditches, feeder streams or other features that convey waters to the waste treatment ponds and impoundments.

If the waste treatment system exclusion were no longer applicable to the on-site water features of mining sites, treatment ponds, sedimentation basins and the ditches and conveyances flowing to these structures could be considered jurisdictional waters as tributaries, adjacent waters or other waters, as explained in more detail within these comments. (p. 12-13)

Agency Response: See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins and wastewater recycling and stormwater control features.

Newmont Mining Corporation (Doc. #13596)

7.101 The Scope of the "Waste Treatment System" Exception is Unclear: The Agencies' Proposal retains the existing exception from jurisdictional waters for "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act." *See, e.g.*, paragraph (b)(1) at 79 Fed. Reg. 22263. Because no State or federal regulators have ever thought to consider Newmont's artificial ponds to be jurisdictional waters, Newmont has never been required to determine whether they could fit within this "waste treatment system" exception. Having now reviewed the history of that provision for purposes of preparing these comments, it is evident that the scope of that exception is far from clear.

Newmont's TSFs, pregnant and barren solutions ponds, and quench ponds are designed to achieve zero discharge to surface water, in order to comply with the law of Nevada (which has been delegated CWA 402 authority by EPA) and, in the case of TSFs, with the ELGs established under the CWA for process wastewater from the precious metal mining industry. 40 C.F.R. §§ 440.100 - 440.105. In addition, the stormwater retention ponds are designed to comply with Newmont's CWA 402 general stormwater permit. Thus, all of Newmont's artificial ponds are designed to meet the requirements of the CWA. Moreover, "treatment" arguably occurs in all of these ponds because the solids in the solutions and slurries that enter these ponds settle, so that the liquids can be recycled

[39] *Ohio Valley Environmental Coal v. Aracoma Coal Company*, 556 F.3d177, 212-219 (4th Cir. 2009).

for further use into production operations. We therefore believe that these ponds would satisfy the "waste treatment system" exception contained in the current regulations and the Agencies' Proposal, but cannot be sure. This is because the waste treatment system exception has a tortured history. The NMA, whose comments we incorporate here, points out the lack of clarity in what the exception encompasses and what it does not encompass. As such, Newmont cannot obtain solace from the existing "waste treatment system" exemption to ensure that its artificial ponds are not deemed jurisdictional waters. (p. 20-21)

Agency Response: See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins and wastewater recycling and stormwater control features.

7.102 Suggested Changes to the Proposal

As noted, EPA and Corps officials with whom we have spoken about this matter have been adamant that the Agencies' Proposal was never intended to encompass mining artificial ponds, and associated constructed ditches and channels, such as those that are operated by Newmont and other hardrock mining companies in the arid and semi-arid West. But given the wording of the Proposal, we cannot be sure that every Corps or EPA regulator will reach the same conclusion. We therefore urge that EPA make clear in any final rule that such artificial ponds, and associated ditches/channels, are not jurisdictional waters. Solutions include the following:[40]

1. Creating a new exception in subsection (b) of the Proposal for: "Hardrock mining artificial ponds (including tailings impoundments, tailings storage facilities, pregnant and barren solution ponds, quench ponds, event ponds and stormwater retention ponds/sediment basins), and all culverts, constructed channels, ditches or other conveyances associated with such ponds, where: (a) the ponds are located in an area where annual evaporation exceeds precipitation; and (b) the ponds are designed to achieve zero discharge to surface water." (p. 26)

Agency Response: See summary response at 7.1. See also summary response at 7.4.4 regarding the agencies' creation of an exclusion for certain stormwater control features.

American Exploration & Mining Association (Doc. #13616)

7.103 The Waste Treatment Exclusion is Unclear.

The agencies state that they do not propose any changes to the exclusion for waste treatment systems, but the applicability of this exclusion has been anything but clear and agency interpretation of the scope of the exclusion has changed over time. Reliance on the waste treatment exclusion is critical for AEMA members. The Agencies also should clarify, either in the preamble or the regulatory text, that the term "treatment" for purposes of the waste treatment system exclusion includes, but is not limited to, methods such as wastewater and stormwater retention, concentration (evaporation), settling, and

[40] In suggested amendments to existing Proposal language, added text is underlined and deleted text is struck through.

active and passive treatments to remove or reduce contaminants. Mining companies uniformly rely on these forms of treatment to support their operations and ensure that, if there are any downstream discharges, they meet all applicable NPDES permitting requirements. Waste treatment does not necessarily require the addition of chemicals or the use of complex technologies like ion exchange or reverse osmosis. Natural processes such as evaporation or pollutant uptake by aquatic vegetation can effectively help solids settle out and even remove pollutants. Collecting and retaining wastewater and stormwater runoff in on-site water management features is a widely used form of waste treatment in many industries, including mining.

The Agencies should explicitly recognize, as they have in prior practice that ditches, feeder streams, and other on-site waters carrying flow to and from ponds and impoundments used to treat wastewater and stormwater are part and parcel of waste treatment systems at mine sites. Such flowing waters are necessary to convey wastewater and stormwater within the mine site, and they help sediment and other pollutants settle out before any water is released to downstream waters of the United States. Water that is conveyed from the mine site to downstream jurisdictional waters requires an NPDES permit and, not surprisingly, NPDES permitting authorities have typically agreed that it would be senseless to require additional permits above the point of discharge to downstream jurisdictional waters. Nevertheless, to avoid any potential confusion in the field concerning the scope of the waste treatment system exclusion, the Agencies should make it clear that the exclusion encompasses both ponds/impoundments and the related flowing waters within a mining project site that are necessary to convey waters to and from those ponds and impoundments.

The agencies should address which features and waters can be considered a waste treatment system. Moreover, the agencies should clarify that all on-site management of water, including transport, storage, treatment, and use, are non-jurisdictional. Any discharges into waters of the U.S. that result from these activities are already covered under Section 402 of the Act. The agencies should engage with stakeholders that rely on the waste treatment exclusion to understand the confusion and unpredictability that surrounds this exclusion. After having these critical stakeholder discussions, the agencies should propose a revised rule that addresses the waste treatment exclusion and provides some much needed clarity for regulators and the regulated public. (p. 8)

Agency Response: **See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins and wastewater recycling and stormwater control features.**

Wyoming Mining Association (Doc. #14460)

7.104 **On-site water management systems should remain non-jurisdictional**

On-site water treatment and conveyance systems are an integral part of mining operations. These systems are used to manage water at mine sites in an environmentally sound manner and may even be statutorily mandated under other regulations such as the Surface Mining Control and Reclamation Act (SMCRA). Mining operations utilize a variety of ditches and conveyance systems, both temporary and permanent in nature, to manage stormwater runoff, provide water for production needs, store water, treat water,

reuse water and keep water away from disturbed areas. Mining operations are dynamic and can be quite expansive, requiring that these systems be used throughout the mine and may need to be frequently relocated. For water treatment, mines also use a number of impoundment and treatment systems which may include settling ponds, heap leach ponds, tailings ponds and slurry impoundments. These systems have traditionally been considered non-jurisdictional and should remain as such.

Under the proposed rule it is not clear that these on-site water management systems will remain non-jurisdictional. As such WMA is concerned that inclusion of these treatment and conveyance systems will significantly impact mining operations. If the rule is not clarified, the unintended consequence will be that many of these traditional, effective treatment systems will no longer be available to the mining industry. Moreover, the mining industry requests a clear statement in the rule that these mine site water management systems are non-jurisdictional.

If the onsite treatment systems are considered jurisdictional, mines will face additional permitting requirements related to these treatment systems. Mines will no longer be able to relocate the systems as needed without additional permitting requirements and associated delays. System maintenance and clean-out may be delayed or stopped because of the jurisdictional status and the inability to impact the system without triggering possible mitigation requirements. These onsite treatment systems must remain non-jurisdictional if they are to remain effective treatment systems.

Many of these onsite treatment systems 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. As such possible, violations of the applicable water quality standards are covered through NPDES regulations. Often times these treatment systems are designed to be zero discharge, further safeguarding that there are no environmental impacts. The need to include these as jurisdictional waters is unwarranted because the discharges from these systems are already regulated through other CWA regulations. (p. 2-3)

Agency Response: **See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins and wastewater recycling and stormwater control features.**

American Petroleum Institute (Doc. #15115)

7.105 **The exclusion for waste treatment systems is incomplete**

The 2014 Proposed Rule provides that "Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" are not jurisdictional.[41] The meaning and scope of this exclusion is unclear. Does the exclusion require that the facility owner have an NPDES permit? Would interconnecting waters among these waters also be exempted? If a holding pond receives cooling water after it has passed through the facility, is that pond exempted, as it is treating water for temperature to meet CWA Section 316(a)? Are temporary and/or permanent basins

[41] 2014 Proposed Rule, 79 Fed. Reg. at 22,272.

designed to meet storm water best management practice provisions exempted? The exclusion should extend to all waters designed and/or operated to meet any provision of the Clean Water Act, whether or not the facility is currently an NPDES permittee. The exclusion should extend to all excavated or installed ditches or conduits conveying water to and from these bodies. Inflow of surface runoff should in no way alter the exclusion. There should be no ambiguity based on the purpose or use of the pond or basin.

Moreover, the exemption should also extend to waste treatment systems that meet the requirements of other environmental statutes, such as the Resource Conservation and Recovery Act, as well as to raw water storage ponds, process water holding ponds, fire water storage ponds, and other industrial water systems necessary for the facility but not designed to meet any particular environmental statutes.

The 2014 Proposed Rule also provides that the exclusion for waste treatment systems "applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal areas in wetlands) nor resulted from the impoundment of waters of the United States."[42] But then, in a footnote to that very sentence, the agencies explain that in 1980 the agencies suspended that sentence, and further explain that the suspension of that sentence continues unaffected by the 2014 Proposed Rule.[43] This footnote is unnecessary. The Proposed Rule exempts waste treatment systems designed to meet the requirements of the Clean Water Act, "notwithstanding whether they meet the terms of [a water of the U.S.]." This clear exemption is sufficient to cover all cases, including waste treatment systems previously created by impounding waters of the U.S. The footnote should therefore be deleted. The agencies should make the proper change to the regulatory text rather than further continue their makeshift patch from decades ago. (p. 30-31)

Agency Response: **See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4.**

Sinclair Oil Corporation (Doc. #15142)

7.106 **Waste Treatment Exemption**

The evaporation ponds and other components of the waste water treatment system have never been considered "waters of the United States"; however, the fact that these features may have been considered impoundments, tributaries, adjacent waters, or other waters, as they could be under the proposed rule, would not have been a major concern to Sinclair. Under the existing definition of "waters of the United States," all of these surface features were exempt from the definition of water s of the United State s because they were part of the refineries' RCRA-permitted waste water treatment systems. See e.g. 33 C.F.R. 328 .3(a)(8). Sinclair is concerned that the proposed rule would support an argument that the waste treatment system exemption is no longer applicable.

Despite the Agencies' assurances that the proposed rule does not substantively alter the waste treatment system exemption and that the changes being made are ministerial, the

[42] *Id*. at 22,213.
[43] *Id*. at 22,313 n.1.

Agencies have substantively narrowed the scope of the waste treatment system exemption. The existing exemption provides that "[w]aste treatment systems, including treatment ponds and lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423 .11(111) which also meet the criteria of this definition) are not waters of the United States." 33 C.F.R. 328.3(a)(8). This exempts all waste treatment systems, regardless of whether they are designed to meet the requirements of the CWA.

By contrast, the proposed rule, in addition to deleting the obsolete reference to 40 C.F.R. § 423 .11(m), adds a comma before the word "designed." *See* 79 Fed. Reg. 22,263. The exemption in the proposed rule exempts from the definition of "waters of the United States" "waste treatment systems, including ponds and lagoons, designed to meet the requirements of the Clean Water Act." *Id*. Under this configuration of the exemption, only waste treatment systems designed to meet the requirements of the CWA are exempt. Since the waste water treatment systems at Sinclair's refineries are permitted under RCRA, not the CWA, the exemption may no longer apply to the evaporation ponds and other surface features that comprise those waste water treatment systems.[44] This apparently unintended result will have major implications for Sinclair and others in the regulated community and should be corrected. The Agencies should take the opportunity to clarify that, as with the existing rule, the waste treatment exemption applies to all waste treatment systems regardless of the statute under which they are permitted.

As the above analyses show, the evaporation ponds and other components of the waste water treatment systems at Sinclair's refineries could be considered "waters of the United States" as impoundments, tributaries, adjacent waters, or other waters under the proposed rule despite the fact that these features do not have a significant nexus to a "water of the United States" and have never been considered jurisdictional in the past. More troubling is the fact that, under the proposed rule, Sinclair would have to disprove the elements of each of these categories of waters cumulatively, in order to re-establish that the waters are non-jurisdictional. Until it could do so and obtain a case-specific determination that the evaporation ponds are not "other waters," Sinclair risks being accused of violating the CWA by operating its RCRA-permitted waste water treatment facility. This scenario fails to provide the clarity, efficiency or regulatory certainty that the Agencies insist is the intent behind the proposed rule. (p. 17-18)

Agency Response: **See summary response at 7.1.**

7.107 If, instead, the Agencies insist on promulgating the proposed rule, at a minimum the following revisions should be incorporated into the final rule:

…

- Remove the comma added before "designed" in the waste treatment system exemption and clarify that the exemption applies to all permitted waste treatment systems, regardless of whether they are permitted under the CWA. (p. 19)

Agency Response: **See summary response at 7.1.**

[44] Sinclair maintains that, even under the proposed language, the waste treatment systems should be considered exempt because they are designed to prevent any discharge to a "water of the United States."

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

7.108 **The Agencies Should Clarify Existing Exemptions to Prevent Unwarranted Claims of Jurisdiction**

Agency staff have emphasized that they are not revising existing exemptions, and that it is their intent, with minor exception, to continue those exemptions in any final rule exactly as they exist today. Due to the expansive nature of the Proposal, and the fact that those exemptions were adopted many decades ago, they may no longer exempt all the waters that should be exempt from jurisdiction. Accordingly, EPA should revise and/or clarify the exemptions as discussed below.[45]

Waste Treatment Exemption

The preamble for the proposal indicates that the Agencies do not intend to change the waste treatment system exemption under the current regulations (79 Fed. Reg. at 22,189). The proposal, however, made three changes to this exemption, two of which were helpful and one of which was not. Since this exemption is extremely important for our facilities, we are suggesting a few additional changes or clarifications that will improve the functioning of the exemption.

The proposal also adds new language to clarify the exemption applies even if the water subject to the exemption would otherwise qualify as a WOTUS. This new language is very helpful.

Domtar is suggesting the following changes/clarification for the Wastewater Treatment Exemption.

- Suspended Language Maintained in the Federal Register

The pre-publication version of the proposal removed the requirement that the waste treatment system be a man-made body of water and not have been created in an area that previously was a water of the U.S. Removal of that requirement from the rule was appropriate as the requirement has been suspended since July 1980, as is indicated in the Federal Register version of the rule. Unfortunately, when the Federal Register version was printed, that provision was not removed, but the language indicating the requirement was suspended was retained. The Agencies should make sure that any final rule removes that language, which apparently was the original intent. The proposal also removes the provision that carved out from the exemption certain cooling ponds. This is a good clarification and should be retained in any final rule. Both of these changes would make the waste treatment system exemption clearer and reduce confusion.

- Removal of a Comma

Unfortunately, the Agencies made one other change to the regulation, which appears to have been unintentional. The proposed rule excludes from "waters of the U.S": "Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act." With the addition of a comma after the word

[45] In any event, EPA should retain the "notwithstanding" language that makes clear that waters qualifying for an exemption do not lose the exemption because they also meet the requirements of a WOTUS.

"lagoons," the proposal arguably limits the exemption to waste treatment systems designed to meet the requirements of the Act, whereas the current regulations arguably only apply the "designed to meet the requirements of CWA" criterion to treatment ponds or lagoons. With the addition of this comma, the proposed rule changes the existing exemption unchanged, and EPA has not provided a rationale for making the change. The comma needs to be removed in any final rule.

- "Designed to Meet"

Due to limiting language in the existing exemption, facilities that created their waste treatment systems before the adoption of the CWA arguably are vulnerable to potential challenges to the applicability of the exemption. These facilities have operated under NPDES permits since the 1970's, and their permits have been continually updated to include stricter provisions over time. There is no reason to question the status of the exemption for these systems. The rationale for the exemption—that waste treatment systems are regulated through the NPDES program, and that imposing requirements intended to protect surface waters from discharges makes no sense when applied to "waters" that are wastewaters and are being treated to make them suitable for discharge to surface waters—applies equally to waste treatment systems that were constructed before 1972. The agencies should clarify that facility systems constructed before the CWA was adopted but are used to meet CWA requirements are still covered by the exemption.

EPA also needs to clarify in the preamble that zero discharge and/or land application systems fall within the exemption. For example, wet woodyard ponds used to implement a zero discharge requirement are implementing EPA effluent guidelines for the Timber Products source category and clearly are designed to meet the requirements of the CWA. On the other hand, land application systems used to meet a zero discharge effluent guidelines or to avoid an unpermitted discharge involve storage or pretreatment ponds as well as acres of sprayfields that may develop some wet areas over time or may collect run off to maintain zero discharge, may be subject only to permits under state law and may not be regulated under the NPDES program. Even though no federal NPDES permit is involved, these systems clearly are designed to meet the requirements of the CWA's provision of no discharge of process wastewater to WOTUS and they should be recognized as such in the Preamble to any final rule. (p. 9-11)

Agency Response: **See summary response at 7.1. See also summary response at 7.4.2 regarding the agencies' creation of an exclusion for certain wastewater recycling features.**

Alpha Natural Resources, Inc. (Doc. #15624)

7.109 **The Agencies Should Clarify that Impoundments Serving as Waste Treatment Systems are Non-Jurisdictional**

The preamble acknowledges that "ponds and lagoons" can serve as waste treatment systems to meet the requirements of the Clean Water Act, and are therefore not jurisdictional waters. *Id*. at 22,263. The preamble should—but does not—explain the difference between lagoons and impoundments, or explain whether the proposed *per se*

regulation of tributaries of impoundments applies even when the impoundment is serving as a waste treatment system.

Additionally, the agencies should make clear that while SMCRA permits are in place, all ponds that are used to control and treat mine drainage—and all natural and man-made ditches and streams carrying flow into those ponds—are non-jurisdictional waste treatment systems. (p. 9)

Agency Response: See summary response at 7.1. See also summary response at 7.4.2 regarding the agencies' creation of an exclusion for certain wastewater recycling features.

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

7.110 The agencies state in the preamble to the proposed rule that they do not propose any changes to the exclusion for waste treatment systems (33 CFR 328.3(b)(1)) and are not soliciting comments on the provision. However, the agencies have added a comma after the word "lagoons" that could substantively change the scope of the exemption. We support the Utility Water Act Group (UWAG) comments on the history, scope and coverage of the waste treatment exemption and the punctuation change in the proposed rule. We request that the comma be removed. (p. 10)

Agency Response: See summary response at 7.1.

Barrick Gold of North America (Doc. #16914)

7.111 The proposed rule would exclude "[w]aste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act." This language is similar to language in the existing regulation, and the agencies disclaim any intent to make substantive changes in it.[46] However, perhaps unintentionally, the proposed exclusion is substantively different than current law because of the placement of a new comma in the text after the word "lagoons." The existing exclusion reads as follows: "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of [the Clean Water Act]." 40 C.F.R. § 122.2 (2013). The existing rule excludes all waste treatment systems, including those designed to meet the requirements of the Clean Water Act. Because of the added comma, the proposed exclusion would apply only to those waste treatment systems specifically designed to meet the requirements of the Clean Water Act.

As explained above, many of Barrick's water management ponds are designed to meet the requirements of the Clean Water Act and should fall within the exclusion. See supra Section I.b. However, infiltration basins and sedimentation ponds do not automatically meet the terms of the proposed exclusion; in the case of infiltration basins, they are designed to place water in or return water to the ground, an activity to which the Clean Water Act does not apply. Sedimentation ponds may discharge as part of storm water

[46] In the preamble, the agencies describe proposed changes to the waste treatment system exclusion as "ministerial" and "non-substantive" and say explicitly: "The agencies do not propose to address the substance of the waste treatment system exclusion …." 79 Fed. Reg. at 22,217.

management, but in some cases they also are designed to allow water to infiltrate into the ground. *Id*.

Consistent with the agencies' intentions as stated in the preamble, and as reiterated in meetings with stakeholders, the proposed waste treatment exclusion should be revised to remove the comma after the word "lagoons." (p. 27-28)

Agency Response: See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins and wastewater recycling and stormwater control features.

Barrick requests that the agencies amend the waste treatment systems exemption to remove the comma after the word "lagoons," and clarify in the preamble to any final rule that the exclusion is intended to apply to ponds used in the mining industry to manage waste water, whether to prevent discharges of waste water to "waters of the United States" or to treat waste water before discharge pursuant to NPDES or storm water permits. See proposed text at 79 Fed. Reg. at 22,262 – 73. Barrick also requests that EPA remove from its proposed rule language the second sentence of the exclusion and its accompany footnote. The text reads: "This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal areas in wetlands) nor resulted from the impoundment of waters of the United States." As explained in the footnote, a version of which also appears in the currently applicable rule, EPA suspended this sentence in a July 21, 1980 Federal Register notice. The suspension has been in place for over 30 years. Since EPA does not propose to modify or revoke the suspension, removing the sentence and footnote would simplify the exemption and add clarity to its applicability.

With regard to the exemption for "artificial lakes or ponds," Barrick proposes the following modifications to make clear that the exemption applies to ponds and basins used at precious metals mining operations:

> (5)(ii) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as process water management, storm water management, infiltration, stock watering, irrigation, settling basins, or rice growing.

(p. 28-29)

Agency Response: See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins and wastewater recycling and stormwater control features.

Halliburton Energy Services, Inc. (Doc. #19458)

7.112 If the Agencies proceed to adopt the rule in its current form, HESI requests a clarification. HESI affiliates create diversions and sediment traps as part of necessary Best Management Practices for stormwater management in mining operational areas. These features are effectively a wastewater treatment system and should be treated as such and therefore fall within the existing exclusion from the definition of waters of the United States. Because there is so much room for interpretation throughout the proposed

rule, HESI seeks clarification or confirmation that the proposed rule is not intended to impose CWA jurisdiction on these necessary stormwater management structures. (p. 11)

Agency Response: See summary response at 7.1. See also summary responses at 7.3.2 and 7.4.4 regarding exclusions for certain settling basins and stormwater control features.

Alameda County Cattlewomen (Doc. #8674)

7.113 The proposed rule excludes waste treatment systems from "waters of the U.S." (Proposed Rule at 22193). Cattle producers across the country utilize waste treatment systems as part of the Sec. 402 NPDES regulations for Concentrated Animal Feeding Operations (CAFOs). Most CAFOs utilize man-made earthen retention structures that are designed to retain the necessary quantity of water to meet the required effluent guidelines, but a small percentage were originally permitted to utilize naturally existing topographic impoundments or structures (such as playas) to retain wastewater. These impoundments or structures have been used by some CAFOs for this purpose since prior to the CWA's inception. For clarity and consistency purposes, ACCW request the agencies remove language that has been stayed since 1980 that would remove natural features from inclusion in the waste treatment system exclusion only for Sec. 402. We also request that the agencies include a statement that further clarifies currently authorized facilities utilizing these features qualify for the exclusion.

ACCW generally support the agencies' decision to maintain this exclusion. However, the exclusion under Sec. 402 includes the language "[t]his exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States." (Proposed Rule at 22268). While this language has been suspended since 1980, ACCW request that it be permanently deleted from the regulation. It has resulted in confusion.

Removing this language from the definition is a logical change considering the agencies' stated intent to provide clarity and consistency. In the other sections of the CWA the Waste Treatment System exclusion does not include this additional language limiting it to manmade features. And considering it has been stayed or suspended for so long, it would just be common sense to get rid of language that has no effect. Doing so would leave a definition that is consistent throughout the CWA. And, given that the provision has been stayed for 34 years, decisions too numerous count have been made by EPA, the Corps, other federal agencies, state agencies and businesses across the U.S. – decisions that were made in compliance with the CWA, under the understanding that the provision for waste treatment systems was not limited to manmade features. While the agencies did not seek comment on this regulatory language because it was not a change to the definition, ACCW see this as an opportunity for the agencies to provide some clarity and certainty to the cattle industry and other industries that have made decisions based on this understanding.

Additionally, ACCW request the agencies include in the definition for "waste treatment systems" exclusion the following statement, "For purposes of this exclusion, existing facilities that have been authorized to operate under the CWA are deemed to meet the

requirements of the Act." This statement would relieve confusion for facilities that have been authorized and operating on these isolated water features for more than four decades.

A number of facilities were constructed and placed into operation prior to adoption of the CWA, and as stated above, a number of decisions had been made by a variety of agencies and businesses in accordance with the stayed provision on waste treatment systems. At the same time, the cattle industry has worked to comply with permit provisions adopted by EPA over the past decade, especially as it relates to Concentrated Animal Feeding Operations (CAFOs). One such requirement has focused on a CAFO's ability to retain rainfall runoff from a 25-year, 24-hour storm event. For the most part, these site-specific rainfall and retention capacity evaluations have been conducted by USDA-NRCS engineers or licensed professional engineers working as consultants for CAFO owners/operators. The resulting, documented engineering analysis forms the basis for the CAFO's ability to meet the requirements for CAFO permit/CWA requirements for either manmade or natural impoundments.

To provide additional clarity regarding the word "designed," ACCW would suggest the following definition for "designed": "For purposes of this section, designed to meet the requirements of the act can be satisfied through a documented engineering analysis showing the waste treatment system's capability to meet or exceed the requirements of a 402 NPDES permit."

ACCW believe these suggested changes to the Waste Treatment System Exclusion would alleviate long-standing confusion, would provide the regulatory certainty needed by currently authorized facilities, and are in line with the agencies' intent to provide clarity to the regulated community. (p. 25-27)

Agency Response: **See summary response at 7.1. See also summary response at 7.4.4 regarding the agencies' creation of an exclusion for certain stormwater control features.**

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

7.114 The applicability of the waste treatment system exclusion historically has been obtuse. There has not been consistent application or understanding of what the agencies consider a "waste treatment system." This uncertainty has led to inconsistent application in the field. Although the proposed rule properly retains the exclusion for waste treatment systems it fails to provide needed clarity regarding the applicability of the exclusion. Specifically, the proposed exclusion would apply to waste treatment systems, including treatment ponds or lagoons, designed to meet the Clean Water Act.[47]

Unclear is whether the exclusion would include multiple-use impoundments. Industrial facility impoundments are often utilized for treatment (e.g., settling out any contaminants in storm water, neutralization, etc.) and also for other beneficial purposes (e.g., water supply for dust suppression, firefighting, irrigation, etc.). Unknown is whether the exclusion applies if the predominant use is not for treatment, i.e., where discharges of

[47] 79 *Fed. Reg.* at 22,263.

treated water rarely or never occur. Similarly, the proposed rule does not indicate whether the exclusion applies if a system was designed to meet CWA requirements but subsequently converted to other uses when discharges were eliminated or handled through alternative means (e.g., by connection to a Publicly Owned Treatment Works). Likewise, the proposed rule does not address whether a system must be permitted under the NPDES program or otherwise subject to CWA regulations to be excluded.

The proposed rule also would add a comma to the regulatory text, which arguably could change the meaning of the exclusion. Currently, the phrase "designed to meet the requirements of the CWA" modifies the examples of "treatment ponds or lagoons."[48] The proposed rule would add a comma after "treatment ponds and lagoons," narrowing the exclusion by requiring all "waste treatment systems," not just "treatment ponds or lagoons," be "designed to meet the requirements of the CWA" to qualify for the exclusion. This change could mean that features constructed for waste treatment prior to the CWA's enactment in 1972 do not qualify for the waste treatment exclusion. Adding the comma might be interpreted as a substantive change with significant implications for many existing waste treatment systems. The agencies should keep the language as is and remove the new comma from the proposed regulatory text.

The proposed rule also would retain in the regulations (1) the sentence proclaiming that the waste treatment exclusion "applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States," and (2) the accompanying footnote explaining that EPA suspended that sentence in 1980.[49] Retaining the suspended language piles added confusion on to an already confusing exclusion. Rather, the suspended sentence and accompanying footnote from 40 CFR 122.2 should be deleted. (p. 8-9)

Agency Response: **See summary response at 7.1. See also summary responses at 7.3.2 and 7.4.4.**

Minnesota Agricultural Water Resource Center (Doc. #14284)

7.115 In agricultural settings, we recommend that the agencies treat wetlands and all ditches and all subsurface drainage systems as part of a treatment system, designed to meet the broad goals of the CWA. (p. 2)

Agency Response: **See summary response at 7.1.**

Irvine Ranch Water District (Doc. #14774)

7.116 **The Waste Treatment Exemption Should Specifically Be Amended to Include Constructed Water Quality Treatment Wetlands.**

…constructed treatment wetlands are designed to treat urban runoff and remove pollutants before they enter jurisdictional waters. IRWD has worked with local partners to protect its watershed by using natural vegetation to remove nutrients and other

[48] 33 CFR 328.3(a).
[49] 79 *Fed. Reg.* at 22,268. 40 CFR 122.2

contaminants, and such facilities result in cleaner water entering WOTUS. Constructed treatment wetland ponds are currently non-jurisdictional, but are often located in floodplains and adjacent to WOTUS. Under the proposed rule, the ponds themselves would likely become jurisdictional. Over regulation and inclusion of these types of facilities in the proposed rule will discourage the use of these water quality treatment methods, which currently provide multiple benefits to the environment, and receiving waters and watersheds.

The waste treatment exemption in Subsection (b)(l) should be amended to exempt constructed treatment wetlands, manmade water quality wetlands, bioswales, detention basins, settling ponds, and similar treatment facilities designed to manage pollutants in a watershed. The exemption should also make clear that lands, which are non-irrigated except by a system of constructed wetlands designed to remove pollutants, and waste treatment plant buffer property are exempt from the proposed rule. We also request that the phrase "meeting the requirements of the CWA" be removed from the waste treatment systems exemption. "Meeting the requirement of the CWA" is too broad and undefined, and may not capture constructed treatment wetlands which benefit receiving waters by removing some, but not necessarily all pollutant constituencies…(p. 2)

Agency Response: **See summary response at 7.1. See also summary response at 7.4.4 regarding the agencies' creation of an exclusion for certain stormwater control features.**

7.117 **The Waste Treatment Exemption Should Specifically Include Water Recycling Facilities and Storage.**

IRWO notes that the proposed rule is meant to retain much of the structure of the Agencies' longstanding definition of WOTUS, and that the Agencies propose no change to the exclusion of waste treatment systems designed consistent with the requirement of the CWA. The District also appreciates that waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the CWA, are exempt under the proposed rule and can never be considered "waters of the U.S." regardless of the other sections of the regulation. These exemptions comprise an essential component of the existing regulatory framework, and should be maintained.

While the proposed rule provides some specific exemptions, it does not provide great clarity on what other waste treatment facilities will be deemed to be exempted from the CWA under the waste treatment system exemption. This lack of clarity in the proposed rule removes any certainty that the proposed rule hopes to give waste treatment system operators through this exemption. In fact, the uncertainty will create regulatory barriers to the implementation of new waste treatment systems and facilities. Without clarification, the proposed rule will expand the scope of CWA jurisdictional waters and interfere with aspects of waste treatment processes and greater water recycling.

Recycled water is a drought-proof water supply that does not rely on uncertain hydrologic conditions associated with climate change. It is a vital part of the California's water supply portfolio, and water providers are aggressively working to expand recycled water within the state. At IRWD, we meet roughly 29,850 acre-feet, or 25 percent, of our service area's water demands with recycled water through a 500-mile recycled water distribution system. We have more than 5,000 recycled water customers and provide

recycled water to homeowner's associations, golf courses, agricultural sites, industrial applications, and to nearly 60 dual-plumb buildings.

Greater recycled water use reduces potable water demand, reducing pressure on the other water resources. Furthermore, if recycled water is not put to use, the water must either be stored in limited recycled water storage facilities, or be discharged and not put to beneficial use. Recycled water storage allows recycled water purveyors to serve a greater amount of recycled water to approved uses by allowing them to adjust to seasonal demand changes. It is an essential component of a recycled water purveyor's waste treatment system. The proposed rule should affirm the importance of recycled water in the nation's water supply and affirm that recycled water storage is within the scope of the water treatment exemption.

Towards this end the waste treatment exemption should expressly include water recycling facilities and storage ponds. We request that the language in Subsection (b) (1) be modified to read as follows:

> "Waste treatment systems, including treatment ponds, lagoons, manmade water quality wetlands, bioswales, detention basins, settling ponds, lands which are non-irrigated except by a system of constructed wetlands designed to remove pollutants, waste treatment plant buffer property, water recycling facilities and storage ponds, and similar treatment facilities designed to improve water quality or provide environmental benefits to a watershed, are not considered waters of the U.S or adjacent waters."

As suggested by the California Association of Sanitation Agencies, "[i]n the alternative, recycled water facilities and features (including storage ponds, basins, artificially created wetlands, recycled water reservoirs and other features associated with water recycling) should be expressly exempted as part of the specifically identified features that are not considered waters of the U.S. within the proposed rule. In this case, recycled water facilities would be treated similar to artificial lakes, ponds, swimming pools, ornamental waters, and groundwater, which are specifically identified and exempted." The same sort of exemption should be provided for water banking facilities.

Additionally, similar to agricultural return water exemptions, the discharge of water from a waste treatment system as described above should not be considered a point source that is regulated under other sections of the CWA. (p. 2-4)

Agency Response: See summary response at 7.1. See also summary responses at 7.4.2 and 7.4.4 regarding exclusions for certain wastewater recycling and stormwater features.

Georgia Paper & Forest Products Association (Doc. #14924)

7.118 EPA should maintain its longstanding wastewater treatment system exemption in the rule. In the proposed rule, modified grammar and new language that it must "be designed to meet CWA", has clouded this exemption. EPA should clarify in the rule that this exemption applies to all wastewater treatment systems, including all their components and management features that are used to meet CWA requirements, even if the system's use for wastewater treatment predates the CWA as many industrial treatment systems do. The exemption also should clearly state that it includes storm water management features

at a facility including, but not limited to, ditches and swales, retention and detention ponds, and any other control structures as well as the outfall structures. All of these features are intended to minimize storm water impacts on water quality regardless of whether the storm water system is covered by Federal or State jurisdiction. The exemption also should clearly state that treatment systems that are State-permitted but may not be NPDES permitted are included in the exemption. This would include systems such as land application systems which may have features like wastewater storage ponds or collection systems that may accumulate water to prevent flow off site. The wastewater treatment exemption should make it clear that none of these systems or any of their components would be included as being a jurisdictional water. EPA has said it does not intend to bring types of water that have not been regulated before into jurisdiction. The rule language should make that intent explicit. (p. 2-3)

Agency Response: **See summary response at 7.1. See also summary responses at 7.4.2 and 7.4.4 regarding exclusions for certain wastewater recycling and stormwater control features.**

Missouri Soybean Association (Doc. #14986)

7.119 **Extremely narrow exemptions -**

The rule also overreaches by narrowing the intent of the exemptions to the point that we are unsure how they would ever apply, rendering them nearly useless in the real world. The exemptions should apply broadly, without exceptions or strings attached to them. Below is an example of some areas where the exemption should be clarified and/or broadened.

a) (t)(l) - Many waste and water treatment and control systems are not designed (or otherwise not constructed) to meet CWA requirements. Thus, the rule overreaches and brings into jurisdiction features that were constructed for treatment or control purposes but not for a regulatory requirement… (p. 7)

Agency Response: **See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins and wastewater recycling and stormwater control features.**

North Carolina Farm Bureau Federation (Doc. #15078)

7.120 The exclusion for "[w]aste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" is a necessary exclusion. We support this exclusion with the understanding that waste treatment systems, including treatment ponds or lagoons designed to meet other federal, state and local laws and rules to protect water quality are also considered as being designed to meet the requirements of the Clean Water Act and are considered exempt as such. This was so stated by EPA representatives at the September 30, 2014 meeting in North Carolina. (p. 15-16)

Agency Response: **See summary response at 7.1.**

Packaging Corporation of America (Doc. #15515)

7.121 **A. Wastewater Treatment Exemption**

The preamble in the Proposal indicates that the Agencies do not intend to change the waste treatment system exemption under the current regulations (79 Fed. Reg. at 22,189).

Changes or Clarifications Needed Regarding the Exemption

i. "Designed to Meet"

Due to limiting language in the existing exemption, certain facilities, including some member mills, that created their waste treatment systems before the adoption of the CWA, arguably are vulnerable to potential challenges to the applicability of the exemption. These facilities have operated under NPDES permits since the 1970's, and their permits have been continually updated to include stricter provisions over time. There is no reason to question the status of the exemption for those systems. The rationale for the exemption-s-that waste treatment systems are regulated through the NPDES program, and that imposing requirements intended to protect surface waters from discharges make no sense when applied to "waters" that are treating wastewater to make it suitable for discharge to surface waters-applies equally to waste treatment systems constructed before 1972. The Agencies should clarify that facility systems constructed before the CWA were adopted but used to meet CWA requirements are still covered by the exemption.

Similarly, EPA should clarify in the Proposed Rule that land application and beneficial use systems fall within the exemption. For example, land application systems used to meet a zero discharge effluent guideline involve storage or pretreatment ponds as well as acres of spray fields that may develop some wet areas over time or may collect run off to maintain zero discharge, may be subject only to permits under state law and may not be regulated under the NPDES program. Even though no federal NPDES permit is involved, these systems clearly are designed to meet the requirements of the CWA's provision of no discharge of process wastewater pollutants to WOTUS, and they should be recognized as such in the Preamble to any final rule. (p. 4)

Agency Response: See summary response at 7.1. See also summary response at 7.4.2 regarding the agencies' creation of an exclusion for certain wastewater recycling features.

Association of American Railroads (Doc. #15018.1)

7.122 **C. Waste Treatment Exception**

…AAR supports the Agencies' continued application of the waste treatment exception to the definition of Waters of the United States. Because the Agencies have proposed to expand CWA jurisdiction, additional clarification is necessary to ensure that features that are excluded under the waste treatment exception will continue to be acknowledged. The need for clarification is underscored by the recent decision purporting to vacate EPA's water transfer rule which had exempted certain conduits and conveyances from CWA jurisdiction. *Catskill Mountains Chapter of Trout Unlimited Inc., et al. v. EPA* consolidated case Nos. 08-cv-0560 and 08-cv-9430 (S.D.N.Y., March 28, 2014). Clarification is appropriate in this rulemaking as the agencies have made "ministerial" changes to the exemption by removing an unneeded reference to cooling ponds and the addition of a comma.

…

2. Waste Water Treatment Systems Should not be Limited to Those "Designed to Meet the Requirements of the CWA"

Because not all waste water treatment systems are subject to the CWA, the waste treatment exception should not be limited to those "designed to meet the requirements of the CWA."

As the Agencies are aware, EPA requires CWA NPDES permits for only certain categories of storm water discharges.20 EPA always has residual authority to require a CWA NPDES permit for facilities or categories not within the prescribed categories upon a determination that a discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. 40 C.F.R. § 122.26(a)(v). There are thousands of waste treatment systems, and in particular storm water management systems, which meet the criteria for the waste treatment exception but are not required to obtain NPDES permits.[50] Examples include storm water systems outside of designated MS4s, parts of industrial facilities not specifically identified in 40 C.F.R. Part 122, roadway drainage systems, railroad ditches and storm water management systems.

Because thousands of waste treatment systems, including storm water management, are not subject to CWA requirements, the Railroads recommend the Agencies remove the phrase "designed to meet the requirements of the Clean Water Act." (p. 13-14)

Agency Response: See summary response at 7.1. See also summary response at 7.4.4 regarding the agencies' creation of an exclusion for certain stormwater features.

County of San Diego, California (Doc. #14782)

7.123 **Strengthen exemption for "waste treatment systems"**

The existing exemption language for "waste treatment systems" must be strengthened. The Federal Register posting asserts that there will be no change to the exclusion for waste treatment systems. The rule should be expanded to specifically exempt facilities that are designed and installed to meet any water quality requirements, including individual state or local water quality regulatory requirements (for example, the Porter-Cologne Act in California). CFR Part 328.3 (7) states that waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA are not waters of the United States. Although the agencies specifically state that they are not seeking comment on this section, the County strongly urges the agencies to strengthen and expand this vaguely written exemption or otherwise explicitly exempt all water quality treatment facilities. Currently, the regulations ("a" and "b" below) appear to only vaguely exempt "waste treatment systems" (which presumably apply to permanent BMPs

[50] *See, e.g.*, Hughey v. JMS, 78 F.3d 1523(11th Cir. 1996)(permit unavailable for construction stormwater discharges; "[p]ractically speaking, rain water will run downhill, and not even a law passed by the Congress of the United States can stop that.).

such as: detention basins, retention basins, bioswales, etc.) that are designed to meet the requirements of the CWA:

> a. Nationwide Permit (NWP) 43 has language that states: "Note that stormwater management facilities that are determined to be waste treatment systems under 33 CFR 328.3(a)(8) are not waters of the United States, and maintenance of these waste treatment systems generally does not require a section 404 permit."
>
> b. Then 33 CFR 328.3(a)(8) states the following: "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11 (m) which also meet the criteria of this definition) are not waters of the United States."

EXAMPLE: Regulators could potentially allow use of the above NWP 43 or the language in 33 CFR 328.3(a)(8) to exempt maintenance of water quality treatment systems from requiring section 401 and 404 permits. However, since NWPs are renewed every five years they are not guaranteed to be in existence. In addition, the language in 33 CFR 328.3(a)(8) is vague and does not specifically exempt water quality treatment so individual regulators may not apply this exemption uniformly to water quality treatment facilities. Therefore, the rule should be clarified to specifically exempt maintenance of these water quality treatment facilities. (p. 4-5)

Agency Response: See summary response at 7.1. See also summary responses at 7.4.2 and 7.4.4 regarding the agencies' creation of exclusions for certain wastewater recycling and stormwater control features.

Arizona Public Service Company (Doc. #15162)

7.124 C. A Simple Comma Could Result in the Loss of Waste Treatment System Exemption

Waste treatment systems (WTS) at APS facilities include, but are not limited to, wastewater collection features (bins, basins, channels), wastewater treatment facilities (cooling ponds, ash ponds, coal pile runoff collection ponds, low volume waste ponds, storm water sedimentation ponds), as well as various wastewater and treated water conveyances such as pipes, channels, and conduits that convey treated or untreated water to and/or from WTS already mentioned. The proposed rule states that "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" will continue to be excluded from the definition of WOTUS. The Agencies do not solicit comment on this exclusion because they claim it has not changed from the current rule. While no change to the WTS exclusion may have been intended by the Agencies, the Agencies' simple addition of a comma after "lagoon" in the WTS exemption will, unless addressed in the final rule, potentially subject WTS to NPDES permit requirements, which will result in substantial cost increases for the owners of these facilities. APS requests that the Agencies remove this comma from the text of the WTS exemption. (p. 11)

Agency Response: See summary response at 7.1.

National Association of Clean Water Agencies (Doc. #15505)

7.125 Preservation and Clarification of Waste Treatment Exemption Critical

The draft rule preserves and clearly articulates a regulatory exemption for waste treatment systems, which is absolutely necessary. NACWA's longstanding position supports an interpretation of CWA jurisdiction that maintains a clear articulation of the waste treatment exemption and we applaud the Agencies for maintaining the critical, existing exemption. Title 40, Section 122.2 of the U.S Code of Federal Regulations explicitly excludes manmade "waste treatment systems" from the definition of "waters of the United States." This enables the proper functioning of publicly owned treatment works (POTWs). However, communities use a variety of approaches, ranging from green infrastructure (constructed wetlands, swales, etc.) and various components of municipal separate storm sewer systems (MS4s), to manage wet weather, which are not included in the exemption. NACWA does not suggest that the definition of POTW be expanded; however, explicit exemptions for these systems designed to meet CWA requirements need to be included in any final rule. In addition to waste treatment systems, the proposed rule exempts "treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" in 40 CFR 230.3(t)(1). Inserting language into this provision to expand it to cover a broader array of wet weather management practices including those discussed above, would be a viable solution. (p. 2)

Agency Response: **See summary response at 7.1. See also summary response at 7.4.4 regarding the agencies' creation of an exclusion for certain stormwater control features.**

Orange County Sanitation District, California (Doc. #16335.1)

7.126 The wastewater treatment process generates biosolids which is commonly applied to lands such as farmlands, drought stricken areas, fire damaged areas, green belts, recreational areas, and landfills. Under the broad criteria of this proposed rule, land application sites for biosolids can be subject to regulation. Such sites are already subject to regulation under 40 CFR 503, which addresses the standards for the beneficial use or disposal of sewage sludge. To mitigate conflicting regulation, the existing rule 40 CFR 503 should govern and therefore the waste treatment exemption should be broadened to include lands subject to 40 CFR 503 regulation. (p. 2)

Agency Response: **See summary response at 7.1.**

7.127 As the proposed rule and existing practice acknowledge, waste treatment systems designed to meet the requirements of the Clean Water Act are not waters of the U.S., and OCSD wants to ensure that as part of these proposed amendments spreading grounds/basins, treatment ponds/lagoons, and constructed treatment wetlands used as part of the wastewater process are subject to the same exemption. Since these facilities are clearly part of the treatment process, providing additional treatment, residence and settling prior to discharge, these facilities should be expressly recognized in the rule as falling under the Waste Treatment Exception.

In addition, many water and wastewater agencies utilize spreading grounds or basins in order to facilitate groundwater replenishment; a vital part of water management throughout California. Others utilize artificially created effluent storage ponds as part of their treatment process. Many agencies maintain reservoirs or storage basins/ponds to store recycled water. These artificially created features and spreading grounds have not

previously been defined or regulated as "waters of the United States," and should remain separate. For this reason, the proposed rule should expressly include treatment ponds/lagoons, spreading grounds/basins, and constructed treatment wetlands within the scope of the Waste Treatment Exception, along with effluent storage reservoirs and recycled water storage facilities discussed previously. (p. 4)

Agency Response: See summary response at 7.1. See also summary response at 7.4.4 regarding the agencies' creation of an exclusion for certain stormwater control features and summary response at 7.4.4. regarding groundwater recharge features.

Duke Energy (Doc. #13029)

7.128 Waste Treatment System Exclusion

Of specific concern to Duke Energy is that under the extremely broad language of the proposed rule, some onsite water management systems could classified as "waters of the United States." Electrical generation sites commonly use many types of water management systems which include interconnected pipes, channels, basins, ponds and other features for collecting, storing and treating wastewater.

Duke Energy has extensive water management and treatment systems as part of the facility design and operations at its generation sites. These systems vary by facility, but can include cooling ponds, discharge canals, ash ponds, industrial stormwater treatment ponds, settling basins, low volume waste ponds, coal pile runoff ponds, and other various collection ponds. These systems also include wastewater and treated water conveyances (such as pipes, channels and conduits) that convey untreated or treated wastewater to and from these features. In addition, Duke Energy maintains "constructed wetlands" at some facilities that were built and designed for the treatment of wastewater. In some cases, Duke Energy also stores rain water or treated and/or partially treated industrial wastewater in ponds for eventual use within the facility. These storage and treatment systems provide important environmental benefits by allowing recycling and reuse of alternative water supplies and also ensures the proper handling and treatment of wastewater produced during the process of generating electricity. This ensures that the water is properly treated before it leaves a facility and these types of programs are encouraged by the State.

Under the proposed rule, some of these storage and treatment systems could be considered "adjacent" or "neighboring" to other "waters of the United States". The majority of these are internal water features that are already regulated at their points of discharge to external waters under the CWA. If such systems were considered to be "waters of the United States," the regulatory consequences would be substantial. The treatment systems would no longer be able to serve their essential purpose, which is to treat wastewater. For example, facilities could face an illogical situation in which an NPDES permit would be required for a discharge of wastewater into those treatment systems, and that permit would require compliance with all technology- and water quality-based limits before the water enters the treatment system. This would make these systems redundant and essentially useless for their intended purpose of controlling and treating waste streams requiring new expensive technologies to "treat" the waste stream before it entered the "waste treatment system" as originally designed. Additional CWA

program requirements could also come into play, such as Section 404 permitting for routine maintenance of a waste treatment pond or it conveyances.

The proposed rule includes the following language for the waste treatment exclusion:

> *Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.*[51]

The agencies are not proposing any changes to the waste treatment exclusion, aside from two ministerial actions.[52] However, they do not see these changes as substantive and are therefore not seeking any comment on it.[53] In a Questions and Answers document on the proposed rule, the agencies explain that "[t]he proposed rule would not change, in any way, existing application of the waste treatment exclusion."[54] However, Duke Energy is concerned that the current language of the waste treatment system exclusion is not adequate to solve the problems created by the proposed rule's revisions. As UWAG points out in their comments[55] on the proposed rule, seemingly minor changes to the exclusion wording over the years have resulted in additional confusion and application of the waste treatment exclusion has been inconsistent.

One area that needs clarity is how the agencies define "designed to meet the requirements of the Clean Water Act." While it seems fairly straightforward, questions arise concerning the historical existence of many of these waste treatment systems prior to the enactment of the CWA. Does the exclusion apply to waste treatment systems that were designed and built pursuant to other statutes beside the CWA? For example, some waste treatment systems at Duke Energy's sites do not have point source discharges, but instead discharge to groundwater. These waste treatment systems typically are not covered by NPDES permits, but are regulated under state permitting programs such as Florida's rigorous licensing program governing discharges to groundwater. Under Florida law these treatment systems must meet state groundwater standards, which include a provision protective of downgradient surface waters.[56] These systems have never been classified as "waters of the United States", but are clearly regulated and protective of the environment. However, it is not clear from the proposed rule's regulatory language if the waste treatment exclusion would be applicable, contrary to the agencies' assertions. Duke Energy recommends that the waste treatment exclusion include any and all types of treatment or water management systems regulated under State provisions.

The agencies also need to clarify that the waste treatment "system" includes all conveyances, drains, pipes or ditches that carry water into or from the places where treatment occurs and should be considered as a holistic unit. At many facilities, there are drains and ditches that flow to sumps, lagoons, and other ponds, whose contents are eventually pumped or discharged to another pond exempted under the waste treatment

[51] 79 Fed. Reg. at 22,263
[52] *Id*. at 22,217
[53] *Id*. at 22,190
[54] EPA & U.S. Army Corps of Engineers, Questions and Answers – Waters of the U.S. Proposal at Page 6 – Q24, available at http://www2.epa.gov/uswaters/questions-and-answers-about-waters-us-proposal-pdf
[55] UWAG comments on WOTUS Proposed Rule (November 14, 2014), Section V (D.)
[56] Fla. Admin. Code 62-520.310(12)

systems (e.g., ash ponds). The entire "system" needs to be defined to include all of these conveyance or internal features.

Classifying waste treatment systems as jurisdictional "waters of the United States" would also place states in an impossible position with respect to setting and implementing water quality standards, including assigning a designated use for the jurisdictional water. Since the agencies are precluded from designating a use as "waste transport," states would be required to assign "fishable, swimmable" uses these waters, unless the state performs an analysis that demonstrates that attaining the highest use is infeasible for one of six narrow reasons. Regulators would face two equally unpalatable options: attempt to impose patently arbitrary "fishable, swimmable" uses for waste treatment systems, effectively rendering them useless for their intended purpose, or undertake the expensive, time-consuming scientific analysis required to justify less restrictive uses and criteria. And, if the state chooses the first option and the "receiving water" fails to meet the applicable criteria (which almost certainly will be the case), the regulator will need to identify the waterbody as impaired and develop any pollutants pecific total maximum daily loads ("TMDLs") necessary to ensure the uses and criteria are met. This would do nothing to protect the Nation's waters; its only purpose would be to undermine the use of treatment systems designed to serve the statute's pollutant discharge reduction goals. (p. 43-46)

Agency Response: **See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins, cooling ponds, and wastewater recycling and stormwater control features.**

7.129 Another specific area for discussion in this area concerns how the proposed rule would affect ash pond closure activities. For example, all of our sites in North Carolina will be undergoing ash pond closures over the next several years. All of Duke Energy's ash ponds are currently covered under the waste treatment exclusion and the effluent from these ponds is addressed through the site's NPDES permit. Duke Energy expects the agencies to continue to include ash ponds under this exemption. As discussed previously in these comments, the agencies have stated publicly several times that they were not making any changes to the waste treatment exemption. However, even with the exemption in place, the proposed rule's expanded definitions, which are expected to bring in an increased number of water features deemed jurisdictional (i.e. conveyances, stormwater drainage areas, etc.). This will result in additional secondary impacts for pond closure activities. Some of these activities include development of temporary roads, laydown areas and borrow areas. Ultimately, this will result in additional permitting requirements for larger areas and increased mitigation costs. Duke Energy recommends that the agencies clarify that all water features that are associated with ash ponds, including conveyances to the pond and any upstream collection basins, be considered part of the entire waste treatment system and covered by the appropriate exclusion. In addition, Duke Energy recommends that the agencies confirm that the waste treatment exclusion for ash ponds and all associated internal conveyances will not change until all closure activities have been completed. Any redundant permitting requirements for these activities could lead to lengthy delays in restoring these areas. (p. 67-68)

Agency Response: **See summary response at 7.1.**

Ameren Corporation (Doc. #13608)

7.130 The proposed rule also indicates there will be no change to the waste treatment exclusion for systems designed consistent with the requirements of the Clean Water Act. However, Ameren energy centers have numerous ponds, lagoons or impoundments used for storage of storm water runoff or for waste water treatment that may fall under this proposed definition and may result in additional permitting or case-specific evaluations. Point source discharges that are covered by NPDES permits should not fall under the jurisdiction of WOTUS. (p. 2)

Agency Response: See summary response at 7.1. See also summary response at 7.4.4 regarding the agencies' creation of an exclusion for certain stormwater control features.

Florida Power & Light Company (Doc. #13615)

7.131 The proposed rule's introduction of several broad terms, such as "tributary," "adjacent," "similarly situated waters," "significant nexus" and "neighboring," complicates a clear assessment of the proposed rule's potential to expand or alter the extent of WOTUS. The terms and their associated definitions expand the Clean Water Act's (CWA) jurisdiction over waters that are currently classified as non-jurisdictional, such as ephemeral streams and geographically isolated features based on current agency practice. For example, FPL has significant concern that the language in the proposed rule could be interpreted to conclude that cooling ponds at power plants could be jurisdictional if they are adjacent or neighboring to WOTUS. Similarly, man-made ditches or drainage swales that are designed to convey stormwater or wastewater to discharge points or on-site retention/detention ponds for subsequent, direct or indirect, discharge to a regulated WOTUS could be jurisdictional under the proposed rule. It is critical that the final rule make clear that the waste treatment system exemption includes each potential design feature of a waste treatment system regardless of its location near a WOTUS, and that cooling ponds at power plants continue to be exempted from WOTUS designation. (p. 1-2)

Agency Response: See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain cooling ponds and wastewater recycling and stormwater control features.

7.132 The proposal removes the "cooling ponds" exception contained in the original exclusion. The original exclusion stipulates that WOTUS do not include "waste treatment systems, including ponds or lagoons designed to meet the requirements of this act (other than cooling ponds as defined in 40 C.F.R. 423.II (m) which also meet the criteria of this definition) ...',[57] The current proposal removes this parenthetical reference, While it is appropriate to remove this language as that definition no longer appears in 40 C.F.R. 423, we urge the inclusion of additional regulatory language that clearly exempts cooling ponds from WOTUS classification.

[57] 40 CFR 122.3(i).

The proposal also adds a comma after "lagoons" in the original exemption. This grammatical modification is a substantive change that could unintentionally limit the exemption to only ponds or lagoons. While we believe the agencies' view is that the rule refers to all waste treatment systems, not just ponds and lagoons, the punctuation error should be addressed so as not to undermine the scope and intent of the exemption.

With respect to the exemption itself, the preamble appropriately notes that "[w]here waters would be determined to be jurisdictional under the proposed rule, applicable exemptions in the CWA would continue to preclude application of CWA permitting requirements.[58] We believe the agencies have not intentionally sought to limit the scope of the existing waste treatment system exemption; however, the inclusion of additional terms such as "adjacency" and "neighboring" create further uncertainty around jurisdictional designations that could potentially result in permitting delays and confusion for regulators and project applicants. As a result, the final rule should include language that clarifies what specific waste treatment system components are exempt in order to minimize applicants' and permitting agencies' confusion.

Adding specificity to the components of exempt waste treatment systems is essential to promoting the regulatory clarity intended through this rulemaking and will ensure that the exemption is not unintentionally undermined. For example, many power plants use large reservoirs for cooling water as part of a closed-cycle recirculating system (CCRS). Traditionally, these are not considered WOTUS as they are created to allow water heated by generation equipment to cool off before being reused. However, under the proposed rule, many such systems could be deemed jurisdictional due to their proximity to WOTUS. If these ponds are designated as WOTUS, they would be subject to additional restrictions or even prevent the use of such ponds for CCRS, undermining the intent of the recently-finalized standards for cooling water intake structures under CWA Section 316(b). Additionally, utilities also use surface drainage ditches and ponds to ensure compliance with existing Spill Prevention, Control and Countermeasures (SPCC) regulations and comply with both the CWA and the Oil Pollution Act, as well as state and local-level water quality laws. In some cases, the ditches are part of an overall system to capture oil and other spills well before reaching regulated WOTUS. These ditches and ponds should remain expressly exempted from WOTUS. We also recommend that any system constructed and maintained as a water quality treatment system, whether under federal or state authority, should be covered under the exemption.

Thus, we recommend regulatory language stating that the waste treatment system exemption includes at least the following components (see proposed regulatory language below):

- Treatment ponds and lagoons
- Drainage ditches
- Stormwater detention/retention ponds
- Cooling water impoundments

[58] 79 Federal Register 22189 (April 21, 2014).

- Spill diversion ditches and containment ponds
- Polishing ponds
- Ditches and canals that connect units of a waste treatment system
- Wastewater treatment tanks, including oil-water separators and sumps, and piping/conveyances

We also urge that the final rule make clear that a waste treatment system should be exempted if it was designed for the purpose, in whole or in part, of treating any type of waste considered a pollutant under the CWA, and the system was constructed in uplands or not in WOTUS. Further, if the construction of the waste treatment system pre-dated the CWA and the agencies' expansion of jurisdictional inclusion of adjacent wetlands, the system should also be expressly exempted. (p. 3-5)

Agency Response: See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain cooling ponds and wastewater recycling and stormwater control features.

7.133 We recommend the following regulatory revision to 33 CFR 328.3(b),[59] with additions **underlined bold**.

(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-

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water **Act or an applicable state water quality law or regulation. Waste treatment systems include, but are not limited to, the following features:**

(i) Treatment ponds and lagoons;

(ii) Drainage ditches;

(iii) Stormwater detention/retention ponds;

(iv) Cooling water impoundments;

(v) Spill diversion ditches and containment ponds;

(vi) Polishing ponds;

(vii) Ditches and canals that connect units of a waste treatment system;

and

(viii) Wastewater treatment tanks, including oil-water separators and sumps, and piping/conveyances.

The agencies should also define such waste treatment features out of WOTUS definitions in existing regulatory guidance documents (p. 3-5)

[59] 79 Federal Register 22263 (April 21, 2014).

Agency Response: **See summary response at 7.1. See also summary response at 7.4.4 regarding the agencies' creation of an exclusion for certain stormwater control features.**

Murray Energy Corporation (Doc. #13954)

7.134 …despite the claim that the existing exclusion for waste treatment systems has been preserved, the Agencies have proposed clerical changes to the exclusion that appear to have the effect of narrowing it. The following marked text highlights the difference between the existing exclusion and the proposed one:

> ***Existing***. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 C.F.R. § 423.11(m) which also meet the criteria of this definition) are not waters of the United States.
>
> ***Proposed***. Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
>
> ***Comparison***. Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

The addition of a comma after "lagoons" would presumably make all waste treatment systems – not just treatment ponds or lagoons – subject to the "designed to meet" standard. This clerical change could have an unintended substantive effect of narrowing the exclusion by making all waste treatment systems – not just treatment ponds or lagoons – subject to the "designed to meet" standard. This is a particular concern for Murray and the coal mining industry…wastewater treatment systems at surface coal mine sites are, as they must be, designed to meet the requirements of SMCRA. We question the Agencies' characterization of this as being an ineffectual "clerical" revision. If the Agencies did not intend to alter the wastewater treatment system exemption in any way, as they claim, then it is hard to see why there is even a need for this change. (p. 19-20)

Agency Response: **See summary response at 7.1.**

The Florida Electric Power Coordinating Group, Inc. (Doc. #13993)

7.135 …A specific concern is that some waste treatment systems could be seen as being waters of the United States under the extremely broad language of the proposed rules. Examples of such waste treatment systems include cooling ponds, ash ponds, industrial stormwater treatment ponds, rapid infiltration basins, settling basins, etc. Many such waste treatment systems very likely will be "adjacent" or "neighboring" under the proposed definition, due to Florida's unique, low gradient topography. If such waste treatment systems are considered to be waters of the United States, the regulatory consequences would be enormous. The treatment systems would no longer be able to serve their essential purpose (which is to treat wastewater), because EPA's regulations specifically state that waste assimilation and transport cannot be designated uses of waters of the United States. 40 CFR §131.10(a).

Capturing such treatment works as waters of the United States would be an absurd policy choice, because permitted waste treatment systems cannot possibly be part of the aquatic

inventory that Congress intended to protect under the CWA (in contrast to some wetlands, that do warrant protection). To assert that waste treatment systems are waters of the United States would be to negate their status as waste treatment systems. Although permitted waste treatment systems potentially could impact nearby jurisdictional waters, asserting jurisdiction is not a sensible approach to addressing potential impacts. Alternatives include reliance on state licensing agencies (in states that have groundwater standards protective of downgradient surface waters), facilitating management of potential impacts through EPA's oversight of the CWA nonpoint source continuing planning process, or relying on potential impacts to be addressed under the TMDL program.

The current language of the waste treatment system exclusion is not adequate to solve the problems created by the proposed rule revisions, because courts have tended to interpret exclusions very narrowly. For example, in one case the court held that the exclusion is available only if the waste treatment system is completely self-contained (presumably meaning it cannot discharge to groundwater that migrates to surface waters) or is authorized under an NPDES permit. Northern California River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007). In Florida, virtually all groundwater migrates to nearby surface waters, and treatment systems that do not have point source outfalls are not covered under NPDES permits (though the discharges to groundwater are regulated under state law). Thus, there is an acute need for changes to the proposed rule revisions.

Recommendation

The FCG-EC recommends that in the final rule the agencies decline to utilize the significant nexus concept to extend jurisdiction categorically to "other waters" that are neighboring or adjacent to traditionally navigable waters (or their tributaries). This would substantially address most of the FCG-EC's concerns with respect to both waste treatment systems as well as CWA §404 permitting more generally. Alternatively, the FCG-EC recommends that this definition of "waste treatment system" be included in the final rule:

> A "waste treatment system" is an impoundment or other body of water that is created primarily to treat pollutants pursuant to the Clean Water Act or State law. It includes treatment ponds or impoundments created prior to the enactment of the Clean Water Act in 1972, and also includes treatment ponds or impoundments created in "waters of the United States" where construction of the pond or impoundment is authorized by a federal regulation or permit that takes into account impacts on the aquatic ecosystem. It also includes all treatment systems regulated under a NPDES permit. It includes treatment ponds or impoundments that do not have point source outfalls and discharge to groundwater, if the groundwater discharges are licensed by a State environmental agency and applicable State groundwater regulations account for impacts to surface waters. A waste treatment system includes any appurtenant features, including, but not limited to, ditches, canals, and other waterways that convey wastewater or treated water to or from features where treatment occurs. (p. 4-5)

Agency Response: **See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain cooling ponds and wastewater recycling and stormwater control features.**

NRG Energy, Inc. (Doc. #13995)

7.136 …NRG understands the rationale for correction of an outdated regulatory reference; however, we strongly disagree with the Agencies ' suggestion that the change is not substantive for the following reasons.

Specifically, the deletion of the cross- reference is of special concern with regard to **perched cooling ponds**. Historically these ponds have been considered to be part of permitted wastewater treatment systems, designed to dissipate heat prior to cooling water being discharged to surface waters. As such, these ponds have been exempt from consideration as either waters of the state or waters of the U.S. However, cooling ponds may lie within the floodplain area of "traditionally navigable waters" or may be in close proximity to such jurisdictional water. Cooling ponds may also be "adjacent" ("borders, contiguous or neighboring") to WOTUS and separated from traditionally jurisdictional waters by man-made dikes or barriers, and therefore could be considered as WOTUS under the proposed definition.

The complete lack of specific reference in the proposed rule to perched cooling ponds or the use of ponds for cooling purposes is problematic in light of the set of new and expanded definitions discussed above, which blur the distinction between a designated wastewater treatment system and a WOTUS.

Another concern involves existing wastewater treatment collection and conveyances historically deemed to meet the current interpretation as components of a permitted treatment system, because they do not directly discharge into a lake, stream, or river unless through an authorized (i.e., permitted) outfall. As mentioned above, the broadened definitions included in the proposed rule could be applied to these storm and process water conveyances (influent and effluent) and holding ponds which historically have been excluded from WOTUS determination, in turn requiring the installation of significant and costly, but unnecessary and redundant new controls to be built to protect these waters, which are already part of a permitted wastewater system.

Because the above mentioned terms are not explicitly identified in the proposed rule definitions, and to eliminate the risk of unintended and unwarranted jurisdiction, NRG recommends the following additions to the definition of "Waters of the US":

Revise 40 CFR 230.3 (t) (1) as follows:

"Waste treatment systems ***and their associated conveyances****, including treatment* ***and perched cooling ponds or lagoons****, designed to meet the requirements of the Clean Water Act."* and,

Revise 40 CFR 230.3 (t) (5) (ii) as follows:

"Artificial lakes or ponds created by excavating and/or diking dry land and used ***primarily*** *for such purposes as stock watering, irrigation,* ***cooling, storage/ retention****, settling basins, or rice growing."*

On a similar note relating to impoundments, the following was taken from the preamble: "The agencies also note that an impoundment of a water that is not a waters of the United States can become jurisdictional if, for example, the impounded waters become navigable-in-fact and covered under paragraph (a)(l)".(Id. at 22201). This statement was

likely intended to exclude waste treatment systems from waters of the United States; however, it should be clarified with specific language identifying perched cooling pond/permitted wastewater system component exclusions, as discussed above. (p. 6-7)

Agency Response: **See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain cooling ponds and wastewater recycling and stormwater control features.**

Southern Company (Doc. #14134)

7.137 ***The Agencies Must Resolve a Clerical Error That Could Undermine Their Intentions of Preserving the Existing Waste Treatment System Exemption***

This historical waste treatment exclusion is vitally important to electric utilities as it applies to operational units such as ash ponds and thermal treatment systems. And, while the agencies claim to have preserved the existing exclusion, a proposed clerical change to the exclusion, involving the insertion of a single comma,[60] may have the effect of narrowing it. In discussions with EPA during the comment period, the agency has reiterated its commitment to maintaining the exclusion and has signaled its willingness to correct this error in the final rulemaking.

The addition of a comma after "lagoons" could be construed to make all waste treatment systems—not just treatment ponds or lagoons—subject to the "designed to meet" standard. To the extent there is any doubt that the comma after "lagoons" is a scrivener's error that would potentially change the scope of the exemption, we note that none of the eight States that have "state waters" definitions modeled on the federal standard have included a comma after "lagoons." (See, e.g., New York, New Jersey, New Mexico, Oklahoma, Louisiana, South Carolina, South Dakota, and Virginia). As such, we propose the following correction: "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act." (p. 47-48)

Agency Response: **See summary response at 7.1.**

Southern Illinois Power Cooperative (Doc. #14402)

7.138 The Agencies should preserve an inclusive wastewater treatment system exclusion, and provide an on-site water and wastewater management exclusion, to avoid disrupting hundreds of thousands of existing industrial operations nationwide; thus impeding development of needed new infrastructure, and imposing substantial new regulatory burdens on the regulated community, States, and the Agencies themselves. (p. 11)

Agency Response: **See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins, cooling ponds, and wastewater recycling and stormwater control features.**

[60] The proposed exclusion provides "Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the CWA" are not waters of the United States."

Golden Spread Electric Cooperative, Inc. (Doc. #14422)

7.139 The Agencies are not proposing any change to this exemption. However, this exclusion has historically suffered from ambiguity, which is not surprising, as the Agencies do not provide a definition of what they consider to be a "waste treatment system." The Agencies do not explain if features that manage water (or convey water through ditches or other structures) but do not provide treatment to meet limits or other standards are exempt. For example, manmade basins and ponds serve a myriad of environmental and process purposes and do so in an environmentally responsible manner. It is also common for facilities to have stormwater retention basins to manage regulated storm water. To render these features "waters of the United States" would make them prohibitively expensive and would eliminate their viability. As such, Golden Spread recommends extending the waste treatment exclusion to manmade basins, in addition to those constructed for stock watering, irrigation or settling basins. (p. 7)

Agency Response: See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain cooling ponds and wastewater recycling and stormwater control features.

National Lime Association (Doc. #14428.1)

7.140 **6. "Isolated" as used in the Definition of "Wetlands" is Another Term Which Needs to be Defined and the Definition of "Wetlands" Needs to Clarified.**

… **b. "Wetlands"**: Although "wetlands" is defined in the regulatory text of the proposed rule, as the proposed rule is currently written, the definition can be construed to include an area where stormwater runoff is held to allow it to evaporate and thereby avoid its discharge into another water which is, or might be, jurisdictional. Such features were created and exist solely for that functional purpose and would thus should fall within the exclusion for waste treatment systems provided under §328.3(b)(1) and the corresponding sections under the related C.F.R. parts (hereafter collectively referred to as the §328.3(b)(1) exclusion). While we believe that this exclusion would apply, because of the broad public belief that the proposed rule expands WOTUS jurisdictional and because of the overall ambiguity of the regulatory text as currently written (discussed throughout these comments), the Agencies need to reconfirm that such features do qualify as waste treatment systems and pursuant to §328.3(b)(1) are not to be considered jurisdictional wetlands.

If, however, the Agencies do not agree that such features qualify for the §328.3(b)(1) exclusion, they should nonetheless be classified as non-jurisdictional along the same lines provided for the several other features which the proposed rule would expressly exclude from being jurisdictional, *see, e.g.*, proposed §328.3(b)(5)(ii) ("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."),[61] 79 Fed. Reg. at 22263, and

[61] As written, the exclusion provided under §328.3(b)(5)(ii) appears to apply solely to agriculture and farming.

§328(b)(5)(v) ("Water-filled depressions created incidental to construction.").[62] *Id.* (p. 10-11)

Agency Response: **See summary responses at 7.1., 7.4.2, and 7.4.4.**

Synagro Technologies, Inc. (Doc. #14565)

7.141 The Waste Treatment Exemption Should Specifically Include Land Applications Sites for Biosolids

Synagro appreciates that the Proposed Rule explicitly specifies that EPA will not change the longstanding regulations that exclude "waste treatment systems" designed to meet the requirements of the CWA (and prior converted cropland) from the definition of "Waters of the United States." (79 FR 22217). As such, the Proposed Rule maintains and clearly articulates the exemption for waste treatment systems designed to meet the requirements of the CWA. Synagro understands that the "waste treatment systems" exclusion from additional regulation from the Proposed Rule will include biosolids management performed in compliance with the Part 503 regulation.[63] These regulations provide an essential component of the existing regulatory framework that ensures effective wastewater agency operations.

The retention of the waste treatment exemption is one of the highest priorities for wastewater agencies and their biosolids management service providers. Synagro also endorses the proposed rule's clarification that EPA does not intend alter the regulation of groundwater at the federal level and, in fact, the proposed rule codifies a number of the waters and features that EPA has by longstanding practice generally considered not to be "Waters of the United States." (Id. at 22218) Nevertheless, Synagro is concerned that without clear and definitive language expressly provided in the Final Rule that it can be inferred that the increased federal jurisdiction over lands (by calling them "navigable waters") could easily be construed as establishing a new federal power would cause an impediment ordinary farming practice of utilizing biosolids as a fertilizer. Specifically, the lack of clarity in the Proposed Rule as to what is included in the waste treatment exemption will create regulatory barriers to the effective implementation of biosolids land application projects without a commensurate benefit to the environment.

The wastewater treatment process generates biosolids which is applied to lands which includes farm land, drought stricken areas, fire damaged areas, green belts, and recreational areas. Under the broad criteria of this Proposed Rule, land application sites for biosolids can be subject to Proposed Rule designation and requirements. As stated before, such sites are already subject to CWA regulation by EPA under the Part 503 Rule which addresses control of coincidental wastewater and runoff which may collect during the handling, interim storage and processing of biosolids for land application. To mitigate conflicting regulation, the existing Part 503 provisions should govern and therefore the

[62] As written, the §328(b)(5)(v) exclusion appears to apply solely to construction.

[63] See 40 C.F.R. §35.2005(b)(12), defining "complete waste treatment system" as "all the treatment works necessary to meet the requirements of title III of the [CWA], involving . . . the ultimate disposal, including **recycling or reuse, of the treated wastewater and *residues*** which result from the treatment process." (Emphasis added)

waste treatment exemption should be broadened to expressly include in the final rule that lands already subject to Part 503 land application requirements. (p. 2)

Agency Response: See summary response at 7.1.

National Rural Water Association (Doc. #14623)

7.142 We do not believe that a new rule should result in changing the historic regulatory understanding for coverage of water infrastructure. Any final rule should retain the current exclusion (33 CFR 328.3(a) and 40 CFR 122.2) for "waste treatment systems" and clarify that that the exclusion includes similar practices implemented by drinking water treatment systems. (p. 4)

Agency Response: See summary response at 7.1.

Berkshire Hathaway Energy Company (Doc. #14650)

7.143 A. The Agencies Should Clarify That Waste Treatment Systems Not Subject To Effluent Limitations or Otherwise Subject to Regulation are Exempt from Waters of the U.S.

The Agencies state that no changes are being proposed to the longstanding exclusion for waste treatment systems designed to meet the requirement of the Clean Water Act.[64] The waste treatment exemption has historically included surface impoundments or settling ponds that are part of a waste treatment system at an electric generation facility. However, if the Agencies proceed with the proposed expansion of the definition of waters of the U.S., changes will be required to the existing exemption for waste treatment systems because utilities will be required to rely on the waste treatment system exemption to a greater degree.

To illustrate, certain surface impoundments and settling ponds that may be considered as part of a waste treatment system may not be subject to effluent limitations under the Clean Water Act because the water is used in a closed-cycle system and is not discharged. Such surface impoundments and settling ponds have not historically been considered waters of the U.S. because they were not considered wetlands. Accordingly, companies have not needed to rely on the waste treatment exemption for exclusion of certain waste water systems. However, under the proposed expanded definition of waters of the U.S., these waste water systems could become jurisdictional. Accordingly, the waste treatment system exemption should be modified to specifically exempt waste treatment systems that are not subject to effluent limitations. In addition, waters that may otherwise be subject to future regulations, such as updated effluent limitation guidelines or coal combustion residual rules, should specifically be included in the exemption of waste treatment systems. (p. 4)

Agency Response: See summary response at 7.1. See also summary responses at 7.3.2 and 7.4.4 regarding exclusions for certain settling basins, cooling ponds, and stormwater control features.

[64] *Id*. at 22217. [*Definition of "Waters of the United States" Under the Clean Water Act*, 79 Fed. Reg. 76 at 22193 (April 21, 2014).]

American Public Power Association (Doc. #15008)

7.144 APPA has concerns that the proposed rule indicates that the agencies would interpret the waste treatment exclusion to mean that no waste treatment system qualifies for the exclusion unless the system was designed consistent with the requirements of the CWA. 79 Fed. Reg. at 22,199. Therefore, facilities designed prior to passage of the CWA could be in question under the proposed rule. Clarification of the waste treatment exclusion is critical for APPA's members, as they must be able to rely on the exclusion. The agencies should address which features and waters can be considered a waste treatment system. Moreover, the agencies should clarify that all on-site management of water, including transport, storage, treatment, and use, are non-jurisdictional. Any discharges into waters of the U.S. that result from these activities are already covered under Section 402 of the CWA. The agencies should engage with stakeholders that rely on the waste treatment exclusion to understand the confusion and unpredictability that surrounds this exclusion. After having these critical stakeholder discussions, the agencies should propose a revised rule that addresses the waste treatment exclusion and provides some much needed clarity for regulators and the regulated public. (p. 9-10)

Agency Response: See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins, cooling ponds, and wastewater recycling and stormwater control features.

Utility Water Act Group (Doc. #15016)

7.145 5. Implications for § 316(b) Regulation of Cooling Water Intake Structures

The definition of WOTUS also determines the applicability of EPA's CWA § 316(b) rules for new and existing facilities, which apply to facilities that withdraw "cooling water" from WOTUS and have any sort of NPDES permit. Although many facilities withdraw cooling water from natural waters, many others withdraw cooling water from purpose-built ponds or impoundments designed to capture on-site stormwater and snowmelt, ensure adequate cooling water supply, and reduce withdrawals from nearby jurisdictional waters. Some of those ponds also receive and remove heat from condenser cooling water, in which case they should fall within the waste treatment system exclusion. But others do not and, given their likely location (adjacent and connected, directly or indirectly, to jurisdictional waters), could be reclassified as WOTUS. Where the cooling impoundment is self-contained and does not require withdrawals from any jurisdictional water, reclassifying the impoundment as a WOTUS would trigger application of the § 316(b) rule and the substantial costs associated with that rule. 79 Fed. Reg. 48,300, 48,383-401 (Aug. 15, 2014); EPA, EPA-821-R-14-001, Economic Analysis for the Final Section 316(b) Existing Facilities Rule (May 2014), *available at* http://water.epa.gov/lawsregs/lawsguidance/cwa/316b/upload/Cooling-Water_Phase-4_Economics_2014.pdf. And where cooling water is replenished by withdrawing make-up water from a WOTUS, classifying the pond as jurisdictional would create enormous confusion regarding the point of compliance with the § 316(b) rules. (p. 28-29)

Agency Response: See summary response at 7.1. See also summary response at 7.3.2 regarding exclusion of certain cooling ponds.

7.146 The Agencies say that they are neither changing nor seeking comment on the waste treatment system exclusion here. 79 Fed. Reg. at 22,189 col. 2, 22,190 col. 1. But the Agencies, perhaps unintentionally, have made at least one change – the addition of a simple but crucial comma – that could be misinterpreted as narrowing this important exclusion. *See infra* p. 73. In meetings with industry and in various public statements, the Agencies have stressed their desire to maintain the *status quo* with respect to waste treatment systems and other industrial features not currently regulated as jurisdictional waters. Below, we explain why it is important for the Agencies to avoid unintended "regulation by punctuation" that could change the *status quo* for many waste treatment systems appropriately treated as non-jurisdictional at steam electric plants and other industrial facilities. If the Agencies intend their proposed definition of waters of the United States to cover any industrial waters, including any waste treatment system components of the type discussed below, which typically have not been considered jurisdictional, they may do so only after fully assessing the costs and other regulatory consequences, and providing adequate notice and an opportunity to comment. (p. 66-67)

Agency Response: **See summary response at 7.1.**

7.147 Waste treatment systems vary by facility, but at electric generating stations, they typically include: wastewater collection features (such as bins, basins, and channels), wastewater treatment facilities (such as cooling ponds, ash ponds, physical/chemical treatment tanks, dewatering bins, coal pile runoff collection ponds, raw water clarifier ponds, sludge management ponds, low volume waste ponds, and stormwater sedimentation ponds), and wastewater and treated water conveyances (such as pipes, channels, and conduits) that convey untreated or treated wastewater to and from these features. Waste treatment systems also include stormwater retention/detention basins at service centers, substations, and other fixed facilities. Waste treatment systems also include SPCC structures located at generating plants and other types of fixed facilities (*e.g.*, substations, transmission poles) containing transformers.

Some components of a waste treatment system may be enclosed *(e.g.*, in a building or a pipe), while other components typically are outdoors (*e.g.*, an ash pond, cooling lake or pond, or a runoff collection pond). The electric utility industry commonly uses systems of interconnected pipes, channels, basins, ponds, and other features for collecting and treating wastewater. As EPA has acknowledged, "[s]ystems for handling the products of coal combustion by hydraulic…conveyors [(*i.e.*, by water)] have been used for 50 years or more.[65]

EPA has long recognized that the collection and treatment of waste in ponds or impoundments is an important component of effective waste treatment. Indeed, the Agency's effluent limitations guidelines for the steam electric power generating category include technology-based limitations predicated on the level of control achievable by "ash ponds." Ash ponds hold and treat ash transport water via the settling of solids, or sedimentation. "Sedimentation processes promote gravity settling of solid particles to the bottom of the water column where accumulated solids are removed." American Water

[65] EPA, Development Document for Final Effluent Limitations Guidelines, New Source Performance Standards, and Pretreatment Standards for the Steam Electric Point Source.

Works Association, *Water Quality and Treatment* 163 (4th ed. 1990); see also Mackenzie Davis & David Cornwell, *Introduction to Environmental Engineering* 189 (2d ed. 1991). Supplemental treatment – for example, the addition of polymers or flocculants – can be designed economically by treating portions of ash transport water separated into treatment "cells."

Ash transport water is just one example of the type of wastestream that steam electric plants manage and treat in ponds or impoundments. As another example, coal-fired plants generally collect sediment-laden runoff from coal piles and then convey that sediment to coal pile runoff collection ponds where the sediment is allowed to settle out of the water before the water evaporates, is re-used, or, in many cases, is discharged.

Coal-fired power plants are not alone in using ponds or impoundments to treat wastewater. Like coal-fired plants, gas- and oil-fired plants, as well as nuclear plants, produce a variety of low volume wastewater and stormwater from the generating site. That water must be managed and treated to ensure compliance with permit requirements. Waste treatment ponds are an effective and proven technology for meeting such requirements – so much so that EPA itself identifies both wet and dry ponds as "best management practices" for controlling pollutant discharges from stormwater. See EPA, *Water: Best Management Practices, Post-Construction Stormwater Management in New Development & Redevelopment*, http://water.epa.gov/polwaste/npdes/swbmp/PostConstruction-Stormwater-Management-in-New- Development-and-Redevelopment.cfm (last updated July 2, 2014).

The treatment of heat is another important example of waste treatment systems at electric generating stations. Steam electric plants use condenser cooling water to transfer waste heat. Heated water from the plant may be conveyed to a cooling pond or impoundment, where the heat is treated by dissipation to the air. Cooled water within the cooling pond can be pumped back into the plant to start the cooling process again (in a closed loop system) or discharged to downstream "waters of the United States" (subject to CWA § 402 permitting requirements, including limits governing waste heat). Many of these features are man-made reservoirs that were created purposefully to serve an industrial facility, and they are different from natural waterbodies. As an example, most power plant cooling impoundments located in Texas are designed specifically for heat dissipation. Moreover, in most cases, the man-made features would not exist without the power plant.

Similarly, areas that might otherwise contain features consistent with jurisdictional wetlands (or "waters of the United States"), such as hydrophytic vegetation and hydric soils, can in fact be waste treatment systems. For example, EPA has recognized and encouraged the use of "constructed wetlands" for wastewater treatment. *See, e.g.*, EPA, EPA/625/1-88/022, Design Manual: Constructed Wetlands and Aquatic Plant Systems for Municipal Wastewater Treatment at 15 (Sept. 1988), *available at* http://water.epa.gov/type/wetlands/upload/design.pdf. EPA also considers wetlands restoration a method of abating pollution from nonpoint and point sources. *See* EPA, EPA-841-B-05-003, National Management Measures to Protect and Restore Wetlands 60 and Riparian Areas for the Abatement of Nonpoint Source Pollution at 43 (July 2005), *available at* http://www.epa.gov/owow/nps/wetmeasures/; EPA, EPA/832-R-93-005, Constructed Wetlands for Waste Water Treatment and Wildlife Habitat, 17 Case Studies

(Sept. 1993*), available at* http://www.epa.gov/owow/wetlands/pdf/ConstructedWetlands-Complete.pdf.

As this short overview demonstrates, water features ranging from constructed wetlands to ponds, lagoons, basins, and other impoundments, along with the ditches, channels, and canals that convey waste to and from those features, typically play an important role in waste treatment systems used at electric generating stations and related transmission and distribution facilities. They provide important environmental benefits by facilitating the proper handling and treatment of wastes produced during the process of generating, transmitting, and distributing electricity, ensuring that pollutant discharges are properly controlled *before* they discharge through a regulated point source to WOTUS.

If these waste treatment systems or their components were deemed WOTUS as a result of the Proposed Rule (for instance, as a result of their "adjacency" to a jurisdictional water), facilities would face the incongruous situation whereby an NPDES permit would be required for a discharge of wastewater or other fluids or substances *into* its treatment system,[66] and that permit would require compliance with all technology- and water quality-based limits before the water enters the treatment system. This would make those features redundant and essentially useless for their intended purpose. It also would add exorbitant costs (mostly borne by the ratepayers) for replacement systems that provide little or no additional benefit.[67] Alternative technologies, if practicable or available at all, could create their own environmental issues, for example by increasing impervious cover and requiring additional energy for pumping. Likewise, a Corps § 404 permit would be required for essential maintenance of waste treatment systems and the placement of control features or other structures within these features. (p. 67-71)

Agency Response: **See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain cooling ponds and wastewater recycling and stormwater control features.**

7.148 **B. Exclusion of All Parts of a Waste Treatment System Is Consistent with the Language of the Statute and Congressional Intent.**

Exclusion of treatment facilities from the definition of the WOTUS is consistent with the language of the statute and Congressional intent. These treatment facilities function as NPDES "end-of-pipe" treatment technologies and form an integral part of the total plant production and treatment process. Congress did not expect that EPA would view treatment facilities as regulated waters or regulate discharges into treatment facilities.

[66] Although § 122.45 of the NPDES regulations authorizes the establishment of "internal waste stream[ ]" limits where compliance monitoring at the point of discharge to WOTUS is impractical or infeasible, the authority to impose those limits is based on control of discharges from the point source to WOTUS. 40 C.F.R. § 122.45(h).

[67] State regulators also would face additional costs, since they would have to establish water quality standards for those waterbodies. As discussed *supra* pp. 13-16 and *infra* p. 63, absent a waste treatment system exclusion, EPA's Water Quality Standards rule, 40 C.F.R. § 131.10, forces regulators to choose between assigning patently arbitrary "fishable, swimmable" uses and associated criteria on manmade systems for which such uses are wholly inappropriate or spending their scarce time and treasure performing "use attainability analyses" in the hopes of justifying less restrictive uses and criteria.

Instead, Congress intended that each company would be free to make "its own, innovative…decision" on how to meet end-of-pipe standards.[68]

The plain language and structure of the CWA reflects Congressional intent that waste treatment systems would be viewed as components of point sources or facilities, not as WOTUS. The CWA defines "point source" as any "discrete conveyance…from which pollutants are or may be discharged." CWA § 502(14), 33 U.S.C. 1362(14) (emphasis added). Waste treatment systems are upstream of the point of discharge and thus are part of the system "from which" – not into which – pollutants are discharged within the meaning of the CWA. *Id.* Both the plurality opinion and Justice Kennedy's opinion in *Rapanos* identify and accept this important distinction and recognize that the CWA definitions conceive of "point sources" and "navigable waters" as separate and distinct categories. *Rapanos*, 547 U.S. at 735 (plurality), 771 (Kennedy, J.).[69] Excluding waste treatment systems from jurisdiction is essential to maintaining this distinction. (p. 71-72)

Agency Response: **See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins, cooling ponds, and wastewater recycling and stormwater control features.**

7.149 The waste treatment system exclusion is one important tool for avoiding those implications and preventing conflicts with NPDES requirements. (p. 73-74)

Agency Response: **See summary response at 7.1.**

7.150 Both Agencies' definitions include a parenthetical cross-reference to "cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition . . . ." 40 C.F.R. § 122.2(g); 33 C.F.R. § 328.3(a). The effect of that parenthetical is to exclude such ponds from protection under the waste treatment system exclusion. But, over thirty years ago, EPA withdrew the technology-based cooling pond regulations and accompanying definition that the parenthetical was designed to reference. See 45 Fed. Reg68,328 (Oct. 14, 1980) (proposed); 47 Fed. Reg. 52,290 (Nov. 19, 1982) (final). The Agencies propose (appropriately, we agree) to delete this parenthetical cross reference, recognizing that it refers to "an EPA regulation that is no longer in the Code of Federal Regulations." 79 Fed. Reg. at 22,217 col. 3. The preamble characterizes this change as non-substantive. *Id.* Again, we agree. EPA long ago withdrew its regulations designed to

[68] S. REP. NO. 92-414, at 59 (1971), reprinted in 2 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1477 (1973). Similarly, the Conference Report on the 1972 CWA states that:

> [T]he Administrator is required to establish standards of performance which reflect the levels of control achievable through improved production processes, and of process technique, etc., leaving to the individual new source the responsibility to achieve the level of performance by the application of whatever technique determined available and desirable to that individual owner or operator.

S. REP. NO. 92-1236, at 128 (1972) (Conf. Rep.), reprinted in 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 311 (1973).

[69] Justice Kennedy takes issue with the plurality for its "negative inference" that, because point source discharges and WOTUS are mutually exclusive, and the plurality assumes that point source discharges are always intermittent, waters that flow intermittently are more like point sources than WOTUS. *Id.* at 771-72. But Justice Kennedy's quarrel is with the assumption that all point source discharges are intermittent, not with the legal significance of the distinction between point source discharges and WOTUS.

constrain the use of cooling ponds and lakes, meaning that the substantive change occurred years ago. (p. 78-79)

Agency Response: **See summary response at 7.1.**

7.151 **2. The Waste Treatment System Exclusion Applies Without Regard to When or Why a System Was Originally Constructed or Whether It Requires an NPDES Permit.**

In many cases, waste treatment systems excluded from CWA jurisdiction involve components that were designed and constructed before the CWA was passed, that perform multiple functions, including treatment, or that do not require an NPDES permit. State and federal regulators routinely apply the waste treatment system exclusion to such systems, thereby excluding them from CWA jurisdiction.

For example, at several electrical generating stations in Florida, the treatment and subsequent movement of industrial wastewater from ponds to groundwater are regulated through a state regulatory program. The Florida Department of Environmental Protection's ("FDEP") Industrial Wastewater Program ("IWW") authorizes the use of "percolation ponds." Percolation ponds are artificial impoundments designed and operated to allow the vertical movement of treated water through the bed of the pond. The wastewater being treated in these ponds is composed mostly of neutralized, non-hazardous low-volume wastes from generating stations.

Because these ponds allow the movement of treated water to groundwater, which is not regulated under the CWA, and typically do not discharge to surface waters regulated under the CWA, these percolation ponds generally are not included or regulated in NPDES permits issued 71 by the FDEP. Instead, percolation ponds are regulated under a separate environmental permit issued by the FDEP under separate state statutes and rules. Therefore, while the design and operation of these ponds are subject to state regulation, the industry and state regulatory agencies consider these ponds to be waste treatment systems, not WOTUS regulated under the CWA. (p. 80-81)

Agency Response: **See summary response at 7.1. See also the summary response at 7.4.2 regarding the agencies' creation of an exclusion for certain wastewater recycling features, including percolation ponds.**

7.152 3. The Waste Treatment System Exclusion Applies to the System as a Whole, Including Related Conveyances.

Most waste treatment systems do not consist of a single impoundment, structure, or feature where all treatment functions occur. Rather, management of the wastewater to and from the places where treatment occurs is an intrinsic and important part of the waste treatment system. This principle should be so obvious as to encounter no opposition.[70]

[70] A passing statement in the Proposed Rule's preamble says: "Ditches may have been created for a number of purposes, such as irrigation, water management or treatment, and roadside drains. In order to be excluded, however, the ditch must be excavated wholly in uplands, drain only uplands, and have less than perennial flow." 79 Fed. Reg. at 22,203-04 (emphasis added). What this statement does not say, however, is whether such a ditch also could be excluded under the waste treatment system exclusion. We believe that the Agencies most likely failed to mention the exclusion in this context because, in their minds, it is settled that it should apply and therefore not worthy of

(After all, the word "system" itself connotes a set of connected parts of things forming a complex whole, not a single, isolated feature.) The Agencies and reviewing courts agree, confirming that channels linking the basin where treatment occurs are unavoidable and necessary components of a waste treatment system. See 2006 Grumbles Letter at 3; *Ohio Valley Envtl. Coal.*, 556 F.3d at 209 ("[S]tream segments, together with the sediment ponds to which they connect, are unitary 'waste treatment systems' . . . ."). Also, as the Agencies acknowledge, such channels often provide additional treatment. 2006 Grumbles Letter at 3.

In short, the waste treatment system exclusion has been properly interpreted and applied to include all of the drains and ditches that flow to sumps, lagoons, and other ponds, or whose contents are eventually pumped or discharged to a pond exempted under the waste treatment systems (e.g., ash ponds) and from there discharge to jurisdictional waters. (p. 82-83)

Agency Response: **See summary response at 7.1.**

7.153 **E. The Agencies Should Undo Their Inadvertent But Potentially Substantive Change to the Waste Treatment System Exclusion.**

The Agencies propose a subtle change in the waste treatment system exclusion that could be misinterpreted to narrow the exclusion (a result the Agencies have said they do not intend). The current rule excludes "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act." With this punctuation, the qualifier "designed to meet the requirements of the Clean Water Act" modifies only the phrase "treatment ponds and lagoons." The Proposed Rule would add a comma after "lagoons," thus excluding "[w]aste treatment systems, including ponds or lagoons, designed to meet the requirements of the Clean Water Act." Proposed 33 C.F.R. § 328.3(b)(1), 79 Fed. Reg. at 22,263 col. 1. This punctuation change could be interpreted as a substantive change to the provision. It can be read to change the reach of the qualifying language by applying it to all waste treatment systems. Under this reading, all systems, not just "treatment ponds and lagoons" to which the qualification currently applies, would have to be "designed to meet the requirements of the Clean Water Act" in order to fall within the exclusion. This creates new interpretative issues, as "designed to meet" could be construed narrowly or broadly.[71] For example, features that were constructed for waste treatment prior to the CWA's enactment in 1972 could not have been designed with CWA compliance in mind, yet such features often play an essential role in achieving compliance with current CWA requirements and are commonly

mention. If so, the Agencies should clarify that ditches that are part of a waste treatment system are covered by the waste treatment system exclusion. If that is not the case, however, the Agencies should explain their position and provide an opportunity for public comment.

[71] Even if the "designed to meet" language were applied to all waste treatment systems, it need not be read as preventing application of the exclusion to systems that pre-date the CWA, serve multiple functions, or require no NPDES permit. Absent temporal and other qualifications, it would be perfectly natural to read the "designed to meet" language as referring to those systems that currently function to reduce water pollution in some fashion. Such a reading is certainly consistent with the way in which the exclusion has been applied in most cases. But adding the comma invites unnecessary speculation and uncertainty, which we urge the Agencies to avoid.

excluded from regulation by virtue of the waste treatment system exclusion. The Agencies should avoid this interpretative minefield by deleting the new comma.

UWAG does not support this unacknowledged edit to the exclusion, which could limit the scope of the exclusion, converting currently excluded waste treatment systems into WOTUS with a single stroke. The Agencies have said they are not making any substantive changes to the provision. If so, they should remove the comma. If the Agencies nevertheless retain the new comma, they must acknowledge the comma, explain what it means, and afford an opportunity for public comment. (p. 83-84)

Agency Response: **See summary response at 7.1.**

Edison Electric Institute (Doc. #15032)

7.154 …today a utility can withdraw water from a river or lake to an on-site, constructed pond and then use that water in a closed-cycle system, with or without returning the water to the river or lake. Under current regulations, that pond typically would not be considered a water of the U.S. and use of the pond would not trigger related regulatory requirements (e.g., CWA section 402 permitting obligations for transfers of water to or from the pond, section 404 permitting obligations for maintenance activities associated with the pond, or section 316(b) cooling water intake structure requirements for withdrawals from the pond to the power plant for cooling purposes). However, the proposed rule categorically asserts jurisdiction over tributary and adjacent waters in a manner that could reclassify the pond as a water of the U.S. This would hinder the use of closed-cycle systems, which EPA's cooling water intake structure rules seek to promote. This also would be inconsistent with past practices and interpretations, creating enormous confusion about the jurisdictional status of the pond and related regulatory requirements. Under longstanding EPA policy, water that has been withdrawn from the waters of the U.S. is not subject to federal jurisdiction. [72] The proposed rule should maintain that distinction. (p. 20)

Agency Response: **See summary response at 7.1. See also the summary response at 7.3.2 regarding the exclusion of certain cooling ponds.**

7.155 …utilities also may have lagoons for the management of wastewater at their generation facilities. In some cases that wastewater may be discharged to a river under a section 402 national pollutant discharge elimination system (NPDES) permit. In other cases, the lagoon may not discharge. In either case, the lagoon should be covered by the waste treatment system exclusion. Like closed-cycle cooling ponds, under the current definition, such a lagoon would not be considered a water of the U.S. However, the proposed jurisdiction over "adjacent waters" under the proposed rule calls into the question the status of these lagoons. These lagoons are determined to be waters of the U.S., utilities may no longer be able to use them for storage, effectively requiring generation facilities immediately to find alternative, undoubtedly very costly, waste system management options that can be implemented within the physical constraints of a

[72] This policy is described in the preamble to EPA's water transfer rule, which distinguishes between "a situation in which, for example, an industrial facility takes in water for the purpose of cooling some part of the facility itself' where "the water used for cooling loses its status as a water of the United States" with transfers of water from one water body to another without an intervening industrial use. 73 Fed. Reg. 33697,33705 n.10 (June 13,2008).

given facility site. This would prevent the use of lagoons in cases where they may be desired and appropriate, and the orderly and cost-effective transition away from them in cases where utilities are required to move to other treatment options over time. Like cooling water, the water in these lagoons is being used for an industrial purpose and should not be considered a water of the U.S.[73] (p. 20-21)

Agency Response: **See summary response at 7.1.**

7.156 The proposed rule would maintain the current exclusion of waste treatment systems from being jurisdictional, and the agencies state that they do not propose any substantive changes to the exclusion for waste treatment systems, though they would add a comma so the exemption would apply to "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act." 79 Fed. Reg. 22217. However, although the exclusion itself is fairly straightforward, it has not always been applied consistently. As a result, the same type of feature may be treated as an excluded "waste treatment system" in one instance, but treated as a jurisdictional "water of the U.S." in another instance.

In addition, by adding a comma after the word "lagoons," the proposed rule could be read to narrow the scope of the exclusion by requiring that all "waste treatment systems," not just "treatment ponds or lagoons" as under the current rules, be "designed to meet the requirements of the CWA" to qualify for the exclusion. This could be interpreted to mean, for instance, that features that were constructed for waste treatment prior to the CWA's enactment in 1972 do not qualify for the waste treatment exclusion. This creates new interpretive issues, as "designed to meet the requirements of the CWA" can be construed narrowly or broadly. For example, features that were constructed for waste treatment prior to the CWA's amendment in 1972 could not have been designed with CWA compliance in mind. Yet these features often play an important role in achieving compliance with current CWA requirements, and are now commonly excluded from regulation by virtue of the waste treatment system exclusion.

Furthermore, the Agencies have missed an opportunity to delete long-suspended language included only in the NPDES version of the exclusion, and thus to bring greater clarity and certainty to the interpretation and application of the exclusion. The agencies should delete that suspended language to avoid confusion. (p. 21-22)

Agency Response: **See summary response at 7.1.**

7.157 The agencies should carefully maintain the waste treatment exemption to ensure that utilities and other businesses can continue to rely on their waste treatment conveyance and storage systems to comply with the water quality requirements of the CWA. The agencies should delete the proposed new comma in the exemption and the suspended limitation in the current section 402 waste treatment exclusion. (p. 30)

[73] *See* preceding note. This policy is described in the preamble to EPA's water transfer rule, which distinguishes between "a situation in which, for example, an industrial facility takes in water for the purpose of cooling some part of the facility itself' where "the water used for cooling loses its status as a water of the United States" with transfers of water from one water body to another without an intervening industrial use. 73 Fed. Reg. 33697,33705 n.10 (June 13,2008).

Agency Response: **See summary response at 7.1.**

Colorado River Water Conservation District (Doc. #15070)

7.158 The River District supports the continuation of the explicit exemption for ditches, canals, and retention/detention/treatment ponds that are part of wastewater treatment systems. We request that the proposed rule also include explicit exemptions for water management infrastructure related to permitted stormwater management and drinking water treatment systems. (p. 3)

Agency Response: **See summary response at 7.1. See also summary response at 7.4.4 regarding the agencies' creation of an exclusion for certain stormwater control features.**

Cleco Corporation (Doc. #15077)

7.159 **The exclusion for waste treatment systems should be clarified.**

The definition of Waters of the U.S. currently appears in EPA's NPDES regulations in 40 C.F.R. § 122.2. That definition section includes the waste treatment system exemption, which reads as follows:

Waste treatment systems, including ponds or lagoons designed to meet the requirements of the Clean Water Act (other than cooling ponds as defined in 40 C.F.R. 423.11 (m) which also meet the criteria of this definition) are not waters of the United States.

Both Agencies' definitions include the reference, in parenthesis, to "cooling ponds as defined by 40 C.F.R. 423.l1(m) which also meet the criteria of this definition." But, over thirty years ago, EPA withdrew the technology-based cooling pond regulations and the accompanying definition that the parenthetical was designed to reference. See 45 Fed. Reg. 67,629, 68,328 (Oct. 14, 1980) (proposed); 47 Fed. Reg. 52,115, 52,290 (Nov. 19, 1982) (final). The Agencies propose to delete this parenthetical cross reference since it refers to an EPA regulation that is no longer in the Code of Federal Regulations. 79 Fed. Reg. at 22,217. Cleco agrees that this action is appropriate. (p. 2)

Agency Response: **See summary response at 7.l.**

7.160 **The exclusion for waste treatment systems should be further clarified.**

The proposed rule excludes "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act." But the agencies retain, in 40 C.F.R. § 122.2, both: (1) the sentence proclaiming that the waste treatment exclusion "applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States," and (2) the accompanying footnote explaining that EPA suspended the sentence in question in 1980. See 79 Fed. Reg. at 22,268. Although this language was suspended in 1980, Cleco is concerned that some may have erroneously applied the suspended language in the past and that others might do so in the future. Retaining this suspended language simply adds confusion. To provide clarity, the Agencies should delete the suspended sentence and accompanying footnote from 40 C.F.R. § 122.2. (p. 2-3)

Agency Response: **See summary response at 7.1.**

7.161 **The proposed addition of a comma in the regulatory text changes the meaning of the waste treatment exclusion.**

The current rule excludes: "Waste treatment systems, including ponds or lagoons designed to meet the requirements of the Clean Water Act." With the punctuation in this sentence, the qualifier "designed to meet the requirements of the Clean Water Act" modifies only the phrase "ponds and lagoons." But the addition of a comma in the Proposal's regulatory text changes the meaning of the waste treatment exclusion. Again, in the existing regulations, the phrase "designed to meet the requirements of the CWA" modifies the examples of "treatment ponds or lagoons." 33 C.F.R. § 328.3(a). The proposed rule's addition of a comma after "treatment ponds and lagoons" narrows the scope of the exclusion by requiring that all "waste treatment systems," not just "treatment ponds or lagoons," be "designed to meet the requirements of the CWA" to qualify for the exclusion. This punctuation change could be interpreted as a substantive change to the provision. It can be read to broaden the reach of the qualifying language by applying it to all waste treatment systems. Under this reading, all systems, not just "ponds and lagoons" to which the qualification currently applies, would have to be "designed to meet the requirements of the Clean Water Act" in order to fall within the exemption. Cleco encourages the Agencies to remove the new comma inserted in the Proposal. (p. 3)

Agency Response: **See summary response at 7.1.**

7.162 **Waste-treatment system ditches should be included in the exemption.**

Ditches are often a necessary component of waste treatment systems. Historically, the waste treatment system exclusion has been properly interpreted and applied to include all of the drains and ditches that flow to sumps, lagoons, and other ponds, or whose contents are eventually pumped or discharged to a pond exempted under the waste treatment systems (e.g., ash ponds) and from there discharge to jurisdictional waters. Agencies should clarify in the final rule that ditches that are part of a waste treatment system are covered by the waste treatment system exclusion. (p. 3)

Agency Response: **See summary responses at 7.1 and 7.4.2.**

7.163 **An exemption should be added to the Proposal to clarify ponds and impoundments used for raw water storage and transfer are not Waters of the U.S.**

Raw water and other service ponds are used in facilities to store rain water, stormwater runoff, and water withdrawn from other water bodies, for eventual use by the facility. For those ponds that do not qualify as waste treatment systems, classifying this type of man-made water feature as a Waters of the U.S. could have important and costly impacts. For example, a particular impact could be a raw water storage pond falling under classification as a Waters of the U.S. could fall under 316(b) regulations for cooling water intake structures. Imposing section 316(b) requirements on cooling water withdrawals from ponds and reservoirs purpose-built to supply water for steam electric plants, would impose enormous costs without any corresponding environmental benefit. To avoid substantial and unnecessary impacts of this kind, Cleco requests that the Agencies add an exemption to clarify that ponds and impoundments used for raw water

storage and transfer are not Waters of the U.S., so as to allow their continued use without the creation of issues associated with water transfer. (p. 3-4)

Agency Response: See summary response at 7.1. See also the summary response at 7.3.2 regarding exclusion of certain cooling ponds.

NiSource Inc. (Doc. #15112)

7.164 The agencies should address which features and waters can be considered a waste treatment system. Moreover, the agencies should clarify that all on-site management of water, including transport, storage, treatment, and use, are non-jurisdictional. Any discharges into waters of the U.S. that result from these activities are already covered under section 402 of the Act. The agencies should engage with stakeholders that rely on the waste treatment exclusion to understand the confusion and unpredictability that surrounds this exclusion. After having these critical stakeholder discussions, the agencies should propose a revised rule that addresses the waste treatment exclusion and provides some much needed clarity for regulators and the regulated public. (p. 7)

Agency Response: See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins, cooling ponds, and wastewater recycling and stormwater control features.

Michigan Manufacturers Association (Doc. #15170)

7.165 The agencies state that they do not propose any changes to the exclusion for waste treatment systems, but the applicability of this exclusion has been anything but clear and agency interpretation of the scope of the exclusion has changed over time. Reliance on the waste treatment exclusion is critical for MMA's members. The agencies should address which features and waters can be considered a waste treatment system. Moreover, the agencies should clarify that all on-site management of water, including transport, storage, treatment, and use, are non-jurisdictional. Any discharges into waters of the U.S. that result from these activities are already covered under section 402 of the Act. The agencies should engage with stakeholders that rely on the waste treatment exclusion to understand the confusion and unpredictability that surrounds this exclusion. After having these critical stakeholder discussions, the agencies should propose a revised rule that addresses the waste treatment exclusion and provides some much needed clarity for regulators and the regulated public. (p. 4-5)

Agency Response: See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain cooling ponds and wastewater recycling and stormwater control features.

Ohio Utility Group (Doc. #15246)

7.166 Under the Ohio Revised Code, "treatment works" are defined as "any plant, disposal field, lagoon, dam, pumping station, building sewer connected directly to treatment works, incinerator, or other works used for the purpose of treating, stabilizing, blending, composting, oz holding sewage, sludge, sludge materials, industrial waste, or other wastes, except as otherwise defined." R.C. 6111.01(F). In addition, "disposal system" is defined as "a system for disposing of sewage, sludge, sludge materials, industrial waste,

or other wastes and includes sewerage systems and treatment works." R.C. 6111.01(G). Under Ohio's regulations, treatment works and disposal systems are excluded from the definition of "surface waters of the state" or "water bodies." Ohio Adm. Code 3745-1-02(13)(77) ("Surface waters of the state" or "water bodies" mean all streams, lakes, reservoirs, ponds, marshes, wetlands or other waterways which are situated wholly or partially within the boundaries of the state, except those private waters which do not combine or effect a junction with natural surface or underground waters. Waters defined as sewerage system, treatment works or disposal system in section 6111.01 of the Revised Code are not included.") (emphasis added). However, under the proposed definition, some treatment works or disposal systems may be considered "waters of the United States." (p. 2)

Agency Response: See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain cooling ponds and wastewater recycling and stormwater control features.

7.167 While the rule affirms that there is still an exclusion of "waste treatment systems," OUG would like U.S. EPA to confirm that the treatment systems defined under R.C. 6111.01 still fall within the exclusion of "waste treatment systems" because a reading of this broad definition of "tributary" appears to broaden the definition and could cover "treatment works" and "disposal systems," which are not subject to Water Quality Standards. (p. 3)

Agency Response: See summary response at 7.1.

7.168 The Utilities have also had mixed results with the Corps on whether small streams that drain in ash ponds are jurisdictional. In some instances, the Corps has determined that since an ash pond had a nexus with a water of the United States, the stream was jurisdictional. In other instances, the inlet stream was deemed non-jurisdictional. Under the proposed rule, it is likely that all inlet streams of this nature would be classified as a water of the United States… (p. 3)

Agency Response: See summary response at 7.1. See also Compendium 8 – Tributaries.

Wisconsin Electric Power Company and Wisconsin Gas LLC (Doc. #15407)

7.169 For the first time, the proposed rule extends the concept of jurisdiction by virtue of adjacency to non-wetland waters. Essentially all waters within the floodplain or riparian area of a jurisdictional water body or waters that have a shallow subsurface hydrological connection to a jurisdictional water body, have a significant nexus and will be jurisdictional by rule.

The proposed approach is certain to sweep in many features that have only remote and insubstantial connections with traditional navigable waters. Waters that used to be considered “isolated” and therefore beyond the scope of CWA jurisdiction will now be “adjacent” and the proposed “shallow subsurface hydrologic connection or confined subsurface hydrologic connection” language will be used to assert jurisdiction over any wet area, including on-site ponds and impoundments.

Such unbounded jurisdiction would have major impacts for countless industrial facilities that rely on industrial earthen settling basins for their operations. For example, our Oak

Creek Power Plant has several DNR-approved basins that are within several hundred feet of Lake Michigan. It is unclear what the jurisdictional result will be when a single water, such as a settling basin, is arguably included in the scope of the rule as a result of adjacency, and also expressly excluded by virtue of coverage under one of the categorical exclusions in 40 C.F.R. § 230.3(t) or § 232.2(2), such as the waste treatment exclusion, discussed below. The solution is for the rule to clearly exclude these types of facilities. The agencies should revise the proposed rule such that only wetlands can be jurisdictional by virtue of adjacency. (p. 5-6)

Agency Response: See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins, cooling ponds, and wastewater recycling and stormwater control features. See also Compendium 3 (Adjacent Waters) and Compendium 5 (Significant Nexus).

7.170 D. The Waste Treatment Exclusion is Unclear

The agencies should address which features and waters can be considered a waste treatment system. Moreover, the agencies should clarify that all on-site management of water, including transport, storage, treatment, and use, are non-jurisdictional. Any discharges of pollutants into waters of the United States that result from these activities are already covered under section 402 of the CWA. The agencies should engage with stakeholders that rely on the waste treatment exclusion to understand the confusion and unpredictability that surrounds this exclusion. After having these critical stakeholder discussions, the agencies should propose a revised rule that addresses the waste treatment exclusion and provides some much needed clarity for regulators and the regulated public. (p. 6)

Agency Response: See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins, cooling ponds, and wastewater recycling and stormwater control features.

SCANA Services, Inc. (Doc. #15660)

7.171 The proposed rule includes a change in punctuation in the waste treatment system exclusion. This change (the addition of a comma after "ponds and lagoons") could be interpreted to include all waste treatment systems, instead of just ponds and lagoons. Clarification is needed here to address whether a change in scope is intended. (p. 2)

Agency Response: See summary response at 7.1.

Lower Colorado River Authority (Doc. #16332)

7.172 The Proposed Rule includes an exclusion of "waste treatment systems, including treatment pond or lagoons, designed to meet the requirements of the Clean Water Act." 79 Fed. Reg. at 22,199. According to EPA and USAGE, the Agencies "propose no change to the exclusion for waste treatment systems designed consistent with the requirements of the CWA." 79 Fed. Reg. at 22,189. LCRA requests that EPA and USAGE confirm that this exclusion covers waste treatment systems such as those in place at electric generation utilities. (p. 4)

Agency Response: See summary response at 7.1.

Seminole Electric Cooperative, Inc. (Doc. #16363)

7.173 The amorphous yet undeniably expansionistic proposed definition of waters of the United States is especially problematic for steam electric utilities near jurisdictional waters. A specific concern is that some waste treatment systems could be seen as being waters of the United States under the extremely broad language of the proposed rules. Examples of such waste treatment systems include cooling ponds, ash ponds, industrial stormwater treatment ponds, rapid infiltration basins, settling basins, etc. Many such waste treatment systems very likely will be "adjacent" or "neighboring" under the proposed definition, due to Florida's unique, low gradient topography. If such waste treatment systems are considered to be waters of the United States, the regulatory consequences would be enormous. The treatment systems would no longer be able to serve their essential purpose (which is to treat wastewater), because EPA's regulations specifically state that waste assimilation and transport cannot be designated uses of waters of the United States. 40 CFR § 131.10(a).

Capturing such treatment works as waters of the United States would be a substandard policy choice, because permitted waste treatment systems cannot possibly be part of the aquatic inventory that Congress intended to protect under the CWA (in contrast to some wetlands, that do warrant protection). To assert that waste treatment systems are waters of the United States would be to negate their status as waste treatment systems. Although permitted waste treatment systems potentially could impact nearby jurisdictional waters, asserting jurisdiction is not a sensible approach to addressing potential impacts.

The current language of the waste treatment system exclusion is not adequate to solve the problems created by the proposed rule revisions, because courts have tended to interpret exclusions very narrowly. Thus, there is an acute need for changes to the proposed rule revisions. In that respect, Seminole supports the proposed definition of "waste treatment system" proposed in a separate comment letter by the Florida Electric Power Coordinating Group, Inc., Environmental Committee. (p. 3-4)

Agency Response: See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins, cooling ponds, and wastewater recycling and stormwater control features.

Tri-State Generation and Transmission Association, Inc. (Doc. #16392)

7.174 The waste treatment system exclusion is a long-held regulatory provision implemented in various sections and programs of the CWA. The proposed rule stated that the Agencies "do not propose to address the substance of the waste treatment system exclusion."[74] However, as written, one such proposed change reads:

Current exemption (33 CFR 328.3(a)(8)):

> *... Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.*

[74] *Id*. at 22217. [79 Federal Register (FR) 22263 and 22217]

Proposed rule exemption (33 CFR 328.3(b)(l)):

> *Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.*

The Agencies have significantly narrowed the exclusion by requiring that all waste treatment systems be "designed to meet the requirements of the Clean Water Act." Under the existing regulations, the phrase "designed to meet the requirements of CWA" only modifies the examples of "treatment ponds or lagoons."[75]

The proposed language indicates that all waste treatment systems that were not designed to meet the requirements of the CWA, which could include, for instance, those that were designed to be zero discharge or to meet the Surface Mining Control and Reclamation Act of 1977 (SMCRA) environmental protection standards would not be exempt from jurisdiction. By mandating that all waste treatment systems be designed to meet the requirements of the CWA, the Agencies' administrative change will have the unintended consequence of potentially denying application of the exclusion to many existing waste treatment systems. Because the Agencies' proposal is not intended to "address the substance" of or narrow this exclusion, the Agencies should remove the new comma from the regulatory text.

Tri-State agrees with the Agencies' intent to not change the existing exclusion. Water reuse is essential for Tri-State operations in the arid to semi-arid western United States, to preserve and protect important water resources. Ditches, onsite ponds, impoundments, and other water management features are used to control and recycle waters onsite, reducing freshwater needs. Some water management features are created on dry lands, while others are created by impounding or modifying existing waters of the United States pursuant to Section 404 permits.

… In the alternative to removing the additional comma, Tri-State urges the Agencies to revise the proposal to maintain the current exclusion for waste treatment systems designed for any water quality purpose. Accordingly, TriState suggests the following added boldface text to the proposed language for 33 CFR 328.3(b)(l) and equivalent sections in the other regulations proposed for revision. Waste treatment systems, including treatment ponds or lagoons~ such as hut not limited to those designed to meet the requirements of the Clean Water Act, Surface Mining Control and Reclamation Act or other water quality requirement of a Local, State or Federal agency. (p. 6-7, 8)

Agency Response: **See summary response at 7.1.**

7.175 The Agencies should also clarify, either in the preamble or the regulatory text, that the term "treatment" for purposes of the waste treatment system exclusion includes, but is not limited to, methods such as wastewater and stormwater retention, concentration (evaporation), settling, and active and passive treatments to remove or reduce contaminants. Power generation and mining companies, and other industries, uniformly rely on these forms of treatment to support their operations and ensure that, if there are any downstream discharges, they meet all applicable NPDES permitting requirements. Wastewater treatment does not necessarily require the addition of chemicals or the use of

[75] *e.g.*, 33 C.F.R. § 328.3(a).

complex technologies like ion exchange or reverse osmosis, and may consist of simply allowing suspended solids to settle prior to discharge under a NPDES permit. Natural processes, such as evaporation or pollutant uptake by aquatic vegetation, can effectively help solids settle out and even remove pollutants. Collecting and retaining wastewater and stormwater runoff in on-site water management features is a widely used form of waste treatment in many industries. In fact, construction of stormwater treatment ponds is often a required "best management practice" to control and treat stormwater runoff and protect downstream WOTUS. Such required features should not be jurisdictional WOTUS.

Finally, the Agencies should explicitly recognize that ditches, feeder streams, and other on-site waters carrying flow to and from ponds and impoundments used to treat wastewater and stormwater are part and parcel of waste treatment systems at industrial facilities and are included in the waste treatment exemption. Such flowing waters are necessary to convey wastewater and stormwater, and increase sediment and other pollutants settling prior to discharge to downstream WOTUS. Waste or process water that is conveyed to downstream jurisdictional waters requires an NPDES permit when a pollutant is added and, not surprisingly, NPDES permitting authorities have typically agreed that it would be senseless to require additional permits above the point of discharge to downstream jurisdictional waters. Nevertheless, to avoid potential confusion in the field concerning the scope of the waste treatment system exclusion, the Agencies should make it clear that the exclusion encompasses both ponds/impoundments and the related flowing waters within a facility project site that are necessary to convey waters to and from those ponds and impoundments as part of the treatment process. (p. 8)

Agency Response: See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins, cooling ponds, and wastewater recycling and stormwater control features.

Xcel Energy (Doc. #18023)

7.176 The agencies should also address which features and waters can be considered a waste treatment system. The agencies should engage with stakeholders that rely on the waste treatment exclusion to understand the confusion and unpredictability that surrounds this exclusion. After having these critical stakeholder discussions, the agencies should propose a revised rule that addresses the waste treatment exclusion and provides some much needed clarity for regulators and the regulated public. (p. 8)

Agency Response: See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins, cooling ponds, and wastewater recycling and stormwater control features.

Alliant Energy Corporate Services, Inc. (Doc. #18971)

7.177 The WTS provision currently provides an exclusion from WOTUS for "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act" 40 C.F.R. §122 .2. EPA and the Corps have acknowledged that WTS are not jurisdictional and should remain excluded from any definitions of WOTUS and thus have "proposed no change to the exclusion for waste treatment systems designed consistent with the requirements of the CWA" (79 Fed. Reg. at 22,189). Alliant Energy

supports the EPA and the Corps' desire to maintain the WTS exclusion. However, a subtle change to the WTS exclusion is noted in the proposed rule as follows: "Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" (79 Fed. Reg. at 22,193). Adding a comma after "lagoons" implies that all systems, not just treatment ponds and lagoons, would have to be "designed to meet the requirements of the Clean Water Act" in order to fall within the exclusion. This creates confusion. For example, a facility may have a WTS with components constructed prior to and after the enactment of the CWA which are covered under the same NPDES permit. It's unclear how the proposed WTS exclusion language, with the additional comma, would apply to such a facility.

In addition, the proposal provides little clarity on other lingering issues regarding implementation and interpretations of the WTS exclusion. Historically, the WTS exclusion has failed to provide consistent application or clear legal - standing for utilities. Alliant Energy utilizes various structures, such as ash ponds, cooling ponds, stormwater run-off ponds, and various conveyances to manage and treat water at its generating facilities. Periodic maintenance, such as dredging, is required for these systems to ensure efficient operation. Without the WTS exemption, these activities would require individual permitting, which would have compounding negative impacts to the facility's operational status and availability. (p. 3)

Agency Response: **See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins, cooling ponds, and wastewater recycling and stormwater control features.**

7.178 **Considerations:**

Alliant Energy has the following suggestions for EPA and the Corps to consider when editing the proposal:

- Clearly define all WTS structures and water features, including influent conveyance and effluent discharge, on -site storage, treatment, and site maintenance (e.g., stormwater management) or otherwise "in-use" waters, which are non-jurisdictional and, therefore, covered by the WTS exclusion.

…

- Clarify that cooling ponds are considered Waste Treatment Systems and therefore, excluded from WOTUS. See the Federal Water Quality Coalition's comments for further detail. (p. 3-4)

Agency Response: **See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins, cooling ponds, and wastewater recycling and stormwater control features.**

South Carolina Public Service Authority (Doc. #18860)

7.179 The proposed rule asserts that "[t]he agencies propose no change to the exclusion for waste treatment systems designed consistent with the requirements of the CWA." The proposed rule provides that "[w]aste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" are not WOTUS. Despite the agencies' claims that nothing has changed with respect to this exclusion, the

language of the proposed rule indicates that the agencies would interpret the waste treatment exclusion to mean that no waste treatment system qualifies for the exclusion unless the system was designed consistent with the requirements of the CWA. Reliance on the waste treatment exclusion is critical. These systems and their discharges are already covered under Section 402 of the CWA. Additional regulation under Section 404 would result in an unintended and unworkable regulatory outcome. There should be no question that systems for on-site, or off-site through legal rights-of-ways, transport, storage, treatment, and use of water, including stormwater, wastewater, drinking water, cooling water, process water, and raw water are not regulated under Section 404.

These comments are also applicable to stormwater systems operating under MS4s and/or local ordinances, and systems handling stormwater discharges from construction activity. Regulation of these systems as WOTUS would be unmanageable and would have direct effect on essentially all of our customers. (p. 4-5)

Agency Response: **See summary response at 7.1. See also summary responses at 7.3.2, 7.4.2, and 7.4.4 regarding exclusions for certain settling basins, cooling ponds, and wastewater recycling and stormwater control features.**

Center for Biological Diversity, Center for Food Safety, and Turtle Island Restoration Network (Doc. #15233)

7.180 …while we agree that waste treatment systems may be properly excluded if they are properly regulated under other sections of the CWA, we are concerned that where wastewater treatment systems include natural, restored, or manmade wetlands, swales, etc., the proposed rule does not clarify how discharges from those features will be addressed by EPA as WOTUS or as wastewater systems? (p. 10)

Agency Response: **See summary response at 7.1.**

Natural Resources Defense Council et al. (Doc. #15437)

7.181 **C. The Rule Should Limit the Current Exemption for Waste Treatment Systems**

The proposal excludes "[w]aste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" from being considered Waters of the United States and therefore jurisdictional under the Act. This aspect of the proposal is unchanged from the current regulations. Because EPA and the Corps are not proposing to do anything new, the Federal Register notice accompanying the proposal contains no commentary or explanation for the exemption.[76]

[76] Indeed, the agencies appear to be trying to wall off this exemption from public comment and perhaps even judicial review. See 79 Fed. Reg. at 22,190 (discussing exemptions and stating, "the agencies do not seek comment on these existing regulatory provisions"). However, this exemption is centrally related to the core elements of this rulemaking, especially because many so-called waste treatment systems would qualify as impoundments of jurisdictional waters, such that they should be categorically protected under this proposal. Moreover, as the history recounted in the text indicates, the exemption as currently implemented has not been subjected to notice-and-comment rulemaking, such that it is only fair to the public that the provision be examined in this rulemaking. Accordingly, the agencies must carefully consider comments on this exemption, and should ensure that any final provision exempting waste treatment systems is consistent with the original intent of the regulatory provision.

We have considerable concern with the agencies' current practice with regard to this exemption for waste treatment systems. Since the exemption was written into the regulations, EPA and the Corps have attempted to expand it to cover waters for which it plainly was not intended. In 1980, EPA amended its regulations to provide that:

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act … are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.[77]

Clearly, the exclusion was limited. In view of the fact that the Act "was not intended to license dischargers to freely use waters of the United States as waste treatment systems, the definition makes clear that treatment systems created in those waters or from their impoundment remain waters of the United States."[78] Although the second sentence of the regulatory exclusion was suspended in order to dispel concerns that pre-existing treatment systems would be retroactively brought into the regulatory system,[79] the exemption was not meant to be a wholesale authorization of anything described as a "waste treatment system." To the contrary, EPA's initial implementation of the rules rejected a sweeping interpretation; the agency argued in litigation that in-stream disposal of coal mining waste did not qualify for the exemption.[80]

Unfortunately, over time, EPA and the Corps have reversed this interpretation, and now allow sources to use the regulatory exemption to treat new waste treatment facilities in protected waters as excluded from the Clean Water Act. Under the agencies' revised interpretation, a new impoundment of waters of the United States is able to qualify for the waste treatment system exclusion if it is established via a section 404 permit.[81] This position has since been upheld in litigation.[82]

We strongly oppose this approach – nothing is more inconsistent with the basic premise of the Clean Water Act and its foundational goal of eliminating discharges of pollutants

[77] *W.Va. Coal Ass'n v. Reilly*, 728 F. Supp. 1276, 1289 (S.D. W.Va. 1989) (quoting 40 C.F.R. § 122.3 (1980)).
[78] *Id*. (quoting 45 Fed. Reg. 33,298 (May 19, 1980)).
[79] *Id*. (citing 45 Fed. Reg. 48,620 (July 21, 1980)).
[80] *Id*. at 1289-90 (deferring to EPA's interpretation that treatment ponds were regulated "impoundments," not excluded "waste treatment systems"). *See also* Memorandum from Marcia Williams, EPA Office of Solid Waste Director, to James H. Scarbrough, EPA Region IV Residuals Management Branch Chief, attachment B (Apr. 2, 1986) ("EPA applies a standard which treats newly created impoundments of waters of the U.S. as 'waters of the U.S.,' not as 'waste treatment systems designed to meet the requirements of the CWA,' whereas impoundments of 'waters of the U.S.' that have existed for many years and had been issued NPDES permits for discharges from such impoundments are 'wastewater treatment systems designed to meet the requirements of the CWA' and therefore are not 'waters of the U.S.'"), available at http://yosemite.epa.gov/osw/rcra.nsf/documents/4BD7508AD59EA15F852565DA006F0A63.
[81] Memorandum from LaJuana S. Wilcher, EPA Assistant Administrator, to Charles E. Findley, Director, Water Div., Region X, U.S. Army Corps of Eng'rs, on Clean Water Act Regulation of Mine Tailings Disposal (Oct. 2, 1992); *see also* State Program Requirements; Approval of Application to Administer the NPDES Program; Texas, 63 Fed. Reg. 51,164, 51,183-84 (Sept. 24, 1998); U.S. EPA, Guiding Principles for Constructed Treatment Wetlands at 16 (Oct. 2000), available at http://water.epa.gov/type/wetlands/constructed/upload/guiding-principles.pdf.
[82] *See Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 211-16 (4th Cir. 2009) (upholding the agencies' interpretation).

into waterways[83] than allowing polluters to convert the nation's waters into waste dumps. The agencies should use the opportunity of this rulemaking to explicitly limit the application of the waste treatment systems exemption to pre-existing facilities. (p. 58-60)

Agency Response: **See summary response at 7.1.**

Waterkeeper Alliance et al. (Doc. #16413)

7.182 **IX. WASTE TREATMENT SYSTEMS SHOULD NOT BE CATEGORICALLY EXCLUDED FROM THE DEFINITION**

A. History of the Waste Treatment System Exclusion

On May 19, 1980, EPA issued a final rule that made clear that waste treatment systems created by impounding "waters of the United States" are not exempt from regulation under the CWA.[84] Specifically, the rule stated:

> [w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 C.F.R. § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. *This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States.*[85]

In response to industry pressure, however, EPA suspended the final sentence of the regulation, which states that "[t]he exclusion applies only to manmade bodies of water which neither were original created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States," just a few months later.[86]

EPA expressly cited the utility industry's concern that they would now have to obtain an NPDES permit to discharge into existing coal ash dumps that were created by impounding "waters of the United States" as part of its justification for suspending this part of the rule.[87] At that time, EPA claimed that this was a temporary suspension and promised to "promptly [] develop a revised definition and to publish it as a proposed rule for public comment. At the conclusion of that rulemaking, EPA [stated] it w[ould] amend the rule, or terminate the suspension."[88]

EPA never followed through on its promise to address this important issue, allow the public an opportunity to provide comments, and finalize a new regulation or terminate the suspension. EPA, along with the Corps, is now proposing to formally codify the waste

[83] 33 U.S.C. § 1251(a)(1) ("it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985").
[84] 45 FR 33,290, 33,424 (May 19, 1980).
[85] *Id*. at 33,424 (emphasis added).
[86] 45 Fed. Reg. 48,620, 48,620 (July 21, 1980).
[87] *Id.*
[88] *Id.*

treatment system exclusion without providing notice and comment.[89] In the current proposed rule, the agencies state that they are not accepting public comment on the waste treatment exclusion because they maintain they have proposed no changes to the waste treatment system exclusion.[90] Instead of making good on the promise it made over thirty years ago, EPA is now attempting to evade compliance with the CWA and Administrative Procedures Act by bootstrapping the impermissible exclusion onto the "waters of the United States" rule without notice and comment.

B. Coal Ash Surface Impoundments

This exclusion has had and will continue to have serious consequences for our nation's waters if the agencies finalize the proposed waste treatment exemption. For example, it has been a common practice for the utility industry to impound streams and rivers to create waste dumps for coal ash[91] and other wastes associated with coal-fired power plants. In fact, EPA cited the utility industry's concern about coal ash impoundments as one of the primary reasons EPA suspended the sentence making clear that permits are required for discharges into a waste treatment system created by impounding waters of the United States.[92] Coal-fired power plants generate millions of gallons of wastewater loaded with toxic pollutants like arsenic, boron, cadmium, chromium, lead, mercury, and selenium into our rivers, lakes, and streams each year. This pollution is discharged directly from the power plant; flows from old, unlined surface impoundments or "ponds" that many plants use to store toxic slurries of coal ash and smokestack scrubber sludge; and seeps from unlined ponds and landfills into ground and surface waters. EPA estimates that *at least 5.5 billion pounds* of pollution are released into the environment by coal-burning power plants every year.[93] Coal-burning power plants are responsible for at least 50 to 60 percent of the toxic pollutants discharged into waters of the U.S-more than the other nine top polluting industries *combined*.[94]

Coal combustion wastewaters contain a slew of toxic pollutants that can be harmful to humans and aquatic life in even small doses. Due to the bioaccumulative nature of many of these toxins, this pollution persists in the environment, and even short-term exposure can result in long-term damage to aquatic ecosystems. In short, coal plant water pollution has serious public health consequences and causes lasting harm to the environment. According to EPA, power plant pollution has caused over 160 water bodies not to meet state water quality standards, prompted government agencies to issue fish consumption advisories for 185 waters, and degraded 399 water bodies across the country that serve as public drinking water supplies.[95]

[89] *See* 79 Fed. Reg. 22,188, 22,189 (Apr. 21, 2014).
[90] 79 Fed. Reg. at 22,190.
[91] Coal combustion waste or coal ash are wastes "from the combustion of coal in power plants and captured by pollution control technologies, like scrubbers." U.S. Envtl. Prot. Agency, Coal Combustion Residuals - Proposed Rule, http://www.epa.govjoswjnonhazjindustrialjspecialjfossiljccr-rulej (last visited Nov. 12, 2014).
[92] 45 Fed. Reg. at 48,620.
[93] EPA, Environmental Assessment for the Proposed Effluent Limitation Guidelines and Standards for the Steam Electric Power Generating Point Source Category 3-14 (Apr. 2013), Docket No. EPA-HQ-OW-2009-0819-2260 [hereinafter EA].
[94] *Id*. at 3-13.
[95] http://water.epa.gov/scitech/wastetech/guide/steam-electric/proposed.cfm.

Utilities in other states have also created coal ash dumps by impounding or burying a waters of the United States. For example, the FirstEnergy Little Blue Run impoundment in Pennsylvania, the nation's largest coal ash impoundment, was created by damming Little Blue Run stream. The Pennsylvania Department of the Environment took enforcement action for widespread pollution caused by this leaking impoundment and recently ordered a $169 million dollar cleanup and closure of Little Blue Run.167 Although EPA claims that the waste treatment exclusion is not a wholesale exemption from compliance with the CWA because they interpret it to apply only to impoundments that had been in existence for many years at the time it first suspended the final sentence of the definition, the plain language of the regulation includes no grandfather provisions or other limiting language related to the age of the impoundment. Further, EPA appears to be backtracking on this interpretation to allow new impoundments to claim the exemption so long as they obtain a § 404 permit. In short, EPA is proposing to codify a regulation that creates a gaping hole in the CWA and authorizes utilities and industrial operators to use our nation's waters as their own private sewers-all while refusing to follow notice and comment requirements of the CWA and the Administrative Procedures Act. (p. 61-64)

Agency Response: **See summary response at 7.1.**

Association of State Floodplain Managers, Inc. (Doc. #19452)

7.183 **6. The proposed rule includes language reiterating current exemptions for waste treatment systems. However, the regulation of natural or artificial waters that are used to convey or treat stormwater is not clear; this is a long standing issue that is further complicated by the proposed rule.**

Regulations and exemptions for waters conveying stormwater should be clarified in the final rule and in implementing guidance. In addition, any distinctions between §404 dredge and fill requirements, and the regulatory scheme under §402 – including stormwater treatment – should be clarified.

…

It is sometimes unclear whether cooling ponds are "waste treatment systems" or treated as such, particularly when a cooling pond is located in the jurisdictional water (i.e. mangroves).

… (p. 9)

Agency Response: **See summary response at 7.1. See also summary responses at 7.3.2 and 7.4.4 regarding exclusions for certain cooling ponds and stormwater control features.**

The Association of State Wetland Managers (Doc. #14131)

7.184 **7. The proposed rule includes language reiterating current exemptions for waste treatment systems. However, the status of regulation of natural or artificial waters that are used to convey or treat stormwater is not clear. This is a long standing issue that is further complicated by the proposed rule.**

Regulations and exemptions for waters conveying stormwater should be clarified in the final rule and in implementing guidance. In additions, any distinctions between §404 dredge and fill requirements, and the regulatory scheme under §402 – including stormwater treatment – should be clarified.

- The basic underlying question of whether stormwater collection and treatment systems are considered to be wastewater treatment systems must be clarified. In some circumstances, artificial stormwater treatment ponds have reportedly been identified by federal agency staff as wastewater systems, but in other cases they have been treated as waters of the United States. Situations where natural waters are used to collect, store, convey, or filter stormwater become even more complicated. It should be noted that a regulatory system that works for dredge and fill activities may not be efficient for §402 permitting, and vice versa. Therefore it is likely that other regulatory tools – including exemptions (e.g. for maintenance), general permits, and so on – may be needed to effectively accommodate both program areas.
- Urban agencies are concerned with MS4 stormwater collection systems and the extent to which these systems may become subject to §404 permitting.
- It is sometimes unclear whether cooling ponds are "waste treatment systems" or treated as such, particularly when a cooling pond is located in the jurisdictional water (i.e. mangroves).
- A number of questions have been raised regarding jurisdiction over natural waters used to convey and filter stormwater. In some instances, these waters were used to convey stormwater prior to regulation under the CWA. Some of these waters are and should remain jurisdictional particularly when they are part of the natural stream and waterbody system that existed historically.
- The distinction between wetlands or other waters that store or convey stormwater, and those wetlands used specifically to treat or filter stormwater, also raises questions regarding the scope of the wastewater system exemption
- Finally, ASWM recognizes that the §402 and §404 programs have distinctly different goals and requirements as applied to stormwater management. Therefore, we urge that EPA recognize these distinctions in the final rule and in subsequent guidance. (p. 8)

Agency Response: See summary response at 7.1. See also summary responses at 7.3.2 and 7.4.4 regarding exclusions for certain cooling ponds and stormwater control features.

Caloosahatchee River Citizen's Association (Doc. #4711.2)

7.185 **Urban waste treatment systems.** In our local watersheds, approximately 200,000 dwellings process their sewage through septic tanks and unregulated "package plant" processors. Poorly treated effluent flows into our drainage canals and thence into formal tributaries of waters of the United States. This effluent contains fecal bacteria as well as trace amounts of mercury and other metals that have been disposed in a household. The Caloosahatchee River has demonstrated discernible levels of dissolved pharmaceutical products that are not removed by wastewater treatment or septic tanks. Nutrient pollution

– nitrogen and phosphorus from human sources – is thought to be equal or greater than nutrient pollution from animal agriculture. Yet the presence of nutrient pollutants, metals, and pharmaceuticals that originate from human wastes and disposals is categorically untouchable due to the exclusion of urban waste waters.

One primary purpose and function of the CWA is to prevent the discharge of biological and medical wastes, sediments, nutrients, and all other forms of pollutants into the "waters of the United States," because these pollutants endanger the nation's public health, drinking water supplies, shellfish, fin fish, recreation areas, etc. Because the entire tributary system of the traditional navigable waters or the territorial seas is interconnected, pollutants that are dumped into any part of the tributary system eventually are washed downstream to traditional navigable waters, interstate waters, or the territorial seas where those pollutants endanger public health and the environment. The significant nexus relating to pollution transport (or prevention of such transport) from all tributaries of traditional navigable waters and the territorial seas to their downstream waters in and of itself justifies the assertion of CWA jurisdiction including all tributaries by rule. (p. 3-4)

Agency Response: **See summary response at 7.1.**

Earthjustice (Doc. #14564)

7.186 III. WASTE TREATMENT EXCLUSION

Earthjustice strongly objects to the proposal to retain the "waste treatment system" exclusion, particularly given that EPA has never allowed for public notice and comment on the current version of this section of the rule. EPA lacks authority to exempt waters of the U.S. from the protections of the Clean Water Act. This exclusion is a major affront to the Clean Water Act and should be deleted. If not, at a minimum EPA must add a provision in the text of the rule explicitly barring its application to waters of the U.S. If this exclusion is retained, it can only be applied to manmade waste treatment systems constructed in uplands that are not waters of the U.S. As it stands, the waste treatment system exclusion contravenes the clearly expressed congressional intent to protect all waters of the U.S., including impounded waters, and it therefore fails Step One of *Chevron*. Moreover, it is an unreasonable and therefore impermissible interpretation under Step Two, and also does not represent reasoned decisionmaking supported by the record.

In various parts of the country—mountainous regions of Appalachia, Iron Range states in the Great Lakes, mining and agricultural areas of the west and in Alaska—the "waste treatment system" exclusion is routinely invoked by federal and state agencies to allow the impoundment of natural streams or wetlands, or the filling or excavation of lakes and wetlands, to drain runoff from surface mines and/or to hold tailings or overburden from mining operations.[96] Playa lakes have been used as animal waste retention ponds for

[96] *See* Bernhardt and Palmer, *The Environmental Costs of Mountaintop Mining Valley Fill Operations for Aquatic Ecosystems of the Central Appalachians*, Ann. N.Y. Acad. Sci. 1223, 39–57, at 43 (2011).

confined animal feeding operations.[97] Generally (almost always) the natural stream, lake, or wetland would be considered a water of the U.S. under the existing or proposed rules.

Under current practice and the so-called "waste treatment system" exception, the now impounded/excavated/filled waterbody loses its status as a protected water under the Clean Water Act, meaning that it does not have to meet basic water quality standards and the mining or coal or utility is free to dump pollutants into the stream or lake or wetland without the basic protections and requirements of a Clean Water Act NPDES permit. These waste treatment ponds are often filled with things like toxic coal ash, acid-leaching mine tailings or overburden from sulfide ore deposits that will also leach acid, selenium, and other toxic metals. The ponds are often filled with sediment that can decimate spawning areas and that can affect light and temperature necessary for aquatic life. The impounded wastes typically *are not* isolated from waters of the U.S., and in most cases are designed to discharge directly into protected waters. The "treatment" that occurs in these impoundments is frequently a farce, and often consists of nothing more than allowing the heaviest sediments in the discharges to settle to the bottom of the pond while the remaining untreated effluent is discharged into downstream waters. This practice causes serious water quality degradation downstream, even when discharges from the waste ponds are covered by permits. Usually water quality constituents such as hardness, conductivity, chlorides, sulfates, temperature and pH are adversely affected. This practice and result is utterly absurd and plainly contrary to law.

First, EPA and the Corps lack authority to adopt a regulation that empowers the agencies to exclude waters that qualify as "waters of the U.S." from statutory coverage under § 502(7), as well as from all of the safeguards that would otherwise protect that water under the Clean Water Act. *National Ass'n of Manufacturers v. Dept. of Labor*, 159 F.3d 597, 600 (D.C. Cir. 1998) ("There is, of course, no such 'except' clause in the statute, and we are without authority to insert one."). This exclusion goes well beyond EPA's authority to interpret and apply the Act. *Cf. Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1372 (D.C. Cir. 1977) (striking down an EPA rule that attempted to exempt certain categories of point sources from the permit requirements of Clean Water Act section 402). Since EPA cannot exempt categories of point sources from NPDES permit requirements, EPA lacks the authority to do so here by creating an artificial exclusion from the definition of waters of the U.S. Furthermore, the exclusion is breathtakingly broad, with no apparent limit on the use of our nation's waters as waste dumps. This is unlawful. See *Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 861 (D.C. Cir. 2006) (rejecting reading of a statute where "there is no stopping point"); *Valdes v. United States*, 475 F.3d 1319, 1328 (D.C. Cir. 2007) (rejecting a legislative interpretation that "appears to lack a limiting principle").

This exclusion is particularly arbitrary in light of the fact that, in almost all other circumstances, impoundments are assiduously guarded within the definition of waters of the U.S. under subsection (s)(4). Earthjustice agrees that the inclusion of impoundments under (s)(4) is justified because "as a legal matter an impoundment of a 'water of the

[97] *See* EPA Region 6, *National Pollutant Discharge Elimination System General Permit and Reporting Requirements for Discharges From Concentrated Animal Feeding Operations*, 58 Fed. Reg. 7610, 7620-21 (February 8, 1993).

United States' remains a 'water of the United States'…." 79 Fed. Reg. at 22201 (discussing *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379 n.5 (2006) and *U.S. v. Moses*, 496 F.3d 984 (9th Cir. 2007)). The only difference between the impoundments that are covered under subsection (s)(4) and those that are excluded through the artifice of the "waste treatment system" exclusion is the fact that the latter are intended to be filled with waste.[98] This is not a reasonable or permissible interpretation of the Act, and it therefore also fails Step Two of *Chevron*. Nor does it constitute reasoned decisionmaking supported by the record.

Second, the proposal to retain the so-called waste treatment system exclusion in its current form violates the notice-and-comment requirements of the Administrative Procedure Act. 5 U.S.C. § 553. The history of the current rule shows that this exclusion was not originally intended to allow the current practice of using the nation's waters as waste dumps. The 1980 regulatory definition of waters of the U.S. clearly provides that the waste treatment exclusion "applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States." Several months later, EPA published notice purporting to "suspend" the operation of this language, but not replacing it with anything else or further explanation. The omission of the language was never the subject of a notice and comment public rulemaking process despite the fact that it plainly significantly alters the law with respect to application of the protections of the Clean Water Act. Now the proposed rule specifically discourages members of the public from commenting on the proposal to retain the exclusion without the limiting language, stating that because the agencies "do not address" this and other exclusions they "do not seek comment" on them. 79 Fed. Reg. at 22190. Even assuming for the sake of argument that this exclusion is lawful under the Clean Water Act (and it is not), a decision to exclude natural bodies of water from the definition of waters of the U.S. must be subject to public process. EPA and the Corps' retention and application of this disastrous and unauthorized exclusion must be suspended pending proper process.

Third, it is simply ludicrous that this brazen give-away to some of the most polluting industries is allowed. Providing this exclusion violates the very fundamentals of the Act to eliminate toxic discharges and to preserve and protect the physical, chemical and biological integrity of the nation's waters. As noted repeatedly by the SAB members, even small tributaries, including wetlands and lakes that are in headwaters of watersheds, provide critical function and value in protecting downstream waters. Indeed, the proposed rule acknowledges that "scientific literature demonstrates that impoundments continue to significantly affect the chemical, physical, or biological integrity of downstream waters[,] traditional navigable waters, interstate waters, or the territorial seas." 79 Fed. Reg. at 22201. To allow them to be obliterated by polluting industrial activity and then polluted further with wastes based on the fiction that they are no longer waters of the U.S. is completely contrary to every single comment regarding tributaries, wetlands, and waters

[98] The impoundments themselves are also sources of pollution. Regardless of whether impoundments and the pollutants therein (including heavier sediment) are intended to 'stay put,' runoff and overflow from these areas can pollute traditional navigable waters. See attached memo ("The *Rapanos* Plurality: 'Mobile' § 402 Pollutants and 'Stationary' § 404 Pollutants"), at 15-20.

of the U.S. submitted by the members of the SAB and the general conclusions of the Connectivity Report. (Moreover, it does not appear that the SAB was given sufficient, or any, information about this exclusion and the way it is applied in practice to enable the SAB to advise EPA on the scientific merit or lack of merit underlying the waste treatment exclusion.) This further illustrates why the waste treatment system exclusion is unreasonable and therefore fails Step Two of Chevron, and does not constitute reasoned decisionmaking supported by the record.

Earthjustice presses EPA to eliminate this exclusion entirely. At a minimum, EPA must provide full opportunity for notice and comment rulemaking for this polluting and damaging practice. (p. 14-17)

Agency Response: **See summary response at 7.1.**

Tulane Environmental Law Clinic, Tennessee Clean Water Network, et al. (Doc. #15123)

7.187 We…believe that the categorical exclusion of upland ditches and certain kinds of wastewater treatment systems incorrectly places many waters of the United States beyond the reach of the Act. When upland ditches function as tributaries, they should be treated as tributaries whether they are manmade or not, and whether they are perennial or not. Likewise, when tributaries or adjacent waters are used in connection with wastewater – whether in-stream disposal of coal mining waste or impoundments used as lagoons or treatment ponds – they should be treated as the tributaries and wetlands they are, and not swept into the exemption for man-made wastewater systems. (p. 2)

Agency Response: **See summary response at 7.1. Also section the ditches compendium (topic 6).**

7.188 **B. Waste Treatment Systems, Including Ponds or Lagoons Should Be Considered Waters of the United States.**

The proposed Rule exempts "[w]aste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" from being considered waters of the United States and therefore jurisdictional under the Act. This aspect of the proposal is unchanged from the current regulations.

We have considerable concern with the agencies' current practice with regard to this exemption for waste treatment systems. Since the exemption was written into the regulations, EPA and the Corps have attempted to expand it to cover waters for which it plainly was not intended. In 1980, EPA amended its regulations to provide that:

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of [the Act] … are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States."[99]

Clearly, the exclusion was limited. In view of the fact that the Act "was not intended to license dischargers to freely use waters of the United States as waste treatment systems,

[99] 40 C.F.R. § 122.

the definition makes clear that treatment systems created in those waters or from their impoundment remain waters of the United States."[100]

Although the second sentence of the regulatory exclusion was suspended in order to dispel concerns that pre-existing treatment systems would be improperly brought into the regulatory system,[101] the exemption was not meant to be a wholesale authorization of anything described as a "waste treatment system." To the contrary, EPA's initial implementation of the rules rejected a sweeping interpretation; the agency argued in litigation that in-stream disposal of coal mining waste did not qualify for the exemption.[102] Unfortunately, over time, a further exception has developed allowing natural streams and lakes to be excluded from the definition of "waters of the United States" when an impoundment of waters of the United States is able to qualify for the waste treatment system exclusion if it is established via a section 404 permit.[103]

We strongly oppose this approach – nothing is more inconsistent with the basic premise of the Clean Water Act than allowing polluters to convert the nation's waters into waste dumps. The agencies should use the opportunity of this rulemaking to explicitly limit the application of the waste treatment systems exemption to pre-existing facilities. (p. 12-13)

Agency Response: **See summary response at 7.1.**

Columbia Riverkeeper (Doc. #15210)

7.189 The "waste treatment exclusion" should be immediately rescinded. In practice, this loophole—on which the public was never allowed to comment—frequently allows the unregulated discharge of mine tailings and other waste into waters of the United States. (p. 2)

Agency Response: **See summary response at 7.1.**

[100] *W.Va. Coal Ass'n v. Reilly*, 728 F. Supp. 1276, 1289 (S.D. W.Va. 1989) (quoting 45 Fed. Reg. 33,298 (May 19, 1980)).
[101] *Id*. (citing 45 Fed. Reg. 48,620 (July 21, 1980)).
[102] *Id*. at 1289-90 (deferring to EPA's interpretation that treatment ponds were regulated "impoundments," not excluded "waste treatment systems"). See also Memorandum from Marcia Williams, EPA Office of Solid Waste Director, to James H. Scarbrough, EPA Region IV Residuals Management Branch Chief, attachment B (Apr. 2, 1986) ("EPA applies a standard which treats newly created impoundments of waters of the U.S. as 'waters of the U.S.,' not as 'waste treatment systems designed to meet the requirements of the CWA,' whereas impoundments of 'waters of the U.S.' that have existed for many years and had been issued NPDES permits for discharges from such impoundments are 'wastewater treatment systems designed to meet the requirements of the CWA' and therefore are not 'waters of the U.S.'"), *available at* http://yosemite.epa.gov/osw/rcra.nsf/documents/4BD7 508AD59EA15F852565DA006F0A63.
[103] Memorandum from LaJuana S. Wilcher, EPA Assistant Administrator, to Charles E. Findley, Director, Water Div., Region X, U.S. Army Corps of Eng'rs, on Clean Water Act Regulation of Mine Tailings Disposal (Oct. 2, 1992); see also State Program Requirements; Approval of Application to Administer the NPDES Program; Texas, 63 Fed. Reg. 51,164, 51,183-84 (Sept. 24, 1998); U.S. EPA, Guiding Principles for Constructed Treatment Wetlands at 16 (Oct. 2000), *available at* http://water.epa.gov/type/wetlands/constructed /upload/guiding-principles.pdf. See also *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 211-16 (4th Cir. 2009) (upholding the agencies' interpretation).

Louisiana Environmental Action Network (Doc. #15377)

7.190 **(2) The Agencies Must Clarify that the Wastewater Treatment Systems Exclusion Does Not Apply to Systems Built in Natural Streams and Lakes.**

The Agencies must revise the categorical exclusion for waste treatment systems to clarify - consistent with EPA's long-standing interpretation - that it does not apply to systems built in natural streams or lakes. *See W. Va. Coal Ass'n v. Reilly*, 728 F. Supp. 1276, 1290 (S.D.W. Va. 1989) (upholding EPA's interpretation that "the exclusion for treatment ponds was never meant to apply to treatment ponds constructed in United States waters."), *aff'd* 932 F.2d 964 (4th Cir. 1991). Although the Proposed Rule does not purport to expand the current waste treatment system exclusion, it fails to clarify the ambiguity that EPA created in 1980 by suspending regulatory language that would have specifically limited the waste treatment system exception to manmade bodies of water. *See* 45 Fed. Reg. 48620, 48620 (July 21, 1980). The suspended language remains in EPA's current and Proposed Rule definition of "waters of the United States at 40 C.F.R. § 122.2, together with a note explaining the suspension remains in place:

> Waste treatment systems . . . are not waters of the United States. ***This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.]***
>
> …
>
> Note 1: At 45 FR 48620, July 21, 1980, the Environmental Protection Agency suspended until further notice in § 122.2, the last sentence, beginning "This exclusion applies ___" in the definition of "Waters of the United States." This revision continues that suspension.

40 C.F.R. § 122.2 (emphasis added); 79 Fed. Reg. at 22268.

When it suspended the clarifying language, EPA affirmed its purpose "to ensure that dischargers did not escape treatment requirements by impounding waters of the United States and claiming the impoundment was a waste treatment system, or by discharging wastes into wetlands." 45 Fed. Reg. at 48620; *see* 45 Fed. Reg. 33290, 33298 (May 19, 1980) (Prior Clean Water Act regulations, like the Act itself, were "not intended to license dischargers to freely use waters of the United States as waste treatment systems."). Nevertheless, EPA agreed to re-consider the language to avoid overbreadth. 45 Fed. Reg. at 48620; 07/15/1980, Memo Re: Suspension of portion of definition of "Waters of the United States" in Consolidated Permit Regulations (noting EPA "did not intend [the] result" that, "could require many power plants and oil refineries (among other industries) to apply for NPDES permits for discharges into their ash ponds and treatment lagoons.")[104] EPA also stated that it "intends promptly to . . . amend the rule, or terminate the suspension." 45 Fed. Reg. at 48620. EPA has still not amended the rule or terminated the suspension. The Proposed Rule is the opportunity to do so.

[104] *Available at* http://www.epa.gov/npdes/pubs/owm560.pdf .

EPA's failure to amend the rule has led to the sort of confusion that the Proposed Rule seeks to avoid. The prolonged limbo of suspension has reduced EPA's clear regulatory mandate to interpretations requiring court intervention or agency guidance to confirm. *See, e.g., W. Va. Coal v. Reilly*, 932 F.2d 964, 1991 WL 75217 *5 (4th Cir. 1991) ("[W]e agree with the district court's conclusion that the in-stream treatment ponds and the waters above such ponds fall within the definition of 'waters of the United States' . . . and the EPA did not act beyond its statutory authority in regulating these waters."); 10/25/2007, Memorandum for POA-1992-574 & POA-1992-574-Z (Oct. 25, 2007) ("EPA and the Corps agree that the agencies' designation of a portion of waters of the U.S. as part of a waste treatment system does not itself alter CWA jurisdiction over any waters remaining upstream of such system. Both the Corps and EPA believe that all the waters upstream and downstream of the tailings dam that were jurisdictional prior to the authorized activity and that qualify as jurisdictional waters of the U.S. under the Rapanos guidance are still subject to CWA jurisdiction . . . .").[105] Moreover, guidance and court intervention have developed a further exception, declining to apply the exclusion to natural streams and lakes unless a U.S. Army Corps of Engineers § 404 permit authorized conversion of waters of the United States to a treatment system. *See Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 215 (4th Cir. 2009) (finding an exception when the Corps "exercises its § 404 authority to permit the use of a stream segment as part of the treatment system for fill runoff, [because] it has allowed the temporary removal of these waters from the definition of 'waters of the United States' only after analyzing the impacts of creating the system and mitigating those impacts as necessary") (citing Letter from Benjamin H. Grumbles, Asst. Administrator for the EPA, to the Hon. John Paul Woodley, Assistant Secretary of the Army (Civil Works) (Mar. 1, 2006); Memo from LaJuana S. Wilcher, Asst. Administrator for the EPA, to Charles E. Findley, Director, Water Division, Region X, United States Army Corps of Engineers, on Clean Water Act Regulation of Mine Tailings Disposal (Oct. 2, 1992)).

In short, to accomplish its purpose of clarity, the Agencies must revise the Proposed Rule to confirm that the wastewater treatment exclusion does not allow a discharger to convert any water of the United States into non-jurisdictional waters by building an in-stream treatment system. Indeed, the failure to "terminate the suspension" or amend the rule now that the opportunity is at hand may increase confusion. Notably, however, if the failure to address the suspended language were to signal an expansion of the waste-treatment system exclusion from the definition of "waters of the United States," such a narrowing of jurisdiction would be arbitrary and capricious and unlawful as contrary to Congress' stated intent for the Clean Water Act. (p. 3-4)

Agency Response: **See summary response at 7.1.**

Delaware Riverkeeper Network (Doc. #15383)

7.191 **Comment 9: Waste Treatment System Exclusion: Section 328.3(b)(1)**

[105] *Available at* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/WTS_POA-1992-574_POA-1992-574-Z.pdf .

Waste Treatment systems should not be excluded; especially those constructed in floodplains and wetlands, and that are subject to flooding or wall collapse. This exclusion was originally added as a footnote after finalization of the CWA, and has therefore never been subject to notice and comment. Because EPA did not follow proper due process requirements, it is now obligated to have a public comment period on the exclusion of impoundment waters that are used as wastewater treatment. The proposed rule seeks to codify this exclusion without proper notice and comment and for this reason the exclusion should not be included in the final rule. DRN does not support the Water Treatment Exclusion for procedural grounds and substantive grounds, especially when these types of facilities are constructed in floodplains. If such an impoundment flooded or was breached due to poor design or maintenance, the responsible party should be fined and ordered to clean up, but under the proposed rule the taxpayers would be responsible. That conclusion is untenable. (p. 5)

Agency Response: **See summary response at 7.1.**

Tennessee Clean Water Network et al. (Doc. #16537)

7.192 **6. Categorical exclusion of certain kinds of wastewater treatment systems incorrectly places many waters of the United States beyond the reach of the Act.**

The proposed rule exempts "[w]aste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" from being considered waters of the United States and therefore jurisdictional under the Act. This aspect of the proposal is unchanged from the current regulations.

We have considerable concern with the agencies' current practice with regard to this exemption for waste treatment systems. Since the exemption was written into the regulations, EPA and the Corps have attempted to expand it to cover waters for which it plainly was not intended. In 1980, EPA amended its regulations to provide:

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act ... are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States."[106]

Clearly, the exclusion was limited. In view of the fact the Act "was not intended to license dischargers to freely use waters of the United States as waste treatment systems, the definition makes clear that treatment systems created in those waters or from their impoundment remain waters of the United States."[107] Although the second sentence of the regulatory exclusion was suspended in order to dispel concerns pre-existing treatment systems would be improperly brought into the regulatory system,[108] the exempt ion was not meant to be a wholesale authorization of anything described as a "waste treatment system." To the contrary, EPA's initial implementation of the rules rejected a sweeping

[106] *W. Va. Coal Ass'n v, Reilly*, 728 F. Supp. 1276, 1289 (S.D.W.Va. 1989) (quoting 40 C.F.R. § 122.3 (1980)).
[107] *Id*. (quoting 45 Fed. Reg. 33,298 (May 19, 1980)).
[108] *Id*. (citing 45 Fed: Reg. 48,620 (July 21, 1980)).

interpretation; the agency argued in litigation that in-stream disposal of coal mining waste did not qualify for the exemption.[109] Unfortunately, over time, EPA and the Corps have reversed this interpretation, and now allow sources to use the regulatory exemption to treat new waste treatment facilities in protected waters excluded from the Clean Water Act. Under the agencies' revised interpretation, a new impoundment of waters of the United States is able to qualify for the waste treatment system exclusion if it is established via a section 404 permit.[110] This position has been upheld in litigation.[111]

We strongly oppose this approach - nothing is more inconsistent with the basic premise of the Clean Water Act than allowing polluters to convert the nation's waters into waste dumps. This threat is especially prominent in the Appalachian region of the state where coal mining companies can abuse this exemption. The agencies should use the opportunity of this rulemaking to explicitly limit the application of the waste treatment systems exemption to pre-existing facilities. (p. 5-6)

Agency Response: **See summary response at 7.1.**

Midwest Environmental Advocates (Doc. #16645)

7.193 **III. The categorical exclusion of waste treatment systems that includes those waters that were once waters of the U.S. is a blatant give away to the mining industry and is inconsistent with the Clean Water Act.**

Similarly, the waste treatment exclusion has no basis in science, sound policy or the law. The purpose of the Clean Water Act is to clean up our nation's waters. "Congress enacted the law to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U. S. C. § 1251(a), and it pursued that objective by restricting dumping and filling in "navigable waters," §§ 1311(a), 1362(12)."[112] This exclusion—allowing waters that were once waters of the U.S. to become waste dumps for the mining industry—is plainly inconsistent with the goals of the CWA.

The waste treatment system started out as a narrow exception for constructed waste treatment systems that were not previously waters of the U.S. The EPA's current

[109] *Id*. at 1289-90 (deferring to EPA's interpretation that treatment ponds were regulated "impoundments," not excluded "waste treatment systems"). *See also* Memorandum from Marcia Williams, EPA Office of Solid Waste Director, to James H. Scarbrough, EPA Region IV Residuals Management Branch Chief, attachment B (Apr. 2, 1986) ("EPA applies a standard which treats newly created impoundments of waters ofthe U.S. as 'wa ters of the U.S.,' not as 'waste treatment systems designed to meet the requirements of the CWA,' whereas impoundments of 'waters of the U.S.' that have existed for many years and had been issued NPDES permits for discharges from such impoundments are 'wastewater treatment systems designed to meet the requirement of the CWA' and therefore are not 'waters of the U.S."'), *available at* http://yosemite.epa.gov/osw/rcra.nsf/documents/4110 7 508AD59EAl5F852565DA006FOA63.

[110] Memorandum from LaJuana S. Wilcher, EPA Assistant Administrator, to Charles E. Findley, Director, Water Div., Region X, U.S. Army Corps of Eng'rs, on Clean Water Act Regulation of Mine Tailings Disposal (Oct. 2, 1992); *see also* State Program Requirements; Approval of Application to Administer the NPDES Program; Texas, 63 Fed. Reg. 51,164, 51,183-84 (Sept. 24, 1998); U.S. EPA, Guiding Principles for Constructed Treatment Wetlands at 16 (Oct. 2000), *available at* http://water.epa.gov/type/wetlands/constrncted/upload/guiding-principles.pdf.

[111] *See Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177,211-16 (4th Cir. 2009) (upholding the agencies' interpretation).

[112] *Rapanos v. United States*, 547 U.S. 715, 779 (2006).

expansive definition of the waste treatment exclusion is not consistent with the initial rule as promulgated in 1980, which provided "that the waste treatment exclusion "applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of water of the United States."[113] EPA later suspended operation of the part of this rule that made the exception inapplicable to waters of the U.S., but did not clarify its position through additional rulemaking. EPA has since taken the position that waters of the U.S. can lose CWA protection if they are turned into waste treatment systems.[114]

Continuing the waste treatment exclusion is inconsistent with the purpose of the Clean Water Act because it is too broad of a construction of the act's language and goes beyond the scope intended in the initial exemption. First, "claims of exemption, from the…CWA broad pollution prevention mandate must be narrowly construed to achieve the purposes of the CWA.[115] Second, the original exemption was strictly limited to "self-contained" bodies of water.[116] Allowing mining companies or other polluters the license to impound navigable waters and create "self-contained" ponds provides an indiscriminate license to pollute into any waters. The practical effect of the proposed exclusion will frustrate the CWA's purpose.

If the EPA continues to allow mining companies to turn our nation's waters into dumping grounds, it will have serious and detrimental effects in Wisconsin. We are currently facing a proposal by Gogebic Taconite, LLC to construct a very large, open-pit iron ore mine—possibly over 4 miles long—in the Penokee hills of northern Wisconsin.[117] The site of the proposed mine is in the headwaters of Bad River watershed, between trout streams designated as Outstanding and Exceptional Resource Waters.[118] Harmful pollution from heavy metals, including selenium among others, has been documented at other iron ore mines in the region, including the Empire and Tilden mines to the north of this proposed mine.[119] Allowing Gogebic Taconite to use these pristine waters as dumping grounds is extremely concerning. (p. 6-7)

Agency Response: **See summary response at 7.1.**

[113] 40 C.F.R. § 122.3 (1980).
[114] 79 Fed. Reg. 22188, 22217 (Apr. 21, 2014) (Proposed Rules) (providing that the proposed rule is consistent with the EPA's "longstanding regulations" that excluded waste treatment systems from the CWA).
[115] *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993,1001 (9th Cir. 2007).
[116] *Id*. at 1001-1002 ("The exception was meant to avoid requiring dischargers to meet effluent discharge standards for discharges into their own closed system treatment ponds.").
[117] Wisconsin Department of Natural Resources, Gogebic Taconite, LLC, potential mining project, available at http://dnr.wi.gov/topic/mines/gogebic.html.
[118] *See* Wisconsin Department of Natural Resources, Gogebic Taconite, LLC, potential mining project, available at http://dnr.wi.gov/topic/mines/gogebic.html; *see also* Wisconsin Department of Natural Resources, Waters designated in 2006 as Exceptional or Outstanding Resource Waters (Oct 2006) (designating Bad River and Tyler Forks River as Outstanding Resource Waters), *available at* http://dnr.wi.gov/topic/SurfaceWater/oerw/list1006.pdf; *see also* Gogebic Taconite, LLC Preapplication Notice to the Wisconsin Department of Natural Resources (June 17, 2013), *available a*t http://dnr.wi.gov/topic/Mines/documents/gogebic/GTACPreapplicationNotice20130617.pdf.
[119] Michigan Department of Environmental Quality, Update on Selenium Projects at Tilden and Empire Mines, Vol. 1 (Jan. 2010), *available at* http://www.michigan.gov/documents/deq/wrd-npdes-EmpireTilden-Vol1_364698_7.pdf.

WaterLegacy (Doc. #18017)

7.194 Mine Tailings Impoundments

Mine tailings impoundments impact the flow of navigable waters and impact water quality. Mine tailings are industrially processed and chemically dissimilar from excavated materials. Yet, they may be treated as fill and exempted from laws defining and requiring containment and treatment of wastes. Despite the potential adverse impacts of mine tailings impoundments and their significant nexus with natural waters, the Clean Water Act has been interpreted to prevent their effective regulation.

An exemption from waters of the U.S. that may be appropriate for an impervious holding pond for a wastewater treatment facility is abhorrent to the purposes of the Clean Water Act if applied to an unlined tailings impoundment seeping into hundreds of acres of wetlands, streams or other natural waters. WaterLegacy proposes that the exemption for waste treatment systems from "waters of the United States" only apply to constructed impoundments that are isolated from natural waters and are part of a wastewater treatment system. We request this change in EPA's proposed rule 40 C.F.R. § 230.03(t):

> (t) The following are not "waters of the United States," notwithstanding whether they meet the terms of paragraphs (s)(1) through (7) of this section—
>
> (1) Waste treatment systems, including treatment ponds or lagoons, isolated from natural waters that are part of a wastewater treatment system designed to meet the requirements of the Clean Water Act; (p. 2-3)

Agency Response: **See summary response at 7.1.**

Clark Fork Coalition (Doc. #19539)

7.195 …regarding the "waste treatment plant" exclusion retained in the proposed rule -we urge you to re-clarify that waste treatment system exclusion only applies to manmade waters, as EPA recognized in 1980. We are particularly concerned about mining companies who construct a tailings dam across wetlands or a river under a 404 permit - and then classify the previously clean and free-flowing waters behind the dam as a "waste treatment system," rather than "waters of the United States." This loophole undermines the entire purpose of the Clean Water Act, encouraging destruction of critical watershed ecosystems rather than prohibiting the use of our waters as a dumping ground for industry. (p. 2)

Agency Response: **See summary response at 7.1.**

Water Environment Federation (Doc. #16584)

7.196 ***Spreading Grounds and Related Features of the Wastewater Treatment Process Should Be Expressly Exempted Under the Final Rule***

As the proposed rule and existing practice acknowledge, waste treatment systems designed to meet the requirements of the Clean Water Act are not waters of the United States, and WEF wants to ensure that as part of these proposed amendments spreading grounds/basins, treatment ponds/lagoons, and constructed treatment wetlands used as part of the wastewater process are subject to the same exemption. Since these facilities are

clearly part of the treatment process, providing additional treatment, residence and settling prior to discharge, these facilities should be expressly recognized in the rule as falling under the Waste Treatment Exception.

In addition, many WEF members utilize spreading grounds or basins in order to facilitate groundwater replenishment; a vital part of water management throughout certain states. Others utilize artificially created effluent storage ponds as part of their treatment process. Many agencies maintain reservoirs or storage basins/ponds to store recycled water. These artificially created features and spreading grounds have not previously been defined or regulated as "waters of the United States," and should remain separate. For this reason, the proposed rule should expressly include treatment ponds/lagoons, spreading grounds/basins, and constructed treatment wetlands within the scope of the Waste Treatment Exception, along with effluent storage reservoirs and recycled water storage facilities discussed previously. (p. 3)

Agency Response: **See summary response at 7.1. See also summary responses at 7.4.2 and 7.4.4 regarding the agencies' creation of exclusions for certain wastewater recycling and stormwater control features.**

Robert J. Goldstein & Associates (Doc. #16577)

7.197 1) Waste treatment ponds or lagoons designed to meet CWA requirements: Some of these features were natural ponds, wetlands, or streams prior to being converted to stormwater or sanitary waste treatment. Features that were designed and legitimately permitted for this purpose should be excluded from WOTUS, but natural waters that have become stormwater treatment ponds by default, due to land management activities that did not provide adequate stormwater management, should not be excluded.

I am aware that some organizations including municipalities, state transportation departments, and the stormwater engineering lobby are recommending that entire municipal stormwater drainage systems be excluded from WOTUS because they are "already regulated" under NPDES. However, many of these drainageways are modified natural streams (some of them quite large) with important aquatic functions. We should not exclude a stream from WOTUS simply because some portion of it is piped or channelized through a developed area as part of a MS-4 system. (p. 1)

Agency Response: **See summary response at 7.4.4.**

7.2. PRIOR CONVERTED CROPLAND (PCC)

Summary Response

In the rule, the agencies identify a variety of waters and features that are not "waters of the United States." In neither the proposed nor the final rule do the agencies make a change to the existing exclusion for prior converted cropland.

The existing exclusion for prior converted cropland moves to paragraph (b)(2) of the rule and is unchanged. The agencies did not propose any changes to the exclusion for prior converted cropland. As a result, comments addressing the substance of the exclusion or its implementation

are outside the scope of this rulemaking and the rule does not reflect changes suggested in public comments. The agencies will continue to implement this exclusion consistent with current policy and practice. In some instances, the agencies have provided information that maybe useful to a commenter, but this does not alter the scope of the rulemaking. In addition, some issues that commenters raised are related to other exclusions identified under paragraph (b), and commenters should see those essays and responses for more detail.

A number of commenters suggested changes to the existing exclusion for prior converted cropland. As previously stated, these comments are outside the scope of this rulemaking and the rule does not reflect changes suggested in public comments.

Comments included questions about dates the exclusion applied to. There was also a request to match definitions with other agencies including two commenters who wanted the agencies to use the USDA definition of PCC at 7 C.F.R. 12.2, specifically. Another commenter recommended using the definition at 58 Fed Reg, 45008, 45301, (Aug 25, 1993). One commenter recommended using procedures defined in RGL 90-07 and then codified at 328.3(a)(8), (Page 2-3).

Several commenters requested that the exclusion be expanded and provided examples of recommended changes. One commenter did not want state or local/municipal/county governments to oppose additional oversight. Commenters suggested that PCC should always be defined as non-jurisdictional regardless of any future change in use. Some expressed concern that PCC does not cover normal farming and wants a clearer statement. A commenter requested that an exemption for PCC also be developed for 402. Another commenter requested that prior converted forest lands be added to exemptions.

Conversely, some commenters felt the exclusion was too expansive. A commenter stated that PCC is a regulatory construct for the Food Security Act and does not reflect the ecological functions or values of these lands. In addition, they said that PCC should be able to be recaptured. Another comment requested that the 5 year abandonment provision be included in the agencies' discussion of PCC.

A few of the concerns appear to be misconceptions about how the exclusion has been used in the past and current practice concerning PCC, farmed wetlands, and the agricultural and silviculture exemptions. A commenter felt that the rule was a barrier to entry into farming for new farmers. A commenter was worried that if they enrolled in NRCS programs such as CRP it would cause them to not meet the exemption because their land would be taken out of production. A commenter was concerned that even if land continues in agricultural production but is sold or passed to next generation then would come under new restrictions. Another commenter was concerned that if prior converted cropland is excluded that cropland would be jurisdictional. Another identified concern that the connectivity language used in the rule would allow some PCC to be considered jurisdictional. Five commenters were concerned about the statement "Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency…" and felt that indicated that EPA will overturn a USDA determination of what was "prior converted cropland." Another commenter asked for the number of times a determination of PCC has been overturned in the past. In contrast, some commenters expressed

concern that the agricultural exemptions allow pollution to enter waters and cause problems for natural communities. Again, the agencies did not propose and are not making any changes to the PCC exclusion. Comments regarding implementation are beyond the scope of this rule.

Several comments in this section are also addressed in other sections of the response to comments. Two commenters expressed concerns about irrigated crop lands. One suggested that irrigated lands should be exempt and that the construction and maintenance of irrigation features should not need a permit. Another commenter wanted formerly irrigated lands brought back into production to also be considered exempt. Artificially irrigated areas that would revert to dry land should application of water to that area cease are excluded from jurisdiction. Section 7.3.1 provides additional discussion. There were two comments related to ditches. One commenter requests that legacy ditches be added to exemptions. Another commenter asked if ditches through PCC regardless of hydrologic regime would also be exempt. For more discussion on ditches see compendium 6, and for tributaries see compendium 8.

Specific Comments

New Mexico Department of Agriculture (Doc. #13024)

7.198 The *Federal Register* notice for this proposed rule (in a footnote) states the Agencies use the Natural Resource Conservation Service (NRCS) definition of *prior converted cropland* for purposes of determining jurisdiction under the CWA (79 FR 22 189). The NRCS defines *prior converted cropland* as farm land that was:

- "Cropped prior to December 23, 1985, with an agricultural commodity (an annually tilled crop such as com);
- The land was cleared, drained or otherwise manipulated to make it possible to plant a crop;
- The land has continued to be used for agricultural purposes (cropping, haying or grazing);
- And the land does not flood or pond for more than 14 days during the growing season."[120]

NMDA is highly concerned with the exclusion of *prior converted cropland*, as it is currently identified, because it relies on the NRCS's use of 1985 as the year that farmland must have been used for agricultural purposes. This creates a clear barrier to entry and is further analyzed in the subsection "Barriers to Entry" in the "Economic Analysis" section below. NMDA requests that all agricultural land be excluded due to the fact that these lands are managed to provide food, fiber, and other necessary products - regard less of whether the agricultural operation was established before or after 1985.

Also, several NRCS programs, such as the Conservation Reserve Program (CRP), incentivizes agricultural producers to take land out of production:

[120] Natural Resource Conservation Service. "Wetland Fact Sheet - Prior Converted Cropland." http://www.nrcs.usda.gov/wps/portal/nrcs/detail/vt/programs/?cid=nrcs142p2_010517.

> "In exchange for a yearly rental payment, farmers enrolled in the program agree to remove environmentally sensitive land from agricultural production and plant species that will improve environmental health and quality. Contracts for land enrolled in CRP are 10-15 years in length. The long-term goal of the program is to re-establish valuable land cover to help improve water quality, prevent soil erosion, and reduce loss of wildlife habitat."[121]

Will being enrolled in conservation programs such as NRCS's CRP bar agricultural producers from this exemption because the land in question has not "continued to be used for agricultural production"?

Furthermore, even though the *Federal Register* notice for this proposed rulemaking claims the Agencies will use the NRCS's definition, the language of the proposed rule states the Agencies have "final authority regarding Clean Water Act jurisdiction." The Agencies have neglected to independently define *prior converted cropland*, which is contrary to logic given that EPA's claims of final authority over determining exclusions. Providing a clear definition would assist in offering consistency for the regulated public in determining if their land will be considered *prior converted cropland* thus excluded from being jurisdictional. (p. 8)

Agency Response: **See Section 7.2 summary response above. The existing exclusion for prior converted cropland is unchanged. As a result, such comments are outside the scope of this rulemaking and the rule does not reflect changes suggested in public comments.**

7.199 Barriers to Entry

As previously detailed, the NRCS defines prior converted cropland as farmland that was "cropped prior to December 23, 1985, with an agricultural commodity (an annually tilled crop such as com); the land was cleared, drained, or otherwise manipulated to make it possible to plant a crop; the land has continued to be used for agricultural purposes (cropping, haying, or grazing); and the land does not flood or pond for more than 14 days during the growing season."[122]

The explicit exclusion for "prior converted croplands" will create a barrier to entry for agricultural producers due to the NRCS cutoff date of 1985. Younger agriculturalists wanting to start their own operations will not be afforded the same opportunities as older, more established farmers or ranchers. The average age of agricultural producers in the United States is 58 years old;[123] implementing arbitrary requirements may prevent new fanners from entering the market. This barrier could have profound impacts on rural economies in addition to the nation's ability to provide enough agricultural goods for a growing population.

[121] U.S. Department of Agriculture, Farm Service Agency. "Conservation Reserve Program." http://www.fsa.usda.gov/FSA/webapp?area=home&subject=copr&topic=crp.
[122] Natural Resource Conservation Service . "Wetland Fact Sheet - Prior Converted Cropland." http://www.nrcs.usda.gov/wps/portal/nrcs/detail/vt/programs/?cid=nrcs142p2_010517.
[123] U.S. Department of Agriculture. "2012 Census of Agriculture." http://www.agecensus.usda.gov/Publications/2012/Full_Report/Volume_1_Chapter _1_US/.

It is also contrary to many policies of the United States Department of Agriculture, which aim to provide incentives to young people to get involved in agriculture and could jeopardize the future of fanning.

Similarly, in reference to the "continuous operation" provision, NMDA requests clarification on whether land use restrictions near a newly designated Waters of the U. S. will change when agricultural lands are either sold or passed from one generation to the next when the use for the land is maintained as agricultural. If restrictions are put into place or if major permitting would be required with new ownership, it would create a barrier to entry for new agricultural producers, especially since it is not uncommon for agriculture operations to be passed on from one generation to the next. (p. 21-22)

Agency Response: **See previous response.**

Gila River Indian Community (Doc. #13619)

7.200 The Community has historically relied upon agriculture for sustenance and commerce. Our ability to farm the Reservation was crippled when upstream water users diverted the flow of the Gila River. However, enactment of the Arizona Water Settlements Act of 2004 has reinvigorated our vibrant agricultural economy by facilitating the restoration and expansion of irrigation canals and related infrastructure that carries water to existing and future croplands.

The Proposed Rule exempts "prior converted croplands" from the definition of waters of the United States, but is silent as to new and future agricultural development, and provides no justification for this distinction. The Reservation includes significant swaths of land that have not been farmed for decades due to a lack of water, but that were historically irrigated. Such historically irrigated crop lands should be exempt, but the Proposed Rule provides significant discretion to the Agencies to assert jurisdiction over upwards of 40,000 new acres of croplands for which irrigation features will be restored or constructed in coming years. The Proposed Rule addresses this point in multiple places but fails to confirm that the construction and maintenance of such necessary irrigation features will not require a permit. The Final Rule should clarify this.[124] (p. 5)

Agency Response: **See Section 7.2 summary response above. The existing exclusion for prior converted cropland is unchanged. The agencies recognize the vital role of farmers in providing the nation with food and fiber and are sensitive to their concerns. The rule does not affect the exemptions provided in the Clean Water Act in Section 404(f)(1) (33 U.S.C. § 1344(f)(1)), which exempts many normal farming activities such as seeding, harvesting, cultivating, soil and water conservation practices, and other activities from the Section 404 permitting requirement. Even where waters are covered by the CWA, the agencies have adopted many streamlined regulatory requirements to simplify and expedite compliance through the use of measures such as general permits and standardized mitigation measures.**

[124] These include: Part 328 (§328.3 (b) (2)); Part 110 (§110.1 (2) (ii)); Part 112 (§112.2 (2) (ii)); Part 116 (§116.3 (2) (ii)); Part 117 (§117.1 (2) (ii)); Part 122 (§122.2 (b) (2)); Part 230 (§230.1 (t) (2)); Part 232 (§232.2 (2) (ii)); Part 300 (§300.5 (2) (ii)); appendix E to Part 300 (1.5 (2) (ii); Part 302 (§302.3 (2) (ii); and Part 401 (§401.11 (2) (ii)).

North Carolina Forest Service, North Carolina Department of Agriculture (Doc. #14122)

7.201 **Comment 1**

In the portion of the proposed rule which explicitly excludes or exempts certain land features from being considered as a WOTUS [Part (b) of the proposed rule], we suggest adding prior-converted forest lands and legacy ditches to this exclusion list, with suggested new text offered below in underline:

- "Prior-converted forest lands and their associated legacy ditches. Notwithstanding the determination of a forest area's status as prior-converted forest lands by any other federal or state or local agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with the USEPA."

Justification for Comment 1:

Forest lands that were converted prior to July 1, 1977 are currently considered not to be jurisdictional wetlands, as allowed in 33CFR330.3. However, with the proposed new and confusing definition of the term "tributary," there is concern that the ditches that were dug in the past to drain and convert these forest lands would be interpreted as a WOTUS "tributary," and thus the "adjacent" or "neighboring" prior-converted forest lands could then be re-captured as jurisdictional wetlands/waters, due to the proposed broad definition of new terms "riparian area" and "floodplain."

The USEPA claims that the proposed WOTUS rule will not expand new jurisdiction into ditches or ephemeral streams. **We disagree with this assertion**, as it depends upon how broadly "tributary" ... "adjacent"...and other related definitions will be interpreted and applied. By adding *prior-converted forest lands and their associated legacy ditches* to the exclusion list under part (b), this would avoid confusion and uncertainty, while adding clarity to the rule; and avoid having two sets of federal rules potentially conflicting with each other.

Also, we suggest adding "*or state or local agencies*" to the exclusion statement, to assure consistent regulatory oversight by the USEPA on wetland matters related to silviculture, and preclude attempts by state or local/municipal/county governments to impose additional oversight of silvicultural activities in wetlands. Primacy must remain vested with the USEPA, and/or USACE where delegated. (p. 1-2)

Agency Response: **In the final rule, the agencies have modified the definitions of "tributary" and "neighboring". See the preamble for a discussion of these terms. See Section 7.2 summary response above. 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.**

Board of Supervisors, Pocahontas County, Iowa (Doc. #13666)

7.202 The federal agencies seek input as to which waters "should be determined non-jurisdictional."[125] Below are the Community's recommendations.

…

5. Prior converted cropland is expressly exempt from jurisdictional waters under the proposed rulemaking. By the absence of any discussion on new or future agricultural lands, future agricultural development could be deemed jurisdictional. These formerly irrigated lands that are brought back into production should be exempt. (p. 9)

Agency Response: See Section 7.2 summary response above. The existing exclusion for prior converted cropland is unchanged.

Board of Supervisors, Sutter County, California (Doc. #19657)

7.203 Under the current regulations, waters of the United States do not include "prior converted cropland." 33 C.F.R § 328.3(a)(8). The Proposed Rule would retain the prior converted cropland exception unchanged, while moving it to subsection 328.3(b)(2).We agree that the agencies should retain this exception, but we request that the agencies' final rulemaking clarify that the prior converted cropland exception applies regardless of any change in use of the land subsequent to its conversion.

The United States Department of Agriculture has defined prior converted cropland by regulation as:

> [A] converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and met the following hydrologic criteria:
>
> > (i) Inundation was less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more); and
> >
> > (ii) If a pothole, playa or pocosin, ponding was less than 7 consecutive days during the growing season in most years (50 percent chance or more) and saturation was less than 14 consecutive days during the growing season most years (50 percent chance or more).

7 C.F.R § 12.2. The Proposed Rule states that the Corps and the EPA use this definition for purposes of determining jurisdiction under the Clean Water Act. See Proposed Rule at 22189 n.2. However, since 2005, the Corps' policy has been to treat prior converted cropland as no longer falling within the exception, and therefore subject to Clean Water Act jurisdiction, if the land is no longer devoted to agricultural use. This policy is not supported by the text of the Corps' regulations and is inconsistent with the USDA's definition of prior converted cropland, because a subsequent change in use has no bearing on whether the converted wetland met the regulatory criteria as of December 23, 1985.

[125] *Id*. at 22193

Moreover, the Corps' policy unnecessarily restricts changes in land use that are necessary and appropriate to meet changing local and regional needs. We therefore request that the agencies make the following change to the Proposed Rule:

- Add language to proposed 33 C.F.R § 328.3(b)(2), clarifying that "waters of the United States do not include prior converted cropland, as that term is defined by USDA regulations at 7 C.F.R § 12.2, notwithstanding any change in use of the prior converted cropland occurring after December 23, 1985." (p. 6)

Agency Response: **See Section 7.2 summary response above. The existing exclusion for prior converted cropland is unchanged, and the definition of the term "prior converted cropland" is outside the scope of this rule.**

Virginia Association of Counties (Doc. #15175)

7.204 Under ([t][2]), "prior converted cropland" is excluded as a jurisdictional water. However, the proposed rule also states that "for purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA." This statement seems to suggest the "prior converted cropland" is excluded, but only until a determination is made by EPA that identifies a significant nexus between "converted cropland" and waters clearly understood to be jurisdictional. To clarify this issue, VACo recommends that EPA codify the longstanding meaning of "prior converted cropland" as found in 58 Fed. Reg. 45008, 45031 (Aug. 25, 1993).

Recommendation: The term prior converted cropland means areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible." (p. 3)

Agency Response: **See Section 7.2 summary response above. The existing exclusion for prior converted cropland is unchanged, and the definition of the term "prior converted cropland" is outside the scope of this rule.**

Michigan Association of Conservation Districts (Doc. # 16583)

7.205 Prior Converted Cropland and Farmed Wetlands. The proposed rule states "Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA". Prior Converted Cropland (PCC) and Farmed Wetlands (FW) that are within agricultural fields and have been actively farmed for generations could be deemed jurisdictional by the proposed rule. Section 404 provides an exemption for normal farming, silviculture and ranching activities for PCC and FW. However, section 402 does not provide a similar exemption and normal farming practice. MACO recommends an agricultural exemption for PCC and FW be developed under Section 402 that is parallel and consistent to what currently exists in Section 404. This will reduce uncertainty for farmers and more clearly spell out section 402 exemptions. (p. 2)

Agency Response: **See Section 7.2 summary response above. The existing exclusion for prior converted cropland is unchanged, and the implementation of the NPDES permitting program is outside the scope of this rule.**

Kerr Environmental Services Corp. (Doc. #7937.1)

7.206 **1. Item (b)(2) Prior Converted Cropland.** On August 25, 1993, the USEPA and USACE published its regulations specifying that Prior Converted cropland were not waters of the United States (Section 328.3(a)(8). The preamble, states at page 45032

> "The amendment of the definition of waters of the United States in today's rule also codifies that agencies' current policy of not regulating prior converted cropland under Section 404 as reflected by Corps RGL 90-7. RGL 90-7, moreover, eased the regulatory burden of the Section 404 program by excluding prior converted cropland from coverage under this provision."

Since this August 25, 1993 regulation, we have experienced strong and consistent resistance by certain USACE Districts to ignore the application of RGL 90-7 in evaluating Prior Converted cropland under the CWA and have been told that RGL 90-07 is no longer applicable at all, in any circumstances relative to CWA jurisdictional determinations made by the USACE.

While USACE and USEPA may have believed it was unnecessary to include a reference to RGL90-7 in the actual 1993 regulation, they have the opportunity to rectify that error as the currently proposed wording for Prior Converted Cropland referencing EPAs authority, has no reference to any standard. We recommend the paragraph on Prior Converted cropland at 328.3(b)(2) be revised as follows (new language underlined):

> Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with the EPA and will rely on the procedures defined in RGL 90-7, and then codified at 328.3(a)(8). (p. 2-3)

Agency Response: See Section 7.2 summary response above. The existing exclusion for prior converted cropland is unchanged, and the case-specific implementation of the 404 permitting program is outside the scope of this rule.

Montana Wool Growers Association (Doc. #5843.1)

7.207 The Proposed Rule's exclusions imply that land features would be jurisdictional but for the exclusion.

a. Section (b)(2) excludes "prior converted cropland," implying that cropland would normally be jurisdictional and any subsequent cropland conversions will be regulated. If the Agencies intend to exclude only croplands that were previously converted from wetlands, riparian areas, or floodplains the Proposed Rule should say so. [For a joint agency memorandum from 1990 discussing prior converted cropland, see EPA, *Memorandum: Clean Water Act Section 404 Regulatory Program and Agricultural Activities*, http://water.epa.gov/lawsregs/guidance/wetlands/cwaag.cfm (May 3, 1990).] (p. 10)

Agency Response: See Section 7.2 summary response above. The existing exclusion for prior converted cropland is unchanged.

National Farmers Union (Doc. #6249)

7.208 The proposed rule also specifically continues the exclusion of prior converted cropland from the definition of "waters of the United States" at section (b)(2). The proposed rule and preamble's direct confirmation of these matters provides clarity for the regulated community. The agencies should provide further clarity for the regulated community on this point by stating in the final rule, "This rule does not require a permit for any plowing and planting activity that was legally conducted without a permit before this rule was issued." This language captures the intent of the agencies and provides the regulated community with the certainty it needs to continue farming its existing planted acreage without threat of new interference. (p. 10)

Agency Response: See Section 7.2 summary response above. The existing exclusion for prior converted cropland is unchanged. The rule does not affect the exemptions provided in the Clean Water Act in Section 404(f)(1) (33 U.S.C. § 1344(f)(1)), which exempts many normal farming activities such as seeding, harvesting, cultivating, soil and water conservation practices, and other activities from the Section 404 permitting requirement.

Michigan Farm Bureau (Doc. #10196)

7.209 While the agencies emphasize the exclusion of prior converted cropland from CWA regulation, the specific inclusion lacks clarity and certainty for landowners and farmers. The EPA and USACE reserve final authority regarding CWA jurisdiction over an area's status as prior converted cropland, but fail to acknowledge the inconsistency with which the agencies have considered prior converted croplands and applicable exclusions from the CWA in the past, such as in *New Hope Power Company, et al. v. United States Army Corps of Engineers*, No. 10-22777- CIV-Moore/Simonton, 2010 U.S. Dist. (S.D. Fla. Sept. 28, 2010). In any proposed rule, EPA and USACE must clarify the exclusion of prior converted cropland as well as assurance of consistent exclusion of those lands. (p. 8)

Agency Response: See Section 7.2 summary response above. The existing exclusion for prior converted cropland is unchanged.

Minnesota Agricultural Water Resource Center (Doc. #14284)

7.210 In agricultural settings, we recommend…Prior converted cropland should also be clearly defined as always non-jurisdictional. (p. 2)

Agency Response: See Section 7.2 summary response above. The existing exclusion for prior converted cropland is unchanged.

California Association of Winegrape Growers (Doc. #14593)

7.211 1. Improper and Illegal Encroachment on Agriculture

The Proposed Rule states that it will not affect prior converted cropland, normal farming practices, or irrigated agricultural return flows. Unfortunately, the tremendous expansiveness of the general concept of "connectivity" as defined in the Connectivity Report and the Proposed Rule's Scientific Evidence in Appendix A opens vast new

frontiers of ambiguity into which we fear various exceptions to the exceptions will predictably creep.

In 1993, the Corps adopted a rule that established that agricultural lands that were converted from wetlands prior to 1985 ("prior converted croplands") were categorically excluded from the definition of "the waters of the United States" and, therefore, were not subject to regulation under Section 404 of the CWA, 33 U.S.C. § 1344. (See Final Rule, Clean Water Act Regulatory Program, 58 Fed. Reg. 45,008 (Aug. 25, 1993) ("1993 Final Rule") (codified at 33 C.F.R. § 328.3(a)(8) (2009)). There are over 53 million acres of prior converted cropland throughout the country. (See U.S. Department of Agriculture, Natural Resources Conservation Service, RCA Issue Brief #8, "Wetlands Programs and Partnerships," (Jan. 1996), available at http://www.nrcs.usda.gov/technical/rca/ib8text.html ["The Corps and EPA agreed to final regulations ensuring that approximately 53 million acres of prior-converted cropland will not be subject to wetland regulation."]; U.S. Army Corps of Eng'rs, "Two Years of Progress: Meeting Our Commitment for Wetlands Reform; Protecting America's Wetlands: A Fair, Flexible and Effective Approach August 1993 - August 1995," available at http://www.usace.army.mil/CECW/Documents/cecwo/reg/materials/wetland_policy1995.pdf ["To make the Federal wetlands program more consistent and predictable for farmers, the Clinton Administration clarified that 'prior converted croplands' are not subject to regulation under Section 404 of the Clean Water Act. Nearly 53 million acres of farm land are covered by this action which exempted lands that no longer perform the wetlands functions as they did in their natural condition."].) Notwithstanding subsequent case law[126] occurring after the adoption of this formal rule, the Corps continues to lack jurisdiction over such lands and no jurisdictional determination or Corps permit is required for their use. Thus, any attempt by the Proposed Rule to infringe about the "prior converted cropland" exemption is improper and invalid. (p. 15-16)

Agency Response: **See Section 7.2 summary response above. In the final rule, the agencies have modified the definitions of "tributary" and "adjacent". See Sections IV.F and G of the preamble for a discussion of these terms.**

American Soybean Association (Doc. #14610)

7.212 **"Prior converted cropland" is another issue in which more questions are raised than answered in the proposed rule.** ASA appreciates the clarity provided in the "Questions and Answers" document that clearly states that the existing exclusion from jurisdiction for prior converted cropland is carried forward unchanged. However, sections of the proposed rule state that, "Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA." While the Department of Agriculture makes the "prior converted" decision, jurisdiction under the law is EPA's. We understand that there is no history of EPA overturning a USDA "prior

[126] *Rapanos* does not affect the conclusion that prior converted croplands are not subject to the Agencies' CWA jurisdiction.

converted" decision. Unfortunately, there is a great deal of unease among farmers that past practice is no guarantee for the future. (p. 2)

Agency Response: See Section 7.2 summary response above.

Great Plains Canola Association (Doc. #14725)

7.213 … The Proposed Rule also states that prior converted cropland is not "waters of the United States", yet other sections of the rule state that "Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA." This contradiction is greatly concerning to GPCA producers. (p. 2)

Agency Response: See Section 7.2 summary response above.

National Pork Producers Council (Doc. #15023)

7.214 We strongly recommend that the Agencies spell out what they believe prior-converted cropland is and how they work with USDA in using the USDA PCC determinations. In particular, we believe a discussion in the preamble of the final rule that details the long relationship and history of coordination between the Agencies and USDA on the issue of PCC determinations would help address any uncertainty pork producers or others in agriculture have regarding the potential treatment of PCC under the proposed rule. In particular, there should be a clear discussion of the number of occasions an NRCS PCC determination has been overturned by the Agencies and the circumstances that existed when that occurred. Additionally, in furtherance of the stated goal of providing clarity and certainty to farmers, we strongly urge the Agencies to expressly define what they consider PCC by simple reference to the current regulatory standards implementing the provisions of the 1985 Food Security Act, set forth at Title 7, Part 12 of the Code of Federal Regulations. (p. 22)

Agency Response: See Section 7.2 summary response above. The existing exclusion for prior converted cropland is unchanged.

North Carolina Farm Bureau Federation (Doc. #15078)

7.215 …This rule states that PCC is not WOTUS. We support the exclusion of PCC. However, we are concerned that there has been a resistance in recent years by some of the Agencies' staff to honoring the existing exemption for PCC and an effort to narrow the existing exemption. Promulgation of a new rule should not be taken as an opportunity to issue new guidance that further narrows the exclusion of prior converted cropland from being considered "waters of the US." (p. 16)

Agency Response: See Section 7.2 summary response above. The existing exclusion for prior converted cropland is unchanged.

US Dry Bean Council (Doc. #15256)

7.216 The Proposed Rule also states that prior converted cropland is not "waters of the United States." Yet other sections of the rule state that "Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of

the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA." This contradiction is unacceptable for dry bean producers and we ask that this be clarified to make it clear that prior converted cropland is not "waters of the United States." (p. 2)

Agency Response: See Section 7.2 summary response above. The existing exclusion for prior converted cropland is unchanged.

Minnesota Soybean Growers Association (Doc. #15542)

7.217 While the definition of "prior converted cropland" is unchanged in the proposed rule, it is confusing and does not give regulatory certainty. Farmers and landowners that currently have "prior converted croplands" are not given any assurance that the EPA will not use a drastically different definition of this phrase than other federal agencies are already using. There is no reason that the EPA could not define this language similar to other definitions used by other federal agencies. The EPA would not be giving up any jurisdiction or ceding their authority to another agency by having a similar definition. (p. 2)

Agency Response: See Section 7.2 summary response above. The existing exclusion for prior converted cropland is unchanged.

National Barley Growers Association (Doc. #15627)

7.218 Prior Converted Cropland. The Proposed Rule provides that prior converted cropland falls outside the definition of "waters of the United States," yet also states: "[n]otwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA." This conflicting language suggests that EPA and/or the Corps are trying to have it both ways. (p. 5)

Agency Response: See Section 7.2 summary response above. The existing exclusion for prior converted cropland is unchanged.

US Canola Association (Doc. #16361)

7.219 The Proposed Rule also states that prior converted cropland is not "waters of the United States." Yet other sections of the rule state that "Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA." This contradiction is unacceptable for canola producers. (p. 2)

Agency Response: See Section 7.2 summary response above. The existing exclusion for prior converted cropland is unchanged.

Department of Public Works, City of Chesapeake, Virginia (Doc. #5612.1)

7.220 1. The Rule states that there will be no change to the exclusion for prior converted cropland; however, the exemption states that authority regarding CWA Jurisdiction for prior converted cropland remains with the EPA. How will jurisdictional determinations on prior converted cropland, including drainage ditches within the cropland be handled by the EPA/Corps if the land use changes? In light of the February 2011 U.S. District Court for Southern District of Florida's decision to deny the Corps' motion to alter the

court's September 2010 decision in the *New Hope Power Company and Okeelanta Corporation v. U.S. Corps of Engineers and Stockton*, **746 F. Surma 2d 1272** (S.D. Fla. 2010), how will the EPA/Corps process jurisdictional requests for prior converted cropland that propose to change their land use? Will the applicant/owners be required to coordinate directly with EPA for all jurisdictional determinations associated with prior converted croplands that propose a change in land use? If case-specific analysis and coordination with EPA is required for all prior converted croplands that propose to change their land use, even in light of the *New Hope v. Corps (Stockton)* court decision, this process may require more time and resources while providing less clarity, certainty and predictability for the regulated community. (p. 5-6)

Agency Response: See Section 7.2 summary response above. In the final rule, the agencies have modified the definitions of "tributary" and "neighboring". See Sections IV.F, IV.G, and IV.I of the preamble for a discussion of these terms and the ditch exclusions.

7.221 5. 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 Section 7.2 summary response above. In the final rule, the agencies have modified the exclusions for ditches. See Section IV.I of the the preamble for the discussion regarding the ditch exclusions.

Caloosahatchee River Citizen's Association (Doc. #4711.2)

7.222 **Categorical Exclusion of Non-Point Pollution Sources**

Agricultural Stormwater and Irrigation Return– Crop Production. American agriculture has become highly productive in its dependency on water-soluble chemicals -- fertilizers, pesticides, and herbicides. Thousands of jobs in Southwest Florida depend on this productive agriculture. Yet one consequence of the use of water-soluble chemicals in crop production is the run-off, in sheetflow or in watercourses, of agricultural chemicals that were not taken up by the crops in the field. Commonly in Southwest Florida, quantities of nutrients such as nitrogen and phosphorus, pesticides such as chlorpyrfos from citrus production and carbofuran from sugar production, and herbicides such as glyphosate from turfgrass sod production and atrazine from sugar production are found in our waters. Yet the presence of these nutrient and chemical pollutants that originate in cropland agriculture are categorically untouchable due to the exclusion of agricultural stormwater and irrigation water return.

In an egregious example of the effect of water-borne agricultural chemicals, the USGS has found atrazine in Southwest Florida waters. Low concentrations of atrazine cause a variety of adverse effects in fish, including reduced sperm production, disruptions of normal behavior, kidney damage, and decreased ability to withstand warm temperatures. The hormone systems of both amphibians and alligators are disrupted by atrazine. Atrazine also stimulates fungi that cause plant diseases, including the common root rot Fusarium.

Atrazine can damage natural communities. For example, in a pond community, atrazine (at a concentration of 20 parts per billion) caused reductions in populations of aquatic plants, aquatic insects, and the fish that feed on them. Despite the demonstrated effects of atrazine, it continues to pollute our surface waters and aquifers.

Agricultural Stormwater – Animal Production. The beef industry is an essential part of Southwest Florida agriculture in jobs and revenues. However, surface run-off from pastures is a major source of nitrate, ammonia, phosphorus, and cryptosporidium in our surface waters and aquifers. The effect of high nutrient content in the Caloosahatchee River has been the seasonal growth of mircroalgae. The turbidity caused by this algae reduces the light penetration to submerged vascular aquatic vegetation, killing off vegetation essential to life cycles of shrimp, crabs, sport fishes, and forage fishes. Yet the presence of these nutrient pollutants that originate in animal agriculture is categorically untouchable due to the exclusion of agricultural stormwater. (p. 2-3)

Agency Response: Implementation of the NPDES permitting program or sources nonpoint source pollution are outside the scope of this rulemaking.

Citizens Committee to Complete the Refuge (Doc. #14738)

7.223 Prior converted croplands:

The preamble to the proposed rule states, "Waters and features that are determined to be excluded under section (b) of the proposed rule will not be jurisdictional under any of the categories in the proposed rule under section (a). *There is no recapture provision for these excluded waters in the proposal.*" [emphasis added]

Prior converted croplands are listed under section (b), with the proviso "Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA." Please clarify what this means with respect to prior converted croplands determinations. Does this mean EPA will review all PCC determinations to determine if these wetlands still possess wetlands functions and values?

EPA and the Corps have not adequately demonstrated their presumption that prior converted croplands do not possess valuable wetlands functions and values, nor have the agencies adequately demonstrated that these areas could not be fully restored to functional and valuable wetlands in the absence of agricultural manipulation. We strongly object to prior converted croplands being placed under section (b) of the proposed rule and classified as areas that have no recapture provision.

A common misconception is that lands identified/certified by the Natural Resources Conservation Service (NRCS) as Prior Converted Croplands have been sufficiently

altered to permanently remove wetland characteristics and in particular, the hydrology required to maintain wetland functions and values. The designation Prior Converted Croplands is a regulatory construct for the purposes of implementing the "swampbuster" provisions of the Food Security Act (FSA) and does not reflect the ecological functions or values of these lands.

Votteler and Muir[127] observed:

> Clinton's proposals relaxed some of the current restrictions on agricultural effects on wetlands and increased funding for incentives to preserve and restore wetlands on agricultural lands. The administrative policy *excluded 53 million acres of "prior converted croplands" from regulation as wetlands*... [emphasis added]

And Ruffolo[128] also referred to changes implemented by the Clinton Administration:

> 7.224 ...It also made the Soil Conservation Service, in the Department of Agriculture, responsible for wetland jurisdictional determinations on agricultural lands under both the Clean Water Act and the "Swampbuster" program (the Food Security Act). The administration also excluded "prior converted croplands" from regulation. *This exemption excluded from regulation vast tracts of wetlands that had been drained and converted to agricultural use prior to 1985.* [emphasis added]

Prior Converted Croplands are defined in the 5th Edition of the National Food Security Act Manual (NFSAM) in the following manner:

> A. Definition
>
> (1) Prior converted cropland (PC) is a converted *wetland* where the conversion occurred before December 23, 1985; an agricultural commodity had been produced at least once before December 23, 1985; and as of December 23, 1985, the area was capable of producing an agricultural commodity (i.e., did not support woody vegetation and was sufficiently drained to support production of an agricultural commodity). The conversion could include draining, dredging, filling, leveling, or otherwise manipulating (including the removal of woody vegetation or any activity that results in impairing or reducing the flow and circulation of water) the wetland area. In addition, PC meets the following hydrologic criteria:
>
> (i) If the area is not a pothole, playa, or pocosin, *inundation* is less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent change or more).
>
> (ii) If the area is a pothole, playa, or pocosin, inundation is less that 7 consecutive days and saturation is less than 14 consecutive days during the growing season in most years (50 percent chance or more). [emphasis added]

[127] Votteler, Todd H. and Thomas A. Muir. "Wetland Management and Research - Wetland Protection Legislation." National Water Summary on Wetland Resources. United States Geological Survey Water Supply Paper 2425. http://water.usgs.gov/nwsum/WSP2425/legislation.html.
[128] *Ibid.*

The definition clearly labels PCCs "wetlands." The determining factor in whether a hydrologically modified (prior to December 23, 1985) wetland is regulated or not, is that of ponding. Is the (hydrologically modified) wetland inundated (ponded) for less than 15 consecutive days? If so (unless it is a pothole, playa, or pocosin), it is a PCC and not regulated, even if there is saturation of soils to the surface.

In response to the question "Why regulate PCC wetlands?" the Washington State Department of Ecology asserts:

> The original assumption behind exempting PCC wetlands from federal regulation was the belief that these wetlands had been so altered they no longer provided important wetland functions. However, *PCC wetlands in Washington perform many of the same important environmental functions as other wetlands, including recharging streams and aquifers, storing flood waters, filtering pollutants from water and providing wildlife habitat*. [emphasis added]

The National Research Council[129] observes (p. 159):

> One potential concern, however, is that agricultural wetlands will begin to diverge as separate from those regulated by USACE and EPA. This divergence could be fostered by maintenance of separate delineation manuals for agricultural and nonagricultural wetlands. Several *major differences based on policy rather than science* are already apparent. [emphasis added]

And, recommends for "Especially Controversial Wetlands" (p. 167):

> Wetlands on agricultural lands *should not be regulated differently from other wetlands.* These wetlands may have many of the same attributes as do other wetlands, including maintenance of water quality, and *there is no scientific basis for delineating them under definitions or federal manuals different from those applicable to other wetlands*. [emphasis added]
>
> ...Wetlands in agricultural settings can enhance runoff water quality...

Sheldon, et al,[130] asserts:

> ...However, *many wetlands meeting the criteria for PCC would still be expected to provide important functions*, given that the criteria for being designated "Prior Converted" require only that the wetland has been manipulated for production of commodity crops since 1985 and *does not pond* for more than 14 consecutive days during the growing season.
>
> ...In addition, the authors of Volume I *have documented significant water quality and quantity functions provided by PCCs* in projects reviewed and permitted by the Department of Ecology (This data has not been published). [emphasis added]

[129] National Research Council. "Wetlands: Characteristics and Boundaries." National Academy Press. Washington D.C. 1995.

[130] Sheldon, Dyanne, Tom Hruby Ph.D., Patricia Johnson, Kim Harper, Andy McMillan, Teri Granger, Stephen Stanley, Erik Stockdale. "Wetlands in Washington State Volume 1: A Synthesis of the Science." Ecology Publication #05-06-006. Department of Ecology Publications Distribution Office. http://www.ecy.wa.gov/biblio/0506006.html.

There is a need for protection and recapture of areas certified as PCC. PCC wetlands receive no protection under the FSA. Thousands of acres of wetlands could be at risk from actions that reduce or impair the reach, flow or circulation of these wetlands.

According to a "Wetland Fact Sheet - Prior Converted Cropland" published by the Vermont NRCS[131]:

> Areas that qualify as Prior Converted Cropland (PC) are exempt from the Swampbuster provision of the Farm Bill. *These areas can be further drained, cropped or manipulated* without loss of eligibility for USDA program benefits. [emphasis added]

Once determined PCC, the wetland is forever considered PCC. Despite the fact that other categories of wetlands on agricultural lands are considered "abandoned" following the cessation for five consecutive years of management or maintenance, "PC lands will not be considered abandoned under the Food Security Act."[132]

The NFSAM does state:

> This definition of abandonment is applicable *only for compliance with the Food Security Act. Regulations governing the Clean Water Act may provide different or additional criteria for abandonment, particularly with regard to PC areas.* Participants who are planning to abandon PC areas should be advised to discuss their plans with the COE before proceeding. [emphasis added]

The February 25, 2005 Memorandum to the Field issued jointly by USDA-NRCS and the USACE provides the following guidance regarding PCCs:

> Prior-Converted Cropland. Prior-converted cropland (PC) is identified for the purpose of implementing the FSA, and refers to wetlands that were converted from a non-agricultural use to cropland prior to December 23, 1985. While a PC area may meet the wetland hydrology criterion, production of an agricultural commodity or maintenance or improvement of drainage systems on the PC area, is exempt from the swampbuster provisions. A certified PC determination made by NRCS remains valid as long as the area is devoted to an agricultural use. *If the land changes to a nonagricultural use, the PC determination is no longer applicable and a new wetland determination is required for CWA purposes*. Specific guidance will be provided by the Corps in the near future addressing how the Corps will treat PC designations for land that changes from agricultural to non-agricultural use. [emphasis added]

This language explicitly states that PCC determinations and exemptions remain valid only as long as the land is in agricultural use. However, the specific guidance promised has yet to be provided by EPA or the Corps. Conversion of agricultural lands to development is an ever present threat in California. The potential loophole afforded by non-regulation of PCC wetlands must be avoided in the WRAPP. We are aware of

[131] Vermont NRCS. "Wetland Fact Sheet - Prior Converted Cropland. http://www.vt.nrcs.usda.gov/programs/Wetland_Compliance/Wetland%20Fact%20Sheet%20-%20Prior%20Converted%20Cropland.htm.

[132] NRCS. National Food Security Act Manual. M_180_NSFAM_514_D, Fifth Edition, November 2010.

situations where landowners/developers have attempted to utilize PCC determinations to preclude Clean Water Act regulation of wetlands.

The proposed rule must not exempt conversion of PCC wetlands to non-agricultural uses and as stated above, must not exempt activities that would reduce or impair the reach, flow of circulation of waters of the U.S. similar to the existing agricultural exemptions. The intent is not to regulate historic and ongoing farming operations, but to regulate any change in use that will result in the conversion of wetland areas to uplands. Changes in use could encompass proposals to remove the agricultural wetlands from farming for the purposes of development, but could also include changes in farming to crops that require drier soils. The latter is especially of concern, as we are aware of several instances in the San Francisco Bay Area where landowners brought in fill or deep ripped soils (e.g. Borden Ranch) under the guise of "normal farming operations" on lands where we were aware of future development proposals. The proposed rule should not include loopholes that would allow the unregulated conversion of wetlands to uplands.

Every five to seven years agricultural policies are evaluated and reauthorized or modified by U.S. lawmakers through the Farm Bill authorization process. As can be observed by the recent 2014 Farm Bill, the process is highly politicized and not without controversy. EPA must not merely adopt NRCS's definition of PCC wetlands, as that definition is vulnerable to changes in definition or conditions with each Farm Bill reauthorization. As an example, PCC wetlands were originally considered abandoned if they were not cropped for five years. This policy was drastically altered with the 1996 Farm Bill, which stated PCC wetlands will not be considered abandoned under the FSA. Once a wetland is identified PCC, that designation (and exemption from regulation) lasts forever, as long as the lands are used for the production of food, forage or fiber, and so long as alterations of PCC wetlands do not alter the hydrology of nearby wetlands. We have already discussed the need for the incorporation of a recapture clause to prevent the unregulated drainage and conversion of these wetlands under the guise of normal farming operations. EPA must ensure its policies are well defined and protective of waters of the state. EPA must ensure its policies will not inadvertently be altered by changes adopted by an outside agency - especially one that does not have protection of waters of the state as its primary charge. To do anything less would be abrogating the EPA's responsibilities under the CWA.

No inventory of PCC determinations is available, thus it is impossible to determine how many thousands of acres of wetlands may be at risk.

Crumpton et al[133] observed:

> Lack of public information on cropped wetlands: Because USDA does not make the data public, very little information about cropped wetlands is available. USDA, the Corps, EPA and the Interior Department coordinated wetland protection under a 1994 interagency agreement. USDA confidentiality, however, was one reason that agreement terminated. It is essential that these data be made

[133] Crumpton, William, Arnold van der Valk, Will Hoyer, David Osterberg. "Wetland Restoration in Iowa Challenges and Opportunities." The Iowa Policy Project. May 2012. www.IowaPolicyProject.org.

> public in order to assess the policy implications of various alternatives for dealing with cropped wetlands.

Without such information, it is impossible for EPA and the Corps to determine the environmental impacts of providing a recapture clause for PCC wetlands.

On February 28, 2005, the NRCS provided rationale for withdrawing from the 1994 Memorandum of Agreement (Ag MOA)[134]. Of note are the following:

> The 2002 amendments *prohibit NRCS from sharing confidential producer information to agencies outside USDA. This makes it illegal for NRCS to provide wetlands delineations and determinations to the COE and EPA for CWA permitting and enforcement.*
>
> *1996 amendments eliminated the concept of "abandonment" for prior converted (PC) cropland*. As a result, land may be considered non-wetland for Swampbuster purposes, and wetland for CWA purposes...

The MOA states that NRCS wetland determinations shall not be revised without interagency coordination. However, NRCS is required to comply with the decision of the USDA National Appeals Division, which may overturn a previous wetland determination without coordination among the agencies.

Per the MOA, NRCS agreed to conduct wetland determinations on agricultural land for the purpose of obtaining a CWA permit. *Regulations at 7 C.F.R. §12.30 state that NRCS's responsibilities regarding wetlands extend only to implementing the wetland conservation provisions of the FSA.* [emphasis added]

Clearly, NRCS cannot comply with the spirit and intent of the 1994 MOA. The FSA fails to provide any regulatory protection of wetlands identified as prior converted croplands. It has been nine years since the NRCS and the Corps withdrew from the Ag MOA and there is yet to be any specific guidance regarding recapture of PCC wetlands.

In conclusion, with the exceptions noted above, we support the proposed definition of "waters of the U.S." We believe ample scientific documentation exists to support the proposed rule. We encourage EPA to adopt the recommendations put forth in the SAB letter dated September 30, 2014. (p. 4-8)

Agency Response: **See Section 7.2 summary response above.**

Stormwater Management Commission, Lake County, Illinois (Doc. #15381)

7.225 We acknowledge and support the proposed exemptions for agricultural lands and the specific exclusion of prior-converted cropland from regulation as WOUS in §328.3(b)(2). (p. 2)

Agency Response: **Comment noted.**

[134] NRCS. "Guidance on Conducting Wetland Determinations for the Food Security Act and Section 404 of the Clean Water Act." http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_007868.pdf.

Wetland Science Applications, Inc. (Doc. #4958)

7.226 I agree with placing the exceptions at 33 CFR 328(b) into the rule with the following exceptions:

1. Regarding (2) prior converted, the 5-year abandonment provision should be specifically included to avoid parochial efforts similar to that adjudicated in the New Hope case;… (p. 1)

Agency Response: **See Section 7.2 summary response above.**

7.3. ADDITIONAL PROPOSED EXCLUSIONS

Summary Response

The Agencies have historically indicated that a number of features are not considered Waters of the United States under the Clean Water Act, but only the exclusions for waste treatment systems and prior converted cropland were found in the rule itself. In the proposed and final rule the agencies add exclusions for waters and features previously identified as generally exempt in preamble language from *Federal Register* notices by the Corps on November 13, 1986, and by EPA on June 6, 1988. The agencies also add exclusions for groundwater and erosional features, as well as exclusions for some waters that were identified in public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies' intent, such as stormwater control features constructed in dry land to convey, treat, or store stormwater, and cooling ponds that are created in dry land. These exclusions generally reflect current agencies' practice, and their inclusion in the rule as specifically excluded furthers the agencies' goal of providing greater clarity over what waters are and are not protected under the CWA. This is the first time these exclusions have been established by rule.

Because questions about permitting sometimes arise, it may be helpful for the agencies to clarify that exemptions and exclusions are not the same. Where something is excluded from the definition of waters of the US, a water or feature meeting the definition of that exclusion is not itself a jurisdictional water under the Clean Water Act. Examples of such exclusions include prior converted cropland and waste treatment systems. However, even where a water is clearly identified as a water of the US, in some cases there are statutory or regulatory permitting exemptions that allow certain activities to occur in jurisdictional waters with no need for a permit. Examples of such permitting exemptions include normal farming, silviculture, and ranching practices and construction and maintenance of farm or stock ponds or irrigation ditches.

The final rule establishes exclusions from the definition of waters of the US for artificially irrigated areas that would revert to dry land should application of water to that area cease; 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; artificial reflecting pools or swimming pools created in dry land; small ornamental waters created in dry land; water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water; erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and puddles. The agencies also exclude groundwater,

erosional features including gullies and rills, and non-wetland swales. Comments relating to all of these issues are discussed in more detail in subsections of 7.3 and in individual comments below.

Specific Comments

Virginia Department of Transportation (Doc. #12756)

7.227 Information contained on p. 22263, first column, paragraphs 7(b)(5)(ii)-(iv), unnecessarily complicates the exclusions from the definition of WOUS. These sections should be rewritten as one exclusion, stating that artificial lakes, ponds or pools created by excavating and/or diking dry land are not WOUS. (p. 6)

Agency Response: The agencies disagree that the organization of the exclusions is unnecessarily complicated and are not making this change.

Ohio Department of Natural Resources et al. (Doc. #15421)

7.228 328.3(b)(5)(ii) Diked/excavated farm ponds, 3283(b)(5)(1ii) Reflection pools, swimming pools, 328.3(b)(5)(iv) Ornamental ponds

It should be clarified in the federal register discussion that these types of areas would not be considered jurisdictional waters of the U.S. even if they have outflow. For example, if an artificial pond was created by excavation and intercepted groundwater, and the resulting pond then possessed a discharge (either ephemeral, intermittent, or perennial), the pond itself would not be considered jurisdictional even though it connects to a water of the U.S. Presumably the new water created from the discharge of the pond would be considered a ditch, and would only be considered jurisdictional if it possessed perennial flow. Please confirm this assumption. (p. 6)

Agency Response: The agencies are clear that waters listed as excluded in paragraph (b) cannot be brought into jurisdiction under other parts of the rule. Where exempted features such as pools and ponds listed in paragraph (b) are connected to jurisdictional waters through outfalls, such outfalls could be considered ditches and treated as such under the rule but this is dependent on the facts of a particular situation. Under prior policies the agencies could determine that a particular feature generally considered nonjurisdictional was a "water of the United States." The agencies do not retain that authority for features excluded under the rule.

Scott County Soil and Water Conservation District, Illinois (Doc. #8410)

7.229 It must not affect areas previously excluded from federal jurisdiction, including prior converted cropland, artificially irrigated areas that would revert to upland if irrigation stops; artificial lakes or ponds created by excavating and/or diking dry land and used for purposes; purposes such as rice growing, stock watering, or irrigation; artificial ornamental waters created for primarily aesthetic reasons; water-filled depressions created as a result of construction activity; pits excavated in upland for fill, sand, or gravel; and waste treatment systems (including treatment ponds or lagoons). (p. 2)

Agency Response: **The agencies are, for the instances mentioned above, reflecting current practice in the exclusions now written into the rule.**

Ames Construction, Inc. (Doc. #17045)

7.230 …with this proposed rule, the agencies are effectively shifting the burden to the regulated community to prove the application of the limited and ambiguous exclusions on a case-by-case basis. This point is particularly prominent with regard to the exclusions for 'water-filled depressions incidental to construction activity' and 'water-filled depressions excavated on dry land for the purposes of obtaining sand and gravel.' Old maps and aerial photos may be the only sources available to identify historic conditions in order to resolve third-party allegations of violations of federal CWA laws; however, these tools often lack the level of resolution required to make a proper determination. It will ultimately be up to the regulated community to provide compelling evidence that an uneven surface area on the land (i.e., man-made wet area) first came about during construction activity, or face complicated and layered reviews, costly penalties or even citizen suits. (p. 2)

Agency Response: **The agencies are formalizing existing exemptions in rule language and expect no difference in implementation for the issues discussed in the comment. It remains the government's burden to demonstrate a particular water is a "water of the United States."**

Richland Communities (Doc. #18793)

7.231 Richland supports the policy decision to exclude rice growing areas from the definition of "waters of the United States" under the Clean Water Act. Richland is concerned, however, that the language in this provision is unclear and incomplete. As such, the language creates the potential that areas dedicated to rice growing could inappropriately be deemed jurisdictional despite the clear policy intent of the agencies that such areas be excluded as a matter of law.

For the reasons explained below, Richland requests that the exclusion for "rice growing" be moved from the second bulleted item listed above involving "artificial lakes or ponds" (79 Fed. Reg. 22263, section (b)(5)(ii)) to the first item encompassing "artificially irrigated areas" (79 Fed. Reg. 22263, section (b)(5)(i)). In addition, language should be added to ensure that the exclusion applies to any areas whose topography lawfully was altered for rice growing prior to the enactment of the Clean Water Act and its regulations, and that the exclusion will apply prospectively to rice growing areas that may change to some other crop or usage.

Specifically, Richland recommends the following changes (shown in italics and strikeout) to the text of these two elements of section (b) of the proposed rule excluding specified features from the definition of "waters of the United States":

- Artificially irrigated areas, *including rice growing areas,* that would revert to upland should application of irrigation water to that area cease. *The exclusion for rice growing areas includes any areas whose topography lawfully was graded, diked or otherwise altered for rice growing prior to the enactment of the Clean*

Water Act and its regulations, and applies prospectively to rice growing areas that may change to some other crop or usage.

- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, *and* settling basins~~, or rice growing~~. (p. 2)

Agency Response: The agencies maintain current policy in the final rule language and the agencies believe this suggestion would alter and expand current practice without sufficient reasons to do so. In all cases in order to be excluded a feature must meet the definitions in paragraph (b). See also the summary response at 7.3.2.

7.232 The agencies' proposed rule appropriately recognizes this historically unique aspect of rice cultivation. As the preamble to the proposed rule states, the agencies propose, for the first time, to exclude by rule certain waters and features over which the agencies have, as a policy matter, generally not asserted jurisdiction in the past. The express exclusion for "rice growing" clearly means that the agencies do not intend for lands used for rice production to be considered "waters of the United States" for Clean Water Act purposes, even if they would otherwise satisfy the regulatory definition. (79 Fed. Reg. 22217-22219, 22263.)

This is an important addition to the proposed rule. But unless the wording of this provision is expanded and clarified as Richland suggests, the intent and goals underlying the exclusion risk becoming diluted and misapplied in practice. (p. 3)

Agency Response: See response above.

7.233 The Term "Dry Land" Is Problematic in the Unique Context of Rice Growing

As noted above, the exclusion for "rice growing" is embedded in an element of section (b) of the proposed rule that would exclude "artificial lakes and ponds created by excavating and/or diking dry land." The term "dry land" in connection with rice growing leaves open the troubling possibility that an entire parcel of land in rice production could be deemed jurisdictional by a future regulator if some small part of the parcel was wetland prior to conversion.

This is no small potential problem. California is the second largest producer of rice in the United States, contributing about one quarter of the nation's rice yield. According to historic data, in California's Central Valley, which is a primary production area, only a very small percentage of active rice production areas would have been converted entirely in dry uplands. (ECORP 2014). Thus, the exclusion should be changed to acknowledge the unique nature of rice farming and to reflect that lands of any type that have been excavated, diked, or otherwise converted for rice farming purposes are excluded from jurisdiction.

Moving the exclusion for rice growing from (b)(5)(ii) to (b)(5)(i) of the proposed rule, as Richland urges, would help to resolve this problem by removing the requirement that the rice growing area was created in "dry land." Without this change to the text of this provision, a strong risk exists that the exclusion could be applied too narrowly or not at all in some cases - despite the clear intent that the proposed rule broadly and definitively exclude rice lands.

This change makes sense because rice growing areas are more akin to "artificially irrigated lands" than to "artificial lakes or ponds" used for such purposes as "stock watering" and "settling basins." If the rice growing provision is left where it is in the rule, it could mistakenly be read to apply only when "artificial ponds and lakes" are present, i.e., only when a rice field is inundated. This is an important consideration because the waters used to flood rice fields are regularly drained due to cultivation practices. They may also be drained for economic reasons such as fallowing during droughts or conversion to other crops or other uses. Property owners - here, rice farmers - deserve the assurance that their lands will not fall in and out of jurisdiction or be subject to capricious case-by-case jurisdictional determinations. Making this simple change to the language of the proposed rule will provide greater certainty to regulators and to land owners by helping to ensure that these lands retain their nonjurisdictional status. (p. 3-4)

Agency Response: **See response above. In addition, in the exclusion for artificial lakes or ponds, the agencies have changed "exclusively" to "primarily" in describing the uses. Artificial lakes and ponds are often not used exclusively for one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. The change to the exclusion reflects Agency practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use.**

7.234 The Historic Use of a Site Should Be Considered

The changes in wording that Richland recommends would take into account the historic use of sites and the fact that conversion to rice growing, in many instances, lawfully occurred prior to the enactment of the federal Clean Water Act and its regulations in areas where wetlands once existed. (See discussion above.) The language should make clear that areas converted to uplands for rice growing purposes prior to the Act's passage should fall within the jurisdictional exclusion as a matter of law. This additional language would be in harmony with the longstanding principle that laws and their regulations are not retroactive in application. (*Hughes Aircraft Co. v. U.S.* (1997) 520 U.S. 939, 946 [presumption against retroactive legislation "is deeply rooted in our jurisprudence"]; *Golden Gate Audubon Society, Inc. v. U.S. Army Corps of Engineers* (N.D. Cal. 1988) 717 F.Supp. 1417, 1421-1422 [Corps could find that dry land was a site's normal circumstance because site was transformed into dry land by 1975 and regulatory definition does not retroactively extend jurisdiction].)

Such additional clarifying language also would be in harmony with the well-established principle that the Clean Water Act does not regulate areas that were historically graded out of wetlands and into uplands. Under a frequently cited distinction, the U.S. Army Corps of Engineers has recognized that wetlands may be altered in a legitimate and permanent manner (construction of levees or placement of drainage tiles, for example) that eliminate an area's wetland properties, thereby removing the area from jurisdiction under Section 404 of the Clean Water Act (33 U.S.C. § 1344). In contrast, lands where individuals engage in ongoing management or removal of hydrophytic vegetation or wetland hydrology to deliberately evade Section 404 regulatory requirements could come under Section 404 jurisdiction. (See, e.g. Regulatory Guidance Letter 90-07, Paragraph 4; 42 Fed. Reg. 37128 [preamble to regulatory definition of "wetlands" responds to "situations in which an individual would attempt to eliminate the permit review

requirements of Section 404 by destroying the aquatic vegetation"]; Army Corps of Engineers Wetlands Delineation Manual, January 1987, p. 73 ["Unauthorized activities"].)

This practical distinction recognizes that lands that have experienced one-time structural-type changes to topography that permanently alter a site's hydrology should not be regulated as long as the changes were conducted lawfully prior to the Clean Water Act's enactment. Rice lands that have been graded and diked to facilitate the inundation necessary for cultivation fall squarely under this rubric. (p. 4-5)

Agency Response: **The agencies discuss the exclusion for rice fields that were constructed by excavating or diking dry land in the summary response to 7.3.2 below. 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 paqragraph (a). In such cases, of course, permitting exemptions for normal farming activities would apply.**

Water Law (Doc. #13053)

7.235 …we recommend that there be a categorical exemption given to all artificial lakes and ponds, artificial water features, ornamental waters, swimming pools, and water filled depressions constructed within upland or dry land regardless of use or size. (p. 11)

Agency Response: **The final rule clarifies exclusions for these features.**

Coalition of Renewable Energy Landowner Associations (Doc. #14626)

7.236 With respect to the exemption for artificial and man-made structures such as upland ditches, lakes, stock ponds, small ornamental waters, water filled depressions created incidental to construction activity, and subsurface drainage systems, it is unclear as to what is available remedies that would prevent these exemptions from becoming "non-exempt" as illustrated before with the "gullies". What is to pre-vent a depression, swale, rice pond or artificial lake or pool from being having its status changed to a wetland or "other waters" if/they are not maintained and/or remediated in a timely and regular fashion for the designated purposes listed in the exemption? Is a requirement for concrete of fabric lining necessitated to keep stock ponds and depressions from becoming an "other water" In some areas, concrete lined stormwater channels are considered "Waters of the United States" We are not convinced that any exemption cannot at a future juncture become jurisdictional as a tributary, other water or wetland without detailed clarification. (p. 7)

Agency Response: **So long as a feature meets the definitions under paragraph (b), it is excluded and is not subject to jurisdiction.**

Pennsylvania Independent Oil and Gas Association (Doc. #15167)

7.237 Exclusions — The exclusions to the definition of "waters of the United States" are very specific and. seemingly arbitrary. PIOGA asks that the exclusions for (1) "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" and (2) "artificial reflecting pools or swimming pools created by excavating and/or diking dry land" be expanded to include other types of ponds excavated in dry land, including impoundments and stormwater ponds. (p. 17)

Agency Response: In the exclusion for artificial lakes or ponds, the agencies have changed "exclusively" to "primarily" in describing the uses. Artificial lakes and ponds are often not used exclusively for one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. The change to the exclusion reflects Agency practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use. The agencies have also added cooling ponds to the list of uses in the rule. The list of uses has always been illustrative rather than exhaustive, and this addition responds to many requests to clarify that cooling ponds created in dry land are excluded. Because of public comments, the agencies now identify stormwater ponds excavated in dry land as excluded under paragraph (b). However, impoundments of waters of the US have historically been and continue to be jurisdictional under the rule.

Ducks Unlimited (Doc. #11014)

7.238 G. Waters that are not "Waters of the United States":

We agree with the inclusion of the expanded list of waters that would be explicitly excluded from jurisdiction. As the agencies well know, this proposed rule has been controversial, to a large extent because of confusion about which waters would be excluded and which could have jurisdiction restored (again, recognizing the overarching fact that the proposed rule will cover significantly fewer waters than are jurisdictional under the existing regulations). Much of the expressed concern and confusion has stemmed from within the agricultural community. Codification of the agricultural and other exclusions, direct and clear communications about them, and follow up administration of the rule that is fully consistent with those communications on a nationwide basis, will go a long way toward increasing certainty and predictability on the part of farmers, ranchers, and other landowners.

In addition, given the concerns that are often raised about small, inconsequential (from the perspective of affecting "waters of the U.S.") water bodies, we believe it is also important and useful for the agencies to have taken the step of explicitly listing a number of exclusions relevant to those concerns, e.g., gullies, rills, non-wetland swales, small ornamental waters, and water-filled depressions incidental to construction activity, among others. Expressly making all of these kinds of waters non-jurisdictional by rule will help convey clarity and address many of the concerns of important segments of the landowning public and, in particular, the farming and ranching communities. (p. 34-35)

Agency Response: The agencies have finalized all exemptions described above from the proposed rule into the final rule, and hope this clarity will address concerns of the farming and ranching communities.

Defenders of Wildlife and Patagonia Area Resource Alliance (Doc. #16394)

7.239 **II. Defenders Objects to the Agencies' Proposal to Exclude Groundwater and Other Categories of Waters From the Protections of the Clean Water Act.**

Defenders disagrees with the agencies' proposal to categorically exclude waters listed in proposed subsections (t)(1)-(5), particularly groundwater, from Clean Water Act protections because this proposal is not grounded in science or the law. As detailed by the individual members of the SAB, the scientific evidence gathered for the Connectivity Report demonstrates that these waters, at a minimum, should be included in the "other waters" category in proposed subsection (s)(7) because they often play critical ecological, hydrological, and biological roles in connecting surface waters and waters of the U.S. As the SAB report concluded, "[t]he Clean Water Act exclusions of groundwater and certain other exclusions listed in the proposed rule and the current regulation do not have scientific justification." SAB letter at 3. In addition, these exclusions have no legal justification. Excluding the waters listed in proposed subsections (t)(3)-(t)(5) based on "longstanding practice" and administrative convenience (79 Fed. Reg. at 22217) is not a reasonable or permissible interpretation of the statute. See Chevron, 467 U.S. 837, 842-43. (p. 1-2)

Agency Response: As explained in the preamble, the agencies believe the caselaw supports the conclusion that some water features should not be subject to jurisdiction, and longstanding practice is an appropriate consideration.

Delaware Riverkeeper Network (Doc. #15383)

7.240 **Comment 8c: Exclusion of Gullies, Rills, Non-Wetland Swales, Artificial Irrigated Areas, Artificial Lakes and Pond, Reflection Pools and Water-Filled Depressions: Section 328.3(b)(5)(i), (ii), (iii) and (v)**

Gullies, rills, and non-wetland swales are important for moving water between jurisdictional waters and should not be excluded from jurisdiction. Such water bodies should be examined on a case-specific basis as science does not support the exclusion of this class of waters as a whole.8 Also, artificial lakes and ponds and reflection pools may be connected to jurisdictional waters by shallow or deeper groundwater, and therefore a blanket exclusion should not be provided for these water bodies. (p. 5)

Agency Response: The exclusions reflect the agencies' long-standing practice and technical judgment that certain waters and features are not subject to the CWA. The exclusions are also guided by Supreme Court cases. The significant nexus standard arises from the case law and is used to interpret the terms of the CWA. Thus, a significant nexus determination is not a purely scientific inquiry, but rather is a determination by the agencies in light of the statutory language, the statute's goals, objectives and policies, the case law, the relevant science, and the agencies' technical expertise and experience. The plurality opinion in *Rapanos* also noted that there were certain features that were not primarily the focus of the CWA. The Supreme Court has recognized that clarifying the lines of jurisdiction is a difficult task: "Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats,

swamps, bogs — in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of 'waters' is far from obvious." Riverside Bayview at 132-33. The exclusions reflect the agencies' determinations of the lines of jurisdiction based on science, the case law and the agencies' experience and expertise.

Community Watersheds Clean Water Coalition, Inc. (Doc. #16935)

7.241 Although "waters that are subject to the ebb and flow of the tide" are listed as jurisdictional under (a)(1), the agencies are proposing to exclude mudflats and sandflats, both tide-dependent, from their jurisdictional list. The agencies need to clarify this apparent contradiction. (p. 6)

Agency Response: While mudflats and sandflats are no longer specifically called out in the rule, such features would be jurisdictional where they meet the definitions in paragraph (a).

Water Environment Federation (Doc. #16584)

7.242 ***The Proposed Amendments to What is Considered an "Adjacent Water" Must be Reexamined to Consider Wastewater Treatment Processes***

Many wastewater treatment processes, including man-made spreading basins, are located near or even "adjacent" to rivers and tributaries that have been (or under the proposed rule, would be) designated as waters of the United States. and may be located in the riparian or floodplain areas of these rivers. Because the proposed rule defines "adjacency" and includes the incorporation of waters within the flood plain or riparian area of a designated water of the U.S. as also being a jurisdictional water (see section 328.3(c)(2)-(4), FR 22263), this could lead to an interpretation that such spreading basins and artificial storage ponds are jurisdictional.

…

Within the proposed rule, there are two specific exemptions that could potentially address this issue. Pursuant to section 328.3(b)(5)(i) and 122.2(b)(5)(i)2, a spreading ground could fall under the definition of "[a]rtificially irrigated areas that would revert to upland should application of irrigation water to that area cease" (79 FR 22263 and 22268) Spreading grounds utilized by wastewater treatment facilities are generally artificially created and might not otherwise exist aside from the application of wastewater effluent to the area. However, without being explicitly stated, it is not clear enough that this definition would apply to upland wastewater spreading grounds. Similarly, pursuant to section 328.3(b)(5)(ii) and 122.2(b(5)(ii), wastewater and recycled water ponds and spreading grounds could fall under an expanded definition of "[a]rtificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock water, irrigation, settling basins, or rice growing." (79 FR 22263 and 22268) The word "such" seems to indicate that these are merely examples, not an exhaustive list, and thus spreading grounds utilized in conjunction with and/or as part of the overall wastewater treatment process could fall under this exclusion. However, without specific references within these provisions to treatment ponds and spreading grounds, WEF and its members are very concerned that these facilities could become jurisdictional and

create significant problems for agencies attempting to protect public health and the environment. This, we would request the explicit inclusion of the terms such as "spreading grounds" and "wastewater and recycled water storage," within this section. (p. 4-5)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water.

The exclusion also covers water distributary structures that are built in dry land for water recycling. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, 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 have not in practice asserted jurisdiction over these types of features when created in dry land. The exclusion in paragraph (b)(7) codifies long-standing agency practice and encourages water management practices that the Agencies agree are important and beneficial. See essay and responses below regarding the exclusion in paragraph (b)(7).

7.3.1 Artificially Irrigated Areas that would Revert to Upland should Application of Irrigation Water to that Area Cease

Summary Response

The agencies have identified artificially irrigated areas that would revert to upland should application of irrigation water to that area cease as generally not "waters of the United States" in

previous preambles or guidance documents. Federal Register notices by the Corps on November 13, 1986, and by EPA on June 6, 1988 identify, among other general exclusions, "artificially irrigated areas which would revert to upland if the irrigation ceased." Under this previous preamble guidance the agencies could determine that a particular feature generally considered nonjurisdictional was a "water of the United States." The agencies do not retain that authority for features excluded under the rule. The proposed rule contained this exemption unchanged from previous preamble language. The rule identifies as excluded "artificially irrigated areas that would revert to dry land should application of water to that area cease," substituting "dry lands" for "uplands."

The agencies clarify in the preamble 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.

The agencies also here clarify their longstanding view that only the specific land being directly irrigated that would revert to dry land should irrigation cease is excluded; it is not the case that all waters within watersheds where irrigation occurs are excluded.

Comments included a request to delete the limitation to areas that would revert to upland and to include all irrigated areas under the exemption for prior converted cropland. Commenters also asked whether irrigation must cease for the exemption to be applied or whether alternative approaches to show lack of hydrology without irrigation would suffice to demonstrate applicability of the exemption and asked whether it mattered if the area being irrigated was considered dry land before the irrigation occurred. As discussed further in the comment responses below, the agencies are not removing the longstanding limitation, nor do they choose to conflate two separate exclusions. In addition, the agencies longstanding practice regarding the implementation of the exclusion for artificially irrigated areas to address the later comments.

Specific Comments

Office of the Governor, State of Montana (Doc. # 16694)

7.243 Amend the proposed definition of the listed features exempted from the definition of "waters of the U.S." in proposed 40 CFR 230.3(t)(5) with one of the following: strike from the proposed definition of "artificially irrigated areas" the language that states "that would revert to upland should application of irrigation water to that area cease;" or replace the entire definition of "artificially irrigated areas" with the existing exemption under 33 CFR 328.3(a)(8), which states: "Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final l authority regarding Clean Water Act jurisdiction remains with the EPA." (p. 4)

Agency Response: The commenter requests that the agencies remove a longstanding limitation on this exclusion by removing the clause about reversion to upland in case irrigation ceases. The commenter's suggestion would substantially alter the scope of this exclusion, and there was no reason provided why the agencies

should adopt the suggested approach. The agencies feel it is important and appropriate to maintain consistency with longstanding practice while bringing the exclusion into rule language. Even where the exclusion does not apply because hydrology remains even without artificial irrigation, the area would have to meet the definitions in paragraph (a) in order to be considered a water subject to the Clean Water Act.

In addition, the rule maintains the longstanding exclusion for prior converted cropland. The exclusions for prior converted cropland and artificially irrigated areas that would revert to dry land if irrigation ceases are separate exclusions that address distinct factual scenarios. The agencies believe combining the exclusions would create significant confusion, if it was even possible. Prior converted cropland, by its definition, was cropped prior to December 23, 1985 with an agricultural commodity; was cleared, drained or otherwise manipulated to make it possible to plant a crop; has continued to be used for agricultural purposes; and has lost wetland characteristics such that it does not flood or pond for more than 14 days during the growing season. The final rule does not change the exclusion for prior converted cropland and comments on the prior converted cropland exclusion are beyond the scope of the rulemaking.

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

7.244 5) Caltrans requests that the exclusion for artificially irrigated areas be further clarified. As currently written, it is unclear whether or not irrigation must cease in order to exclude these areas, or if other documentation showing that the area would lack hydrology without the irrigation would be sufficient to support the exclusion of an irrigated area. (p. 2)

Agency Response: Continuing longstanding agency practice, irrigation does not need to cease in order to meet the exclusion. There are a number of tools such as maps, aerial photos, remote sensing, and water budgets that can show that an area was previously dry land and can show an area would lack hydrology without the irrigation.

Board of Supervisors, Sutter County, California (Doc. #19657)

7.245 …we request that the agencies make the following changes and additions to the exceptions in the Proposed Rule.

- Clarify that "artificially irrigated areas" described in proposed 33 CF.R § 328.3(b)(i) will be deemed to revert to uplands absent irrigation if the area being irrigated was dry land when the irrigation began or if the irrigation started before July 25, 1975. (p. 5)

Agency Response: In most cases, where an area was dry land before it was irrigated it will revert to dry land when irrigation ceases. Continuing longstanding agency practice, irrigation does not need to cease in order to meet the exclusion. There are a number of tools such as maps, aerial photos, remote sensing, and water budgets that can show that an area was previously dry land and can show an area would lack hydrology without the irrigation. The exclusion for artificially irrigated

areas that would revert to dry land if irrigation ceased is activity based not time based. This means there is no date before which irrigation must have begun in order to qualify for the exclusion. The commenter does not explain why a date limitation is appropriate or the particular date was chosen. As mentioned in the summary, Federal Register notices by the Corps on November 13, 1986, and by EPA on June 6, 1988 identify, among other general exclusions, "artificially irrigated areas which would revert to upland if the irrigation ceased." This exclusion has been in place since then and will continue to be in place with this rule.

Earthjustice (Doc. #14564)

7.246 C. Subsection (t)(5)(i), (ii)—"Artificially" Irrigated or Created Areas.

This part of the rule is simply unclear. What is meant by "artificially" irrigated areas that would return to upland? This implies that there are areas that are so heavily irrigated they turn into wetland or other bodies of water that might be considered a water of the U.S. It is unclear what fact pattern this language is trying to address. The next subsection specifically refers to rice growing, so it appears (t)(5)(i) does not refer to the kind of flood irrigation that might occur in a rice operation.

This exclusion (and the exclusion for ditches) also raises a question with respect to point sources and protected waters. EPA knows that many of the categorical exclusions are also significant sources of pollutants to water of the U.S. Artificial irrigation, rice growing operations (that fill and then later drain fields) and other "artificially" created areas such as settling basins, flush huge amounts of sediments, nutrients and chemicals such as pesticides into our waters. If they are not themselves protected waters subject to meeting water quality standards or protected by permit requirements if someone is to discharge to them, then EPA must ensure that the pollutants that the artificial areas contribute to waters of the U.S. do not escape regulation and continue to jeopardize downstream waters, currently severely polluted with agricultural runoff wastes. If they are not waters of the U.S. and they are not regulated as discrete point source conveyances of pollutants, then a very large problem for our waters will be unaddressed and wholly unregulated. (p. 13-14)

Agency Response: **In practice across the country some areas are irrigated through man-made systems sufficiently to develop wetland characteristics. This is a common occurrence, for example, in the arid west, which relies heavily on artificial irrigation. Under longstanding agency practice, codified into regulations through this final rule, areas that are so heavily irrigated they develop wetland characteristics are not considered waters of the US if they would revert to upland should irrigation cease. The agencies note that if a feature functions as a "point source" under CWA section 502(14)), discharges of pollutants to waters through these features would be subject to other CWA regulations (e.g., CWA section 402).**

7.3.2. 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

Summary Response

The Agency received a total of 53 comments that were categorized under Section 7.3.2- *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*. Most of the comments centered on requesting language changes to the rule to increase the list of exclusions, and/or broaden the definition within the exclusions. Some of these comments were incorporated during the rulemaking process, for example, suggestions that cooling ponds be considered non-jurisdictional (see below).

In the exclusion for artificial lakes or ponds, the agencies have removed language regarding "use" of the ponds, including the term "exclusively." More importantly, the agencies recognize that artificial lakes and ponds are often used for more than one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. For example, rice fields are flooded for the purpose of weed control and to facilitate rice cultivation, but these rice fields are often extensively used by waterfowl and other wildlife. The agencies agree with commenters who raised concerns that rice fields "used" both for rice growing and waterfowl habitat should continue to be excluded even where they are not used "exclusively" for a single purpose. The change to the exclusion reflects the agencies' practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use.

The agencies have also added farm ponds, log cleaning ponds, and cooling ponds to the list of excluded ponds in the rule based on public comments. The list of ponds has always been illustrative rather than exhaustive, and the additions respond to requests to clarify that farm ponds, log cleaning ponds, and cooling ponds created in dry land are excluded. The agencies recognize that cooling ponds may be exempt under the waste treatment exemption as well as this provision. Listing cooling ponds as an example here does have any relation to the waste treatment system exemption, and the agencies are not reopening that exclusion. Additional ponds will also likely fall under the exclusion based on site specific evaluation, including, for example, fire control ponds and fishing ponds excavated from dry land. Artificial lakes and ponds created in dry land that do not connect to jurisdictional waters are covered by this exclusion. Where these ponds do connect and discharge to jurisdictional waters, the agencies will evaluate factors such as the potential for introduction of pollutants and coverage under an issued NPDES permit. As a general matter, ponds created in dry land that discharge to "waters of the United States" are covered by the exclusion where such discharge is regulated under a NPDES permit. Conveyances created in dry land that are physically connected to and are a part of the excluded feature are also excluded. These artificial features are working together as a system, and it is appropriate to treat them as one functional unit. The agencies emphasize that ponds excluded from "waters of the United States" can, in some circumstances, be point sources of pollution subject to section 301 of the Act. In addition, the agencies make clear in the preamble that water

features identified in paragraph (b) as excluded will not be "waters of the United States," even if they otherwise fall within one of the categories in paragraph (a)(4) through (a)(8).

The phrase "dry land" appears in the 1986 and 1988 preambles, and the agencies believe the term is well understood based on almost 30 years of practice and implementation. However, in keeping with the goal of providing greater clarity, section IV.I of the preamble clarifies 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.

To address the comments correlating to ponds or lakes for recreational purposes, flood reduction, erosion reduction, or for purposes that are not listed for exclusivity, the Agency redirects the commenters to the traditional CWA 404 process for making a jurisdictional determination followed by the CWA 404 permitting process.

Specific Comments

Oak Ridge National Laboratory (Doc. #14463)

7.247 The meaning of the exclusion at (b)(5)(ii) should be clarified. It could be interpreted in contradictory ways. On one hand, the lake or pond must be "used exclusively" but then examples of such uses are listed "for such purposes as stock watering, irrigation, settling basins, or rice growing" which implies that there are unlisted purposes that would qualify under this exception. The Agencies need to be clear if these are examples or an exclusive list of purposes. If they are examples list, how do you determine when or if other examples qualify for the exception? The current-day purpose of the water feature, even if different than past purposes, should be used to evaluate this exception. (p. 2)

Agency Response: **See summary response.**

Tennessee Department of Environment and Conservation (Doc. #15135)

7.248 The exemption for artificial lakes or ponds created by excavating and/or diking dry land unnecessarily includes the requirement that they be used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing. The state agencies understand these features to be wholly in uplands with no hydrological connection to any waters; therefore, it seems unnecessary to additionally mandate their use for specific purposes. We request EPA and the Corps remove the qualification for specific uses or explain why this additional qualification is necessary under the CWA. (p. 29)

Agency Response: **See summary response.**

Arizona Game and Fish Department (Doc. #15197)

7.249 6. The Department requests that 40 CFR 230.3 (t)(5)(ii) be revised to additionally exclude from the definition of waters of the United States the following: fish hatcheries; fish production ponds; wildlife watering ponds; and wildlife water catchments. (p. 3)

Agency Response: **See summary response.**

Southern Ute Indian Tribe Growth Fund (Doc. #15386)

7.250 **9. Comments on the exclusion of manmade structures**

…

It is not clear whether the Proposed Rule would exclude, for example, artificial lakes and ponds that have connections to downstream waters, underground stormwater drainage, natural versus artificial swales, roadside ditches, stormwater quality basins, bioswales, or treatment wetlands regardless of whether they were installed to meet the requirements of the Clean Water Act.

…

With respect to artificial lakes and ponds that have connections to downstream waters, underground stormwater drainage, natural versus artificial swales, roadside ditches, stormwater quality basins, bioswales, or treatment wetlands, it would be important to exclude these types of structures from jurisdiction since many of them provide both water quality and hydrologic benefits to downstream water. (p. 9)

Agency Response: See summary response above. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response 7.4.4. See summary response at 7.3.7 for additional information regarding swales.

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

7.251 The WVDEP recommends broadening the exclusion for artificial lakes so that impoundments constructed for industrial purposes by the mining and oil and gas industries are also excluded. As to the coal mining industry, the WVDEP regulates these structures under the state counterpart to SMCRA, W. Va. Code 8 22-3-1, et seq. As to the quarry mining industry, the WVDEP regulates these structures under the state Quarry Reclamation Act. W.Va. Code 22-4-1, et seq. As to the oil and gas industry, the WVDEP regulates these structures under the West Virginia Horizontal Well Control Act, W.Va. Code 9 22-6A-1, et seq. In the oil and gas industry, these structures are built for two primary purposes, both of which provide significant environmental benefits. Freshwater impoundments enable gas operators to withdraw the water they need for their operations from the State's streams during periods of higher flow and store it until needed for use. This allows the operators to protect streams by avoiding excessive withdrawals of water during periods of lower flow. Other impoundments provide storage for flowback water from gas operations. This allows operators to: (1) re-use contaminated flowback water, avoiding the need for additional fresh water withdrawal from streams; and (2) avoid the need to treat and discharge the stored flowback water. (p. 14)

Agency Response: See summary response. Also see summary response at 7.4.2 with regard to wastewater recycling features.

Allen Boone Humphries Robinson, LLP (Doc. # 19614)

7.252 "Artificial Lakes, Ponds, and Pools"

The agencies further propose to exclude lakes, ponds and pools that have been created for specifically listed purposes: stock watering, irrigation, settling, rice growing, reflecting, swimming and ornamentation. To qualify for the exclusion, these features must have been created by excavating and/or diking dry land. These proposed exclusions are wholly inadequate for our clients, who create lakes, ponds and pools for a variety of non-excluded purposes, such creating conditions suitable for non-swimming recreation, such as fishing and canoeing, and for restricting the flow of storm water runoff to reduce peak flows so as to minimize down-slope erosion and turbidity. (p. 9)

Agency Response: See summary response. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response 7.4.4.

Board of Supervisors, County of Nevada, California (Doc. #6856)

7.253 The proposed rule states: Artificial lakes or ponds created by excavating and or diking dry land and used exclusively for purposes such as stock watering, irrigation or rice growing are not "waters of the United States". The rule also states: Lakes and ponds (either natural or man-made) that contribute flow either directly or indirectly are considered tributaries and are "waters of the United States". Unless clarified, these conflicting statements opens the potential for any stock watering pond, irrigation pond or rice growing area that overflows during the rainy season and contributes flow to be considered jurisdictional. (p. 2)

Agency Response: See summary response. Also see overarching summary response for topic 7.

Central Valley Soil and Water Conservation District and Penasco Soil and Water Conservation District, Artesia, Maryland (Doc. #14943)

7.254 The proposed rule states that it will not change the jurisdiction over farm ponds or stock tanks. This is not true. The rule would make farm or stock tanks meaningless by regulating low spots as "navigable waters." The rule will also prevent landowners from building and/or maintaining a pond or stock tank. Existing tanks would also not be in compliance if the water runs through or around a spillway after the tank was full. (p. 3)

Agency Response: See summary response. Also see overarching summary response for topic 7.Arizona Game and Fish Department (Doc. #14789)

7.255 The Department requests that 40 CFR 230.3 (t)(5)(ii) be revised to additionally exclude from the definition of waters of the United States the following: fish hatcheries; fish production ponds; wildlife watering ponds; and wildlife water catchments. (p. 3)

Agency Response: See summary response.

City of Glendale, Arizona (Doc. #15054)

7.256 **Artificial Lakes and Ponds**

Water is a precious resource in the arid West. To save potable water resources, effluent provided by the City of Glendale is used for a variety of purposes such as irrigating golf courses and parks. For example, the Arrowhead Lakes development in northern Glendale

includes multi-purpose lakes. In support of continued use of effluent, the City of Glendale agrees with the proposed exclusion of artificial lakes or ponds used for irrigation. However, the City of Glendale ***respectfully requests the removal of "exclusively"*** from the exclusion language as these lakes and ponds often provide aesthetic amenities as well. (p. 2-3)

Agency Response: **See summary response.**

Board of Supervisors, Nevada County, California (Doc. #18894)

7.257 The proposed rule states: Artificial lakes or ponds created by excavating and or diking dry land and used exclusively for purposes such as stock watering, irrigation or rice growing are not "waters of the United States". The rule also states: Lakes and ponds (either natural or man-made) that contribute flow either directly or indirectly are considered tributaries and are "waters of the United States". Unless clarified, these conflicting statements opens the potential for any stock watering pond, irrigation pond or rice growing area that overflows during the rainy season and contributes flow to be considered jurisdictional. (p. 2)

Agency Response: **See summary response. Also see overarching summary response for topic 7.**

Board of Supervisors, Sutter County, California (Doc. #19657)

7.258 …we request that the agencies make the following changes and additions to the exceptions in the Proposed Rule.

- Add a definition for "excavating and/or diking dry land," applicable to proposed 33 CF.R §328.3(b)(5)(ii), (iii) and (iv), which clarifies that features created before July 25, 1975, are deemed to have been created by excavating or diking dry land without a factual showing by the applicant of conditions existing at the time of excavation. Suggested language: "Excavating or diking dry land means that the land being excavated or diked was not a water of the United States when the excavation or diking occurred; the excavation or dike was authorized by a section 404 permit; or the land was excavated or diked before July 25, 1975." Also clarify that the non-jurisdictional status of lands subject to proposed 33 CF.R § 328.3(b)(5)(ii), (iii) and (iv) continues to apply for 10 years after the land is no longer used for the purpose specified in each subsection. (p. 5)

Agency Response: **See summary response.**

Washington State Water Resources Association (Doc. #16543)

7.259 Despite the proposals stated objective to add clarity to the regulatory process, the proposal in fact creates great confusion and uncertainty. Some of the unanswered questions have been alluded to…Other issues that must be addressed, through clarification and in the context of an ongoing dialogue amongst stakeholders, include:

…

- How will the agencies treat artificial lakes or ponds that are not used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing, including stormwater detention ponds;

… (p. 17, 18)

Agency Response: See summary response above, as well as summary responses at 7.4.2 and 7.4.4.

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

7.260 Artificial Lakes, Ponds, and Pools

The Agencies further propose to exclude lakes, ponds and pools used exclusively for listed purposes: stock watering, irrigation, settling, rice growing, reflecting, swimming and ornamentation. To qualify for the exclusion, these features must have been created by excavating and/or diking *dry land*. In other words, if a stock watering pond or a settling pond was excavated in a small wetland area that was not jurisdictional (maybe nothing more than a low spot), the resulting stock pond or settling pond is not excluded from jurisdiction and instead may be regulated. Given that ponds and pools tend to be dug in low spots, these proposed exclusions are wholly inadequate.

In addition, while the exclusions may theoretically benefit some uses, they do nothing for most industrial/commercial operations. Lakes, ponds and pools are used throughout the country for a wide variety of industrial uses, as well as for combinations of different uses. Examples include: storing storm water for use as a dust suppressant; storing storm water for use in industrial processes; storing storm water for use in fighting fires; creating conditions suitable for non-swimming recreation, such as fishing and duck hunting; and restricting the flow of storm water runoff to reduce peak flows so as to minimize down-slope erosion and turbidity. (p. 34-35)

Agency Response: See summary response. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response 7.4.4.

South Carolina Chamber of Commerce (Doc. #14535)

7.261 B. Industrial Holding Ponds

There should be no question that man-made industrial or commercial holding ponds that store rain water, stormwater runoff, and water withdrawn from other water bodies for eventually use by the facility, such as cooling water or process water, should also be clearly and explicitly excluded from regulation. Some facilities may discharge treated effluent to such ponds for re-use, in which case the same exclusion should apply. There is an exemption for "artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, and rice growing." It may have been the agencies' intention to broadly exclude man-made reservoirs constructed for commercial or industrial purposes but the language provided does not appear to provide clarity on this point. The Chamber requests that the rule add language to clarify that ponds and impoundments used for water storage and transfer are not WOTUS. (p. 5)

Agency Response: **See summary response. Also see summary response at 7.4.4 with regard to stormwater control features.**

Dow Chemical Company (Doc. #15408)

7.262 Dow and Dow Agricultural Sciences (DAS) facilities…create and/or manage artificial lakes, ponds, basins, field tiles and engineered farm drainage systems (e.g., field waterways, field strips) and basins that are not used exclusively for purposes such as stock watering, irrigation, settling basins, or rice growing. The most common usage of these items is for erosion control. It is common to form artificial lakes and ponds to retain storm water through the use of dams, terraces, and similar engineered structures. These structures exist both on conventional farms as well as in many industrial R&D/field stations. Many of these man-made structures are constructed under USDA oversight. Thus, these infrastructure elements should also be excluded from the jurisdiction of waters of the United States for the same reasons described in comment #3 above.

Dow Recommendation: The proposed should rule be amended to exclude…artificial lakes, ponds, and basins, as well as field tile and engineered farm drainage systems (field waterways, filter strips, etc.) that are not used exclusively for purposes such as stock watering, irrigation, settling basins, or rice growing from those waters covered by the CWA. The inclusion of these "waters" such would be an undue burden on the regulated community, unnecessary paperwork for government agencies, costly to implement, and will not have a positive environmental effect on our nation's water resources. (p. 7)

Agency Response: **See summary response. Also see summary responses at 7.3.6, 7.4.2, and 7.4.4.**

Federal Water Quality Coalition (Doc. #15822.1)

7.263 **3. Artificial lakes or ponds**

Under the proposed rule, artificial lakes or ponds that are *used exclusively* for purposes such as stock watering, irrigation, settling basins, or rice growing are not waters of the U.S. Expressly excluding only specific types of artificial lakes and ponds has created significant uncertainty about the status of other artificial lakes and ponds not explicitly included in the exemption language, such as cooling ponds and fire water retention ponds. (p. 19)

Agency Response: **See summary response.**

NAIOP Commercial Real Estate Development Association (Doc. #14621)

7.264 4. §328.3(b)(5)(ii). Artificial Ponds.

There is much concern in the regulated community that stormwater facilities currently exempt from regulations as a WOTUS could become regulated by the proposed rule,[135] and that the adjective "exclusively" is extremely limiting. Therefore, to codify statements from the Agencies to the contrary, please revise this section to read as follows:

[135] This concern clearly generated EPA Q&A #22. However, it only addresses rain gardens – and not other stormwater facilities.

(ii) Artificial lakes or ponds created by excavating and/or diking dry land and used for such purposes as stock watering, irrigation, settling basins, rice growing, or wet or dry stormwater facilities, stormwater Best Management Practice (BMPs), flood control facilities, Low Impact Development (LID) facilities or other systems designed to control and treat stormwater runoff.

This achieves the stated purpose of the proposed rule and eliminates the current ambiguities. (p. 3-4)

Agency Response: See summary response. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response 7.4.4.

Staker Parson Companies (Doc. #15618)

7.265 EPA's website indicates that pits excavated in uplands are exempted from the rule but EPA did not include that exemption in the rule itself. This is a crucial issue for the industry. Pits excavated in uplands for sand and gravel must be included in the rule, which should also state that an excavated pit is not "abandoned" if it is still undergoing reclamation under State law or otherwise permitted. I am furthermore concerned about pits in states that do not have reclamation jurisdiction over sand & gravel (Utah for example) and how this would apply if there was no formal reclamation obligation. Throughout the West there are sand & gravel operations that are inactive due to economic conditions. Some sites have been inactive for close to a decade but will be put back into production given better economic conditions. (p. 1)

Agency Response: See summary response at 7.3.5.

Texas Mining and Reclamation Association (Doc. #10750)

7.266 **3. The Agencies Should Clarify that the Artificial Ponds and Lakes Exclusion Applies to Certain Water Features on Mine Sites**

As an initial matter, TMRA notes that, if the Agencies clarify the scope of the waste treatment system exclusion as suggested above, TMRA's following comments with respect to artificial ponds and lakes are moot, as the features discussed below would be excluded due to being part of a wastewater treatment system. However, to the extent that the Agencies do not adopt TMRA's suggested language concerning the waste treatment system exclusion, the artificial ponds and lakes exclusion should be modified accordingly.

The Agencies have long recognized that artificial ponds created on dry land to collect and retain water and that are used as settling basins are generally not jurisdictional.[136] The proposed rule would clarify that "[a]rtificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as ... settling basins," among other purposes, are per se not jurisdictional.[137] TMRA supports the categorical exclusion of

[136] See, e.g., 51 Fed. Reg. at 41,217 (Corps regulatory preamble); 53 Fed. Reg. at 20,765 (EPA regulatory preamble).
[137] 79 Fed. Reg. at 22,263.

such ponds and lakes, but would urge the Agencies to make it clear that this exclusion encompasses the many types of ponds on mine sites that are used for the collection, re-direction, and concentration and/or settling of solids.[138]

As currently drafted, the regulatory text appears to apply to sediment ponds and other onsite ponds on mine sites that are used for concentration and settling.[139] But, TMRA is concerned that some might interpret the exclusion as being limited to water features associated with agriculture given that the term "settling basins" appears in the regulatory text among a list of references to agricultural activities, i.e., "stock watering," "irrigation," and "rice growing." The preamble to the proposed rule does not shed any light on whether the reference to "settling basins" encompasses such features used in other industries. The Agencies should therefore clarify that this exclusion is not limited to agriculture-related ponds by explicitly referencing "industrial sediment ponds" or "industrial settling basins" in the list of permissible purposes, and should also clearly note that on-site ponds which may incidentally manage water but which are constructed for purposes including emergency firewater and cooling water ponds, ponds used for dust suppression water, evaporation ponds, and water recycle ponds qualify for this exclusion as well, In addition, the Agencies should clarify in the preamble that the exclusion is not confined to water features relating to agricultural activities.

The Agencies should further clarify that artificial ponds meet the requirement of being [excavated on dry land even if such features are constructed within floodplains or riparian areas land even if such features might share a subsurface hydrological connection to a downstream jurisdictional water. The exclusion would be rendered meaningless if it does not apply to ponds constructed on lands within floodplains and riparian areas. The same would be true if the Agencies (or a citizen plaintiff) could claim that a pond is a "water of the United States" based solely on a groundwater connection that ultimately develops between an on-site pond and an ephemeral tributary, to use an example. (p. 17-18)

Agency Response: See summary response. Also see summary response at 7.4.2 with regard to exclusion of wastewater recycling features.

Pennsylvania Coal Alliance (Doc. #13074)

7.267 **8. The Proposed Rule should be revised to expand coverage of the exclusions for settling ponds and other types of ponds created by excavating dry land.**

In addition to exclusions for waste treatment systems and converted croplands, the Proposed Rule would codify exclusions for a long list of other practices and water features that have been generally regarded as excluded from the definition of "waters of the United States." While the PCA supports the incorporation of these exclusions into the Proposed Rule, the PCA also supports the comments of NMA and WAC, which seek

[138] As previously explained, TMRA believes that these sorts of ponds are already excluded as waste treatment systems. But to the extent they do not fall within that existing exclusion, they should nevertheless remain non-jurisdictional under this newly codified exclusion.

[139] *Cf* 64 FR 39252,39332 (July 21,1999) (Corps nationwide permit recognizing that "[s]upport facilities are essential components of a mining operation" and authorizing facilities such as "settling ponds and settling basins, ditches, stormwater and surface water management facilities" among others).

further clarification and expansion of the applicability of these exclusions. The agencies state that these exclusions will provide more "clarity, certainty and predictability" in identifying jurisdictional waters.[140] However, as written, the exclusions are very narrow, with little explanation to why certain waters and features are excluded and other similar waters and features, presumably, are not. For example, the Proposed Rule excludes " "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," but does not clarify whether the reference to "settling basins" is intended to apply only to agricultural purposes or to all industries that use settling basins. This exclusion should be revised to make clear that it applies to all industries and all types of settling basins. (p. 13)

Agency Response: **See summary response.**

Newmont Mining Corporation (Doc. #13596)

7.268 The Agencies' Proposal, and in particular Appendix A to that Proposal, states that a "significant nexus" can be established though a deep groundwater connection or through the fact that organisms might use a certain isolated water as well as a nearby tributary as part of their habitat. See 79 Fed. Reg. at 22246. The Preamble also states in Appendix B that if an artificial pond collects meteoric water that otherwise might flow to a TNW, that might also be deemed a "significant nexus." Id. at 22261. While the vast majority of Newmont's artificial ponds are lined (and in many cases double-lined), and the groundwater is monitored and the distance to groundwater is typically hundreds of feet, Newmont cannot guarantee that there could never be one molecule of a solution from some of its artificial ponds that might migrate to deep groundwater and from there eventually migrate to a tributary network that gets to a TNW. Moreover, even though Newmont's operations are all located in arid to semi-arid climates, precipitation does occur, and Newmont's artificial ponds will collect meteoric water, some of which perhaps otherwise might have migrated to a tributary network that reaches a TNW if the artificial pond had never existed. Moreover, at least in the case of some stormwater retention ponds, certain biota may use the pond, as well as perennial streams, as habitat.

Perhaps of more concern, statements made in the Preamble and Appendix A to the Proposal suggest that, in determining the jurisdictional status of Newmont's artificial ponds, a regulator would have to take into account all "similarly situated" ponds in the same watershed. See 79 Fed. Reg. at 22204, 22246. That means that if artificial ponds operated by another operator – whether or not a mining operator – in the watershed release solutions to surface water, or release solutions to deep groundwater, or prevent rainfall from reaching a TNW, or provide habitat to biota that also inhabits a TNW, then somehow Newmont's ponds could potentially be deemed jurisdictional even though they have no such characteristics.

That result, we submit, is unfair. It would put Newmont and other mining companies in a position of having in effect to prove to the Corps (and EPA) that every single artificial pond on their properties should not be deemed jurisdictional. The expense and

[140] 79 Fed. Reg. 22217.

inconvenience of doing so, and the fact that current operations would be thrown into limbo, would be enormous – and totally unnecessary, because these ponds could never affect (significantly or otherwise) a TNW. In this respect, we incorporate the comments of the WAC and NMA dealing with the "science" upon which the Agencies' Proposal is based. As far as we have been able to ascertain, the claimed scientific underpinning for the Agencies' Proposal contains no evidence, or discussion, that artificial ponds such as those operated by Newmont in the arid West could have any impact, much less a significant adverse impact, on the chemical, biological, or physical integrity of a TNW located from 50 to 200 miles away.

Finally, we note that any attempt by EPA to assert jurisdiction over such ponds would run directly counter to the square holding in SWANCC that EPA and the Corps have no jurisdiction under the CWA to regulate isolated ponds that do not discharge to TNWs, or to a tributary system to a TNW. (p. 19-20)

Agency Response: See summary response. Also see overarching summar response at topic 7.

7.269 d. The Scope of the Artificial Pond Exception is Likewise Unclear: Nor is it clear whether Newmont's artificial ponds fall within the "artificial lakes or ponds" exception contained in the Agencies' Proposal. That exception excludes from the scope of jurisdictional waters: "Artificial . . . ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing." See, e.g., paragraph (b)(5)(ii) at 79 Fed. Reg. 22263. Newmont's artificial ponds are in the main created by excavating and/or diking dry land; however, as noted earlier, at times Newmont must divert portions of ephemeral drainages that could be deemed jurisdictional waters under the Agencies' Proposal. Moreover, it is unclear whether the purposes to which mining ponds are put – e.g., retention of stormwater, retention and recycling of cooling fluids, retention and recycling of tailings slurry, retention and recycling of pregnant and barren heap leach solutions – would fall within the phrase "used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing."

The Proposal's Preamble contains no discussion on the universe of artificial ponds intended to be encompassed by this new exception. While settling does, and is intended to, occur in mining artificial ponds, the illustrative examples given in the exception all appear to be related in some way or form to agriculture or silviculture activities, and so one could argue that only ponds used in those industries were intended to be excluded. We submit that mining artificial ponds are as, if not more, deserving of exemption than agriculture and silviculture artificial ponds. As discussed earlier, Newmont's artificial ponds are permitted and regulated under the comprehensive State WPCA designed to ensure that there is no discharge to surface or groundwater and that any releases to groundwater will be detected and remediated. Moreover, they are located in the arid and semi-arid West, where evaporation exceeds precipitation, and the chances are virtually nil that the contents of these ponds could ever reach surface water.

The bottom line, therefore, is that some of Newmont's artificial mining ponds might be deemed per se jurisdictional under the Agencies' Proposal (if they are adjacent to an ephemeral drainage that is otherwise deemed a jurisdictional water under the Proposal),

and all of Newmont's artificial ponds could potentially be deemed "other waters," because they might collect rainfall that might otherwise flow to a jurisdictional water, or might be connected by deep groundwater to jurisdictional waters many miles away, or might provide habitat to organisms that also have habitat in jurisdictional waters, or might be deemed "similarly situated" to ponds operated by others. Moreover, although Newmont has good arguments that its artificial ponds should fall within the "waste treatment system" or "artificial pond" exceptions, there is no guarantee that every regulator, or indeed any regulator, would so concur. Thus, Newmont's artificial ponds could potentially be deemed regulated waters of the United States, even though: (1) no one would ever, or could ever, conclude that they have any kind of impact, significant or otherwise, on a TNW; (2) the "science" relied upon by the Agencies as a basis for the Proposal does not establish or support in any way the assertion of jurisdiction over such artificial ponds; and (3) assertion of jurisdiction over such artificial ponds would be directly contrary to the holding in SWANCC that isolated ponds cannot be deemed jurisdictional by the Agencies. (p. 21-23)

Agency Response: **See summary response. Also see summary responses at 7.4.2 and 7.4.4 regarding exclusions for wastewater recycling and stormwater control features.**

7.270 5. Suggested Changes to the Proposal

As noted, EPA and Corps officials with whom we have spoken about this matter have been adamant that the Agencies' Proposal was never intended to encompass mining artificial ponds, and associated constructed ditches and channels, such as those that are operated by Newmont and other hardrock mining companies in the arid and semi-arid West. But given the wording of the Proposal, we cannot be sure that every Corps or EPA regulator will reach the same conclusion. We therefore urge that EPA make clear in any final rule that such artificial ponds, and associated ditches/channels, are not jurisdictional waters. Solutions include the following:[141]

…

2. Amending the existing "artificial lakes or ponds" exception contained in subsection (b)(5)(ii) of the Proposal to read: "Artificial lakes or ponds created primarily by excavating and/or diking dry land and/or diverting ephemeral or intermittent drainages and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing, or managing process waters, wastewaters, solutions, groundwater or other liquids associated with the extraction, beneficiation or processing of ores and minerals, and all culverts, ditches, constructed channels or conveyances associated with such lakes or ponds."

3. Creating a new exception in subsection (b) of the Proposal for: "Industrial artificial ponds and associated culverts, ditches, constructed channels, and other conveyances, that are permitted under State or federal law to manage solutions, wastewater, process water, stormwater, or other liquids." (p. 26-27)

[141] In suggested amendments to existing Proposal language, added text is underlined and deleted text is struck through.

Agency Response: **See summary response. Also see summary responses at 7.4.2 and 7.4.4 regarding exclusions for wastewater recycling and stormwater control features.**

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

7.271 **Exemption for Artificial Lakes or Ponds**

The proposed rule continues the existing exemption from CWA jurisdiction for "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." (122.2(b)(5)(ii)) This long-standing exemption recognizes that these bodies of water are fundamentally different from the nation's waters that Congress intended to address through the CWA, and that there would be little or no regulatory benefit and substantial confusion if EPA or the Corps, state agencies or private citizen-suit plaintiffs tried to apply CWA requirements to these water bodies.

However there are the following potential ambiguities in this exemption which the agencies need address for any final rule for improved clarity and reduced confusion.

- Substitute the term "dry land," with upland and define uplands as recommend above. If the agencies view it necessary to continues to use the term "dry lands" then discuss that "dry lands" mean the same as uplands (using the definition of uplands provided above).
- It is unclear how much these four listed purposes limit the exemption. Because the exemption speaks of purposes "such as" the four listed ones, they cannot be the only purposes covered by the exemption. The agencies need to clarify in any final rule that the exemption is intended to cover any artificial lakes or ponds created by excavating or diking dry land, that are used for a particular purpose or purposes and these four listed purposes are just examples.
- The requirement that the pond be used "exclusively for such purposes" adds just another layer of ambiguity. While it appears the intent behind the "exclusively" language was to make sure that a lake or pond whose use is unrestricted is not considered exempt just because it is used for one of the listed purposes. However if applied literally, very few lakes and ponds might be said to be used for only one purpose, although they might have been excavated for only one purpose, or their owner's primary use maybe for only one purpose. Domtar recommends the agencies remove the "exclusively" qualification and explain in a final rule that the exemption is not meant to include lakes or ponds whose use is unrestricted (e.g., an artificial lake that functions like a natural lake and is a source of irrigation water) however the exemption is also not lost if the artificial lake or pond is used for more than one purpose. (p. 13-14)

Agency Response: **See summary response.**

Barrick Gold of North America (Doc. #16914)

7.272 There is no exclusion in the existing rules for artificial lakes and ponds, but the agencies note in the preamble that, "by longstanding practice," they have not considered these

features (among others) to be "waters of the United States." 79 Fed. Reg. at 22,218. The agencies thus propose a new exclusion for "[a]rtificial 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." Id. The exclusion could apply to Barrick ponds, but its applicability is not clear. The listed examples of covered ponds seem mostly to apply to agricultural activities, and thus do not clearly apply to process ponds and other ponds related to industrial activity such as gold mining.

Some of Barrick's process ponds, mine water and storm water management ponds do function as "settling ponds." The primary purpose of tailing ponds is to settle out solids and recycle process water. Similarly, infiltration basins and sedimentation ponds function as settling ponds. These features therefore arguably would be covered by the proposed exclusion. However, even if that were the case, other ponds, such as Barrick's pregnant and barren ponds associated with heap leaching, would not be covered because they are not designed to be settling ponds. (p. 28)

Agency Response: **See summary response. Also see summary responses at 7.1, 7.4.2, and 7.4.4.**

Montana Wool Growers Association (Doc. #5843.1)

7.273 The Proposed Rule's exclusions imply that land features would be jurisdictional but for the exclusion.

b. Section (b)(S)(ii) excludes "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," implying all ponds caused by natural depressions, all abandoned (but functional) reservoirs, and all ponds constructed for recreation, personal enjoyment, or to increase the value of property, would be jurisdictional. The exclusion should be rewritten to give full effect to the exclusion to avoid creating false impressions about the breadth and scope of the CWA. For example, "artificial lakes or ponds including, but not limited to, those used for farming, stock watering, settling basins, recreation, and landscaping." (p. 10)

Agency Response: **See summary response.**

Alameda County Cattlewomen (Doc. #8674)

7.274 The agencies' exclusion of "artificial ponds excavated wholly in uplands,…used exclusively for livestock watering…" is both unclear and not encompassing of many ponds used by the livestock industry. The agencies, once again, have simply forgotten to define key terms. What does the word "exclusively" mean in terms of uses? Does this mean that a cost-shared pond that has been stocked with fish for the occasional recreational fishing use is now outside the exclusion? If a farmer or rancher's children swim occasionally in the pond, is it now outside the exclusion?

Farmers and ranchers utilize both natural ponds and artificial ponds for watering their livestock. Both natural and artificial ponds are maintained by farmers and ranchers, which benefits not only the livestock but also the wildlife in the area. Our industry's preservation of such ponds, whether natural or artificial, benefits everyone. The proposed rule will create a disincentive from maintaining and creating such beneficial ponds.

Although Sec. 404(f)(1)(C) exempts construction and maintenance from Sec. 404 permitting, it does not protect farmers and ranchers from Sec. 402 NPDES permits, or from 404 permits for activities outside the scope of "construction and maintenance" or "normal" under both the (C) and (A) exemptions. Calling all natural ponds a "water of the U.S." and perhaps including many artificial ponds that might not be exclusively used for stock watering is inappropriate. These isolated waters are beyond the scope of "navigable waters" and the agencies should recognize them as such.

ACCW assert that all stock ponds should be excluded from the category of "waters of the U.S." because they are not navigable in-fact and they lack a significant connection to any TNWs. We also assert that it is ludicrous that all natural ponds in a region or floodplain can be aggregated under the agencies "similarly situated" criteria to find a significant nexus where one does not exist individually. Additionally, the burden on livestock producers to determine whether their ponds meet the criteria for exclusion is extremely high, and opens their operations up to citizen suit litigation, where the farmer or rancher himself will need to defend his stock pond use in court. (p. 24)

Agency Response: See summary response. With regard to significant nexus for non-excluded ponds, see Section III of the preamble and Section II of the Technical Support Document. It remains the government's burden to demonstrate a particular water is a "water of the United States."

California Agricultural Commissioners and Sealer Association (Doc. #9670)

7.275 IV. Contradictions within the rule concerning agricultural practices.

Some sections of the proposed rule appear to contradict other sections. For example, the proposed rule states: Artificial lakes or ponds created by excavating and or diking dry land and used exclusively for purposes such as stock watering, irrigation or rice production are not "waters of the United States". However, the rule also states: Lakes and ponds (either natural or man-made) that contribute flow either directly or indirectly are considered tributaries and are "waters of the United States." Interpreting the two sections would lead to the conclusion that any stock watering pond, irrigation pond or rice growing area that overflows during the rainy season and contributes flow would no longer be exempt. (p. 2)

Agency Response: See summary response. Also see overarching summary response for topic 7.

Montana Farm Bureau Federation (Doc. #12715)

7.276 Under the proposed rule, any impoundment of those drainage features will be an unlawful discharge absent a section 404 permit, and the resulting farm pond itself will become a "Water of the United States." In addition, any construction of a farm pond in a small low spot (wetland) swept into CWA jurisdiction under the "adjacent" or "other waters" provisions of the proposed rule (also explained above) will also require a section 404 permit and the consequent pond/reservoir would itself be considered a water of the U.S. Not only would this render the pond largely unusable, it makes no sense that a farmer or rancher would have to acquire a 404 permit in order to build a structure to create another "Water of the United States."

This aspect of the rule will affect countless farm and stock ponds. By expanding jurisdiction to include common ephemeral drainages and isolated wetlands, the rule will prohibit the impoundment of natural drainages and low spots. Places like this are the only logical locations to build farm or stock ponds. Farm or stock ponds, called reservoirs here in Montana, are typically constructed at natural low spots to capture rain water and snow melt through ephemeral drainages. Depending on the topography, reservoir construction is virtually impossible without diking or damming a natural drainage. For that reason, the proposal's exclusion for "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" is almost meaningless. As explained above, "dry land" is interpreted to exclude anything that qualifies as a wetland or any ephemeral feature where storm water naturally migrates. This leaves little "dry" land available for the construction of reservoirs, and if land qualified as "dry" under this rule is dammed, it is highly unlikely that it will collect any water, especially in areas that receive very little precipitation.

Consequently, reservoirs are not excavated on hill tops and ridges. They are excavated at low spots where water naturally flows and collects. Thus, the proposed farm pond exclusion will provide no relief for most farmers and ranchers. (p. 6-7)

Agency Response: **See summary response.**

Bayless and Berkalew Co. (Doc. #12967)

7.277 The ambiguous wording of the rule is ripe for litigation as left to the interpretation of agency enforcement and environmental litigants. In one section of the proposed rule the agencies exempt specific agricultural construction, such as stock ponds, from permitting while in the pre-amble of the document making such statements as *"As a matter of law and science, an impoundment does not cut off connection between upstream tributaries and a downstream WOTUS and the agencies technical expertise and practical knowledge confirm that impoundments have chemical, physical, and biological effects on downstream waters."* (p. 4)

Agency Response: **See summary response.**

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

7.278 The proposed rule also would exclude lakes, ponds, and pools created for specifically listed purposes: stock watering, irrigation, settling, rice growing, reflecting, swimming, and ornamentation. To be excluded these features must have been created by excavating and/or diking dry land. The proposed exclusions are insufficient because, although they may benefit some agricultural uses, they do nothing for most industrial or commercial operations. Lakes, ponds, and pools are used for an array of industrial purposes, and combinations of different uses. The lakes, ponds, pools exclusion should be broadened to accommodate legitimate industrial and commercial purposes. (p. 9)

Agency Response: **See summary response. Also see summary responses for 7.4.2 and 7.4.4 with regard to exclusions for wastewater recycling and stormwater control features.**

USA Rice Federation (Doc. #13998)

7.279 …the proposed exemptions for ponds used for irrigation and rice growing do not achieve their intended purpose. First, a rice field may not be considered a lake or pond. Second, as discussed above, rice fields and onsite reservoirs for irrigation water do not have exclusive uses. Rice farmers may grow other crops in rotation. Some rice farmers also use their fields to raise crawfish. Many rice farmers allow sportsmen to hunt waterfowl on their property. In fact, USA Rice Federation has a partnership with Ducks Unlimited, the "USA Rice-DU Stewardship Partnership" that serves as a model of cooperation and communication between a farm group and a conservation organization. Its purpose is to promote the conservation and enhancement of wildlife habitat on working lands. Under the proposed rule, rice farmers would have to deny access to sportsmen for hunting to allow their rice fields and reservoirs to meet the terms of the exclusion for ponds, contrary to the objectives of our partnership. (p. 8-9)

Agency Response: See summary response.

Kansas Agriculture Alliance (Doc. #14424)

7.280 This exception struggles for the same reason as the exception for ditches in that it fails to define what is meant by "excavation and/or diking of dry land . . . ."[142] Without a definition, the only certainty that agriculture has is to excavate a pond on top of a hill. This is particularly troubling to a western state like Kansas where annual rainfall can be as little as fifteen inches per year. In such situations, ponds cannot function unless the pond is constructed on an ephemeral or intermittent stream or feature that has a bed, bank, and OHWM. It seems odd that EPA and the Corps would not build this into the exception, as ephemeral and intermittent streams in the west have limited connection to a TNW. This not only forecloses the building of new ponds, but also maintenance of existing ponds.

In addition, the constraint that the pond be used exclusively for stock watering, irrigation, a settling basin, or rice growing is further troubling. The term exclusively suggests that no other use may be permitted or the pond would lose its exempt status. Many farm ponds may be primarily used for agricultural purposes, but may also provide auxiliary benefits to the owner such as wildlife habitat or recreational uses. Incidental utilization of a pond or lake for such purposes should not destroy the exception. (p. 7)

Agency Response: See summary response. Also see the tributaries compendium (topic 8).

Missouri Soybean Association (Doc. #14986)

7.281 **Extremely narrow exemptions -**

The rule also overreaches by narrowing the intent of the exemptions to the point that we are unsure how they would ever apply, rendering them nearly useless in the real world. The exemptions should apply broadly, without exceptions or strings attached to them.

[142] 79 Fed. Reg. at 22263.

Below is an example of some areas where the exemption should be clarified and/or broadened.

…c) (t)(S)(ii) ... "Artificial lakes, ponds…used exclusively for such purposes as stock watering...." No lake or pond is exclusively used for anyone purpose and it is next to impossible to prevent wildlife from purposefully using it. Thus the rule overreaches by narrowing the exemption with the word 'exclusive' to an extent that it will have no applicability as no feature will ever meet this standard. The exemption should apply broadly, without except ion or strings attached, to a number of non-natural purposes including agricultural, wastewater and stormwater control and treatment, ornamental waters, aesthetic purposes, swimming pools , and reflecting pools among many others… (p. 7-8)

Agency Response: **See summary response.**

Colorado Cattlemen's Association (Doc. #15068)

7.282 The agencies' exclusion of "artificial ponds excavated wholly in uplands, ...used exclusively for livestock watering..." is both unclear and not encompassing of many ponds used by the livestock industry. The wording of this exclusion leaves too many questions for livestock producers. It also well documented that these ponds benefit wildlife and the livestock industry is instrumental in preserving and maintaining these extremely important resources. Consequently, these features should not be regulated and should be broadened even further to exclude all stock ponds from the category of "waters of the U.S." Additionally, because they are not navigable in-fact and they lack a significant connection to any TNWs they should be excluded. The burden on livestock producers to determine whether their ponds meet the criteria for exclusion is extremely high, and opens their operations up to citizen suit litigation, where the fanner or rancher himself will need to defend his stock pond use in court. (p. 7-8)

Agency Response: **See summary response. It remains the government's burden to demonstrate a particular water is a "water of the United States."**

North Carolina Farm Bureau Federation (Doc. #15078)

7.283 The exclusion "[a]rtificial 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" is far too narrow. The restriction to "dry land" is problematic, because farm ponds are not built on the tops of hills because they will never fill. This exclusion may also inadvertently narrow the agricultural pond exemption under Section 404(f). Another problem is the phrase "used exclusively for such purposes as ..." This seems to mean that the pond could not be used for more than one purpose, such as stock watering and irrigation. It is commendable that the Agencies are trying to carve out exclusions, but the pond exclusion should be much more expansive to include situations in the real world. (p. 16)

Agency Response: **See summary response.**

Jensen Livestock and Land LLC (Doc. #15540)

7.284 **v. Exclusively**

The agencies have failed to provide clarity or certainty regarding livestock ponds. The proposed rule states, "Specifically, the agencies propose that the following are not ''waters of the United States'' notwithstanding whether they would otherwise be jurisdictional under section (a):…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." (Proposed Rule at 22218 (emphasis added)).

Under the exclusion for artificial ponds the agency has failed to extrapolate on and clearly define the extent of the agencies' meaning in using the word "exclusively." The livestock industry heavily utilizes artificial stock ponds to deliver water to our animals. The exclusion of such ponds only when they are "exclusively" used for watering of livestock raises many questions. Does the term mean for commercial purposes? Does it mean 90 percent of the time what is the purpose for which it is used? If the pond is also used as a water retention system, does it lose its excluded status. If the livestock producers' children swim in the pond occasionally does that mean it is sometimes used for recreation and loses its excluded status? If, as many stock ponds provide, they are used by wildlife does that negate its excluded status? Jensen Livestock and Land LLC. assert the agencies should have provided an explanation about the extent of the qualification that only artificial ponds used exclusively for stock watering are excluded.

The Merriam-Webster definition of "exclusive" (root word) means "not shared: available to one person or group."[143] As used in the exclusion for artificial ponds and lakes, it is apparent the only purpose that an artificial livestock pond can ever have is livestock watering. If at any time it is used for fishing, swimming, ice skating, water retention, or any other purpose it would be removed from the excluded category and make it a "water of the U.S." Jensen Livestock and Land LLC are extremely disappointed that the agencies have once again failed to adequately define what their exclusions actually mean, calling into question whether any water will actually fall into such categories. Jensen Livestock and Land LLC. believe that due to the subjective nature of the artificial ponds and lakes exclusion, very few livestock ponds will be excluded from the category of "waters of the U.S." Jensen Livestock and Land LLC submit that the agencies should exclude from "waters of the U.S." "all ponds used for livestock watering." (p. 18-19)

Agency Response: **See summary response.**

National Barley Growers Association (Doc. #15627)

7.285 Stock Ponds. While EPA says that the Proposed Rule will not affect stock ponds, the language presented suggests otherwise. For example, the rule says that stock ponds are exempt only if they are "artificial" and used "exclusively" for stock watering, irrigation, settling basins or rice growing. Natural stock ponds and stock ponds used for purposes other than those listed by EPA may meet the WOTUS definition. EPA and the CORPS should broaden the definition of stock ponds that fall outside federal regulatory authority. (p. 6)

Agency Response: **See summary response.**

[143] Merriam-Webster Dictionary, *available at* http://www.merriam-webster.com/dictionary/exclusive.

Florida Crystals Corporation (Doc. #16652)

7.286 The Proposed Rule also would assert jurisdiction over most artificial ponds and lakes in Florida. Florida is dotted with artificial lakes and ponds, many of which have no surface connection to offsite navigable waters. On farmlands, ponds are commonly present for purposes of stock watering, local drainage and irrigation, sumps, or other purposes. In urban areas, lakes and ponds were created as borrows pits, and now serve recreational, drainage, and other purposes. Since most of Florida originally was a wetland, such artificial lakes and ponds were typically excavated from wetlands, either pursuant to a CWA permit or before passage of the CWA itself.

Currently, such ponds and lakes are not subject to CWA regulatory jurisdiction. After the Supreme Court decision in *Solid Waste Agency of Northern Cook County v. us. Army Corps of Eng'rs*, 531 U.S. 159 (2001), the Army Corps Jacksonville District generally has not asserted jurisdiction over such "isolated" lakes and ponds if they are located more than 200 feet away from a regulated navigable water and do not have a surface connection. U.S. General Accounting Office, *Waters and Wetlands: Corps of Engineers Needs to Evaluate its District Office Practices in Determining Jurisdiction* 19 (Feb. 2004). (p. 4-5)

Agency Response: **See summary response.**

Richland Communities (Doc. #18793)

7.287 Rice Lands Converted to Other Uses in the Future Should Continue To Be Nonjurisdictional

Given the agencies' intent to take uncertainty out of the equation for rice growing areas by making them nonjurisdictional as a matter of law, the language of the proposed rule should clarify that the legal designation can be relied upon and will not be revoked based on a future changed use. The lack of such assurances could open the door to the exact problem the agencies seek to eliminate with the proposed rule- costly case-by-case jurisdictional determinations for a historically unique type of land that the agencies have wisely determined should not be jurisdictional as a matter of law. For this reason, Richland requests that the proposed rule clarify that the legal nonjurisdictional status of rice growing areas applies prospectively. Otherwise, the legal status of a parcel of rice growing land could be based on a rule of law one day, and on the personal determination of a regulator the next. Such a scenario is illogical but unfortunately possible without the clarification Richland seeks.

The preamble to the proposed rule explains the agencies' rationale for "drawing lines and concluding that certain waters and features are not subject to the jurisdiction of the Clean Water Act," including rice growing areas. (79 Fed. Reg. 22218.) The agencies were guided by the Supreme Court's observation in *United States v. Riverside Bayview Homes* (1985) 474 U.S. 121 that it can be difficult to identify "where waters end" and the Supreme Court plurality's observation in *Rapanos v. United States* (2006) 547 U.S. 715 that "there were certain features that were not primarily the focus" of the Clean Water Act. As the preamble states:

> One of the agencies' goals in this proposed rule is to increase clarity and certainty about the scope of "waters of the United States." To that end, the agencies

> propose not simply that these features and waters are "generally" not "waters of the United States," but that they are expressly not "waters of the United States" by rule .... These waters would not be jurisdictional by rule.
>
> (79 Fed. Reg. 22218.)
>
> In applying the spirit of the *Rapanos* plurality, the agencies have made the policy decision that rice growing areas do not fall under the primary "focus" of the Clean Water Act. Clarifying that this provision would not expire at some point in the future would help to strengthen the agencies' objective to provide "greater clarity, certainty, and predictability for the regulated public and the regulators" under the proposed rule. (79 Fed. Reg. 22189.) (p. 5-6)

Agency Response: See summary response. Also see overarching summary response for topic 7.

Water Law (Doc. #13053)

7.288 Artificial Lakes and Ponds used exclusively for stock watering, irrigation, settling basins, or rice growing. This necessarily makes artificial lakes and ponds that are used for any other purpose jurisdictional, such as ponds used for piscatorial, fire suppression, geothermal exchange, dust suppression, municipal supply, stormwater retention, or augmentation purposes. No rationale for this limited list is given. Nearly all ponds in the western United States are permitted or decreed for multiple uses. For example, a fire protection pond filled by a ditch in a rural area will now be subjected to federal jurisdiction. (p. 9)

Agency Response: See summary response. Also see summary response at 7.4.4 with regard to stormwater control features.

Colorado Water Congress Federal Affairs Committee (Doc. #14569)

7.289 **VI. Unanswered Questions**

> Despite the proposal's stated objective to add clarity to the regulatory process, the proposal in fact creates great confusion and uncertainty…issues that must be addressed, through clarification and in the context of an ongoing dialogue amongst stakeholders, include:
>
> …
>
> - How will the agencies treat artificial lakes or ponds that are not used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing, including stormwater detention ponds;
>
> … (p. 6-7)

Agency Response: See summary response.

Oglethorpe Power Corporation (Doc. #14618)

7.290 The Proposed Rule also seeks to exclude "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," as well as for use as artificial reflecting pools,

swimming pools, and ornamental waters. However, the language of this proposed exclusion is not all-inclusive, thus creating ambiguity whether any other uses are allowed for "artificial lakes or ponds." Therefore, Oglethorpe Power seeks clarification regarding the following question:

- Would a retention or detention pond that was created by excavating dry land, which is currently used exclusively to collect or detain storm water, constitute an artificial lake or pond, such that the retention or detention pond would be excluded from the meaning of "waters of the United States"? (p. 3)

Agency Response: **See summary response. Also see summary response at 7.4.4.**

Santa Clara Valley Water District (Doc. #14776)

7.291 THE EXCLUSIONS SET FORTH IN THE PROPOSED RULE SHOULD BE CLARIFIED AND EXPANDED IN CERTAIN RESPECTS

A. Artificial Groundwater Recharge Basins Should More Clearly Be Excluded

Artificial groundwater recharge basins can be used to clean and store surface water underground for use later for irrigation, municipal, or industrial purposes. The Proposed Rule would exempt "groundwater" and "[a]rtificial 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." Although the District believes that this language is broad enough to cover artificial groundwater recharge basins, uncertainty arises from the fact that artificial groundwater recharge basins are not specifically excluded. The Proposed Rule should clarify that artificial groundwater recharge basins are excluded from the definition of "waters of the United States."

Sub-paragraph (b)(5)(ii) should be amended as follows to add the underlined language: "Artificial lakes, basins, or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, groundwater recharge, or rice growing;" (p. 6-7)

Agency Response: **See summary response. Also see summary response at 7.4.2.**

Tri-State Generation and Transmission Association, Inc. (Doc. #16392)

7.292 The Agencies have long recognized that artificial ponds created on dry land to collect and retain water and that are used as settling basins are generally not jurisdictional.[144] The proposed rule would clarify that "[a]rtificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as ... settling basins," among other purposes, are *per se* not jurisdictional.[145] Tri-State supports the categorical exclusion of such ponds and lakes rather than relying on the 1986 preamble language, but would urge the Agencies to make it clear that this exclusion encompasses the many types of ponds on mine sites and other facilities that are used for the concentration and settling of solids.

[144] 51 FR 41217 (1986 Corps regulatory preamble); 53 FR 20765 (EPA regulatory preamble).
[145] 79 FR 22263.

As currently drafted, the proposed regulatory text appears to apply to sedimentation ponds and other onsite ponds on mine sites that are used for concentration and settling.[146] But, Tri-State, along with NMA, is concerned that some might interpret the exclusion as being limited to water features associated with agriculture given that the term "settling basins" appears in the regulatory text among a list of references to agricultural activities, i.e., "stock watering," "irrigation," and "rice growing." The preamble to the proposed rule does not shed any light on whether the reference to "settling basins" encompasses such features used in other industries, often for stormwater management and treatment purposes. The Agencies should therefore clarify that this exclusion is not limited to agriculture-related settling basins by explicitly referencing "industrial sedimentation ponds" or "industrial settling basins" in the list of permissible purposes. In addition, the Agencies should clarify in the preamble that the exclusion is not confined to water features relating to agricultural activities.

The Agencies should further clarify that artificial ponds meet the requirement of being excavated on dry land even if such features are constructed within floodplains or riparian areas, and even if such features might share a subsurface hydrological connection to a downstream jurisdictional water. The exclusion would be rendered meaningless if it does not apply to ponds constructed on *lands* within floodplains and riparian areas. The same would be true if the Agencies (or a citizen plaintiff) could claim that a pond is a "water of the United States" based solely on a groundwater connection that ultimately develops between an anthropogenic on-site pond and an ephemeral tributary, to use an example. (p. 10)

Agency Response: **See summary response. Also see overarching summary response for topic 7 and summary responses at 7.4.2 and 7.4.4.**

Xcel Energy (Doc. #18023)

7.293 Section 328.3(b)(5)(ii) of the Proposed Rule would exempt "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[.]" The scope of this exemption is unclear, because the term "exclusively" would indicate that only reservoirs used for the specifically listed purposes will qualify. However, the use of the phrase "such purposes as" would indicate that other purposes of use may also qualify for the exemption. Xcel Energy recommends that the revised Proposed Rule should not use the word "exclusively" to describe the purposes of use of the reservoir. The exemption from jurisdiction found in §404(f)(l) contains no such "exclusive" limitation. (p. 8)

Agency Response: **See summary response.**

Ducks Unlimited (Doc. #11014)

7.294 In the same vein, the exclusion of "artificial lakes or ponds created by excavating and/or diking dry land and used *exclusively* [emphasis ours] for such purposes as stock watering,

[146] 64 FR 39252, 39332 (July 21, 1999) (Corps nationwide permit recognizing that "[s]upport facilities are essential components of a mining operation" and authorizing facilities such as "settling ponds and settling basins, ditches, stormwater and surface water management facilities" among others).

irrigation, settling basins, or rice growing," should be modified. Many of the artificial reservoirs used for rice agriculture, for instance, serve additional, ancillary purposes such as waterfowl hunting. These water bodies, whose primary use is clearly to provide agricultural irrigation water and which have not previously been regulated, should not now be brought under the jurisdiction of the new rule because there are often secondary uses of that water. We leave it to the agencies to work with the agricultural sector to develop suitable wording to address this concern. (p. 21)

Agency Response: **See summary response.**

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

7.295 To avoid confusion the term "dry land" should be changed to "uplands." To the extent that this is an alternative to using the farm pond exemption set forth in the statute, we support it. (p. 42)

Agency Response: **See summary response. The agencies have deleted the term "uplands" in response to the confusion the term created and instead use the term "dry land," which was used in prior preamble statements.**

Center for Biological Diversity, Center for Food Safety, and Turtle Island Restoration Network (Doc. #15233)

7.296 The same thing is true for your new proposed exclusions of artificial lakes and ponds, artificial reflecting pools and swimming pools, "small ornamental waters," water-fill depressions created "incidental to construction activity," and your exclusion of gullies, rills and non-wetland swales. 40 CFR 122.2 (b)(5)(ii), (iii), (iv), (v), (vi). Here, again, even where these waters and features have a significant nexus to and impact on the physical, chemical and biological integrity of downstream waters, you would define them as non-jurisdictional. However, this conflates the question of jurisdiction with level of concern regarding these particular "other waters". In most cases these may be waters of no concern (e.g., swimming pools and reflection ponds), however, in other cases they may be of concern. These should not, then, be removed from the definition of "other waters" categorically. For instance, field runoff catch basins from CAFO manure application fields where applications have been above agronomic rates would lose agricultural runoff exemptions and become, at least, point sources subject to CWA 301 prohibitions from discharge. Stock water ponds, where animals have direct contact with the ponds, should not be allowed to discharge to streams or rivers. If they have intermittent hydrologic interaction they would impact the physical, chemical and biological integrity of downstream waters in violation of the CWA. (p. 10)

Agency Response: **See summary response. Also see overarching summary response for topic 7.**

Patrick E. Murphy, Member of Congress, House of Representatives (Doc. #15371.1)

7.297 I. The Proposed Rule Will Greatly Increase the Scope of Federal Clean Water Act Jurisdiction Over Farmlands

B. Most Farm Ponds Will Become "Waters of the United States"

- Currently, small isolated bodies of water (such as farm ponds and quarry lakes) are not regulated by the Corps or EPA under the Clean Water Act
- The Proposed Rule will make most such waters in Florida "waters of the United States"
    - The Proposed Rule states that all waters that are "adjacent" to federally-regulated waters are part of the "waters of the United States"
    - "Adjacent" is defined to mean "neighboring," which is further defined to mean "waters located within the … floodplain [of jurisdictional waters] or waters with a shallow subsurface hydrological connection [to jurisdictional waters]"
    - In Florida, with our flat topography and surficial aquifers, the "floodplain" covers most farmlands and there almost always is a subsurface connection between isolated ponds and some offsite body of water. (p. 1-2)

Agency Response: **See overarching summary response for topic 7. The agencies have revised the definition of adjacency. See the preamble and Compendium 3 regarding adjacent waters. As described in the rule and throughout this document, the agencies have identified a number of exclusions that may apply to agricultural operations.**

Robert J. Goldstein & Associates (Doc. #16577)

7.298 **3) Lakes or ponds created by excavating or diking dry land**: Does "dry land" include former wetlands that were drained by ditching? Does "dry land" include intermittent streams that were diked/dammed during their fry season? If so, then the inconsistency described in #2 above is again a concern. Please define the concept of "dry land" more completely. (p. 2)

Agency Response: **See summary response.**

7.3.3. Artificial Reflecting Pools or Swimming Pools Created by Excavating and/or Diking Dry Land

Specific Comments

Federal Water Quality Coalition (Doc. #15822.1)

7.299 **3. Artificial pools.**

Under the proposed rule, artificial reflecting pools or swimming pools created by excavating and/or diking dry land are not jurisdictional. Limiting the exemption to reflecting or swimming pools has created significant uncertainty about the status of other artificial pools that can hold water, such as concrete tanks and even secondary containment structures. (p. 19)

Agency Response: **The final rule identifies several artificial water features that are excluded. Concrete tanks and secondary containment structures may be excluded under other exclusions, depending on the circumstances. The agencies disagree this exclusion creates significant uncertainty.**

Water Law (Doc. #13053)

7.300 Artificial Reflecting Pools or Swimming Pools created by excavating and/or diking dry land. This necessarily means that artificial pools for any purpose other than reflecting and swimming are subjected to federal jurisdiction. (p. 9)

Agency Response: The final rule identifies several artificial water features that are excluded. Artificial pools in addition to reflecting and swimming pools may be excluded under other exclusions, depending on the circumstances.

Berkshire Hathaway Energy Company (Doc. #14650)

7.301 C. The Agencies Should Clarify the Exemption for Artificial Lakes or Ponds to Also Exempt Drainage Water or Channels from Artificial Lakes or Ponds

The Agencies should similarly consider modifications to the exemption for artificial lakes or ponds created by excavating and/or diking dry land. Waters that otherwise show characteristics of waters of the U.S. but are sourced from an exempt water such as an artificial pond should not be jurisdictional. The drainage water and channel from an exempt artificial pond created by excavating dry land should not create a nexus to the pond or themselves be jurisdictional. The Agencies should clarify this accordingly. (p. 5)

Agency Response: The final rule clarifies that excluded waters are never jurisdictional even where they otherwise fall into one of the categories in paragraphs (a)(4) through (a)(8).

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

7.302 Dry land should be changed to uplands. (p. 42)

Agency Response: The agencies retain the term "dry land" but have provided additional explanation of the term in response to requests for additional clarity.

7.3.4. Small Ornamental Waters Created by Excavating and/or Diking Dry Land for Primarily Aesthetic Reasons

Summary Response

The agencies have identified small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons as generally not "waters of the United States" in previous preambles or guidance documents. The Federal Register notices by the Corps on November 13, 1986, and by EPA on June 6, 1988, preambles indicated these waters could be determined on a case-specific basis to be "waters of the United States." The agencies do not retain that authority for features excluded under the rule. The proposed rule contained this exemption unchanged from previous preamble language.

Most commenters noted that the rule does not provide guidance on how "small ornamental waters" will be distinguished from medium or large ornamental waters for jurisdiction. The example given was ornamental lakes within cities. Commenters were also uncertain about the status of large ornamental waters that are not primarily aesthetic, such as those that capture

stormwater and are ornamental. Commenters noted that no rationale was given for subjecting ornamental waters "not primarily used for aesthetics" to federal jurisdiction, and recommend that dry land should be changed to uplands.

In response to comments, the agencies have deleted language that a small ornamental water must be created "for primarily aesthetic reasons." The agencies agree this element introduces a "purpose test" that can be difficult to implement and is unnecessary for this exclusion. With respect to "small," rather than focusing on the objective size of the water, it is more important to consider whether the water is contributing to the chemical, physical, or biological integrity of downstream waters. The agencies anticipate that excluded ornamental waters will not provide the functions of natural water features. For example, in many circumstances ornamental waters such as fountains and reflecting pools and similar features are not part of the tributary system and do not connect with downstream waters. If a water is conveying, treating, or storing stormwater, the agencies would refer to the exemptions for stormwater which is further explained in the summary for Section 7.4.4. Rather than replace "dry lands" with uplands, which itself confused many commenters, the agencies have clarified in the preamble 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.

Specific Comments

City of Glendale, Arizona (Doc. #15054)

7.303 There are many ornamental lakes within the City of Glendale, such as Coyotes Lakes near the hockey arena. It is unclear whether this lake would qualify under the exclusion for small ornamental waters. ***The proposed rule does not provide guidance on how "small ornamental waters" will be distinguished from jurisdictional (medium or large) ornamental waters.*** (p. 3)

Agency Response: **See summary response above.**

Rubber Manufacturers Association (Doc. #15419)

7.304 IV. RMA supports the exemption for small ornamental ponds

Section 122.2(b)(5)(iv) exempts "small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons." 76 Fed. Reg. 22268. RMA members' ornamental ponds are not affecting the chemical, physical, or biological integrity of waters of the U.S. RMA supports the exemption for small ornamental ponds. (p. 3)

Agency Response: **The agencies agreed and retained the exemption for small ornamental ponds. See summary response above.**

Federal Water Quality Coalition (Doc. #15822.1)

7.305 **5. Small ornamental waters.**

Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons are not jurisdictional. Limiting the exemption to small ornamental

waters has created significant uncertainty about the status of large ornamental waters or ornamental waters that are not primarily aesthetic, such as waters that both capture stormwater and are ornamental. (p. 19)

Agency Response: **See summary response for 7.3.4 above.**

Northern Arizona Municipal Waters Users Association (Doc. #9730)

7.306 Small ornamental waters created for aesthetic reasons are not included. "Small" is not defined and large ornamental waters are not addressed? (p. 1)

Agency Response: **See summary response above.**

Water Law (Doc. #13053)

7.307 Small Ornamental Waters created by excavating and/or diking dry land primarily for aesthetic purposes. The Agencies provide no definition of what constitutes "small", leaving nearly any amount potentially regulated. The Agencies give no rationale for subjecting ornamental waters "not primarily used for aesthetics" to federal jurisdiction. (p. 9)

Agency Response: **See summary response above.**

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

7.308 Same comment as immediately above. [Dry land should be changed to uplands.] (p. 42)

Agency Response: **The agencies disagree and instead clarify in the preamble 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. See summary response above.**

7.3.5. Water-filled Depressions Created Incidental to Construction Activity

Summary Response

The agencies have identified Water-filled Depressions Created Incidental to Construction Activity as generally not "waters of the United States" in previous preambles or guidance documents. The Agencies' 1986 and 1988 preambles indicated these waters could be determined on a case-specific basis to be "waters of the United States." The 1986 and 1988 Preambles state: *"Water-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States."*

The final rule expands and clarifies this language by stating that water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water are not considered "waters of the United States", even where they otherwise meet the terms of paragraphs (a)(4) through (8). Codifying these longstanding practices supports the agencies' goals of providing greater clarity, certainty, and

predictability for the regulated public and the regulators. In addition, under prior preamble guidance the agencies could determine that a particular feature generally considered non-jurisdictional was a "water of the United States." The rule does not allow for this case-specific analysis to be used to establish jurisdiction - these waters are categorically excluded from jurisdiction.

The rule includes several refinements to the exclusion for water-filled depressions created as a result of certain activities. In addition to construction activity, the agencies have also excluded water-filled depressions created in dry land incidental to mining activity. This change is consistent with the agencies' 1986 and 1988 preambles, which generally excluded pits excavated for obtaining fill, sand or gravel, and there is no need to distinguish between features based on whether they are created by construction or mining activity. Several commenters asked that this exclusion be broadened to include other types of artificial waterbodies. However, this exclusion is not the only one that addresses artificial waters. Paragraph (b) of the regulations excludes a number of artificial features, and commenters should see those essays and responses for more detail. In particular, the agencies have revised and clarified the exclusion for artificial lakes and ponds created in dry land in response to comments. See summary response at 7.3.2 and related individual questions in that section. The agencies therefore have not made further changes to this exclusion. Some commenters felt this exclusion created confusion by suggesting other water-filled depressions would be jurisdictional. The agencies again note the rule includes several exclusions for artificial waters, so the agencies disagree this exclusion will form the basis of any misinterpretation. Moreover, the examples provided, such as water in tire ruts, are typically the types of transitory pooling of water that would be excluded as puddles. Finally, the agencies are clear in the final rule that all waters and features identified in paragraph (b) of the rule as excluded will not be "waters of the United States" even if they otherwise fall within one of the categories in paragraphs (a)(4) through (a)(8).
It is important to note that this exclusion is limited to features created in dry land. The phrase "dry land" appears in the 1986 and 1988 preambles, and the agencies believe the term is well understood based on the more than 30 years of practice and implementation. But in keeping with the goal of providing greater clarity, the agencies clarify 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, 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. In addition, features meeting this exclusion may function as a "point source" under CWA section 502(14)), such that discharges of pollutants to waters through these features would be subject to other CWA regulations (e.g., CWA section 402).

Specific Comments

Pennsylvania Fish and Boat Commission (Doc. #4826)

7.309 The PFBC concurs with the exclusion of most specific waters and features from the definition of "waters of the United States" including, waste treatment systems, prior converted cropland, ditches that are excavated wholly in uplands, artificially irrigated areas that would revert to upland, ditches that do not contribute flow, either directionally or through another water, artificial lakes/ponds created by excavating or diking dry land used exclusively for stock watering, irrigation, settling, etc., reflecting pools, ornamental

waters used for aesthetic purposes, gullies and rills and non-wetland swales. The PFBC suggests that the agencies clarify "water-filled depressions created incidental to construction activity" by re-defining this feature as "water-filled depressions created temporarily and incidental to construction activity". Such depressions left in the landscape under typical climatic conditions will over time develop into wetland habitat that may qualify for jurisdictional protection under "other waters". (p. 3)

Agency Response: See summary response above. The rule does not alter the agencies' existing practice that these features could be found to be jurisdictional once the construction activity is completed or abandoned and the water feature remains.

North Carolina Forest Service, North Carolina Department of Agriculture (Doc. #14122)

7.310 Comment 2

In the portion of the proposed rule which explicitly excludes or exempts certain land features from being considered as a WOTUS, [Part (b) of the proposed rule] we suggest adding the following text, shown below in underline, added to existing proposed rule language:

- "(S)(v) water-filled depressions created incidental to construction, agricultural, horticultural, or silvicultural activity;"

Justification for Comment 2:

Incidental water filled depressions can be created by the use of tractors, trucks, and other portable machinery used for agricultural, horticultural, and silvicultural activities on the land, much in the same way as construction machinery. There is no reason to limit this exclusion to only those depressions which are created from construction activity. (p. 2)

Agency Response: See summary response above.

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

7.311 Another exclusion that has raised concerns for the agriculture community is (b)(S)(v): "Water-filled depressions created incidental to construction activity." This wording leads to the conclusion that all other water-filled depressions, including those in farm fields, could be subject to jurisdiction. This concern could be eased by a change in the wording of this exclusion, or addition of a new one. If a new exclusion was added to say, "Any water-filled depression that does not meet the definition of a wetland," this would make it clear that any wet areas in a farm field would in fact need to meet the definition of a regulated wetland in order to be jurisdictional. (p. 3-4)

Agency Response: See summary response above.

Wisconsin Department of Natural Resource (Doc. #15141)

7.312 …the agencies should consider adding language to the exceptions for water-filled depressions created incidental to construction activity, and groundwater, including groundwater drained through subsurface drainage systems. Specifically, the WI DNR suggests that the agencies consider adding the language, which is underlined, to the exception for water-filled depressions,

"(v) water-filled depressions created incidental to construction activity created by excavating or diking dry land that do not constitute a new normal circumstance under the 1987 US Army Corps of Engineers Wetland Delineation Manual." (p. 3)

Agency Response: See summary response above. The agencies do not agree this added language is needed and are concerned it would introduce confusion.

California State Water Resources Control Board (Doc. #15213)

7.313 The following specific comments are provided by the California State Water Resources Control Board and the nine California regional water quality control boards (collectively, the "Water Boards ") staff regarding the proposed "Definition of 'Waters of the United States' Under the Clean Water Act" (Proposed Rule) for 40 CFR 230.3. Specific recommended changes to the proposed regulations are shown in ~~strikeout~~/underline format. Additional comments are presented as endnotes [see footnote].

…

(v) Water -filled depressions created incidental to construction activity that are not part of an interconnected network of waters of the United States;[147] (p. 6)

Agency Response: See summary response above. The exclusion is limited to depressions created in dry land.

Ohio Department of Natural Resources et al. (Doc. #15421)

7.314 328.3(b)(5)(v) Water-filled depressions created incidental to construction activity

Greater clarification would be needed to exclude these waters. Presumably, "incidental to construction activities" would mean the depressions were created unintentionally during construction. These types of areas often occur within construction zones and remain on the landscape following construction. An example would include tire ruts and large flat areas that have not been precisely graded to allow for positive drainage. Many of these unintentional water-filled depressions often become sparsely or fully vegetated with hydrophytic vegetation and develop hydric soil characteristics over time. Would exempted water-filled depressions remain non-jurisdictional even after they have developed wetland criteria? Currently, Section (b) of the proposed definition would not allow for the recapture of these water-filled depressions under any of the categories listed in Section (a) (1)-(7).

For example, a large area in an interchange infield may have been poorly graded when it was constructed 40 years ago. The area was relatively flat and did not drain thoroughly. The result was that depressions were created unintentionally and incidental to construction activities that, over time, have formed areas meeting all three wetland criteria. It is apparent that these areas are adjacent to a tributary. Based on the proposed

[147] There are cases where after a number of years of inactivity, water-filled depressions created incidental to construction activity become habitat for plants and animals and support other designated uses. These water-filled depressions may be considered to be waters of the United States if they are interconnected with other waters of the United States.

definition, ODOTs interpretation is that these areas would not be jurisdictional waters of the U.S. despite meeting all three wetland criteria. Similar scenarios could include areas that have been subjected to past mining or other construction activities. These are not uncommon features on the Ohio landscape.

Please confirm ODOT's interpretation of the proposed definition, or provide modifications or clarification to the proposed definition to accurately reflect the intent. (p. 6-7)

Agency Response: **See summary response above. The exclusion covers water-filled depressions that exhibit wetland criteria, as well as pits excavated in dry land for obtaining fill, sand, or gravel.**

Water and Sewer Department, City of Greeley, Colorado (Doc. #15258)

7.315 Greeley proposes the following:

- Incorporate the full Preamble Exclusion for gravel pits into 40 CFR §122.2(b)(5)(v) to cover:

  Water filled depressions created incidental to construction activity *and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of United States.*

- Add a provision to 40 CFR §122.2(b) excluding: "Lined sand and gravel pits used to store water." The Agencies could define "lined sand and gravel pits" to specify state or local performance standards that would adequately sever connectivity for purposes of the exclusion. The definition could also require the lined pits to be operated pursuant to a state or local program that ensures the lining maintains its integrity.

… (p. 6)

Agency Response: **See summary response above. The exclusion applies to pits excavated in dry land for obtaining fill, sand, or gravel. The rule does not change the agencies' existing practice that these features could be found to be jurisdictional once the construction or mining activity is completed or abandoned and the water feature remains.**

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

7.316 Depressions:

(b)(5)(v): "Water- filled depressions created incidental to construction activity," leads to the conclusion that all other water filled depressions, including those in farm fields, could be subject to jurisdiction. This should be changed to read, "Any water filled depression that does not meet the definition of a wetland." This change would make it clear that any wet areas in a farm field would in fact need to meet the definition of a regulated wetland in order to be jurisdictional. (p. 2)

Agency Response: **See summary response above.**

Minnesota Chamber of Commerce (Doc. #16473)

7.317 C. The Proposed Rule Would Create Other Impediments to the Efficient Operation of Minnesota Mining Facilities.

1. Water- Filled Depression Exclusion

Section (b)(s)(v) of the Proposed Rule excludes from the definition of "waters of the United States" "Water-filled depressions created incidental to construction activity." Such depressions are frequently created at Minnesota mine sites. For example, one of our members describes a situation where it excavates sand from one part of its mine site for use in its mining operations, and the depression created soon fills with water from precipitation. However, because the company often will not need to dig sand again for many months, vegetation may begin to grow in and around the depression in the intervening months, taking on the appearance of a wetland.

Recommendation:

The Agencies should revise the Proposed Rule to clarify that if a water body qualifies for the water-filled depression exclusion, it will not lose its excluded status by the simple passage of time or because vegetation grows on or around the depression. Additionally, the definition of construction activities should include activities that support mining operations, such as the excavation of mine pits, borrow areas, tailings basins, settling basins, and water recirculation ponds. (p. 6-7)

Agency Response: See Summary response above. The exclusion applies to excavations in dry land for obtaining fill, sand, or gravel. See summary responses at 7.3.2 and 7.4.2 regarding the exclusions for certain settling basins and wastewater recycling features.

Washington State Water Resources Association (Doc. #16543)

7.318 Despite the proposals stated objective to add clarity to the regulatory process, the proposal in fact creates great confusion and uncertainty. Some of the unanswered questions have been alluded to…Other issues that must be addressed, through clarification and in the context of an ongoing dialogue amongst stakeholders, include:

…

- How will the agencies treat water-filled depressions that are incidental to "other than" construction activity;

… (p. 17, 18)

Agency Response: See summary response above.

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

7.319 "Water-Filled Depressions"

The Agencies propose to exclude "water-filled depressions created incidental to construction activity." The language of the proposed exclusion is ambiguous. The Agencies do not clarify what is meant by "incidental to" or "construction activity." Depressions are commonly created in the course of construction for various reasons,

including borrow pits, retention basins, architectural landscaping, diversion of storm water run-off, creation of water storage features, etc. Are these and similar depressions excluded if they were created in the course of constructing something other than a structure or a facility? Also unclear is whether this exclusion applies for as long as a depression exists and continues to apply irrespective of whether it is "water-filled" at all times or whether a condition of "construction" ceases to exist. Depressions created incidental to construction activity may continue to exist, by design or happenstance, for indefinite periods—even beyond the life of the structure or facility with which their creation was associated. For instance earthen dikes around storage tanks often accumulate rain water over periods of time, particularly in areas of heavy rainfall. (p. 35)

Agency Response: See summary response above. The exclusion applies to excavations in dry land for obtaining fill, sand, or gravel. Also see summary responses at 7.3.2, 7.3.4, 7.4.2 and 7.4.4 regarding exclusions for certain artificial lakes and ponds, small ornamental waters and wastewater recycling and stormwater control features. The rule does not change the agencies' existing practice that these features could be found to be jurisdictional once the construction or mining activity is completed or abandoned and the water feature remains.

South Carolina Chamber of Commerce (Doc. #14535)

7.320 **D. Exemption for "Water-Filled Depressions Created Incidental To Construction Activity" (122.2(b)(5)(v))**

This exemption, carried over from current regulations, is not further defined in the Proposed Rule or explained in the Preamble. On its face, this exemption is not limited in time, but it has sometimes been interpreted as applying only while construction activity is ongoing. That interpretation is inconsistent with the plain language of the exemption, and it also is inconsistent with the rationale for the exemption.

First of all, an exemption that only applied while construction activity was underway would be of little value. Only once construction is completed will the full extent of any such water-filled depressions created by the construction activity be known. A water-filled depression that is formed either by excavation associated with construction activity or by the creation of an area that is poorly drained or not drained at all due to changes in land contours and drainage resulting from construction activity, is certainly not a traditional navigable water, nor does its existence have a significant effect on traditional navigable waters.

Just as importantly, little or no regulatory benefit would result from treating such depressions as WOTUS. EPA should make clear, either in the exemption itself or in the Preamble, that this exemption is not limited only to the duration of the construction activity. EPA also should clarify that a depression excavated as a source of soil, sand, gravel, etc. to be used in the construction falls within the notion of "incidental to construction activity." Again, these depressions are fundamentally different from, and do not warrant application of the same regulatory requirements as, other, natural surface water bodies. (p. 7-8)

Agency Response: See Summary response above. The exclusion applies to excavations in dry land for obtaining fill, sand, or gravel. The rule does not change

the agencies' existing practice that these features could be found to be jurisdictional once the construction or mining activity is completed or abandoned and the water feature remains.

Federal Water Quality Coalition (Doc. #15822.1)

7.321 **6. Water-filled depressions.**

Water-filled depressions created incidental to construction activity are not jurisdictional. Limiting the exemption to depressions created incidental to construction activity has raised significant uncertainty about the status of other depressions on the ground that could collect water, even tire ruts. (p. 19)

Agency Response: See summary response above.

Lydig Construction Inc. (Doc. #14147)

7.322 …with this proposed rule, the agencies are effectively shifting the burden to the regulated community to prove the application of the limited and ambiguous exclusions on a case-by- case basis. This point is particularly prominent with regard to the exclusions for 'water-filled depressions incidental to construction activity' and 'water-filled depressions excavated on dry land for the purposes of obtaining sand and gravel.' Old maps and aerial photos may be the only sources available to identify historic conditions in order to resolve third-party allegations of violations of federal CWA laws; however, these tools often lack the level of resolution required to make a proper determination. It will ultimately be up to the regulated community to provide compelling evidence that an uneven surface area on the land (i.e., man-made wet area) first came about during construction activity, or face complicated and layered reviews, costly penalties or even citizen suits. (p. 2)

Agency Response: See summary response above. It is the government's burden to demonstrate that a water is jurisdictional.

Associated General Contractors of America (Doc. #14602)

7.323 **VIII. Water-Filled Depressions**

Summary: The proposed language that would exclude "water-filled depressions created incidental to construction activity" from the definition of WOTUS is ambiguous. This is particularly problematic for AGC members because it will ultimately be up to the regulated community to provide compelling evidence that an uneven surface area on the land (i.e., man-made wet area) first came about during construction activity — or face complicated and layered reviews, costly penalties, or even citizen suits. Old maps and aerial photos may be the only sources available to identify historic conditions in order to resolve alleged violations of federal CWA laws. However, these tools often lack the level of resolution required to make a proper determination.

The proposed revisions to the definition of WOTUS would introduce many new ways for the federal government to regulate isolated waters that are normally wet only during seasonal rain events. It is likely that new types of waters will be regulated by the federal government. In this regard, the public will frequently face the difficult task of proving, on

a case-by-case basis, that the water or feature at issue qualifies for one of the limited and ambiguous exclusions. This point is particularly prominent with regard to the exclusions for "water-filled depressions incidental to construction activity" and "water-filled depressions excavated on dry land for the purposes of obtaining sand and gravel." AGC notes that this exclusion provides yet another example of this rulemaking being overly broad and ambitious in scope, so much so, as to require an exclusion for waters this small – the implication being that without this exclusion these waters would be jurisdictional WOTUS.

As proposed, the language of the "water-filled depressions" exclusion is ambiguous. The agencies do not clarify what is meant by "incidental to" or "construction activity." Depressions are commonly created in the course of construction for various reasons, including borrow pits, retention basins, architectural landscaping, diversion of storm water run-off, creation of water storage features, etc. Are these and similar depressions excluded if they were created in the course of constructing something other than a structure or a facility? It is also unclear whether the exclusion survives beyond the period of the actual construction activity.

AGC members are also concerned that the burden will fall to the regulated community to provide compelling evidence that an uneven surface area on the land (i.e., man-made wet area) first came about during a construction activity and should not be regulated. A failure to prove this fact would carry important regulatory implications that could significantly affect the utility and value of land, as well as the jurisdiction of state and federal agencies. Proving that a land depression was created by a construction operation will require historical information.

In many instances, a series of old maps and aerial photographs from different dates may provide the only opportunity to determine the origin of a particular wet area or water, in cases where there is some doubt as to whether or not they were man-made. Old maps may include topographic sheets, soil, geology, and land surveys. Even still, they may not be sufficient to identify small water bodies, wetlands, and wet soils, or, alternatively, to document their absence.

In an outreach meeting with AGC members, the agencies shared the opinion that general contractors would have "easy access" to topography maps and aerial photos to demonstrate the creation of "water-filled depressions incidental to construction" — if/when any jurisdictional issues or challenges would arise. AGC disagrees and finds that the agencies are oversimplifying what it will take to demonstrate the presence or absence of water-filled depressions. Historically, topographic maps and aerial photographs have been useful in identifying well-defined areas with wetland characteristics (i.e., true wetlands). However, with the proposed rule and the strong potential for the inclusion of more isolated depressions, these tools lack the level of resolution required to make a proper determination. AGC members have shared reports of former construction, industrial, and logging sites where wetland plants have become established within areas as shallow as 3 to 4 inches (e.g., tire tracks, poor grading practices, and natural settlement of non-compacted areas) from the surrounding landscape. In many instances the wetland vegetation is sparse and often comingled with grasses, such as reed canary grass. This unique characteristic, in addition to the flat topography that is often associated with

water-filled depressions, make it nearly impossible to classify some areas using topographic maps and/or aerial photos. (p. 17-18)

Agency Response: See summary response above. The exclusion applies to excavations in dry land for obtaining fill, sand, or gravel. Also see summary responses at 7.3.2, 7.3.4, 7.4.2 and 7.4.4 regarding exclusions for certain artificial lakes and ponds, small ornamental waters and wastewater recycling and stormwater control features. It is the government's burden to demonstrate that a water is jurisdictional. The rule does not change the agencies' existing practice that these features could be found to be jurisdictional once the construction or mining activity is completed or abandoned and the water feature remains.

NAIOP Commercial Real Estate Development Association (Doc. #14621)

7.324 7. §328.3(b)(5)(v). Water-filled Depressions.

Routinely federal regulators, despite guidance in the preamble of the 1986 Final Rule, attempt to exert jurisdiction over features such as sediment traps, sediment basins, vegetated swales, and stormwater ponds (created for and during construction activities) when projects are delayed due to economic conditions (loss of funding, foreclosures, etc.). While higher level managers usually intercede, the delays and angst could be eliminated by providing more specific and clear language.

Therefore, we recommend that you replace: "Water-filled depressions created incidental to construction activity;" with the following subsection:

(v) Depressions that become water filled periodically or permanently with or without hydrophytic vegetation or hydric soils created incidental to construction or quarrying activity whether actively in use or abandoned. (p. 5)

Agency Response: See summary response above. Also see summary responses at 7.3.2 and 7.4.4 regarding exclusions for certain settling basins and stormwater control features.

O'Neil LLP (Doc. #14651)

7.325 **Other Needed Clarifications to the Rule Requiring Revision and Re-Circulation for Public Comment Before Adoption**

Water-filled Depressions Created Incidental to Construction Activity

With regard to the Agencies' proposed exclusion from regulation for "water-filled depressions created incidental to construction activity," the Agencies should address the issue of agency alleged "abandonment" of the construction activity and whether there is a period of time after which such a feature would no longer qualify under the Rule as exempt from CWA regulation if the construction activity has, in fact, been abandoned. The Rule should be clear that a claim of "abandonment" by the Agencies should not be available unless the Agencies can show that all construction and project development activity has been abandoned for at least 10 years and that no efforts were being made during that time by any person to resume development activity on that project site. Providing a clear time frame, with a l0-year minimum period, would be important for

both the regulators and regulated public so that there is clarity for features that while clearly incidental to construction may have taken on wetland characteristics. (p. 5)

Agency Response: See summary response above. The rule does not alter the agencies' existing practice that pits excavated in dry land for obtaining fill, sand, or gravel could be found to be jurisdictional once the construction or mining activity is completed or abandoned and the water feature remains.

Reclamation and Abandoned Mine Lands Divisions, Public Service Commission, North Dakota (Doc. #12857)

7.326 Many of the hazardous abandoned coal mines we reclaim hold water in final mine pits and in mine spoils. It's not clear if these areas would be considered 'water filled depressions created incidental to construction activity' which would be exempt from the proposed "waters of the United States" definition. We believe the rule needs to clarify that such areas are exempt. Otherwise, reclamation work to eliminate hazardous conditions will unnecessarily be subject to the lengthy Section 404 permitting process. (p. 2)

Agency Response: See summary response above.

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

7.327 NSSGA is pleased to see that EPA's website on the proposed rule excludes "water filled depressions excavated on dry land for the purposes of obtaining fill, sand or gravel" from jurisdiction. However, the rule does not expressly include this exclusion but simply refers in the preamble to exclusions found in the 1986 preamble. See 79 Fed. Reg. 22218. That preamble states the following "generally" will not be considered waters of the United States and therefore will not be subject to federal jurisdiction as follows:

> Water-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel, unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.

The jurisdictional status of water bodies incidentally created at the site of aggregate mining and production facilities as part of normal mining, processing and reclamation is of particular importance to NSSGA members. Aggregate operations often create open depressions at mining sites that serve as sediment catch basins and areas that direct drainage from the surrounding site so as not to fill the active mining area with water. Indeed, the excavation of dry land areas creates the majority of sand pit lakes. As excavation commences, water fills the pit. This is due, in large part, to the high water table where many companies operate. Not only should the exclusion be in the text of the rule, the exclusion should be clear that sites undergoing active reclamation under state law have not been "abandoned." (p. 49-50)

Agency Response: See summary response above. The exclusion applies to excavations in dry land for obtaining fill, sand, or gravel. The rule does not alter the agencies' existing practice that these features could be found to be jurisdictional once the construction or mining activity is completed or abandoned and the water feature remains.

7.328 A. The Rule must clarify that a mining site is not "abandoned" after active mining activities cease if the site is still undergoing reclamation activities under State law, and/or where an operator can demonstrate that economic conditions resulted in delays in completing mining activities.

For many companies, reclamation under state law continues well past cessation of active mining operations and the mine site is not considered abandoned under state reclamation programs.[148] Yet, the interpretation of "abandonment" has never been clarified under this exclusion to include sites undergoing reclamation. Since the institution of the 404 program, controversy has often arisen as to the jurisdictional status of this incidentally created water/wetland where a site is still undergoing reclamation under state law.[149] NSSGA submits that a site is "not abandoned" if it is still undergoing the reclamation process under state law... (p. 50)

Agency Response: **See summary response above. The rule does not change the agencies' existing practice that these features could be found to be jurisdictional once the construction or mining activity is completed or abandoned and the water feature remains.**

Lyman-Richey Corporation (Doc. #14420)

7.329 *Clarifying the Exemption for Active Sand and Gravel Operations*

The Guidance presently explains that the following "generally" will hot be considered waters of the United States and therefore will not be subject to federal jurisdiction:

> Water-filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel, unless and until the construction or excavation operation is abandoned and the resulting body of Water meets the definition of waters of the United States.

Lyman-Richey supports this interpretation, as the majority of sand pit lakes are excavated from dryland areas. As excavation commences, water fills the pit. This is due, in large part, to the high water table in which Lyman-Richey operates its mining activities. But for Lyman-Richey's activities, these pits would not contain any water, much less water subject to federal jurisdiction.

Confusion can arise in cases when an active sand and gravel operation expands and incorporates an existing wetland or when a small tributary is "mined through" to access

[148] Under Cal. Law a mining operations cannot commence without an approved reclamation plan and that plan must include a description of how "mining water will be disposed" Cal. Pub. Resources Code §2770(a) and (c) (8) (A). A number of other western states require reclamation as part of a mining operation. See Alaska Stat. §27.19.020; Ariz. Rev. Stat. §27-921; Mont. Code §82-4-336; Or. Rev. Stat. §517.750; Wash. Rev. Code §78.44.111. In all, at least 37 states regulate non-coal surface mining on a statewide basis, 35 states require some sort of bond or security from the operator, and at least 26 states provide for public comment at permit review. Available at http://nssga.org/communications/whoweare.cfm.

[149] In *Northern Cal. River Watch v. City of Healdsburg*, 496 F. 3d. 9931002 (9th Cir) (2007), the corps determination that a waste pond had not been abandoned because reclamation activities under state law were still underway was overturned by the district court. The Ninth Circuit affirmed holding that the excavation operation exemption applies not to ponds undergoing actual extraction."

additional upland ground on the other side of the tributary. To be clear, no waste sand is placed into the wetland or tributary in these cases, and therefore, there is no discharge in violation of Clean Water Act § 404.

Nevertheless, we are aware of instances in which the Corps has asserted jurisdiction over an entire mining pit once either circumstance occurs. The Corps apparently relies on 33 C.F.R. § 328.5 for this jurisdictional assertion, However, this provision only applies to permanent changes in the shoreline configuration of the relevant waters, But, this regulation should not apply as long as the pit in question is clearly being mined because the change is by definition transient.

The agency's assertion of jurisdiction over an entire pit adversely affects ongoing operations not otherwise subject to Clean Water Act § 404 by precluding the discharge of any process waste sand back into the pit, which is the common industry practice. The only viable solution is to deposit all process waste sand onto upland ground. Depending on the operation in question, it is possible that no available upland ground exists. And, in each case, large upland waste sand deposits can present a nuisance to surrounding communities as the sand is exposed to wind and other elements over time. In addition, many times, all operation is occurring in a floodway, so depositing waste S31ld upland might violate other federal regulations, and the waste sand could not stay upland.

Finally, some consideration should be given to the typical life cycle of a sand and gravel pit. Most mining sites are excavated from upland areas located within a floodplain and/or floodway. The upland ground is dug out, and the pit fills with water from the surrounding groundwater table. The aggregates are removed with a suction dredge, and process waste sand is deposited directly back into the pit along the edges of the water. This usually results in substantial habitat creation for many species including threatened and endangered species. Indeed, in some case, such as interior least terns and piping plovers, sand and gravel pits often represent the best remaining habitat available in certain areas. *See, e.g.*, Bomberger Brown and Jorgensen, *2010 Interior Least Tern and Piping Plover Monitoring, Research, Management, and Outreach Report/at the Lower Platte River, Nebraska*. Thus, the Guidance should not create any disincentive toward the creation of these sensitive areas.

For these reasons, the agencies should make clear in the Guidance that no discharges of process waste sand within an active milling pit, when made incident to active sand and gravel operations, will be considered subject to Clean Water Act jurisdiction. At a minimum, the agencies should explain and define the concept of abandonment (and the corollary of permanent change in 33 C.F.R. § 328.5). Lyman-Richey recommends the term require a cessation of all active mining operations for a period of five or more years without any intent to reinitiate operations... (p. 13-14)

Agency Response: **See Summary response above. The exclusion applies to excavations in dry land for obtaining fill, sand, or gravel. The rule does not alter the agencies' existing practice that these features could be found to be jurisdictional once the construction or mining activity is completed or abandoned and the water feature remains.**

Virginia Coal and Energy Alliance and Virginia Mining Issues Group (Doc. #14619)

7.330 C. The Agencies Should Clarify That "Old Works" Are Not Jurisdictional

"Old works" are excavations and depressions left from historic mining activities conducted prior to the passage of the CWA and SMCRA. These features are generally considered non-jurisdictional and are reclaimed according to current SMCRA regulatory requirements. Nearly 80% of all surface mining conducted in Virginia involves remining; thus, these features are encountered at the majority of mine sites in the SVC. Active mining operations in the SVC utilize these "old works" - pre-law relic drainage ditches and depressions that have filled with water over time - for drainage and sediment basins, slurry impoundments and other operational purposes. Mining operations also frequently cross over and impact these features.

For the most part, these "old works" have remained outside of CWA jurisdiction under the exemption for "water-filled depressions created incidental to construction activity." But the Proposal threatens to erode or eliminate the applicability of this exemption to old works. We urge the Agencies to clarify that old works are not jurisdictional, either categorically or otherwise. (p. 7)

Agency Response: **See summary response above. The rule does not alter the agencies' existing practice that these features could be found to be jurisdictional once the construction or mining activity is completed or abandoned and the water feature remains.**

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

7.331 **Exemption for "Water-Filled Depressions Created Incidental To Construction Activity" (122.2(b) (5) (v))**

This exemption exists in the current regulations and there is not further discussion or explanation in the proposal. While the exemption is not limited in time it has sometimes been interpreted as applying only while construction activity is ongoing. That interpretation is inconsistent with the plain language of the exemption, and it also is inconsistent with the rationale for the exemption. First of all, an exemption that only applies while construction activity was underway would be of little value. Only once construction is completed will the full extent of any such water-filled depressions created by the construction activity be known. A water-filled depression that is formed either by excavation associated with construction activity or by the creation of an area that is poorly drained or not drained at all due to changes in land contours and drainage resulting from construction activity, is certainly not a traditional navigable water, nor does its existence have a significant effect on traditional navigable waters. Just as importantly, little or no regulatory benefit would result from treating such depressions as WOTUS subject to CWA permitting and water quality regulations. Domtar suggest the agencies clarify in any final rule that this exemption is not limited to only the duration of the construction activity. The agencies also need to clarify that a depression excavated as a source of soil, sand, gravel, etc. to be used in the construction falls within the notion of "incidental to construction activity." Again, these depressions are fundamentally different from, and do not warrant application of the same regulatory requirements as, other, natural surface water bodies. (p. 14)

Agency Response: **See summary response above. The rule does not alter the agencies' existing practice that these features could be found to be jurisdictional once the construction or mining activity is completed or abandoned and the water feature remains. The exclusion applies to excavations in dry land for obtaining fill, sand, or gravel.**

Valero Companies (Doc. #15363)

7.332 All of these definitional sections that outline exemptions from "Waters of the United States" contain language similar to the following:

> *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;*
>
> *Water-filled depressions created incidental to construction activity;*

Waters meeting these limitations would not be considered "jurisdictional" under the CWA. Regardless of the Agencies final action regarding definitions of "Waters of the United States", the Agencies should expand, amplify, or otherwise provide clarity regarding circumstances waters are:

1. Collected in ponds and used for fire control/suppression (i.e. "fire water ponds")
2. Water that has collected and stands within storage tank containment dikes

The proposed definition of "Waters of the United States" does not specifically mention such waters as being jurisdictional. However, the exemptions from the definition of "Waters of the United States" in all of the citations above are sufficiently unclear as to exempting these two circumstances that, under the proposed definitions, there is significant risk that fire water ponds and water ponding in storage tank containment dikes would, in fact, be construed as jurisdiction. We strongly urge the Agencies to revise the exemption language cited above to specifically cite our concerns as non-jurisdictional. The language regarding "artificial lakes and ponds" should be broadened beyond those activities currently listed and include "fire-water ponds".

Additionally, the "water-filled depression" language should be broadened in a way that makes clear this exclusion applies for as long as a depression exists and continues to apply irrespective of whether it is "water-filled" at all times or whether a condition of "construction" ceases to exist. Depressions created incidental to construction activity may continue to exist, by design or happenstance, for indefinite periods – even beyond the life of the structure or facility with which their creation originally was associated. Earthen dikes around storage tanks often accumulate rain water for periods of time, particularly in areas of heavy rainfall. There is no justification for the exclusion to cease operating due to subsequent events. Moreover, a depression may well be water-filled during wet periods and virtually empty during dry periods. The exclusion should apply so long as such depression occasionally retains water. (p. 2-3)

Agency Response: **See summary response above. The rule does not alter the agencies' existing practice that these features could be found to be jurisdictional**

once the construction or mining activity is completed or abandoned and the water feature remains. See summary response at 7.3.2 with regard to fire control ponds.

North Carolina Farm Bureau Federation (Doc. #15078)

7.333 Why are only "water filled depressions created incidental to construction activities" excluded, but not those created by farm or forestry equipment? All water filled depressions created incidental to activities such as construction, farming, forestry and such should be excluded. (p. 16)

Agency Response: See summary response above.

Oglethorpe Power Corporation (Doc. #14618)

7.334 Oglethorpe Power generally agrees with the exclusions provided within the Proposed Rule, but believes the exclusions should be broader and that the Proposed Rule fails to provide requisite specificity in regard to the application of the exclusions. For instance, the Proposed Rule excludes from the CWA's jurisdiction "water-filled depressions created incidental to construction activity," but fails to define key terms, including "incidental to" and "construction activity." The exclusion also does not indicate which types of water-filled depressions are excluded (if not all). Oglethorpe Power seeks clarification regarding the following question:

- Would a water-filled retention or detention pond built during the construction of a facility and for the purpose of collecting storm water runoff constitute a "water-filled depression created incidental to construction activity," such that the pond would be excluded from the meaning of "waters of the United States"? Does the answer remain the same if the facility's construction has been completed? (p. 3)

Agency Response: See Summary response above. The rule does not alter the agencies' existing practice that these features could be found to be jurisdictional once the construction or mining activity is completed or abandoned and the water feature remains. The final rule also excludes stormwater control features created in dry land.

Washington County Water Conservancy District, St. George, Utah (Doc. #15536)

7.335 **C. THE AGENCIES SHOULD CLARIFY THE EXCLUSION FOR WATER-FILLED DEPRESSIONS FROM CONSTRUCTION.**

The Agencies should clarify their exclusion for "water-filled depressions created incidental to construction activity." First, the Agencies should define the terms "depression" and "incidental to construction activity."[150] Specifically, the Agencies should clarify that such "incidental" depressions includes intentionally-created features like temporary erosion ponds, and are not limited to inadvertent features like depressions created by construction equipment. Second, the Agencies should clarify that there is no

[150] Proposed Rule, 79 Fed. Reg. at 22,263.

time limit following construction of such artificially created water-filled depressions to qualify for this exclusion.

While the Proposed Rule retains the exclusion for "water-filled depressions created incidental to construction activity," it eliminates the exclusion for "pits excavated in dry land for the purpose of obtaining fill, sand or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States."[151] The WWG understands that "pits excavated in dry land" typically refer to mining lakes.[152] The Agencies should revise the Proposed Rule to explain their reasons for eliminating this exclusion. (p. 27)

Agency Response: **See summary response above. Also see summary response at 7.4.4 with regard to the exclusion for certain stormwater control features. The exclusion applies to pits excavated in dry land for obtaining fill, sand, or gravel. The rule does not alter the agencies' existing practice that these features could be found to be jurisdictional once the construction or mining activity is completed or abandoned and the water feature remains.**

Colorado Water Congress Federal Affairs Committee (Doc. #14569)

7.336 **VI. Unanswered Questions**

Despite the proposal's stated objective to add clarity to the regulatory process, the proposal in fact creates great confusion and uncertainty…issues that must be addressed, through clarification and in the context of an ongoing dialogue amongst stakeholders, include:

…

- How will the agencies treat water-filled depressions that are incidental to "other than" construction activity;

…

- How will the agency treat construction detention ponds that ultimately drain to navigable waters;… (p. 6-7)

Agency Response: **See summary response above. Also see summary response at 7.4.4 with regard to stormwater control features.**

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

7.337 This exemption should be removed. In major construction projects such as interstate highways, extremely large borrow pits are dug with the express purpose of turning these

[151] EPA, Draft Guidance on Identifying Waters Protected by the Clean Water Act 20-21 (Apr. 2011), available at http://www.epa.gov/tp/pdf/wous_guidance_4-2011.pdf.

[152] Under the Proposed Rule, it appears that even if an active mining lake lacks a surface-water connection to traditionally navigable waters, or tributaries to such traditionally navigable waters, it is possible the mining lake would be jurisdictional as "adjacent" waters if it has a "shallow subsurface hydrologic connection to such a jurisdictional water." Proposed Rule, 79 Fed. Reg. at 22,208. Thus, it appears that under the Proposed Rule, discharges into active mining lakes would likely require a CWA permit.

"waterfilled depressions" into lake-front property. Under this exemption such amenity lakes would not be subject to regulation in the future. This would be a mistake. Other constructed depressions turn into wetlands over time and are often connected with jurisdictional waters. Again, cutting such waters off from any future protections would be a mistake. (p. 42)

Agency Response: See summary response above. The rule does not alter the agencies' existing practice that these features could be found to be jurisdictional once the construction or mining activity is completed or abandoned and the water feature remains.

Stormwater Management Commission, Lake County, Illinois (Doc. #15381)

7.338 We recommend clarifying the exclusion related to water-filled depressions in §328.3(b)(5)(v) to include a timeframe for this exclusion (e.g., abandoned for the past 5 years). (p. 2)

Agency Response: See summary response above. The rule does not alter the agencies' existing practice that these features could be found to be jurisdictional once the construction or mining activity is completed or abandoned and the water feature remains.

WaterLegacy (Doc. #18017)

7.339 Permanent Mine Pit Lakes

Mine pit lakes, which are allowed to be created in a natural landscape may become extensive permanent waters that are functionally indistinguishable from a contaminated natural lake in terms of impacts on birds, wildlife, and hydrological interaction with nearby waters. Such mine pits should be regulated as waters of the U.S. WaterLegacy proposes language clarifying that mine pit lakes are not exempt from consideration as "waters of the United States." We request a change from EPA's proposed rule 40 C.F.R.§230.03(t) as follows:

> (t) The following are not "waters of the United States," notwithstanding whether they meet the terms of paragraphs (s)(1) through (7) of this section—
>
> . . .
>
> (5). . .(v) Temporary ~~W~~ water-filled depressions, created incidental to construction activity, not including mine pit lakes; (p. 3)

Agency Response: See summary response above.

O'Neil LLP (Doc. #16559)

7.340 **Water-filled Depressions Created Incidental to Construction Activity**

With regard to the Agencies' proposed exclusion from regulation for "*water-filled depressions created incidental to construction activity*," the Agencies should address the issue of agency alleged "abandonment" of the construction activity and whether there is a period of time after which such a feature would no longer qualify under the Rule as exempt from CWA regulation if the construction activity has, ***in fact***, been abandoned.

The Rule should be clear that a claim of "abandonment" by the Agencies should not be available unless the Agencies can show that all construction and project development activity has been abandoned for at least 10 years and that no efforts were being made during that time by any person to resume development activity on that project site. Providing a clear time frame, with a 10-year minimum period, would be important for both the regulators and regulated public so that there is clarity for features that while clearly incidental to construction may have taken on wetland characteristics. (p. 7)

Agency Response: **See summary response above. The rule does not alter the agencies' existing practice that pits excavated in dry land for obtaining fill, sand, or gravel could be found to be jurisdictional once the construction or mining activity is completed or abandoned and the water feature remains.**

Robert J. Goldstein & Associates (Doc. #16577)

7.341 **5) Depressions created incidental to construction**: As discussed in #4 above, this exclusion should be restricted to depressions created incidentally in non-wetlands only. (p. 2)

Agency Response: **See summary response above. The exclusion applies only to water-filled depressions created in dry land.**

7.3.6. Groundwater, including Groundwater Drained through Subsurface Drainage Systems

Summary Response

The agencies have consistently interpreted the Clean Water Act to exclude shallow or deep groundwater from the geographic scope of the waters of the United States. The final rule continues to exclude shallow subsurface water and groundwater, including groundwater drained through subsurface drainage systems. This decision reflects current agencies' practice and provides greater clarity.

Many of the commenters were unclear from the proposed rule whether all groundwater is excluded including subsurface drainage systems and shallow subsurface connections. A few commenters questioned whether groundwater pumped through surface drainage ditches or into a pond/reservoir would be excluded and whether a tributary that disappears underground remains a "water of the United States" while underground.

Many commenters supported excluding all groundwater since that has been the historical interpretation, and stated that groundwater is currently regulated by states and tribes and should remain their jurisdiction. Many other commenters argued that the rule should not exclude groundwater because of its intrinsic connection with surface water and stated that groundwater often has closer hydrological connections to traditionally navigable waters than do jurisdictional tributaries and adjacent waters. They argued that no other rule fully protects groundwater and that groundwater supports ecologically important water including spring-fed and groundwater-fed streams.

The final rule continues to identify as excluded "Groundwater, including groundwater drained through subsurface drainage systems" reflecting the agencies' interpretation of "waters of the United States." This exclusion applies to all groundwater, including shallow subsurface flow. Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters. As many commenters pointed out the close connection of groundwater with surface water, this exclusion does not apply when groundwater emerges on the surface, contributing surface flow to streams and spring-fed waters. At this point, when groundwater emerges on the surface, it is surface water, and the resulting water feature is potentially regulated under the Clean Water Act. With this understanding, once groundwater is pumped into surface drainage ditches or into a pond/reservoir, the surface feature itself could be subject to jurisdiction. In the reverse, when a covered tributary has a segment that disappears underground that segment is not a "water of the United States." However, the covered tributary itself remains a "water of the United States" (see discussion in tributary compendium (topic 8) on breaks in OHWM). The extent of groundwater protection in other rules is beyond the scope of this rulemaking.

Some commenters questioned the use of subsurface hydrologic connections to establish jurisdiction when groundwater is excluded from the rule. A few comments requested specific limits on shallow groundwater connection distance, rate of groundwater flow, volume of groundwater flow, groundwater depth and or other hydrologic information to be used to establish jurisdiction. A few commenters supported the use of shallow subsurface/ groundwater as an avenue to document significant nexus including the use of subsurface drainage systems as a connection to establish jurisdiction to a wetland.

It is important to note the discussion in the rule preamble that while exclusions are not "waters of the United States," they can serve as a hydrologic**,** nonjurisdictional connection that agencies would consider when making case-specific significant nexus determinations. The agencies' decision is consistent with the law and current practice. For example, the agencies' 2008 *Rapanos* guidance states, "Under this definition, the agencies consider wetlands adjacent if one of following three criteria is satisfied. First, there is an unbroken surface or shallow sub-surface connection to jurisdictional waters. This hydrologic connection may be intermittent." In addition, the science strongly supports the important role shallow subsurface connections can play when assessing the effects of surface waters, and it is appropriate to consider them in a significant nexus determination. See Technical Support Document Sections II and IX. There is no basis in the statute or caselaw to ignore the significant effects a water has downstream waters simply because the connection exists through a non-jurisdictional feature. The agencies have made determinations since the *Rapanos* guidance which established jurisdiction using shallow subsurface hydrologic connections for adjacency. The preamble identifies a shallow subsurface hydrologic connection as lateral water flow over a restricting layer in the top soil horizons, or a shallow water table which fluctuates within the soil profile, sometimes rising to or near the ground surface but moving quickly through the soil impacting surface water directly within hours or days. See also the Technical Support Document, Section IX. Therefore, the agencies will continue the current practice of considering whether subsurface connections contribute to the type and strength of functions provided by a water or similarly situated waters when making a case-specific significant nexus determination. See topic 5 (Significant Nexus).

Several commenters cited to Hawai'i Wildlife Fund v. County of Maui to argue the agencies should include groundwater as "waters of the United States." The court there held that groundwater was a "conduit" through which pollutants were being discharged into the ocean, requiring an NPDES permit. This finding is consistent with agency interpretation that discharges of pollutants to "waters of the United States" via groundwater with a direct hydrologic connection to surface waters are subject to the CWA. See Concentrated Animal Feeding Operation Proposed Rule, 66 FR 2960, 3015 (Jan. 12, 2001). The exclusion for groundwater in the rule does not affect this longstanding interpretation as the agency has never considered the groundwater itself to be a "water of the United States." While the court analyzed whether a discharge of pollutant into groundwater itself would require a permit, the court acknowledged the agencies' interpretation, including citing to the proposed rule. The court further acknowledged that if the agencies promulgated a final rule that reflected their interpretation, it would be entitled to Chevron deference.

Specific Comments

Region 10 Tribal Caucus (Doc. #14927)

7.342 …EPA's proposed categorical exclusion of groundwater will leave ecologically important waters unprotected. The rule appears to be inconsistent with EPA's longstanding and consistent interpretation that the CWA may cover discharges of pollutants from a point source to surface water that occur via groundwater that has a direct hydrologic connection to the surface water.

The Tribal Caucus believes that the exclusion of groundwater, particularly the exclusion of "groundwater, including groundwater drained through subsurface drainage systems" from the definition of "Other Waters" should be revised to include, rather than exclude such waters. Groundwater is often hydrologically connected to navigable waters to the same extent, if not more, in some cases then waters that the rule has included in the definition. (p. 3)

Agency Response: See summary response above. Based on longstanding legal interpretation and current practice the agencies disagreed with the request to include groundwater as a water of the United States and retained groundwater as a categorical exclusion from the definition. However, the agencies agreed that subsurface connections can serve as a hydrologic, nonjurisdictional connection that agencies will consider when making case-specific significant nexus determinations.

U.S. House of Representatives Committee on Science, Space and Technology (Doc. #16386)

7.343 Nancy Stoner recently claimed that this rule does not regulate groundwater. Does the Clean Water Act give the EPA jurisdiction over groundwater?

a. Please provide a detailed legal rationale and any supporting examples or precedent.

b. If it does not, then does EPA use "ground water" as a means of establishing a "connection?" Please provide a detailed legal rationale and any supporting examples or precedent. (p. 7)

Agency Response: See summary response above. The agencies have consistently interpreted the CWA to exclude groundwater from the geographic scope of the

waters of the United States. The agencies have clarified that subsurface connections can serve as a non-jurisdictional hydrologic connection that agencies would consider when making case-specific significant nexus determinations.

State of Idaho (Doc. #9834)

7.344 2. Ground Water

"Waters of the United States" under the CWA do not include ground water. Idaho appreciates the Proposed Rule's specific exclusion of "ground water, including ground water drained through subsurface drainage systems." However, the Proposed Rule's use of "shallow subsurface hydrologic connections" to establish jurisdiction of adjacent surface waters is less clear even though the preamble states that "nothing ... would cause the shallow subsurface connections themselves to become jurisdictional."

The preamble language clarification should be included in the Proposed Rule itself to avoid misinterpretations and confusion about the EPA and Corps' intent and the jurisdictional status of such waters. Idaho requests the ground water exclusion in section 40 CFR 328.3(b)(5)(vi) of the rule be amended to state as follows:

> "Ground water, including *but not limited to* ground water drained through subsurface drainage systems *and shallow subsurface hydrologic connections between adjacent surface waters under this section*" (changes in italics). (p. 4-5)

Agency Response: See summary response above. The agencies in the final rule preamble clearly state, "neither shallow subsurface connections nor any type of groundwater, shallow or deep, are themselves 'waters of the United States'." The agencies disagree that a change to the rule language was necessary.

State of Oklahoma (Doc. #14625)

7.345 **a. Jurisdiction over subsurface flows, a.k.a. "groundwater"**

Of great significance to Oklahoma, the proposed rule does not go far enough to ensure that Oklahoma's groundwater is off limits. While I appreciate that EPA and the Corps have added a specific statement in the proposed rule that excludes groundwater, they continue to say that shallow subsurface flows could be used to establish jurisdictional nexus. In Oklahoma, any subsurface water, no matter how shallow, is considered groundwater and thus belongs to private property owners subject only to reasonable regulation by the state. As a practical matter, it's hard to fathom how CWA regulations can be effectively applied to distinct surface waters connected only through subsurface waters without ultimately expanding jurisdiction over the property owner's groundwater resource. Any regulation of subsurface flows, or other water under the surface, would be a severe encroachment on the private property rights of Oklahoma landowners. (p. 11)

Agency Response: See summary response above. The agencies have consistently interpreted the CWA to exclude groundwater from the geographic scope of the waters of the United States. The final rule continues to provide an explicit exclusion for groundwater, including groundwater drained through subsurface drainage systems, and the final rule preamble explicitly states that neither shallow subsurface connections nor any type of groundwater, shallow or deep, are ever jurisdictional.

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

7.346 In the proposed rule, groundwater remains exempt from jurisdiction. However, a shallow groundwater connection is proposed to be a factor in determining whether a significant nexus exists. The proposed rule does not place any limits on distance, rate of groundwater flow, volume of groundwater flow, or any other hydrologic information needed to determine whether or not a water body has a significant connection to a navigable water.

Groundwater should be removed from the proposed rule as a tool to determine whether or not a significant nexus is present. If groundwater remains in the rule as a significant nexus test, specific limits must be enacted to enable consistent determinations of jurisdiction. (p. 4)

Agency Response: The science strongly supports the important role subsurface connections can play when assessing the effects of surface waters, and it is appropriate to consider them in a significant nexus determination. See Technical Support Document sections II and IX. Because subsurface connections can vary based on geography, topography, and soil type, among other factors, the agencies did not identify specific limitations, but rather to allow these hydrologic connections to be assessed appropriately for the individual water. In terms of limits, the agencies note that case-specific determinations, and thus consideration of subsurface flow, are limited to two narrow classes of waters identified in paragraphs (a)(7) and (a)(8) of the final rule. See Section IV.H of the preamble.

Wisconsin Department of Natural Resource (Doc. #15141)

7.347 …the agencies should consider adding language to the exception for groundwater to clarify the intent of the exception. If a subsurface drainage system was installed to drain a wetland or other aquatic resource, but is not effectively draining that wetland, then that wetland or aquatic resource should still be regulated under the Clean Water Act. The department suggests adding the following language, which is underlined,

> "(vi) groundwater, including groundwater drained through subsurface drainage systems. If a subsurface drainage system is not effectively draining a wetland or aquatic resource, the wetland or aquatic resource remains a waters of the United States and activities to repair or enhance subsurface drainage may require approval under Section 404 of the Clean Water Act. (p. 3)

Agency Response: Section IV.H of the preamble clarifies that shallow subsurface connections, including subsurface drainage systems, are a factor in case-specific significant nexus analyses.

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

7.348 …the Agencies' proposed approach seemingly allows for groundwater to be inappropriately regulated as a tributary. The Agencies affirm in the preamble that they "have never interpreted 'waters of the United States ' to include groundwater and the proposed rule explicitly excludes groundwater, including groundwater drained through subsurface drainage systems"." LADWP supports the Agencies' exclusion of groundwater from the definition of WOUS, and seeks clarification in the final rule that groundwater will not be regulated. Groundwater should remain as a Water of the State, regardless of

its source. However, it can be interpreted under the newly proposed rule that groundwater is a tributary water.

Considering the above, LADWP suggests that the Agencies clarify the language as follows:

…

- Groundwater should remain as Water of the State and exempt from the definition of the WOUS, regardless of its source;
- Ephemeral streams: due to their nature, dry for some seasons and wet others, should not be deemed WOUS, but only Waters of the State, similar to groundwater;
- Dry Lake beds should be excluded from WOUS, since most are isolated and do not have a significant nexus to a WOUS; and
- Off-site storage and/or man-made impoundments related to hydroelectric facilities are only created for the operations of the plant, and should not be defined as WOUS. (p. 3-4)

Agency Response: See summary response above. The agencies have consistently interpreted the CWA to exclude groundwater from the geographic scope of the waters of the United States.

Information on the following comments can be found in other sections: ephemeral stream status see topic 8 (Tributary); dry lake beds see topics 4 (Other Waters) and 5 (Significant Nexus); hydroelectric facility man-made impoundments see Section 7.3.2 and topic 2.4 (Impoundments).

New Mexico Environment Department (Doc. # 16552)

7.349 **Exclusions from Jurisdictional Determinations are Unclear**

In reviewing the proposed rule's exemptions, several clarifications related to the exemptions are needed to avoid conflict with other portions of the proposed rule. For example, it is unclear why the exemption for groundwater has the proposed language "including groundwater drained through subsurface drainage systems." 79 Fed. Reg. 22,180, 22,199. The Department asserts that all groundwater drains through subsurface drainage systems, and as such, the exemption suggests that some groundwater(s) might not be excluded. Although the Department presumes that this language was intended to clarify that water collected through agricultural tile drains is excluded, as written it only adds ambiguity and confusion. The Department requests that the Agencies clarify this exemption. (p. 12)

Agency Response: The agencies believe the rule is clear and have added specific language to the preamble that neither shallow subsurface connection nor any type of groundwater are jurisdictional. See summary response above.

State of Oklahoma, et al. (Doc. # 16560)

7.350 **VII. Exempt Groundwater, Including Subsurface Hydrologic Connections**

As noted particularly in the preamble to the draft WOTUS rule, groundwater is outside the reach and scope of the CWA. In fact, it's a great example of an equally important source of freshwater for our citizens and industries that is well protected and managed solely within the purview of States. We appreciate the proposed rule's exclusion of groundwater, both in the preamble and now in the regulatory text, including the exemption of "groundwater drained through subsurface drainage systems." Still, given the proposed rule's use of "shallow subsurface hydrologic connections" as a possible means to establish jurisdiction, we believe the regulatory exemption should be extended to cover such shallow subsurface water. In Oklahoma and a number of other states, any water under the surface, no matter how shallow, is groundwater and is a property right of the overlying landowner. While the discussion in the preamble states that subsurface hydrologic connections will not become jurisdictional themselves, we remain concerned about the fact that preamble language often becomes unplugged from the regulatory language upon final codification in the CFR. Accordingly, we propose that the groundwater exclusion in paragraph (t)(5) (vi) of the proposed rule be amended as follows:

"Groundwater, including <u>but not limited to</u> groundwater drained through subsurface drainage systems <u>and shallow subsurface hydrologic connections used to establish jurisdiction between surface waters under this section.</u>"(proposed changes underlined) (p. 5)

<u>Agency Response:</u> See summary response above. The agencies have consistently interpreted the CWA to exclude groundwater from the geographic scope of the waters of the United States. The final rule continues to provide an explicit exclusion for groundwater, including groundwater drained through subsurface drainage systems, and final rule preamble explicitly states that neither shallow subsurface connections nor any type of groundwater, shallow or deep, are jurisdictional.

<u>State of Idaho (Doc. # 16597)</u>

7.351 2. Ground Water

"Waters of the United States" under the CWA do not include ground water. Idaho appreciates the Proposed Rule's specific exclusion of "ground water, including groundwater drained through subsurface drainage systems." However, the Proposed Rule's use of "shallow subsurface hydrologic connections" to establish jurisdiction of adjacent surface waters is less clear even though the preamble states that "nothing ... would cause the shallow subsurface connections themselves to become jurisdictional." The preamble language clarification should be included in the Proposed Rule itself to avoid misinterpretations and confusion about the EPA and Corps' intent and the jurisdictional status of such waters. Idaho requests the ground water exclusion in section 40 CFR 328.3(b)(5)(vi) of the rule be amended to state as follows: "Ground water, including *but not limited to* ground water drained through subsurface drainage systems *and shallow subsurface hydrologic connections between adjacent surface water-s under this section"* (changes in italics). (p. 4-5)

<u>Agency Response:</u> See summary response above. The agencies in the final rule preamble clearly state, "neither shallow subsurface connections nor any type of

groundwater, shallow or deep, are themselves 'waters of the United States'." The agencies disagree that a change to the rule language was necessary.

Office of the Governor, State of Montana (Doc. # 16694)

7.352 However, when the rules are codified, the preamble language regarding shallow subsurface hydrologic connections will not be codified with them, leading to possible misinterpretations and confusion about your agencies' intent and the jurisdictional status of such waters. Therefore, the State of Montana requests that the groundwater exclusion in section 40 CFR 230.3(t)(5)(vi) of the rule be amended to restate the intent of the language in the preamble that "nothing...would cause the shallow subsurface connections themselves to become jurisdictional." (p. 5)

Agency Response: The agencies believe the rule is clear and have added specific language to the preamble that neither shallow subsurface connection nor any type of groundwater are jurisdictional. The agencies disagree there will be confusion on this point. See summary response above.

State of Nevada, Department of Conservation, et al. (Doc. # 16932)

7.353 V. Categorical Exclusions

We appreciate EPA's attempt to clarify the categorical exclusion of certain types of waters. Of fundamental importance are exclusions for ground water and exemptions for agricultural activities. The CWA was not intended to be applied to the management of ground water. While we applaud the Proposed Rule's exclusion of ground water, the issue becomes blurred when shallow subsurface hydrologic connections are used to establish jurisdiction between surface waters. This opens the door to interpretation and argument for extension of CWA jurisdiction to groundwater resources.

Ground water should not be part of the CWA, and EPA should follow a more legally defensible path as described in the last section, where a clear surface connection is required rather than a link through ground water.

The State agrees with Western States Water Council (WSWC) that the groundwater exclusion in paragraph (t)(5)(vi) of the Proposed Rule should be amended to state as follows:

"Groundwater, including *but not limited to* groundwater drained through subsurface drainage systems *and shallow subsurface hydrologic connections used to establish jurisdiction between surface waters under this section*" (changes in italics). (p. 5)

Agency Response: See summary response above. The agencies agree that groundwater is excluded from the CWA and the rule and preamble are very clear on this point; however, the science strongly supports the important role subsurface connections can play when assessing the effects of surface waters, and it is appropriate to consider them in a significant nexus determination. See Technical Support Document sections II and IX.

State of Alaska (Doc. # 19465)

7.354 **1. Groundwater**

The regulatory reach of the CWA was not intended to be applied to the management and protection of groundwater. As such, the State appreciates the rule's exclusion of "groundwater, including groundwater drained through subsurface drainage systems."[153]

Given the rule's use of "shallow subsurface hydrologic connections" to establish jurisdiction between surface waters, the State also appreciates the preamble's statement that "nothing…would cause the shallow subsurface hydrologic connections themselves to become jurisdictional."[154]

However, once codified, the preamble language regarding shallow subsurface hydrologic connections will not be published in the Code of Federal Regulations, leading to possible misinterpretations and confusion about your agencies' intent and the jurisdictional status of such waters. Therefore, the State requests that the groundwater exclusion in section (t)(5)(vi) of the rule be amended to state as follows:

> "Groundwater, including *but not limited to* groundwater drained through subsurface drainage systems *and shallow subsurface hydrologic connections used to establish jurisdiction between surface waters under this section*" (changes in italics).

Further, while EPA states it would not regulate the land on which "shallow subsurface water" flows, the practical effect would be to regulate both those groundwaters and the land on which they rest because it accommodates the flow, and it makes remotely connected waters jurisdictional when there may be no significant connection. Simply put, the CWA does not provide the federal agencies legal authority to use shallow-subsurface waters that are groundwaters regulated by the states as a means to assert CWA jurisdiction over waters not directly connected to downstream navigable waters. (p. 31)

Agency Response: **See summary response above. The agencies agree that groundwater is excluded from the CWA and the rule and preamble are clear on this point; however, the science strongly supports the important role subsurface connections can play when assessing the effects of surface waters, and it is appropriate to consider them in a significant nexus determination. See Technical Support Document, particularly sections II and IX.**

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

7.355 6) Caltrans requests that the exclusion of groundwater from jurisdiction be further clarified to identify whether or not groundwater pumped through surface drainage ditches would be excluded from jurisdiction. (p. 2)

Agency Response: **See summary response above. While groundwater is exempted from this rule, once it is pumped into surface drainage ditches or into a pond/reservoir, the surface feature itself could be subject to jurisdiction.**

[153] 984 F. Supp. 2d 538 (E.D. Va. 2013).
[154] *Id.* at 22210.

City of Pompano Beach, Florida (Doc. #16438)

7.356 The proposed rule, as written, could include groundwater in the surficial aquifer as WOTUS, due to the connection to category 1-3 navigable waters. This definition would impact indirect discharges to shallow aquifers and make underground injection unfeasible. Groundwater should be excluded from the WOTUS definition. (p. 2)

Agency Response: Groundwater is exempted from the final rule, and does not affect the application of other laws including the requirements for underground injection wells in the Safe Drinking Water Act in accordance with 40 CFR Parts 144-147. Additional details can be found in the summary response at 7.4.2.

Maui County, Hawaii (Doc. #19593)

7.357 …

4. While the proposed rule excludes "groundwater, including groundwater drained through subsurface draining systems" there is ambiguity as to the depth of "subsurface hydrology" and at what depth groundwater is included or excluded. "Shallow" groundwater hydrologically connected to WOTUS appears to be included in definition of "other water."

5. Discharges to groundwater of any depth, permitted by an Underground Injection Control permit issued pursuant to the Safe Drinking Water Act should be categorically exempt. (p. 4)

Agency Response: See summary response above. The agencies in the final rule preamble clearly state, "neither shallow subsurface connections nor any type of groundwater, shallow or deep, are themselves 'waters of the United States'." In terms of limits, the agencies note that case-specific determinations, and thus consideration of subsurface flow, are limited to two narrow classes of waters identified in paragraphs (a)(7) and (a)(8) of the final rule. The final rule does not affect the application of other laws including the requirements for underground injection wells in the Safe Drinking Water Act in accordance with 40 CFR Parts 144-147. Additional details can be found in the summary response at 7.4.2.

Association of Drinking Water Administrators (Doc. #15530)

7.358 Role of Groundwater: ASDWA supports the recognition, in the proposed rule, that groundwater is not and has never been a jurisdictional water under the definition of "waters of the United States" – and, as such, should not be subject to regulation under the CWA. However, that recognition should not prevent the continued commitment by EPA – together with state and local partners -- to integrate groundwater as part of the planning approaches to municipal wastewater and stormwater management. There should be a common purpose for protecting drinking water sources under both the CWA and Safe Drinking Water Act (SDWA). For instance, if stormwater is redirected to groundwater for either disposal or shallow recharge, the two Acts should not be implemented at cross purposes. In short, the proposed rule changes should not be interpreted to allow groundwater to be contaminated. (p. 2)

Agency Response: **The agencies agree although the requirement to protect drinking water sources is beyond the scope of this rule. The final rule does not affect the application of other laws including the requirements for underground injection wells in the Safe Drinking Water Act in accordance with 40 CFR Parts 144-147. Additional details can be found in the summary responses at 7.4.2 and 7.4.4.**

Western States Water Council (Doc. #9842)

7.359 D. Groundwater

The regulatory reach of the CWA was not intended to be applied to the management and protection of groundwater. As such, the WSWC appreciates the rule's exclusion of "groundwater, including groundwater drained through subsurface drainage systems." Given the rule's use of "shallow subsurface hydrologic connections" to establish jurisdiction between surface waters, the WSWC also appreciates the preamble's statement that "nothing...would cause the shallow subsurface connections themselves to become jurisdictional.,,[155] However, once codified, the preamble language regarding shallow subsurface hydrologic connections will not be published in the CFR, leading to possible misinterpretations and confusion about your agencies' intent and the jurisdictional status of such waters. Therefore, the WSWC requests that the groundwater exclusion in paragraph (t)(5)(vi) of the rule be amended to state as follows:

> "Groundwater, including but not limited to groundwater drained through subsurface drainage systems *and shallow subsurface hydrologic connections used to establish jurisdiction between surface waters under this section*" (changes in italics). (p. 6)

Agency Response: **See summary response above. The agencies agree that groundwater is excluded from the CWA and the rule and preamble are clear on this point; however, the science strongly supports the important role subsurface connections can play when assessing the effects of surface waters, and it is appropriate to consider them in a significant nexus determination. See Technical Support Document, particularly sections II and IX.**

7.360 The report [*Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (September 2013 External Review Draft, EPA/600/R-11/098B] should not be used to support a rule that improperly asserts that the scope of the CWA is essentially unlimited. We recognize that there are differing interpretations of *Rapanos*, but it is undisputed that the Court rejected the EPA's and the Corps ' pre-*Rapanos* interpretation of CWA authority. A rule that attempts to return CWA jurisdiction to the pre-*Rapanos* "status quo," using the report 's findings of global hydrologic connectivity would be contrary to the limits that Congress and the Court have established, and would be an improper use of the report and federal rulemaking authority. Moreover, the CWA does not apply to ground waters, which are protected and allocated by western states, which recognize the hydrogeologic connections. Any reference to

[155] *Id*. at 22210 [Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,269 (April 21, 2014) (to be codified at 40 CFR Part 230.3)]

ground waters, including "shallow subsurface flows," is inappropriate in any related rulemaking. (p. 30)

Agency Response: **See summary response above. The agencies have consistently interpreted the CWA to exclude groundwater from the geographic scope of the waters of the United States. However, the agencies have clarified that subsurface connections can serve as a non-jurisdictional hydrologic connection that agencies would consider when making case-specific significant nexus determinations. The science strongly supports the important role subsurface connections can play when assessing the effects of surface waters, and it is appropriate to consider them in a significant nexus determination. See Technical Support Document sections II and IX.**

Groundwater Protection Council (Doc. #13055)

7.361 GWPC supports the recognition that groundwater is not and has never been a jurisdictional water under the definition of waters of the United States and the proposed section of the regulations which exclude from the definition of waters of the United States "groundwater, including groundwater drained through subsurface drainage systems". The preamble also states that "The agencies have never interpreted ''waters of the United States'' to include groundwater and the proposed rule explicitly excludes groundwater, including groundwater drained through subsurface drainage systems."

We agree that many states and tribes protect groundwater that is outside the regulatory jurisdiction of the CWA. The preamble states that "Nothing in this proposed rule would limit or impede any existing or future state or tribal efforts to further protect their waters." However; due to the very broad scope of activities covered under this proposed rule, GWPC is concerned that some may interpret the specific exclusion of groundwater to affect EPA's support of existing important provisions contained within 40 CFR Sections 106, 305, and 319 that support state and tribal programs in their protection of groundwater. The ability of states and tribes to request funding for groundwater protection programs from EPA under these provisions of the regulations should not be impeded by future grant guidance. GWPC recommends that EPA continue to include support for groundwater within the text discussion of future grant guidance for these sections. (p. 1-2)

Agency Response: **The agencies reiterate that nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their water, nor does it change any existing grant guidance. See summary response above.**

Federal Water Quality Coalition (Doc. #15822.1)

7.362 **7. Groundwater.**

Groundwater, including groundwater drained through subsurface drainage systems, is not jurisdictional. We appreciate the affirmation that the CWA does not regulate groundwater. However, the frequent use of groundwater in the proposed rule to establish a jurisdictional connection has caused significant confusion and concern. For example, the definition of "tributary" includes water that disappears underground and recharges

surface water downstream. It is unclear whether the "tributary" retains its status as a water of the U.S. while underground. (p. 19-20)

Agency Response: **See summary response above. The agencies believe the rule is clear and have added specific language to the preamble that neither shallow subsurface connection nor any type of groundwater are jurisdictional. When a covered tributary has a segment that disappears underground that segment is not a "water of the United States." However, the tributary itself remains a "water of the United States" (see discussion in Tributary compendium on breaks in OHWM).**

Minnesota Chamber of Commerce (Doc. #16473)

7.363 The Minnesota Chamber strongly supports the Agencies' codification of the longstanding groundwater exclusion in section (b)(S)(vi) of the Proposed Rule. To avoid any confusion, the Agencies should make clear - in the preamble to the Final Rule or in the Final Rule it self- that the existence of a "shallow sub surface hydrologic connection" is relevant only to the question of whether one surface water should be deemed jurisdictional on the basis of being adjacent to surface water. The Agencies should emphasize that groundwater, including any "subsurface hydrologic connection," shallow or otherwise, is outside the scope of the CWA and that discharges directly to groundwater do not require an NPDEs permit requirement. Congress intentionally limited the reach of the CWA to surface water discharges. However, limiting the reach of the CWA in this way does not mean that groundwater will go unregulated. To the contrary, state regulation is fully effective and sufficient to regulate discharges to groundwater and control, through appropriate conditions in state discharge permits, any attendant impacts on hydrologically connected surface waters. (p. 6)

Agency Response: **See summary response above. The agencies believe the rule is clear and have added specific language to the preamble that neither shallow subsurface connection nor any type of groundwater are jurisdictional. EPA's position that discharges to groundwater with a direct hydrological connection to a jurisdictional water require an NPDES permit is not changed by the final rule. (See summary response at 12.3 with respect to the NPDES program.)**

7.364 The Minnesota Chamber recommends that the Agencies make the following changes to the Proposed Rule:

…

3. The Agencies should make clear-in the preamble to the Final Rule or in the Final Rule itself-that the existence of a "shallow subsurface hydrologic connection" is relevant only to the question of whether one surface water should be deemed jurisdictional on the basis of being adjacent to another surface water. The Agencies should emphasize that groundwater, including any "subsurface hydrologic connection," shallow or otherwise, is outside the scope of the CWA and that discharges directly to groundwater do not require an NPDEs permit requirement . (p. 6)

Agency Response: **See above response.**

Alameda County Cattlewomen (Doc. #8674)

7.365 The agencies' proposed rule leaves open the question whether they will assert jurisdiction over groundwater through contradictory statements and ill-defined terms and phrases. While under Section I the agencies have specifically excluded "Groundwater, including groundwater drained through subsurface drainage systems" they turn around and find that connection through "shallow subsurface" flows can make a water an "adjacent water" and therefore jurisdictional. (Proposed Rule at 22207). It is hard for a reasonable person to see how "groundwater" is different than "shallow subsurface" flow. It appears that "groundwater" includes "shallow subsurface" flow, and the agencies have failed to distinguish the two from each other. It is also unclear how a landowner could dig up some ground, and seeing water, whether they would know whether they are obstructing "shallow subsurface" flow or are at groundwater. EPA official Robert Perciascepe stated at a Congressional hearing before the House Science Committee on July 9, 2014 that the "shallow subsurface" flow is not jurisdictional. If true, could a landowner not cut off the "shallow subsurface flow" and prevent their natural pond from being a "water of the U.S.?"

The federal government cannot divert or otherwise control water for its own uses regardless of the authority cited without a reserved water right or a state-adjudicated water right. Never has it been suggested that the scope of the CWA extends to the regulation of groundwater.[156] (p. 25)

Agency Response: **See summary response above. The agencies clearly state in the final rule preamble that "neither shallow subsurface connections nor any type of groundwater, shallow or deep, are themselves 'waters of the United States'." This is a definitional rule and does not address water allocation. Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their water. Not enough information is given to answer the question about a "natural pond".**

Colorado Cattlemen's Association (Doc. #15068)

7.366 The agencies' proposed rule leaves open the question whether they will assert jurisdiction over groundwater through contradictory statements and ill-defined terms and phrases. While under Section I. the agencies have specifically excluded "Groundwater, including groundwater drained through subsurface drainage systems" they turn around and find that connection through "shallow subsurface" flows can make a water an "adjacent water" and therefore jurisdictional. (Proposed Rule at 22207). It is unclear how a landowner could dig up some ground, and seeing water, whether they would know whether they are obstructing "shallow subsurface" flow or are at groundwater. (p. 8)

[156] *Rapanos*, J. Scalia, at 24 ("First, that the adjacent channel contains a "wate[r] of the United States," (i.e., a relatively permanent body of water connected to traditional inter- state navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.).

Agency Response: **See summary response above. The agencies clearly state in the final rule preamble that "neither shallow subsurface connections nor any type of groundwater, shallow or deep, are themselves 'waters of the United States'."**

North Carolina Farm Bureau Federation (Doc. #15078)

7.367 All groundwater should be excluded under all circumstances, including using groundwater to establish shallow subsurface hydrologic connections. (p. 16)

Agency Response: **See summary response above. The agencies have consistently interpreted the CWA to exclude groundwater from the geographic scope of the waters of the United States. However, the agencies have clarified that subsurface connections can serve as a non-jurisdictional hydrologic connection that agencies would consider when making case-specific significant nexus determinations. The science strongly supports the important role subsurface connections can play when assessing the effects of surface waters, and it is appropriate to consider them in a significant nexus determination. See Technical Support Document sections II and IX.**

Irrigation Association (Doc. #15217)

7.368 In Nebraska, the highest irrigated state by irrigated acreage (according to the 2013 Farm and Ranch Irrigation Survey), agriculture depends on both surface and groundwater for its irrigation needs. Sitting on top of the largest aquifer in the U.S. (the Ogallala), Nebraska's farmers and ranchers continue to produce record yields, while keeping the aquifer thriving and healthy. The WOTUS rule does not have clarity on the nexus between surface and groundwater. Many times, groundwater is pumped on to agricultural land (into a pond/reservoir) and later used for irrigation. This was groundwater, not subject to the scope of the original Clean Water Act nor the proposed WOTUS rule, but once it is pumped for irrigation use, we are concerned that this is now subject for federal clean water jurisdiction. (p. 3)

Agency Response: **See summary response above.**

National Barley Growers Association (Doc. #15627)

7.369 Groundwater. While EPA says that it intends to exclude groundwater, there is language in the Proposed Rule that casts doubt on this claim. More specifically, the Proposed Rule states that a body of water may be a "water of the United States" if it has a "shallow subsurface hydrological connection" to other jurisdiction waters. This language suggests that groundwater may serve as a basis for regulation under the Clean Water Act. EPA and the CORPS should review and narrow this part of the WOTUS definition. (p. 6)

Agency Response: **See summary response above. The agencies have consistently interpreted the CWA to exclude groundwater from the geographic scope of the waters of the United States. However, the agencies have clarified that subsurface connections can serve as a non-jurisdictional hydrologic connection that agencies would consider when making case-specific significant nexus determinations. The science strongly supports the important role subsurface connections can play when assessing the effects of surface waters, and it is appropriate to consider them in a**

significant nexus determination. See Technical Support Document sections II and IX.

Charlotte-Mecklenburg Storm Water Services (Doc. #3431)

7.370 4. This comment pertains to Section 328.3 Definitions, (b)(5)(vi), Federal Register page 22263. "Groundwater drained through a subsurface drainage system" is not clearly defined. For example, there is no distinction between tile drainage of agricultural fields and a drainage system used by an MS4 for storm drainage. In many cases, our pipe systems do accept groundwater drainage, especially when the system is installed at an elevation lower than the current ditch, channel or existing pipe system. It will be difficult to determine the contributions of groundwater versus surface water to the pipe system. Also, surface waters are always the result of a groundwater connection, so where is the line drawn between underground drainage of groundwater versus surficial drainage of groundwater? **CMSWS recommends clarifying the definition of "drainage system" and how it would apply to MS4 storm water drainage systems.** (p. 2)

Agency Response: See summary response above. The agencies continue to exclude groundwater in the final rule. The final rule also provides an exclusion from jurisdiction for stormwater control features that are created in dry land; please see summary response at 7.4.4.

Upper Niobrara White Natural Resources District, Chadron, Nebraska (Doc. #13562)

7.371 …if EPA does not intend to regulate groundwater, this should be explicitly stated in the rule as not being "waters of the United States" - in section t, definitions. (p. 2)

Agency Response: See summary response above. The final rule explicitly states that groundwater, including groundwater drained through subsurface drainage systems, is excluded.

Southern Nevada Water Authority (Doc. #14580)

7.372 The Proposed Rule states "groundwater, including groundwater drained through subsurface drainage systems" is excluded from CWA jurisdiction (79 FR 22263). SNWA supports this specific exclusion, and agrees it will provide clarity regarding the scope of WOTUS. SNWA also recommends groundwater recharge basins be specifically excluded from jurisdiction. Groundwater recharge basins are temporary facilities that are isolated from other waters and typically periodically dry. They do not contribute flow to traditional WOTUS, similar to dry lake beds (playas)... (p. 5)

Agency Response: Wastewater recycling structures created in dry land are excluded under the final rule. See summary response at 7.4.2.

Berkshire Hathaway Energy Company (Doc. #14650)

7.373 B. The Agencies Should Clarify the Exemption for Groundwater to More Clearly Exempt All Groundwater from the Definition of Waters of the U.S.

The Agencies must also clarify the exemption for groundwater. The Agencies propose that groundwater, including groundwater drained through subsurface drainage systems, will continue to be exempt from the definition of waters of the U.S.[157] However, under the proposed rule, groundwater connectivity may be used to create a significant nexus with traditional navigable waters and thereby establish a jurisdictional connection.[158] Presumably, if such connection is established through groundwater connecting two bodies of water, one of which is a traditional navigable water, the groundwater would also become jurisdictional. This has the potential to create confusion and uncertainty with respect to the treatment of groundwater, which has not historically been nor should be regulated under the Clean Water Act. The Agencies should maintain the clear exemption for groundwater in the proposed definition. In addition, the Agencies should not use groundwater or other isolated surface or shallow subsurface hydrologic connections as a means of establishing a significant nexus with traditional navigable waters to establish jurisdiction. If a water is not itself jurisdictional, it should not be used to establish jurisdiction for any other water. (p. 5)

Agency Response: **See summary response above. The agencies have consistently interpreted the CWA to exclude groundwater from the geographic scope of the waters of the United States. However, the agencies have clarified that subsurface connections can serve as a non-jurisdictional hydrologic connection that agencies would consider when making case-specific significant nexus determinations. The science strongly supports the important role subsurface connections can play when assessing the effects of surface waters, and it is appropriate to consider them in a significant nexus determination. See Technical Support Document sections II and IX.**

Eagle River Water & Sanitation District, Vail, Colorado (Doc. #15116)

7.374 …the District and the Authority support the exclusion of groundwater. However, we are concerned that the provision in the new rule stating that "groundwater drained through subsurface drainage systems" is not a water of the United States may be construed to remove protections for important spring-fed and groundwater-fed streams if flow from "subsurface drainage systems" is present. It could also remove subterranean dewatering systems from jurisdiction under section 402:

> *"The following are not "waters of the United States" notwithstanding whether they meet the terms of [those waters of the United States designated by rule]:*
>
> *…*
>
> *(vi) Groundwater, including groundwater drained through subsurface drainage systems…" (see, e.g., proposed §32.83(b)(5)(vi).*

Without clarification, the "no-recapture clause" may be construed to remove protections for these important spring-fed tributaries. (See discussion re: features excluded by rule

[157] *Id*. at 22218. [*Definition of "Waters of the United States" Under the Clean Water Act*, 79 Fed. Reg. 76 at 22193 (April 21, 2014).]
[158] *Id*. at 22196.

under subpart (b) cannot be recaptured and considered jurisdictional under any of the jurisdictional waters of the U.S. categories by rule, p. 22203, Federal Register, Vol. 79, No. 76, April 21, 2014.) (p. 8)

Agency Response: See summary response bove. When groundwater emerges on the surface, it is surface water, and surface feature receiving groundwater input may be subject to jurisdiction.

Wyoming State Engineer Office (Doc. #15496)

7.375 Groundwater in Wyoming is not presumed to be connected to surface water unless determined by field hydrogeologic surveys. Many western states have similar statutes. Varying geological formations, fault conditions and changes in rock structures make connectivity and continuity between stream and groundwater flows unpredictable. Using groundwater as a means to expand the definition of "waters of the United States," as EPA and the Corps have done in the proposed rule, represents an unwarranted and unsubstantiated regulation of a resource with questionable continuity to downstream navigable waters, particularly in Wyoming.

While EPA and the Corps have attempted to exclude some forms of groundwater from being defined as "waters of the United States," the agencies' definitions and treatment of "neighboring" and "adjacency" undermines the potential groundwater exemption. This is particularly true where groundwater and shallow groundwater will be used to establish a "significant nexus" between isolated or other minor bodies of waters and tributaries that they are "waters of the United States." Therefore, Wyoming requests that the following clarification be added to the proposed rule:

> Groundwater, including but not limited to groundwater drained through subsurface drainage system and shallow subsurface hydrologic connections, shall not be considered waters of the United States, and may not be used as a means to demonstrate a significant nexus to adjacent waters. (p. 3)

Agency Response: The final rule eliminates shallow subsurface connectivity as a basis for adjacency. However, the agencies have clarified that subsurface connections can serve as a non-jurisdictional hydrologic connection that agencies would consider when making case-specific significant nexus determinations. The science strongly supports the important role subsurface connections can play when assessing the effects of surface waters, and it is appropriate to consider them in a significant nexus determination. See Technical Support Document sections II and IX. Section IV.H of the preamble discusses identifying shallow subsurface hydrologic connections.

San Luis & Delta-Mendota Water Authority, Los Banos, California (Doc. #15645)

7.376 C: Groundwater should be clearly excluded from jurisdiction under the proposal

The Agencies have consistently stated that the proposed rule will not regulate groundwater. However, concern remains that the proposal could inadvertently envelope some groundwater banking and recharge projects. Groundwater banking is a particularly critical management tool for members of the Water Authority and California generally.

The Agencies should provide clarity that the rule will not apply to groundwater, shallow subsurface aquifers and groundwater banking and recharge projects. (p. 3)

Agency Response: See summary response above. The agencies believe this point is clear in the rule and preamble. Also see summary response at 7.4.2 regarding exclusion of certain wastewater recycling features.

Northern California Association (Doc. #17444)

7.377 The EPA's Science Advisory Board (SAB) noted in their advice and comments on the proposed rule in a letter to EPA dated September 30, 2014 that the CWA excludes groundwater, including groundwater drained through subsurface drainage systems, from federal regulation. The SAB states that, while the CWA excludes groundwater from regulation, a point of law that is reiterated in the proposed rule as well as in the current regulation, there is no scientific justification to support such exclusion. The SAB goes on to state that "the available science shows that groundwater connections, particularly via shallow flow paths in unconfined aquifers, can be critical in supporting the hydrology and biogeochemical functions of wetlands and other waters."

While the SAB may conclude that the "available science" may prove that groundwater is connected to traditional navigable waters in some circumstances, it is also clear that Congress intended that the CWA not address nor regulate groundwater even if connected to navigable waters that are regulated under the CWA. As we point out in our issues with the new definition of "adjacent"…, subsurface groundwater connections are not subject to CWA jurisdiction and are clearly excluded from regulation under the Act. The proposed rule should be consistent with this statutory limitation of the CWA on federal regulation of groundwater. (p. 5)

Agency Response: See summary response above. The agencies have consistently interpreted the CWA to exclude groundwater from the geographic scope of the waters of the United States. However, the agencies have clarified that subsurface connections can serve as a non-jurisdictional hydrologic connection that agencies would consider when making case-specific significant nexus determinations. The science strongly supports the important role subsurface connections can play when assessing the effects of surface waters, and it is appropriate to consider them in a significant nexus determination. See Technical Support Document sections II and IX.

Center for Small Business and the Environment (Doc. #6981)

7.378 The rule is a good start but needs to cover direct impacts on the groundwater. Since groundwater is the source of much of our drinking water, this key issue should not be overlooked. Ground water provides drinking water for more than one-half of the Nation’s population (Solley and others, 1993), and is the sole source of drinking water for many rural communities and some large cities. In 1990, ground water accounted for 39 percent of water withdrawn for public supply for cities and towns and 96 percent of water withdrawn by self-supplied systems for domestic use. The results of research published in the online edition of the Proceedings of the National Academy of Sciences (PNAS, 24 June 2013) lend strong support to the conclusion that toxic chemicals are leaking into ground water. Contrary to the popular impression that at least the waters from our

springs and wells are pure, we're uncovering a pattern of pervasive pollution there too. And in these sources, unlike rivers, the pollution is generally irreversible. The rate of groundwater renewal is very slow in comparison with that of surface water. It's true that some aquifers recharge fairly quickly, but the average recycling time for groundwater is 1,400 years, as opposed to only 20 days for river water. Experts and regulators agree that investigating complaints of water-well contamination is particularly difficult, in part because some regions also have natural methane gas pollution or other problems unrelated to drilling. A 2011 Penn State study found that about 40% of water wells tested prior to gas drilling failed at least one federal drinking water standard. According to A National Look at Nitrate Contamination of Ground Water by Bernard T. Nolan, Barbara C. Ruddy, Kerie J. Hitt, and Dennis R. Helsel [Water Conditioning and Purification, January 1998, v. 39, no. 12, pages 76-79.], nitrate pollution generally is a public-health threat for children, ingestion in drinking water by infants can cause low oxygen levels in the blood, a potentially fatal condition (Spalding and Exner, 1993). There are some 126,000 groundwater sites in the United States that have not met pollution standards and the cost of meeting those goals could range from $US110 billion to $US127 billion, according to a report from the National Research Council. Since 1987 the NRC has released at least six reports describing the challenges associated with groundwater contamination. By not addressing a proactive approach to groundwater, the ruling falls short in primarily focusing on surface water. (p. 1)

Agency Response: See summary response above. The agencies have consistently interpreted the CWA to exclude groundwater. The requirement to protect drinking water sources is beyond the scope of this rule. The final rule does not affect the application of other laws.

Ducks Unlimited (Doc. #11014)

7.379 Finally, with respect to the issue of groundwater, it is scientifically appropriate and necessary that groundwater be allowed to be used as an avenue of documenting significant nexus. It is among the most important of the types of connectivity that exists between adjacent, neighboring, and "other waters" and "waters of the U.S." However, given the abundant existing case law relative to governance of groundwater, it is appropriate that the final rule explicitly exclude groundwater from jurisdiction. Given the magnitude and importance of that issue to the states and landowners in many parts of the country, any change to existing practices with respect to state-based regulation of groundwater should come only as a result of Congressional action. (p. 35)

Agency Response: The agencies agree.

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

7.380 If the agencies do include groundwater as not regulated, the agencies must be very clear in explaining that although the Clean Water Act is typically viewed as not regulating groundwater, shallow subsurface movement of water can be used to establish a connection between a water and a jurisdictional water. (p. 42)

Agency Response: The agencies have clarified that subsurface connections can serve as a non-jurisdictional hydrologic connection that agencies would consider when making case-specific significant nexus determinations. The science strongly

supports the important role subsurface connections can play when assessing the effects of surface waters, and it is appropriate to consider them in a significant nexus determination. See Technical Support Document sections II and IX.

National Wildlife Federation (Doc. #15020)

7.381 We…support the agencies' express exclusion of groundwater, recognizing that the agencies "have never interpreted "waters of the United States" to include groundwater." Id. at 22218. We note, however, that it is scientifically appropriate and necessary that groundwater be recognized as among the most important types of connectivity that exists between adjacent, neighboring, and "other waters" and tributaries, TNWs, and IWs. The agencies must recognize at least shallow groundwater as an avenue of documenting significant nexus despite not being jurisdictional waters in their own right. For example, a "gully" or "arroyo" connected via ground water to a tributary of a TNW, and which flows in response to storm events, likely qualifies as a waters of the United States.[159] (p. 102-103)

Agency Response: the agencies have clarified that subsurface connections can serve as a non-jurisdictional hydrologic connection that agencies would consider when making case-specific significant nexus determinations. The science strongly supports the important role subsurface connections can play when assessing the effects of surface waters, and it is appropriate to consider them in a significant nexus determination. See Technical Support Document sections II and IX. Section VII of the Technical Support Document addresses tributaries with segments that flow underground.

Center for Biological Diversity, Center for Food Safety, and Turtle Island Restoration Network (Doc. #15233)

7.382 Under your newly proposed exclusion, "[g]roundwater, including groundwater drained through subsurface drainage systems," proposed 40 CFR 122.2 (b)(5)(vi) at 79 Fed. Reg. 22268, is to be deemed not a water of the United States "notwithstanding whether [it meets] the terms of paragraphs (a)(1) through (7) of this definition." *Id*. at (b). Accordingly, even if, on an individual basis, groundwater in a region has "a significant nexus" to a traditionally jurisdictional water body, you would deem it not a WOTUS. The same would be true under your proposed formulation for groundwater adjacent to a traditionally jurisdictional water body. This makes no sense and would invite endless abuse of our nation's waters. *See* Howard J, Merrifield M (2010) Mapping Groundwater Dependent Ecosystems in California. (p. 10)

Agency Response: See summary response above.

Defenders of Wildlife and Patagonia Area Resource Alliance (Doc. #16394)

7.383 Groundwater is excluded under the proposed subsection (t)(5)(vi). However, groundwater often significantly influences the chemical, physical and biological integrity of surface waters of the U.S. For example, "[i]n the arid and semi-arid lands. . . groundwater is the

[159] *See, e.g., Quivira Mining, supra.*

dominant source of flow to both tributaries and the main stem river segments." Member Comments, Dr. Kenneth Kolm, at 31. The SAB wrote to EPA that "[t]he available science. . . shows that groundwater connections, particularly via shallow flow paths in unconfined aquifers, are critical in supporting the hydrology and biogeochemical functions of wetlands and other waters. Groundwater also can connect waters and wetlands that have no visible surface connections." SAB letter at 3; see SAB Review at 20 ("[a]n understanding of regional groundwater flow systems is critical to the understanding of four-dimensional hydrologic connectivity on both the local and regional scales."); id. at 27 ("the conclusions in the [EPA Connectivity] Report should emphasize that dynamic groundwater-surface water connections not only maintain the ecological integrity of ephemeral streams, but also connect them structurally and functionally to downstream waters, whether or not the upstream channels are perennial").

These connections mean that protecting groundwater is often essential to protecting surface water. As the U.S. Geological Study concluded, "[m]uch of the ground-water contamination in the United States is in shallow aquifers that are directly connected to surface water. In some settings where this is the case, ground water can be a major and potentially long-term contributor to contamination of surface water." U.S. Geological Survey Circular 1139, "Ground Water and Surface Water: A Single Resource," (1998), at VI, attached as Exh. D. The USGS also noted changes in the groundwater and surface water connection can impact the aquatic species that depend on the habitats created by this interchange. Id. at VII.

The San Pedro River in southeastern Arizona illustrates the critical role that groundwater can play in a watershed. The San Pedro and its surrounding riparian habitat supports one of the richest areas of biodiversity in the United States and is an important corridor for millions of migrating songbirds. The San Pedro supports hundreds of species of birds, mammals, reptiles, amphibians, and plants, including three species protected by the Endangered Species Act: the western yellow-billed cuckoo, Southwestern willow flycatcher, and the Huachuca water umbel, as well as designated critical habitat for the umbel. In 1988, Congress recognized that the river is one of the nation's and the world's environmental crown jewels and protected 36 miles of the river and its surrounding riparian habitat through the creation of the San Pedro Riparian National Conservation Area (SPRNCA). 16 U.S.C. § 460xx (purpose of SPRNCA is "to protect the riparian area and aquatic, wildlife, archaeological, paleontological, scientific, cultural, educational, and recreational resources of the public lands surrounding the San Pedro"). The base flows for the river segments within the SPRNCA, and the water supply for the surrounding cottonwood forest, are provided by groundwater within the Sierra Vista subwatershed. See, e.g., Thomas, B.E., and Pool, D.R., "Trends in Streamflow in the San Pedro River, Southeastern Arizona, and Regional Trends in Precipitation and Streamflow in Southeastern Arizona and Southwestern New Mexico," U.S. Geological Survey Professional Paper 1712 (2006), attached as Exh. E. Thus, the health of the river within the SPRNCA – and the health of the riparian habitats supporting hundreds of species – depends upon the health of the groundwater within the Sierra Vista subwatershed. Due to the close groundwater-surface water connection in this subwatershed, both the groundwater and the river itself should be protected as waters of the U.S. – not just the San Pedro. It would be nonsensical and contrary to the purpose and intent of the Clean Water Act to protect the river, but not the groundwater that sustains it.

Similarly, west of the Sierra Vista subwatershed, the Town of Patagonia, Arizona, relies on Sonoita and Harshaw Creeks and their subterranean aquifers as their only source of potable water. "The Hermosa Mine Proposal: Potential Impacts to Patagonia's Water Supply" (October 2014), at 22-23, attached as Exh. F. "The shallow depth of the aquifers combined with the nature of the soils and underlying geology make the relationship between the surface and ground water watersheds a particularly close and interconnected one." Id. at 22 (quoting Coronado National Forest Draft Land and Resource Management Plan at 137). Isotopic analysis have also confirmed these connections. Id. As noted above, both creeks are the site of past and proposed mining operations. The acid mine drainage and heavy metals from these operations may seep into the aquifer and then contaminate these connected streams, affecting Patagonia's water supply and potentially affecting habitat used by several species protected under the Endangered Species Act, including the western yellow-billed cuckoo and Gila topminnow. As with the San Pedro River, protecting the surface water of Harshaw and Sonoita Creeks under the Clean Water Act – but failing to protect the groundwater that sustains them – is nonsensical and contrary to the purpose and intent of the Clean Water Act.

A recent study in California mapped all of the Groundwater Dependent Ecosystems (GDE) (seeps, groundwater dependent wetlands and rivers) and provides an excellent source of information as to how many "waters of the U.S." in California are dependent upon groundwater. All three types of groundwater-dependent ecosystems studied were widely, although unevenly, distributed across California. Although different types of GDEs are clustered more densely in certain areas of the state, watersheds with multiple types of GDEs are found in both humid (e.g. coastal) and more arid regions. Springs are most densely concentrated (high percentage of land area ranking 4) at the HUC12 scale in the North Coast and North Lahontan, whereas groundwater dependent wetlands and associated vegetation alliances are concentrated in the North and South Lahontan and Sacramento River hydrologic regions. The percentage of land area where stream discharge is most dependent on groundwater is found in the North Coast, Sacramento River and Tulare Lake regions. Howard J, Merrifield M (2010) Mapping Groundwater Dependent Ecosystems in California. PLoS ONE 5(6): e11249. doi:10.1371/journal.pone.0011249.

A recent court decision recognized that a discharge into groundwater requires a permit under the Clean Water Act where the groundwater acts as a "conduit" for pollutants from the point of discharge to surface water that is a jurisdictional water. Hawai'i Wildlife Fund v. County of Maui, 2014 WL 2341565 (D. Haw. 2014). While some discharges may be properly regulated under this "conduit" approach, it is more scientifically and legally sound to protect the groundwater itself as a water of the U.S. where the aquifer has a significant connection to surface "waters of the U.S." Defenders urges the agencies to include groundwater in the "other waters" category to be evaluated on a case-by-case basis under the "significant nexus" test. Because there is no support in the scientific literature or the law to exclude groundwater from the jurisdictional scope of the Act, the proposed exclusion of groundwater is an unreasonable interpretation of the statute. See Chevron, 467 U.S. 837, 842-43. (p. 12-14)

Agency Response: **See summary response above.**

Waterkeeper Alliance et al. (Doc. #16413)

7.384 VII. THE AGENCIES SHOULD CONFIRM THAT THIS RULEMAKING DOES NOT ALTER EPA'S LONGSTANDING AND CONSISTENT INTERPRETATION REGARDING DISCHARGES VIA HYDROLOGIC CONNECTION. FURTHER, THE AGENCIES SHOULD NOT CATGORICALLY EXCLUDE GROUNDWATER FROM THE DEFINITION OFWATERS OFTHE UNITED STATES

B. EPA and the Corps Should Not Categorically Exclude All Groundwater from the Definition of Waters of the United States.

The agencies' proposal to include language in the regulation categorically excluding groundwater from the definition of waters of the United States is scientifically and legal unsound. Many SAB panelists questioned this exclusion.

For example:

- Dr. David Allan questions the exclusion of "Groundwater, including groundwater drained through subsurface drainage systems" because "an important pathway for some nutrients and contaminants is via subsurface drainage systems to ditches that may not have perennial flow, but which may deliver much of the nonpoint runoff to downstream waters." Dr. Allan concluded that "this exclusion is a concern, and should be recognized as SUCh."[160]
- Likewise Dr. Robert Brooks stated that this exclusion "seems illadvised because of the likely connectivity of surface flows into features such as karst sinkholes, with a potential to contaminate groundwater aquifers used for human water supplies, plus the possibility of reconnections to surface water a reasonable distance away."[161]
- And following a lengthy analysis, Dr. Kenneth Kolm concluded: "In no cases should groundwater that is shown to be connected to 'waters of the US' be exempt."[162]

Courts have also agreed that groundwater can, and in some circumstances should, itself, be considered waters of the United States. For example, in the *Hawai'i Wildlife Fund v. County of Maui* case cited above, the court held that "liability arises even if the groundwater under the [discharging facility] is not itself protected by the Clean Water Act, as long as the groundwater is a conduit through which pollutants are reaching navigable-in-fact water."[163] However, the court went on to note:

> That is not to say that groundwater can never be regulated under the Healdsburg test [i.e., under the Ninth Circuit's decision in N. Cal. River Watch v. City of Healdsburg, which applied Justice Kennedy's concurrence in Rapanos to find CWA coverage based on a subsurface connection]. An aquifer with a substantial

[160] Member Comments, supra note 72, compilation of comments of members at 14.
[161] *Id*. at 17.
[162] *Id*. at 49.
[163] *Hawai'i Wildlife Fund v. County of Maui*, 2014 U.S. Dist. LEXIS 74256 *35 (D. Haw. May 30, 2014).

> nexus with navigable-in-fact water may itself be protected under the Clean Water Act even if it is not necessarily a conduit for pollutants.[164]

The agencies' proposed categorical exclusion of groundwater will leave ecologically important waters unprotected. The groundwater exclusions are scientifically and legally indefensible. Given that the proposed rule provides that a significant nexus between two surface waters can be demonstrated on the basis of a subsurface hydrologic connection, it makes no sense to categorically exclude all groundwater, including the very same groundwater that forms the hydrologic connection between the two surface waters and establishes that significant nexus. Instead, EPA and the Corps should include groundwater as a subcategory of "other waters," and leave its jurisdictional status to be determined on a case-by- case basis. (p. 43, 56-58)

Agency Response: **See summary response above.**

Western Resource Advocates (Doc. #16460)

7.385 WRA supports the proposed rule insofar as it would exclude from jurisdiction "groundwater, including groundwater drained through subsurface drainage systems."[165] The preamble to the proposed rule and the appendices have gone to great lengths to describe how some (a)(5) tributaries, (a)(6) adjacent waters including wetlands, and (a)(7) other waters including wetlands are jurisdictional because they connect to and influence (a)(1) through (4) waters via groundwater. This concept is well-captured in the language of the proposed rule with new definitions of both "neighboring" that describes "adjacent" waters as including those with a "shallow subsurface hydrologic connection" 79 Fed. Reg. 22263 (c)(2). to (a)(1) through (5) waters, and "tributary" which states,

> 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 natural breaks (such as … 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.[166]

WRA understands the exclusion of groundwater will not exclude these adjacent and tributary waters that connect via groundwater to larger waterways, and are defined elsewhere in the rule. Moreover, WRA also understands that excluding groundwater from Clean Water Act jurisdiction will not mean that activities which pollute surface waters via groundwater go unregulated.[167] (p. 25)

Agency Response: **The agencies appreciate the comment.**

Indiana Karst Conservancy (Doc. #6993)

7.386 I apologize if I am missing something here, but in the section on "features" NOT waters of the United States, it includes "Groundwater, including groundwater drained through subsurface drainage systems". Does this imply waters flowing through natural caves and

[164] *Id*. at *45.
[165] 79 Fed. Reg. 22263 (b)(5)(vi).
[166] 79 Fed. Reg. 22263 (c)(5).
[167] *See supra* section IV, *"Tributaries connected through another water."*

karst drainage systems are not considered WOTUS? In the extreme, there are numerous examples of significant surface creeks and rivers (e.g., the Lost River in Indiana) that "sink" and flow underground, only to resurge later and continue to flow as a surface river. So during the time the water flow is subsurface, the water is not considered WOTUS? That does not seem consistent. Perhaps the characterization of "subsurface" could be better defined (e.g., artificial subsurface drainage systems excluded, but natural subsurface drainage that mimics flowing channels are considered WOTUS. Many underground karst streams function just like surface streams and should not be excluded. (p. 1)

Agency Response: **The agencies have consistently interpreted the CWA to exclude groundwater. See summary response above. Section IV.F of the preamble clarifies that segments of tributaries that flow underground do not sever jurisdiction, while Section IV.H identifies hydrologic connections through karst topography as a consideration for case-specific significant nexus evaluations.**

Earthjustice (Doc. #14564)

7.387 A. Groundwater Should Not Be Categorically Excluded.

Earthjustice strongly objects to EPA's categorical exclusion of groundwater from Clean Water Act protection. EPA's proposal will leave important waters exposed to pollution. The groundwater exclusions are unsupported from a scientific perspective and may lead to regulatory confusion. The better-supported approach would be to identify groundwater as a subcategory of "other waters" for which jurisdictional status will be determined on a case-by-case basis. In that fashion, EPA will ensure that the full purpose and intent of the Clean Water Act is realized and that it will not leave waters unprotected.

As noted by various individual members of the SAB, groundwater connections to surface water do not separate along ill-defined and fairly unscientific lines such as "shallow" or "deep." Rather, connections occur as a result of topography, geology, geography, and time. In late summer and fall, many western rivers are almost entirely dependent upon groundwater. Sometimes connections through geographic features such as lava tubes or karst formations are very deep, but nonetheless very direct between groundwater and surface waters. See Member Comments Aldous at 3 (must definitely include shallow unconfined aquifers as providing connections between wetland types and open waters; pointing out that inclusion of groundwater in connectivity should not simply be a function of distance; and questioning exclusion of shallow subsurface flows); Brooks at 17 (exclusion of groundwater "seems ill-advised because of the likely connectivity" through different features with a potential to contaminate drinking water and connections with surface water a reasonable distance away); Gooseff at 21 (strongly questioning exclusion of groundwater and giving examples of significant connectivity between surface and subsurface waters and problems with EPA's definitions); Kolm at 31-32 ("regional ground water flows commonly interact with the surface environment at sinks and springs"; giving examples in the Floridian aquifer), at 33 ("In general, the role of regional groundwater systems in neighboring systems is not addressed by this Rule and leaves the waters of the US vulnerable"), at 34 ("Care should be taken not to imply that bedrock is impermeable because ground water flows through bedrock are important flowpaths that connect hydrologic landscapes over long distances and often across

watershed boundaries"), at 39 ("as indicated with the Karst references, deep groundwater should be included as well for connectivity and include not only Karst, but certainly sedimentary systems, fractured rock systems, and volcanic systems as well…[t]he real issue is both temporal and spatial as the SAB has clearly and thoroughly discussed"), at 43 (pointing out that the role of regional groundwater is inappropriately ignored in the proposed rule), and at 46; and Sullivan at 87 (ensuring the mechanism of connectivity is protected—even if that is groundwater—is critical). Plainly, EPA's categorical exclusion of groundwater from the protections of the Clean Water Act (or its general exclusion with the ill-defined "shallow subsurface connection" exception) is not supported by the science and the science advisors.

EPA should therefore revise the proposed rule to provide that groundwater shall be protected as a water of the U.S. where it is hydrologically connected to surface water in a way that is not de minimis. This approach makes sense given the decision in Hawai'i Wildlife Fund v. County of Maui, __ F.Supp.2d __ (D. Ha. 2014) 2014 WL 2451565, where the court found "[t]here is nothing inherent about groundwater conveyances and surface water conveyances that requires distinguishing between these conduits under the Clean Water Act. Id. at *13. The court found that where treated effluent was injected into groundwater and months later emerged from seeps into the ocean, the groundwater aquifer served as a conduit for discharges of pollution into the ocean and the discharge required a National Pollutant Discharge Elimination System ("NPDES") permit. Id. at *18. At the same time, the court understood that the groundwater aquifer would also meet the significant nexus test being used by EPA here, because it has a hydrologic connection with the ocean, and the groundwater "significantly affects the physical, chemical, and biological integrity of the ocean water." Id. at *21-23.

While a discharge of pollutants into groundwater may be regulated under the "conduit" approach, it makes more sense, consistent with the approach advocated by members of the SAB, that the groundwater itself be protected as a water of the U.S. because of its hydrologic connection with the ocean. See, e.g. Member Comments, Aldous at 4, Brooks at 17, Kolm at 49. The water is plainly hydrologically connected to and affects another water of the U.S. and should be protected in its own right both for human consumption and for the obvious ultimate impact to aquatic ecosystems. It is nonsensical to protect water in a stream, then not protect it if the water molecules change to a subsurface flow, and then protect it again when those molecules surface in the ocean or a spring-fed stream. And, as the court noted in Hawai'i Wildlife Fund, "[n]either logic nor case law supports distinguishing between 'shallow' and 'deep' groundwater." 2014 WL 2451565 at *17.While groundwater might not in every instance be a water of the U.S., excluding groundwater from ever being considered a water of the U.S. would not be a reasonable interpretation of the Act, nor would it be reasoned decision-making supported by the record. EPA should revise the rule accordingly.

Earthjustice urges EPA to conform the groundwater sections of the proposed rule to the existing law and science to ensure that waters of the U.S. are fully protected as intended under the Clean Water Act. EPA should revise the rule to remove groundwater as a categorical exclusion and either fully include it in the "other waters" analysis of subsection (s) or create a new subpart in subsection (s) to ensure that groundwater that is

connected to surface water, regardless of its "depth," is protected as a water of the U.S. (p. 11-12)

Agency Response: **See summary response above.**

Columbia Riverkeeper (Doc. #15210)

7.388 Groundwater and surface water are inherently interconnected in most watersheds. Groundwater should be protected as a water of the U.S. where it is hydrologically or biologically connected to surface waters in any detectable way. (p. 2)

Agency Response: **See summary response above.**

Raritan Riverkeeper (Doc. #15360)

7.389 *Subsection (2) Must be Rewritten to Ensure Jurisdictional Waters are Not Needlessly Excluded*

…

Finally, the Agencies should clarify what "groundwater" features will be excluded from the definition of Waters of the United States. Under the proposed language, §401(1)(2)(v)(f) exempts "Groundwater, including groundwater drained through subsurface drainage systems" from the definition. However, in the accompanying materials contained in the Federal Register notice, the agencies twice differentiate "deep groundwater" from shallow groundwater that can be shown to be hydrologically part of surface waters (and thus can be deemed jurisdictional). The Agencies should clarify what groundwater, if any, they intend to include or exclude from the definition (p. 14-15)

Agency Response: **See summary response above.**

Delaware Riverkeeper Network (Doc. #15383)

7.390 **Exclusion of Groundwater and Shallow Subsurface Connections: Section 328.3(b)(5)(vi)**

There is no scientific justification for the exclusion of groundwater and shallow subsurface connections. Groundwater connections, especially those with shallow flowpaths in unconfined aquifers, are critical to supporting surface water and biochemical processes of wetlands and other waters, and serve to connect wetlands and waters that have no apparent surface connections.[168] Because of their ability to critically influence wetlands, such connections should not be excluded. (p. 5)

Agency Response: **See summary response above. The agencies have clarified that subsurface connections can serve as a non-jurisdictional hydrologic connection that agencies would consider when making case-specific significant nexus determinations. The science strongly supports the important role subsurface connections can play when assessing the effects of surface waters, and it is appropriate to consider them in a significant nexus determination.**

[168] Letter from the Science Advisory Board to The Honorable Gina McCarthy, Administrator of the EPA (Sept. 30, 2013).

Center for Environmental Law & Policy (Doc. #15431)

7.391 I. GROUNDWATER IS A THREATENED NATIONAL AND LOCAL RESOURCE.

A. Groundwater is an essential national resource.

The protection of groundwater specifically implicates the nation's environmental health, economic growth, and national security. To state the obvious, the enormous quantity of water available for all of these essential purposes is of little value if the water is not of sufficient quality to support our needs. Our nation's water supply must be of secure quantity *and* quality to remain a valuable asset.

Unfortunately, the nation's current fragmented approach to groundwater pollution regulation—creating a dizzying array of state and federal standards—is inadequate to keep this essential resource safe for current and future generations. Over a decade ago, the EPA's Ground Water Report to Congress noted that piecemeal regulation is ineffective because "fragmentation of ground water programs impedes effective management."[169] Continued regulatory fragmentation—such as the kind EPA is proposing in this rule—would only increase the ineffectiveness. As Robert Hirsch, the former Chief Hydrologist for the USGS, wrote, "[e]ffective policies and management practices must be built on a foundation that recognizes that surface water and ground water are simply two manifestations of a single integrated resource."[170]

1. Americans across the country are dependent on groundwater in large amounts

Americans pump 83 billion gallons of groundwater each day, representing roughly 25 percent of the nation's total water use.[171] Specific use varies by region; California and Texas use the most groundwater by volume, while Hawaii depends on groundwater for fully 95 percent of its water needs.[172] Nationally, groundwater is a key source of potable water: roughly 15 million households get their water from domestic wells, and 800,000 new wells are installed annually.[173] Groundwater is also a pillar of our agricultural industry; irrigation uses account for 65 percent of groundwater use nationwide.[174] Ecologically, groundwater provides essential ecosystem services, the most fundamental of which are water-table recharge and sustaining perennial flows in countless streams and rivers.[175]

2. The national groundwater supply faces additional challenges due to climate change

[169] Environmental Protection Agency, Ground Water Report to Congress iii (2001), available at http://www.epa.gov/safewater/sourcewater/pubs/rpt-congress_gw_2001.pdf.
[170] Ground Water and Surface Water, A Single Resource, U.S. Geological Survey Circular 1139 at 1 (1998), available at http://pubs.usgs.gov/circ/circ1139/#pdf.
[171] Robert Glennon, Unquenchable: America's Water Crisis and What to Do About It 111 (2009).
[172] Dr. Venkatesh Uddameri, Importance of Groundwater to the US Economy, National Ground Water Association presentation 2, available at http://water.epa.gov/action/importanceofwater/upload/21-Uddameri.pdf .
[173] Glennon at 130.
[174] Uddameri at 3.
[175] Id. at 5.

Although climate change risks to water are most often discussed in the context of surface water, climate change will also impact groundwater.[176] Climate change will impact groundwater both directly (influencing recharge and chemical composition) and indirectly (as impacts on surface water are felt in the water cycle).[177] The IPCC recently reported that "[c]limate change is projected to reduce renewable surface water and groundwater resources in most dry subtropical regions…intensifying competition for water among sectors."[178] Indeed, author Catherine Hughes reports that "[c]limate is the major factor driving temporal variability in groundwater recharge."[179] However, a 2011 report co-authored by the USDA Agricultural Research Service (ARS) cautioned that climate-driven recharge patterns also affect the *quality* of groundwater.[180] For example, saline encroachment driven by rising sea levels may limit the usefulness of groundwater for agricultural, ecosystem, or drinking needs. Thus, even as arid regions experience reduced recharge, rising seas will *increase* recharge of coastal aquifers by up to 15 percent, correspondingly increasing the level of salinity and dissolved solids in coastal groundwater.[181]

3. Groundwater remains susceptible to many forms of pollution

Due to groundwater's status as an essential national resource, studies showing the deteriorating health of our nation's groundwater are cause for alarm. For example, the USGS Quality of Waters in Domestic Wells Survey revealed that more than one in five sampled wells contained one or more contaminants at concentrations greater than EPA human health benchmarks.[182] The most common contaminant from man-made sources was agricultural nitrate,[183] which is associated with both ecological impacts and human health risks (including infant death). In industrial use areas, the most common pollutants were volatile organic compounds (VOCs).[184] Other threats vary across the more than 60 principal aquifers across the country; Floridian agricultural aquifers far exceed permissible levels of dissolved arsenic,[185] for example, while High Plains wells exhibit concerning levels of dissolved atrazine.[186]

[176] Timothy R. Green et al., Beneath the Surface of Global Change: Impacts of Climate Change on Groundwater, 405 Journal of Hydrology 532, 533 (2011).
[177] Green et al., at 533.
[178] IPCC, Climate Change 2014: Synthesis Report 10 (2014), available at http://www.ipcc.ch/pdf/assessmentreport/ar5/syr/SYR_AR5_SPM.pdf.
[179] Catherine E. Hughes et. al, Climate Change and Groundwater 98 (2011) (emphasis added).
[180] Green et al., at 544-5.
[181] Id. at 545; see also Priyantha Ranjan, So Kazama and Masaki Sawamoto, Effects of climate change on coastal fresh groundwater resources, 16 Global Environmental Change 388, 395 (2006), available at http://espace.library.curtin.edu.au/cgi-bin/espace.pdf?file=/2011/01/25/file_1/135411 (observing that climate change will impact freshwater globally by increasing coastal aquifer salinity and shifting recharge away from inland arid zones).
[182] Leslie A. DeSimone, Pixie A. Hamilton, and Robert J. Gilliom, Quality of Water from Domestic Wells in the United States, United States Geological Society (USGS) National Water-Quality Assessment Program, http://water.usgs.gov/nawqa/studies/domestic_wells/.
[183] Id.
[184] USGS, Southwest Principal Aquifers Regional Ground-Water Quality Assessment 3 (2009), available at http://pubs.usgs.gov/fs/2009/3015/pdf/fs2009-3015.pdf.
[185] USGS, Comparison of Dissolved Arsenic Concentrations in Select Principal Aquifers,

4. Groundwater is an engine of national economic growth

While the ecological and health risks to our nation's groundwater independently justify protection, the economic importance of groundwater further recommends its conservation. Benjamin Franklin said, "When the well's dry, we know the worth of water."[187] Discussing groundwater purely as a resource, however, we need not wait: the estimated value of groundwater produced annually exceeds $20 billion, sales of groundwater-related businesses exceed $15 billion, and sales of related manufacturing industries exceed $350 million.[188] Community water systems alone employ more than 200,000 workers; adding in associated industries like drilling, environmental services and remediation roughly doubles this figure.[189]

One popular example of a largely groundwater-dependent industry is the bottled water business. With certain brands selling twenty ounce bottles for more than the price of a gallon of gas—yet spending cents on the dollar to "produce" the water—this industry has seen rapid growth in recent decades.[190] In 2011, American consumers drank 9 billion gallons of bottled water.34 While the increasing privatization of water traditionally held in trust for future generations raises its own concerns, on an economically pragmatic level it is clear that carefully managing the resource on which these industries rely is a prerequisite for, at a minimum, the continued enjoyment of economic benefits from resource use.

5. Groundwater is essential to national security

> *"The groundwater is our strategic reserve. It's our backup, and so where do you go when the backup is gone?"*[191] – James Famiglietti

The Department of Defense recently released an "Adaptation Roadmap," in which the Pentagon positively identified climate change as a threat to national security.[192] On a global scale, the United Nations estimates that more than half of the world's population will live in waterscarce areas.[193] In a February 2012 "Global Water Security" report, the Director of National Intelligence predicted that water over-use and resulting scarcity will be a contributing factor in armed conflict.[194] America's own water infrastructure is also vulnerable to attack; with 75,000 dams and reservoirs in constant use—serviced by two

http://water.usgs.gov/nawqa/studies/praq/images/ComparisonGraphics/arsenic.jpg.
[186] USGS, Comparison of Dissolved Atrazine in Select Principal Aquifers, http://water.usgs.gov/nawqa/studies/praq/images/ComparisonGraphics/atrazine.jpg.
[187] Glennon at 16.
[188] Uddameri at 6-7.
[189] Id. at 10.
[190] James Salzman, Drinking Water: A History 16 (2013).
[191] Suzanne Goldenberg, Why Global Water Shortages Pose Threat of Terror and War, The Guardian, February 8, 2014, available at http://www.theguardian.com/environment/2014/feb/09/global-water-shortages-threat-terror-war (quoting hydrologist James Famiglietti of the University of California at Irvine).
[192] Department of Defense, 2014 Climate Change: Adaptation Roadmap 1 (2014) available at http://www.acq.osd.mil/ie/download/CCARprint.pdf.
[193] Salzman at 71.
[194] Defense Intelligence Agency, Global Water Security iii (2012) available at http://www.dni.gov/files/documents/Newsroom/Press%20Releases/ICA_Global%20Water%20Security.pdf.

million miles of piping—it is simply impossible to defend it all.[195] Enemies both foreign and domestic have already sought to exploit infrastructure weaknesses, such as the 2002 terrorist attempt to poison the water of the American embassy in Rome or the Weather Underground's plot in the 1970s to use the military's own biological warfare material to poison domestic waters.[196]

In this context, it is a matter of national security to preserve the nation's groundwater. Most obviously, damage to our groundwater would directly impact national security because one quarter of our drinking water comes from groundwater. Second, in the context of the extreme vulnerability of our (primarily surface) water infrastructure, it would be dangerously irresponsible neglect the strategic reserve that America's groundwater represents. Our government stockpiles food, gasoline, and even nuclear missiles to gird this country against the possibility of attack—yet these resources are ultimately useless without an adequate national reserve of *clean* water. (p. 3-6)

Agency Response: The agencies have consistently interpreted the CWA to exclude groundwater. See summary response above. The requirement to protect drinking water sources is beyond the scope of this rule. The final rule does not affect the application of other laws.

7.392 II. THE CWA PROVIDES AN ESSENTIAL FEDERAL SAFETY NET FOR GROUNDWATER RESOURCES

Three acts provide the most significant regulation of the nation's groundwater outside of the CWA: the Safe Drinking Water Act (SDWA) of 1974, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, and the Resource Conservation and Recovery Act (RCRA) of 1976. Each act has a limited scope; none deals with groundwater comprehensively. Without the crucial gap-filling role of the CWA, these three statutes leave vulnerable many of the nation's important groundwater resources.

A. CERCLA and RCRA respond to pollution after-the-fact.

CERCLA and RCRA are, as the agency knows well, restorative rather than preventative acts. They focus on remedying groundwater contamination after it occurs, as has been long recognized.[197] CERCLA enables the EPA to act only once there is a release or a substantial threat of release of a hazardous pollutant, which must present an imminent and substantial danger to the public health or welfare.[198] RCRA implements cleanup requirements for the EPA once contamination has occurred.[199]

Taking a reactive approach to the pollution of our groundwater not only permits groundwater to become contaminated, it results in groundwater contamination that may not be possible to restore or restoration may take decades. The difficulty or impossibility

[195] Salzman at 144.
[196] Id. at 143-4.
[197] See, e.g., Linda A. Malone, The Necessary Interrelationship Between Land Use and Preservation of Groundwater Resources, 9 UCLA J. Envtl. L. Pol'y 1, 16, 26-27, (1990); Mining Contamination of Groundwater: The Need for Legislation and Reform, 2 U. Denv. Water L. Rev. 60, 73 (1998).
[198] CERCLA, 42 U.S.C. § 9604(a)(1)(A)-(B) (2006).
[199] RCRA, 42 U.S.C. § 6973(a) (2011).

of cleaning up groundwater contamination means that many aquifers are permanently lost as useful water sources. The EPA has long admitted to the public that some sources of groundwater can never be effectively cleaned once contaminated.[200] Often, the most a cleanup effort achieves is containing the contamination and preventing it from dispersing further. And despite many significant advances in groundwater remediation technologies, restoring the entire volume of a contaminated aquifer remains an elusive goal, and few examples of such restoration have been reported.[201]

B. SDWA jurisdiction is limited to public water supplies.

The SDWA gives direct, though narrow, coverage to groundwater: the act only applies to "public water systems," not all groundwater.[202] Public water systems are defined as systems providing water for human consumption to at least fifteen service connections or twenty-five individuals.[203] Under the SDWA, groundwater used by a single household and groundwater utilized for purposes such as agriculture, but not consumption, receives no protection.

C. SDWA jurisdiction is limited to pollution by "injection."

The SDWA regulations of the disposal of wastes into groundwater are very narrow. The SDWA deals strictly with waste that is "injected" into groundwater.[204] So, for example, waste from mines that enters groundwater by seeping through the soil is not regulated under the act. SDWA's regulation of groundwater and drinking water supplies is further narrowed by the statute's lack of protection for residents utilizing private wells.

D. SDWA jurisdiction is limited by exclusions.

The proposed categorical exclusion of groundwater under the CWA must be assessed in light of other deliberate rollbacks for the protection of groundwater. This proposed rule comes at a moment not of strengthening but of weakening of related programs. Twenty-five years ago there were high expectations that attended our laws to protect drinking water:[205]

> The 1974 Safe Drinking Water Act (U.S. Public Law 93-523) authorized the [U.S. EPA] to establish federal standards to protect the public from harmful contaminants of drinking water. The law also provided for the establishment of a joint national-state system to ensure compliance with the standards and to protect underground water sources from contamination. … Section 1412(c) of the act and its amendments … mandated that the National Research Council (NRC) conduct

[200] see, e.g., Ground Water Cleanup at Superfund Sites, U.S. Environmental Protection Agency, http://www.epa.gov/superfund/health/conmedia/gwdocs/ brochure.htm ("[t]reatment technologies are limited in their ability to clean up an aquifer, even if the location of the contaminants is known.")
[201] United States Army Environmental Center, Guidance to Site Managers at Army Installations: Groundwater Evaluation and Development of Remediation Strategies where Aquifer Restoration may be Technically Impracticable 3-7 (2002).
[202] SDWA, 42 U.S.C. §300f(4)(a) (2012).
[203] *Id*.
[204] SDWA, 42 U.S.C. § 300h(d)(1)-(2) (2012).
[205] Safe Drinking Water Committee, Drinking Water and Health, V. 9: Selected Issues in Risk Assessment ix (1989 National Academy Press).

> studies to identify adverse health effects associated with contaminants in drinking water, to identify relevant research needs, and to make recommendations regarding such research. Amendments to the law in 1971 requested revisions of the NRC studies to report "new information which had become available since the NRC's most recent report, and every two years thereafter."

These expectations would be difficult to meet under the best of circumstances. Circumstances are not the best. In *Legal Environmental Assistance Foundation v. U.S. EPA*,[206] the court held that fracking fluids were subject to the regulatory measures for "underground injection" but this case was overruled by the Energy Policy Act of 2005,[207] that excludes —

> (ii) the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.

This is an exception, as the agency well knows, to the underground injection regulatory regime for not one contaminant but several of them largely unidentified. This loophole effectively permits natural gas and chemicals, such as methanol, hydrochloric acid, benzene, and quaternary ammonium chloride, to be injected into areas of groundwater that provide water to twenty-five or more individuals.[208] Many of the chemicals qualifying as exempt under SDWA section 300h(d)(1)(b) are the same listed by the EPA as carcinogens and provided maximum contaminant levels for primary drinking water regulation under the SDWA.[209]

This protective regime was turned over to the mercies of the common law, with consequences predictably perceived by courts that have been called to the rescue[210]:

> By any responsible account, the exploitation of the Marcellus Shale Formation will produce detrimental effects on the environment, on the people, their children, and future generations, and potentially on the public purse, perhaps rivaling the environmental effects of coal extraction. …

We know that cracks in the legal protective canopy of the SDWA cannot be fixed here. But they cannot be ignored here by the proposals that would add another crack in that protective legal canopy.

<u>E. SDWA high-level protection for "sole source aquifers" applies to a fraction of the nation's groundwater.</u>

The greatest protection SDWA provides to groundwater is the qualification as "sole source aquifers."[211] The designation of sole source aquifer is granted to aquifers that

[206] 276 F.3d 1253 (11th Cir. 2001).
[207] Pub. L. No. 109-58, § 1(a), 119 Stat. 594 (2005) ("underground injection").
[208] What Chemicals are Used, Frac Focus Chemical Disclosure Registry (Nov. 12, 2014, 7:00 PM), https://fracfocus.org/chemical-use/what-chemicals-are-used.
[209] Drinking Water Contaminants, U.S. Environmental Protection Agency (Nov. 12, 2014, 7:00 PM), http://water.epa.gov/drink/contaminants/#List; SDWA, 42 U.S.C. § 300(f)(1)(c)-(d) (2012)
[210] Robinson Township v. Commonwealth of Pennsylvania, 83 A.3d 901, 976 (Pa. 2013) (public trust under art. 1, § 27 of the Pa. Constitution)

supply at least 50 percent of drinking water consumed in the area overlying the aquifer.[212] The designation is not automatically granted, and a party must submit an application identifying a protection area for consideration. Once designated as a sole source aquifer, the SDWA requires all commitment of federal financial assistance to be considered for possible negative effects to the designated aquifer.[213] Only 77 designated sole source aquifers are designated under the SDWA nationwide.[214] The exclusivity of this program leaves the majority of the nation's groundwater without such protection.

F. SDWA enforcement lacks resources and capacity.

In addition to the insufficient coverage by the SDWA to prevent discharge of pollutants to groundwater, the act has been poorly enforced. Reports by the U.S. Government Accountability Office over the last few years continue to find that the EPA is ineffectively implementing and enforcing its responsibilities under the SDWA. In 2011, the GAO found that the EPA had not effectively implemented the 1996 amendments' requirement to consider, for regulatory determinations, contaminants that present the greatest public health concern.[215] A study by GAO in 2014 determined that the SDWA needed to permit the monitoring of more contaminants and at increased frequencies as part of the EPAs Unregulated Contaminant Monitoring Program.[216] The GAO recently found that the EPA fails to properly enforce the underground injection control (UIC) program of the SDWA.[217] (p. 10-13)

Agency Response: See above response. The regulation of groundwater under other statutes is beyond the scope of this rule.

7.393 III. THE AGENCY DOES NOT ADEQUATELY EXPLAIN ITS RATIONALE FOR A TOTAL GROUNDWATER EXCLUSION.

As the EPA and its Scientific Advisory Board are aware, firm distinctions between groundwater and surface water are often empirically false. To take only one prominent example: The U.S. Geological Survey reports that the groundwater contribution to all streamflow in the United States may be as large as 40 percent.[218] Despite this, EPA gives scant justification for its groundwater exclusion in the proposed rule, writing simply that

[211] SDWA, 42 U.S.C.A. § 300h-3(e).
[212] *Id.*
[213] WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 4.8 (2014).
[214] Sole Source Aquifer Protection Program, U.S. Environmental Protection Agency (Nov. 12, 2014, 7:00 PM), http://water.epa.gov/infrastructure/drinkingwater/sourcewater/protection/solesourceaquifer.cfm.
[215] *See* U.S. Government Accountability Office, Improvements in Implementation are Needed to Better Assure the Public of Safe Drinking Water GAO-11-803T (2011), *available at* http://www.gao.gov/products/GAO-11-803T.
[216] *See* U.S. Government Accountability Office, EPA Has Improved Its Unregulated Contaminant Monitoring Program, but Additional Action Is Needed GAO-14-103 (2014), *available at* http://www.gao.gov/products/GAO-14-103.
[217] *See* U.S. Government Accountability Office, EPA Program to Protect Underground Sources from Injection of Fluids Associated with Oil and Gas Production Needs Improvement GAO-140-555 (2014), *available at* http://www.gao.gov/products/GAO-14-555.
[218] United States Geological Survey, Sustainability of Ground-water Resources: U.S. Geological Survey Circular 1186 7 (1999).

the "agencies have never interpreted 'waters of the United States' to include groundwater."[219] The size of this rationale is too small to justify so large an exclusion.

In its one-sentence explanation, the agency does not sufficiently explain its reasoning for creating a CWA permit exemption with the force of law for the entire supply of national groundwater. EPA should explain in substantial detail its understanding of the agency's obligations to protecting groundwater under the CWA.

A. Prior Practice Is Not a Sufficient Rationale for Continued Practice

Groundwater should not be excluded simply because it has never been included in EPA's prior definition of waters of the United States. Prior practice is not a sufficient prima facie rationale for continued practice. As Supreme Court stated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, "An agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."[220]

1. Since EPA generally champions its use of the scientific literature in fashioning its proposed definition, EPA should explain fully its reasons for excluding deeper groundwater and shallow subsurface flows.

CELP applauds EPA's strong use of science in supporting certain portions of this rule. For example, EPA proposes the wholesale inclusion of "adjacent waters" with a science-based effort. The proposed "adjacent waters" is boxed in by three outer limits. "Adjacent waters" must be within the riparian zone, the floodplain, or have a "shallow subsurface hydrologic connection or confined surface hydrologic connection" to a jurisdictional water. While the limiting factors are not an entirely accurate representation of the scientific understanding, CELP supports EPA's effort to use scientific literature in making these boundaries. EPA also proposes that "other waters" should be examined on a "case-specific basis." In doing so, EPA correctly realizes that certain waters that are not easily encapsulated in rigid definitions and can still significantly affect jurisdictional waters. Again, CELP agrees with EPA's championing of science to make these determinations.

Yet, in examining shallow subsurface flows and deeper groundwater, EPA does not give similar scientific analysis. Indeed, by EPA's own admission, in advancing the "adjacent waters" definition, EPA explicitly states that shallow subsurface flows are not themselves waters of the United States.[221] There is a clear gap between scientific reasoning and EPA's proposed exclusion of shallow subsurface waters.

2. Use of detailed reasoning and science is good practice and required by case law.

EPA should not simply give prior practice as its reason for exclusion of groundwaters (whether they be "shallow subsurface" flows or deeper groundwater) because case law expects more than minimal reasoning, consideration of science, and logical consistency.

[219] 79 Fed. Reg. 22,218 (April 21, 2014).
[220] 467 U.S. 837, 838 (1984)
[221] 79 Fed. Reg. 22,208 (April 21, 2014) ("While they may provide the connection establishing jurisdiction [between adjacent water and the jurisdictional water], these shallow subsurface flows are not 'waters of the United States.'").

An agency must give "*detailed* and *reasoned*" analysis before it excludes groundwater.[222] A rule based on "no scientific judgment" runs the risk of failing to sufficiently meeting its statutory mandate.[223] EPA has simply provided no detailed analysis of why all groundwater is excluded. Its only reason seems to be that it has never interpreted groundwater as included. This is not a detailed explanation, as required under *Chevron*.

EPA lacks scientific support for groundwater exclusion; indeed, EPA's discussion shows scientific support for inclusion, not exclusion. For example, EPA argues "wetlands and other waters in landscape settings that have bidirectional hydrologic exchanges with streams or rivers . . . are chemically, physical, and biological connected with rivers via the . . . temporary storage of local groundwater that supports baseflow in rivers."[224] Elsewhere, EPA states that "[H]eadwater tributaries often depend on groundwater inputs."[225] EPA, in excluding groundwater, fails to provide sufficiently detailed and reasoned scientific judgment. (p. 13-15)

Agency Response: **See summary response above.**

7.394 IV. A TOTAL GROUNDWATER EXCLUSION IS NOT WARRANTED AND THE EPA SHOULD CATEGORIZE QUALIFIED GROUNDWATER AS A WATER OF THE UNITED STATES.

A. The groundwater exclusion should be removed from the proposed rule.

CELP urges EPA to remove the categorical groundwater exclusion from the proposed rule.

1. A categorical exclusion does not fulfill the EPA's broad and aspirational CWA mandate to protect the nation's waters.

> *"It is the intent of the Clean Water Act to cover, as much as possible, all waters of the United States instead of just some."*[226]

The CWA is an aspirational statute, and the Agency's proposed rule fails to meet the CWA's aspirational goals established by Congress in 1972. The declared objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and Congress specifically outlined detailed goals, policies, and deadlines by which to make the CWA's aspirations a reality.[227]

"Hortatory congressional statements" like those in Section 101 of the CWA usually have limited legal force.[228] But statutory goals should be given more weight. Elected officials carefully craft a statute's goals in response to constituents' desires. Statutory goals,

[222] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).
[223] Natural Res. Def. Council, Inc. v. Daley, 209 F.3d 747, 756 (D.C. Cir. 2000).
[224] 79 Fed. Reg. 22,223 (April 21, 2014).
[225] Id., 22,228.
[226] *Quivira Min. Co. v. E.P.A.*, 765 F.2d 126, 129 (10th Cir. 1985).
[227] See 33 U.S.C. §1251(a) (2014).
[228] Robert W. Adler, *The Decline and (Possible) Renewal of Aspiration in the Clean Water Act*, 88 Wash. L. Rev. 759, 771 (2014). See also, David M. Dreisen, *Purposeless Construction*, 48 Wake Forest L. Rev. 97, 98 (2014) (arguing that "the Supreme Court's statutory construction has become increasingly 'purposeless'" and that "the Court should give more weight to statutory goals, properly identified and conceived, than it has in recent years").

therefore, "tend to reflect public values to a greater extent than other statutory provisions."[229] When a statute is "ambiguous or silent… construing the statute to conform to its goals serves democratic values by allowing law to reflect the electorate's desires."[230] The aspirational goals of the CWA reflect the desires of the American public to value, maintain, and restore our nation's waters, and should be given special consideration.

The CWA is unique among environmental statutes. The hortatory statements of other major environmental statutes fail to "articulate affirmative aspirations as clearly, as specifically, and as unambiguously as does the CWA."[231] But Congress included "specific operative provisions designed to implement the major aspirations in the [CWA's] opening statement, making it more difficult to simply ignore those aspirations as the product of lofty legislative pronouncements."[232] Unlike other environmental statutes, "[i]t is clear that Congress adopted specific provisions designed to effectuate the goals articulated in section 101, rather than leaving them as entirely hortatory aspirations."[233]

The EPA should give the aspirational goals of the CWA special consideration when interpreting the CWA and defining the waters of the United States. Given the broad opening language of the CWA and the importance of groundwater to surface water, groundwater should not be wholly excluded from the proposed definition of waters of the United States.

2. The proposed categorical exclusion creates absurd results.

By electing to exclude groundwater from the waters of the United States, the agency appears to give a permit to pollute to anyone with the capacity to dig a decent hole. A discharger need only bury its point source below what the agency considers a "shallow subsurface hydrologic connection" to escape CWA regulation. Since only "shallow" subsurface connections between waters are protected under the proposed definition, in situations where both shallow and deep subsurface connections exist, a party could exploit the deep connections and remain legitimately permit-free. For instance, a Section 402 NPDES permit could be avoided by discharging the exact same pollutants into the "deep" part of the subsurface connection rather than the "shallow" part.

Further, by expressly asserting "shallow subsurface flows are not 'waters of the United States'" the agency creates another opening for circumventing the CWA.[234] A plain reading of that explanation is that protection extends only to the waters connected by the shallow subsurface connection, and not to the shallow subsurface connection itself. Thus, a clever discharger could avoid a 402 permit by carefully pointing the discharge into the shallow subsurface connection itself and never directly into one of the waters it connects. This would have the same physical impact as discharging into the connected waters, and

[229] David M. Dreisen, *Purposeless Construction*, 48 Wake Forest L. Rev. 97, 98 (2014).
[230] *Id.*
[231] Adler at 771.
[232] Adler at 771.
[233] Adler at 775.
[234] 79 Fed. Reg. 22,208 (April 21, 2014).

yet it appears that the Agency would have to allow it absolutely. Once the connection itself is expressly written out of the waters of the United States, discharge to it requires no permit.

Such absurd results are woefully inconsistent with any sound reading of the CWA, its legislative history, and many Federal District court decisions.

B. Qualified groundwater should be protected using subsection (s) of the proposed rule

Instead of a categorical exclusion, CELP urges EPA to include groundwater within the list of protected waters in subsection (s) of the proposed rule. Groundwater shares many of the same characteristics as the protected waters listed in subsection (s) and fits more logically in that subsection than in subsection (t).

The intent and letter of the Act could be met—and the absurd results avoided—if the EPA were to simply follow one of two routes.

One route would be to include groundwater in the "other waters" category of subsection (s)(7). This would allow a case-by-case analysis to determine whether any groundwater in particular presented a significant nexus to the traditional waters of the United States described in subsections (s)(1)-(6).

A second route would be to establish a clear definition in subsection (u) for "tributary groundwater" and then include tributary groundwater under subsection (s)(5). Professor Mary Wood explained this concept in substantial detail in 1988 and that analysis remains sound today.[235] All that remains is for the agency to add tributary groundwater to the acceptable list of tributaries in the definitions in subsection (u) of the rule.

By either route, the agency includes as waters of the United States only groundwater that flows in some measure to traditional waters of the United States. Beyond that most important step, the agency is left to grapple with smaller but still essential differences.

The "other waters" route presumes, by definition, that the groundwater has a significant nexus to the traditional water (emphasis added). This leaves open a possible reading that polluted groundwater, to qualify as a water of the United States, must flow to the traditional water within a specific time frame and have some specific effect on the chemical, physical, or biological integrity of the surface water.

In contrast, the "tributary groundwater" route may require the agency to more strictly apply the standard established in subsection (s)(5): a proven groundwater tributary would be a per se tributary like any other; hence, the 402 or 404 requirement to secure a permit would attach to any discharge of pollutants from a point source into the subsurface tributary without requiring a threshold of "significance" to the receiving water.[236]

[235] Wood, Mary Christina, *Regulating Discharges into Groundwater: The Crucial Link in Pollution Control Under the Clean Water Act*, 12 Harv. Envtl. L. Rev. 569, 586-619 (1988).

[236] The tributary groundwater approach better comports with the understanding that "[t]he Clean Water Act creates a strict liability scheme that "categorically prohibits any discharge of a pollutant from a point source without a permit," irrespective of whether that discharge affects the receiving water." *Hawai'i Wildlife Fund v. Cnty. of Maui*, __ F. Supp. 2d __, 2014 WL 2451565, at *15 (D. Haw. May 30, 2014).

CELP believes that groundwater is best treated as a water of the United States in the sense of "tributary groundwater," but recognizes that the agency might reasonably categorize groundwater under "other waters."

C. EPA could increase administrative efficiency by developing, under separate rule or guidance, a classification system for subsurface permeability and accompanying general permits.

CELP recognizes the administrative burdens that accompany groundwater point-source regulation. We therefore suggest that the EPA pursue a separate rule or guidance to increase the efficiency of groundwater regulation under the CWA. In this separate action, the agency could assist the conservation and regulated communities alike by setting a default rule that transparently established a presumption either for or against subsurface connectivity in specific areas. The presumption could be rebuttable by evidence presented by the challenging party.

The recent *Hawai'i Wildlife Fund* case illustrates the issues well.[237] In that case, a group seeking to show that waste that a county facility was depositing into the ground traveled into the ocean via groundwater.[238] The plaintiffs conducted a study in which special dye was deposited with the waste, and was spotted in the ocean nearly three months later.[239] This presented prima facie evidence that the chemicals from the waste facility were indeed reaching surface waters, and therefore the discharge should be regulated under the CWA.

EPA should draw on this example to develop specific guidance on where the presumption of hydrological connection lies. The scientific data available in *Hawai'i Wildlife Fund* is not easily obtainable in many other contexts, and involves substantial expense. Moreover, the heterogeneous features of various aquifers and other groundwater systems make evaluating the scientific data in every groundwater case burdensome on citizens and courts alike. Indeed, requiring such expensive data from citizens runs against the spirit of the CWA's citizen-suit provisions.

Therefore, CELP urges EPA to develop a region- or basin-specific classification system that establishes rebuttable presumptions of hydrological connectivity (or non-connectivity). EPA would be able to draw on its technical expertise to determine where the presumption of hydrological connectivity should apply based on a region or basin's groundwater characteristics. Such a classification system could create a degree of certainty for all parties by establishing a shared and transparent baseline assumption of connectivity or non-connectivity.

The agency might find additional efficiencies by combining the region- or basin-wide classification system with a general permit scheme. If a potential permittee sought to discharge into the ground, EPA could consult its basin- or region-specific classification and then, as appropriate, issue a general permit matched to a set of standardized limitations fitting to the permeability of the area at the depth in question. As is the case

[237] *Id*.
[238] *Id*. at 1.
[239] *Id*.

with existing discharges that use general permit schemes, the agency should realize cost savings over preparing project-specific permits. (p. 18-21)

Agency Response: **See summary response above.**

The River Alliance of Wisconsin (Doc. #16344)

7.395 RECOMMENDATION: River Alliance recommends that EPA consider building a process for including groundwater as a WOTUS either by creating an additional category under 40 CFR §230.3(s) or by including a mechanism to include it under "Other Waters".

While we understand this is not a revision to the existing rule, River Alliance strongly objects to the categorical exclusion of groundwater from waters of the U.S. and from the protections afforded under the Clean Water Act. Recent court decisions in Wisconsin have affirmed that groundwater and surface water are inextricably linked and our courts have affirmed the mandate that the Wisconsin Department of Natural Resources must consider the impacts of groundwater diversions and groundwater contamination on the chemical, physical and biological integrity of waters of the state. It is impossible to adequately protect the chemical, physical and biological integrity of WOTUS if we categorically exclude the connected waters that run below the surface of the ground.

Exclusion of groundwater is not supported by science and the treatment of groundwater in this proposed rule revision is inconsistent at best - some kinds of groundwater connections are a basis for inclusion as WOTUS, other kinds of groundwater connections are not considered an adequate connection and groundwater itself is not considered as a WOTUS or capable of affecting the chemical, physical and biological integrity of WOTUS. This continues to be one of the major unaddressed weaknesses of the WOTUS rule. In Wisconsin the impact of large scale agricultural industry on groundwater quantity and quality and the effect that is having on our waters makes this exclusion particularly jarring (see http://wisconsinwatch.org/2014/10/judge-blames-toxic-kewaunee-county-wells-on-massive-regulatory-failure/). (p. 4-5)

Agency Response: **See summary response above. Nothing in the final rule precludes state efforts to protect groundwater.**

Water Watch of Oregon (Doc. #16568)

7.396 WaterWatch supports a broad, science-based definition of the waters of the U.S. and urges EPA to heed the advice and comments of the EPA Science Advisory Board (SAB) to strengthen the rule to ensure full protection of the nation's waters. Further, WaterWatch of Oregon requests that the EPA revise the rule to remove most of the categorical exclusions, most especially the exclusion of groundwater, from the definition of waters of the U.S., preserving the ability to more fully protect our nation's waters, again consistent with the advice and counsel of the SAB. (p. 1)

Agency Response: **See summary response above.**

Community Watersheds Clean Water Coalition, Inc. (Doc. #16935)

7.397 **The EPA and the ACOE Should Reinstate as "Waters of the U.S." those that the *SWANCC/Rapanos* Decisions Listed as No Longer Jurisdictional**

…

Surprisingly, the agencies specifically exclude groundwater from the waters that are jurisdictional, even on a case-specific basis.[240] Even the very short excerpt from the DEC's description of the attributes of ground-waters demonstrates how vital they are to a livable, healthy environment. The fact that groundwater can, and often does connect a wetland to a "navigable river", i.e. provide a "nexus", makes it exclusion even more confusing. Groundwater can be, and often is, a vital component of a wetland or stream. For example, in times of drought, when stream levels are low, a stream that shares the groundwater of a nearby wetland can receive replenishment form that source. The reverse may be true when stream levels are high. Clearly, a "significant nexus" exists between the stream and the wetland, even though "significance" is not restricted to a surface connection, as in the Supreme Court decision.

According to Section 305(b) of the Clean Water Act Amendments of 1977, "Section 106(e) of the Clean Water Act requests that each State monitor the quality of its ground water resources and report the status to Congress every two years in its State 305(b) report. To provide guidance in preparing the 305(b) reports, EPA worked with States to develop a comprehensive approach to assess ground water quality that takes into account the complex spatial variations in aquifer systems, the differing levels of sophistication among State programs, and the expense of collecting ambient ground water data. This approach incorporates all of the components requested during previous 305(b) reporting periods".[241] Yet, contrary to this clear intent of Congress, EPA and ACOE expressly propose to exclude from their consideration this vital component of our water resources.

A particularly critical component of groundwater is its hyporheic zone where stream and groundwater interact. "The hyphorheic zone can be regarded as the heart of a river. Without a healthy, intact hyphoreic zone, river ecosystems could not function satisfactorily. The hyphorheic zone is the pore space at the interface between surface- and ground- water, and encompasses the areas both beneath, and laterally of, the bed of a river or lake. Water in this zone necessarily comprises a mixture of both surface and ground water components. Interactions between surface waters and groundwater are strongly affected by the composition of the pore system. The hyporheic zone harbors the most part of the water bodies' biomass (animals, micro organisms). Thus, the decomposition of organic material, the so-called natural purification, occurs primarily within the hyporheic zone".[242]

Finally, in addition to bypassing the "intent of Congress", the agencies are ignoring an irrefutable fact of nature – that of the 1% of fresh water available on earth for drinking needs, only 4% is surface water; the remaining 96% is groundwater. For the most part, the two are inextricably linked together. By ignoring this fundamental fact of nature, the Agencies' proposed regulations will only include a small sub-group of US waters that need protection. (p. 6)

[240] Groundwater: Water found in the spaces between soil particles and cracks in rocks underground located in the saturation zone. Cracks in rocks can be due to joints, faults, etc. Groundwater is a natural resource that is used for drinking, recreation, industry, and growing crops. (NYS Department of Environmental Conservation)
[241] http://water.epa.gov/type/watersheds/monitoring/upload/2003_07_03_monitoring_305bguide_v1ch5.pdf
[242] Institute for Groundwater Ecology: info@groundwaterecology.de

Agency Response: **See summary response above. The agencies have clarified that subsurface connections can serve as a non-jurisdictional hydrologic connection that agencies would consider when making case-specific significant nexus determinations.**

7.398 **The EPA and the ACOE Should Reconsider as "Waters of the U.S." those that the *SWANCC/Rapanos* Decisions Listed as No Longer Jurisdictional**

The agencies should include the following in their list of jurisdictional waters.

…

(e) Groundwater

In round figures, 97% of earth's water is ocean water – not suitable for drinking or for agriculture – and 3% is freshwater. Of this 3%, close to 70% is frozen in glaciers and icecaps.

Of the remaining 1%, 96% is groundwater; only 4% is surface water.

In 2010, over 26 % of the total water supply for the nation came from groundwater.

These simple facts alone should make it clear that groundwater must be protected with as much diligence as surface water. Yet, the Proposed Rules state clearly that "groundwater, including groundwater drained through subsurface drainage systems" will be excluded from the definition of "waters of the United States (emphasis added)". [243]

The need to monitor and preserve groundwater in the US has never been more compelling. A recent NASA satellite study published on July 24, 2014, shows "shocking groundwater loss in the Southwest… 75 percent of the losses were of groundwater….which can get so low that it never recovers".

However, even more compelling – and contradictory - is the EPA's admission of the "hydrologic and biogeochemical interactions occurring in and among surface and groundwater flows including hyporheic zones and alluvial aquifers". How can the EPA admit to the interconnection of ground- and surfacewater, yet, at the same time, rule out any need to include groundwater, as waters of the United States, under CWA regulations.

The requirement for states to monitor and assess the quality of their groundwater has been a federally designated responsibility recognized under Section 305(b) of the Clean Water Act of 1977.

There is some confusion over the definition of groundwater. Here we refer to "Legal Groundwater" as discussed in the Oregon Law ReviewVol.91,[244] Of the three categories of groundwater discussed in the article, the most applicable by the courts is the "subflow" from surface streams - the water that forms a bed under and around a stream.

Pollutants in groundwater that do not affect surface water are not subject to CWA.xviii

This is in sharp distinction to the proposal to eliminate groundwater completely from consideration under the CWA. (p. 6, 8-9)

[243] Federal Register/Vol.79, No.76/Monday, April 21, 2014/Proposed Rules.
[244] Beneath the Surface of the Clean Water Act: Oregon Law Review, Vol.91, By Anna Makowski.

Agency Response: **See above response. The final rule clarifies that subsurface connections can serve as a non-jurisdictional hydrologic connection that agencies would consider when making case-specific significant nexus determinations. Nothing in the final rule precludes state efforts to protect groundwater.**

WaterLegacy (Doc. #18017)

7.399 Our comments reflect concerns about regulatory language and interpretations that are inconsistent with the purpose of the Clean Water Act and may allow sulfide (hardrock) mines to discharge tailings and other wastes into the nation's rivers, lakes, and wetlands and to replace water bodies in natural landscapes with permanent impoundments of polluted waters.

Mines have avoided regulation of discharge to groundwater connected with surface water, impacting fish, wildlife and drinking water. The proposed "waters of the United States" rules, which would apply to all sections of the Clean Water Act, must not provide an exemption that further undermines control of polluted discharge through groundwater. In addition, both current and proposed interpretations of the Clean Water Act provide loopholes where adverse impacts from tailings waste and creation of permanent contaminated mine pit lakes evade regulatory controls. These loopholes should be closed to protect waters of the U.S.

Groundwater Connected to Surface Water

Regulating discharge to surface water when mining facilities pollute hydrologically connected groundwater is a significant regulatory challenge. Rather than containing, treating and discharging water directly to surface water, mining facilities may be designed to allow or even facilitate seepage of contaminants to surficial groundwater so pollutants can be hidden, particularly when monitoring of affected surface waters is distant or poorly sited. It is established that groundwater and surface water are often hydrologically connected. WaterLegacy believes that the exemption for groundwater from the definition of "waters of the United States" is overly broad and would encourage evasion of pollution containment, treatment and control.

We would recommend that *no* exemption be provided in Rule 40 C.F.R. § 230.3(t) for groundwater, and that the question of whether groundwater has a "significant nexus" with waters of the U.S. be addressed case-by-case under subsection (s)(7). At the least, in order to prevent pollution of surface waters through connected groundwater, the following change to the groundwater exemption proposed in 40 C.F.R. § 230.3(t) should be made:

> (t) The following are not "waters of the United States," notwithstanding whether they meet the terms of paragraphs (s)(1) through (7) of this section—
>
> . . .
>
> (5) The following features. . . (vi) Groundwater, ~~including groundwater drained through subsurface drainage systems~~; that is not diverted from or hydrologically connected to surface water. (p. 1-2)

Agency Response: **See summary response above. EPA's position that discharges to groundwater with a direct hydrological connection to a jurisdictional water**

require an NPDES permit is not changed by the final rule. (See summary response at 12.3 with respect to the NPDES program.)

National Association of Flood & Stormwater Management Agencies (Doc. #19599)

7.400 Paragraph (b)(5)(vi) exempts groundwater and the CWA jurisdiction clearly does not cover groundwater. However, "shallow subsurface hydrologic connection" is used in the proposed rule as a jurisdiction nexus. We believe this contradicts the exemption, and we request that the proposed rule refrain from reliance on "shallow subsurface hydrologic connection." (p. 3)

Agency Response: The science strongly supports the important role subsurface connections can play when assessing the effects of surface waters, and it is appropriate to consider them in a significant nexus determination. See Sections II and IX of the Technical Support Document.

Environmental Technology Consultants (Doc. #2597)

7.401 What features does this apply to? What types of lands are involved, and how does the drainage affect the definition of a wetland? If this drainage system reduces the water table to the point where the criteria for wetland hydrology is no longer met, what does it do to a wetland determination? (p. 1)

Agency Response: See summary response above. Questions regarding wetlands delineations are outside the scope of this rule.

Wetland Science Applications, Inc. (Doc. #4958)

7.402 I agree with placing the exceptions at 33 CFR 328(b) into the rule with the following exceptions:

…

4. Regarding (5)(vi). Ground water is not regulated under the CWA. It is regulated under the Safe Drinking Water Act and, therefore, it is correct that it should be excluded from waters of the U.S. While there might be some justification for extending channelized flows through a very shallow hyporheic zone within the bed of a stream during some portions of the year, the Connectivity Study considers "shallow" to be from centimeters to tens of meters (p. 2-1, ln 25+). There are many landscapes that not even the EPA or the COE under the Regional Supplements would call wetlands that have water tables within tens of meters for extended if not perennial timeframes. The Rule must be more explicit on groundwater. Is the exclusion total?

… (p. 2)

Agency Response: See summary response above. The agencies in the final rule preamble clearly state, "neither shallow subsurface connections nor any type of groundwater, shallow or deep, are themselves 'waters of the United States'."

Robert J. Goldstein & Associates (Doc. #16577)

7.403 **4) Groundwater drained through sub-surface drainage systems**: NO !!! This exclusion as currently worded could be applied to millions of acres of wetlands that do

not have surface flow or ponding, including wet savannas, flatwoods, Carolina bays, pocosins, bogs, and other environmentally important sub-surface waters. This exclusion should be re-written more narrowly. (p. 2)

Agency Response: **The agencies have consistently interpreted the CWA to exclude groundwater. See summary response above. The agencies have clarified that subsurface connections can serve as a non-jurisdictional hydrologic connection that agencies would consider when making case-specific significant nexus determinations. The science strongly supports the important role subsurface connections can play when assessing the effects of surface waters, and it is appropriate to consider them in a significant nexus determination.**

7.3.7. Gullies and Rills and Non-Wetland Swales

Agency Summary Response

Based on comments additional clarity was provided in the final rule and preamble.

The final rule identifies all erosional features, including gullies, rills, and non-wetland swales as non-jurisdictional features. Several commenters expressed concern that "arroyos" and "man-made swales "were absent from the list of erosional feature types. The final rule makes it clear that all erosional features would be excluded. Specifically, erosional features are not jurisdictional under the terms of paragraph (a) and the definitions in paragraph (c), especially the definition of tributary, and would be non-jurisdictional in any case. The Agencies inclusion of erosional features in the final rule was aimed to specifically avoid the confusion from previous regulatory guidance and at the request of commenters who stated that such exclusions were important to maintain.

Several commenters identified the need to clearly differentiate erosional features from jurisdictional waters, more specifically intermittent and ephemeral tributaries. The final rule clearly states that tributaries would be distinguished from erosional features by the presence of bed and banks and an ordinary high water mark. Concentrated surface runoff may occur within an erosional feature, but without creating the permanent physical characteristics associated with bed and banks and ordinary high water mark, the feature will not be jurisdictional.

Several commenters suggested that ephemeral and intermittent drainages as well as streams that are not tributaries should be excluded from the final rule as these features are generally not considered jurisdictional waters. The final rule preamble states that some ephemeral streams are colloquially called "gullies" or "swales" 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 or wetland are not excluded erosional features. Given this variability in terminology, and the focus on physical characteristics in the definition of tributary, the agencies did not think it necessary to define terms like "gully" or "rill" in the final rule. Similarly, some wetlands are given the name swale, regardless of the name given, waters that meet the definition of a wetland are not excluded erosional features and are subject to jurisdiction.

Several commenters expressed concern that while the waters listed in the exclusions are never "waters of the United States," they can serve as a hydrologic connection that the agencies might consider under a case-specific significant nexus under paragraphs (a)(7) and (a)(8). The final rule provides additional clarity in that, for example, while the non-wetland swale itself will always be excluded from jurisdiction, the connection of the wetland to the tributary is relevant for determining whether the wetland has a significant nexus to downstream traditional navigable waters, interstates waters, or the territorial seas.

In addition, several commenters had concerns about how the final rule would impact CWA 402 permitting as well as the status of man-made swales created expressly for the purpose of detention, infiltration and bio-attenuation of pollutants of stormwater runoff. The final rule states that these geographic features may function as "point sources" under CWA section 502(14)), such that discharges of pollutants to waters through these features would be subject to other CWA regulations (e.g., CWA section 402). Please note that the proposed rule did make changes to the definition of "waters of the U.S." for all affected CWA programs, as does the final rule (please see summary response at 7.4.4 with respect to stormwater control features).

The final rule also excludes lawfully constructed grassed waterways. The final rule states that once converted to grassed waterways, these former streams segments no longer exhibit a bed and banks or ordinary high water mark and are excluded because they no longer meet the definition of "tributary." It should be noted that such conversion does not sever jurisdiction over the entire length of the tributary above and below the grassed waterway. Instead, the rule states that the grassed waterway is considered a constructed break in the bed and banks and ordinary high water mark. This is reflected in the definition of tributary, which specifically addresses natural or man-made breaks in bed and banks and ordinary high water mark.

The final rule also adds an exclusion for puddles. The proposed rule did not explicitly exclude puddles because the Agencies have never considered puddles to meet the minimum standard for being a "water of the United States," and it is an inexact term. 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. However, numerous commenters asked that the agencies expressly exclude puddles in a rule. The final rule does exclude puddles.

Specific Comments

U.S. House of Representatives Committee on Science, Space and Technology (Doc. #16386)

7.404 In her blog, Acting Assistant Administrator Stoner said that the proposed rule specifically excludes erosional features. She was referring to gullies and rills.

Does EPA believe that the CWA covers erosional features? Please provide a detailed legal rationale and any supporting examples or precedent. (p. 16)

Agency Response: The final rule makes it clear that all erosional features would be excluded from CWA jurisdiction. Specifically, erosional features are not jurisdictional under the terms of paragraph (a) and the definitions in paragraph (c), especially the definition of tributary, and would be non-jurisdictional in any case.

The Agencies inclusion of erosional features in the final rule was aimed to specifically avoid the confusion from previous regulatory guidance and at the request of commenters who stated that such exclusions were important to maintain. See summary response 7.3.7 above.

New Mexico Department of Agriculture (Doc. #13024)

7.405 Erosional Features

The proposed rule lacks a definition for any of the terms: gullies, rills, or non-wetland swales. However, the Federal Register notice for this proposed rule does indicate that gullies "are ordinarily formed on valley sides and floors where no channel previously existed," indicating the relative impermanence thus variability that these erosional features contribute in flow into jurisdictional waters.

Arroyos are another type of erosional feature found throughout many western states. They are dry the vast majority of the year and are wet only immediately following a strong precipitation event. The topography in the arid West, with low-density vegetative cover and highly erodible soils, causes arroyos to form in much the same way as gullies.

Arroyos are similar to gullies in their hydrological significance. However, one main difference between the two features is that arroyos are typically wide and shallow, whereas gullies are relatively deep channels. This difference is inconsequential regarding the volume of water either can carry or contribute to a system, especially when considering the arid landscapes in which arroyos exist. In these regions, arid top soils are more prone to erosion hence erosional features tend to be wider.

NMDA requests that arroyos he added to this exclusion category.

Aside from gullies, rills, and non-wetland swales, how do the Agencies plan on differentiating other erosional feature s not specifically excluded from the definition of *Waters of the U.S.*? (p. 9-10)

Agency Response: The final rule makes it clear that all erosional features would be excluded from CWA jurisdiction, including "arroyos" and "man-made swales". Specifically, erosional features are not jurisdictional under the terms of paragraph (a) and the definitions in paragraph (c), especially the definition of tributary, and would be non-jurisdictional in any case. The Agencies inclusion of erosional features in the final rule was aimed to specifically avoid the confusion from previous regulatory guidance and at the request of commenters who stated that such exclusions were important to maintain. See summary response 7.3.7 above.

Tennessee Department of Environment and Conservation (Doc. #15135)

7.406 Gullies, rills and non-wetland swales are notoriously difficult to distinguish as compared to what the Corps often classifies as ephemeral streams and/or wetlands. In fact, the proposed rule indicates that waters the agencies would consider jurisdictional are often

confused as these erosional features.[245] The distinction is particularly difficult in mountainous areas where the concept of an erosional feature and a vertical stream are often confused. EPA and the Corps must include greater clarity with regard to how gullies, rills and non-wetland swales are defined. Explicit definitions will specifically enable crop and livestock production to continue without the concern over potential fines that may result without such clarity. Greater specificity will also aid federal and state soil and water conservation programs, including EPA's 319 Nonpoint Source Program, by avoiding unnecessary permits for the installation of Best Management Practices that lessen sediment and nutrient transport into Tennessee's waters. We request the agencies also provide more clarity as to what they believe are the driving distinctions between these features and waters that would be considered waters of the U.S. (p. 29)

Agency Response: **See summary response 7.3.7 above.**

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

7.407 The WVDEP supports the exclusion of rills and gullies. However, this exclusion may create some confusion between what classifies as a non-jurisdictional rill or gully and what qualifies as a *per se* jurisdictional ephemeral tributary. Rills, gullies, and ephemeral drainways are all channels through which water only flows following precipitation that are otherwise dry. This exclusion should be broadened to eliminate ephemeral drainways and, thus, eliminate any confusion that may arise as a result of the proposed regulation's disparate treatment of these two classes of drainways. The preamble to the proposed regulation also states that puddles that dry up are excluded. 79 Fed.Reg. at 22,218. Whether as part of this gullies and rills exclusion or elsewhere, the exclusion of puddles needs to be clarified. (p. 14)

Agency Response: **See summary response 7.3.7 above.**

Department of Public Health and the Environment, State of Colorado (Doc. # 16342)

7.408 Definitions: As exemplified by the above comments, there is some confusion related to the concept and definition of uplands. This may be the basis for some concerns that the proposed rule serves to increase CWA jurisdiction over areas that many consider to be outside the definition of waters of the US. Additionally, the terms "gullies,"" rills," and "non-wetland swales" are proposed to be exempt by rule, but the agencies have also not provided definitions of these features. The State recommends that the proposed rule clarify what is meant by these terms and in so doing recognize the unique nature of water in the West to avoid unnecessary conflicts and/or unintended consequences.

Agency Response: **See summary response 7.3.7 above for discussion of gullies, rills, and non-wetlands swales and summary response 6.3 for discussion of uplands.**

[245] *Id*. at 22218-19. [79 Fed. Reg. 22188, 22211 (April 21, 2014)] ("It should be noted that some ephemeral streams are called' gullies' or the like when they are not 'gullies' in the technical sense ; such streams where they are tributaries under the proposed definition would be considered 'waters of the United States,' regardless of the name they are given locally"). *Id*. at 22219.

Board of County Commissioners, Delta County, Colorado (Doc. #14405)

7.409 The gullies and rills exclusion is not adequately defined for livestock producers to determine the type of features on their properties, or to determine whether those features are jurisdiction or not excluded. While Delta County Commissioners generally agree that gullies and rills are the types of features that are far beyond the jurisdiction of the CWA and therefore the agencies should make clear they are not "waters of the U.S.," the agencies should include in the exclusion water features that have a bed and bank and in which water flows only briefly during and following a period of rainfall in the immediate locality. (p. 5)

Agency Response: See summary response 7.3.7 above for discussion of gullies and rills and summary response 8.1.1 for discussion of the relevance of flow regime for the definition of tributary.

Southern California Water Committee (Doc. #16170)

7.410 The Proposed Rule intends to maintain current exclusions contained within the definition of WOTUS, and to also incorporate others that have not been considered WOTUS through longstanding practice of the Agencies. However, the current exclusions and the proposed new exclusions do not specifically include or incorporate MS4 conveyance facilities and other stormwater related facilities. The exclusions need to be revised to provide certainty to stormwater managers, state regulators, and the Agencies themselves.

…

D. 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, SCWC recommends that the exclusion be revised as follows:

> Gullies and rills, and non-wetland and man-made swales. (p. 7, 9)

Agency Response: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. See summary response 7.3.7 above for discussion of swales.

San Bernardino County, California (Doc. #16489)

7.411 **Exclusion of Swales:** The language pertaining to the jurisdictional exclusion of "swales" is confusing. The proposed Rule appears to limit the stated exclusion by indicating that wetland swales could be jurisdictional under the "adjacent" or "other waters" categories. This is a concern when dealing with man-made swales created expressly as a treatment system for detention, infiltration and bio-attentuation of pollutants in stormwater runoff. The DPW seeks clarification of this exclusion. (p. 4)

Agency Response: **With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. See summary response 7.3.7 above for discussion of swales.**

7.412 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 . . .'."[246] The Proposed Rule then appears to limit the stated exclusion by indicating that wetland swales could be jurisdictional under the "adjacent waters" or "other waters" categories.[247] This is a concern when dealing with manmade swales (wetland or otherwise constructed) created expressly as a treatment system for detention, infiltration and bio-attenuation of pollutants in stormwater runoff. In the interest of clarity and to avoid uncertainty, the DPW seeks a more precisely worded exclusion regarding the status of man-made swales, As such the DPW recommends that the exclusion be revised as follows:

> "Gullies and rills, and non-wetland and man-made swales." (p. 20)

Agency Response: **With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. See summary response 7.3.7 above for discussion of swales.**

City of Oceanside, California (Doc. #16509)

7.413 To ensure clarity with respect to the status of man-made swales, CASQA recommends that the exclusion be revised as follows: Gullies and rills, and non-wetland and man-made swales. (p. 5)

Agency Response: **See summary response 7.3.7 above.**

Hidalgo Soil and Water Conservation District, Lordsburg, New Mexico (Doc. #19450)

7.414 Gullies, Rills, & Non-Wetland Swales: *Erosional features* with minimal hydrologic impact, such as arroyos, should be excluded alongside gullies, rills, and non-wetland swales. (p. 1)

Agency Response: **See summary response 7.3.7 above.**

National Association of Flood & Stormwater Management Agencies (Doc. #13613)

7.415 Paragraph (b)(5)(iii) exempts gullies and rills and non- wetlands swales, however, the preamble on page 22208 states that a "confined surface connection consist of permanent, intermittent or ephemeral flow paths, such as (but not limited to) swales, gullies, rills, and ditches." This narrative contradicts the proposed rule exemption for gullies and rills and NAFSMA requests that EPA reaffirm the exemption by clarifying and correcting the contradiction. (p. 3)

Agency Response: **See summary response 7.3.7 above.**

[246] Federal Register, at 22218 and 22219.
[247] Ibid.

Indiana Farm Bureau et al. (Doc. #14119)

7.416 There is also concern about whether gullies, rills and non-wetland swales are truly exempt from regulation. While the rule states that they are not "waters of the United States," the preamble notes that they "may still serve as a confined surface hydrologic connection between an adjacent wetland or water and a traditional navigable water, interstate water or the territorial sea, provided there is an actual exchange of water between those waters, and the water is not lost to deep groundwater through infiltration (i.e., transmission losses). 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)." 79 Fed. Reg. at 22204. It is incumbent upon the agency to more clearly explain the activities that will be allowed in relation to gullies, rills and non-wetland swales (i.e., that they can be filled in, excavated or moved without the requirement to obtain a permit even if they serve as the confined surface hydrologic connection for an adjacent water). Additionally, it would be helpful to note when a section 402 permit may be required for gullies, rills and non-wetland swales.

Finally, it appears that the agency has slightly hedged on the statement that gullies, rills, and non-wetland swales are not "waters of the United States." While we are confident that we and our members can recognize gullies, rills and non-wetland swales, we have learned that the agencies will still want jurisdictional determinations in many cases to determine whether the exemption is met. It would appear that the concern here is much like that for ditches. If the agency is looking to regulate something that is perennial in nature, that should be stated. It is inaccurate and misleading to claim that gullies, rills and non-wetland swales are exempt while at the same time intending to perform delineations to make sure they meet whatever internal policies the agencies may have. (p. 4)

Agency Response: Gullies, rills, and swales that do not meet the definition of tributary are not jurisdictional, regardless of their status as a connection to downstream waters. Please see Section 12.3, 402 – NPDES in the Implementation Issues Compendium, regarding additional information on the NPDES program. See summary response 7.3.7 above for discussion of gullies, rills, and swales.

Southpace Properties, Inc. (Doc. #6989.1)

7.417 The proposed approach stands to cause chaos in the field resulting in confusion and delay as regulators struggle to distinguish between jurisdictional 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. 2)

Agency Response: The rule provides greater clarity regarding which waters are subject to CWA jurisdiction, reducing the instances in which permitting authorities are required to make jurisdictional determinations on a case-specific basis. See summary response 7.3.7 above for discussion of gullies and rills and summary response 8.1.1 for discussion of the relevance of flow regime for the definition of tributary.

Kerr Environmental Services Corp. (Doc. #7937.1)

7.418 **4. 328.3(b)(5)(vii) Gullies and rills and non-wetland swales**. The rationale for gullies, rills and swales not being waters of the United States should be that they, like ditches, when located wholly in uplands and drain only uplands are not jurisdictional as long as they have less than perennial flow. As such, the explanation at (b)(5)(vii) should drop the reference to non-wetland swales as follows:

"Gullies and rills and swales"

Man-made swales wholly in uplands, and draining only uplands, are constructed to concentrate and convey stormwater drainage. There is no distinct "design standard" for swales compared to "ditches" and the terminology/differences between swale and ditch are simply subjective terms. Swales can, in Coastal Plain, Piedmont and even mountain/bedrock environments, accumulate fine materials (clay and silts), which will inhibit infiltration, allowing hydrophytic vegetation to predominate and even allow marginal hydric soils to begin to form. They also allow additional infiltration and can assist in recharging the groundwater table, and are thus a credible part of the "green infrastructure" approach to improving water quality. Such a condition should not, by definition, cause the United States government to consider such swales to be waters of the United States. This would both be inconsistent with the approach of the USACE since 1986 with regards to wetlands (November 13, 1986 preamble for 328.3, page 41217), and inconsistent with USACE/USEPA guidance issued for compliance with the *Rapanos* decision. For these reasons the wording of this item needs to be revised accordingly.

Rills and gullies are by definition erosional features that convey runoff, and thus when entirely in uplands should not be considered waters of the United States. (p. 4)

Agency Response: **See summary response 7.3.7 above.**

NAIOP Commercial Real Estate Development Association (Doc. #14621)

7.419 6. §328.3(b)(5)(vii). Arid Ephemeral Streams.

It is unclear whether EPA intends to regulate ephemeral streams such as arroyos as "tributaries".[248] If arroyos are considered tributaries, this would be a dramatic increase in regulatory jurisdiction and a burden on landowners, especially in the arid West. These arid ephemeral streams typically carry stormwater only during seasonal, and in some cases rare, rain events. The truth is that water flows downhill and water in the arid West has been carving the landscape for centuries.

We think the more reasonable and justifiable approach is, as a matter of policy, not to regulate arid ephemeral streams. However, exceptions to this policy would make sense. EPA might determine that a particular ephemeral stream should be opted in because (a) it has been proven to flow, at X rate (i.e., that is more than de minimus), into a regulated water, for Y number of hours (e.g., 240), for Z number of years (e.g., 5 consecutive), based on historic flow, or (b) the Corps has made a case-by-case determination under the significant nexus criteria.

[248] EPA's Q&A #6 did not answer this concern.

7.420 Given the lack of justification for treating ephemeral streams differently than gullies and rills, which function similarly in conveying water in response to rainfall events, we recommend that you replace:

> *"(vii) Gullies and rills and non-wetland swales" with:*
>
> *(vii) Gullies, rills, non-wetland swales and arid ephemeral streams such as arroyos.* (p. 4-5)

Agency Response: See summary response 7.3.7 above for discussion of gullies, rills and swales and summary response 8.1.1 for discussion of historic and final rule coverage of ephemeral streams.

Vulcan Materials Company (Doc. #14642)

7.421 Categorically, exempt ephemeral waters from jurisdictional coverage and establish reasonable minimum flow characteristics for a water to be considered subject to CWA jurisdiction. (p. 4)

Agency Response: See Technical Support Document section VII and summary response 8.1.1.

Newmont Mining Corporation (Doc. #13596)

7.422 4. Exclusion for Swales, Rills, and Gullies

The Agencies' Proposal would exclude from the definition of jurisdictional waters all "[g]ullies and rills and non-wetland swales." *See, e.g.*, paragraph (b)(5)(vii) at 79 Fed. Reg. 22263. While we applaud the Agencies for including this provision in the Proposal, we find it puzzling that the Agencies did not also exclude ephemeral drainages. The flow in ephemeral drainages, as is the case with the flow in gullies, rills, and swales, is entirely precipitation-based – either snowmelt or rainfall. No groundwater by definition infiltrates ephemeral drainages. The amount and duration of flow in ephemeral drainages, when located in the arid/semi-arid West, will typically be comparable to that in gullies, rills, and swales – that is, there will typically be no flow, or at most a few hours of flow every year. Moreover, the chances that the flows in such drainages will reach, by surface or shallow subsurface hydrological connection, a tributary network to a TNW is the same as rills, gullies, and swales: in the arid and semi-arid West, the chances are slim to none. Yet somehow ephemeral drainages are *per se* jurisdictional if one drop of water ever reaches a tributary network, while rills, gullies, and swales are categorically excluded. This distinction makes no sense. Where channels or drainages contain only precipitation runoff, and are located in areas of the country where evaporation exceeds precipitation, then the channels should not be deemed jurisdictional waters. The reason is simple: they cannot be deemed capable of, much less actually, having a significant effect on the chemical, physical, or biological integrity of a TNW. (p. 37-38)

Agency Response: See summary response 7.3.7 above for discussion of gullies, rills and swales and summary response 8.1.1 for discussion of historic and final rule coverage of ephemeral streams.

7.423 6. Suggested Changes to the Proposal

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 non*-jurisdictional. 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." (p. 37-36)

Agency Response: See summary response 7.3.7 above for discussion of gullies, rills and swales and summary response 8.1.1 for discussion of historic and final rule coverage of ephemeral streams.

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

7.424 **Proposed Exemption for Gullies, Rills, and Non-wetland Swales**

The proposed rule includes an exemption for "gullies and rills and non-wetland swales" ((122.2)(b)(5)(vii)). The proposed rule does not define "gully," "rill," or "swale," but the preamble talks in terms of lacking features such as an Ordinary High Water Mark (OHWM) and distinct bed and banks. See 79 Fed. Reg. at 22218-19. That explanation must be included in the regulation itself. In addition, the agencies' statement (79 Fed. Reg. at 22219) that a gully or swale may, even if exempt, provide a hydrological connection between a wetland and a tributary of a navigable water, so as to make the wetland subject to CWA jurisdiction, should only apply if there is a very short distance between the wetland and the navigable water. Otherwise, the effect of the wetland on the navigable water through the gully or swale is just too theoretical for the basis of CWA jurisdiction. (p. 12-13)

Agency Response: See Technical Support Document sections II and IX and summary response 7.3.7 above.

Alameda County Cattlewomen (Doc. #8674)

7.425 The gullies and rills exclusion is not adequately defined for livestock producers to determine the type of features on their properties, or to determine whether those features are jurisdiction or not excluded. The agencies specifically asked for comments on "how they could provide greater clarity on how to distinguish between erosional features such as gullies, which are excluded from jurisdiction, and ephemeral tributaries, which are categorically jurisdictional. While ACCW generally agree that gullies and rills are the types of features that are far beyond the jurisdiction of the CWA and therefore the

agencies should make clear they are not "waters of the U.S.," the agencies should include in the exclusion water features that have a bed and bank and in which water flows only briefly during and following a period of rainfall in the immediate locality. The inclusion of the features would do exactly what the agencies requested. If landowners cannot distinguish these features than they should all be treated the same way, and because they do not meet the standard articulated by Justice Scalia in *Rapanos*, they should be excluded.[249]

The addition of these ephemeral features (those that only hold water during and immediately following a rainfall event) would alleviate much of the confusion and anger the agriculture community has with the proposed rule. The exclusion of more features under the "gullies" definition would allow the agencies to focus on those features that more clearly have a significant nexus to larger bodies of water. It would provide clarity to the livestock industry that producers' dry washes and dry ditches are clearly not jurisdiction, without being dependent on the definition or an analysis of "uplands." And it would allow the agencies to focus their resources on those bodies of water that have a better chance of having a significant nexus with larger downstream waters. (p. 23-24)

Agency Response: See summary response 7.3.7 above for discussion of gullies, rills and swales and summary response 8.1.1 for discussion of historic and final rule coverage of ephemeral streams.

Hancock County Farm Bureau, Indiana (Doc. #11980)

7.426 We are also concerned that gullies, rills and non-wetland swales will be considered regulated features even though they are generally deemed to be exempt in the rule. First, we understand that those features have generally been exempt when they are within fields. Those exact same features have been regulated in construction projects, such as when roads are built or repaired. It is also our understanding that the agencies may still conduct on-site reviews of some gullies, rills and non-wetland swales to determine whether they may be declared to actually be a tributary and not an exempt feature or to review the amount of flow they may carry. (p. 2)

Agency Response: See summary response 7.3.7 above for discussion of gullies, rills and swales and summary response 8.1.1 for discussion of ephemeral streams.

Bayless and Berkalew Co. (Doc. #12967)

7.427 The ambiguous wording of the rule is ripe for litigation as left to the interpretation of agency enforcement and environmental litigants… In section 328.3 (5) (vi) and (vii) gullies, rills and shallow subsurface connections are exempt, however on page 22210 of the proposed rule it states that *"confined surface connections that provide a discrete pathway for water to be exchanged between the potentially adjacent wetland or water and an (a) (1) through (a) (5) water present the clearest evidence of a hydrologic connection… examples of confined surface water hydrologic connections that demonstrate adjacency are swales, gullies, and rills."* The proposal states that it can be

[249] Supra Note 21. [*San Franscisco Baykeeper v. Cargill Salt Division*, 418 F.3d 700, 707 (9th Cir. 2007).]

hard to tell the difference between an erosional feature and an "ephemeral stream", which is regulated (79 Fed. Reg. 22209). (p. 4)

Agency Response: **See summary response 7.3.7 above.**

Indiana Farm Bureau, Inc. (Doc. #14124)

7.428 **EXCLUSION FOR GULLIES, RILLS, AND NON-WETLAND SWALES**

The exemption for "gullies, rills and non-wetland swales" is also one which may have little effect in removing features from jurisdiction. We have been made aware of several instances over the years in which the agencies claimed jurisdiction over gullies. Based upon our inquiries on this particular exception, we are extremely concerned that the agencies will still seek to review gullies, rills and non-wetland swales to determine whether they are "gullies" or something else that the agencies want to regulate. While we are asked to trust the agencies in the statements that these features are excluded and that the scope of jurisdiction is consistent with the limited jurisdiction acknowledged by the U.S. Supreme Court, history has shown that there is intent to regulate these features as something other than "gullies, rills and non-wetland swales."

The use of "gullies, rills and non-wetland swales" as required connections for adjacent waters also raise questions about whether any limits will be placed on those features. As excluded features, there would be no requirement to obtain a permit to do anything to or within the feature, such as filling in a gully or moving a non-wetland swale. However, there is serious concern that efforts will be made by either the agencies or environmental groups to limit the ability of someone to remove a feature which also provides the requisite connection for an "adjacent water" to be jurisdictional. If the feature is removed, the jurisdictional nature of the "adjacent water" would be removed. The "other water" would now be an isolated feature and subject solely to state law, not federal. Our members are skeptical that the agencies will concede that they no longer have jurisdiction. (p. 5)

Agency Response: **Gullies, rills, and swales that do not meet the definition of the tributary are not jurisdictional, regardless of their status as a connection to downstream waters. See summary response 7.3.7 above.**

Kansas Agriculture Alliance (Doc. #14424)

7.429 Again, the terms gullies and rills are completely undefined in the functional part of the rule and provide no certainty to the regulated community as to how to apply the terms. The term "gully" is defined by Merriam Webster dictionary as: "[A] trench which was originally worn in the earth by running water and through which water often runs after rains."[250] On its face the term seems to imply that a gully could be an ephemeral stream, but this cannot be verified as the term is not defined. The agencies have further muddied the water by stating that gullies "are younger than streams in geologic age . . . ."[251] This puts landowners in the awkward position of determining a feature's age. In addition,

[250] Merriam Webster Online Dictionary, *available at* http://www.merriam-webster.com/dictionary/gully (last visited Nov. 7, 2014).
[251] 79 Fed. Reg. at 22218.

because the agencies' age restraint only appears in the preamble it does not have the effect of law.

Rills are also undefined in the functional part of the rule. While the agencies state that rills are "formed by overland water flows eroding the soil surface during a rain" and are "less permanent on the landscape," the definition would not have the force of law because it exists in the preamble.[252] The introduction of a permanency component to define rills will make it difficult for a landowner to distinguish a rill, from a gully, from a ditch, or from an ephemeral stream. (p. 7-8)

Agency Response: **See summary response 7.3.7 above.**

LeValley Ranch, LTD (Doc. #14540)

7.430 The gullies and rills exclusion is not adequately defined for livestock producers to determine the type of features on their properties, or to determine whether those features are jurisdiction or not excluded. (p. 7)

Agency Response: **See summary response 7.3.7 above.**

Colorado Cattlemen's Association (Doc. #15068)

7.431 The gullies and rills exclusion is not adequately defined for livestock producers to determine the type of features on their properties, or to determine whether those features are jurisdiction or not excluded. While CCA generally agrees that gullies and rills are the types of features that are far beyond the jurisdiction of the CWA and therefore the agencies should make clear they are not "waters of the U.S.," the agencies should include in the exclusion water features that have a bed and bank and in which water flows only briefly during and following a period of rainfall in the immediate locality. (p. 7)

Agency Response: **See summary response 7.3.7 above.**

North Carolina Farm Bureau Federation (Doc. #15078)

7.432 …There is an exclusion for non-wetland swales, but no exclusion for grassed waterways. There should be an exclusion for grassed waterways which are essentially manmade swales. These should not be considered streams or tributaries or any other type of jurisdictional water, and should be automatically excluded from jurisdiction in the same manner as swales. (p. 16)

Agency Response: **See summary response 7.3.7 above for discussion of gullies, rills and swales and summary response 8.1.1 for discussion of historic and final rule coverage of ephemeral streams.**

Weyerhaeuser Company (Doc. #15392)

7.433 E. The Exclusion for Erosional Features Should be Expanded

[252] *Id.*

The proposed rule categorically excludes several erosional features (gullies, rills, and non-wetland swales) from the definition of "waters of United States,"[253] and Weyerhaeuser agrees that these features should remain non-jurisdictional. The Agencies should extend the exclusion to cover ephemeral drainages on the same grounds. Even the Agencies seem to acknowledge the similarities between these features and the difficulty in distinguishing between excluded erosional features and jurisdictional tributaries. Yet, the Agencies are unable to articulate a meaningful justification for the differential treatment apart from noting the absence of an ordinary high water mark in the excluded features.[254] But the ordinary high water mark concept is not a reliable basis for distinguishing between jurisdictional and non-jurisdictional features. (p. 12)

Agency Response: **See summary response 7.3.7 above for discussion of gullies, rills and swales, summary response 8.1.1 for discussion of historic and final rule coverage of ephemeral streams, and summary response 8.1.2 for discussion of the use of OHWM.**

Charlotte-Mecklenburg Storm Water Services (Doc. #3431)

7.434 5. This comment pertains to Section 328.3 Definitions, (b)(5)(vii), Federal Register page 22263. The difference between a "gully" and a "ditch" is not clear. **CMSWS recommends defining gullies, rills, and non-wetland swales.** (p. 2)

Agency Response: **See summary response 7.3.7 above.**

Duke Energy (Doc. #13029)

7.435 **d. Ephemeral Streams Should be Excluded from Jurisdiction the Same as Erosional Features**

Duke Energy is encouraged that the agencies have determined that erosional features would be excluded from jurisdiction. However, there is still a significant debate over how these features, such as gullies and rills, are any different than ephemeral drainages or tributaries, which would be classified categorically jurisdictional as tributaries. According the preamble: "Gullies are relatively deep channels that are ordinarily formed on valley sides and floors where no channel previously existed." "Rills are formed by overland water flows eroding the soil surface during rain storms."[255] Both of these are erosional features that only carry water when it rains, which is also true of ephemeral streams. While the proposed rule does not define an ephemeral stream, EPA's Connectivity Report defines it as: "A stream or river that flows briefly in direct response to precipitation; these channels are above the water table at all times."[256] Likewise, non-wetland swales, that mainly carry water during rainstorms or snowmelt, are difficult to distinguish from ephemeral streams.

[253] 79 Fed. Reg. at 22,263.
[254] *See id*. at 22,218-19.
[255] 79 Fed. Reg. at 22,218.
[256] 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-5.

The agencies, themselves, recognize this difficulty and seek comment on how to clarify and differentiate these types of features.[257] It seems that if these types of features are so similar in function as to be difficult to distinguish one from the other. Therefore, Duke Energy believes it would be logical for the agencies to exclude ephemeral streams from the proposed definition of "waters of the United States" in addition to gullies, rills and non-wetland swales. (p. 49)

Agency Response: See summary response 7.3.7 above for discussion of gullies, rills and swales, summary response 8.1.1 for discussion of historic and final rule coverage of ephemeral streams, and the TSD section 7.B.6 for discussion of intermittent, ephemeral and headwater tributaries on downstream waters.

Southern Company (Doc. #14134)

7.436 … the agencies seek to expand the list of non-jurisdictional waters to include gullies, rills and non-wetland swales. Once, again, we believe this is an appropriate response and commend the agencies for excluding such features from the Act's reach. Yet the proposal fails to provide any meaningful definition or distinguishing criteria between jurisdictional ditches and these other excluded features. If the agencies wish to provide clarity and predictability, such clarification is absolutely warranted. Otherwise, confusion and inconsistency involving jurisdictional and non-jurisdictional features will continue. (p. 50)

Agency Response: See summary response 7.3.7 above for gullies, rills and swales and summary responses 6.0 for ditches.

National Lime Association (Doc. #14428.1)

7.437 **5. "Rills," "Swales," and "Upland" are also Words Which the Regulatory Text Needs to Define.**

a. "Rills": Ambiguity also exists with respect to the term "rills." The Merriam-Webster online dictionary defines "rill" as a "very small stream."[258] The proposed rule does not explain how one is expected to differentiate between a "rill" and a "ditch" or a "gully" containing some amount of water. The need to be able to do so will be obviously critical, because, under the proposed rule, "gullies" and "rills" are per se not jurisdictional, whereas a "ditch" may or may not be. The proposed rule as currently written offers no help in this regard. Instead, the proposed rule merely assumes that such a distinction can and will be made. NLA submits that such an assumption is not justified. Not only does the proposed rule need to define these critical terms, it would be extremely beneficial were the rule to also include pictorial examples of these terms.

b. "Swales": The Merriam-Webster online dictionary defines "swale" as "a low-lying or depressed and often wet stretch of land."[259] The proposed rule would exclude a "swale"

[257] 79 Fed. Reg. at 22,219.
[258] *See* http://www.merriam-webster.com/dictionary/rill.
[259] http://www.merriam-webster.com/dictionary/swale.

as a WOTUS, provided it is in a non-wetland.[260] The proposed rule fails, however, to provide any meaningful help or insights for identifying a "swale." (p. 7-8)

Agency Response: See summary response 7.3.7 above for gullies, rills and swales and summary responses 6.0 for ditches.

Salt River Project Agricultural and Power District and the Salt River Valley Water Users Association (Doc. #14928)

7.438 2. Gullies, Rills and Swales

The agencies propose to exclude gullies, rills, and non-wetland swales, but do not propose definitions of those terms. The preamble states that the agencies specifically seek comment on how to distinguish between erosional features, such as gullies, which are excluded from jurisdiction, and ephemeral tributaries, which would be subject to jurisdiction.

Asking field personnel to correctly categorize erosional features is arbitrary at best, and will only lead to over-regulation of erosional features that should remain non-jurisdictional. The agencies should exclude erosional features like gullies, rills and non-wetland swales from jurisdiction, particularly when their formation is directly associated with active mining, dredging or construction activities. (p. 16)

Agency Response: See summary response 7.3.7 above for gullies, rills and swales and summary response 8.1 for discussion of tributaries.

Luminant (Doc. #15100)

7.439 Luminant further believes that the EPA and USACE should revise their proposed approach to ephemeral tributaries and erosional features to ensure that ephemeral waters that are not tributaries are expressly excluded from jurisdiction. For example, additional considerations could have been included for distinguishing between ephemeral tributary streams and non-jurisdictional ephemeral features to help exclude gullies, rills, and non-wetland swales from inappropriate jurisdictional designations as contemplated by the Proposed Rule. These issues and many other aspects of the Proposed Rule create significant uncertainty surrounding the costs and other permitting and operational implications to the coal mining and coal-fired electric power generation industry should this rule be finalized and fully implemented. (p. 7)

Agency Response: See summary response 7.3.7 above and summary response 8.1 for discussion of tributaries.

Wisconsin Electric Power Company and Wisconsin Gas LLC (Doc. #15407)

7.440 **F. The Proposed Rule Provides No Basis for Distinguishing Between Erosional Features and Small Ephemeral Features.**

…

[260] See, e.g., proposed regulatory text for section 328.3(b)(5)(vii).

The proposed approach stands to cause chaos in the field, resulting in confusion and delay as regulators struggle to distinguish between jurisdictional ephemeral drainages and unregulated gullies, rills, and non-wetland swales.[261] Indeed, if these features are so similar, there is no rational reason that erosional features are 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. 7)

Agency Response: **See summary response 7.3.7 above for discussion of gullies, rills and swales, summary response 8.1.1 for discussion of ephemeral streams, and the TSD section 7.B.6 for discussion of intermittent, ephemeral and headwater tributaries on downstream waters.**

Washington County Water Conservancy District, St. George, Utah (Doc. #15536)

7.441 **D. THE AGENCIES SHOULD CLARIFY THE EXCLUSION FOR GULLIES, RILLS, AND NON-WETLAND SWALES.**

The Agencies should clarify their proposal to exclude gullies, rills, and non-wetland swales. First, the Agencies should clearly define the terms "gully," "rill," and "non-wetland swale." While the Proposed Rule excludes gullies, it also notes that some ephemeral streams are called "gullies" even if they are not technically gullies. A definition is needed to clarify the difference between such mis-named streams and gullies. Similarly, the Proposed Rule states that in "certain circumstances,"[262] swales may include areas that meet the regulatory definition of wetlands. The Agencies should define "swale" in a way that clearly distinguishes such features from wetlands and tributaries.

Second, the Agencies should reconcile potentially conflicting statements in the Proposed Rule about gullies, rills, and non-wetland swales. While the Agencies state that gullies, rills, and non-wetland swales will be non-jurisdictional by rule, even if they meet the definition of a categorical "waters of the United States," the Agencies undercut this statement elsewhere in the rule:

> 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).[263]

Thus, it appears that even if a gully, rill, or non-wetland swale is not jurisdictional in and of itself, these water features can still be the conduit for the Agencies to assert jurisdiction over another water, such as waters in the same floodplain or riparian area. With respect to tributaries, the Proposed Rule states that gullies, rills, and non-wetland swales will not be considered tributaries even though these water features "may

[261] In fact, in practice even the distinction between "swales" and "ditches" is largely limited to a subjective choice of terminology rather than any actual difference in design.
[262] *Id*. at 22,219. [Proposed Rule, 79 Fed. Reg.]
[263] *Id*.

contribute flow to a tributary in systems with steep side slopes."[264] However, in the Proposed Rule's discussion of "adjacent waters," the agencies state that "[c]onfined surface connections that provide a discrete pathway for water to be exchanged between the potentially adjacent wetland . . . present the clearest evidence of a hydrologic connection."[265] The agencies list swales, gullies, and rills as "[e]xamples of confined surface water hydrologic connections that demonstrate adjacency."[266] The Agencies should revise the Proposed Rule to reconcile these conflicting statements. (p. 28)

Agency Response: Gullies, rills, and swales that do not meet the definition of tributary are not subject to jurisdiction, regardless of their status as a connection to downstream waters. See summary response 7.3.7 above. In addition, even where these features provide a connection between upstream and downstream waters, they remain nonjurisdictional. These statements are not in conflict as jurisdictional status never changes.

Ducks Unlimited (Doc. #11014)

7.442 We are aware that the issues of ditches, swales, gullies, and rills have caused concern among the agricultural sector. For example, the rice industry has expressed the concern that the changes made to the treatment of ditches and irrigation canals could bring these key on-farm infrastructural components of rice production within the new definition of "waters of the U.S."

Thus, the longstanding exemption for the agricultural drainage ditches and irrigation canals (enshrined within past regulatory practices, if not rule) needs to be made perfectly clear by the language of the final rule.

We encourage the agencies to consider any revisions to the definitions and language of the rule and preamble that help ensure its intentions with respect to these types of waters and artificial water conveyances, and the meaning and interpretation of the rule, are clear and precise to the public and to their own regulators. (p. 14-15)

Agency Response: Gullies, rills, and swales that do not meet the definition of tributary are not jurisdictional, regardless of their status as a connection to downstream waters. See summary response 7.3.7 above. In addition, see summary response 6.0 for ditches.

Clean Water Action (Doc. #15015)

7.443 We recommend that gullies, rills and non-wetland swales not be categorically excluded from CWA jurisdiction, and suggest the agencies instead classify them as "other waters" and evaluate their jurisdictional status on a case specific basis. In the preamble of the proposed rule, the agencies address the difficultly of distinguishing gullies from ephemeral streams and further note that these water features are often conduits for moving water between streams, wetlands and other adjacent waters that are clearly jurisdictional. We agree with the SAB panel's assessment that water features like gullies,

[264] *Id*. at 22,204.
[265] *Id*. at 22,210.
[266] *Id*.

rills and non-wetland swales can have a significant impact on the physical, biological and chemical integrity of downstream waters, and to automatically exclude all of these features from CWA protections is not scientifically sound.[267]

Such a decision is particularly concerning given that the rule as proposed lacks a recapture provision, so if any of these types of water features were in the future found to have a significant impact on downstream water quality, the agencies would be unable to step in to protect them. We recommend that the agencies take a closer look at the wealth of literature on human-modified stream ecosystems, as described by the SAB in it comments on EPA's Connectivity Report.[268] This literature could help inform the agencies as to which human or naturally altered water features have a significant impact on downgradient water quality, and which do not. As the science of stream connectivity, especially as it relates to impacts caused by human alterations and natural events evolves, it is essential that the agencies continue to have the ability to evaluate the potential impact of these water features on a case specific basis. (p. 4-5)

Agency Response: See summary response 7.3.7 above, compendium 8 regarding tributaries and TSD section 7.A.2.

American Rivers (Doc. #15372)

7.444 2. Allow Gullies and Non-Wetland Swales to Benefit from a Significant Nexus Test

Gullies should not be categorically excluded as a "water of the United States." Instead they should be considered as "other waters" and be subject to a case-specific determination of significant nexus. Gullies are formed by the same erosional processes that maintain and shape stream channels, particularly headwater streams in steep, erodible, landscapes. Headcutting and formation of gullies is the means by which river networks extend their reach further in the direction of the headwater landscape. For this reason, gullies may be difficult to distinguish from ephemeral tributaries, which are jurisdictional. In fact, the Agencies note this difficulty in the proposed rule.[269] Additionally, gullies can be a surface hydrologic connection for purposes of the proposed definition of adjacent under paragraph (a)(6) and for the purpose of a significant nexus analysis under paragraph (a)(7).[270] Despite these connections, under the proposed rule gullies are categorically excluded as jurisdictional waters. With the absence of a recapture provision, gullies that might demonstrate a significant nexus to downstream waters could not be deemed jurisdictional. Therefore, we recommend that gullies should

[267] Memorandum from Dr. Amanda Rodewald to Dr. David Allen, Comments to the chartered SAB on the Adequacy of the Scientific and Technical Basis of the Proposed Rule Titled "Definition of 'Waters of the United States" Under the Clean Water Act." (September 2, 2014). Available at: http://yosemite.epa.gov/sab/sabproducts.nsf/F6E197AC88A38CCD85257D49EDC/$File/Rodewald_Memorandum_WOUS+Rule_9_2_14.pdf (Hereinafter SAB Review Memo) and SAB Rule Review Letter.

[268] U.S. EPA Science Advisory Board, SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, EPA-SAB-15-001, at 46 (Oct 17, 2014) (hereinafter "SAB Connectivity Review"), available at http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/AF1A28537854F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf.

[269] *Id.* at 22219. [*Definition of WOTUS*, 79 Fed. Reg. at 22203.]

[270] *Id.*

be re-categorized under "other waters" and be subject to the significant nexus test. We believe that some gullies can have a significant effect on the chemical, physical, and biological integrity of downstream waters and therefore should not be categorically excluded.[271]

Additionally, non-wetland swales should not be categorically excluded from being considered a jurisdictional water. Swales are categorized as wetland swales or non-wetland swales. Wetland swales are jurisdictional as adjacent waters or other waters. Non-wetland swales are not eligible to receive jurisdictional status under the proposed rule. Like gullies, non-wetland swales can be considered a surface hydrologic connection for purposes of the proposed definition of adjacent under paragraph (a)(6) and for the purpose of a significant nexus analysis under paragraph (a)(7).[272] Thus, water may flow through them from one jurisdictional water to another, and these connections may significantly affect jurisdictional waters. Swales are also used to define 'river network' in the Connectivity Report, "a hierarchical, interconnected population of channels or swales that drain water to a river. Flow through these channels can be perennial, intermittent, or ephemeral."[273] This further emphasizes their importance to downstream waters.[274] By treating non-wetland swales as categorically excluded waters, the Agencies are creating a scenario where there is potential for confusing non-wetland swales with the jurisdictional ephemeral streams they resemble. The Agencies recognize this similarity in the proposed rule and are asking for comments on how to distinguish the two.[275] Rather than categorically excluding all non-wetland swales, these features should be treated as "other waters" and be subject to a significant nexus test to determine their impact on the integrity of downstream jurisdictional waters. (p. 29-30)

Agency Response: See summary response 7.3.7 above, compendium 8 regarding tributaries and TSD section 7.A.2.

7.445 3. Clarify the Definition of "Rills"

We recommend that rills remain as non-jurisdictional waters, however the current definition in the proposed rule is ambiguous and needs to be modified. Rills are defined largely in the context of other features in the proposed rule. For example, they are defined as "less permanent on the landscape than streams and typically lack an OHWM."[276] For increased clarity, the Agencies should more clearly define "rills," reflecting their physical characteristics as small, shallow, and temporary pathways for water that typically occur in areas with no vegetation such as farm fields or construction sites and deemphasize the importance of the presence or absence of an OHWM. (p. 30)

Agency Response: The final rule clearly states that tributaries would be distinguished from erosional features by the presence of bed and banks and an ordinary high water mark. Concentrated surface runoff may occur within an

[271] *See*, *SAB review of the proposed rule*, *supra* note 89, at 3.
[272] *Definition of WOTUS*, 79 Fed. Reg. at 22219.
[273] *EPA Draft Connectivity Report*, *supra* note 22, at A-15.
[274] *See*, *SAB review of the proposed rule*, *supra* note 89, at 3.
[275] *Definition of WOTUS*, 79 Fed. Reg. at 22219.
[276] *Id*. at 22218.

erosional feature, but without creating the permanent physical characteristics associated with bed and banks and ordinary high water mark, the feature will not be jurisdictional. See summary response 7.3.7 above.

Western Resource Advocates (Doc. #16460)

7.446 Gullies

The agencies propose that "gullies" not be WOTUS.[277] While the preamble discusses what does and does not constitute a gully,[278] the rule itself provides no definition of a gully. This lack of detail is insufficient as the basis for categorically excluding these waterways from jurisdiction.

For almost three decades, the Tenth Circuit Court of Appeals, whose territory covers a large chunk of the arid and semi-arid southwest (Colorado, New Mexico and Utah) has found gullies – or arroyos, in the language of southwestern geography – jurisdictional. The cases involve waterways connected via groundwater to a tributary of a TNW, but also flowing on the surface after storm events.[279] In *Quivira*, a mining company challenged case its 402 permit, including on jurisdictional grounds because its pollutant discharges were to an arroyo, albeit one whose waters, sometimes on the surface and sometimes via groundwater, found their way to more clearly recognizable jurisdictional waters, themselves tributaries to TNW.[280]

> Although neither the Arroyo del Puerto nor the San Mateo Creek is navigable-in-fact, surface flow occasionally occurs, at times of heavy rainfall, providing a surface connection with navigable waters independent of the underground flow. . . . [T]he record supports the finding that both the Arroyo del Puerto and San Mateo Creek flow for a period after the time of discharge of pollutants into the waters [and] the flow continues regularly through underground aquifers fed by the surface flow of the San Mateo Creek and Arroyo del Puerto into navigable-in-fact streams.[281]

The Court stated, repeatedly, that the Clean Water Act was based on the commerce clause and that Congress intended its scope to go far beyond traditionally navigable waters, "it was the clear intent of Congress to regulate waters of the United States to the fullest extent possible under the commerce clause."[282]

As the agencies concede in the preamble to the proposed rule, many "gullies" or "arroyos" may in fact be either ephemeral streams, or indirectly connected to waters of the US, e.g., via groundwater, as was the case in *Quivira* and these other Tenth Circuit cases. Thus, it is critical that the proposed blanket exclusion of "gullies" be narrowly crafted, perhaps by adding a qualifier, so that the rule would exclude only "non-tributary gullies." (p. 25-26)

[277] 79 Fed. Reg. 22263 (proposed 33 C.F.R. § 328.3(b)(5)(vii)).
[278] 79 Fed. Reg. 22218-19.
[279] *Quivira*, 765 F.2d at 126.
[280] *Id*. at 127-28.
[281] *Id*. at 129.
[282] *Id*. at 130.

Agency Response: **The final rule states that some ephemeral streams are colloquially called "gullies" or "swales" 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 or wetland are not excluded erosional features. Given this variability in terminology, and the focus on physical characteristics in the definition of tributary, the agencies did not think it necessary to define terms like "gully" or "rill" in the final rule. See summary response 7.3.7 above.**

Earthjustice (Doc. #14564)

7.447 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-bycase 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. 13)

Agency Response: **See summary response 7.3.7 above, compendium 8 regarding tributaries and TSD section 7.A.2**

Columbia Riverkeeper (Doc. #15210)

7.448 Ditches, gullies, rills, non-wetland swales, and "artificially" irrigated areas should not be categorically exempt from the Clean Water Act. Discharges of pollution or fill into these areas can have significant biological and hydrological consequences on site and elsewhere in the watershed, as explained by members of the Scientific Advisory Board. (p. 2)

Agency Response: **See summary response 7.3.7 above and TSD section 7.A.2.**

National Association of Flood & Stormwater Management Agencies (Doc. #19599)

7.449 Paragraph (b)(5)(iii) exempts gullies and rills and non- wetlands swales, however, the preamble on page 22208 states that a "confined surface connection consist of permanent, intermittent or ephemeral flow paths, such as (but not limited to) swales, gullies, rills, and ditches." This narrative contradicts the proposed rule exemption for gullies and rills and NAFSMA requests that EPA reaffirm the exemption by clarifying and correcting the contradiction. (p. 3)

Agency Response: **Gullies, rills, and swales that do not meet the definition of tributary are not jurisdictional, regardless of their status as a connection to downstream waters. See summary response 7.3.7 above.**

Environmental Technology Consultants (Doc. #2597)

7.450 What is the difference between a gully or rill and a seasonal stream? The new definitions would appear to find a significant nexus between navigable waters and the seasonal streams that feed them, however gullies and rills and non-wetland swales appear to be excluded from the definition. We need field actionable definitions for these terms. (p. 1)

Agency Response: **See summary response 7.3.7 above and TSD section 7.A.2.**

Wetland Science Applications, Inc. (Doc. #4958)

7.451 I agree with placing the exceptions at 33 CFR 328(b) into the rule with the following exceptions:

…

5. Regarding (5)(vii). I fully agree that gullies, rills and non-wetland swales should not be regulated. However, it is inappropriate and deceitful to say that such features are not jurisdictional and then to reach through such features and claim jurisdiction over upslope features because a theoretical molecule of water might pass thru them on its way downslope. When jurisdiction ends, it should flat-out end, just like it says in 33 CFR 328.4.

… (p. 2)

Agency Response: **See summary response 7.3.7 above and TSD sections 7.A.2, 8.A. and 9.B.**

Kirk Mantay, PWS, Wetland Ecologist (Doc. #15192.1)

7.452 **Regulation of Non-Agricultural Ephemeral Ditches and Gullies**

Comment: EPA and USACE staff continue to programmatically regulate actively eroding ephemeral channels that exist due to historical and/or ongoing erosive flows during and immediately after storms. While EPA correctly notes that they cannot and do not require mitigation for activities (like voluntary stream restoration) that occur in these ephemeral gullies, the federal agencies require full permit coordination for the sake of "documentation," a federal action that requires the project proponent to spend up to $200,000 on permit drawings, legal papers, and even public hearings for a voluntary habitat project that may only cost $100,000 to construct. Voluntary habitat projects that take weeks to construct routinely take a year to permit impacts to ephemeral waters, which legally speaking, are not Waters of the US.

My observation has been that the federal agencies administer this policy to encourage permit applicants to withdraw their proposal to enter any ephemeral waterway for their project. Federal cases are currently underway challenging EPA (notably, Foster vs. EPA) on their ability to legally regulate activities in dry, eroding gullies. It is likely that the plaintiff, a land developer, will win the case, in which EPA fined him for filling a landscape feature that SCOTUS has thrice instructed EPA not to regulate. Other more

reasonable provisions of CWA are likely to also be stricken during that litigation. As a wetland ecologist and a staunch conservationist, I do not view this as a favorable outcome, and a very dangerous precedent for future de-regulation of more valuable natural resources that must be conserved.

Recommendation: Strike the portion of the New Rule dealing with ephemeral gullies that are actively eroding. Replace it with language that requires, as part of any grading project's federal water quality certification, that the eroding ephemeral gully must be restored to a stable and functional waterway or "stable configuration" that has measurable habitat benefits and high stability under storm flows. Specifically, make provisions in regulatory language that an individual Section 404 permit (IP) will never be necessary to conduct that activity when the primary goal is stream restoration or floodplain reconnection, and when the net benefits to Waters of the US can be accurately documented and monitored. (p. 3)

Agency Response: The requirements of section 404 permits are outside the scope of this rulemaking. See summary response 8.1.1 for discussion of historic and final rule coverage of ephemeral streams and summary response 7.3.7 above for discussion of gullies.

Robert J. Goldstein & Associates (Doc. #16577)

7.453 **6) Gullies, rills, non-wetland swales**: Many of the "gullies" I see in urban and agricultural settings are (or were) natural headwater streams, ephemeral or intermittent. A stream that has become a "gully" due to land management activities that did not provide adequate stormwater management should not be excluded. (p. 2)

Agency Response: Intermittent and ephemeral streams that dramatically incise are often called gullies but retain bed and banks and an OHWM, retaining their status as tributaries under the final rule. See summary response 7.3.7 above for further discussion of gullies.

7.4. SUGGESTED NEW EXCLUSIONS/LANGUAGE BY COMMENTERS

Summary Response

Introduction

The agencies received a variety of comments requesting new or additional exclusions from jurisdiction. As outlined below, the agencies have adopted a number of these suggestions in the final rule. The agencies also maintained existing exclusions already found in regulation and adopted some existing practices into regulation as exclusions for the first time. A number of these exclusions were presented in the proposed rule and revised in the final rule to increase clarity and consistency, in part based on the comments received.

Under paragraph (b) of the rule, the agencies identify a variety of waters and features that are not "waters of the United States." Prior converted cropland and waste treatment systems have been excluded from this definition since 1992 and 1979, respectively, and they remain substantively

and operationally unchanged. Comments and the agencies' responses on these exclusions are discussed above in this Compendium.

The agencies also proposed to add a number of exclusions that are adopted (in some cases with modifications) in the final rule.

The agencies added exclusions in the final rule for all waters and features identified as generally exempt in preamble language from *Federal Register* notices by the Corps on November 13, 1986, and by EPA on June 6, 1988. This is the first time these exclusions have been established by rule. Note that, under prior preamble language, the agencies could determine that a particular feature generally considered non-jurisdictional was a "water of the United States." The agencies do not retain that authority for features excluded under the rule. Comments and the agencies' responses on these exclusions are discussed above in this Compendium.

The agencies for the first time also establish by rule that certain ditches are excluded from jurisdiction. Comments and the agencies' responses on these exclusions are discussed in a separate Compendium on Ditches.

The agencies also add exclusions for groundwater and erosional features. Comments and the agencies' responses on these exclusions are discussed above in this Compendium.

A number of comments were made that suggested the addition of new exclusions, some of which were identified in public comments as possibly being found jurisdictional under proposed rule language where this was not the agencies' intent.

Adopted exclusions are reflective of current agencies' practice, and their inclusion in the rule furthers the agencies' goal of providing greater clarity over what waters are and are not protected under the CWA. Importantly, under the rule all waters and features identified in paragraph (b) as excluded will not be "waters of the United States," even if they otherwise fall within one of the categories in paragraphs (a)(4) through (a)(8). The proposed rule referenced paragraphs (a)(1) through (a)(8), but the agencies did not intend to exclude any traditional navigable waters, for example, and the revision clarifies that.

The exclusions reflect the agencies' long-standing practice and technical judgment that certain waters and features are not subject to the CWA. The exclusions are also guided by Supreme Court cases. The significant nexus standard arises from the case law and is used to interpret the terms of the CWA. Thus, a significant nexus determination is not a purely scientific inquiry, but rather is a determination by the agencies in light of the statutory language, the statute's goals, objectives and policies, the case law, the relevant science, and the agencies' technical expertise and experience. The plurality opinion in *Rapanos* also noted that there were certain features that were not primarily the focus of the CWA. See 547 U.S. at 734. In this section of the proposed rule, the agencies are drawing lines and concluding that certain waters and features are not subject to the jurisdiction of the Clean Water Act. The Supreme Court has recognized that clarifying the lines of jurisdiction is a difficult task: "Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats,

swamps, bogs — in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of 'waters' is far from obvious." *Riverside Bayview* at 132-33.

The exclusions are an important aspect of the agencies' policy goal of providing clarity and certainty. Just as the categorical assertions of jurisdiction over tributaries and adjacent waters, as defined, simplify the jurisdiction issue, the categorically exclusions will likewise simplify the process, and they reflect the agencies' determinations of the lines of jurisdiction based on science, the case law, and the agencies' experience and expertise. The agencies stated in the proposed rule that the exclusions were guided by decisions of the Supreme Court as well. The agencies in the proposed rule sought to provide a "full description" of the waters that will not be "waters of the United States." 79 FR at 22218.

It is important to note that while the waters listed in the exclusions are never "waters of the United States," they can serve as a hydrologic connection that the agencies would consider under a case-specific significant nexus under paragraphs (a)(7) and (a)(8). For example, a wetland may be directly hydrologically connected to a covered tributary via flow through an excluded non-wetland swale. While the swale itself will always be excluded from jurisdiction, the connection of the wetland to the tributary is relevant for determining whether the wetland has a significant nexus to downstream traditional navigable waters, interstate waters, or the territorial seas. In addition, these geographic features may function as "point sources" under CWA section 502(14), such that discharges of pollutants to waters through these features would be subject to other CWA regulations (e.g., CWA section 402).

Disposition of Requested New Exclusions

The final rule includes new exclusions for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land, as well as for wastewater recycling structures constructed in dry land. These exclusions were the subject of the majority of comments for new exclusions or clarification of provisions of proposed exclusions.

The new exclusion in paragraph (b)(6) is for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. In response to the agencies' proposal, commenters indicated additional clarity was needed. This exclusion responds to numerous comments that raised concerns that the proposed rule would adversely affect municipalities' abilities to operate and maintain their stormwater systems, and also to address confusion about the state of practice regarding jurisdiction of these features at the time the rule was proposed. Comments and the agencies' responses on the new stormwater control features exclusion are discussed below in this Compendium, which includes a summary discussion on the substantive provisions, issues, and comments raised, as well as individual responses to comments that refer to that discussion and add additional tailored information as appropriate.

The new exclusion in paragraph (b)(7) covers wastewater recycling structures constructed in dry land. As with the stormwater provisions, in response to the agencies' proposal, commenters indicated additional clarity was needed. This new exclusion clarifies the agencies' intent that such waters and water features used for water reuse and recycling are not jurisdictional when

constructed in dry land. This exclusion responds to the many comments that raised concerns that the proposed rule would adversely affect the ability of public and other agencies to pursue constructed detention and retention basins created in dry land used for wastewater recycling, as well as groundwater recharge basins and percolation ponds and distributary structures built for wastewater recycling. The agencies recognize the importance of water reuse and recycling, and encourage water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's waters under the CWA. Comments and the agencies' responses on the new wastewater recycling structures exclusion are discussed below in this Compendium, which includes individual responses to comments with tailored information as appropriate.

The agencies also received other suggestions for new exclusions that were not adopted in the final rule. These suggested exclusions sought to add general categories (e.g., any ponds used for some commercial purpose) or more explicitly enumerate a specific use. The agencies determined that it was not necessary to add certain requested exclusions for one or more reasons, including: (1) the requested exclusion was too broadly characterized as to have the effect of excluding waters that the agencies have determined should be covered as "waters of the U.S.," (2) the requested exclusion was so site-specific or activity-based as to lack illustrative value, or (3) the requested exclusion was likely covered by another exclusion in the final rule.

With respect to requested exclusions that are too broad, the agencies' sought to avoid adding exclusions that were so broadly worded they would introduce confusion and potentially exclude waters that the agencies have consistently covered as "waters of the United States". Such an approach—as with, for example, "all waters used for a commercial purpose"—would have the effect of not providing necessary CWA coverage for waters that have been historically protected, and would not accomplish the agencies' goal of providing bright line distinctions of what waters are and are not covered under the CWA.

A number of commenters described specific types of activities (not waters), such as the re-mining of legacy coal ash stockpiles, where the activity may or may not involve jurisdictional waters. This rule is a definitional rule defining the scope of "waters of the United States." It does not address implementation of CWA programs nor how various activities are regulated under them.

Many comments requested exclusions for specific industrial features that are linked with the management of stormwater run-off. In such circumstances, the agencies determined that if the structures associated with stormwater management meet the provisions of the new stormwater exclusion in the final rule, those structures are excluded, regardless of the specific industry that may be served by those structures.

A key common feature of most of the exclusions in the final rule is that the structure or feature is constructed in dry land. In many circumstances, there may be opportunities to convert or impact waters for similar structures or features, and such actions have impacts that the agencies determine should be evaluated under the provisions of the CWA. When such features are constructed in dry land, however, their effects on waters are generally far less, and only if there are discharges to waters of the U.S. from such features is evaluation under CWA authorities

necessary. In addition, it is important to note that the agencies view the lists of excluded waters under the stormwater and artificial lakes and ponds exclusions as illustrative and not comprehensive. As a result, the agencies did determine that modification to the artificial lakes and ponds exclusion, for example, to add log cleaning ponds constructed in uplands, was appropriate.

Comments and the agencies' responses on such requested additional new exclusions are discussed below in this Compendium, which includes individual responses to comments with tailored information as appropriate. Questions beyond the scope of rulemaking regarding the applicability of exclusions may be directed to the agencies' relevant field staff.

Specific Comments

Waters of the United States Coalition (Doc. #14589)

7.454 ***1. The plain text of the Clean Water Act precludes treating water supply, waste treatment, and flood control channels as waters of the United States.***

The Clean Water Act is based on a definition of the term "point source" that includes ditches and other conveyances that are part of the nation's water supply, waste treatment, transportation and flood control systems. If the Proposed Rule is adopted without revision, it will conflict with the plain text of the Clean Water Act which regulates these sources at the point of discharge into the waters of the United States.

The Clean Water Act defines the term "point source" as the following:

> 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, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff. (See § 122.3).[283]

EPA has adopted similar definitions for the terms "MS4" and "outfall" to allow for regulation of the system before discharges to waters of the United States occur:

> (8) Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):
>
> > (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

[283] 33 U.S.C. § 1631 (14); 40 C.F.R. 122.2.

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

(9) Outfall means a point source as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.[284]

Aqueducts, water supply canals, storm drains, agricultural drains, and other manmade conveyances that were never traditional navigable waters fit squarely within the above listed definitions. They cannot be both waters of the United States and a point source. The structure of the Clean Water Act prevents it. (p. 26-27)

Agency Response: With respect to the jurisdictional status of storm sewer and stormwater control features as waters of the U.S., see summary response at 7.4.4. below. Also see the Technical Support Document at I.C., which explains EPA's legal rationale for its position that point sources and waters of the U.S. are not mutually exclusive terms.

Peltzer & Richardson, LC (Doc. #16360)

7.455 **The proposed rule should exclude groundwater recharge basins and stormwater management facilities, together with their infrastructure, because it places them at risk.**

The Tule and Kaweah Commenters use surface infiltration as a management tool to prevent flooding, store excess water for future use, replenish groundwater supplies, or abate land subsidence. The most economical manner of groundwater recharge is to construct a basin in alluvial material immediately adjacent to a stream, almost all of which are intermittent or ephemeral within the boundaries of the Tule and Kaweah Commenters. This allows water to rapidly infiltrate through the basin to the unsaturated zone where it is added to the aquifer below. In addition to the basins, flood control levies, swales and ditches are used to capture and convey stormwater to protect public safety. In addition to sometimes being adjacent to "waters of the United States", all of these features may contain hydric soil, wetland vegetation, and have an ordinary high water mark. Currently, these facilities have not been deemed to have a significant nexus with traditional navigable waters. Under the proposed rule these facilities would meet the definition of "waters of United States". Accordingly, the Tule and Kaweah Commenters request that groundwater recharge facilities and stormwater retention basins, together with all related infrastructure (including construction, operations, and maintenance), be explicitly excluded from the proposed definition of "waters of the United States". (p. 6-7)

[284] 40 C.F.R. 122.26(b)(8)-(9).

Agency Response: **With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. Groundwater recharge basins are covered under the exclusion at (b)(7) for "wastewater recycling structures created in dry land: detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling." Please note that the final rule does not change the applicability of the Underground Injection Control program for Class V injection wells or subsurface fluid distribution systems under the Safe Drinking Water Act. See 40 CFR Part 144.**

Coachella Valley Water District (Doc. #16926)

7.456 The proposed rule states currently applicable CWA exemptions for farming 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 farming 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.

CVWD's 1,000 acres of groundwater replenishment and 330 acres of stormwater retention basins, 73 miles of flood control dikes, and over 100 miles of swales and ditches are currently not jurisdictional, but under the proposed rule it is our understanding that these facilities meet the definition of Waters of the U.S. These facilities are critical to life in the desert because they capture and infiltrate water into the drinking water aquifer. In addition to capturing and infiltrating storm flows, CVWD's flood control facilities protect property and public safety. Groundwater replenishment and flood control facilities should be excluded from the definition of Waters of the U.S. (p. 2)

Agency Response: **With respect to stormwater control features, please see summary response at 7.4.4. Groundwater recharge basins are covered under the exclusion at (b)(7) for "wastewater recycling structures created in dry land: detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling." Please note that the final rule does not change the applicability of the Underground Injection Control program for Class V injection wells or subsurface fluid distribution systems under the Safe Drinking Water Act. See 40 CFR Part 144.**

7.4.1. Stormwater Ponds not Adjacent

Summary Response

Please see the summary response at 7.4.4, which addresses the jurisdictional status of stormwater control features, including stormwater ponds, as waters of the U.S.

Specific Comments

City of Glendale, Arizona (Doc. #15054)

7.457 **Stormwater Retention Basins**

The City of Glendale requires on-site retention of stormwater from a 100-year, 2-hour storm event. These retention basins allow sediments to settle out before discharge to the municipal separate storm sewer system (MS4). In many cases, retention basins manage stormwater runoff near its source which is consistent with EPA's low-impact development approach.

Artificial lakes and ponds used for settling basins are excluded in the proposed rule. However, since stormwater retention basins do not hold water for extended periods of time as a lake or pond would, it is unclear whether stormwater retention basins would qualify for this exclusion. Stormwater retention basins should be specifically excluded from the definition of "waters of the United States."

Without a specific exclusion for stormwater retention basins, additional permits would be required in order to perform routine maintenance (discing/blading the basins and removal of sediment and vegetation to improve infiltration). The City of Glendale's limited financial resources would be spent on permits without additional benefit to the environment. (p. 3)

Agency Response: The agencies have identified an exclusion for stormwater control features created in dry land-- please see summary response at 7.4.4.

Boulder County and the City of Boulder, Colorado (Doc. #15495)

7.458 **4) Constructed Wetlands.** There is language in the Proposed Rule that would appear to make a large number of constructed stormwater ponds and constructed wetlands fall under the "tributary" definition. Tributary would be defined to include wetlands and other waters that do not have ordinary high water marks, provided that the water feature contributes flow (directly or indirectly) to a traditional navigable water. Features that would otherwise meet the definition of tributary do not lose that status if, for any length, there are natural or manmade breaks, provided that there is an ordinary high water mark upstream of the break. It seems inappropriate and undesirable to have a large number of constructed stormwater ponds and constructed wetlands fall under the "tributary" definition and be considered WOTUS.

Recommendation: Boulder County and the City of Boulder request that the Proposed Rule be clarified and/or that there be a categorical exclusion for most types of constructed stormwater ponds and constructed wetlands. (p. 4)

Agency Response: The agencies have identified an exclusion for stormwater control features created in dry land-- please see summary response at 7.4.4.

County of Los Angeles and Los Angeles County Flood Control District, California (Doc. #15620)

7.459 ***2. Detention Basins***

Similar to groundwater infiltration basins, detention basins serve a specific function. The LACFCD owns and operates detention basins that provide a critical flood control function of preventing potential flooding by temporarily storing high flows and then releasing those flows when the flood threat has ended. In effect, these basins act as "surge protectors" during high flow events. See Attachment B for a photo of a typical detention basin. Detention basins are usually located along storm drain systems, are restricted from public access, and are currently not considered WOTUS. However, under the Proposed Rule, detention basins potentially could be designated as "tributaries" to WOTUS or impoundments, even though, like the infiltration basins, they serve a specific and crucial function. The Proposed Rule should be revised to clearly exclude detention basins in order to avoid unnecessary and potentially serious disruptions to flood risk management created by the need to treat such isolated, non-public features, as jurisdictional waters.

Given the critical functions of groundwater infiltration basins and detention basins and the need for clarity as to nature of WOTUS, any final WOTUS rule should include a specific exclusion for these types of facilities. The County and LACFCD propose that the following underlined language be added to provision (b)(5)(ii) in the Proposed Rule:

Amendment to Provision (b)(5)(ii)

> **"(ii) Artificial lakes or, ponds, or basins created by excavating and/or diking and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing, groundwater recharge, or detention of stormwater runoff for flood protection;"** (p. 7-8)

Agency Response: The agencies have identified an exclusion for stormwater control features created in dry land-- please see summary response at 7.4.4. Groundwater recharge basins are covered under the exclusion at (b)(7) for "wastewater recycling structures created in dry land: detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling" or under the stormwater control feature exclusion at (b)(6), depending on the source of water. In effect, both have the same result, i.e., the infiltration basin is not a jurisdictional water as long as it was built in dry land. Please note that the final rule does not change the applicability of the Underground Injection Control program for Class V injection wells or subsurface fluid distribution systems under the Safe Drinking Water Act. See 40 CFR Part 144.

City of Pompano Beach, Florida (Doc. #16438)

7.460 **Reclaimed Water and Stormwater Storage Ponds**

The proposed change in the WOTUS definition includes the existing exemption for "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act." Storage ponds for reclaimed water and water reuse that were not constructed to meet treatment requirements, but rather for water resource utilization, are not clearly excluded under the current language. The language needs to be clarified to include other purposes besides treatment in the exclusion. Our City has a Reuse Water Facility and system without a Wastewater Treatment Plant. Therefore, all our uses are for water supply and water resource sustainability, and not treatment. (p. 2)

Agency Response: **The agencies have identified an exclusion for stormwater control features created in dry land-- please see summary response at 7.4.4. Water reuse facilities are covered under the exclusion at (b)(7) for "wastewater recycling structures created in dry land: detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling." In effect, both have the same result, i.e., the infiltration basin is not a jurisdictional water as long as it was built in dry land.**

Tennessee Department of Transportation (Doc. # 16470)

7.461 **Jurisdictional Status of Stormwater Management Systems**

The proposed rule would identify as non-jurisdictional by rule "[w]aste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act." (79 Fed. Reg. 22263). The preamble does not contain any explanation of this exclusion, so it is not clear how this exclusion would apply to stormwater management systems that are constructed as part of transportation facilities to meet requirements of the Clean Water Act.

Under Section 402 of the Clean Water Act, States are required to obtain National Pollutant Discharge Elimination System (NPDES) permits or equivalent permits under State laws, where responsibility for that permitting program has been delegated to States. In Tennessee, the permitting requirements increasingly call for natural methods of stormwater management, in which wetlands are constructed specifically to receive and treat stormwater run-off from roads. The construction of this "green infrastructure" has important ecological benefits and has been encouraged by federal and state regulatory agencies.

One of the potential impediments to developing green infrastructure is the concern that natural features created to receive stormwater run-off could themselves be deemed jurisdictional waters. If a natural feature that is constructed to receive and treat stormwater run-off is itself treated as a jurisdictional water, TDOT would be in the paradoxical position of needing to obtain Section 404 permits to discharge stormwater into facilities constructed to satisfy stormwater permit requirements under Section 402 of the Clean Water Act.

TDOT suggests that the final rule (or guidance issued together with the final rule) should clarify the circumstances under which the exclusion for "[w]aste treatment systems, including treatment ponds or lagoons" applies to stormwater treatment systems constructed as part of transportation facilities. More generally, the USACE and EPA should work cooperatively with State DOTs and other transportation agencies to ensure that concerns about creating jurisdictional waters do not discourage the adoption of natural methods of stormwater management. (p. 6-7)

Agency Response: **The agencies have identified an exclusion for stormwater control features, including green infrastructure, created in dry land-- please see summary response at 7.4.4. See summary response at 7.1.with respect to the waste treatment system exclusion.**

Rubber Manufacturers Association (Doc. #15419)

7.462 **II. RMA recommends that EPA expressly exempt permitted stormwater ponds**

In the proposed rule, there are three exemptions that could potentially apply to RMA members' stormwater ponds. Section 122.2(b)(3) exempts "ditches that are excavated wholly in uplands, drain only in uplands, and have less than perennial flow." 76 Fed. Reg. 22268. Section 122.2(b)(5)(ii) exempts artificial ponds "created by excavating dry land … and used exclusively … as settling basins." *Id*. Additionally, section 122.2(b)(4) exempts "ditches that do not contribute flow" to interstate waters and the territorial seas. *Id*. Yet, the key terms "uplands" and "settling basins" are not defined, therefore it is difficult to determine if RMA members' ponds fall under the §§ 122.2(b)(3) and (b)(5)(ii) exclusions. As proposed, the § 122.2(b)(4) exclusion is too narrow to exclude RMA member stormwater ponds because these ponds may contribute to flow, albeit in an attenuated way, to interstate waters. Since it is not clear whether RMA member stormwater ponds fall under any of these three exemptions, RMA recommends that EPA clarify these exemptions to exclude permitted stormwater ponds.

RMA members' stormwater retention ponds and detention ponds comply with NPDES permits. To meet numeric and non-numeric limits in NPDES permits, RMA members use control measures such as baffles, weirs, and skimmers to remove solids, oils, and other contaminants. RMA members monitor pH levels, remove chlorine, and control biological oxygen demand. These stormwater ponds are also typically lined with an impermeable layer of clay or plastic to prevent untreated water from leaching into other waters. Stormwater ponds play a vital role treating stormwater, preventing erosion, controlling flooding, and collecting water used to fight fires at RMA member facilities.

Because these stormwater ponds are permitted, RMA recommends that EPA explicitly exempt stormwater ponds from the rule. If these ponds are considered waters of the U.S., there would be a significant regulatory burden with no additional environmental benefit because NPDES permits already require RMA members to control floating solids, settled solids, suspended solids, oil sheen, and other indicators of stormwater pollution. (p. 2)

Agency Response: The agencies have identified an exclusion for stormwater control features created in dry land-- please see summary response at 7.4.4.

Indiana Manufacturers Association (Doc. #15704)

7.463 … the proposal does not make clear what is intended to be included within the phrase waste treatment system…

… It should be clear that a waste treatment system should include conveyance structures flowing to a treatment facility including retention basins for stormwater… (p. 2)

Agency Response: The agencies have identified an exclusion for stormwater control features created in dry land-- please see summary response at 7.4.4. With respect to stormwater control features, please see summary response at 7.4.4.

National Association of Home Builders (Doc. #19540)

7.464 **iii. Stormwater Treatment Ponds and Other Stormwater Management Facilities are not "Waters of the United States."**

Construction site operators must secure an NPDES stormwater permit (general or individual) before discharging stormwater to a surface water of the United States or an MS4.[285] The most significant component of NPDES construction stormwater permits is the Storm Water Pollution Prevention Plan (SWPPP), which identifies sediment and erosion control measures necessary to protect water quality. Historically, the preferred method of treating stormwater under a SWPPP has been through the use of on-site retention or detention ponds, infiltration trenches, or other conveyance systems. These man-made ponds and trenches are designed to slow concentrated runoff and trap sediment to protect receiving streams, lakes, and other downstream waterbodies. Without an explicit exclusion, however, stormwater treatment ponds and conveyances could be deemed "waters of the United States" because they meet the Agencies' overbroad "tributary," "adjacent waters," and/or "other waters" definitions.

Indeed, without a stormwater exclusion, the courts have on several occasions ruled that these features – although they are designed specifically to treat pollutants and protect downstream waters – are "waters of the United States." In *Northern California River Watch v. City of Healdsburg*, 2004 WL 201502 (N.D.Cal.), the district court rejected a claim that a pond formed from an abandoned gravel mining pit was a waste treatment system exempt from coverage under the CWA. Although the pond served as a percolating filter for wastewater received from the defendant's waste treatment facility, the pond "itself was not 'designed' to meet the requirements of the Clean Water Act or 'designed' to be part of the waste-treatment system."[286] Also noteworthy was the fact that the pond preexisted both the CWA and construction of the waste treatment plant.[287]

On appeal, the Ninth Circuit affirmed, holding that the pond fell outside the exemption "because it is neither a self-contained pond nor is it incorporated in an NPDES permit as part of a treatment system."[288] The Court added that the exception "was meant to avoid requiring dischargers to meet effluent discharge standards for discharges into their own closed system treatment ponds."[289] Stormwater ponds are constructed with an outflow and are not closed systems; they contribute flow to downstream waters.

The case of *West Virginia Coal Ass'n v. Reilly*, 728 F.Supp. 1276 (S.D.W.Va.1989), addressed whether sedimentation ponds constructed in streams were "waste treatment systems" excluded from the definition of "waters of the United States." Plaintiffs had challenged EPA's decision to overrule state approval of several NPDES permits authorizing in-stream sedimentation ponds.

[285] 33 U.S.C. §§ 1311-1342.
[286] 2004 WL 201502 at 11.
[287] *Id.*
[288] *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 1002 (9th Cir. 2007). *See also California Sportfishing Protection Alliance v. California Annonia Company*, 2007 WL 273847, at 6 (E.D.Cal) (holding that the "key question" for the court in determining whether stormwater pooling in a manmade detention pond qualifies for the waste treatment system exception was whether the pond is a "treatment system covered by a valid NPDES permit").
[289] Id. at 1032 (citing 45 Fed. Reg. 48,620 [July 21, 1980]).

EPA claimed that the ponds were inconsistent with the CWA and state water quality standards.[290] The court deferred to EPA's interpretation of the CWA and position that "the 'waters of the United States' over which EPA has regulatory control cannot be removed from the purview of the Clean Water Act merely by impounding those waters."[291]

A general purpose of the "waste treatment system" exclusion is to encourage the development of innovative waste treatment technologies and further the goals of the CWA. Absent the exclusion, construction site operators would be punished. In addition to the required CWA Section 402 NPDES permit covering construction-related stormwater discharges exiting a site, construction site operators would be forced to secure a Section 404 dredged or fill material permit for discharges *into* their own stormwater control systems. Furthermore, stormwater impoundments might be interpreted as artificially created "waters of the United States," imposing additional regulatory burdens on construction site operators and surrounding landowners. This perverse outcome is inconsistent with the common sense interpretation of the Agencies "waste treatment systems" exclusion.

Additionally, stormwater treatment ponds could be deemed to not be "waters of the United States" because they are settling basins and thereby meet exclusion (b)(5)(ii):

> "The following are not 'waters of the United States' . . . 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."[292]

Stormwater ponds and other stormwater management techniques function to slow down the flow of water from a development, parking lot, roadway, etc., by collecting the water in a basin and governing outflow to the stream network to better mimic natural stream hydrology. In the process, runoff is slowed down, and pollutants, including sediment and sorbed nutrients (e.g., phosphorus, organic matter) and contaminants (e.g., heavy metals) that enter the pond or other treatment facility, settle out. Additionally, biota (e.g., plants, animals, microorganisms) within the stormwater ponds can account for biological uptake of excess nutrients and dissolved contaminants. EPA notes, "[w]et [stormwater] detention ponds provide both storm water quantity and quality benefits, and provide significant retrofit coverage for existing development. Benefits include decreased potential for downstream flooding and stream bank erosion and improved water quality due to the removal of suspended solids, metals, and dissolved nutrients."[293] What's more, saturated stormwater pond soils can enhance the reduction of nitrate, otherwise responsible for

[290] *West Virginia Coal Ass'n*, 728 F.Supp. at 1,279.
[291] *Id*. at 1,283. *See also Ohio Valley Environmental Coalition v. U.S. Army Corps*, 2007 WL 2200686, at 12 (S.D.W.Va.) (rejecting the Corps position that construction of treatment ponds in stream segments previously classified as "waters of the United States" cause protected waters to temporarily lose that status and qualify for the "waste treatment system" exception because they assist in the discharge of pollutants).
[292] 79 Fed. Reg. at 22,263 (emphasis added).
[293] EPA, Storm Water Technology Fact Sheet: Wet Detention Ponds. Office of Water. EPA 832-F-99-048. (Sept. 1999) at 1, 2, *available at* http://water.epa.gov/scitech/wastetech/upload/2002_06_28_mtb_wetdtnpn.pdf

downstream eutrophication and algal blooms, to inert gaseous nitrogen via denitrification.[294]

According to case law and lacking an explicit exclusion, these ubiquitous treatment ponds would not meet the existing waste treatment exclusion. Similarly, because exclusion (b)(5)(ii) includes the phrase "used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing," a stormwater pond used for any other purpose (e.g., recreation, aesthetics) may not meet the artificial lakes or ponds exclusion. At a minimum, the word "exclusively" must be removed from this exclusion for it to have any practical application.

The vast majority of stormwater systems used to control both the quality and quantity of stormwater discharges from construction sites form waste treatment systems and function as settling basins. These systems are specifically "designed" to be incorporated in an NPDES permit as detailed in a site-specific SWPPP. They are man-made, typically constructed separate and apart from existing waters of the United States, and do not themselves create new waters of the United States.

Conversely, as "waters of the United States," stormwater ponds would be subject to all CWA programs (see Section VII. a.), and routine maintenance would require expensive and burdensome CWA permits (e.g., dredging sediment would require a Section 404 permit and application of mosquito pesticides would require a Section 402 permit). This would create regulatory headaches with no ecological benefits.

For these reasons, the Agencies must explicitly exclude stormwater systems from the definition of "waters of the United States." (p. 112-114)

Agency Response: **The agencies have identified an exclusion for stormwater control features created in dry land-- please see summary response at 7.4.4. Also see the discussion about the waste treatment system exclusion at 7.1. Please note that the Agencies' adoption of a specific exclusion for stormwater control features built in dry land does not alter the outcomes of the cases cited by the commenter or any other court case.**

Department of Public Works, City of Northglenn, Colorado (Doc. #14990)

7.465 Constructed Wetlands. There is language in the Proposed Rule that would appear to make a large number of constructed stormwater ponds and constructed wetlands fall under the "tributary" definition. *"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 paragraphs (a)(l) through (3) of this section. 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*

[294] See Groffman, P.M., E.A. Holland, D.D. Myrold, G.P. Robertson, and X. Zou. 1999. Denitrification. In: *Standard soil methods for long-term ecological research* (Robertson, G.P., D.C. Coleman, C.S. Bledsoe, and P. Sollins, eds.). Oxford University Press, New York. Soil saturation creates anaerobic conditions that promote facultative microbial reduction of nitrate-N to gaseous N (NO, N2O, and N2) in a process called denitrification.

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 in paragraph (b)(3) or (4) of this section." (Proposed Rule at 40 CFR 230.3(u)(S)) It seems inappropriate and undesirable to have a large number of constructed stormwater ponds and constructed wetlands fall under the "tributary" definition and be considered WOTUS.

Northglenn requests that the Proposed Rule clarify the rule language and/or provide a categorical exclusion for most types of constructed stormwater ponds and constructed wetlands. (p. 4)

Agency Response: The agencies have identified an exclusion for stormwater control features created in dry land-- please see summary response at 7.4.4.

7.4.2. Groundwater Recharge Ponds

Summary Response

Overall, commenters expressed their desire for the Agencies to include exemptions for infiltration and groundwater recharge basins. Several commenters requested that recharge facilities be included in specific exclusion categories such as groundwater or artificial lakes or ponds.

Additionally, three commenters expressed concerns about any interpretation of the rule that might include infiltration basins as waters of the U.S., particularly within the definition of "adjacent waters". Another commenter specifically requested that shallow aquifers be exempt from the definition of waters of the U.S. One other commenter recommended that waters in a watershed in which there is no connection to a traditional navigable water, interstate water or the territorial seas not be included in the definition of waters of the U.S.

To address the concerns raised by many of the commenters and to clarify the Agencies' intent with respect to groundwater recharge features, the Agencies developed a new exclusion for "Wastewater recycling structures created in dry land" from the definition of "waters of the U.S." at paragraph (b)(7). The following summary describes this new exclusion and addresses the many comments related to a wastewater exclusion. Some issues raised in connection with wastewater control are also addressed in other compendiums as well, such as the Implementation compendium, the Legal compendium, and the Miscellaneous compendium.

Specifically, the Agencies specifically excluded constructed detention and retention basins created in dry land that are used for wastewater recycling, including groundwater recharge basins and percolation ponds built for wastewater recycling. Infiltration basins are among the features covered by the exclusion. The new exclusion also covers water distributary structures that are built in dry land for water recycling. The Agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." The exclusion in paragraph (b)(7) codifies the long-standing

agency practice that water reuse and recycling structures are important and beneficial in protecting the chemical, physical, and biological integrity of the nation's water under CWA.

As identified in Section 7.3.6. of this compendium (Groundwater, including Groundwater Drained through Subsurface Draining Systems), the final rule continues to identify as excluded "Groundwater, including groundwater drained through subsurface drainage systems" reflecting the agencies interpretation of "waters of the United States." This exclusion applies to all groundwater, including shallow subsurface flow and shallow aquifers as identified above. Nothing in this rule limits or impedes any existing or future state or tribal efforts to further protect their waters. Please note that this exclusion does not apply when groundwater emerges on the surface and contributes baseflow to streams and spring-fed waters. At this point, when groundwater emerges on the surface, it is surface water, and thus potentially regulated under the Clean Water Act.

Finally, although the rule does not include an explicit exemption for waters in a watershed in which there is no connection to a traditional navigable water, interstate water or the territorial seas, waters can only be jurisdictional where they meet one of the jurisdictional categories listed in the rule, and these require a significant nexus to traditional navigable waters, interstate waters or the territorial sea. In some cases where a case-specific significant nexus is performed the absence of a connection may be a sign of the water's function in relationship to the traditional navigable water, interstate water, or the territorial seas. These functional relationships include retention of floodwaters or pollutants that would otherwise flow downstream to the traditional navigable water, interstate water, or the territorial seas. But in all cases, there must be a significant nexus to a traditional navigable water, interstate water, or territorial sea.

Specific Comments

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

7.466 [The Rule] Claims to exclude groundwater, but includes certain waters based on a subsurface groundwater connection (p. 2)

Agency Response: See the summary response of 7.3.6 Groundwater, Including Groundwater Drained through Subsurface Drainage Systems.

Flood Control and Water Conservation District, Riverside County, California (Doc. #14581)

7.467 IV. NEED TO EXCLUDE BASINS USED TO RECHARGE GROUNDWATER

Riverside County, like many counties in California and the Southwest, has an extensive program of groundwater recharge to support drinking water supplies. Central to this program are "spreading basins", basins located adjacent to flood control channels (which may be designated as WOTUS) which collect and percolate water into underground aquifers.

The need to recharge the aquifers with local stormwater, as well as recycled water, is becoming even more vital in time of drought. The infiltration basins must be rigorously maintained to ensure that they continue to support their infiltration purpose.

The District is very concerned about any interpretation of the rule that might include infiltration basins as WOTUS, particularly the definition of "adjacent waters". The Proposed Rule expands the scope of "adjacent" from "wetlands" to all waters. 79 Fed. Reg. 22206. "Adjacent" waters are waters which are "bordering, contiguous or neighboring", including waters "separated from other [WOTUS] by man-made dikes or barriers, natural river berms, beach dunes and the like". 79 Fed. Reg. at 22263. Additionally, waters which are "neighboring", defined to be "waters located within the riparian area or flood plain of a[WOTUS], or waters with a shallow subsurface hydrologic connection or confirmed surface hydrologic connection to such a jurisdictional water" also meet this definition and would be considered WOTUS. Id. As discussed, many infiltration basins are adjacent to channels that are considered WOTUS. Basins may also be located within the floodplain of the adjacent channels. Also, the exclusion for artificial lakes or ponds in Section b(5)(ii) is limited to specified uses, which currently do not include infiltration basins. 79 Fed. Reg. at 22218. Thus, under the Proposed Rule, the infiltration basins could be classified as WOTUS (though, as noted above, the District opposes the designation of "adjacent" waters based on a subsurface hydrologic connection).

However, as the Proposed Rule indicates, "adjacent waters" are distinguished by the fact that they "provide similar functions which have a significant nexus to [WOTUS]". 79 Fed. Reg. at 22207. Infiltration basins do not provide a similar function to the adjacent channels. The channels are designed to rapidly convey floodwaters so that they do not threaten lives and property. The infiltration basins, by contrast, are designed and maintained to percolate waters into groundwater, which is not a WOTUS. This characteristic distinguishes infiltration basins from other waters adjacent to a WOTUS, such as a wetland, which can influence the character of waters in the WOTUS.

The District supports language in the final rule exempting the designation of infiltration basins as WOTUS. (p. 11-12)

Agency Response: See summary response. Infiltration basins created in dry land that recharge groundwater are excluded.

City of Glendale, Arizona (Doc. #15054)

7.468 **Basins at Aquifer Recharge Facilities**

The City of Glendale operates the West Area Aquifer Recharge Facility to store effluent produced at the West Area Water Reclamation Facility for future beneficial use. The recharge facility consists of a series of basins where effluent is discharged to soak into the ground for storage. Although groundwater, including groundwater drained through subsurface drainage systems, is excluded in the proposed rule, it is unclear whether recharge facilities would qualify for this exemption.

…

Recharge facilities should be excluded from the definition of Waters of the United States. Recharge facilities are regulated by state laws to protect groundwater quantity and quality. The Arizona Department of Water Resources requires extensive studies prior to permitting a recharge facility and routine monitoring and reporting of the volume of water recharged. The Arizona Department of Environmental Quality requires an Aquifer

Protection Permit for the facility with permit-specific water quality standards to be met for discharges into the recharge basins. Without a specific exclusion for recharge basins, additional permits would be required in order to perform routine maintenance (discing/blading the basins and removal of sediment and vegetation to improve infiltration). The City of Glendale's limited financial resources would be spent on permits without additional benefit to the environment. (p. 1-2)

Agency Response: **Basins created in dry land that recharge groundwater are excluded. See summary response.**

County of Los Angeles and Los Angeles County Flood Control District, California (Doc. #15620)

7.469 ***1. Groundwater Infiltration Basins***

The LACFCD owns and operates numerous groundwater infiltration basins, designed to recharge underground aquifers with stormwater, recycled water, and imported water. Each year the basins recharge an average of 290,000 acre-feet of water, which is equivalent to the annual water needs of 2.3 million people. The basins represent a vital part of the drinking water portfolio in Los Angeles County, where many communities obtain the majority of their drinking water (in some communities as much as 80 percent) from underground aquifers. A reliable local water supply, whether recycled or from rain, is more important than ever as California continues to face one of the most severe droughts on record.

The construction of groundwater infiltration basins first began in the early 1930s and continued into the 1960s. Modernization and operational enhancements continue today under funding partnerships with local water supply entities and the California Department of Water Resources. The basins - either excavated or converted from old gravel pits - are typically located next to engineered channels (which are considered to be WOTUS) and are separated from those channels by levees. Although located adjacent to flood control channels, the infiltration basins serve a very different function - to percolate water into underground aquifers. Water is diverted from the flood control channel to the basins via a headwaters structure and then allowed to percolate into the groundwater aquifer typically 100 to 200 feet below the ground surface. Optimal percolation capacity is achieved through regular and rigorous maintenance, which includes vegetation clearing, debris and sediment removal, vector control, and "ripping" of the basin floor to loosen compacted soils. Some or all of these activities potentially would require a CWA 404 permit and 401 certification if conducted in a jurisdictional waterbody. Any interference in such maintenance (for example, due to a delay in obtaining a 404 permit or 401 certification, or resulting from the permit conditions themselves) can seriously and irreversibly degrade a basin's percolation capacity.

The County and LACFCD are very concerned about any interpretation of the rule that might include infiltration basins as WOTUS, particularly the definition of "adjacent waters." The Proposed Rule expands the scope of "adjacent" from "wetlands" to all waters. 79 Fed. Reg. 22206. "Adjacent" waters are waters which are "bordering, contiguous or neighboring," including waters "separated from other [WOTUS] by man-made dikes or barriers, natural river berms, beach dunes and the like." 79 Fed. Reg. at

22263. Additionally, waters which are "neighboring," defined to be "waters located within the riparian area or floodplain of a [WOTUS], or waters with a shallow subsurface hydrologic connection or confirmed surface hydrologic connection to such a jurisdictional water" also meet this definition and would be considered WOTUS. Id. As discussed, the LACFCD's infiltration basins are adjacent to channels that are considered WOTUS. The basins may also be located within the floodplain of the adjacent channels. Also, the exclusion for artificial lakes or ponds in section b(5)(ii) is limited to specified uses, which currently do not include groundwater recharge. 79 Fed. Reg. at 22218. Thus, under the Proposed Rule, groundwater infiltration basins could be classified as WOTUS, even though they are not currently considered as such.

However, as the Proposed Rule indicates, "adjacent waters" are distinguished by the fact that they "provide similar functions which have a significant nexus to [WOTUS]." 79 Fed. Reg. at 22207. Infiltration basins do not provide a similar function to the adjacent channels. The destination of the water in infiltration basins is underground aquifers, which is not a WOTUS.[295] Since the water in the infiltration basins is being rapidly percolated into underground aquifers (a process which takes approximately one week from entry into the basin), there is not sufficient detention time for the water to make a hydrologic connection with adjoining channels. This characteristic distinguishes infiltration basins from other waters adjacent to a WOTUS, such as a wetland, which can influence the character of waters in the WOTUS.

Therefore, to avoid ambiguity, we request that Provision b(5)(ii) of the Proposed Rule be revised (as shown in Comment 2 below) to include an express exemption for groundwater infiltration basins. (p. 6-7)

Agency Response: Groundwater infiltration basins created in dry land are excluded. See summary response.

Southeast Florida Utility Council (Doc. #11879)

7.470 SEFLUC understands there is an exemption for groundwater, including groundwater drained through subsurface drainage system. However, it is concerned shallow subsurface connections referenced in the definition of adjacent waters may be used to establish jurisdiction despite this exemption. Arguably, if the groundwater exemption was intended to exclude all groundwater, including shallow aquifers, then the adjacent water definition would not specifically reference shallow subsurface hydrology connections as being included within the definition. Therefore, there must be some reconciliation of the exclusion of all ground waters in one section of the Proposed Rule and the inclusion of shallow subsurface waters in another. Given the uncertainty with future interpretations of this exemption, SEFLUC requests the Proposed Rule specifically exempt shallow aquifers from the WOTUS definition. (p. 4)

[295] In California, groundwater is a "water of the State" (California Water Code § 13050(e)) ("'Waters of the state' means any surface water or groundwater . . . within the boundaries of the state") and the Los Angeles Regional Water Quality Control Board has jurisdiction over groundwater basins in Los Angeles County.

Agency Response: **See summary response. See also the summary response of 7.3.6 Groundwater, Including Groundwater Drained through Subsurface Drainage Systems.**

San Gabriel Basin Water Quality Authority, California (Doc. #17049)

7.471 WQA respectfully requests that groundwater recharge basins be excluded from jurisdiction under the proposed rule. We note that the proposed rule definition of "waters of the United States" now includes, "...*all waters, including wetlands, adjacent to traditional navigable water*..." Although EPA has also listed several exceptions, we believe the definition should be modified to also allow an exception for groundwater recharge basins created specifically for the discharging, capturing and infiltrating of groundwater, storm water and non-storm water runoff. Such an exception would allow for the efficient discharge and reuse of water in infiltration basins without additional layers of onerous regulatory reviews — a scenario, which WQA envisions, could apply to discharges throughout the San Gabriel Valley regardless of whether or not the discharges are coveted by an NPDES permit. (p. 2)

Agency Response: **See summary response.**

Center for Water Advocacy et al. (Doc. #15225)

7.472 The Definition of Navigable Waters Should Include Groundwater. While we appreciate that the Proposed Rule would restore protections to most streams, regardless of size or frequency of flow, and to all wetlands inside of floodplains, we are concerned that it does not go far enough. For example, the rule specifically excludes "groundwater, including groundwater drained through subsurface drainage systems"[1] from the definition of "Other Waters". This is regardless of the fact that groundwater is often hydrologically connected to navigable waters to the same extent, if not more, in some cases then waters which the Proposed Rule has included in the definition.

In addition, while we appreciate that, in many cases, ground water does not contain the proper nexus to with navigable waters as to be defined as "Other Waters" under the Proposed Rule, the Rule has built in mechanisms that resolve this issue. For example,

> Under the proposed rule, these 'other waters' (those which do not fit within the proposed categories of waters jurisdictional by rule) would only be jurisdictional upon a case-specific determination that they have a significant nexus as defined by the proposed rule. Waters in a watershed in which there is no connection to a traditional navigable water, interstate water or the territorial seas would not be 'waters of the United States'.[2]

This same analysis could be applied to ground water so as to eliminate ground water when it does not fit under the definition of Other Waters but to include it when it is hydrologically connected and retains a nexus to Waters of the US. Indeed, this same rational applies to wetlands which are included in the definition by the Proposed Rule:

[1] https://www.federalregister.gov/articles/2014/04/21 /20 14-07142/definition-of-waters-of-the-united-statesunder-the-clean-water-act#h-13.
[2] Id.

> "On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas."[3]
>
> Finally, in many cases groundwater, clearly, falls under EPA's/CORPS' description of "significant nexus":
>
> > "Significant nexus" is not itself a scientific term, The relationship that waters can have to each other and connections downstream that affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas is not an all or nothing situation. The existence of a connection, a nexus, does not by itself establish that it is a "significant nexus." There is a gradient in the relation of waters to each other, and this is documented in the Report. The agencies propose a case-specific analysis in establishing jurisdiction over these "other waters" as consistent with the current science, the CWA, and the caselaw. A case-specific analysis allows for a determination of jurisdiction at the point on the gradient in the relationship that constitutes a "significant nexus."[4] (p. 6-7)

Agency Response: See also the summary response of 7.3.6 Groundwater, Including Groundwater Drained through Subsurface Drainage Systems.

7.4.3. Agricultural

Summary Response

Several commenters addressed exclusions for agriculture from the definition of "waters of the United States," both exclusions in the proposed rule and additional exclusions commenters would recommend. Note that these comments are in addition to those received on prior converted cropland, addressed earlier in this compendium.

Issue: Jurisdiction over discharges into farm or stock ponds, and irrigation features

Several commenters expressed concern that the rulemaking would limit or eliminate current exemptions from permit requirements for construction of farm or stock ponds, and construction and maintenance of agricultural irrigation features, by extending jurisdiction to cover such features. Others called for farm and stock ponds, irrigation ditches, and maintenance of ditches be identified as beyond the scope of "waters of the United States."

In response, the agencies note the proposed and final rules make no change to the permitting exemptions under CWA section 404(f)(1) and associated regulations. As a result, construction of farm or stock ponds, construction and maintenance of irrigation ditches, maintenance of drainage ditches, and other activities addressed under 404(f) will be treated under the final rule

[3] Id.
[4] Id.

exactly as they have been treated for many years: exempt from 404 permitting requirements unless recaptured under 404(f)(2). Note that these permitting exemptions apply to discharges of dredged or fill material into a water of the U.S. that would otherwise need a section 404 permit; they do not speak to the scope of jurisdictional waters.

The proposed and final rule does speak to the jurisdictional status of upland farm or stock ponds, and artificially irrigated areas. This rulemaking adds exclusions to the regulatory definition for the first time under (b)(4)(B) for artificial lakes and ponds created in dry land for uses such as stock watering, irrigation, settling basins, rice growing, or cooling ponds, and under (b)(4)(B) artificially irrigated areas that would revert to dry land should application of water to that area cease. In response to public comments, and discussed in section 7.3 above, the final rule preamble explains that these exempted areas need not be used exclusively for such purposes rather. As a result of these provisions, the agencies believe the final rule helps provide important clarity to the scope of excluded waters. For more discussion of these and other exclusions from the definition of waters of the US, see section 7.2 of this compendium, the preamble, and the Technical Support Document. In addition, Compendium 6 focuses on public comments and responses regarding ditches.

Issue: Jurisdiction over ditches, irrigation canals and other water distribution systems

Some commenters indicated an exclusion for ditches wholly in uplands or that do not discharge into tributaries is trivial because water inevitably goes somewhere. If the use of drains is impaired by this perceived regulatory overreach, commenters assert it would cause unnecessary expense for farmers. The cumulative effect of drains on navigable interstate waters should be subject to state-based requirements at discharge points that focus on a pollution problem. Commenters also noted the Proposed Rule does not expressly exempt irrigation canals, but instead defines "tributary" to include canals, and ditches not excluded in paragraph (b). They are concerned that many irrigation canals and water detention or delivery systems could become newly jurisdictional. Some commenters were concerned that the final rule would create a bias against irrigation projects on tribal lands, which (unlike most non-Indian irrigation projects) were created since the enactment of the CWA. They recommended the final rule should clearly exclude Indian irrigation projects from the definition of WUS.

In response, the agencies note that longstanding agency practice has regulated many but not all ditches, and that the agencies are for the first time excluded certain ditches by rule. The agencies do not agree the final rule expands jurisdiction over ditches. The agencies have considered ditches to be generally non-jurisdictional when they were excavated wholly in uplands, drained only uplands, and had less than intermittent flow. This approach is, for example, reflected in the 2008 *Rapanos* Guidance. The final rule refines the approach to ditches, by clarifying for the first time in rulemaking which ditches are excluded from jurisdiction. The final rule is also clear that ditches that do contribute flow directly or through another water to a water identified in paragraphs (a)(1) through (a)(3) are not jurisdictional. See Compendium 6 on ditches for more discussion, as well as the preamble and Technical Support Document.

With respect to commenters' suggestion that ditches and drains should be addressed as a point source and not as jurisdictional waters, the final rule is unchanged from the proposal. The

approach that ditches can be considered both reflects the CWA itself as well as longstanding policy. See the final rule preamble and Technical Support Document for more discussion.

The final rule does not exclude all canals from jurisdiction, and as indicated in the preamble and rule text, some canals may be waters of the United States where they meet the definition of tributary. The agencies do recognize, however, the importance of water reuse and recycling, and therefore paragraph (b)(7) clarifies that wastewater recycling structures created in dry land are excluded, including water distributary structures built for wastewater recycling. Paragraph (b)(7) of the final rule specifically excludes constructed detention and retention basins created in dry land used for water recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they also often are located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, waters of the United States. In contrast, 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 exclusion in paragraph (b)(7) codifies longstanding agency practice and encourage water management practices that the agencies agree are important and beneficial.

The purpose and intended effect of the final rule is not to create a bias against irrigation facilities developed on tribal lands. As mentioned above, the final rule policies are intended to encourage beneficial water management practices with all waters of the United States, including on tribal lands. As discussed in the preamble, tribes play a vital role in the implementation of the CWA and achievement of its goals.

Specific Comments

Gila River Indian Community (Doc. #13619)

7.473 By far the most significant impact that the Proposed Rule could have is on the Community's ongoing effort to develop and revamp our irrigation system to convey water throughout Community lands. This program, called the Pima-Maricopa Irrigation Project ("P-MIP"), has been ongoing for over a decade, and is intended to modernize and expand the on-Reservation irrigation system based upon the blueprint of complex agricultural waterways that were built by our ancestors. The Community is developing the P-MIP system to deliver water throughout the Community through an expansive 2,400 mile irrigation canal system. The Community's plans to expand agricultural production are directly tied to efforts to restore our traditional way of life and fight many of the alarming public health trends in our community. However, additional permitting requirements significantly hamper these efforts by additional permitting requirements for on-Reservation activities that have not required a CWA permit in the past. The Proposed Rule's broad definition of "waters of the United States" is comprehensive and has the

potential to encompass and extend Agency jurisdiction over the entire P-MIP system, which is currently exempt from jurisdiction.

The expansive assertion of jurisdiction that the Agencies' propose appears to run contrary to Congress' intent in enacting the CWA, at least with respect to agricultural projects, such as the Community's. The legislative history and text of the CWA clearly evince Congress' intent to specifically exempt from permit requirements the construction of farm or stock ponds, as well as the construction and maintenance of agricultural irrigation features.[296] The Community is concerned that the Proposed Rule contravenes Congressional intent – a power that regulatory agencies lack - and improperly extends agency jurisdiction over these types of features, which are extremely prevalent on the Reservation and critical to P-MIP.

The Proposed Rule does not expressly exempt irrigation canals, but instead defines "tributary" to include "canals, and ditches not exempted in paragraphs (b)(3) or (4)" of the proposed definition of "waters of the United States."13 These sections define ditches but do not define or describe canals. Under this approach, the P-MIP canal system could become jurisdictional under a broad interpretation of the Proposed Rule, even if this is not the Agencies' intent at this point in time. This would have deleterious impacts on the Community in general and P-MIP canals in particular, and runs contrary to Congressional intent underlying the CWA. (p. 3-4)

Agency Response: **See summary response above.**

7.474 The federal agencies seek input as to which waters "should be determined non-jurisdictional."[297] Below are the Community's recommendations.

1. The Final Rule should include unambiguous exemptions for all existing irrigation projects. These exemptions should clearly confirm that the proposed rulemaking does not apply to existing irrigation systems and that irrigation-related canals are not extensions of the waters of the U.S.

2. The expansion of these CWA rules discriminates against Indian irrigation projects. Most non-Indian irrigation projects were constructed in the latter 19th and first part of the 20th centuries before such regulations existed. By the latter 20th and early 21st centuries, as tribal nations engaged in nation-building by putting their hard-earned water resources to use, a plethora of regulations govern, restrict, and unnecessarily add expense to these tribal efforts to make beneficial use of their trust water resources. The Final Rule should make clear that Indian irrigation projects are exempt from the definition of "waters of the United States" and specify that the Agencies' jurisdiction under the CWA does not extend to Indian irrigation projects.

…

4. The rulemaking should clearly confirm that "canals" related to irrigation are not jurisdictional. Absent this clear definition, there appears to be great discretion on the part of the EPA and Corps to misapply and misappropriate jurisdiction by declaring

[296] S. Rep. 95-370, at 76 (1977); 33 U.S.C. § 1344.
[297] *Id*. at 22193.

jurisdictional all or parts of the P-MIP system, and thus requiring permits for maintenance of the system. (p. 9)

Agency Response: **See summary response above.**

North Carolina Forestry Advisory Council (Doc. #14123)

7.475 There is a list in the proposed rule of features that are not "waters of the US." Farming and silvicultural activities are not included on this list, but we feel they should be. Agriculture and forestry practices are already exempt under Section 404 of the Clean Water Act. It appears that this proposed rule seems to limit and possibly restrict activities covered in Section 404. (p. 1)

Agency Response: **See summary response above, particularly section discussing the 404(f) exemptions from permitting requirements and their relationship to waters of the United States.**

North Dakota Office of the Governor, et al (Doc. #15365)

7.476 **Agriculture drains should not be regulated as WOTUS; rather, states jurisdiction should address pollution concerns.**

The agriculture drainage exemption conflicts with the inclusion of ditches as tributaries. Similarly, exemptions of drains wholly in uplands or that do not discharge into EPA's expansively defined tributaries are trivial. Agricultural waters flow into drains that invariably go somewhere. For example, the exemption of subsurface drains as claimed by EPA is trivial because subsurface drains generally flow directly into surface drains that are claimed jurisdictional in the proposed rule. Very seldom do drains, including tile drains, flow into a waterbody that would not be considered tributary under the proposed expansive definitions. If use of the drains themselves is impaired by regulatory overreach by EPA or others with respect to drains, exemption of water removal at the land location will have little meaning

Agricultural drains should not be regulated as WOTUS. While the cumulative effect of drains on navigable interstate waters at discharge points should be subjected to state-based requirements, the oversight should not be on the drain. Instead, states should be allowed to focus on the receiving waterbody if there is a pollution problem. (p. 12)

Agency Response: **See summary response above.**

7.477 **The storm water runoff exemption is ill-defined.**

EPA needs to clarify if the stormwater runoff exemption refers to tile and surface drainage practices that remove those waters. If not, the exemption provides little protection to agriculture producers. It is important to understand that EPA's definition of tributary would not only authorize it to regulate water quality or limit discharge of agricultural chemicals (as with a TMDL) into a major natural waterway affecting downstream interests, but within the drain itself – within which waters would be under direct EPA jurisdiction. This offers an opportunity for micromanagement of the land itself at the field exit point, discounting downstream dissipation factors within the ditch or intervening wetlands.

North Dakota is particularly concerned with the impact to farmers during the current wet cycle. Within the wet climate scenario, many depressional areas flood. North Dakota is currently dealing with situations that involve the expansion of waters into farmsteads, farm fields, and towns. Many of these would be connected naturally under some scenarios; others would need to be artificially connected (drained) to protect the flooded parties. This authority would offer a powerful tool for federal interests to interfere with farmland water management, causing farmers hardship and delay as they are forced to spend more money and time on the permitting process. (p. 12-13)

Agency Response: See summary response above. In addition, it is important to note that the final rule includes clarifications made in response to public comments on stormwater-related features. Comments on regulation of stormwater management features and associated responses are discussed in 7.4.4, and in the final rule preamble.

Department of Public Health and the Environment, State of Colorado (Doc. # 16342)

7.478 **Agricultural Exemptions:**

The agencies have stated that the proposed rule does not change or limit any of the multiple exclusions and exemptions from jurisdiction and permit requirements provided by the CWA and its regulations. Colorado supports the agencies' decision to retain intact all of the CWA agricultural exemptions. Agriculture is one of the largest economic sectors in our state; our farmers and ranchers feed the people of Colorado and beyond while conserving environmental resources. It is essential that any revisions to the provisions defining the scope of CWA jurisdiction and its exemptions not create any confusion for the agricultural sector, and that the proposed definitions do not impact the scope of the agricultural exemptions. Compliance with the CWA must be straightforward and reasonable.

Furthermore, to provide clarity to the regulated community, the exemptions in CWA sections 402, 502, and 404 should be specifically included as exemptions in the proposed rule to expressly identify what is meant by the statement 9n the Fed. Reg. notice (page 22193-4) that all statutory exemptions for agriculture from CWA jurisdiction will be retained. (p. 2)

Agency Response: See summary response above. The final rule preamble expressly indicates that permitting exemptions are unchanged by this rulemaking.

State of Idaho (Doc. # 16597)

7.479 **3. Exclusions**

The Proposed Rule should specifically exclude additional waters and features generally considered to be outside the scope of CWA jurisdiction, including:
a. Farm ponds, stock ponds, irrigation ditches, and the maintenance of drainage ditches, as currently excluded under the CWA's agricultural exemption;
b. Man-made dugouts and ponds used for stock watering or irrigation in upland areas that are not connected to surface waters; and
c. Dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement. (p. 5)

Agency Response: **See summary response above. See response 7.3.2 regarding artificial lakes and ponds created in dry land.**

Pyramid Lake Paiute Tribe (Doc. # 17472)

7.480 6. Specific examples of agriculture exemptions should be addressed in § 328.3 Definitions. (p. 2)

Agency Response: **See summary response above. Specific examples of agricultural activities exempted from permitting requirements typically are addressed under program permitting regulations, and thus are outside the scope of this rulemaking. However, several types of water features often found on agricultural lands are excluded from the definition of waters of the United States under this rule, as noted in the preamble, Technical Support Document, and several compendiums in the Response to Comments (including this one).**

Board of County Commissioners, Clermont County, Ohio (Doc. #4581.2)

7.481 We are also concerned that certain agricultural best management practices, including grassed waterways and constructed vegetated beds or wetland treatment systems, could be regulated under the proposed definition. Local soil and water conservation districts and USDA Natural Resources Conservation Service agents are hard at work to encourage local farmers to voluntarily adopt these practices. If there is any possibility that a practice might result in the creation of a regulated "Waters of the U.S.," farmers across the country will stop utilizing these practices, which in turn would result in higher nutrient and sediment loadings to local streams. We recommend that any agricultural best management practice approved by the U.S. Department of Agriculture should be excluded from the proposed definition. (p. 2)

Agency Response: **The agencies agree that encouraging USDA best management practices is desirable. The interpretive rule issued in April 2014 addressing the relationship between USDA best management practices and CWA permitting requirements has been withdrawn. USDA best management practices and the Interpretive Rule are discussed in Compendium #14 at section 14.2.**

Land Improvement Contractors of America (Doc. #8541)

7.482 While EPA's efforts to preserve the agricultural exemptions are critical and well-intentioned, the combined effect of the expansion of jurisdiction, and the framework to implement the agricultural exemptions, creates the following legal uncertainties and risks: (1) the potential that current non-jurisdictional features, such as on-farm wetlands, ditches and ponds will be deemed jurisdictional (e.g., those located in natural streams or connected to downstream jurisdictional waters), (2) discharges or fill and dredge activities affecting such previously non-jurisdictional features may require a 402 or 404 CWA permit; and (3) failure to obtain a CWA permit may subject a farmer to CWA enforcement, including a citizen suit. (p. 2)

Agency Response: **See summary response above, as well as the final rule preamble and Technical Support Document.**

Annette Schafer (Doc. #2743)

7.483 I oppose the rule for the following reasons:

1: The rule does not explicitly exempt waters that have no potential to directly impact human health. 2: The rule does not exempt farm-use water that does not flow into or return to navigable waters, aquifers with no potential to be impacted by chemical application, surface streams and rivers. 3: Water used for irrigation, supplied through canals and ditches that does not return to rivers, streams, and potentially impacted aquifers should be exempted. 4: The distribution systems used to convey irrigation waters should also be exempted. (p. 1)

Agency Response: See summary response above, particularly the subsection addressing jurisdiction over ditches, irrigation canals and other water distribution systems. An earlier section of this compendium addresses the fact the final rule excludes groundwater from the definition of waters of the United States. As discussed in the Technical Support Document, CWA jurisdiction is not based on the potential for such waters to directly impact human health.

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

7.484 The EPA has stated that the proposed rule will NOT apply to wet areas on fields or erosion features on fields. We are concerned that in the future, the broadening of the definitions and jurisdictions of "wetlands", "ephemeral streams" and "ditches" in this document could lead to regulation of retention ponds, a water quality measure that's been widely adopted in our area, to the benefit of our lakes and streams. (p. 2)

Agency Response: See summary response above, particularly the subsection on jurisdiction over ditches, irrigation canals and other water distribution systems.

Adams Ranch, Inc. (Doc. #4978.2)

7.485 While agricultural operations have listed exemptions, there are situations that may not be considered. As an example, water retention has been identified as a "Best Management Practice," or an income source with "Dispersed water storage," In either case, agricultural lands may take on wetland characteristics. This could be detrimental to the lands under lying value, if they could not be converted back to an upland use (prior use). (p. 1)

Agency Response: See summary response above.

National Farmers Union (Doc. #6249)

7.486 The agencies can alleviate agriculture's concerns by noting that waters not listed under section (b) of the proposed rule are not jurisdictional by default and will not be considered within CWA jurisdiction unless they fall into one of the categories listed in sections (a)(l) to (a)(7). (p. 8)

Agency Response: Under the final rule, all waters and features identified in paragraph (b) as excluded will not be waters of the United States, even if they otherwise fall within one of the categories in paragraphs (a)(4) through (a)(8).

Minnesota Agricultural Water Resource Center (Doc. #14284)

7.487 In agricultural settings, we recommend… Farm fields should also be defined as always non-jurisdictional. (p. 2)

Agency Response: The CWA and the final rule defining waters of the United States only address waters, not dry land in farm fields. As discussed in many of the Response to Comments compendiums, the final rule preamble, and Technical Support Document, many water features on farm fields are non-jurisdictional. In addition, longstanding permitting exemptions for agricultural activities in jurisdictional waters are unchanged by the final rule.

Peltzer & Richardson, LC (Doc. #16360)

7.488 …the exclusion should be expanded to include agricultural ponding basins that are not connected to any other water body. Agricultural operations often have need for temporary ponding of irrigation or tail water, and basins for these purposes have no logical or functional connection to any navigable waterway, and should simply be excluded by rule. Currently, such basins can trigger the need for a full jurisdictional determination, requiring costly and lengthy review by USACE. Again, such processes have little to no value in meeting the core intent of the CWA (the preservation of the nation's navigable waterways), and therefore a simple exclusion for these basins would serve the public interest. (p. 6)

Agency Response: See summary responsive above, as well as responses regarding artificial lakes and ponds and wastewater recycling structures.

Glenn-Colusa Irrigation District (Doc. #16635)

7.489 The Proposed Rule intends to maintain current exclusions contained within the definition of WOTUS, and to also incorporate other exclusions that have been implemented through longstanding practices of the Agencies. However, the current exclusions and proposed new exclusions do not specifically address constructed facilities used to convey and deliver irrigation supply water, and irrigation and drainage ditches used in agriculture.

…

With respect to constructed facilities used to convey agricultural supply waters, the Proposed Rule is silent and arguably no exclusion exists to protect such facilities from falling within the definition of WOTUS. Considering the intent and purpose of such facilities, and the fact that such facilities were constructed for this sole purpose, it is inappropriate for them to be WOTUS by virtue of some "controlled" connection to a traditional navigable water. To avoid this result, GCID recommends that a new exclusion be created for constructed facilities that convey agricultural supply water. Accordingly, we recommend the following new category be added to the list of exclusions:

> Constructed facilities that are used solely to convey agricultural supply waters. (p. 7, 9)

Agency Response: See summary response above, particularly subsection on jurisdiction over ditches, irrigation canals and other water distribution systems.

Washington County Water Conservancy District, St. George, Utah (Doc. #15536)

7.490 **Irrigation Facilities.** 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.

The irrigation facilities of the WWG member irrigation districts which receive Central Arizona Project (CAP) water cross many dry washes and streams within the Gila River Watershed, which ultimately drains into the Colorado River several hundred miles away. In constructing, operating, and maintaining its irrigation and electrical systems, the CAP Irrigation Districts are constantly crossing and occasionally working in these dry stream beds which are often located in flood plains. The CAP's Irrigation Districts have their own irrigation water distribution systems which consist of multiple reasonably large canals and concrete lined ditches, which deliver irrigation water to the individual farms within the districts and are constructed pursuant to Bureau of Reclamation (BOR) designs and remain subject to BOR inspection and ownership. The CAP Irrigation Districts deliver only irrigation water through these systems to the individual farms of landowners, and to a few Indian reservations. Most of these individual farms include man-made dirt ditches for irrigation purposes, and tail water or excess flows often drain into one or more of the dry washes that the rule would likely treat as "ephemeral tributaries" to the Gila River Watershed. In addition, the natural drainage features have been enhanced to support flood control channels, which protect fields and irrigation facilities from flash flood events. In the very occasional major flood event, these flood control channels will divert flood flows into and through the natural drainage system. Historically, maintenance work on these flood control channels has been performed on short notice and without the need to obtain CWA permits under section 404. The CAP Irrigation Districts also operate and maintain hundreds of irrigation wells within these same areas, which could be treated as impacting "shallow subsurface" water under the Proposed Rule. In short, the Proposed Rule would appear to render most or all of the CAP Irrigation Districts' systems as potentially jurisdictional.

To date, the Agencies' only response to the many concerns expressed by the irrigation community is to state that the rule "keeps intact all [CWA] exemptions and exclusions for agriculture that farmers count on,"[298] but the Agencies fail to recognize that the Proposed Rule would limit the effect of existing exemptions and exclusions by asserting jurisdiction over a much wider range of irrigation facilities, and fail to recognize that CWA permitting exemptions do not cover many routine activities necessary for irrigation. In particular, as noted above, the scope of the proposed jurisdictional exclusions for artificially-irrigated areas and irrigation ponds is unclear. Moreover, even supporters of the Proposed Rule have admitted that "it is true that certain exemptions

[298] Nancy Stoner, *Setting the Record Straight on Waters of the US*, EPA CONNECT BLOG (Jul. 7, 2014), http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/.

only apply to discharges of dredged or fill material, as opposed to pesticides."[299] For these reasons, rather than subjecting water purveyors and users to a patchwork quilt of vague and narrow jurisdictional exclusions and permitting exemptions, the Agencies should categorically exclude all artificial irrigation facilities, as proposed in Section IV above. (p. 30-31)

Agency Response: **See summary response above, particularly subsection on jurisdiction over ditches, irrigation canals and other water distribution systems. With respect to jurisdiction over ephemeral streams and certain ditches, see Compendium #8 on tributaries. With respect to the CWA section 404(f) permitting exemptions applying only to discharges of dredged or fill material, the CWA itself limits the exemption to dredged and fill material.**

Castaic Lake Water Agency, Santa Clarita, California (Doc. #17061)

7.491 The proposed definition of tributary includes "A tributary, including wetlands, can be a natural, man-altered, or man-made water (emphasis added) and includes...canals and ditches...". This definition is so broad that numerous man-made non-stream conveyances would constitute tributaries and become subject to unnecessary permitting. As discussed above, CLWA relies on water banking programs with agricultural water agencies in the San Joaquin Valley. These agencies operate manmade canals, such as the Cross Valley Canal in Kern County, to convey water between water banking facilities and the California Aqueduct. CLWA joins ACWA's requests that water conveyance systems be excluded from the definition of "waters of the U.S." in the proposed rule. (p. 2)

Agency Response: **See summary response above.**

Kansas Natural Resource Council (Doc. #14599)

7.492 It is understandable that the Kansas agricultural community would be concerned about the proposed rule, especially if one looks at the available maps of potential playas and tributaries in Kansas. According to Bowen et al. (2010) there are over 22,000 playas in western Kansas. However, approximately 80% of these are less than five acres. It is likely that the majority of playas in Kansas are considered prior converted cropland and are therefore exempt from jurisdiction. The EPA, in an effort to further clarify jurisdictional waters, should attempt to assess the status of playas in this regard. At this juncture it is expected that protection of our remaining playas will come as a result of cooperative efforts such as the Playa Lake Joint Venture rather than through an application of the proposed rule. Cooperative efforts such as the PLJV should be encouraged and supported. It may be that efforts by groups such as PLJV afford playas greater protection than imposition of "significant nexus" rulings. As for the tributaries, the proposed rule plainly states that there are to be no new jurisdictional waters. The agricultural activities that currently take place in the ephemeral waters of the agricultural landscape are exempt from regulation. The ephemeral and intermittent tributaries have

[299] Natural Resources Defense Council, Analysis of American Farm Bureau Federation Response to EPA Myth Blog 2, *available at* http://switchboard.nrdc.org/blogs/jdevine/Analysis%20of%20AFBF%20response%20to%20EPA%20myth%20blog.pdf (last visited Nov. 7, 2014).

always been jurisdictional under the Clean Water Act but have been ignored or exempt from protection in our highly altered and agricultural landscape. (p. 1-2)

Agency Response: The agencies support state efforts to protect local water resources. See also Compendium # 4 on other waters, and Compendium #5 on significant nexus. See also the final rule preamble and Technical Support Document.

7.4.4. MS4s and other stormwater management features

Summary Response

Background

A municipal separate storm sewer system (MS4) is a conveyance or system of conveyances that is owned or operated by a public entity, designed and used to collect or convey stormwater and discharge it to waters of the U.S. This conveyance system includes road drainage systems, catch basins, curbs, gutters, ditches, man-made channels, or storm drains. An MS4 is often operated by a municipality or county government, but other storm sewer systems, such as large public institutions (e.g., military bases) and State Departments of Transportation operate MS4s. MS4s often rely on a drainage network consisting of jurisdictional waters as well as constructed conveyance structures to transport stormwater. Where MS4s incorporate creeks and streams, which may be channelized, piped or otherwise modified within their drainage network, the creeks and streams remain jurisdictional waters even if they are considered to be a part of the MS4. As development has intensified and reduced the infiltration capacity of the land, storm sewer systems have become significant pathways for collecting and carrying pollutants to waters of the U.S., often causing significant adverse effects on receiving water. To mitigate impacts on water quality, MS4s may have constructed stormwater "best management practices" (BMPs) to control the volume and/or pollutant loading of stormwater before it is discharged.[300]

Stormwater discharges from certain MS4s to waters of the U.S. are regulated under the National Pollutant Discharge Elimination System (NPDES) permit program under CWA § 402(p). Regulated MS4s include those serving a population greater than 100,000, those within Census-designated urbanized areas, and others that are designated by the NPDES permitting authority on a case-by-case basis. MS4 permits must require controls to reduce pollutant discharges to the "maximum extent practicable" and may include other appropriate control requirements, such as specific provisions to address water quality. Most states are authorized to implement the NPDES

[300] Under the NPDES regulations, "best management practices" or "BMPs" mean schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollutions of "water of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks or drainage from raw material storage. 40 CFR §122.2. In the stormwater program, a BMP can be structural or nonstructural, and is the term used to describe the varied activities undertaken to administer a stormwater management program in order to meet permit conditions. "Practices" in this context does not necessarily mean regulated activities; the term can also refer to physical structures built to manage stormwater, e.g., a stormwater pond or a constructed treatment wetland.

stormwater program and issue MS4 permits. Permitting authorities have considerable flexibility in establishing structural and non-structural BMPs to control stormwater discharges. MS4 permits typically require implementation of stormwater control practices targeted at reducing pollutants in stormwater before it reaches the MS4, such as controlling sediment and erosion at construction sites, reducing or treating discharges from new development and redevelopment projects, sweeping streets, eliminating illicit discharges to the MS4, and implementing pet waste control ordinances.

Unlike most other NPDES permits, such as industrial plants and sewage treatment works permits that establish pollutant limits and monitoring requirements for discharges from each of a facility's discharge pipes, MS4 permits generally do not have specific provisions requiring end-of-pipe effluent limitations for specific pollutants or monitoring at each MS4 outfall. CWA § 402(p)(3)(B)(i) specifically authorizes the issuance of system-wide or jurisdiction-wide permits to MS4. Requirements in MS4 permits typically apply to the entire system without reference to specific outfalls. MS4s typically implement a monitoring program that relies on representative sampling of outfalls and in some cases in-stream monitoring. Monitoring results are typically used to inform the MS4 and the permitting authority as to how the existing best management or source control practices are performing and how they might be modified to further reduce pollutant discharges.

MS4 NPDES permits require control of discharges to and from their storm sewer systems in several ways. They must prohibit non-stormwater discharges into the MS4 unless the non-stormwater discharges have their own NPDES permit coverage. In addition, stormwater discharged from certain industrial or construction sites through the MS4 to the receiving water (or directly to the receiving water) must be covered by an NPDES permit. The MS4s' programs also need to reduce pollutants in stormwater to the MS4 from construction sites during construction and to have controls in place that prevent or minimize water quality impacts from post-construction stormwater discharges from areas of new development and redevelopment. Larger MS4s are also required to oversee regulated discharges from industrial sites. All MS4 permits must require reduction of pollutants "to the maximum extent practicable" and may include requirements targeting pollutants of concern to address impaired waters and to be consistent with the wasteload allocations from an approved total maximum daily load calculations. Increasingly, "green infrastructure" is used to achieve water quality objectives for urban stormwater and to minimize damage to the biological, physical and chemical integrity of the receiving water by reducing the volume of stormwater being discharged. While there is no single definition of "green infrastructure," with respect to stormwater, it generally refers to stormwater management systems that mimic nature by infiltrating (and thereby treating), evapotranspirating or storing precipitation and runoff. Examples of green infrastructure include rain gardens, bioswales, and other infiltration devices, permeable pavement, green roofs, tree canopy, and cisterns. Minimizing the creation of impervious surfaces and downspout disconnection are also forms of green infrastructure practices to control stormwater.

A fundamental requirement for operators of all regulated MS4s is to develop a map of their separate storm sewer systems showing the location of all outfalls and receiving waters. See 40 CFR §122.26(d)(1)(iii(B)*(1)* and §122.26(d)(ii) for Phase I MS4s and §122.34(b)(3)(ii)(A) for Phase II MS4s. As has been the case with the NPDES permit program in general, identification

of jurisdictional receiving waters initially is done by the permit applicant by specifying outfall locations and the names of receiving waters, either when they apply for a permit or as part of complying with permit terms. As noted above, MS4s frequently incorporate existing jurisdictional waters into their stormwater systems, though these jurisdictional waters may not be explicitly identified as such where they lack outfalls. Issues associated with the jurisdictional status of waters are generally resolved through the permit issuance process, rather than as a separate or preliminary determination before permit coverage is decided. Mapping of outfalls and jurisdictional receiving waters has been an ongoing effort for most regulated MS4s.

Whether they are regulated under § 402(p) or not, 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. 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.

Summary of comments

While EPA did not propose to change the jurisdictional status of various components of an MS4, numerous commenters asserted that the definitions of "adjacent water," "tributary," or "other waters" in the proposed rule would encompass various MS4 features and make them jurisdictional waters of the U.S. In some cases, commenters expressed concern that if one component of an MS4 were jurisdictional, then the entire system would be considered jurisdictional. The result, commenters argued, is that the universe of waters of the U.S. would be greatly expanded and require significant state efforts to establish water quality standards and TMDLs for these newly created jurisdictional waters, and potentially the adoption of water quality-based effluent limitations in MS4 permit for discharges to these waters. An oft-noted contention was that MS4 owners/operators would need to obtain § 404 permits for routine maintenance of their MS4s even if their systems were already regulated under § 402 permits. This in turn could cause delays while waiting for § 404 permit coverage, even in time-sensitive or emergency situations. Other concerns listed by commenters included unspecified conflicts between § 402 permit requirements and § 404 requirements, possibly inconsistent jurisdictional determinations under the two programs, and confusion about the extent to which an MS4 would qualify as an excluded "waste treatment system." Many commenters asserted that regulation of MS4s under the § 402 program is sufficient for any waters within their drainage systems and regulation under the § 404 program would not add any additional protection for those waters. In addition, commenters were concerned that the extent to which MS4s fall under the waste treatment system or other exclusions had not been clearly expressed and requested very clear guidance on which features are jurisdictional and which are not, particularly where natural drainage features had been replaced by or made into engineered drainage features.

Commenters provided several general and very specific recommendations for exclusions from the definition of waters of the U.S. for stormwater control features. Many questioned how stormwater facilities fit into the various exclusions listed in paragraph (b) of the proposed rule, e.g., settling ponds, artificial ponds, etc. A number asserted that an MS4 and its entire system of conveyances and other features, whether currently considered jurisdictional or not, should be

excluded. Many claimed that MS4s are waste treatment systems and should be clearly identified as falling within the existing waste treatment system exclusion. Some commenters observed that stormwater control features that do not belong to a regulated MS4 should also be excluded, including MS4s not regulated under 402(p), and stormwater control ponds, conveyances and similar structures located at industrial and commercial sites. Others suggested that an exclusion be only for those MS4s that are permitted, or only MS4s that are owned by municipalities. Several commenters supported an exclusion only if the components were not built in waters of the U.S. Specifically, this was the recommendation of the Local Government Advisory Group.

Commenters identified numerous physical features of an MS4 that should be excluded. Many also expressed concern that green infrastructure and other "natural" practices to improve water quality or reduce runoff would be considered waters of the U.S. under the proposed rule. According to commenters, making such features jurisdictional would discourage the use of green infrastructure practices, contrary to EPA's promotion of green infrastructure as a way for municipalities and others to provide multiple benefits for their communities.

Final Rule

To address the concerns raised by many of the commenters and to clarify the Agencies' intent with respect to stormwater control features, the Agencies have a new exclusion for "stormwater control features constructed to convey, treat, or store stormwater that are created in dry land" from the definition of "waters of the U.S." at paragraph (b)(6). The following summary describes this new exclusion and addresses the many comments related to a stormwater exclusion. Some issues raised in connection with stormwater control are also addressed in other compendiums as well, such as the Implementation compendium (12), the Legal compendium (10), the Ditch compendium (6) and the Miscellaneous compendium (14).

MS4s often are a complex mix of constructed and natural features. When the EPA first proposed regulations for stormwater management to implement the 1987 amendments to the CWA, it was careful to distinguish between the constructed conveyance structures and natural (or altered natural) waters that are used as part of the MS4's drainage system. See 53 Fed. Reg. 49442 (Dec. 7, 1988). Generally, constructed features are not considered jurisdictional, while waters that were jurisdictional in the past retain their jurisdictional status as waters of the U.S., even if they are physically incorporated into the stormwater drainage network through piping, ditching, channelizing, etc. The final rule retains this status quo, but to provide clarity and to respond to the considerable confusion expressed by commenters about which stormwater control features are jurisdictional and which are not, and widespread calls for a stormwater component exclusions, particularly for MS4s, the Agencies developed a specific exclusion for stormwater control features at paragraph (b)(6) of the final rule. EPA's intent is to provide additional clarity and certainty. Consistent with the other exclusions in the final rule, as long as a feature qualifies for the stormwater control exclusion, i.e., constructed to convey, treat, or store stormwater and built in dry land, it cannot become a jurisdictional water by virtue of the definitions of jurisdictional waterbodies, such as "adjacent waters," "tributaries" or "other waters."

The new stormwater control exclusion covers all stormwater control features that are built in dry land (with one exception noted below). The exclusion is broadly defined to cover stormwater

control measures that are constructed to convey, treat, or store stormwater built in dry land, and does not specify particular control measures that qualify for the exemption. Stormwater professionals and NPDES regulation refer to stormwater control features as Best Management Practices or BMPs. The Agencies decided not to list specific measures or features because the lack of uniform definitions for many of the features could miss some features and fail to anticipate future control features that should be captured by the exclusion. While the Agencies understand the desire to specify the exact features that qualify for the exclusion in the rule language itself, they determined that the better course of action would be to provide a more general category of excluded features. Some of the most common stormwater control measures include traditional stormwater control structures such as pipes, street gutters, retention basins, detention basins, and ponds, as well as the newer types of control that fall generally into the category of "green infrastructure" such as rain gardens, bioswales, cisterns, and constructed wetlands. 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 also note that the stormwater control exclusion applies to all covered stormwater control features, with one exception, regardless of whether an NPDES permit for the stormwater discharge from the control feature is required. Thus, it covers municipal (regulated and unregulated), industrial, commercial, institutional, and residential stormwater control features that are built in dry land. This exclusion does not cover transportation ditches; those ditches are addressed under paragraph (b)(3) of the rule For ease of implementation, the agencies want water features to be dealt with under only one provision of the rule; the agencies do not expect the scope of ditches excluded to be different under (b)(3) and (b)(6).

Commenters suggested that stormwater ponds could be covered by the exclusion for ""[a]rtificial 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 . . . ." Other commenters questioned whether stormwater retention or detention ponds built at NPDES regulated construction sites would qualify for the exclusion for "water-filled depressions created in dry land incidental to … construction activity." By creating a separate exclusion that covers stormwater control measures not built in dry land, the Agencies avoid uncertainty about interpreting other exclusions and enhance consistency in the application of the exclusions. Many commenters promoted the idea of using the waste treatment exclusion as the best means for excluding stormwater control devices. As others noted though, the waste treatment exclusion has limitations, such as being available only for waste treatment systems built to meet Clean Water Act (CWA) requirements. Since the CWA only regulates some MS4s, any stormwater control measures constructed and used for purposes other than meeting CWA requirements would not have qualified for this particular exclusion. This could cause confusion since unregulated MS4s often use the same types of stormwater control measures as regulated MS4s, but are not building them for purposes of meeting the CWA. In addition, conventional stormwater collection control measures may be designed simply to provide flood control and stormwater transport, rather than pollutant removal. While some stormwater control features, such as bioretention basins and constructed wetlands, clearly provide treatment of pollutants, it would be difficult to assert that treatment was actually occurring in some MS4 components, such as street gutters. Historically, EPA has considered constructed treatment wetlands that are not built in waters of the U.S. to be covered by the waste treatment system exclusion. EPA notes

that regardless of which exclusion under paragraphs (b)(1) – (b)(7) is applied, the effect is the same under the final rule. Any feature that qualifies for an exclusion cannot be a water of the U.S., even if it otherwise would fit into the categories of jurisdictional waters specified in paragraph (a)(4) – (a)(8).

The Agencies do not agree with commenters who stated that jurisdictional waters incorporated into the drainage or stormwater conveyance system should be excluded by virtue of the fact that they are part of the larger stormwater control system. A water does not lose its jurisdictional status if it is piped, channelized, ditched or otherwise modified. This has been the case historically under the rules that applied prior to today's action and continues to be the case under the final rule. The Agencies note that the Local Government Advisory Council specifically recommended not excluding "natural waters." The Agencies recognize that this means highly engineered MS4s that may have replaced natural drainage features with engineered structures will likely have jurisdictional waters within their systems. Urban waters provide important amenities to communities and aquatic life. Maintaining the jurisdictional status of streams that have been piped or altered will encourage stream restoration in urban areas, which has been vital in improving water quality. If a stream that has been enclosed in a pipe is jurisdictional only in its natural state, becoming a jurisdictional water when it is restored would most likely discourage important restoration efforts. By acknowledging through the exclusion that urban stormwater drainage systems can contain jurisdictional waters within them even if they have been modified or engineered over time, communities may be more likely to appreciate the importance of these waters within the larger system and to undertake efforts to restore these waters over time to restore water quality.

The Agencies also do not agree with some commenters that "waters of the U.S." and "point sources" are mutually exclusive terms under the CWA. As noted in the preamble, EPA's longstanding position as a legal matter, is that one feature can be both a point source and a jurisdictional water. This position is discussed more thoroughly in the Technical Support Document. As a practical matter, commenters seem to use the term "MS4" in varying ways. Some MS4 owners/operators recognize that certain waters within the drainage network are jurisdictional and serve to convey stormwater collected elsewhere in the system further downstream; stormwater may enter and leave numerous constructed conveyance features along its pathway to a water of the U.S. Other MS4 owners/operators consider all waters within their drainage structures to be part of their MS4s because they form a continuous route for channeling stormwater to receiving waters. Stating that MS4s can contain waters of the U.S. is not only a long-standing position, but also recognizes that different perspectives exist on describing the scope of an MS4.

Several commenters stated that having jurisdictional waters within their regulated municipal separate storm sewer systems would cause confusion, especially with respect to the application of water quality standards and TMDLs in their NPDES permits. Jurisdictional waters have always been subject to requirements for WQS and TMDLs and this is unchanged by the final rule. Furthermore, MS4 permits are written on a system-wide basis and do not typically require compliance with end-of-pipe numeric effluent limitations at each outfall. Permit writers have a great deal of flexibility in how MS4 permits can be written to protect receiving waters from stormwater discharges. In addition, states have flexibility to identify the designated use of a

jurisdictional water and to establish what water quality criteria are necessary to meet that use. For example, some states have used narrative criteria rather than numeric criteria to protect certain jurisdictional waters within MS4 drainage networks. The final rule does not change these existing flexibilities. The Agencies do not share the view that the final rule greatly expands the universe of waters requiring the need for states to establish water quality standards and TMDLs. As an overall matter, the Agencies have worked diligently to ensure that the final rule does not change the jurisdictional status of various components of stormwater systems by creating new categories of jurisdictional waters.

Several commenters cited a policy against using jurisdictional waters for in-stream treatment and the prohibition in 40 CFR §131.10 (a) against designating waste transport or waste assimilation as a use as reasons against retaining jurisdiction over waters that are part of the overall drainage network to manage stormwater. The agencies do not want jurisdictional waters to become receptacles for waste. However, on the rare occasions that in-stream treatment is the only feasible alternative, usually due to geographical restraints, a permit applicant may apply for a § 404 permit to create a waste treatment system in a jurisdictional water, thereby converting that water to non-jurisdictional status. That a jurisdictional water may transport stormwater along with other flows, such as base flows, does not mean that a water cannot have beneficial use other than "waste transport." States are required to designate uses and adopt criteria consistent with Clean Water Act requirements. There, the agencies disagree with the commenters' point that waters that a part of a stormwater drainage network cannot be jurisdictional.. MS4 permits rarely specify numeric water quality based effluent limits for specific outfalls; more likely, the permit would have requirements to use best management practices (BMPs). In those instances where an NPDES permit establishes a numerical effluent limitation for a particular MS4 outfall and the MS4 is not able to achieve that limitation, further off-stream treatment would need to occur. It is important to keep in mind that not every change in a conveyance structure (e.g., channelized in concrete to unchannelized) means there is a discharge that would need an NPDES permit. See §122.26(b)(9), which explains that in the context of MS4s, open conveyances that connect segments of the same stream or other jurisdictional waters that transport waters of the U.S. are not outfalls for purposes of MS4 NPDES permits.

As a general matter, the agencies do not agree that regulation under both § 402 and § 404 of the CWA provides redundant protection. These CWA sections protect the nation's water resources in different ways, and standards for determining permit terms and conditions differ under the two programs. Permits for "traditional" NPDES discharges (e.g., POTWs and industrial plants) contain effluent limitations for pollutants in discharges that are based on the level of pollutant control achieved by specified levels of technology, with more stringent effluent limitations imposed when they are necessary to attain water quality standards in the receiving water body. Permits for MS4 stormwater discharges differ in the applicable standards for permit terms and conditions issued for MS4 in that the permit "shall require controls reduce the discharge of pollutants to the maximum extent practicable, . . . including such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." § 402(p)(3)(B)(iii). Permits typically require source control BMPs, rather than end-of-pipe effluent concentration limitations. Under the § 404 program, permit conditions may be derived from § 404(b)(1) guidelines and may involve an analysis of alternatives to the discharge to minimize environmental harm. There may be some overlap between the two programs in terms

of sites and facilities regulated, but the protections and actions offered by each program differ. The two programs are not interchangeable in how they protect waterbodies or in how they are implemented.

Many commenters said that having jurisdictional waters within an MS4 drainage network would mean that discharges to the MS4 would also have to be regulated, implying that this would change the current situation. To support this assertion, some commenters cited a discussion in the preamble to the 1990 Phase I stormwater regulations that covers large/medium MS4s and stormwater discharges associated with industrial activity. This discussion distinguishes between direct discharges to a Waters of the U.S. and discharges through an MS4. EPA notes that while not every source of pollutants that enter an MS4 is regulated under federal law, controlling sources and preventing pollutants from entering the MS4 has always been a significant focus of the MS4 program. CWA § 402(p)(3)(B)(ii) requires that permits for MS4s "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers." In addition, stormwater discharges associated with certain industrial activity must be covered under an NPDES permit regardless of whether they discharge directly to waters of the U.S. or through an MS4. For this reason, the preamble to the 1990 Phase I regulation explained that discharges to waters of the U.S. via an MS4 are still discharges subject to the NPDES permit program. EPA's explanation of discharges through an MS4 does not support a conclusion that MS4s cannot have jurisdictional waters within their systems and has nothing to do with the location of jurisdictional waters. The permitting authority may designate additional stormwater discharges that are discharged via an MS4. It is also important to note that the MS4 owners/operators must develop and implement controls for certain stormwater discharges like sediment from construction sites and controls related to post-construction stormwater in new and redevelopment. Contrary to the assertions made by these commenters, the NPDES program for stormwater discharges does regulate discharges of pollutants that enter an MS4. Implementation of the stormwater program under CWA § 402(p) does not change as a result of the final rule. The stormwater control feature exclusion is designed to reflect the status quo with respect to MS4 components. Commenters raised a number of questions about implementation of the rule with respect to stormwater, but implementation issues are outside the scope of this rulemaking. These types of issues may be addressed in outreach materials.

Specific Comments

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

7.493 The State of Hawaii Department of Transportation (HDOT) respectfully recommends the following changes to the Proposed Rule at 33 CFR Part 328.3 (Federal Register Vol. 79, No. 76 p. 22263 column I paragraph 3) and similar sections in 40 CFR Parts 110, 112, 116, 117, 122, 230,232,300, 302, 401, and Appendix E to Part 300 as follows:

[Note: underlined section is to be added and bracketed section with strikeout is to be deleted]

"(b) The following are not 'waters of the United States' notwithstanding whether they meet the terms of paragraphs (a)(I) through (7) of this definition-

"(1) Waste treatment systems, including treatment ponds, lagoons**, or Clean Water Act regulated municipal separate storm sewer systems**

and the component conveyances within such systems." ~~[designed to meet the requirements of the Clean Water Act.]"~~

Rationale

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...(p. 1)

Agency Response: Please see summary response to 7.4.4.

Pyramid Lake Paiute Tribe (Doc. #17472)

7.494 The rule explains that connectivity to a traditional navigable water is considered criteria for waters of the United States. There isn't any language in the rule that defines geographic limit. The rule states that tributaries have a significant nexus to traditional navigable waters, but the nexus test is inapplicable to MS4s, since they are already regulated under CWA Section 402. To address this matter, we suggest that the rule clearly delineates that components of the MS4 are not waters of the United States. MS4s should be specifically defined as exempt from waters of the United States. (p. 2)

Agency Response: Please see summary response at 7.4.4.

State of Alaska (Doc. #19465)

7.495 Finally, further clarity is needed in a newly proposed rulemaking that explicitly excludes stormwater collection and treatment systems from broad CWA jurisdiction. EPA already regulates discharges from certain stormwater systems to navigable waters under CWA 402. (p. 32)

Agency Response: Please see summary response at 7.4.4

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

7.496 3) Caltrans requests that the exclusions listed in section (b) of the proposed rule specifically exclude stormwater facilities created in uplands, and designed to meet the requirements of an MS4 program, from jurisdiction under the CWA. (p. 2)

Agency Response: Please see summary response at 7.4.4

Florida Department of Transportation (Doc. #18824)

7.497 **Jurisdictional Status of Stormwater Management Systems**

The proposed rule identifies as non-jurisdictional "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act." However, the agencies do not provide an explanation of this exclusion, so it is not clear how or if this exclusion would apply to stormwater management systems that are constructed as part of transportation facilities to meet requirements of the Clean Water Act (CWA).

The rule should clarify that the exclusion for "waste treatment systems, including treatment ponds or lagoons" specifically applies to stormwater management systems that are constructed as part of transportation facilities to meet state and federal regulatory requirements of the National Pollutant Discharge Elimination System (NPDES) pursuant to Section 402 of the CWA. The exclusion should specifically extend to all stormwater management facilities, including stormwater collection, conveyance, treatment and discharge systems that are or may be regulated as Municipal Separate Storm Sewer Systems (MS4s) under the NPDES permitting program pursuant to Section 402 of the CWA. Without such exclusion for stormwater management systems, many MS4 regulated entities, including state transportation agencies such as FDOT, will no longer be able to appropriately manage and treat stormwater consistent with CWA requirements prior to discharge to Waters of the United States (WOTUS) as the MS4 itself would likely be deemed WOTUS under the proposed rule.

Even though USACE and USEPA do not propose to make conforming changes to the existing definitions of WOTUS for the various CWA programs to have the same language with respect to the "waste treatment system" exclusion, there is uncertainty as to whether canals, ditches and or any feature that may be part of a permitted facility will now be deemed a WOTUS and subjected to additional permitting. In transportation facilities, linear flow features such as swales, ditches, canals and culverts provide additional treatment to stormwater. Extending WOTUS jurisdiction within the treatment train of a stormwater management system may have the unintended consequence of giving stormwater management systems a regulatory status that is at best unclear. This is a chance to clarify that uncertainty by expressly exempting these facilities. (p. 1-2)

Agency Response: Please see summary response at 7.4.4. Also please note that the proposed rule made changes to the definition of "waters of the U.S." for all affected CWA programs, as does the final rule.

Lee County, Florida (Doc. #1346.1)

7.498 Without further guidance, by defining ditches and their contents to be "Waters of the US," local governments will lose the ability to use existing ditches for treatment to improve water quality. Under existing MS4 permits, stormwater systems are authorized to accept and treat pollutants in the system as a whole which allows an opportunity for the pollutants to be assimilated prior to the stormwater being discharged into "Waters of the US." These conveyance systems provide "treatment trains" which reduce nutrient loading and are physically separated from what has historically been considered "Waters of the US." This loss will place a much greater burden of achieving water quality on the system operator in treating the source, as there is no provision for treating in "Waters of the US." (p. 2)

Agency Response: Please see summary response at 7.4.4.

Board of County Commissioners, Clermont County, Ohio (Doc. #4581.2)

7.499 We are concerned that the "adjacent waters" definition could be interpreted to include stormwater retention ponds. To maintain their functionality, accumulated sediment must be cleaned from these ponds over time. This standard maintenance item would become exceptionally difficult to complete if retention ponds were to be regulated under the

proposed Waters of the U.S. definition. Clermont County recommends that the definition specifically exclude stormwater management basins, as the more appropriate place to regulate these is under EPA's municipal separate storm sewer system (MS4) regulations. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

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

7.500 Under section Ill. A. Summary of Proposed Rule, the list of specific waters excluded under the Clean Water Act does not include man-made, engineered stormwater systems. Irrigation, artificial water bodies, swimming pools, waters created for aesthetic reasons, depressions, groundwater and erosional features were addressed. Ditches, swales, retention ponds, piping, infiltration areas, Low Impact Development (LID) techniques and all other stormwater management systems for the control of runoff were not specifically excluded. These integral parts of stormwater systems perform water quality and quantity functions prior to discharging to downstream waters but should not by themselves be considered under the Clean Water Act. The presence or absence of a significant nexus for waters, especially those that do not have a hydrologic connection, appears to lump all waters together within a watershed. Once a significant nexus is made within a watershed, all other similarly situated waters could also be found to have a significant nexus. Ditches could also be considered subject to the Clean Water Act under this proposed legislation even when not declared jurisdictional water. Most of the stormwater conveyances in New Hanover County are maintained by the property owner of record so numerous permits would have to be issued to maintain them. (p. 3)

Agency Response: **Please see summary response at 7.4.4.**

Carroll County Department of Land Use, Planning & Development, Maryland (Doc. #6266.1)

7.501 County-maintained, man-made conveyances and ditches, used to treat or mitigate stormwater in particular, should not be subject to a Section 404 permit. Ephemeral flows in these ditches are already captured through the CWA Section 402 NPDES MS4 permit process… **All local streets, gutters, man-made ditches, and any other facilities covered under the NPDES MS4 permit should be explicitly excluded from the definition of waters of the U.S.** If this recommendation is not taken, at the very least, the federal agencies should clarify whether ditches will be considered in segments or only in whole.

Since stormwater activities are not explicitly exempt under the proposed rule, we are concerned that MS4 ditches could be classified as "waters of the U.S." If these facilities flow into a "water of the U.S.," they are already regulated through the Section 402 NPDES MS4 permit process. **Doubling up on the permit coverage and requirements will just create a more cumbersome, expensive, and lengthy process for local jurisdictions, with greater cost to taxpayers and slower progress toward Bay clean up.** In addition, the implementing agencies would be in a potential position of enforcing conflicting conditions or overlapping responsibilities. Even if this is not the current intention of the agencies, they may be forced to do so through citizen and interest group lawsuits. These additional requirements in the process will also create a need for additional staff for the federal agencies. For these reasons, **stormwater management**

activities, as well as green infrastructure, should be explicitly exempt from the Section 404 permit requirements. These facilities already provide a water quality function to mitigate or eliminate the impacts of ephemeral flows to "waters of the U.S." (p. 2-3)

Agency Response: **Please see summary response at 7.4.4.**

City of Westminster, Colorado (Doc. #7327.2)

7.502 Under the existing rules, the 2012 Nationwide Permit 43: Stormwater Management Facilities states that these facilities could be excluded by USACE determination. However, the proposed rule is vague about the exemption. The City possesses numerous stormwater management facilities for flood control and water quality purposes. The City feels these facilities are in compliance with the CWA, and should be exempt from USACE jurisdictional rule. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

Transportation and Storm Water Department, City of San Diego, California (Doc. #7950.1 and #7950.2)

7.503 Key implications of the Proposed Rule that cause concern for the City are summarized below and specific comments are found in the attached table:

…

- Storm water facilities, storm water basins, and capture and treatment systems may or may not be subject to the Proposed Rule. Water bodies that are waste treatment systems designed to comply with the Clean Water Act are still categorically exempt. However, it is unclear how much of the MS4 infrastructure would be considered as "waste treatment". In California, waters designed to store or infiltrate water that could be discharged to surface water or land without further treatment as part of a municipal wastewater treatment plant are not considered part of the treatment train and are not exempt.
- The language specifying other WOTUS definition exclusions (both old and new), such as that for swales and ditches, does not clearly exclude MS4 conveyance facilities and other storm water related facilities.

Because of these issues, the City requests that the US Environmental Protection Agency and US Army Corps of Engineers (together referred to as the Agencies) incorporate a clear categorical exemption for MS4 systems into the final rule. The Agencies must ensure that the definition of MS4s and the explicit exclusion for MS4s included in the pertinent sections of CFR 33 and CFR 40 are broad enough to exempt the full range of conveyances, green infrastructure, and treatment, storage, and infiltration facilities contemplated in California to achieve compliance with MS4 permits and integrated planning for storm water management and water supply reliability. The definitions and exclusions must ensure that the design and siting of storm water BMPs can remain consistent with the goals of storm water management, and not be compromised by the need to avoid federal jurisdiction. (Doc. #7950.1, p. 2)

Agency Response: **Please see summary response at 7.4.4.**

7.504 *Comment Number:* 2

Section: 22201-F

Topic: Tributaries

Comment: The proposed rule states that some channels would not be considered "waters of the U.S." if the channels are excavated wholly in uplands, drain only uplands and have less than perennial flow or channels that do not contribute flow either directly or through water.

ACOE dredge and fill policies would be applicable in WOTUS. Therefore, storm water attenuation ponds (with no water quality treatment) and drainage ditches that are in the floodplain would be required to meet jurisdictional requirements – even during routine maintenance activities, unless an exemption is granted by the ACOE. This will lead to significant permitting and possibly mitigation costs for routine maintenance of essential public infrastructure (e.g. ditches, MS4).

Recommendation: Identify exemptions for storm water infrastructure maintenance activities. (Doc. #7950.2, p. 1)

Agency Response: Please see summary response at 7.4.4. Also, please note that the final rule concerns the definition of which waterbodies are protected by the Clean Water Act.

7.505 *Comment Number:* 5

Section: 22206

Topic: Exemptions

Comment: Since, storm water management activities are not exempt under the proposed rule, the man-made conveyances and facilities for storm water management could potentially be classified as a "water of the U.S." This broad term and reach has implications for adding increased cost for maintenance operations in the form of permits and required studies to prove the jurisdiction of the conveyance structure.

Recommendation: Provide exemption for storm water conveyance system. (Doc. #7950.2, p. 2)

Agency Response: Please see summary response at 7.4.4.

Office of Environmental Programs, City of Phoenix, Arizona (Doc. #7986)

7.506 **Stormwater Infrastructure (MS4)**

The Municipal Separate Storm Sewer System (MS4) is the city's stormwater conveyance system to the WOTUS, and has water quality compliance points where the MS4 discharges into the WOTUS. The proposed rule includes a very broad definitional of "tributary", which could be interpreted to include the City's entire MS4 infrastructure, including constructed ditches, pipes, storm water basins, water infiltration basins, up-gradient interceptor ditches or channels, and other facilities. The rule could be interpreted to include the rainwater collecting and running in the city streets, which could change the water quality compliance points from MS4 discharges to the MS4 itself, making it almost impossible to meet water quality standards. Therefore, we respectfully request the

inclusion of the "MS4" in the list of features identified as "not waters of the United States" in §328.3 (b). (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

Board of Douglas County Commissioners, Colorado (Doc. #8145)

7.507 MS4 facilities can include ditches, swales, ponds and other features which are authorized under Section 402 of the CWA to treat and discharge concentrated stormwater. The extent of Waters of the U.S. is relevant to MS4 permittees because there are a variety of regulatory requirements that may be triggered when MS4 facilities are located adjacent to, or within, Waters of the U.S. For example, MS4 facility maintenance required under CWA Section 402 which results in a change in the elevation of the ground within a jurisdictional area (through sediment and vegetation removal, regarding to restore flow, etc.) may trigger regulatory permitting requirements under Section 404 of the CWA.

Currently, stakeholders and regulators evaluate Waters of the U.S. using an EPA and USACE joint agency guidance title *Clean Water Act Jurisdiction following the U.S. Supreme Court Decision in Rapanos v. United States & Carabell v. United States* (2008), hereafter referred to as "Current Guidance". Under the Current Guidance, hydrologic features may be considered Waters of the U.S. depending on a variety of factors, including connectivity to downstream Traditional Navigable Waters (TNW), presence of wetlands or an Ordinary High Water Mark (OHWM), and possibly qualification for a waste treatment facility exclusion (Waste Treatment Exclusion), to name a few.

If adopted, the Proposed Rule would obviate the Current Guidance (which is not a law but rather a guidance document that provides recommended practices based on law). Although the Proposed Rule includes a variety of changes and clarifications, the most relevant changes to MS4 facilities appear to include the requisite connectivity to downstream TNWs and the definition provided for tributaries. Also relevant to MS4 permittees is that the Proposed Rule maintains (without substantial revision) an exclusion which states that waste treatment systems that are constructed to meet other CWA requirements (e.g., MS4 permitting requirements) are not Waters of the U.S. (Waste Treatment Exclusion). Although the Waste Treatment Exclusion is not proposed to be changed substantially under the Proposed Rule, its current interpretation by EPA and USACE staff is variable and WWE has encountered resistance in having this exclusion applied to MS4 facilities in various parts of the United States. Based on this, the Waste Treatment Exclusion is evaluated alongside the Proposed Rule. Application of the Waste Treatment Exclusion to different types of MS4 facilities is a topic that should be discussed with the USACE and EPA to gain an understanding of how it will be applied to MS4 features. (p. 21-22)

Agency Response: **Please see summary response at 7.4.4**

Aurora Water (Doc. #8409)

7.508 **3. Since stormwater activities are not explicitly exempt under the proposed rule, temporary Best Management Practices (BMPs), such as diversion ditches and sedimentation basins, and constructed green infrastructure used to comply with**

Municipal Separate Storm Sewer System (MS4) permits could now be classified as a "WOTUS".

Since many of these temporary BMPs are often constructed adjacent to a "tributary" of a WOTUS, the proposal could be interpreted to now include these features as a WOTUS. As a result, maintenance activities to ensure continued effectiveness of the BMP may require permitting under CWA Section 404. Some counties and cities, such as Aurora, own MS4 infrastructure including ditches, channels, pipes and gutters that flow into a WOTUS and are therefore regulated under the CWA Section 402 stormwater permit program. Additional water quality standards (including total maximum daily loads) would apply should these stormwater ditches become classified a WOTUS. Not only would the discharge leaving the system be regulated, but all flows entering the MS4 infrastructure could be regulated under NPDES as well.

In addition, "green" infrastructure is not exempt under the proposed rule. A number of local governments are using green infrastructure as a stormwater management tool to lessen flooding and to protect water quality by using vegetation, soils and other natural processes. The proposed rule could inadvertently impact a number of these sites by requiring Section 404 permits for non-MS4 and MS4 green infrastructure construction projects. It is unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure once established.

Recommendation: MS4 stormwater features, such as related Best Management Practices and constructed green infrastructure should be clearly exempted from the definition of WOTUS. (p. 3)

Agency Response: **Please see summary response at 7.4.4**

Alameda Countywide Clean Water Program, California (Doc. #8417)

7.509 Our concern is that the Proposed Rule's suggestion that some types of storm water facilities, infrastructure projects and associated facilities could be regulated within the scope of a definitional WOTUS poses significant uncertainty and potential confusion among the regulated entities, and may increase the regulatory burden associated with implementation of MS4 permit requirements.

We concur with and support the comments filed by the California Stormwater Quality Association (CASQA) in this regulatory water docket process which 1) recommends that the Agencies revise the Proposed Rule to clarify that MS4s are not WOTUS; 2) that the new definition of "Tributary" could improperly include MS4 facilities; 3) that the new definition of "Adjacent" could improperly include MS4 and other water resources facilities; … and 5) that certain types of storm water related facilities discussed in the CASQA comments are also not considered to be WOTUS. Specifically, we concur with the CASQA recommendation that certain exclusions within the Proposed Rule be expanded to include MS4 conveyance facilities and other related facilities. Exclusions needing expansion include: waste treatment system, artificial lakes, ditches, and

swales.[301] We specifically refer to and support the revisions to the Proposed Rule that are provided in section II of the CASQA comments. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

Southern California Association of Governments, et al (Doc. #8534.1)

7.510 The Proposed Rule will have real impacts for transportation and other critical infrastructure. Road cuts and underpasses can impact high water tables that keep storm drains perennially wet. These drains are not natural in any sense and Congress did not intend them to be subject to the Clean Water Act's fishable, swimmable standards. Likewise, at the encouragement of EPA and its sister agencies at the state level, our agencies are installing structural treatment controls that mimic natural wetlands. These treatment controls are installed within the stormwater discharge system and ultimately drain to traditional navigable waters. They are likewise planted with wetland plant species and if they are working properly, will provide habitat for various aquatic and wetland species.

Under the Proposed Rule this infrastructure that provides a substantial environmental benefit will now be classified as a Water of the United States. As such these treatment controls would require 404 permits for maintenance and could be subject to Total Maximum Daily Loads (TDML).

This was not the intent of Congress and the EPA and Army Corps need to draft specific exclusions for this type of infrastructure into the Proposed Rule. (p. 3-4)

Agency Response: **Please see summary response at 7.4.4.**

Anne Arundel County, Maryland (Doc. #8574)

7.511 Where these roadside ditches to come under the definition of a Water of the US, it would severely curtail the ongoing maintenance of roadside ditches and other manmade conveyances. Similarly, though there is an exemption for "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act," the revised definition of "waste treatment systems" should include explicit language indicating that stormwater management facilities (e.g., ponds, constructed wetlands, bioretention facilities, etc.) constructed as part of development projects or as part of a local jurisdiction's restoration requirements associated with its MS4 are categorically excluded from coverage as a Water of the US. There is a broad-based acknowledgement that the aforementioned storm drainage and stormwater quality features require regular maintenance and adaptive management, and that any regulatory hurdles placed in the way of accomplishing that important, ongoing work, are only like to result in their eventual deterioration and failure to function properly. (p. 1-2)

Agency Response: **Please see summary response at 7.4.4.**

[301] The exclusion should be revised to include gullies and rills, and non-wetland and man-made swales, and other storm water treatment measures.

City of Portland, Maine (Doc. #8659)

7.512 While we support the goals of the proposed rule-making and as we continue to better understand the objectives by EPA with the Waters of the US, we have the following questions and concerns:

- The final rule must clarify that municipal separate storm sewer systems (MS4's) are covered by the waste treatment system exemption and will not be jurisdictional under the CWA above any existing point of permitted discharge, including any ditches that are part of MS4.
- EPA has verbally stated that the proposed rule is not intended to make green infrastructure (GI) installations jurisdictional, indicating that any Gl installation or Gl practice designed to meet CWA obligations or achieve water quality goals is not meant to be included. However, EPA and the Army Corp of Engineers need to specifically clarify this in the final rule. The City of Portland is expanding plans for green infrastructure projects as a means to enhance water quality as part of our approved Tier III LTCP for CSO abatement projects, and does not want added regulations under the new proposed Rule as a means to mandate CWA results.
- The rule fails to provide intended level of clarity, certainty and predictability. Appears to increase the EPA's reach in an unpredictable way. Are drainage ditches, catch basins, swales, and other man made Ponds (such as the Deering Oaks Pond) exempt from the Rule?

  ...
- Waste treatment systems are excluded so clarity is needed if MS4's are covered under "systems" and thus exempt? (p. 1-2)

Agency Response: Please see summary response at 7.4.4. In this response to comments, the Agencies cannot address whether or not a particular feature (Deering Oaks Pond in this instance) is a jurisdictional water of the U.S. Please consult the relevant permitting authority

Carroll County Board of Commissioners, Maryland (Doc. #8667)

7.513 All local streets, gutters, man-made ditches, and any other facilities covered under the NPDES MS4 permit should be explicitly excluded from the definition of waters of the U.S. (p. 2)

Agency Response: Please see summary response at 7.4.4.

City of Chesapeake, Virginia (Doc. #9615)

7.514 2. 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. All man-made purpose built stormwater management facilities, not just ditches and

impoundments excavated from uplands and with less than perennial flow, should be explicitly exempt from regulatory oversight under the CWA. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

7.515 4. The Rule provides an exemption for *artificial lakes or ponds used exclusively as settling basins, ditches that are excavated wholly in uplands, and ditches that do not contribute flow to a traditional navigable water*. These exemptions are not comprehensive. Specifically, the Rule should have an exemption specifically for construction, maintenance and/or retrofitting of purpose built stormwater management facilities. Without such an exemption, the City's efforts to comply with its Section 402 National Pollution Discharge Elimination System (NPDES) requirements (MS4) and compliance with future TMDL allocations will be severely limited. In addition, if these features are not exempt to the Rule, additional cumbersome reporting and resource intensive water quality standards may be applied to new WOUS under the Section 303 program. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

7.516 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? Without more specific exemptions provided for purpose built stormwater management facilities including, but not limited to stormwater ditches and ponds, the proposed Rule may have unreasonable, burdensome and unintended consequences. (p. 3)

Agency Response: **Please see summary response at 7.4.4.**

7.517 …the City of Chesapeake has identified a significant number of concerns and problems with EPA's proposed waters of the US Rule; however, the City does support streamlining regulatory oversight by the EPA and the Corps through various sections of the CWA. Other than the regulatory provisions already contained within Section 402 of the CWA (NPDES & MS4), stormwater management facilities which have been constructed specifically for the purposes of conveyance, management, retention, and treatment of stormwater should be specifically excluded from regulatory oversight under the CWA including, but not limited to stormwater management ponds, lakes, swales, dry or wet detention basins, constructed wetlands, bio-retention areas, rain gardens and intermittent/ephemeral ditches regardless of their proximity to a waters of the US or a traditional navigable water; regardless of being ephemeral, intermittent, perennial; regardless of having shallow subsurface groundwater connections or confined surface hydrologic connections; regardless of contributing to WOUS in storm events; and regardless of being excavated from uplands, wetlands, or agricultural lands. Without

these exclusions, there may be unintended consequences for local governments subject to MS4 regulation as well as private property owners. (p. 7)

Agency Response: **Please see summary response at 7.4.4.**

Pasco County, Florida (Doc. #9697)

7.518 Many stormwater management facilities, even those designed primarily for conveyance, have been "designed with nature" in which they would intentionally function as a natural wetland, pond or stream. In addition to its many ecosystem and hydrologic benefits, it is a design concept that has been strongly encouraged by State and Federal Agencies. Moreover, these facilities are designed and permitted to provide flood control and water quality treatment benefits, and it is not appropriate to regulate them as WOTUS.

Recommendation: The final rule should explicitly state that stormwater management facilities are excluded from being considered WOTUS. More generally, USACE and EPA should work to ensure that concerns about creating jurisdictional waters do not discourage the implementation of green infrastructure or natural methods of stormwater management. (p. 3)

Agency Response: **Please see summary response at 7.4.4.**

7.519 Waste Treatment Systems - The proposed rule would identify as non-jurisdictional by rule "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" (79 FR 22263). The preamble does not contain any explanation of this exclusion, so it is not clear how this exclusion would apply to stormwater management systems that are constructed to meet requirements of the CWA. One of the potential impediments to developing green infrastructure is the concern that wetlands created to receive stormwater runoff could themselves be deemed jurisdictional.

Recommendation: The final rule should clarify that the exclusion for waste treatment systems, including treatment ponds or lagoons also applies to stormwater management facilities. More generally, the USACE and EPA should work to ensure that concerns about creating jurisdictional waters do not discourage the adoption of natural methods of stormwater management. (p. 4-5)

Agency Response: **Please see summary response at 7.4.4.**

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

7.520 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: **Please see summary response at 7.4.4.**

Board of Supervisors, Imperial County, California (Doc. #10259)

7.521 Uplands: 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. 1-2)

Agency Response: **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 preamble to the final rule explains why the term "upland" is no longer used in the final rule and clarifies what "dry land" means.**

Board of Supervisors, Imperial County, California (Doc. #10259)

7.522 **Water Quality Treatment Features**: Any constructed feature built for the purpose of water quality treatment or runoff control as required by any agency should be exempt from regulation under the CWA. It is important that counties are able to construct these features in a manner that is consistent with the overall goal of stormwater management without subjecting themselves to federal regulation. (p. 5)

Agency Response: **Please see summary response at 7.4.4.**

7.523 ***Impact on MS4***

The proposed rule does not discuss the interrelationship of WOTUS and municipal separate storm sewer systems (MS4). The interconnected nature of storm drain systems regulated under MS4 permits and the broad nature of the definitions in the proposed rule could lead to legal uncertainty and regulatory confusion. It is especially important for the Agencies to provide clear guidance on where an MS4 ends and WOTUS begins for counties in the Southwest, where engineered drainage systems have mostly replaced the natural drainage patterns in urbanized watersheds.

The current definition of tributary states that "a water that otherwise qualifies as a tributary…does not lose its status if, *for any length*, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams)…so long as a bed and bank with an ordinary high water mark can be identified upstream of the break." (79 Fed. Reg. at 22263) The proposed rule would render a number of open channels per se jurisdictional under the broad definition of tributary and subject local agencies to further regulation. In addition, due to the proximity of WOTUS channels, it is possible that MS4 channels could be considered "adjacent" waters and therefore jurisdictional.

All told, the proposed rule could subject local agencies to the 404/401 permit process; result in high costs for repairing or upgrading infrastructure when it is already covered by the MS4 permit process; and, potentially expose local agencies to citizen suits. Accordingly, we believe that the Agencies should include language that exempts MS4 from CWA regulation even if it otherwise qualifies as a "tributary" under the proposed rule. The exemption language should explicitly address: stormwater conveyances, bioswales, green projects, and infiltration basins used to comply with an MS4 permit as these facilities are necessary to comply with the CWA. (p. 5-6)

Agency Response: **Please see summary response at 7.4.4.**

Kendall County Board, Illinois (Doc. #10965)

7.524 We object to the definition of waters of the US that does not specifically exclude stormwater management facilities and man-made conveyances created for the purpose of preventing, limiting or controlling flooding. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

City of Escondido, California (Doc. #11116)

7.525 The expansion of the definition of Waters of the U.S. is seen in the last three bullets of the definition (page 22913) relating to:

- *All tributaries of a traditional navigable water, instate water, the territorial seas or impoundment;*
- *All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary; and*
- *On a case-specific basis other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial seas.*

The current definition provides a disincentive to construct structural stormwater BMPs if there is a risk that a permit would be required for maintenance. **Bullet 2 should be revised to exclude basins and other structures for water quality treatment or flow control from the definition.** (p. 1-2)

Agency Response: Please see summary response at 7.4.4.

Urban Drainage and Flood Control District, Denver, Colorado (Doc. #12263)

7.526 Excluded Waste Treatment Facilities. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act, are not Waters of the U.S. The 2012 Nationwide Permits language clarifies that stormwater management facilities that are determined to be waste treatment systems and under current regulations are not Waters of the U.S. The proposed rule does not significantly change the language regarding the excluded waste treatment facilities. Additional clarification is required to identify types of facilities that qualify for this exclusion. **Any facility designed and operated to treat stormwater runoff to meet the requirements of the Clean Water Act should be included in this exclusion. If municipal stormwater is to continue to be regulated as wastewater, lack of consistency in this exclusion is not defensible.** (p. 2)

Agency Response: Please see summary response at 7.4.4. Also see the summary response at 7.1 with respect to waste treatment systems.

Board of County Commissioners, Mesa County, Colorado (Doc. #12713)

7.527 **Waste treatment systems**: Under the Proposed Rule, the reference to "waste treatment systems" introduces some confusion regarding the types of features excluded. Mesa County requests additional clarifying language that extends the exclusion of waste treatment systems to include various components of MS4 systems that are constructed under requirements of CWA Section 402. Examples of the components include stormwater detention ponds, and ditches which collect the stormwater and transport it to stormwater detention ponds. (p. 3-4)

Agency Response: Please see summary response at 7.4.4. Also see the summary response at 7.1 with respect to waste treatment systems.

City of Palo Alto, California (Doc. #12714)

7.528 Palo Alto owns and operates its municipal separate storm sewer system (MS4) and is a co-permittee of the San Francisco Bay Municipal Regional Stormwater NPDES Permit. We strongly recommend that because MS4s are already permitted under the Clean Water Act and are regulated as point sources, they and their component features should be exempt from definition as waters of the U.S. The existing Section 402(p) permit program mandates the management and discharge of storm water in our community. The proposed definition of tributaries creates the prospect of MS4 features being defined as waters of the U.S., resulting in uncertainty at best and ultimately complex and costly new regulatory requirements for storm water. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

Vermont League of Cities and Towns (Doc. #13075)

7.529 How will municipal separate storm sewer systems (MS4) infrastructure or infrastructure related to reducing stormwater runoff to Lake Champlain in compliance with that lake's total maximum daily load be treated? We urge the EPA to exempt such infrastructure from the definition of Waters of the United States. A Waters of the United States determination for MS4s and other stormwater systems – including drains, roads, pipes, curbs, gutters, ditches, and other components that channel runoff – will have a tremendous cost impact on local governments. (Examples include permit application costs, wetlands and stream mitigation costs, and project delay, redesign, and relocation costs.) (p. 1-2)

Agency Response: **Please see summary response at 7.4.4.**

MS4 NPDES Steering Committee, Palm Beach County, Florida (Doc. #13218)

7.530 Palm Beach County's MS4 Program will be crippled upon implementation of the proposed WOTUS rule, as the majority of the components of the MS4 system in Palm Beach County will be considered WOTUS under the currently proposed rule language, despite the fact that Palm Beach County's current MS4 permit defines them as outside WOTUS jurisdiction. This reality necessitates an explicit exemption from jurisdiction within the proposed WOTUS rule for man-made stormwater treatment systems that have been previously permitted under MS4 or EPA approved state permitting programs.

…If man-made stormwater treatment systems became WOTUS, water quality requirements would have to be met prior to discharge into these systems. But these systems are intended to provide treatment. Under current State law, these systems are exempt from meeting state water quality requirements, and only discharges from the stormwater treatment systems are subject to the State water quality requirements. If our stormwater treatment systems become WOTUS, then how do we provide treatment? The proposed WOTUS rule contains an exception for wastewater treatment systems; we believe there should also be an exception for stormwater treatment systems. (p. 1-2)

Agency Response: **Please see summary response at 7.4.4.**

Natural Resources Division, Public Works Department, Pinellas County, Florida (Doc. #14426.1)

7.531 Holding man-made stormwater management systems to the same water quality, TMDL, NPDES, and other CWA requirements as natural systems causes a burden on the local governments that construct and maintain these systems for flood control and water quality improvements. The rule will essentially shift the point of compliance for MS4s further upstream and in the case of Pinellas County will include the majority of stormwater ditches, canals, and stormwater treatment ponds. Applying water quality standards to infrastructure designed to reduce flooding, protect public safety, and treat stormwater pollutants will cause the County unnecessary costs and decrease the funds available for protection and restoration of downstream natural systems.

The rule should include an explicit exemption for man-made permitted stormwater management facilities constructed for flood control and/or water quality improvements. (p. 5)

Agency Response: **Please see summary response at 7.4.4.**

Bangor Area Storm Water Group, Hampden, Maine (Doc. #14543.1)

7.532 MS4 Stormwater Controls should be listed under waste treatment system exemptions. While there has been discussion with EPA that has assured MS4s that traditional stormwater practices (e.g. stormwater detention pond and green infrastructure) are not intended to be jurisdictional, the current wording does not provide this assurance.

Request: The BASWG requests that specific terms, such as "stormwater control measures" or "Stormwater best management practices" should be formally included under this section on exemptions to reduce debate and legal action over this issue. (p. 1)

Agency Response: **Please see summary response at 7.4.4.**

7.533 3. Designation of "all tributaries" that have an Ordinary High Water Mark connecting them to a traditional water of the U.S. as jurisdictional is excessively broad. This definition brings into question whether EPA intends (or would be able) to consider stormwater conveyance facilities, treatment wetlands and infiltration projects to be Waters of the U.S. Natural and manmade ponds and wetlands could be considered tributaries under this definition. This would lead to regulation of stormwater conveyance or treatment systems that are already regulated under the NPDES permit.

Request: The BASWG requests that the definition of tributary explicitly exclude MS4 facilities and clarify that MS4 facilities are not "Waters of the US." (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

City of Buckeye, Arizona (Doc. #14591)

7.534 Added to **PART 32eDEFINITION OF WATERS OF THE UNITED STATES § 328.3 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.

Comment Directly Related to the New Recommended Revised Rule Language Provided Above…

…

4. Specific exclusion language is needed for urban SCMs [stormwater control measures]. If, as has been stated publicly, it is EPA's intent that most of these waters and structures are not to be considered WOTUS, this should be clearly stated in the rule. Such a clear statement would formalize and clarify EPA's intent.

5. The current draft of the rule is almost silent about urban stormwater, in the preamble and the proposed rule language. This recommended revision language would rectify a portion of that deficiency. Adding exclusion language for urban SCMs to this rule would be appropriate, historic, and significant.

6. Because EPA is driving construction of MS4 SCMs and BMPs as part of its regulatory function, EPA has a responsibility to define clearly the jurisdictional status of most urban SCMs in the new WOTUS rule. This is part of the reason why an explicit exclusion for most urban SCMs is needed…

…

9. The approach with this new recommended revised rule language is to provide a broad exclusion for most types and the vast majority of urban stormwater SCMs, BMPs, and roadside ditches. The authors recognize that it may be appropriate that some types of urban SCMs are determined to be WOTUS, on a case-by-case basis. To this end, the new recommended revised language includes "exceptions to the exclusion" in the definition for "fully-constructed SCMs" (see the last three sentences). We urge EPA and the Corps to consider this approach for the final rule language. This approach allows for a categorical exclusion for most urban SCMs but also allows for some types of urban SCMs to be determined to be WOTUS, on a case-by-case basis. If additional exceptions are needed and appropriate for "fully-constructed SCMs" or exceptions are needed and appropriate for some types of roadside ditches, we urge EPA and the Corps to use this approach and add exceptions as needed.

10. We urge EPA to add explanatory language to the preamble to clarify its approach for urban SCMs. The preamble should be as clear for urban SCMs and roadside ditches as it is for agricultural waters, flows, practices, and ditches.

11. The exclusion language in the current proposed rule (" Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act. ") is inadequate for urban SCMs. Many urban SCMs were constructed for and serve purposes other than "waste treatment". Many urban SCMs were designed for purposes other than meeting "the requirements of the Clean Water Act". For example, this language does not cover many SCMs constructed in non- permitted MS4s. This language would not cover urban SCMs and roadside ditches constructed before the passage of the CWA The new recommended revised rule language is intended to address these deficiencies… (p. 2, 3-4)

Agency Response: **Please see summary response at 7.4.4.**

Public Works, City Golden, Colorado (Doc. #14617)

7.535 The potential for inclusion ofMS4 stormwater facilities would result in redundant regulation and oversight, as MS4 agencies would be regulated under both NPDES and WOTUS where maintenance of stormwater features is concerned. This would be burdensome to general operations and maintenance of our stormwater system in our effort to comply with MS4 requirements. Because EPA is mandating construction of BMPs within MS4s as part of its regulatory function, EPA has a responsibility to define clearly the jurisdictional status of BMPs.

If the intent of the proposed rule is to not include MS4 storm water facilities under WOTUS, the proposed rule must provide clear and broad exclusions so stating, much the same as the rule does for agricultural considerations. Without clear exclusions, operation and maintenance of BMPs will become complicated, difficult, and expensive for those responsible, without any corresponding environmental benefit. (p. 1)

Agency Response: **Please see summary response at 7.4.4.**

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

7.536 The proposed rule would apply to other Clean Water Act programs which would then be subject to increasingly complex and costly federal regulatory requirements. For example, Larimer County has a Municipal Separate Storm Sewer System (MS4) General Permit from the Colorado Department of Public Health and Environment. We are concerned that man-made conveyances and facilities for stormwater management could now be classified as jurisdictional under the proposed rule, potentially making them subject to additional permitting requirements and water quality standards (including total maximum daily loads). It seems inappropriate and unnecessary to require additional water quality regulations on this type of manmade infrastructure that is constructed to meet the requirements of the MS4 regulations under the Clean Water Act. Larimer County suggests that any facilities designed and operated to detain and treat stormwater runoff to meet the requirements of the Clean Water Act should not be considered waters of the U.S." and should be excluded under the existing Waste Treatment Facilities Exclusion. This exclusion should be the national standard that is followed by all local EPA and USACE offices. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

Board of County Commissioners, Marion County, Florida (Doc. #14979)

7.537 The proposed regulations expand key definitions that have potentially far-reaching effects. "Tributaries" may now include stormwater management features such as treatment ponds, swales, and ditches. These facilities are already constructed in accordance with Florida's longstanding environmental resource permitting program. Stormwater facilities, required to be maintained under state, as well as, federal (Section 404) rules, will now have another layer of regulation. Marion County recommends that: Stormwater conveyance systems, including upland cut ditches and swales, should be excluded from the definition of WOTUS with limited exceptions.

Stormwater facilities including constructed ponds and created wetlands should be excluded specifically from the proposed definition of WOTUS. (p. 1)

Agency Response: **Please see summary response at 7.4.4.**

City of Glendale, Arizona (Doc. #15054)

7.538 **Municipal Separate Storm Sewer System**

The City of Glendale operates a MS4 in accordance with an Arizona Pollutant Discharge Elimination System permit issued by the Arizona Department of Environmental Quality. The MS4 consists of a series of open channels (gutter/curbs, roadside ditches, concrete channels) and underground piping to convey stormwater to Skunk Creek, New River, Agua Fria and other MS4s. It is unclear whether portions or all of the MS4 would be considered a "tributary" under the proposed rule.

Green infrastructure or low-impact development stormwater management methods control and utilize stormwater near its source. For example, instead of directing stormwater immediately into the underground stormwater pipe conveyance system, swales could be constructed and planted with vegetation to utilize stormwater before the excess water makes its way to the conveyance system. Under the proposed rule, these swales may be considered a "waters of United States."

The proposed rule excludes ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow. Glendale's storm sewer system has less than perennial flow, however it is unclear whether portions or all of the system would be considered excavated in uplands or drain only uplands. Although the addition of a definition for uplands may provide clarity for the proposed rule, ***municipal separate storm sewer systems and associated green infrastructure should be specifically excluded from the definition of "waters of the United States."***

Without a specific exclusion for MS4s, additional permits would be required. The City of Glendale's limited financial resources would be spent on permits without additional benefit to the environment. (p. 3-4)

Agency Response: **Please see summary response at 7.4.4.**

National Association of Counties (Doc. #15081)

7.539 **Counties Need Clarity on Stormwater Management and Green Infrastructure Programs**

Under the CWA Section 402 National Pollution Discharge Elimination System (NPDES) permit program, all facilities which discharge pollutants from any point source into "waters of the U.S." are required to obtain a permit; this includes localities with a Municipal Separate Storm Sewer System (MS4). An MS4 is defined 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 by a state, tribal, local or other public body, which discharge into "waters of the U.S."44 They are designed to collect and treat stormwater runoff.

Since stormwater management activities are not explicitly exempt under the proposed rule, NACo is concerned that man-made conveyances and facilities for stormwater management could now be classified as a "water of the U.S."

In various conference calls and meetings over the past several months, the agencies have stressed that municipal MS4s will not be regulated as "waters of the U.S." However, EPA has indicated that there could be "waters of the U.S." designations within a MS4 system, especially if a natural stream is channelized within a MS4. This means an MS4 could potential have a "water of the U.S." within its borders, which would be difficult for local governments to regulate.

MS4s are subject to the CWA and are regulated under Section 402 for the treatment of water. However, treatment of water is not allowed in "waters of the U.S." This automatically sets up a conflict if an MS4 contains "waters of the U.S." Would water treatment be allowed in the "waters of the U.S." portion of the MS4, even though it's disallowed under current law? Additionally, if MS4s contained jurisdictional waters, they would be subject to a different level of regulation, requiring all discharges into the stormwater system to be regulated along with regulating discharges from a NPDES system.

The definitional changes could easily be interpreted to include the whole MS4 system or portions thereof which would be a significant change over current practices. It would also potentially change the discharge point of the MS4, and therefore the point of regulation. Not only would MS4 permit holders be regulated when the water leaves the MS4, but also when a pollutant enters the MS4. Since states are responsible for water quality standards of "waters of the U.S." within the state, this may trigger a state's oversight of water quality designations within an MS4. Counties and other MS4 permittees would face expanded regulation and costs as they will now have to ensure that discharges from outfalls to these new "waters of the U.S." meet designated water quality standards.

This would be problematic and extremely expensive for local governments to comply with these requirements. Stormwater management is often not funded as a water utility, but rather through a county or city general fund. If stormwater costs significantly increase due to the proposed rule, not only will it potentially impact our ability to focus available resources on real, priority water quality issues, but it may also require that funds be diverted from other government services such as education, police, fire, health, etc. Our county members cannot assume additional unnecessary or unintended costs.

Further, by shifting the point of compliance for MS4 systems further upstream, the proposed rule could reduce opportunities for establishment of cost effective regional stormwater management systems. Many counties and stormwater management agencies are attempting to stretch resources by looking for regional and integrated approaches for managing stormwater quality. The rule would potentially inhibit those efforts. Even if the agencies do not initially plan to treat an MS4 as a "water of the U.S.," they may be forced to do so as a result of CWA citizen suits that attempt to address lack of clarity in the proposed rule.

EPA has indicated these problems could be resolved if localities and other entities create "well-crafted" MS4 permits. In our experience, writing a well-crafted permit is not enough—localities are experiencing high levels of litigation from outside groups on

approved permits that have been signed off by both the state and the EPA. A number of Maryland counties have been sued over the scope and sufficiency of their approved MS4 permits.

In addition, green infrastructure, which includes existing regional stormwater treatment systems and low impact development stormwater treatment systems, is not explicitly exempt under the proposed rule. A number of local governments, as well as private developers, are using green infrastructure as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes to treat stormwater runoff. The proposed rule could inadvertently impact a number of these facilities by requiring Section 404 permits for green infrastructure construction projects that are jurisdictional under the new definitions in the proposed rule. Additionally, it is unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established.

While jurisdictional oversight of these "waters" would occur at the federal level, actual water quality regulation would occur at the state and local levels, becoming an additional unfunded mandate on our counties and agencies.

Recommendations:

- **Explicitly exempt MS4s and green infrastructure from "waters of the U.S." jurisdiction** (p. 15-16)

Agency Response: **Please see summary response at 7.4.4.**

Attorney's Office, Harris County, Texas (Doc. #15097)

7.540 Since stormwater activities are not explicitly exempt under the Proposed Rule, Harris County is concerned that MS4 ditches could now be classified as Waters of the U.S…

…the Proposed Rule designates all tributaries, not otherwise excluded, as jurisdictional if they have an OHWM connecting them to a traditional Water of the U.S. This has the potential to include stormwater conveyance facilities, treatment wetlands, and infiltration projects within jurisdictional waters. This potentially expansive reading attempts to regulate MS4 infrastructures under both Section 402 and 404, which is an untenable reading of the CWA. It completely ignores the concept that MS4s are a point source distinct from and not coextensive, with Waters of the U.S. [The MS4 conveyance system is conceptually tied to the definition of "discharge" from the MS4, which occurs only when water is discharged from an outfall into the Waters of the U.S. Attempting to include MS4 infrastructures within the definition of a Water of the U.S., in effect, alters the current outfall locations of our MS4 permitting program and potentially eliminates our MS4 altogether. Accordingly, Harris County requests that the Proposed Rule unequivocally state that the definition of a tributary does not include MS4 facilities, and MS4 facilities are not a water of the U.S. (p. 3)

Agency Response: **Please see summary response at 7.4.4.**

City of Stockton, California (Doc. #15125)

7.541 The proposed rule defines a tributary as a water characterized with a bed and banks and ordinary high water mark, which directly or indirectly contributes flow to other waters of the U.S. Wetlands, lakes, and ponds can also be a tributary if they contribute flow to other waters yet may not have an ordinary high water mark. The rule continues by clarifying that a tributary does not lose its status as water of the U.S. if, for any length, there are natural breaks (such as wetlands, debris piles, boulder fields, or streams that flow underground) or man-made breaks (such as bridges, culverts, pipes, or dams). These provisions seem expressly intended to cover storm water systems because the definition could be traced upstream from a storm water discharge point to any MS4 feature that collects rain water or runoff, including surface ditches and channels that are part of a storm water system. These features have beds, banks, and ordinary high water marks that conduct flow to a water of the U.S. Likewise, upstream detention basins could be jurisdictional because they hold water that drains through ditches and pipes to a water of the U.S. Because much of the MS4 is constructed in the 100- or 500-year floodplain, it could be defined as waters of the U.S. since the rule proposes to cover all "water"-not just wetlands-that are in a floodplain and thus adjacent to jurisdictional waters.

We strongly recommend that because MS4s are already permitted under Section 402(p) of the Clean Water Act requiring NPDES permits, they should be exempt from characterization as waters of the U.S. Similarly, features that make-up the MS4 should also be exempt in order to ensure the continued functioning of the system; existing regulation prohibits treatment of water within waters of the U.S., thus rendering a system unmanageable if a component part of the system is redefined as water of U.S. It would be infeasible to construct a storm water system that escapes the proposed definition of "tributary" because the very nature of storm water itself requires the collection of runoff, and sometimes storage, to adequately manage the flow of storm water and avoid flooding. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

City of Arvada, Colorado (Doc. #15153)

7.542 The City of Arvada is dedicated to protecting water quality through our efforts as a Phase II Separate Storm Sewer System NPDES Permit holder and fully supports the goals of the Clean Water Act. However, we are very concerned about the ultimate consequences of the Proposed Rule in its current form and its significant effects to the Arvada community, specifically as it relates to identified stormwater infrastructure.

Under the connectivity criteria, stormwater features such as swales, detention ponds, retention ponds, constructed wetlands, and green infrastructure could be considered WOUS. Further, roadside ditches that show connectivity could now fall under this Proposed Rule requiring significant permitting to conduct basic maintenance activities. Language defining and excluding all man-made stormwater facilities and their required maintenance must be added to the Proposed Rule. (p. 1)

Agency Response: **Please see summary response at 7.4.4.**

Board of Commissioners, Carroll County, Maryland (Doc. #15190)

7.543 All local streets, gutters, man-made ditches, and any other facilities covered under the NPDES MS4 permit should be explicitly excluded from the definition of waters of the U.S. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

Water and Sewer Department, City of Greeley, Colorado (Doc. #15258)

7.544 **D. Exclusion for Municipal Separate Storm Systems ("MS4s")**

Please confirm that MS4s are non-jurisdictional under the waste treatment system exclusion or as point sources, or create a specific exclusion for MS4s in 40 CFR §122.2(b). It appears that certain components of MS4s could constitute Tributaries, Adjacent Waters, or Other Waters. Treating such components as jurisdictional would hinder the water quality functions that the systems provide, and squander local government resources. (p. 7)

Agency Response: **Please see summary response at 7.4.4.**

Utilities Department, City of Santa Maria, California (Doc. #15487)

7.545 Santa Maria is concerned that the Proposed Rule will undermine its efforts to implement its Integrated Plan. Specifically, Santa Maria is concerned that its manmade drainage infrastructure ("MS4"), which is not natural or located where a natural surface water previously existed, may be considered to be a WOTUS under either the definition of "tributaries" or "adjacent" waters. Further, Santa Maria is concerned that the per se exclusion from WOTUS for certain ditches is not sufficiently clear to apply to the City's MS4. Therefore, Santa Maria is concerned that the Proposed Rule will transform its MS4 into a WOTUS.

Santa Maria believes that treating the MS4 as a WOTUS is inconsistent with the CWA and, most importantly for the City, will hinder improvements to water quality. As pointed out in the Waters of the U.S. Coalition comment letter and in the California Stormwater Quality Association ("CASQA") letter, MS4s are not WOTUS. (See, e.g., 40 CFR § 122.26(b)(8) (defining MS4); CWA § 402(p)(3)(B) (establishing requirements for MS4 permits for discharges from MS4s to WOTUS).) In addition, treating the MS4 as WOTUS would prevent the City from moving forward with a watershed-based approach to solving water quality problems because the City would have to focus on each individual discharge into the MS4, rather than investing in comprehensive, integrated ways to achieve better water quality results using its system of detention and retention basins. Such an approach might force the City to only worry about its urban contributions into the MS4 rather than allowing the City to address the larger water quality problem on a broader, more effective scale. The City believes that its concerns could be addressed through a narrowly tailored exclusion to the WOTUS definition that applies to the MS4. The Waters of the U.S. Coalition has suggested language for such an exclusion, as has CASQA. Such an exclusion is vital to allowing the City to move forward with its integrated planning efforts. (p. 2-3)

Agency Response: **Please see summary response at 7.4.4.**

Boulder County and the City of Boulder, Colorado (Doc. #15495)

7.546 **2) Stormwater** - Since stormwater management activities are not explicitly exempt under the proposed rule, we are concerned that required (under an MS4 permit) man-made conveyances and facilities for stormwater management could now be classified as WOTUS. The County and City both have MS4 permits which require infrastructure including ditches, channels, pipes and gutters that flow into a WOTUS and are therefore regulated under the CWA Section 402 stormwater permit program. There is a significant potential threat for cities and counties that own and maintain MS4 infrastructure because they would be subject to additional water quality regulations if their stormwater ditches and otherMS4 infrastructure are considered a WOTUS. Not only would the discharge leaving the system be regulated, but all flows, including uncontrolled flows entering the MS4, would be regulated as well. Even if the agencies do not initially plan to regulate an MS4 system as a WOTUS, they may be forced to do so through CWA citizen suits, unless MS4 infrastructure is explicitly exempted from the requirements. Additionally, any change to the definition of WOTUS directly affects existing State and Federal programs that support the Clean Water Act such as the State of Colorado Water Quality Control Division, Water Quality Standards program, and the National Pollutant Discharge Elimination System program. These changes will add complexity to required stormwater BMPs that are required under MS4 permits to protect stormwater quality and downstream WOTUS.

Recommendation: The final rule should explicitly state that any stormwater management facility designed and operated to treat stormwater runoff to meet permit requirements or local regulations for managing stormwater be excluded from consideration as a WOTUS. More generally, the Corps and EPA should work to ensure that concerns about creating jurisdictional waters do not discourage the implementation of green infrastructure or natural methods of stormwater management. (p. 3)

Agency Response: **Please see summary response at 7.4.4.**

7.547 **3) Clarification regarding exclusion for waste treatment systems.** Waste treatment systems, including stormwater treatment ponds or lagoons designed to meet the requirements of the CWA, or requirements of an MS4 permit, are not WOTUS under the current rule. Language in the 2012 Nationwide Permits and Current Guidance clarifies that permanent BMPs that are determined to be waste treatment systems under current regulations are not WOTUS. The Proposed Rule does not significantly change the language regarding the excluded waste treatment facilities. However, it does not include a categorical exclusion for stormwater BMPs and additional clarification is required to identify the types of facilities that should qualify for this exclusion.

Recommendation: Any facility designed and operated to treat stormwater runoff to meet the requirements of the CWA, local regulations or MS4 permit requirements for managing stormwater should be considered an excluded waste treatment system. (p. 3-4)

Agency Response: **Please see summary response at 7.4.4.**

Anderson County, South Carolina (Doc. #15514)

7.548 Stormwater treatment facilities, best management practices, and MS4 infrastructure should be exempted just as wastewater treatment facilities are exempted. (p. 1)

Agency Response: **Please see summary response at 7.4.4.**

County of Los Angeles and Los Angeles County Flood Control District, California (Doc. #15620)

7.549 **B. NEED TO EXPRESSLY RECOGNIZE THE DISTINCTION BETWEEN MS4 AND WOTUS**

…a significant portion of the waters within the urbanized areas of Los Angeles County are either man-made or man-altered channels serving a flood control function. Most of these engineered channels, including the main stem of the Los Angeles River and its major tributaries, have been determined by EPA, the USACE, or the Los Angeles Regional Water Quality Control Board to be WOTUS and are so listed and mapped in the Water Quality Control Plan for the Los Angeles Region. We reiterate that it is not the intent of the County or the LACFCD to advocate for the de-designation of these existing jurisdictional waters. Our concern is for an unintended expansion of the reach of jurisdictional waters in relation to MS4s, where waterbodies that are currently MS4s could become jurisdictional WOTUS. This concern is rooted in the definition of "tributary" and the absence of any discussion, in the Proposed Rule or its Preamble, clarifying the relationship of MS4 and WOTUS. To avoid confusion in stormwater regulations, as has been expressed by many commenters, the Proposed Rule should be revised to clearly recognize the delineation between MS4 and WOTUS.

Both the CWA and its implementing regulations distinguish between an MS4 (which is a point source) and a WOTUS (which is the "receiving water" into which the MS4 point source discharges). CWA Section 402(p) requires that MS4s discharging into WOTUS must, as a "point source" discharge, obtain a National Pollutant Discharge Elimination System permit.... 33 U.S.C. § 1342(p)(3)(B)(iii). "Municipal separate storm sewer" is defined to mean "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)". 40 CFR § 122.26(b)(8). Moreover, "outfall" is defined to mean "a point source as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels of other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States." 40 CFR § 122.26(b)(9) (italicized emphasis in original). The phrase "open conveyances connecting two municipal separate storm sewers" means that open channels or other conveyances linked on either end by storm sewers cannot be a WOTUS, since there is no "outfall" to a WOTUS when the upstream storm sewer discharges into the open conveyance. Such an open conveyance only links MS4 components and remains a part of the MS4.

In Los Angeles County, some isolated open channel segments that are fed by MS4 pipes and discharge into MS4 pipes are currently considered part of the MS4 but could become jurisdictional WOTUS based on the definition of "tributary". Similarly, the detention basins previously described would, under high-flow circumstances, constitute open-water features within the MS4. These channels and basins are limited in length and are secured from public access for safety reasons. Under the Proposed Rule, however, such isolated features, because they have bed and banks and "ordinary high water mark", could

arguably be construed as WOTUS, even though they have never been viewed or treated by the EPA, USACE, or the Los Angeles Regional Water Quality Control Board as anything other than a component of the MS4.

The regulatory definitions of both an "MS4" and an "outfall" plainly distinguish between an MS4 and a WOTUS, which is the water into which the MS4 discharges. By definition, an MS4 discharges "to" a WOTUS, and it necessarily ends at the point of discharge to the WOTUS. 40 CFR 122.26(b)(8). An "outfall" exists only where a MS4 discharges "to" a WOTUS. 40 C.F.R. § 122.26(b)(9). Indeed, in litigation involving the County and the LACFCD, the United States Court of Appeals for the Ninth Circuit has held that "[a]s a matter of fact and law, the MS4 is distinct from the two navigable rivers [the Los Angeles and San Gabriel Rivers]." *Natural Resources Defense Council, Inc. v. County of Los Angeles*, 673 F.3d 880, 899 (9th Cir. 2011), reversed on other grounds, *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc.*, 568 U.S. ___, 133 S.Ct. 710 (2013).

The distinction between MS4 and WOTUS has been recognized both by EPA and the United States Supreme Court. In the preamble to the original version of the MS4 regulations, EPA drew a clear distinction between waters in an MS4 and a WOTUS: "[W]aters of the United States are not storm sewers for purposes of this rule." 53 Fed. Reg. 49416, 49442 (Dec. 7, 1988). This distinction was affirmed by the United States Supreme Court in *Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc., supra*, in which the Court held that no "discharge" from an MS4 had occurred when waters flowed from an engineered portion of the Los Angeles River into another portion of that same river. 133 S.Ct. at 712.

The absence of any discussion, in the Proposed Rule or its Preamble, to acknowledge the distinction between MS4s and WOTUS could potentially lead to regulatory confusion. Though EPA representatives have indicated that "well-crafted" MS4 permits may minimize confusion, this assumes that permitting agencies can and are willing to limit liability to only certain discharges into WOTUS and could, by permit, so immunize MS4 operators from the threat of citizen suits. Without clarification, the rule could have the unintended consequence of expanding the reach of jurisdictional waters and force MS4 permittees to re-evaluate watershed-based best management practices, which are aimed at addressing pollutants in the MS4 as close to the receiving water as possible. This benefit would be lost if MS4 operators were forced to address each "upstream" discharge into an open conveyance. Finally, clarifying the demarcation between MS4 and WOTUS would not contradict the Proposed Rule's emphasis on designating waters as jurisdictional where they would have a significant effect on the chemical, physical, and biological integrity of a WOTUS; the impacts of MS4 discharges into WOTUS are addressed under CWA Section 402(p) through NPDES permits.

It is thus important that the final WOTUS rule leave no confusion as to where the MS4 ends and a WOTUS begins. At a minimum, the Agencies should include clarifying language in the Preamble to the final WOTUS rule. Additionally, the County and LACFCD propose the following language to be added to the exclusions in the Proposed Rule:

New Provision (b)(6)

"Storm water conveyances or systems of conveyances that meet the definition of "municipal separate storm sewer system" as defined at 40 CFR 122.26(b)(8), are located upstream of an "outfall," as defined in 40 CFR 122.26(b)(9), and are required to obtain a National Pollutant Discharge Elimination System permit pursuant to Section 402(p) of the CWA. Any man-made or man-altered waters conveying storm water previously designated as a water of the United States are not subject to exclusion." (p. 9-12)

Agency Response: Please see summary response at 7.4.4. See also the Technical Support Document at Section I.C.

Public Works Department, Contra Costa County, California, et al. (Doc. #15634)

7.550 Municipal separate storm sewer systems (MS4), including stormwater conveyances (storm drain systems), bioswales, and green projects that are already regulated under NPDES should be excluded from designation as a Water of the U.S. and should be exempted from Clean Water Act regulation, even if they may otherwise qualify as a tributary under the proposed rule. (p. 2)

Agency Response: Please see summary response at 7.4.4.

Village of Wellington, Florida (Doc. #15654)

7.551 Wellington is a 34,000-acre residential/equestrian community with some commercial areas and has been an MS4 NPDES permittee since 1997. Our man-made MS4 (110 miles of canals, 170 acres of lakes, 400 acres of wetland/marsh preserves) is both a conveyance system and a stormwater treatment system. Our current MS4 NPDES permit defines WOTUS as the receiving water bodies that accept discharges from the MS4. Our primary concern is that under the proposed definition of Waters of the United States, our MS4 would become WOTUS. If these made-man treatment systems become WOTUS, then in accordance with the proposed rule, these systems will be required to meet water quality requirements themselves. This will set our permitted state and federal stormwater water quality programs back fifteen years and we will have wasted tax payers +$40 million dollar investment. This necessitates our request for an exemption from jurisdiction within the proposed WOTUS rule for man-made stormwater treatment systems that have been permitted under MS4 or EPA approved state permitting programs. (p. 1-2)

Agency Response: Please see summary response at 7.4.4. Also note that the final rule does change the implementation of the 402 program. See the summary response at 12.3.

Town of Shady Shores, Texas (Doc. #15709)

7.552 **Proposed rule does not specifically exempt Municipal Separate Storm Sewer Systems (MS4s)**

Since stormwater management activities are not explicitly exempt under the proposed rule, the Town is concerned that man-made conveyances and facilities for stormwater management could now be classified as a "water of the U.S.". The Town owns MS4

infrastructure including ditches, channels, pipes and gutters that flow into a "water of the U.S." and are therefore regulated under the CWA Section 402 stormwater permit program. There is a significant potential threat for municipalities that own MS4 infrastructure because they would be subject to additional water quality standards (including total maximum daily loads) if their stormwater ditches are considered a "water of the U.S." Not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well. Even if the EPA and Corps do not initially plan to regulate an MS4 as a "water of the U.S.", they may be forced to do so through CWA citizen suits, unless MS4s are explicitly exempted from the requirements. (p. 3)

Agency Response: **Please see summary response at 7.4.4.**

7.553 **Proposed rule will hamper beneficial development such as green infrastructure**

Green infrastructure is often utilized as a stormwater management tool to lessen flooding and protect water quality. Green infrastructure uses vegetation, soils, and natural processes to manage water and create healthier urban environments. Green infrastructure is not explicitly exempt under the proposed rule. The proposed rule could inadvertently impact the number of these types of storm water management systems built by developers, property owners and municipalities by requiring Section 404 permits for non-MS4 and MS4 green infrastructure construction projects. Additionally, it is unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established. (p. 3)

Agency Response: **Please see summary response at 7.4.4.**

Southern California Water Committee (Doc. #16170)

7.554 **A. New definition of Tributary could improperly include MS4 Facilities**

In the Proposed Rule, all "tributaries" are considered jurisdictional if it is a water physically characterized by the presence of a bed and banks and ordinary high water mark, which contributes flow (including on an ephemeral or intermittent basis), either directly or indirectly through another water, to a more "traditional" WOTUS.[302] Further, wetlands, lakes, and ponds may be a tributary even if they lack beds and bank and an ordinary high water mark. A tributary can be natural, man-altered, or man-made water and includes rivers, streams, lakes, ponds, wetlands, impoundments, canals, and ditches that are not otherwise excluded. Man-made or natural breaks (e.g., pipes, culverts, boulder fields) do not disqualify upstream reaches as tributaries.

Considering the expansive nature of this proposed definition, and unless otherwise excluded by rule, stormwater conveyance facilities, treatment wetlands, and/or infiltration projects could be considered tributaries. 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 characteristics in a natural

[302] Notably, the map prepared by EPA and included in the National Hydrography Database identifies even the washes in much of the Mohave Desert in southeastern California as "intermittent" and, under the Proposed Rule, would be a WOTUS. (See http://science.house.gov/epa-maps-state-2013#overly-context.)

or man-made channel, canal, ditch, or swale. For example, some MS4 conveyance facilities have open channels that ultimately enter a WOTUS through an outfall.[303] 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."3 (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 the 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.

In addition to capturing open conveyance channels under the definition of tributary, other types of stormwater facilities may also be captured by this definition. For example, stormwater treatment or capture basins that have an "open water" feature could be jurisdictional under the tributary definition, if there is some form of connectivity to a traditional navigable water, or connectivity to a tributary to a traditional navigable water. The Proposed Rule has no geographical limit with respect to such connectivity. Thus, e.g., a constructed stormwater treatment system located miles from a traditional navigable water could be a WOTUS.

The Proposed Rule claims that it is appropriate to include tributaries "by rule" because it summarily concludes that tributaries have a significant nexus to a traditional navigable water, and that they affect the physical, chemical, and biological integrity of a traditional navigable water. With respect to MS4 facilities, the significant nexus test is inapplicable because MS4 facilities are already regulated under CWA section 402. Specifically, to the extent that MS4 facilities may significantly affect traditional navigable waters, they are regulated like other point source discharges to a WOTUS, and are subject to extensive NPDES permit requirements. Since they are so regulated, it is not necessary to capture such facilities under the definition of tributary because their physical, chemical, and biological impacts to traditional navigable waters are addressed through the terms of the applicable NPDES permit.

In light of these concerns, SCWC recommends that the Proposed Rule be revised to clearly indicate the definition of tributary does not, and is not intended to, include MS4 facilities. The Agencies can accomplish this by ensuring the exclusions (discussed below in section II) are clear, concise, and specifically address stormwater management facilities. The Agencies also need to include text within the descriptive portion of the

[303] SCWC 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. SCWC'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 stormwater. Rather, SCWC is stating that stormwater 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.

final rule that clearly and definitively states that MS4 facilities are not a WOTUS. Such a clarification is consistent with previous EPA findings. (See 53 Fed. Reg. 49416, 49442 (Dec. 7, 1988) ["[W]aters of the United States are not storm sewers for purposes of this rule."].) (p. 3-5)

Agency Response: **Please see summary response at 7.4.4.**

7.555 **II. The exclusions for waters that are not WOTUS must be revised to incorporate MS4 conveyance and other related facilities**

The Proposed Rule intends to maintain current exclusions contained within the definition of WOTUS, and to also incorporate others that have not been considered WOTUS through longstanding practice of the Agencies. However, the current exclusions and the proposed new exclusions do not specifically include or incorporate MS4 conveyance facilities and other stormwater related facilities. The exclusions need to be revised to provide certainty to stormwater managers, state regulators, and the Agencies themselves.

A. Waste Treatment System Exclusion

With respect to the waste treatment system exclusion, it does not adequately address the range of facilities constructed in California to convey, capture, treat, or infiltrate stormwater. At most, one would have to show that the stormwater facility was "designed to meet the requirements of the Clean Water Act." However, considering the iterative nature of stormwater BMPs and MS4 permits in general, considerable discretion will be given to the Agencies, and ultimately the courts, in determining if a specific stormwater BMP was designed to meet the requirements of the CWA. Further, based on information presented in public workshops since the Proposed Rule was published, the Agencies have been unable to provide clear direction with respect to stormwater facilities, and how they are covered by the waste treatment system exclusion. Accordingly, there is significant uncertainty with maintaining the waste treatment system exclusion, as it currently exists. To ensure stormwater facilities are properly included in the waste treatment system exclusion, SCWC recommends that it be revised as follows:

> *Waste treatment systems, including treatment ponds~~, or~~ lagoons, or stormwater capture and treatment systems designed to meet the requirements of the CWA (including permits issued pursuant to CWA section 402(p)) are not waters of the United States. This exclusion applies only to manmade bodies of water that neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States . . .*

B. Artificial Lakes Exclusion

The Proposed Rule would also exclude waters that have the features of being "[a]rtificial 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 . . . ." Many stormwater related facilities have similar features to those that are included within this exclusion. Examples of such facilities could include infiltration basins, bioswales, spreading grounds, detention basins, green infrastructure projects, and others. Further, many of these facilities were created in dry land and thus clearly meet the intent of the exclusion provided here. However, as currently proposed, this exclusion does not

specifically include stormwater related facilities and thereby creates uncertainty as to where such facilities would fall under the Proposed Rule. To ensure that stormwater related facilities that meet the intent and purpose of this exclusion are properly included, SCWC recommends that this exclusion be revised as follows:

> *Artificial lakes, or ponds, or basins created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, stormwater infiltration, groundwater recharge, or rice growing . . .* (p. 7-8)

Agency Response: With respect to stormwater control features, please see summary response at 7.4.4. Groundwater recharge basins are covered under the exclusion at (b)(7) for "wastewater recycling structures created in dry land: detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling" or under the stormwater control feature exclusion at (b)(6), depending on the source of water. In effect, both have the same result, i.e., the infiltration basin is not a jurisdictional water as long as it was built in dry land. Please note that the final rule does not change the applicability of the Underground Injection Control program for Class V injection wells or subsurface fluid distribution systems under the Safe Drinking Water Act. See 40 CFR Part 144.

7.556 To ensure that MS4 conveyance facilities that otherwise qualify as ditches are properly excluded, SCWC 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. 9)

Agency Response: Please see summary response at 7.4.4.

Department of Environmental Services, Clark County, Washington (Doc. #16455)

7.557 While we support rulemaking to help define "Waters of the U.S." to help provide certainty to the jurisdictional scope of the Clean Water Act, we believe that the rule making falls short for governmental entities that have a Municipal Separate Storm Sewer System (MS4) permit, and attempt s to recapture jurisdiction reach and rulemaking that had previously been stricken down by the Supreme Court.

We urge you to specifically exempt MS4 infrastructure from regulatory coverage under Section 404 of the Act and limit the regulatory governance to Section 402. (p. 1)

Agency Response: Please see summary response at 7.4.4.

City of Beaverton, Oregon (Doc. #16466)

7.558 We recognize that EPA and the Corps may claim these outcomes are unanticipated. However, there is so much gray area in the proposed rule that the rise of third-party citizen suits are likely to define all these described waters as WOTUS. The agency's so-

called intent will not matter, because where there is gray, there will be a lawyer to file a lawsuit. Ultimately, the aggressive reach of this rule and its ambiguous provisions and terminology introduces uncertainty, requires more agency analysis and intervention, and will create increased litigation.

With that in mind, the rule must include the following provisions that are priority concerns for local governments:

- Separate municipal storm sewers will continue to be regulated and permitted under Section 402 of the Clean Water Act, and shall not be considered, either in their entirely or any individual feature thereof, waters of the U.S.;

… (p. 2-3)

Agency Response: **Please see summary response at 7.4.4.**

City of Oceanside, California (Doc. #16509)

7.559 …the City recommends that certain exclusions within the Proposed Rule be expanded to include MS4 conveyance facilities and other related facilities. Key implications of the Proposed Rule that cause concern for the City are summarized below:

The Proposed Rule identifies human-altered channels and human-made structures, including potentially storm water (MS4) infrastructure, as a WOTUS. MS4s are highly regulated, and NPDES permits provide legal authority for discharges from MS4s to WOTUS They are not themselves WOTUS, and MS4s are required, at a minimum, to implement controls to reduce the discharge of pollutants to WOTUS to the maximum extent practical (MEP). The consequence is that water quality standards (including Total Maximum Daily Loads) would have to be met within the MS4 and would undermine how the system is operated; the potential for beneficial capture, treatment and reuse of dry and wet weather flows would be diminished; and it would be more difficult for the City to comply with the requirement to reduce pollutants discharged from the MS4 to the "maximum extent practicable". Unfortunately, the Proposed Rule fails to specifically exclude MS4s (and related infrastructure and associated facilities) from being a WOTUS. Thus, many of the newly proposed definitions create significant uncertainty, and could be interpreted in a manner that would find an MS4 and/or its related facilities to e aW0TUS. These new definitions identify waters by category, and include tributaries, jurisdictional ditches, adjacent waters, and "other waters" with significant nexus to an existing WOTUS. The type of storm water facilities and o her related infrastructure projects that are potentially vulnerable to jurisdiction under these new categories, include, but are not limited to:

- MS4 conveyance facilities
- Detention and settling basins
- Storm water treatment systems
- Infiltration facilities
- Bioswales
- Groundwater recharge facilities

- Green infrastructure projects (p. 2)

Agency Response: **Please see summary response at 7.4.4. Groundwater recharge basins are covered under the exclusion at (b)(7) for "wastewater recycling structures created in dry land: detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling" or under the stormwater control feature exclusion at (b)(6), depending on the source of water. In effect, both have the same result, i.e., the infiltration basin is not a jurisdictional water as long as it was built in dry land. Please note that the final rule does not change the applicability of the Underground Injection Control program for Class V injection wells or subsurface fluid distribution systems under the Safe Drinking Water Act. See 40 CFR Part 144.**

7.560 Tributaries to WOTUS are now broadly defined, including man-made structures (dams, culverts), and are Jurisdictional by Rule. MS4 systems may be defined as tributaries and become subject o WOTUS regulation. In the Proposed Rule, all "tributaries" are considered jurisdictional if it is a water physically characterized by the presence of a bed and banks and ordinary high water mark, which contributes flow (including on an ephemeral or intermittent basis), either directly or indirectly through another water, to a more "traditional" WOTUS. Further, wetlands, lakes, and ponds may be a tributary even if they lack beds and bank and an ordinary high water mark. A tributary can be natural, man-altered, or man-made water and includes rivers, streams, lakes, ponds, wetlands, impoundments, canals, and ditches that are not otherwise excluded. Man-made or natural breaks (e.g., pipes, culverts, boulder fields) qualify upstream reaches as tributaries. Considering the expansive nature of this proposed definition, and unless otherwise excluded by rule, storm water conveyance facilities, treatment wetlands, and/or infiltration projects could be considered tributaries. 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 characteristics in a natural or man-made channel, canal, ditch, or swale. City recommends that the Proposed Rule be revised to clearly and explicitly indicate that the definition of tributary does not, and is not intended to, include MS4 facilities. (p. 2-3)

Agency Response: **Please see summary response at 7.4.4.**

Palm Beach County, Florida (Doc. #16647)

7.561 Given the unique topography and high water table in South Florida, stormwater treatment mechanisms are necessary parts of the conveyance system of an MS4 that are integrated throughout the system to ensure water quality benefits are achieve prior to discharge through a control structure into a receiving "water of the State" at the downstream end of the MS4 system. If stormwater treatment mechanisms and their accompanying MS4 systems become "Waters of the US," the points of discharge would be required to move upstream of the stormwater treatment system, resulting in the almost total elimination of the MS4 jurisdictional area. State water quality requirements would have to be met inside the systems, or DEP would be forced to adopt additional standards for those water bodies. For privately owned stormwater management systems (also referenced below), this would directly contradict established and EPA approved state law and regulatory regimes

that consider the systems "waters" only for the purposes of discharge. For local government systems, this would practically eliminate the ability to provide treatment within the systems prior to discharge. As an example, the lead permittee on the Palm Beach County MS4, Northern Palm Beach County Improvement District, will see its MS4 area reduced from 36,000 acres to less than 1,000 acres (a 97% reduction) under the proposed rule. The Village of Wellington, one of the larger municipalities in the County, will see a reduction in its MS4 area from 20,000 acres to 6,000 acres (a 70% reduction).

Under the proposed rule, an overwhelming majority of existing stormwater management systems will become "tributaries" or "adjacent waters," rendering the ability of permittees to the Palm Beach County MS4 Permit to implement Stormwater Management Programs almost non-existent. Maintenance activities that are required to be undertaken within the systems by State ERPs and the PBC MS4 Permit will be subject to permitting under Section 404 of the CWA, requiring additional time and resources from both local governments and the US Army Corps of Engineers. Delays in procuring required permits will impact the permitted systems flood protection and water supply benefits, and can expose local governments to legal liability regardless of whether the delay is attributable to a federal agencies failure to issue a permit. Additionally, businesses will not be able to rely on the rule to prevent a backlog in permitting that could have a negative impact on the construction schedule for redevelopment.

All stormwater systems permitted under Florida law and regulatory programs are designed to provide retention, conveyance and treatment prior to discharge into "waters of the State." EPA Region IV's guidance on the treatment of wastes, including the treatment of stormwater, finds that such treatment in "Waters of the US" is inconsistent with provisions of the Clean Water Act.[304] Simply put, if stormwater management systems are considered jurisdictional "Waters of the United States" as contemplated under the proposed rule, the ability of local governments in South Florida to provide treatment will be eliminated. This will result in deleterious water quality impacts to the water resources of the region, a result not contemplated by the agencies. As articulated below, Palm Beach County recommends that the federal agencies include language in the final rule explicitly excluding, as part of the waste treatment system exclusion, those man-made stormwater management systems that have been previously permitted under existing federal or federally approved state permitting programs. (p. 11-12)

Agency Response: **Please see summary response at 7.4.4.**

7.562 To avoid regulatory uncertainty, legal deficiencies and the practical consequences that will result from finalization of the proposed rule, Palm Beach County proposes the following amendments to the rule language:

…

4) Clarify the waste treatment exemption to clearly include man-made storm water management and treatment systems that have been previously permitted under the MS4 permitting program or a federally approved state permitting program. Exempted man-

[304] See Final Region 4 Guidelines for Reconciling Storm Water Management and Water Quality and Resource Protection Issues (11/14/01).

made storm water features should include ditches, canals and conveyances, wetlands, inflow basins, and other features that should be clearly articulated in the rule. Alternatively, the proposed rule should be amended to include a new exemption for stormwater management facilities and features.

… (p. 13, 14)

Agency Response: Please see summary response at 7.4.4.

City of Portland, Bureau of Environmental Services (Doc. #16662)

7.563 1) BES requests that EPA specifically exclude MS4 activities and permitted facilities and other constructed green infrastructure facilities from the definition of "Waters of the US." Many municipalities are required to obtain Municipal Separate Storm Sewer System (MS4) permits for discharge of collected stormwater into Waters of the US. Green infrastructure, such as roadside ditches, stormwater swales and green street facilities, is a key component of many MS4 systems. Because the appropriate regulatory controls and adequate oversight already apply to these discharges, all components of these systems should be clearly exempted from the definition of Waters of the US. The MS4 permits and oversight however do not apply to the surface water components of natural drainages upstream or downstream. Those sections should continue to be jurisdictional under the proposed rule. In addition, constructed green infrastructure facilities that are not part of an MS4 system should also be excluded from the definition of Waters of the US. Without this clear exclusion, EPA could be inadvertently discouraging the use of green infrastructure because of the perception that they could be subject to additional oversight and regulation. (p. 1-2)

Agency Response: Please see summary response at 7.4.4.

Board of Supervisors, Lassen County, California (Doc. #17461)

7.564 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.

California has imposed stricter standards on all storm water permittees, including MS4 permit holders, and the proposed rule as it stands would only serve to exacerbate the already difficult task of compliance for rural counties in our State by causing jurisdictional confusion and dramatically increased compliance costs. Many rural California counties have either recently been required to comply with the MS4 permit, or will be required to comply within the next permit cycle. The implementation costs for new permittees would increase exponentially if the proposed rule is not modified to include clarification and exemptions for MS4 permit holders.

RCRC recommends that, should you choose to proceed with the rulemaking, you specifically include ditches and other conveyance methods used to comply with MS4 permits under the exemption for waste water treatment systems. (p. 3)

Agency Response: **Please see summary response at 7.4.4.**

Board of Supervisors, Amador County, California (Doc. #17450)

7.565 Changes to the terms "navigable water" or "waters of the United States" will likely alter the way many water bodies arc regulated and trigger new unfunded mandates on local governments. Additionally, the expanded definition will subject counties to additional enforcement actions, including civil and criminal penalties, and place local governments at great risk of third-party litigation. Some examples include:

…

- 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.

…

Rather than codify what the agencies have practice for the past few decades, this rulemaking is an opportunity to re-examine legislative direction and provide corrective measures where needed. The two key words to focus on are "navigable" and "significant". We urge the agencies to narrow the scope of jurisdiction to waters suitable for vessels and waters that have a significant nexus to those waters, consistent with the CWA and Justice Kennedy's standard. At a minimum, we urge the agencies to clarify and specifically exclude water re-use facilities, roadside and MS4 ditches, and floodwater control systems from the definition of "waters of the U.S.". (p. 2, 3)

Agency Response: **With respect to stormwater control features, please see summary response at 7.4.4. Groundwater recharge basins are covered under the exclusion at (b)(7) for "wastewater recycling structures created in dry land: detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling" or under the stormwater control feature exclusion at (b)(6), depending on the source of water. In effect, both have the same result, i.e., the infiltration basin is not a jurisdictional water as long as it was built in dry land. Please note that the final rule does not change the applicability of the Underground Injection Control program for Class V injection wells or subsurface fluid distribution systems under the Safe Drinking Water Act. See 40 CFR Part 144.**

Department of Public Works, County of San Diego, California (Doc. #17920)

7.566 The County requests that the new rule exempt the full range of conveyances, green infrastructure, treatment, storage, and infiltration facilities necessary to comply with MS4 permits. The proposed rule should explicitly and categorically exclude from the definition of a Water of the US multiple separate storm sewer systems (MS4s), conveyances, and related infrastructure designed for stormwater management. MS4s are not mentioned in the proposed rule. This is a glaring omission. Without a clear exemption, many features of MS4s could be potentially considered Waters of the U.S. Although there is an existing exemption for "waste treatment systems," it is not clear if all features of MS4s would qualify for this exemption.

An exemption is needed for MS4s because the new rule redefines treatment and the definition of tributaries in a way that could allow many MS4 facilities to be considered Waters of the U.S. because they contribute flow downstream. This presents a conflict in complying with sections 402 and 404/401 of the CWA. MS4 facilities and conveyances require maintenance to sustain their proper water quality function; however, Sections 404 and 401 could trigger a need for permits to conduct the maintenance if these facilities are considered Waters of the U.S. Clearly, clarification is needed to exempt infrastructure and BMP features that are built and maintained to comply with MS4 permits. As explained above, the new definition of tributaries appears more expansive, which would reduce available water quality treatment options and make it difficult to locate such facilities, as Waters of the U.S. cannot be treated directly. As such, the new broad definition of tributaries would increase the cost of compliance, reduce treatment options, and make it more difficult to comply with Section 402 of the Clean Water Act.

Conveyances should be explicitly defined as drainage facilities other than sanitary sewers by which urban runoff may be conveyed to receiving waters, including, but not limited to, roads, streets, constructed channels, aqueducts, storm drain. pipes, street gutters, inlets to storm drains or pipes and catch basins. The rule should specifically exempt stormwater conveyances, bioswales, green streets, and infiltration basins that are necessary to comply with an MS4 permit. Additionally, the exemption should include structures and features designed in pursuit of watershed-based compliance options and integrated planning for stormwater management and water supply reliability. The definitions and exclusions must ensure that the design and location of stormwater BMPs can remain consistent with the goals of stormwater management without these areas being considered Waters of the U.S.

EXAMPLE: The San Diego Regional MS4 Permit requires plans to address pollutants and impairments in jurisdictional water bodies, The Regional Water Quality Control Board has identified Chollas Creek as impaired by dissolved metals. Expanding the definition of Waters of the U.S. to include ditches and other "offline" MS4 conveyances with connectivity to the Creek would significantly limit opportunities to treat stormwater before it reaches the receiving water. (p. 2-3)

Agency Response: **Please see summary response at 7.4.4. In this response to comments, the Agencies cannot address whether or not a particular feature (Chollas Creek in this instance) is a jurisdictional water of the U.S.**

7.567 Any constructed feature built for the purpose of water quality treatment and/or runoff control as required by any federal, state, or local agency, including those with wetland indicators, connectivity and/or within a floodplain or riparian area, should be specifically defined as being non-jurisdictional by rule. In the Federal Register posting, the agencies request comment on which waters should be determined non-jurisdictional by rule; this is an important example of such. It is imperative that the County, and other local agencies, be able to construct and maintain water quality treatment facilities to ensure that the design and location of such facilities can remain consistent with the goals of stormwater management. If these facilities are left undefined, counties and stakeholders would be vulnerable to broad application of federal jurisdiction as these facilities would be open to being considered jurisdictional by local regulators. If these water quality treatment features are considered jurisdictional, then lengthy permitting and possible costly mitigation would be required to construct and maintain these features.

EXAMPLE: The County implements bridge replacement projects administered by the Federal Highway Administration. These bridge replacement projects are commonly located at stream crossings and typically include an increase in impervious surface to bring the bridge up to current standards. The increase in impervious surface area would trigger a requirement to install detention basins or a similar water quality treatment facility pursuant to Clean Water Act Section 402 and the corresponding MS4 permit. In this scenario, the water quality treatment facility must be installed adjacent to the new impervious surface in order to filter the water, which would also be adjacent to the stream. Thus, such a water quality treatment system would likely have direct connectivity, be within the floodplain, and within the riparian area. This example illustrates the importance of insuring that such facilities can be constructed and maintained unimpeded by potentially being considered to impact Waters of the U.S. by a significant nexus, wetland, or other determination. (p. 4)

Agency Response: **Please see summary response at 7.4.4.**

Board of County Commissioners, Marion County, Florida (Doc. #18868)

7.568 The proposed regulations expand key definitions that have potentially far-reaching effects. "Tributaries" may now include stormwater management features such as treatment ponds, swales, and ditches. These facilities are already constructed in accordance with Florida's longstanding environmental resource permitting program. Stormwater facilities, required to be maintained under state, as well as, federal (Section 404) rules, will now have another layer of regulation. Marion County recommends that: Stormwater conveyance systems, including upland cut ditches and swales, should be excluded from the definition of WOTUS with limited exceptions.

Stormwater facilities including constructed ponds and created wetlands should be excluded specifically from the proposed definition of WOTUS. (p. 1)

Agency Response: **Please see summary response at 7.4.4.**

Stormwater Advisory Committee, DeSoto County, Mississippi (Doc. #19473)

7.569 There is a risk that portions of our MS4s could be considered a WOTUS even before discharging into a jurisdictional water such as a river or a stream, which could lead to

significant new and duplicative regulations and costs. The DeSoto County Stormwater Advisory Committee believes that the proposed rule should clarify that MS4s are covered by the water treatment system exemption and will not be jurisdictional under the Clean Water Act above any existing point of permitted discharge, including any ditches that are a part of the MS4. (p. 1)

Agency Response: **Please see summary response at 7.4.4.**

Maui County, Hawaii (Doc. #19593)

7.570 Municipal Separate Storm Water Systems

1. The rule's new definitions for "tributaries" and "other waters" are abstract and contingent on variable field conditions. Under the proposed rule many stormwater systems and features could be considered WOTUS.

2. Waters associated with storm water infrastructure should be specifically excluded from the WOTUS definition.

3. Under the proposed rule, these stormwater channels could be considered jurisdictional even though they are part of the MS4 and regulated under an NPDES permit. Regulating such waters under both an NPDES permit and Section 404 of the CWA is overly burdensome and unworkable from a regulatory and compliance standpoint.

4. If stormwater conveyances are deemed WOTUS, they will be subject to water quality standards. The costs of complying with water quality standards could be extreme.

5. Stormwater or stream channels could be considered "tributaries" or "roadside ditches" under the proposed rule, and including tributaries by rule is not practical. The proposed rule should be revised to state unequivocally that the definitions of tributary and roadside ditch do not include MS4 facilities, and MS4 facilities are not "waters of the U.S."

6. Waste treatment systems, excluded under 40 CFR 122.3, should include stormwater management and treatment systems. The lack of such language leaves the rule open to interpretation as to whether stormwater controls are considered jurisdictional.

7. Infrastructure used to treat, manage, infiltrate or retain urban stormwater runoff should be specifically included in the "waste system treatment" exclusions.

8. The rule should define the systems to which the exemption applies, including manmade structures and devices as well as treatment measures to improve water quality, reduce stormwater volume, control flow rate and flooding, convey stormwater, or a combination of these purposes. (p. 3)

Agency Response: **Please see summary response at 7.4.4.**

Board of Supervisors, Navajo County, Arizona (Doc. #19569)

7.571 Since storm water management activities are not explicitly exempt under the proposed rule, Navajo County is concerned that man-made conveyances and facilities for storm water management could now be classified as a “water of the U.S.” Some counties and cities own Municipal Separate Storm Sewer System (MS4) infrastructure including ditches, channels, pipes and gutters that flow into a “water of the U.S.” and are therefore regulated under the CWA Section 402 storm water permit program. There is a significant

potential threat for counties that own MS4 infrastructure because they would be subject to additional water quality standards (including total maximum daily loads) if their storm water ditches are considered a "water of the U.S." Not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well. Even if the agencies do not initially plan to regulate an MS4 as a "water of the U.S.," they may be forced to do so subsequently through CWA citizen suits, unless MS4s are explicitly exempted from the requirements.

This concern is validated with the Science Advisory Board (SAB) Panel for the Review of the EPA Water Body Connectivity stating in its report that "the Panel members noted that many of the exclusions in the proposed rule do not have strong scientific justification and, rather, reflect policy decisions that account for stakeholder concerns and / or historical practices" (p. 6).

Storm water management is often not funded as a water utility, but rather through a county general fund. If storm water costs significantly increase due to the proposed rule, not only will it potentially impact the counties ability to focus available resources on real, priority water quality issues, but it may also require that funds be diverted from other government services such as education, police, fire, etc.

By shifting the point of compliance for MS4 systems further upstream, the proposed rule could reduce opportunities for establishment of cost effective regional storm water management systems. Many counties and storm water management agencies are attempting to stretch resources by looking for regional and integrated approaches for managing storm water quality. The rule would potentially inhibit those efforts. (p. 4-5)

Agency Response: **Please see summary response at 7.4.4.**

Department of Public Works & Engineering, City of Cookeville, Tennessee (Doc. #19619)

7.572 Certain categories of waters need to be specifically excluded from WOTUS status:

- Urban stormwater control measures and BMPs within a regulated MS4 should be excluded as they are already regulated through the NPDES communities
- Constructed wetlands (constructed in uplands) are a waste treatment facility and should not be considered WOTUS
- MS4 conveyance facilities and other stormwater related facilities such as roadside ditches, gutters, culverts, swales, and flood control features, etc.

… (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

Association County Commissioners of Georgia (Doc. #5912)

7.573 Since stormwater management activities are not explicitly exempt under this proposed rule, we are concerned that Municipal Separate Storm Sewer System (MS4s) infrastructure could now be classified as a "Water of the U.S."

This infrastructure includes many county MS4 conveyances, including ditches, channels, pipes and gutters that flow into a water of the U.S. and are already regulated under the CWA Section 402 stormwater permit program.

We are concerned that not only would the discharge leaving the stormwater system be further regulated, but all flows entering the MS4 could be regulated as well.

In various conference calls with the National Association of Counties, EPA staff have stressed that they do not "intend" to regulate an MS4, as a "water of the U.S."

We take them for their word on their intentions.

However, EPA and the Corps may be forced to do so through citizen/environmental group CWA lawsuits as these ditches, pipes and channels, under the rule's "tributary" and "adjacency" definitions, could very well be interpreted to be "Waters of the U.S."…

Proposed Action: In order to avoid this, ACCG respectfully recommends that MS4 activities be explicitly exempted under the proposed rule. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

California State Association of Counties (Doc. #9692)

7.574 The ramifications of…plausible scenarios are: subjecting local agencies to the CWA 404/401 permit process, high costs for repairing or upgrading such infrastructure when it is already covered by the MS4 permit process, and potential liability to citizen suits. It should be noted the EPA has previously determined that storm drains cannot be WOUS. The agencies should therefore include language that exempts MS4 from CWA regulation even if it otherwise qualifies as a "tributary" under the proposed rule. The exemption language should explicitly exempt: stormwater conveyances, bioswales, green projects, and infiltration basins used to comply with an MS4 permit as these facilities are necessary to comply with the CWA. (p. 9)

Agency Response: **Please see summary response at 7.4.4.**

Association of California Water Agencies (Doc. #12978)

7.575 ***The proposed rule places groundwater recharge facilities and stormwater management at risk.***

Many arid western states use surface infiltration as a management tool to prevent flooding, store excess water for future use, replenish groundwater supplies, mitigate salt water intrusion, or abate land subsidence. The most economical manner of groundwater recharge is to construct a basin in alluvial material immediately adjacent to a perennial or ephemeral stream. This allows water to rapidly infiltrate through the basin to the unsaturated zone where it is added to the aquifer below. In addition to the basins, flood control dikes, swales and ditches are used to capture and convey stormwater to protect public safety. In addition to being adjacent to a "waters of the United States", all of these features may contain hydric soil, wetland vegetation, and have an ordinary high water mark. Currently, these facilities have not been deemed to have a significant nexus with traditional navigable waters. Under the proposed rule these facilities would meet the definition of "waters of United States". ACWA requests that groundwater recharge

facilities and stormwater retention basins (including construction, operations, and maintenance) be excluded from the proposed definition of "waters of the United States". (p. 15)

Agency Response: **With respect to stormwater control features, please see summary response at 7.4.4. Groundwater recharge basins are covered under the exclusion at (b)(7) for "wastewater recycling structures created in dry land: detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling" or under the stormwater control feature exclusion at (b)(6), depending on the source of water. In effect, both have the same result, i.e., the infiltration basin is not a jurisdictional water as long as it was built in dry land. Please note that the final rule does not change the applicability of the Underground Injection Control program for Class V injection wells or subsurface fluid distribution systems under the Safe Drinking Water Act. See 40 CFR Part 144.**

Colorado Stormwater Council (Doc. #12981)

7.576 The CSC respectfully requests exclusions for MS4 features including roadside ditches, detention facilities, and detention outfalls. (p. 3)

Agency Response: **Please see summary response at 7.4.4.**

7.577 **Excluded Best Management Practices**. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA are not WOTUS under the current rule. Language in the 2012 Nationwide Permits and Current Guidance clarifies that permanent Best Management Practices (BMPs) that are determined to be waste treatment systems under current regulations are not WOTUS. The Proposed Rule does not significantly change the language regarding the excluded waste treatment facilities. However, there is not a categorical exclusion for BMPs. Additional clarification is required to identify the types of facilities that should qualify for this exclusion. EPA, as the regulatory authority driving the construction of many BMPs under the MS4 Stormwater Program, should have a responsibility to make the jurisdictional status of these features clear in the rule language.

The CSC requests that any facility designed and operated to treat stormwater runoff to meet the requirements of the CWA or local regulations for managing stormwater should be included in this exclusion. (p. 4)

Agency Response: **Please see summary response at 7.4.4.**

7.578 Furthermore, the existing regulations include exclusions for waste treatment facilities that are constructed to meet CWA requirements and are constructed in uplands. Currently, this exclusion is inconsistently implemented or misinterpreted by USACE and EPA staff at the national offices and regional regulatory field offices level. Clearly, additional language is necessary to restore the intent of this exclusion.

The CSC requests that language be included in the Proposed Rule to state that treatment of stormwater runoff from rural and urban settings conforms to the

exclusion and that the exclusion applies to all necessary and constructed components of the stormwater treatment system. (p. 4)

Agency Response: Please see summary response at 7.4.4.

National Association of Flood & Stormwater Management Agencies (Doc. #13613)

7.579 The broad definitions in the proposed rulemaking, especially the definition of Tributary in conjunction with Adjacent, can lead to the conclusion that MS4s would be deemed Waters of the US. The distinction between MS4s and WOTUS is critical and begs the question of how CWA Sections 303 and 402 will be applied to historic MS4s deemed to be WOTUS. NAFSMA requests that the EPA clearly define what is considered to be an MS4 and what is determined to be a WOTUS, and reaffirm that an MS4 cannot be WOTUS.

The proposed rulemaking is also silent on Low Impact Development (LID). Many LID features will fit the definitions outlined in the proposal and NAFSMA requests that EPA explicitly exempt LID / green infrastructure features from WOTUS. The vague language in the proposed rule could contradict the existing waste water treatment exemption and inadvertently recapture MS4s, including treatment BMPs, back under WOTUS. Commingling MS4s and WOTUS will forcibly misapply costly compliance requirements intended for 2 receiving water bodies to the vast water collection and conveyance network. One of the many unanticipated consequences will be deterring the regulated community from implementing green infrastructure. NAFSMA acknowledges permit requirements for new construction activities, however, the maintenance of LID, green infrastructure, and MS4 features should all be explicitly exempt from WOTUS. (p. 1-2)

Agency Response: With respect to stormwater control features (including green infrastructure), please see summary response at 7.4.4.

Western Coalition of Arid States (Doc. #14407)

7.580 The agencies proposed rule also directly contradicts longstanding EPA guidance regarding the jurisdictional status of MS4s. In the 1990 preamble to the Phase I stormwater regulations, EPA made clear that storm water runoff into municipal sewers (roads, ditches, storm drains, etc.) is not a discharge of a pollutant into a water of the United States.[305] Recently, the agency also confirmed that MS4s are "by definition" not CWA navigable waters.[306] And under agency guidance issued by the Arizona Department of Environmental Quality for their §402 Construction General Permit project, the state asserts that, "Man-made structures such as retention basins, storm sewer systems or city storm drains are not [CWA] receiving waters.[307]

From interpretations made by both EPA and several state agencies under their respective stormwater programs, it is obvious that roadside ditches, especially those that are associated with a MS4 permit are not jurisdictional waters. They are, however, point

[305] 55 Fed. Reg. 47990, 47991, Nov. 16, 1990.
[306] In a memo from Ann R. Klee, Former General Counsel, and Benjamin H. Grumbles, Former Assistant Administrator for Water, EPA, to Regional Administrators, August 5, 2005.
[307] 2013 Construction General Permit Fact Sheet, Page 17 of 71, June 3, 2013.

sources under the CWA. And any person who discharges a pollutant to a roadside ditch or to a MS4 that, in turn, results in a discharge of pollutants under §301(a), must obtain a permit. The physical act of discharging pollutants to a roadside ditch or MS4 does not automatically trigger CWA jurisdiction. This is a practice that has been enforced throughout the history of the CWA and needs to be reflected in the Final Rule. (p. 12)

Agency Response: The commenters appears to misunderstand the meaning of the 1990 preamble discussion. Please see summary response at 7.4.4. Also see the Technical Support Document at Section I.C. The EPA August 5, 2005 memorandum from Ann R. Klee, and Benjamin H. Grumbles, does not address whether or not MS4s are jurisdictional. That memorandum addresses only the question of whether transfers of water from one jurisdictional waterbody to another without an intervening use of that water is an "addition" of pollutants under the CWA, and therefore is a discharge that requires an NPDES permit. While the 2005 memorandum did take note of the waste treatment system exclusion, an MS4 is not necessarily a waste treatment system, as explained in the summary response at 7.4.4. EPA statements about the waste treatment system exclusion in the definition of waters of the U.S. do not equate to statements about MS4s.

Georgia Municipal Association (Doc. #14527.1)

7.581 EPA and Army Corps should provide a clear exemption for MS4s, other stormwater systems and features, and green infrastructure. GMA requests that EPA and the Corps clearly state that MS4s and the conveyances within these systems, as regulated under the NPDES program, are categorically excluded from the Waters of the U.S. jurisdiction.

7.582 MS4s are defined under 40 CFR 122.26(b)(8) 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." MS4s and their component parts are waste treatment systems that manage and control pollutants conveyed by stormwater and currently regulated under CWA's Section 402{p), and therefore they should be categorically excluded from the scope of the "Waters of the U.S." (p. 4)

Agency Response: While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dryland is appropriate. Please see summary response at 7.4.4.

Florida Rural Water Association (Doc. #14897)

7.583 Community storm sewer systems (MS4s) should be excluded from the final rule in a similar manner as waste treatment systems. Some communities' storm sewer system conveyance facilities include channels that may discharge to traditional "Waters of the U.S." (p. 4)

Agency Response: Please see summary response at 7.4.4.

Kentucky League of Cities (Doc. #15227)

7.584 The language in the proposed rule regarding MS4s is ambiguous at best. Without a specific exemption for MS4 systems including drains, roads, pipes, curbs, gutters, ditches and other conveyances that channel runoff, local governments will be left open for

potential litigation and citizen lawsuits in an effort to determine the jurisdiction of an MS4 as a "Water of the U.S." This could create additional regulatory red tape as local governments and their MS4 systems could now be subject to 404 permitting and state water quality standards. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

NC League of Municipalities (Doc. #15358)

7.585 Many aspects of a MS4 system (ditches, channels, conveyance, etc.) are not explicitly exempt and could therefore be considered jurisdictional. This is a significant concern because if considered jurisdictional, these aspects of the MS4 system would be subject to Section 404 permits, as well as state Water Quality Standards. The Section 404 permit process can be extremely cumbersome and expensive. Without a specific exemption for MS4 system components that channel runoff, EPA and the Corps open the door for litigation and citizen suits that could determine that these components are jurisdictional waters and thereby subject to Section 404 permitting and state Water Quality Standards. The League believes that MS4s and their component man-made parts are systems that manage and control pollutants conveyed by stormwater that are regulated under the NPDES program and should be categorically excluded from the definition of a "waters of the U.S." (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

South Carolina Association of Counties (Doc. #15573)

7.586 Since stormwater management activities are not explicitly exempt under the proposed rule, the Counties are concerned that municipal conveyances and facilities for stormwater management could now be classified as a "water of the U.S." A number of South Carolina counties maintain large systems of Municipal Separate Storm Sewer System (MS4) infrastructure including ditches, channels, pipes, and gutters that may directly or indirectly flow into a "water of the U.S." and are therefore regulated under the CWA Section 402 stormwater permit program. There is a significant potential threat for counties that own MS4 infrastructure because they would be subject to additional water quality standards, including total maximum daily loads, if their stormwater ditches are considered a "water of the U.S." Not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well. Even if the agencies do not initially plan to regulate an MS4 as a "Water of the U.S.," they may be forced to do so through CWA citizen suits, unless MS4s are explicitly exempted from the requirements. (p. 5)

Agency Response: **Please see summary response at 7.4.4.**

The United States Conference of Mayors et al. (Doc. #15784)

7.587 Under the NPDES program, all facilities which discharge pollutants from any point source into a "waters of the U.S." are required to obtain a permit, including local governments with Municipal Separate Storm Sewer Systems (MS4s). Some cities and counties own MS4 infrastructure that flow into a "waters of the U.S." and are therefore regulated under the CWA Section 402 stormwater permit program. These waters,

however, are not treated as jurisdictional waters since the nature of stormwater makes it impossible to regulate these features.

It is this distinction that creates a conflict between the stormwater program and the definition of "waters of the U.S." in the proposed rule and opens the door to citizen suits. Water conveyances including but not limited to MS4s that are purposed for and servicing public use are essentially a series of open ditches, channels and pipes designed to funnel or to treat stormwater runoff before it enters into a "waters of U.S." However, under the proposed rule, these systems could meet the definition of a "tributary," and thus be jurisdictional as a "waters of the U.S." The language in the proposed rule must be clarified because a water conveyance cannot both treat water and prevent untreated water from entering the system.

Additionally, waterbodies that are considered a "waters of the U.S." are subject to state water quality standards and total maximum daily loads, which are inappropriate for this purpose. Applying water quality standards and total maximum daily loads to stormwater systems would mean that not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well. This, again, creates a conflict between the stormwater program and the definition of "waters of the U.S." in the proposed rule.

Request:

- Provide a specific exemption for water conveyances including but not limited to MS4s that are purposed for and servicing public use from the "waters of the U.S." definition. (p. 5)

Agency Response: While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dryland is appropriate. Please see summary response at 7.4.4.

League of Oregon Cities (Doc. #16546)

7.588 While the proposed rule maintains the exclusion for wastewater treatment systems, including treatment ponds and lagoons, the rule fails to exempt other types of treatment systems for both wastewater and stormwater. We ask the EPA and Corps to consider adopting an explicit exemption for stormwater treatment facilities and green infrastructure investments for wastewater systems, This would include bioswales that filter water and discharge to downstream waterways, stormwater wet retention ponds, and engineered wetlands for wastewater facilities: Stormwater facilities and technologies are adequately regulated under NPDES MS-4 permits, and engineered wetlands for wastewater treatment are additionally permitted through the NPDES program. Additional regulation or uncertainty around the permitting of such projects could serve as an unfortunate deterrent for projects that have proven to be highly effective and more environmentally beneficial than traditional grey infrastructure investments. (p. 2)

Agency Response: **While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dryland is appropriate. Please see summary response at 7.4.4.**

Oregon Association of Clean Water Agencies (Oregon ACWA) (Doc. #16613)

7.589 1. Failure to specifically exclude stormwater facilities may discourage use of green infrastructure.

The primary concern for ACWA is the failure to categorically exclude MS-4 activities and facilities, especially green infrastructure solutions (including but not limited to swales, filter strips, detention ponds, constructed wetlands and similar vegetated facilities) from the definition of "*waters of the United States."* First, stormwater facilities are already subject to NPDES MS-4 permits, so regulatory controls and adequate oversight already applies to these discharges. Second, the backbone of EPA's push for green infrastructure, low impact development and stormwater retrofits - - which ACWA members have whole-heartedly supported - - is implemented, in large part, through the stormwater program. Quite frankly, subjecting stormwater facilities to additional oversight may result in project delays and cost increases, discouraging green infrastructure and making grey infrastructure a more viable alternative. Examples of the types of environmentally beneficial projects that may be discouraged by the new rule include, for instance,

1) retrofitting an existing piped stormwater system to construct a vegetated flow-through bioswale that collects and filters storn1water runoff prior to discharging it to a downstream creek; and
2) daylighting an existing pipe outfall in an existing developed area in combination with the construction of a flow-through vegetated swale to filter stormwater runoff prior to discharging to a downstream creek.

ACWA requests that EPA specifically exclude MS-4 activities and stormwater facilities from the definition of "*waters of the United States*" in Section 40 CFR 230.3(t) and related provisions.

This would be consistent with EPA's verbal representation that the proposed is not intended to make green infrastructure facilities jurisdictional, stating that green infrastructure designed to meet CWA obligations or are intended to advance water quality goals are excluded. This needs to be made explicit in the final rule. (p. 1-2)

Agency Response: **Please see summary response at 7.4.4. With respect to the projects mentioned by the commenter, the jurisdictional status of pipes structures depends on whether or not they were built in dry land and otherwise meet the definition of jurisdictional waters.**

Maine Municipal Association (MMA) (Doc. #16630)

7.590 For example, municipal separate stormwater sewer system (MS4) infrastructure is currently covered by the waste treatment system exemption, but the new definitions could make MS4 stormwater drainage ditches jurisdictional under the CWA above existing permitted discharge points. This should be clarified; an EPA administrator has verbally committed to the MMA and Maine municipalities that existing permits will stand yet the

proposed rule casts a shadow on the reliability of that commitment. The definition of "tributary" ought to explicitly exclude MS4 stormwater conveyance and treatment systems that are already regulated under the National Pollutant Discharge Elimination System permit program.

MMA respectfully suggests that your agencies consider removing non-wetland waterbodies with a surface or shallow subsurface hydrologic connection to jurisdictional waters from the definition of "neighboring" and clarify that drainage ditches, catch basins, swales, settlement ponds and other low impact development infrastructure, as well as MS4 permitted discharges, continue to be exempt. (p. 2, 3)

Agency Response: **With respect to stormwater control features, please see summary response at 7.4.4. Additionally, in order to provide more certainty to the public, the rule does not include a provision defining neighboring based on shallow subsurface flow, though such flow may be an important factor in evaluating a water on a case-specific basis under paragraph (a)(8), as appropriate. See Preamble at Section III.**

NC League of Municipalities (NCLM) (Doc. #17443)

7.591 Related to the issue above and also of specific concern to League members is the proposed rule's effect on Municipal Separate Storm Sewer Systems (MS4). Many aspects of a MS4 system (ditches, channels, conveyance, etc.) are not explicitly exempt and could therefore be considered jurisdictional. This is a significant concern because if considered jurisdictional, these aspects of the MS4 system would be subject to Section 404 permits, as well as state Water Quality Standards. The Section 404 permit process can be extremely cumbersome and expensive. Without a specific exemption for MS4 system components that channel runoff, EPA and the Corps open the door for litigation and citizen suits that could determine that these components are jurisdictional waters and thereby subject to Section 404 permitting and state Water Quality Standards. The League believes that MS4s and their component man-made part s are systems that manage and control pollutants conveyed by stormwater that are regulated under the NPDES program and should be categorically excluded from the definition of a "waters of the U.S." (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

Iowa League of Cities (Doc. #18823)

7.592 …without a specific exemption for MS4 systems including drains, roads, pipes, curbs, gutters, ditches and other components that channel runoff, as well as non-MS4 storm-water systems and features/components, EPA and Army Corps open the door for litigation and citizen suits that could determine that they are considered a "Waters of the U.S." and thereby subject to Section 404 permitting and state Water Quality Standards.

EPA has stated repeatedly in public meetings and conference calls that it is not the intention of the rule to further impact waste water and storm water systems. However, during the Point Source Stakeholder call on June 17 the Agency representatives stated that the rule could impact new waters within MS4 collection systems but could not provide details as to how these determinations would be made. We understand that this

discussion is likely focused on western cities but without more explanation this provides uncertainty for Iowa cities trying to determine the potential impact to their systems.

…

Request for EPA Response: Plainly state how this rulemaking will Impact storm-water collection systems and clearly exempt those parts of the systems that EPA does not wish to include.

Example Language:

"(2) The following are not 'waters of the United States' notwithstanding whether they meet the terms of paragraphs (1)(1)(i) through (viii) of this definition-

> "(i) Waste treatment systems, including treatment ponds, lagoons, or Clean Water Act regulated municipal separate storm sewer systems and the component conveyances within such systems regulated under the National Pollutant Discharge Elimination System." ~~[designed to meet the requirements of the Clean Water Act.]"~~

(p. 3-4)

Agency Response: **Please see summary response at 7.4.4.**

Virginia Municipal Stormwater Association (VAMSA) (Doc. #19517)

7.593 This proposed rule should clarify beyond all doubt that stormwater treatment and conveyance systems are not jurisdictional waters of the United States. A local government should not, for example, have to be concerned that a regulator or citizen suit plaintiff may assert that an NPDES permit is required to discharge stormwater into its MS4 system. Likewise, it should be clear that a Clean Water Act § 404 permit is not required to perform maintenance work on a BMP.

We understand that EPA and the Army Corps of Engineers do not intend for stormwater management systems to be regulated as waters of the United States. The final rule should express this intent with a greater degree of clarity. To this end, MAMSA and VAMSA make the following two recommendations on the proposed rule:

I. Add an Exclusion for Stormwater Treatment and Conveyance Systems

Many common features of MS4s and other stormwater treatment and conveyance systems— including many stormwater conveyance ditches and settling basins—are expressly excluded from regulation under the proposed definition of waters of the United States. However, the jurisdictional status of some stormwater management features is far from clear under the proposal. One example is constructed wetlands. These BMPs often are virtually indistinguishable from natural wetlands, notwithstanding that they are constructed in uplands and carefully engineered to perform important stormwater management functions. It is not clear which, if any, exclusion would apply to constructed wetlands when they are used as BMPs. That ambiguity must be resolved in the final rule.

Stormwater management systems are vitally important to public safety and water quality. They deserve an express and unambiguous exclusion in the rule. The exclusion should clarify that no purposefully constructed stormwater management feature should be

regulated as a water of the United States. The exclusion should apply whether the feature is part of a larger stormwater system or is a standalone BMP, and irrespective of whether it is part of an MS4. The definition must also be broad enough to encompass all purposefully constructed stormwater conveyances and the many different and innovative types of stormwater BMPs. To meet these objectives, MAMSA and VAMSA propose that the following exclusion (italicized text) be added to the rule:

(2) The following are not ''waters of the United States'' notwithstanding whether they meet the terms of paragraphs (1)(i) through (vii) of this definition

. . . .

(vi) Stormwater management systems or features, including all portions of a municipal separate storm sewer, constructed in uplands and designed or used for the purpose of collecting, treating, infiltrating, evaporating, or conveying stormwater.

This definition would add much needed clarity to the rule. (p. 2-3)

Agency Response: **Please see summary response at 7.4.4.**

Pennsylvania Chamber of Commerce and Industry (Doc. #14401)

7.594 The PA Chamber also requests that, should this rulemaking be amended, specific exemptions be made for stormwater conveyance and treatment systems. Otherwise, stormwater retention basins might be unnecessarily categorized as waters of the United States. The PA Chamber also requests that, should this rulemaking be amended, specific exemptions be made for stormwater conveyance and treatment systems. Otherwise, stormwater retention basins might be unnecessarily categorized as waters of the United States. (p. 4)

Agency Response: **Please see summary response at 7.4.4.**

California Building Industry Association et al. (Doc. #14523)

7.595 **VIII. CWA 402 PROGRAM: MANY PERMITTED MS4 FEATURES WOULD BE RENDERED WATERS OF THE UNITED STATES, MAKING OPERATION OF THE MS4, AS PERMITTED, ILLEGAL**

Perhaps nowhere is the conflict and consequence – intended or otherwise – of the Proposed Rule more dramatically illustrated than in the context of the nation's innumerable multiple separate storm sewer or "MS4" systems. Regulated and permitted under Section 402 of the CWA, MS4s exist for the purpose of channelizing (as opposed to surface sheet flows) and transporting storm water runoff and the various pollutants and waste that inevitably get swept up into such flows.

MS4s are composed of everything from highly engineered treatment facilities to pipes to concrete-lined channels to ditches. It is indisputable that with the broad and inclusive definitions of "tributary" and "adjacent waters" in the Proposed Rule, component features of MS4s nationwide will be deemed jurisdictional waters of the United States.

This is not a mere labeling exercise or circumstance without consequence. Quite to the contrary, the Code of Federal Regulations expressly prohibits utilization of a water of the United States as a conveyance feature for an MS4 system: "[I]n no case shall a state

adopt waste transport . . . as a designated use for any water of the United States." 40 C.F.R. § 131.3(i).

As discussed in greater detail below, in California, the water quality control program is carried out by the State Water Resources Control Board and nine Regional Water Quality Control Boards. They implement both federal and state water quality control statutes and regulations primarily via adoption and enforcement of regional Basin Plans. It is in the Basin Plans that beneficial uses, water quality standards, and total maximum daily loads (TMDLs) are specified. The noted regulation, 40 C.F.R. § 131.3(i), prohibits Basin Plans from acknowledging waste transport as an appropriate use for designated waters of the United States.

But the very purpose of an MS4 is the capture and transportation of waste in storm water so that it is directed to appropriate treatment points and not allowed to sheet flow directly into receiving waters. Designating a component feature of a permitted MS4 system as a jurisdictional tributary renders operation of the MS4 illegal. In such an instance, you would have a system permitted under one provision of the CWA, Section 402, and at the same time its operation would violate CWA Section 404 and section 131.3(i) of the regulations.

Accordingly, any component feature of a functioning MS4 system under CWA section 402 should be explicitly excluded from the Proposed Rule and recognized as non-jurisdictional. (p. 28-29)

Agency Response: While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dry land is appropriate. Please see summary response at 7.4.4.

South Carolina Chamber of Commerce (Doc. #14535)

7.596 … Similarly, there should be no question that constructed stormwater control measures (SCMs) should be excluded from regulation except in very specific well-defined situations. SCM means man-made structures, devices, measures, or Best Management Practices (BMPs) that are constructed for the purpose of water quality treatment, stormwater volume reduction, stormwater rate control, flood control, stormwater conveyance, or any combination of these purposes. SCM may be owned and operated by subdivisions of the state, such as municipalities, counties, or other governmental bodies; agencies of the state government such as Departments of Transportation; public business entities; or private business entities. Regardless of the owner/operator, SCM should be excluded from the definition of WOTUS except in the very limited circumstances described below.

SCMs include the following man-made features: constructed stormwater ponds, constructed stormwater wetlands, rain gardens, infiltration devices and structures, groundwater recharge facilities, stormwater reuse facilities, swales, bioswales, Low Impact Development structures and BMPs, pipes, streets, curbs, gutters, roadside ditches, man-made channels, storm drains, and other constructed stormwater control and conveyance structures, devices, and features.

SCMs that have been built at the approximate location of similar types of natural waters (such as stormwater ponds constructed at the location of natural lakes or natural wetlands,

ditches constructed at the location of natural streams or creeks, or stormwater channels constructed at the location of natural rivers) shall be excluded from this exemption and may be WOTUS. Natural lakes, natural ponds, and natural wetlands with stormwater conveyance pipes discharging to them and with constructed outlets shall be excluded from this exemption and may be WOTUS, although the stormwater conveyance pipes or channels are not WOTUS. (p. 4-5)

Agency Response: **Please see summary response at 7.4.4.**

Greater Houston Partnership (Doc. #14726)

7.597 GHP supports the exemptions outlined in the proposed rule, however, as described elsewhere in this letter, we suggest the rule include some additional explicit exemptions. GHP also urges that the rule be modified to explicitly include an exemption for stormwater detention and retention basins and related constructed drainage channels and drainage storm sewers designed for flood damage reduction or water quality improvement. (p. 4)

Agency Response: **Please see summary response at 7.4.4.**

Institute of Scrap Recycling Industries, Inc. (Doc. #15041)

7.598 2.3 Significance of Ditches, Pipes, and Storm Sewers Conveying Stormwater Discharges as Waters of the U.S.

The possibility that the Proposed Rule could cause ditches, pipes, and storm sewers conveying regulated stormwater discharges to be "waters of the U.S." themselves and thus subject to additional CWA regulation would be a surprising regulatory outcome and is almost certainly not what Congress intended or expected via the CWA. If the purpose of identifying waters as "waters of the U.S." is to be able to use the CWA to protect such waters, which are assumed to lack CWA protection in the first place, then it would be unnecessary to declare waters that are already regulated by the CWA (e.g., NPDES permits for stormwater discharges) as "waters of the U.S." because the CWA would already apply to them and enable their protection.

Making such ditches, pipes, and storm sewers and/or the regulated stormwater discharges conveyed by them "waters of the U.S." would theoretically require, among other things, designating uses, setting water quality standards, and establishing total maximum daily loads for those ditches, pipes, and storm sewers and/or regulated stormwater discharges. Those would be pointless exercises and wastes of EPA's limited resources, especially when CWA authority could have been used already to address any issues posed by such regulated stormwater discharges. Furthermore, such ditches, pipes, and storm sewers would become new or additional receiving waters, and such stormwater discharges would effectively be their own receiving waters! This would be a particularly surprising outcome.

Another potential surprising outcome is related to the storage of oil in containers at industry facilities. For this discussion, the facility has also developed and implemented an SPCC plan, as required by 40 CFR §112, to prevent the "discharge [of] oil in quantities that may be harmful, as described in part 110 of this chapter, into or upon the navigable waters of the United States…" (40 CFR §112.1(b)). An oil discharge is "harmful" if it

"(a) [v]iolate[s] applicable water quality standards; or (b) [c]ause[s] a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause[s] a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines" (40 CFR §110.3). If the ditches, pipes, or storm sewers that convey stormwater discharges from the facility to receiving waters were "waters of the U.S." under the proposed definition, then it would seem that any released oil that touches such ditches, pipes, or storm sewers would be "harmful", whether or not the released oil would have affected or did affect the receiving water in a "harmful" way. Providing notice of a harmful release (40 CFR §110.3) would be required immediately, and the notice would potentially have to identify two or more receiving waters as being harmed (e.g., the pipe, ditch, and receiving water in flow order). This would be a surprising outcome.

To prevent these surprising regulatory outcomes and any resulting pointless and resource-consuming regulatory endeavors, the proposed definition should specifically exclude water discharges subject to NPDES permits (e.g., industrial stormwater discharges), which are already regulated under the CWA, and any conveyances of such NPDES-permitted discharges (e.g., ditch, pipe, and storm sewer) from being or becoming "waters of the U.S." subject to additional CWA regulation. (p. 7-8)

Agency Response: **While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dry land is appropriate. Please see summary response at 7.4.4. See also responses to SPCC comments at 12.5.**

Federal StormWater Association (Doc. #15161)

7.599 **Stormwater Program Implications**

The proposed rule includes exemptions from the current regulations, but those exemptions are based on clarifications of the scope of federal jurisdiction in those *prior* rulemaking preambles. Unfortunately, the explanations from the preambles of prior rules are no longer valid because the agencies have changed the underlying basis for defining waters of the U.S. This oversight could alter the applicability of the exemptions to the agencies' determinations regarding what is a jurisdictional water. And, while we agree that there are many waters that are not the primary focus of the CWA, the agencies have not established a rational basis for drawing the line between water that is federally regulated and water that is left to state jurisdiction or otherwise exempt. This has led to significant uncertainty.

Many facilities regulated by the CWA stormwater permit program rely upon various exemptions to ensure that existing treatment ponds, drainage areas, or other "water" features are not the regulated point of discharge into a water of the U.S. For example, current regulations include exemptions for waste treatment systems, including impoundments "designed to meet the requirements of the Clean Water Act." While the words of the wastewater treatment exemption are not being changed, the agencies are proposing to add a comma before the "designed to" clause, thus applying that clause to all waste treatment systems, not just impoundments. This change would create significant uncertainty about the scope of the long-standing waste treatment system exemption. The agencies must be clear that facilities with fully compliance stormwater treatment systems

today do not have parts of those systems deemed waters of the U.S. as a result of any final rule resulting from this proposal.

Municipal Separate Storm Sewer Systems (or MS4s) play important roles in collecting and treating stormwater discharges from industrial and commercial operations. In addition, some large manufacturing plants have drainage systems that may mirror or are included in larger MS4 systems. The status of these drainage systems under the agencies proposed rule is critical, yet unclear.

In the comprehensive and exhaustive proposed rule, nowhere do the agencies mention MS4s – much less the elaborate CWA regime that governs and regulates these systems across the United States. Municipal pollutant discharges from MS4s are one of three categories of stormwater permits authorized by CWA Section 402(p).[308] For over 20 years, EPA has implemented Congress's plan for a "phased" approach to regulate municipal runoff based on the size of the population served by an MS4.[309] NPDES permits must be obtained for all stormwater discharges from "large" and "medium" MS4s under so-called "Phase 1" rules,[310] and from regulated "small" MS4s under Phase 2 rules.[311]

The CWA's overriding regulatory objective is to prohibit pollutant discharges without a permit – such as a permit issued under the NPDES program.[312] Stormwater that conveys pollutants"[313] from a "point source"[314] into waters of the U.S. are a type of "discharge"[315]

[308] 42 U.S.C. § 1342(p)(2). The other categories are discharges associated with "industrial activity" (including land disturbing construction activities), and certain other discharges that, as EPA determines on a case-by-case basis, contribute to a water quality violation or other significantly pollutants to waters of the U.S.. See *EDC*, 344 F.3d at 841-842.

[309] See 33 U.S.C. § 1342(p)(2)-(4), (6) (two-phase approach for stormwater regulation). MS4s can be "large," "medium," or "small." Large MS4s serve a population of 250,000 or more (40 CFR § 122.26(b)(4)), while medium MS4s serve a population of 100,000 or more but less than 250,000. (*Id*. § 122.26(b)(7)). Large and medium MS4s have been subject to NPDES regulation since 1990 under the so-called "Phase 1" rules, see 55 Fed. Reg. 47,990 (Nov. 16, 1990) (codified at 40 CFR pts. 122-124). Small MS4s (defined *id*. § 122.26(b)(16) have been regulated since 1999 under the "Phase 2" rules, see 64 Fed. Reg. 68,722 (Dec. 8, 1999) (codified at 40 CFR pts. 9, 122, 123, and 124). The phased approach for the NPDES stormwater permit program, including MS4 discharge permits, is discussed at *EDC*, 344 F. 3d at 841-842.

[310] See, *e.g.*, 40 CFR §§ 122.26(a)(3), (4).

[311] See, *e.g.*, *id*. § 122.26(a)(5).

[312] 33 U.S.C. §§ 1311(a), 1342(a); see *Envt'l Def. Ctr. v. EPA*, 344 F. 3d 832, 841 (9th Cir. 2003) ("EDC") (the CWA "prohibits the discharge of pollutants from a 'point source' into the waters of the United States without a permit issued under the terms of the National Pollutant Discharge Elimination System ….").

[313] While Congress exempted most discharges "composed entirely of stormwater" (i.e., not mixed with wastewater or other regulated discharges) (33 U.S.C. § 402(p)(1), it specifically identified certain MS4 and industrial stormwater pollutant sources for permitting to control pollutants discharged in stormwater from those point sources. The CWA defines "pollutants" to mean wastes like "dredged spoil, solid waste, … sewage, garbage sewage sludge, … chemical wastes, biological materials, … heat, … rock, sand, cellar dirt, and industrial, municipal and agricultural waste discharged into water." 33 U.S.C. § 1362(6). See *LA Cnty. Flood Control Dist. v. NRDC*, 133 S. Ct. 710, 712 (2013) ("Because stormwater is often heavily polluted, … the CWA and its implementing regulations require the operator of an MS4 … to obtain a [NPDES] permit before discharging storm water into navigable waters"); *EDC*, 344 F.3d at 840-841 ("Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorous), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants ….") In *Virginia DOT v. EPA*, 2013 WL 53741 (E.D. Va., Jan. 3, 2013), the court held that EPA did not have the statutory authority to establish a Total Maximum Daily Load (TMDL) based on "stormwater flow rate"

that triggers NPDES permitting requirements. Regulations define MS4s as "a conveyance or *system of conveyances* … designed or used for collecting or conveying storm water."[316] The component "conveyances" within a larger MS4 "system" collect and channel runoff through "roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains."[317] The MS4 definition closely tracks the separate definition of "point source"[318] – thus confirming that "'[s]torm sewers are established point sources subject to NPDES permitting requirements" within section 402's regime.[319] All of the municipally owned or operated pipes, curbs, gutters, ditches, drains and other conveyances that comprise an MS4 system collect and carry stormwater to an "outfall" – specifically designated by EPA's regulations as a "point source" because it is "the point where a municipal separate storm sewer discharges to [waters of the U.S.]."[320]

EPA's pronouncements in developing NPDES regulations have long distinguished between MS4s as "point sources" on the one hand, and the "waters of the United States" on the other hand. In the 1990 preamble to the Phase 1 regulations, EPA stated that stormwater runoff *into* municipal sewers (including MS4-controlled ditches, roads, storm drains, etc.) is not a discharge of a pollutant into a waters of the U.S.

In the context of the Phase 1 regulations, a municipality commented to EPA "that neither the term 'point source' nor 'discharge' should be used in conjunction with industrial releases into urban storm sewer systems because that gives the impression that such systems are navigable waters."[321] EPA responded that it, "[A]lways addresses such

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as a "surrogate" or "proxy" for sediment. *Id*. at *2, *3. For purposes of the CWA, the court stated "sediment is a pollutant, … but stormwater is not. " *Id*. at *3. In short, stormwater is subject to NPDES permit requirements to the extent such runoff discharges "pollutants" into waters of the U.S.

[314] "The term 'point source' means any discernible, defined 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." 33 U.S.C. § 1362(14); 40 CFR § 122.2.

[315] The CWA defines "discharge of a pollutant" as "any addition of any pollutant ***to*** navigable waters ***from*** any point source …." 33 U.S.C. § 1362(12) (emphasis supplied). Thus, in the "discharge" definition, Congress distinguished between "navigable waters" (defined to mean waters of the U.S. at 33 U.S.C. § 1362(7)) on the one hand, and "point sources" on the other hand. EPA regulations likewise specify that "discharge of a pollutant" includes "additions of pollutants into [waters of the U.S.] from … discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works …" 40 CFR § 122.2. Thus, "point sources" (like MS4s) serve the function to convey and carry pollutants, and are features from which pollutants are discharged into waters of the U.S. . But "point sources" are *not* themselves waters of the U.S. Congress did not give the Agencies broad authority over "point sources" as conveyances *per se* -- but only conferred limited federal permitting authority over the *activity* of a "discharge" when a "point source" adds a pollutant to waters of the U.S.. See *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 109-110 (2004) (emphasizing that CWA permits are required for "any addition" of pollutants to waters of the U.S., not the movement of pollutants within the same waterbody).

[316] 40 CFR § 122.26(b)(8) (emphasis supplied).

[317] *Id.*

[318] See *supra* note 15.

[319] *EDC*, 344 F.3d. at 841 (citing NRDC v. Costle, 568 F.2d 1369, 1379 (D.C. Cir. 1977)).

[320] 40 CFR § 122.26(b)(9). A "major" MS4 outfall discharges from a single pipe with an inside diameter of 36 inches or more; or an inside diameter of 12 inches in the case where an MS4 receives stormwater from lands zoned for construction and other types of industrial activity. *Id*. § 122.26(b)(7).

[321] *Id.*

discharges as 'discharges *through* municipal separate storm sewers' as opposed to 'discharges *to* waters of the United States."[322] In addition, implementing regulations require MS4 permit applicants to identify and list "water bodies" that receive discharges from municipal storm systems – further making plain that EPA does not consider MS4s as jurisdictional water bodies under the CWA.[323]

But, as stated above, the overly broad proposed definition of "tributary" may improperly treat MS4s not as conveyance systems but as jurisdictional waters. Pursuant to the proposed rule, a "tributary" is a waterbody that has a bed, bank and ordinary high water mark (OHWM), and contributes flow to waters that are used in interstate commerce, territorial seas, interstate waters, and their impoundments. The agencies further explain that ponds and wetlands are "tributaries" as long as they also contribute flow. In addition, "tributaries" can be manmade; their flow may be ephemeral, intermittent, or perennial; and they may be broken by features such as pipes, culverts and dams.[324]

MS4 systems often include ditches and other manmade structures that have a bed, bank and OHWM. Moreover, as they are designed to convey and treat stormwater, MS4s will contribute flow (directly or indirectly) to traditionally jurisdictional waters. Under the proposed tributary definition, these common MS4 components – owned and controlled by municipalities, and already subject to NPDES permit requirements – could be confusingly and unnecessarily layered with more federal regulation as a jurisdictional water. Certainly, Congress never envisioned a circumstance where a "water of the U.S." could be located *within* a "point source."

Further, CWA Section 303 requires States to adopt and submit to EPA water quality standards (WQSs) which "consist of a designated use or uses for the waters of the United States …."[325] If MS4s were waters of the U.S., then state-developed and EPA-approved WQSs would need to designate "uses" for storm sewer systems. However, "in no case shall a State adopt waste transport … as a designated use for any water of the United States."[326] Yet one of the very purposes of an MS4 and the ditches, drains and gutters within these systems is, in fact, to transport waste. It would be impossible to designate a WQS for an MS4 for any other reason but to convey and treat stormwater – in plain violation of EPA's regulations for water quality standards.[327]

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[322] *Id*. (emphasis supplied). Indeed, the CWA's "discharge" definition drives home the point that Congress did not intended MS4s and other permitted "point sources" to be waters of the U.S. See supra notes 15-16. For purposes of these comments, the CORE Associations maintain that permitted MS4s are categorically not waters of the U.S. We do not address here whether, or under what circumstances, other "point sources" can ever be considered waters of the U.S.

[323] 40 CFR § 122.26(d)(1)(iv).

[324] See, *e.g.*, *id*. at 22,202, col. 3 ("[T]ributaries that have been channelized in concrete or otherwise have been human altered, may still meet the definition of tributaries under the agencies' proposed regulation so long as they still contribute flow to an (a)(1) through (a)(4) water. The agencies' proposed definition of tributary provides a non-exclusive list of the types of waters, natural, man-altered, and man-made, that may be tributaries: …. [P]onds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4) of the proposed rule."

[325] 33 U.S.C. § 1313; 40 CFR § 131.3(i).

[326] 40 CFR § 131.10(a).

[327] In the context of industrial discharges into MS4s, EPA has explained that the discharger's obligation to satisfy WQSs is "at the boundary of a State established mixing zone … located in the receiving waters of the United

Moreover, if an MS4 were somehow deemed a water of the U.S., then the MS4's NPDES permit becomes an approval to discharge pollutants from one jurisdictional water into another jurisdictional water. Of course, Congress required permits for discharges from point sources into waters of the U.S. – not for discharges from a water of the U.S. to a water of the U.S.[328] To avoid such an untenable result within the Act's structure and the agencies' own regulations, they should thus clarify that MS4s are not waters of the U.S.. Without such clarification, MS4s could be forced to break up their MS4 permit programs into smaller pieces so that each permit is limited to each discharge into a water of the U.S., further confusing and adding complexity when the agencies' intent was the opposite. (p. 7-11)

Agency Response: **While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dry land is appropriate. Please see summary response at 7.4.4. Also see the Technical Support Document at I.C.**

National Association of Home Builders (Doc. #19540)

7.600 **a. The Waste Treatment Systems Exclusion Should Explicitly State that Municipal Separate Storm Sewer Systems (MS4s), Green Infrastructure, and Stormwater Management Facilities are Excluded.**

The proposed rule's waste treatment systems exclusion falls short of explicitly excluding municipal separate storm sewer systems (MS4s) and other infrastructure designed to treat stormwater. Off the record, the Agencies have stated that these features are not "waters of the United States," but unofficial statements carry no regulatory weight.[329] Instead, specific language should be included in the regulation itself. (p. 105-106)

Agency Response: **Please see summary response at 7.4.4.**

Federal Water Quality Coalition (Doc. #15822.1)

7.601 ***2. Point source conveyances.***

Water in a point source conveyance is not a water of the U.S. Rather, such water may be discharged *to* a water of the U.S. *from* the conveyance. That discharge may carry pollutants that are regulated under section 404 or 402 (or may be exempt by statute). However, the water itself is not regulated until it is discharged and enters a channel that is a water of the U.S.[330]

States." 55 Fed. Reg. at 48,037. That is, the industrial discharger's obligation to satisfy WQSs does not pertain to such standards for the very storm sewer system itself.

[328] Moving pollutants within the same waterbody is not a "discharge" because no pollutants are added, and hence do not trigger CWA permitting obligations. See, *e.g., LA Cnty. Flood Control Dist. v. NRDC*, 133 S. Ct. 710, 733 (2013); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. (2004) (both cases quoting *Catskill Mountains Chapter of Trout Unlmtd., Inc. v. New York*, 273 F.3d 481, 492 (2nd Cir. 2001)).

[329] EPA and U.S. Army Corps of Engineers, Questions and Answers – Waters of the U.S. Proposal (Sept. 9, 2014), http://www2.epa.gov/sites/production/files/2014-09/documents/q_a_wotus.pdf (hereinafter, September 2014 Q & A).

[330] *See, e.g., National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011) (water in a lagoon is not regulated under the CWA until it is discharged); *American Iron and Steel Inst. v. EPA*, 155 F.3d 979, 996 (D.C. Cir.

For example, EPA has long recognized that collected stormwater is not a water of the U.S. Thus, all of the municipally owned or operated pipes, curbs, gutters, ditches, drains, and other conveyances that comprise an MS4 system collect and carry stormwater to an "outfall," which is specifically designated by EPA's regulations as a "point source" because it is "the point where a municipal separate storm sewer discharges to [WOTUS]."[331] Industrial stormwater, including runoff from many construction sites, also is collected and discharged through an outfall.[332] If stormwater collection systems themselves were considered waters of the U.S., then EPA would have no authority to regulate the discharge from the collection system to a river or stream.181 Runoff into municipal and industrial stormwater collection systems would be unregulated nonpoint sources, and the collection systems themselves would be waters of the U.S. that merely transfer water to another water of the U.S. The result would leave stormwater unregulated, undermining the objectives of Congress in section 402(p) of the CWA and reducing the protection of the environment.

A reproposal that limits tributaries to natural streams, as suggested above, would add certainty by making make it clear that conveyances, such as MS4 systems, are not waters of the U.S. As noted by one of the SAB Panel members, the agencies must distinguish between infrastructure and waters of the U.S.[333] (p. 67-68)

Agency Response: **While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dry land is appropriate. Please see summary response at 7.4.4.**

American Society of Civil Engineers (Doc. #19572)

7.602 **Clarify Potential Jurisdiction Over Municipal Separate Storm Sewer Systems (MS4)**

Nearly a third of the ASCE members surveyed on the proposed rule expressed significant concern about the potential impacts of the rule on managing Municipal Separate Storm Sewer Systems (MS4s). Nowhere in the proposed rule is the term "MS4" mentioned, yet the rule applies to all sections of the Clean Water Act including the NPDES program. The agencies must address the relationship between MS4 stormwater programs and jurisdiction over ditches. We recommend that the final rule either expressly exclude

1997) ("The statute is clear: The EPA may regulate the pollutant levels in a waste stream that is discharged directly into the navigable waters of the United States through a "point source"; it is not authorized to regulate the pollutant levels in a facility's internal waste stream.").

[331] 40 C.F.R. § 122.26(b)(9). A "major" MS4 outfall discharges from a single pipe with an inside diameter of 36 inches or more; or an inside diameter of 12 inches in the case where an MS4 receives stormwater from lands zoned for construction and other types of industrial activity. Id. § 122.26(b)(7). For a further discussion of the distinction between MS4s and waters of the U.S. see the August 8, 2014 comments of the Coalition of Real Estate ("CORE") Associations.

[332] According to EPA's Phase 1 stormwater rules an "industrial activity" includes construction activity (such as land clearing, grading and excavation) on sites larger than five acres, but may also include land clearing activities on smaller lots in a common plan or development (like a subdivision) that is five acres or more. 40 C.F.R. § 122.26(b)(14)(x). Under the Phase 2 rules, "small construction activity" on sites between one and five acres must also obtain NPDES permit coverage for stormwater discharges. Id. § 122.26(b)(15).

[333] *See* 40 C.F.R § 122.3(i) (the transfer of water from one water of the U.S. to another does not require a permit even if the water carries pollutants).

MS4s from jurisdiction under §(t) or provide additional guidance on their potential jurisdiction. Broadly read, the proposed rule MS4s could qualify as "waste treatment systems" under §(t)(1).

Many of our members manage MS4 systems. There is concern that if a MS4 becomes jurisdictional in addition to the current regulation under 402(p) that locations of outfalls, and therefore the point of regulation could change. MS4 permit holders would then not only be regulated at the point of discharge into a water of the U.S., but also when a pollutant initially enters the stormwater conveyance system. MS4 systems should continue to be regulated as point sources and not considered "waters of the U.S." since they cannot be both. (p. 9)

Agency Response: **Please see summary response at 7.4.4.**

Coalition of Real Estate Associations (Doc. #5058.2)

7.603 In the comprehensive and exhaustive Proposed Rule, nowhere do EPA and the Corps (the "Agencies") mention the term "MS4" – much less the elaborate Clean Water Act ("CWA") regime that governs and regulates these systems across the United States. The CORE Associations believe that the Agencies must address the interplay between the MS4 stormwater program and WOTUS coverage. Indeed, the Proposed Rule's "strong intent to provide as much certainty to the regulated public and the regulators"[334] requires clarification on the jurisdictional status of MS4s. Moreover, while EPA's recent "Ditch the Myth" campaign[335] states that the Proposed Rule "cuts through the red tape" to offer greater certainty and consistency on WOTUS 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 WOTUS matters. Consistent with EPA Administrator McCarthy's commitment to address key issues of concern in the WOTUS context,[336] the jurisdictional status of MS4s and their component conveyances is the very kind of issue that warrants the agencies' careful deliberation and clear explanation.

Accordingly, the Agencies should state in plain language whether CWA permitted MS4 systems and their component conveyances are "in" or "out" of the scope of WOTUS. The CORE Associations suggest there is little room for gray area or case-by-case field determinations on this point. We believe that:

- "Waste treatment systems" have long been excluded from WOTUS jurisdiction under EPA and Corps regulations – including the regulations implementing the permit program for the National Pollutant Discharge Elimination System ("NPDES") authorized by CWA section 402.[337] MS4s are "waste treatment

[334] 77 Fed. Reg. at 22,189, col. 2.
[335] See http://www2.epa.gov/uswaters/ditch-myth.
[336] "I commit to you that if you raise an issue of concern, I will address it." Administrator Gina McCarthy, Remarks at the Agricultural Business Council of Kansas City on Clean Water Proposal, As Prepared (July 10, 2014) ("McCarthy Remarks"). Available at http://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/aa42d63b31d4b1fa85257d110066168b!OpenDocument.
[337] See 40 C.F.R. § 122.2 (exclusions from WOTUS definition at subsection (b)(1)).

systems" and, accordingly, should be categorically excluded from the reach of WOTUS.

- The CORE Association's proposal to exclude MS4s from WOTUS jurisdiction as waste treatment systems is not to avoid CWA regulation. Rather, our proposal is intended to avoid double regulation. MS4s – and the drains, roads, pipes, curbs, gutters, ditches and other component parts of these systems that channel runoff – are regulated "point sources" that discharge pollutants conveyed in stormwater. Though section 402(p), Congress required MS4s to obtain NPDES permits for stormwater discharges.[338] Thus, because MS4s and all identified components of these systems are already subject to NPDES permitting requirements, excluding them for WOTUS jurisdiction as waste treatment systems is wholly consistent with the Act's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[339]…
- …Deeming permitted MS4s and their components as WOTUS would also contravene the plain language of the CWA and implementing regulations, and lead to strained and illogical regulatory results. For example, if a ditch within an NPDES-permitted MS4 system was somehow deemed jurisdictional, then a "water of the United States" would be located within a regulated "point source." That result would upend the Act's entire regulatory structure. Similarly, if an MS4 was a WOTUS, then States and EPA would be compelled to establish water quality standards, criteria, and total maximum daily loads for municipally-owned storm sewers. Nothing in the CWA's language, structure, or legislative history supports such interpretations. These and other untenable results would be easily avoided by the Agencies' express clarification that the exclusion for waste treatment systems captures MS4s.

Ditches are a common component in MS4s to convey and channel stormwater runoff. The Proposed Rule suggests that some ditches are excluded from WOTUS coverage, while other ditches are "tributaries" and thus within CWA jurisdiction. These comments do not opine on the jurisdictional treatment of ditches outside of permitted MS4s. But to the extent that ditches (and other system components) are mapped and identified as part of an MS4, and subject to an NPDES permit governing the MS4 of which they are a part, then such ditches (and components) should not be WOTUS under the exclusion for waste treatment systems.[340] The CORE Associations thus recommend modest – but important – changes to the Proposed Rule, as follows:

> "(b) The following are not 'waters of the United States' notwithstanding whether they meet the terms of paragraphs (a)(1) through (7) of this definition—

[338] 33 U.S.C. § 1342(p)(1). See also *id*. § 1342(p)(3)(B) (establishing contours of "permit requirements" for "discharges from municipal storm sewers ….")
[339] *Id*. § 1251(a).
[340] This comment letter focuses on regulated MS4s. However, there are other stormwater systems and conveyances not covered by NPDES permits that the Agencies should also exempt from the WOTUS definition. Certain CORE members will comment on those systems separately.

> "(1) Waste treatment systems, including treatment ponds, lagoons, or Clean Water Act regulated municipal separate storm sewer systems and the component conveyances within such systems."[341] ~~[designed to meet the requirements of the Clean Water Act.]~~"[342] (p. 2-4)

Agency Response: While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dry land is appropriate. Please see summary response at 7.4.4. Also see Technical Support Document at Section I.

7.604 **II. MS4s AND THEIR COMPONENT CONVEYANCES SHOULD BE EXPRESSLY EXCLUDED FROM WOTUS JURISDICTION.**

The Proposed Rule is intended to offer "greater clarity to regulated entities as to whether [or not] individual water bodies are jurisdictional" under the CWA.[343] The Agencies' aim of improved regulatory predictability is to "minimiz[e] the number of case specific" WOTUS determinations in the field.[344] Because of the "strong intent to provide as much certainty to the regulated public and the regulators as to which waters are and *are not* jurisdictional," EPA and the Corps have specifically requested comment on "which waters should be determined non-jurisdictional."[345]

In this regard, the CORE Associations respectfully urge the Agencies to clarify that WOTUS jurisdiction does not reach MS4s and the component conveyances that comprise these systems. Any final rule should state that MS4s fall within the "waste treatment systems" exclusion from WOTUS, at 40 C.F.R. § 122.2 of the NPDES program regulations.[346] The CORE Associations thus recommend modest – but important – changes to the Proposed Rule, as follows:

> "(b) The following are not 'waters of the United States' notwithstanding whether they meet the terms of paragraphs (a)(1) through (7) of this definition—
>
> > "(1) Waste treatment systems, including treatment ponds, lagoons, **or Clean Water Act regulated municipal separate storm sewer systems and the component pollutant conveyances within such systems.** ~~designed to meet the requirements of the Clean Water Act~~"

[341] The last sentence of the "waste treatment systems" exclusion reads: "This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal areas in wetlands,) nor resulted from the impoundment of waters of the United States." 40 C.F.R. § 122.2(b). Since 1980, EPA has "suspended" this last sentence. See 45 Fed. Reg. 48,620 (July 21, 1980); 48 Fed. Reg. 14,153 (Apr. 1, 1983). The Proposed Rule continues this longstanding suspension, with which the CORE Associations agree. See 79 Fed. Reg. at 22,268 col. 3.

[342] The condition in the last clause that waste treatment systems be "designed to meet the requirements of the Clean Water Act" unnecessarily narrows the exclusion. Certain waste treatment systems are designed to meet state and local (as opposed to federal) requirements, but should still be excluded from the WOTUS definition. Some members of the CORE Associations will provide separate comments concerning this issue.

[343] Proposed Rule, 79 Fed. Reg. at 22,188, col. 3.

[344] *Id*.

[345] *Id*. at 22,189, col. 2 (emphasis supplied).

[346] Conforming changes should be made to all relevant WOTUS definitions in the "List of Subjects" in the Code of Federal Regulations set forth in the Proposed Rule at 79 Fed. Reg. 22,262, cols. 2-3.

A categorical WOTUS exclusion of MS4s and their component conveyances is warranted for the following reasons:

A. MS4s are "waste treatment systems" – which have never been considered WOTUS. No lessened protections for aquatic resources would result by clarifying that MS4s are not WOTUS.

As explained above, MS4s are systems that treat wastes transported by stormwater. This fact is amplified by Congress's direction that MS4s must control stormwater pollutants "to the maximum extent practicable" by deploying a suite of best management practices, control techniques, and engineering methods designed to treat pollutants in runoff.[347] A 2005 memorandum from EPA's General Counsel and Assistant Administrator for Water confirms that "waste treatment systems" are "by definition" *not* WOTUS.[348]

Excluding MS4s from WOTUS jurisdiction will not lower protection of aquatic resources, because pollutant discharges from these systems are fully covered by the comprehensive and exhaustive NPDES regime. Direct or indirect discharges – from MS4 outfall points into WOTUS – must be permitted under all of the section 402 authorities and implementing regulations controlling additions of pollutants from point sources.[349] Furthermore, when an industrial activity results in a discharge into an MS4, EPA has "always addressed such discharges as discharges *through* [MS4s] as opposed to 'discharges to waters of the United States' …."[350] EPA thus provides an exhaustive online library of resources for MS4 operators to detect, eliminate, and take action against "illicit discharges" into their systems.[351] Indeed, a municipal program to fully address "illicit discharges" is a prerequisite to Section 402 permit coverage for any municipal storm sewer.[352] As EPA's guidance manual for MS4s explains:

> Provisions of the Clean Water Act (1987) require National Pollutant Discharge Elimination System (NPDES) permits for storm water discharges. Section 402 (p)(3)(B)(ii) requires that permits for municipal separate storm sewers shall include a requirement to effectively prohibit problematic non-storm water discharges into storm sewers. Emphasis is placed on the elimination of inappropriate connections to urban storm drains. This requires affected Agencies to identify and locate sources of non-storm water discharges into storm drains so they may institute appropriate actions for their elimination.[353]

[347] 33 U.S.C. § 1342(p)(3)(B).
[348] Memorandum from Ann R. Klee, General Counsel, and Benjamin H. Grumbles, Assistant Administrator for Water, Environmental Protection Agency, to Regional Administrators, Regarding Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfer, at 18, n. 18 (Aug. 5, 2005) (available at http://www.epa.gov/ogc/documents/water_transfers.pdf).
[349] See *supra* notes 34-44.
[350] Preamble to Phase 1 Rule, 55 Fed. Reg. 47,900, 47,997 (Nov. 16, 1990) (emphasis supplied).
[351] See http://cfpub.epa.gov/npdes/stormwater/idde.cfm.
[352] See *supra* notes 40-44.
[353] Center for Watershed Protection, et al., "Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessments," (October 2004) at p. i, available at http://www.epa.gov/npdes/pubs/idde_manualwithappendices.pdf

In short: Because MS4s and their component parts are waste treatment systems that manage and control pollutants conveyed by stormwater, they should be categorically excluded from the scope of WOTUS. (p. 11-13)

C. Treating MS4s (and their component conveyances) as WOTUS would undermine longstanding EPA interpretations and practice.

EPA's pronouncements in developing NPDES regulations have long distinguished between MS4s as "point sources" on the one hand, and the "waters of the United States" on the other hand. In the 1990 preamble to the Phase 1 regulations, EPA stated that stormwater runoff *into* municipal sewers (including MS4-controlled ditches, roads, storm drains, etc.) is *not* a discharge of a pollutant into a WOTUS. In the context of the Phase 1 regulations, a municipality commented to EPA "that neither the term 'point source' nor 'discharge' should be used in conjunction with industrial releases into urban storm sewer systems because that gives the impression that such systems are navigable waters."[354] EPA responded that it:

> "[A]lways addresses such discharges as 'discharges *through* municipal separate storm sewers' as opposed to 'discharges to waters of the United States."[355]

In addition, implementing regulations require MS4 permit applicants to identify and list "water bodies" that receive discharges from municipal storm systems – further making plain that EPA does not consider MS4s as jurisdictional water bodies under the CWA.[356]

A contrary interpretation – whereby an MS4 and its component conveyances could possibly be swept within the scope of WOTUS – would yield unintended and unreasonable results. The proposed rule explains that the term "navigable waters" (defined by statute to mean WOTUS)[357] "is used in a number or provisions of the CWA"[358] including "the water quality and total maximum daily load programs under section 303, and the section 401 state water quality certification process." Application of these programs to MS4s and their conveyances – a result that would follow upon deeming these storm sewer systems as WOTUS – would lead to strained agency interpretations and likely cause increased litigation.

For example, section 303 requires States to adopt and submit to EPA water quality standards ("WQSs") which "consist of a designated use or uses for the waters of the United States …."[359] If MS4s were WOTUS, then State-developed and EPA-approved WQSs would need to designate "uses" for storm sewer systems. However, "in no case shall a State adopt waste transport … as a designated use for any water of the United

[354] *Id.* [*SWANCC*, 531 U.S. at 173.]
[355] *Id*. (emphasis supplied). Indeed, the CWA's "discharge" definition drives home the point that Congress did not intended MS4s and other permitted "point sources" to be WOTUS. See *supra* notes 15-16. For purposes of these comments, the CORE Associations maintain that permitted MS4s are categorically not WOTUS. We do not address here whether, or under what circumstances, other "point sources" can ever be considered WOTUS.
[356] 40 C.F.R. § 122.26(d)(1)(iv).
[357] 33 U.S.C. § 1362(7) ("The term 'navigable waters' means the waters of the United States, including the territorial seas").
[358] 79 Fed. Reg. at 22,191, col. 2.
[359] 33 U.S.C. § 1313; 40 C.F.R. § 131.3(i).

States."[360] Yet one of the very purposes of an MS4 and the ditches, drains and gutters within these systems is, in fact, to transport waste. It would be impossible to designate a WQS for an MS4 for any other reason *but* to convey and treat stormwater – in plain violation of EPA's regulations for water quality standards. To avoid such an untenable result within the Act's structure and the Agencies' own regulations, EPA and the Corps should thus clarify that MS4s are not WOTUS.[361]

Furthermore, WQSs contain both designated uses for a waterbody and water quality criteria ("WQC") which protect the designated use.[362] If a waterbody is not meeting its WQC then the state must develop a pollutant-specific total maximum daily load ("TMDL") for the waterbody.[363] Interpreting the CWA in a manner that construes MS4s to be WOTUS would force states to develop WQC and TMDLs for storm systems designed to treat pollutants. Aside from the sizeable resource commitment (which the states would bear) to develop WQCs and TMDLs for every MS4 and all of the ditches, drains, and pipes that comprise these systems, such an interpretation adds unnecessary layers of regulation. The MS4's section 402 permit would already regulate pollutants that the operator may discharge from the storm sewer into receiving waters; concurrently, any WQC and TMDL would regulate pollutants entering the MS4 from third party releases, and pollutant loads within the system itself. Because any WQC and TMDL would control pollutant levels in the MS4, there would be no need for an NPDES permit because the pollutant levels within the MS4 would be at the same levels allowed for the discharge into the receiving water.

Moreover, if an MS4 were somehow deemed a WOTUS, then the MS4's NPDES permit becomes an approval to discharge pollutants from one jurisdictional water into another jurisdictional water. Of course, Congress required permits for discharges from point sources into WOTUS – not for discharges from a WOTUS to a WOTUS.[364] Such an absurd result can be avoided by excluding MS4s from the definition of CWA jurisdictional waters.

The specific, detailed statutory and regulatory provisions regarding the treatment of MS4s as NPDES "point sources" must trump the more general provisions that define "waters of the United States."[365] Under the rule of statutory construction that specific provisions supersede general ones, the Agencies should avoid any possible regulatory

[360] 40 C.F.R. § 131.10(a).
[361] In the context of industrial discharges into MS4s, EPA has explained that the discharger's obligation to satisfy WQSs is "at the boundary of a State established mixing zone … located in the receiving waters of the United States." 55 Fed. Reg. at 48,037. That is, the industrial discharger's obligation to satisfy WQSs does not pertain to such standards for the very storm sewer system itself.
[362] 40 C.F.R. § 131.11(a).
[363] 33 U.S.C. § 1313(d).
[364] Moving pollutants within the same waterbody is not a "discharge" because no pollutants are added, and hence do not trigger CWA permitting obligations. See, *e.g., LA Cnty. Flood Control Dist. v. NRDC*, 133 S. Ct. 710, 733 (2013); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. (2004) (both cases quoting *Catskill Mountains Chapter of Trout Unlmtd., Inc. v. New York*, 273 F.3d 481, 492 (2nd Cir. 2001)).
[365] "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) (internal quotes omitted).

interpretation that MS4s and their component conveyances are somehow penumbral to the WOTUS definition. The CORE Associations thus request EPA and the Corps to state clearly that MS4s – and the conveyances within these systems – as regulated under the NPDES program are categorically excluded from WOTUS jurisdiction. (p. 15-17)

Agency Response: While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dry land is appropriate. Please see summary response at 7.4.4. Also please see the Technical Support Document at Section I.3. with respect to "point source" and other legal issues.

7.605 **III. CONCLUSION**

The CORE Associations submit that MS4s should be categorically excluded from the definition of WOTUS because:

- For decades, the Agencies have interpreted the CWA to exclude "waste treatment systems" from WOTUS coverage. MS4s and the ditches, pipes, ponds and other conveyances that make up these storm sewer systems are indeed "waste treatment systems." The Agencies should accordingly clarify that their longstanding jurisdictional exclusion captures MS4s.
- The WOTUS exclusion for MS4s should apply to storm sewer systems and their components that are mapped, identified and governed by a duly issued section 402 permit for the discharge of pollutants. Aquatic resources are thus fully protected, and the CWA's objectives are furthered, by virtue of the panoply of NPDES program requirements that apply to MS4 permits…
- …Somehow deeming MS4s as jurisdictional WOTUS would disserve key definitions of, and upset the overall structure of, the CWA and the Agencies' own regulations. For example, EPA's obligations to establish water quality standards, criteria, and TMDLs would prove to be illogical and unworkable as applied to MS4s and the conveyances within these systems.
- Express exclusion of MS4s from the WOTUS rule is warranted to provide regulatory clarity and prevent improper interpretations that municipal storm sewers and their components could somehow be deemed jurisdictional "tributaries" or "adjacent waters." (p. 19-20)

Agency Response: While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dryland is appropriate. Please see summary response at 7.4.4.

Southpace Properties, Inc. (Doc. #6989.1)

7.606 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)

Agency Response: While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dryland is appropriate. Please see summary response at 7.4.4.

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

7.607 …the exclusion for waste treatment systems and non-wetland swales is not clear in that it fails to encompass the full an-ay of green infrastructure devices (e.g., rain gardens), stormwater treatment systems (e.g., MS4s) and other features installed on private property that gain little benefit from federal oversight. (p. 2)

Agency Response: While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dry land is appropriate. Please see summary response at 7.4.4.

Lydig Construction Inc. (Doc. #14147)

7.608 I also oppose any regulatory language that would extend CWA jurisdiction to stormwater control basins and ponds of any size or function that ultimately drain to an otherwise regulated 'water of the United States.' It is unclear whether or not such stormwater controls would qualify for any of the exclusions in the proposal. On a majority of regulated construction sites, current NPDES permit requirements have led contractors to build temporary basins to hold rainwater that has 'run off' the surrounding jobsite and slowly release it to receiving waters via an outlet control structure and/or under-drainage system. EPA is now pushing cities to require that contractors build permanent structural controls to treat, store, and infiltrate runoff onsite before it enters the municipal storm sewer system. These stormwater control systems would, under this proposed regulation, become 'waters of the United States,' forcing construction site operators to create federally jurisdictional waters on their property to meet other requirements of the CWA. (p. 2)

Agency Response: Please see summary response at 7.4.4.

Associated General Contractors of America (Doc. #14602)

7.609 **V. MS4s Are Point Sources, Not WOTUS**

Summary: AGC maintains that MS4s should not be WOTUS, as they are already regulated under CWA Section 402 NPDES permits. To avoid double regulation, and shifting the point of compliance from the MS4 outfall to the roads and ditches at the system's periphery, MS4's should be categorically excluded from being WOTUS.

MS4s play important roles in collecting and treating stormwater discharges from industrial and commercial operations. In the entire proposed rule, nowhere do the agencies mention MS4s — much less the elaborate CWA regime that governs and

regulates these systems across the United States. Regulations define MS4s as "a conveyance or *system of conveyances* … designed or used for collecting or conveying storm water."[366] The component "conveyances" within a larger MS4 "system" collect and channel runoff through "roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains."[367]

As stated in Section III above, AGC is very concerned that the overly broad proposed definition of "tributary" may improperly treat MS4s not as conveyance systems, but as jurisdictional waters. AGC urges the agencies to clarify that WOTUS jurisdiction does not reach MS4s and the component conveyances that comprise these systems, as further detailed in the comment letter already submitted by the Coalition of Real Estate Associations (an informal group that includes AGC).

• Lead to illogical results

Classifying any components of an MS4 — but ditches and stormwater control basins/ponds, in particular — as WOTUS would yield illogical results (see related discussions in Sections III and VI). As explained other sections of this letter, maintaining the conveyances within the MS4 (including clearing vegetation, removing silt/sediment, and stabilizing banks, draining ponds, etc.) would 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.

Specifically, if MS4s were WOTUS, then states would need to develop EPA-approved WQSs and "designate uses" for storm sewer systems, as well as water quality criteria (WQC) that protect the designated use.[368] If a waterbody is not meeting its WQC then the state must develop a pollutant-specific total maximum daily load (TMDL) for the waterbody.[369] Interpreting the CWA in a manner that construes MS4s to be WOTUS would force states to develop WQC and TMDLs for storm systems designed to transport stormwater. Moreover, if an MS4 were somehow deemed a WOTUS, then the MS4's NPDES permit becomes an approval to discharge pollutants from one jurisdictional water into another jurisdictional water. Of course, Congress required permits for discharges from point sources into WOTUS — not for discharges from a WOTUS to a WOTUS.[370] It is also important to note that MS4 operators have NPDES permit liability for implementing their stormwater programs to control their point source discharges into WOTUS. If the MS4 system itself becomes "waters of the United States," then the point of compliance would shift from the nearby surface water to the ditch on the side of the roadway. For reasons such as these, the structure of CWA Section 402 and EPA's regulations make clear that MS4s are point sources and not WOTUS.

[366] 40 C.F.R. § 122.26(b)(8) (emphasis supplied).
[367] *Id.*
[368] 40 C.F.R. § 131.11(a).
[369] 33 U.S.C. § 1313(d).
[370] Moving pollutants within the same waterbody is not a "discharge" because no pollutants are added, and hence do not trigger CWA permitting obligations. See, e.g., *LA Cnty. Flood Control Dist. v. NRDC*, 133 S. Ct. 710, 733 (2013); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. (2004) (both cases quoting *Catskill Mountains Chapter of Trout Unlmtd., Inc. v. New York*, 273 F.3d 481, 492 (2nd Cir. 2001)).

Excluding MS4s from WOTUS jurisdiction will not lower protection of aquatic resources, because pollutant discharges from these systems are fully covered by the comprehensive and exhaustive NPDES regime. Direct or indirect discharges — from MS4 outfall points into WOTUS — must be permitted under all of the Section 402 authorities and implementing regulations controlling additions of pollutants from point sources.

Any agency interpretation or field determination that subjects MS4s and the conveyances within them to WOTUS jurisdiction would enormously disrupt state and local government programs and responsibilities to maintain, manage, and treat stormwater discharges under Section 402(p). It would federalize a vast network of storm sewer systems within state and local control — plainly upsetting the goal and policy of federal-state balance that Congress announced in CWA Section 101(b). (p. 11-12)

Agency Response: **While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dry land is appropriate. Please see summary response at 7.4.4. Also please see the Technical Support Document at Section I.C.**

7.610 VI. Stormwater Control Basins & Ponds

Summary: AGC is opposed to any regulatory language that would extend CWA jurisdiction to stormwater control basins and ponds that contractors build to satisfy another section of the Clean Water Act — for example, the NPDES permitting requirements within Section 402's regime. It is unclear whether or not such stormwater controls would qualify for any of the exclusions in the proposal. On a majority of regulated construction sites, current NPDES permit requirements have led contractors to build temporary or permanent basins to hold rainwater that has "run off" the surrounding jobsite and slowly release it to receiving waters via an outlet control structure and/or under-drainage systems. EPA is now pushing cities to require contractors to build permanent structural controls to treat, store, and infiltrate runoff onsite before it enters the municipal storm sewer system. Increasingly common biofiltration and bioretention systems — all designed to control the velocity and volume of stormwater and settle out particles to reduce pollutant discharges — could become WOTUS. Under the proposal, construction site operators would be forced to create federally jurisdictional waters on their property to meet other requirements of the CWA.

Under the proposed rule, CWA jurisdiction would arguably extend to stormwater control basins and ponds of various sizes and function that ultimately drain to an otherwise regulated WOTUS. This result would stem from the agencies' finding that all "tributaries" and "adjacent waters including wetlands" have a significant nexus to WOTUS by definition and are thus jurisdictional by rule. Specifically, as discussed above, the proposed rule defines "tributary" based on some evidence of flow, however indirect, to a traditional navigable water, interstate water, or territorial sea. The origin of the water, whether natural, man-altered, or manmade, expressly does not matter. Similarly, waters and wetlands adjacent to tributaries (e.g., a seasonally wet pond or swale) are categorically jurisdictional. An "adjacency" determination includes waters and wetlands with a confined surface or shallow subsurface connection to jurisdictional water. The agencies' proposed "other waters" category would give the agencies the

discretion to capture any wet feature (even geographically isolated ones) that cannot be found jurisdictional under the "tributary" or "adjacent water" categories, as discussed in Section VII below.

• NPDES Program calls for contractors to build basins, ponds

EPA's NPDES permit for active construction sites (which serves as a model for the nation) requires contractors to "design, install, and maintain erosion and sediment controls that minimize the discharge of pollutants from earth-disturbing activities." Contractors also are required to "control stormwater volume and velocity" to minimize pollutant runoff and streambank/channel erosion. On a large majority of regulated construction sites, these requirements have led contractors to build temporary basins to hold rainwater that has "run off" the surrounding jobsite and slowly release it to receiving waters via an outlet control structure and/or under-drainage systems. At present time, ponds and basins are the most reliable and proven way of containing sediment-laden water on a construction site. Ponds and basins are a "best management practice" (BMP) to protect surface water. (Prior to 2012, the federal Construction General Permit mandated sediment basins on all construction sites where the total disturbed drainage area at any given time was 10 acres or more.) After the soil disturbance (earth-moving) phase of the project, it is quite common for the property owner or contractor to clean out and modify the basin to function as a permanent stormwater management pond for the completed site, either as a detention pond or a retention pond. Additionally, the permanent pond must be maintained on a life-cycle basis to ensure that it is functioning properly.

It is worth noting that EPA's 2012 Construction General Permit for Stormwater[371] does not consider "stormwater control features" (MS4s and parts thereof) as "surface waters" for purposes of the 50-foot natural buffer requirement.

Recently, there has been an explosion in the number of ponds dotting the suburban landscape. Most have been created to satisfy local government requirements to retain/infiltrate stormwater discharges (onsite) at newly developed and redeveloped sites. Requirements that municipalities (MS4s) use so-called "green infrastructure" as part of their stormwater management programs are becoming more common in local and state permitting procedures and regulations, administered by the NPDES program.[372]

Most filtration basins have under-drain systems; they may also have outlet control structures and emergency spillways, depending on the variety and purpose. The under-drain gradually dewaters the sand bed and discharges the runoff to a nearby channel, swale, or storm sewer. Infiltration basins would be the only instance where all outflow goes back into the ground. This type of system does not normally have a structural outlet

[371] *See* http://www.epa.gov/npdes/pubs/cgp2012_finalpermit.pdf (CGP Part 2.1.2.1 Provide Natural Buffers or Equivalent Sediment Controls – noting that EPA does not consider stormwater control features (e.g., stormwater conveyance channels, storm drain inlets, sediment basins) to constitute "surface waters" for the purposes of triggering the requirement to comply with this Part).

[372] *See* http://cfpub2.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action=browse&Rbutton=detail&bmp=66&minmeasure=4.

to discharge runoff or an under-drain system. It is very challenging to apply on most sites, however, because it is only effective in relatively small drainage areas with permeable soils. Therefore, infiltration basins are typically combined with an extended detention basin to provide additional runoff storage for both stormwater quality and quantity management. Detention basins, which need to be cleaned out on a regular basis, trap sediment and deleterious maters before entering the infiltration system, thereby extending the life of the system.

Under the proposed regulatory framework outlined above, there would be many opportunities for Corps field staff and EPA inspectors to assert federal control over ephemeral ponds and basins that were built to serve as stormwater control devices, merely because those devices drain (e.g., via a shallow groundwater flow or a seasonally wet ditch that may flow a great distance, etc.) to a navigable water only in storm events.

• Not otherwise exempt

The proposal excludes the following from the "waters of the United States" definition:

- Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
- 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.

Unfortunately, these exclusions are too amorphous to address AGC's serious concerns. It is highly questionable and open to interpretation whether or not stormwater control basins/ponds would meet the criteria for these listed exclusions on a consistent or occasional basis.

Stormwater control basins/ponds are designed to help protect areas from flooding by reducing how fast runoff enters nearby surface waters. Most ponds (and certainly temporary or permanent sediment basins) also function to trap pollutants in runoff such as sediment nutrients and metals. Pollutant reduction is achieved through settling, capture by indigenous wetland plans and vegetation, and filtration through soil. The basins/ponds must be cleaned out in order to remove the captured pollutants. It is unclear whether stormwater control basins/ponds would qualify as "waste treatment systems." No "treatment" (chemical or otherwise) is typically occurring, as is the case with other waste management programs. What is more, stormwater (e.g., rain, snowmelt) is not the same as wastewater (sewage); each is covered under a separate NPDES permit program.

Moreover, the basins/ponds that contractors build on active construction sites, and later modify to serve as permanent stormwater control structures, are not "used exclusively for… settling basins." While all types of "green infrastructure" effectively retain and infiltrate rainfall, these practices also can simultaneously help filter air pollutants, reduce energy demands, mitigate urban heat islands, provide wildlife habitat and sequester carbon while also providing communities with aesthetic and natural resource benefits.[373]

• Lead to illogical results

[373] *See* http://water.epa.gov/infrastructure/greeninfrastructure/index.cfm.

Extending CWA jurisdiction to stormwater control basins and ponds would lead to illogical results (see related discussions in Section V). In meeting the goals of the NPDES program, contractors build stormwater control basins and ponds to protect WOTUS both during construction and for permanent, long-term water resource protection. Does EPA intend to regulate these features as WOTUS, or are they intended to be exempted? As explained above, AGC finds that they would not meet the proposed exemption criteria on a consistent or occasional basis.

Stormwater control basins/ponds are a widely used BMP that must be designed, constructed and maintained to function properly. Basin/pond maintenance is often dictated by local laws and is necessary to prevent downstream pollutant loadings, erosion, and flooding. Yet, under the proposal, contractors and property owners/managers would need to obtain a Section 404 permit to authorize them to repair outlet structures, clear vegetation, remove sediment, stabilize the pond banks, or drain the pond. (They would also need a Section 404 permit to convert a temporary basin to a permanent pond.) In addition, the stormwater discharges into the basin/pond may require a separate NPDES Section 402 permit. Further, CWA Section 303 requires states to adopt and submit to EPA water quality standards (WQSs) which "consist of a designated use or uses for the waters of the United States …."[374] If stormwater control basins/ponds were WOTUS, then state-developed and EPA-approved WQSs would need to designate "uses" for those basins/ponds. In turn, the state would need to develop a pollutant-specific TMDL for any basin/pond that failed to meet its use.[375]

Where maintenance of stormwater BMPs is hampered, the BMPs 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. What is more, in a case where the basin/pond fails to meet a CWA water quality standard, a construction contractor in a design-build contract scenario could be held responsible for design or construction flaws or defects.

Some state NPDES construction stormwater permits require contractors to direct turbid or sediment-laden waters to a temporary or permanent sedimentation basin or pond. For example, the Minnesota Construction Stormwater Discharge General Permit (MNR 100001, issued August 1, 2013) states: "The permittee(s) must discharge turbid or sediment-laden waters related to dewatering or basin draining (e.g., pumped discharges, trench/ditch cuts for drainage) to a temporary or permanent sedimentation basin on the project unless infeasible." See Exhibit 1 below.

Finally, if construction activity in/around a basin/pond causes a sheen on surface (possibly because of fuel and fluid in earth moving equipment), the construction site operator would need to immediate report an oil spill to the National Response Center — pursuant to EPA rules in place for a discharge of oil into waters of the United States. (p. 12-16)

[374] 33 U.S.C. § 1313; 40 C.F.R. § 131.3(i).
[375] 33 U.S.C. § 1313(d).

Agency Response: **While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dry land is appropriate. Please see summary response at 7.4.4. See also responses to SPCC comments at 12.5.**

NAIOP Commercial Real Estate Development Association (Doc. #14621)

7.611 5. §328.3(b)(1) MS4s.

The proposed definitions of tributary could be construed to include municipal separate storm sewer systems (MS4s) and their components. The Agencies' overly broad definition of "tributary" may improperly treat MS4s as WOTUS and clarification is needed to proclaim that MS4s are excluded from jurisdictional coverage. EPA and the Corps propose that any waterbody that meets the definition of a tributary is "by rule" a WOTUS. Pursuant to the Proposed Rule, a "tributary" is a waterbody that has a bed, bank and ordinary high water mark (OHWM), and contributes flow to waters that are used in interstate commerce, territorial seas, interstate waters, and their impoundments ("(1)-(4) waters").

Under this proposed definition, MS4s and their system components could be deemed jurisdictional WOTUS. MS4 systems often include ditches and other manmade structures that have a bed, bank and OHWM. Moreover, as they are designed to convey and treat stormwater, MS4s will contribute flow (directly or indirectly) to the categories of so-called (1)-(4) waters. These common MS4 components are already subject to National Pollutant Discharge Elimination System (NPDES) permit requirements and could be confusingly and unnecessarily layered with more federal regulation as a WOTUS.

EPA and the Corps should thus clarify for its field offices, state and local governments, and the regulated community that MS4s and their component conveyances are not considered WOTUS under the proposed rule.

The following change is recommended:

"(b) The following are not 'waters of the United States' notwithstanding whether they meet the terms of paragraphs (a)(1) through (7) of this definition—

"(1) Waste treatment systems, including treatment ponds, lagoons, or Clean Water Act regulated municipal separate storm sewer systems and the component conveyances within such systems." (p. 4)

Agency Response: **Please see summary response at 7.4.4.**

Vulcan Materials Company (Doc. #14642)

7.612 Add language to the rule that clearly exempts from jurisdictional status water management systems, including associated collection, conveyance, and treatment systems that are permitted under NPDES or delegated state storm water and/or process water discharge permitting authority. Similarly, water management systems associated with zero discharge facilities should be clearly exempted from jurisdictional status permitting authority. Similarly, water management systems associated with zero discharge facilities should be clearly exempted from jurisdictional status. (p. 4-5)

Agency Response: **With respect to stormwater control features, please see summary response at 7.4.4. See also summary response at 7.4.2**

Maryland Chapters of NAIOP (Doc. #15837)

7.613 We are among those concerned that the overly broad definition of tributary may improperly identify channels and conveyances, environmental site design (ESD) features and structures that are subject to NPDES or MS4 permits as regulated waters and request that a the final rule contain a clarification that stormwater and ESD structures are not WOTUS. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

Ames Construction, Inc. (Doc. #17045)

7.614 I also oppose any regulatory language that would extend CWA jurisdiction to stormwater control basins and ponds of any size or function that ultimately drain to an otherwise regulated 'water of the United States.' It is unclear whether or not such stormwater controls would qualify for any of the exclusions in the proposal. On a majority of regulated construction sites, current NPDES permit requirements have led contractors to build temporary basins to hold rainwater that has 'run off" the surrounding jobsite and slowly release it to receiving waters via an outlet control structure and/or under-drainage system. EPA is now pushing cities to require that contractors build permanent structural controls to treat, store, and infiltrate runoff onsite before it enters the municipal storm sewer system. These stormwater control systems would, under this proposed regulation, become 'waters of the United States,' forcing construction site operators to create federally jurisdictional waters on their property to meet other requirements of the CWA. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

National Association of Home Builders (Doc. #19540)

7.615 **i. MS4s are not "Waters of the United States."**

Municipal separate storm sewer system (MS4) infrastructure is defined 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 and operated by a state or municipality which "discharges to waters of the United States" and is "[d]esigned or used for collecting or conveying storm water."[376] The National Pollutant Discharge Elimination System (NPDES) program regulates stormwater discharges from MS4s, construction activities, and industrial activities. The Phase I MS4 requirements, issued in 1990, direct medium and large cities and certain counties with populations of 100,000 or more to obtain NPDES permit coverage for their stormwater discharges. There are approximately 750 Phase I MS4s. Phase II MS4s whose requirements were issued in 1999, include small MS4s in urbanized areas, as well as small MS4s outside the urbanized areas that are designated by the permitting authority. Like Phase I MS4s, they

[376] 40 C.F.R. § 122.26(b)(8).

too must obtain NPDES permit coverage for their stormwater discharges. There are roughly 6,700 Phase II MS4s.[377]

In the comprehensive and exhaustive proposed rule, nowhere do the Agencies mention MS4s, much less the elaborate CWA regime that governs and regulates these systems across the United States. The Agencies must address the interplay between the MS4 stormwater program and waters of the United States coverage. Indeed, the proposed rule's strong intent to provide as much certainty to the regulated public and the regulators demands clarification on the jurisdictional status of MS4s.

NAHB urges the Agencies to clarify that MS4s are "point sources" regulated under CWA Section 402, and are not also waters of the United States.[378] Additionally, MS4s are waste treatment systems and, accordingly, should be categorically excluded from the reach of waters of the United States. The CWA's regulatory scheme, for all its detail, is quite simple: the Act prohibits the discharge of pollutants from point sources to navigable waters unless authorized by a permit.[379] The term "'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, . . . from which pollutants are or may be discharged. . . ."[380] The CWA further provides that "'discharge of a pollutant' . . . means . . . any addition of any pollutant to navigable waters from any point source. . . ."[381] The Act thus contemplates that point sources are not themselves "navigable waters," but instead are "discrete conveyances" for conveying pollutants to navigable waters.[382] The proposed rule ignores this distinction and may potentially and improperly define some well-recognized point sources as waters of the United States.

Similarly, the Agencies should clarify that no permit is necessary to contribute pollutants that are conveyed to a local government-owned MS4.[383] Otherwise, the Agencies will upset the CWA framework by requiring a permit for "discharging" pollutants to a "point source," which is well beyond the Agencies' CWA authority.[384] For example, the proposed rule defines tributaries in such a broad manner as to potentially cover ditches

[377] *See* http://water.epa.gov/polwaste/npdes/stormwater/Municipal-Separate-Storm-Sewer-System-MS4-Main-Page.cfm.
[378] Similarly, any ditch or other feature upstream of the MS4 or any other NPDES outfall should also not be considered a jurisdictional "water of the United States."
[379] 33 U.S.C. § 1311(a) (prohibiting the "discharge of any pollutant[s]" unless permitted elsewhere in the CWA).
[380] 33 U.S.C. § 1362(14) (emphasis added).
[381] 33 U.S.C. § 1362(12) (emphasis added).
[382] *See also Rapanos*, 547 U.S. at 735 ("The definitions thus conceive of 'point sources' and 'navigable waters' as separate and distinct categories;" "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.'").
[383] These systems are owned and operated by public entities, including states, local governments, and special governments created under state law, such as sewer districts, flood control districts, or drainage districts.
[384] The Act authorizes the Agencies to control "discharges" of pollutants to navigable waters. A "discharge" covers only the "addition of any pollutant to navigable waters *from* any point source;" not a discharge from a point source to a point source. 33 U.S.C. § 1362(12) (emphasis added).

that flow into MS4s, which Congress designated as point sources subject to CWA Section 402(p).[385]

Treating MS4s, and the ditches that convey runoff to them, as waters of the United States would mark a 180-degree turn from the Agencies' traditional practice. For example, in the 1990 preamble to EPA stormwater regulations, EPA made clear that stormwater runoff into municipal sewers (roads, ditches, storm drains, etc.) is not a discharge of a pollutant into a water of the United States.[386] EPA has "always addresse[d] such discharges as 'discharges through municipal separate storm sewers' as opposed to 'discharges to waters of the United States.'"[387]

Similarly, in 2005, EPA confirmed that MS4s are "by definition" not CWA "navigable waters."[388] The Agencies must continue that trend.

Moreover, the case law makes clear that "a two-permit regime is contrary to the statute and the regulations … [and] would cause confusion, delay, expense, and uncertainty in the permitting process."[389] The Supreme Court concluded "that, when a permit is required to discharge fill material, either a § 402 or a § 404 permit is necessary."[390] The same principle holds true here – where a point source like an MS4 (including ditches flowing to the MS4) is regulated under Section 402 of the Act, it is contrary to the statute, the case law, and common sense to also treat that ditch as a water of the United States. While off the record the Agencies assert it is not their intent to regulate MS4s as waters of the United States, the proposed rule is broad enough to create confusion.[391]

As point sources, MS4s are local government-owned systems that are required to control the volume of stormwater while reducing the discharge of pollutants therein. Congress conceived of this framework so that, "[r]ather than regulate individual sources of runoff, such as churches, schools and residential property, . . . the NPDES permitting

[385] Congress amended the CWA in 1987 and added section 402(p) which, among other things, required EPA to develop regulations for an MS4 permit program regarding stormwater discharges. *See* 33 U.S.C. § § 1342(p)(3)(B), (4). The history of the MS4 permit program and its phased approach for regulation of municipalities based on their population size is summarized in *Envtl. Def. Ctr., Inc. v. U.S. EPA*, 344 F.3d 832, 841-42 (9th Cir. 2003). According to EPA, approximately 70 percent of the nation's population lives within an urbanized area subject to EPA's MS4 regulations. See U.S. EPA, Fact Sheet 2.2 (EPA 833-F-00-004), *Storm Water Phase II Final Rule, Urbanized Areas: Definition and Description* (Dec. 1999, rev. Dec. 2005), available at http://cfpub.epa.gov/npdes/stormwater/swfinal.cfm.

[386] 55 Fed. Reg. 47,990, 47,991 (Nov. 16, 1990) ("[M]ost urban runoff is discharged through conveyances such as separate storm sewers or other conveyances which are point sources under the CWA. These discharges are subject to the NPDES program.").

[387] *Id*. (emphasis added).

[388] Memorandum from A. Klee, Former General Counsel, and B. Grumbles, Former Assistant Administrator for Water, EPA, to Regional Administrators at 18 n.18 (Aug. 5, 2005) ("Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers"), available at http://www.epa.gov/ogc/documents.htm.

[389] *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S.Ct. 2458, 2474 (2009) (Op. by Kennedy, J.).

[390] *Id*. (emphasis added).

[391] September 2014 Q and A at 5. ("Question 13: Will stormwater management systems permitted under the CWA, commonly called MS4s, become "waters of the US" under the proposed rule? ANSWER: No. The proposed rule does not change the status of an MS4 under the CWA. The proposed rule does not regulate any types of waters that are not regulated under the current rule. We are eager to work with stakeholders and the public to ensure the final rule reflects this intent.")

requirement [operates] at the municipal level to ease the burden of administering the program."[392] Because states and local governments are already charged with controlling stormwater volume and reducing pollution from urban runoff through the NPDES program, there is no benefit or administrative efficiency gained by treating the same drainage systems as jurisdictional waters. Classifying MS4s as waters of the United States would disrupt state and local government programs that maintain, manage, and treat stormwater discharges under CWA Section 402(p).

Case law and the Agencies' long-standing position on MS4s are also consistent with how these systems operate. MS4s are waste treatment systems for sediment and other pollutants, and thus they should be excluded from the definition of waters of the United States. Under EPA regulations and the proposed rule, waste treatment systems are not waters of the United States.[393] Instead, they are "manmade bodies of water which neither were originally created in waters of the United States . . . nor resulted from the impoundment of waters of the United States."[394] Because MS4s collect stormwater runoff and remove pollutants, including sediment, from stormwater runoff, they operate as waste treatment systems and are, therefore, not jurisdictional waters.

Even more problematic, if MS4s are treated as waters of the United States, all CWA programs will apply to them. States will then be required, among other things, to monitor water quality, designate beneficial uses, establish water quality standards, and establish TMDLs for any part of an MS4 under the jurisdiction of the CWA. Additionally, a Section 404 permit could be required to perform necessary maintenance and repair on MS4s that are wrongly deemed waters of the United States. The time and money it will take to obtain Corps permits to repair or maintain ditches and conveyances within an MS4 will cost local governments extra time and money while simultaneously jeopardizing public infrastructure and safety.

A more common sense approach is to treat MS4s and those entities that release pollutants through them like publicly owned treatment works (POTWs) and to treat those that introduce pollutants into them as part of the POTW. Under this approach, discharges from the point source (i.e., the MS4) are appropriately permitted under Section 402, and no permit is required for persons to discharge into the point source, as is consistent with the Act. Those entities who introduce pollutants to the MS4, which then discharges the pollutants to navigable waters, must then comply with the requirements that the MS4 establishes. Indeed, this is the basic structure EPA has created within the Section 402 program and there is no need to change it now.

Because conveyances within an MS4 or that convey pollutants through an MS4 could readily meet the proposed rule's broad tributary definition, many MS4s and/or other components could be treated as waters of the United States rather than as point sources.

[392] *Nat. Res. Def. Council, Inc. v. Cnty. of Los Angeles*, 636 F.3d 1235, 1247 (9th Cir. 2011). The Ninth Circuit quoted Senator Wallop, who called the alternative approach an administrative nightmare: "'[T]he regulations can be interpreted to require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to get a permit from EPA as a point source. . . . Requiring a permit for these kinds of stormwater runoff conveyance systems would be an administrative nightmare.'" Id. (citing 131 CONG. REC. 15616, 15657 (Jun. 13, 1985)).
[393] 40 C.F.R. § 122.2 (defining waste treatment systems); 79. Fed. Reg. at 22,263.
[394] 40 C.F.R. § 122.2 (defining waste treatment systems).

The Agencies must confirm that point sources, such as MS4s, that are regulated by CWA Section 402 are not "waters of the United States." One way to do so is to specifically include MS4s in the waste treatment system exclusion. (p. 106-109)

Agency Response: Please see summary response at 7.4.4. Also see the Technical Support Document at Section I.C.

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

7.616 The CWA stormwater program requires the construction of retention ponds to manage stormwater.[395] Treating stormwater as waters of the U.S. will create a never-ending cycle of regulation. Similarly, Federal Emergency Management Agency flood control provisions require stormwater management, drainage, and flood control.[396] Municipal and county codes also require stormwater management and drainage, often with EPA guidance. Likewise, the Corps manages and administers national flood control and drainage of stormwater, including ditches that would qualify as waters of the United States.

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 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. 3)

Agency Response: Please see summary response at 7.4.4.

The Mosiac Company (Doc. #14640)

7.617 In addition to the list above, however, Mosaic urges the agencies to expand the list to NPDES systems, both industrial and stormwater (MS4), to provide clarification and assurance to the regulated public and stakeholders that systems designed to provide water treatment for the benefit of waters of the U.S. won't become jurisdictional themselves. Similar to the exemption for waste treatment systems (including treatment ponds or lagoons) already stated in the proposed rule, waters that are a part of NPDES systems convey water to, from, and through areas used for treatment and discharge from a regulated outfall structure. The discharge location is the point where water from the NPDES system enters waters of the State or waters of the U.S. and is the point where all applicable water quality standards must be met. Waters upstream of the discharge location are not currently required to meet these limits or they would cease to be able to provide their treatment function. Therefore, the same exemption provided for waste treatment systems should apply to NPDES systems (stormwater and industrial). While it

[395] *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 U.S." on MS4s, and the component conveyances within these systems that channel and discharge stormwater runoff).
[396] *See, e.g.*, 40 CFR Part 213.

is known that these features are not proposed to be considered jurisdictional if excavated solely in uplands, in central and south Florida and other areas with generally flat terrain and high water tables, it is not practicable to construct such systems solely in uplands.[397] Providing an express exemption in the proposed rule for these waters would alleviate this concern. (p. 5)

Agency Response: **Please see summary response at 7.4.4.**

Packaging Corporation of America (Doc. #15515)

7.618 The preamble in the Proposal indicates that the Agencies do not intend to change the waste treatment system exemption under the current regulations (79 Fed. Reg. at 22,189).

Changes or Clarifications Needed Regarding the Exemption

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 and not subject to Section 402 or 404 permit requirements. 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. The preamble should make clear that ditches that are conveying stormwater to or from stormwater management facilities also are covered by the exemption. (p. 4-5)

Agency Response: **Please see summary response at 7.4.4.**

Hampton Roads Planning District Commission, Virginia (Doc. #9612)

7.619 **1. All man-made purpose built stormwater management facilities should be explicitly excluded from the definition of WOTUS.** If stormwater management facilities are not explicitly excluded in this Rule, then they may be classified as tributaries to WOTUS. Because a stormwater management facility is designed to drain and treat the runoff within its drainage area, under the definition of "adjacent" in this Rule, most of the water draining to the stormwater facility could be classified as WOTUS and subject to the CWA. The Rule should include exemptions specifically for construction, maintenance and/or retrofitting of purpose built stormwater management facilities. Without such exclusion, the Hampton Roads localities' ability to comply with its Section 402 National Pollution Discharge Elimination System (NPDES) requirements (MS4) and compliance with TMDL allocations will be limited. (p. 2)

Agency Response: **Please see summary response at 7.4.4. . Please note that the proposed rule did not address which activities are regulated under the CWA; rather it addressed which waterbodies are jurisdictional. Comments about activities such as maintenance, construction and/or retrofitting are outside the scope of this rule.**

[397] Water Environment Federation webinar: *Potential Impacts of Waters of the U.S, Rulemaking on Stormwater Infrastructure*. Online Webcast, November 6th, 2014.

Division of Transportation, Kane County, St. Charles, Illinois (Doc. #9831)

7.620 Since stormwater management activities are not explicitly exempt under the proposed rule, we are concerned that man-made conveyances and facilities for stormwater management could now also be classified as a "water of the U.S." We are concerned that municipal separated storm sewer infrastructure within our right-at-way may be subject to additional water quality standards (including total maximum daily loads) if our stormwater ditches are considered a "water of the U.S." Not only would the discharge leaving the system be regulated, but all flows entering the system would be regulated as well. Unless municipal separated storm sewers are explicitly exempted from the requirements, we may be forced to regulate them as a "water of the U.S.," through Clean Water Act citizen suits. (p. 2)

Agency Response: Please see summary response at 7.4.4.

Roads and Drainage Department, DeKalb County, Georgia (Doc. #13572)

7.621 Since stormwater management activities are not explicitly exempt under this proposed rule, we are concerned that Municipal Separate Storm Sewer System (MS4) infrastructure could now be classified as a "water of the U.S." This infrastructure includes many county MS4 conveyances, including ditches, channels, pipes and gutters that flow into a water of the U.S. and are already regulated under the CWA Section 402 stormwater permit program. We are concerned that not only would the discharge leaving the stormwater system be further regulated, but all flows entering the MS4 could be regulated as well. In communications to-date, EPA staff have stressed that they do not "intend" to regulate an MS4, as a "water of the U.S." We take them for their word on their intentions.., however, they may be forced to do so through citizen/environmental group CWA lawsuits as these ditches, pipes and channels, under the rule's "tributary" and "adjacency" definitions, could very well be interpreted to be "Waters of the U.S." Vague federal rules have been used by various outside groups to litigate for years. We feel that this is yet another area where EPA rule ambiguity will end up being fodder for the courts. Recommendation: In order to avoid this, we respectfully recommend that MS4 activities be specifically exempt under the proposed rule. (p. 2)

Agency Response: Please see summary response at 7.4.4.

Elmore County Highway Department, Wetumpka, Alabama (Doc. #14072)

7.622 Since storm water management activities are not explicitly exempt under the proposed rule, we are concerned that man-made conveyances and facilities for storm water management could now be classified as a "water of the U.S." Some counties and cities own Municipal Separate Storm Sewer System (MS4) infrastructure including ditches, channels, pipes and gutters that flow into a "water of the U.S:' and are therefore regulated under the CWA Section 402 storm water permit program. There is a significant potential threat for counties that own MS4 infrastructure because they would be subject to additional water quality standards (including total maximum daily loads) if their storm water ditches are considered a "water of the U.S:' Not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well. Even if the agencies do not initially plan to regulate an MS4 as a "water of the U.S.," they may

be forced to do so through CWA citizen suits, unless MS4s are explicitly exempted from the requirements.

Further, storm water management is often not funded as a water utility, but rather through a county general fund. If storm water costs significantly increase due to the proposed rule, not only will it potentially impact our ability to focus available resources on real, priority water quality issues, but it may also require that funds be diverted from other government services such as education, police, fire, etc. Our County cannot assume additional unnecessary or unintended costs. (p. 5)

Agency Response: **Please see summary response at 7.4.4.**

Lake County Division of Transportation, Lake County, Illinois (Doc. #14743)

7.623 Since stormwater management activities are not explicitly exempt under the proposed rule, we are concerned that conveyances and facilities constructed for stormwater management would be classified as a "water of the U.S." Municipal Separate Storm Sewer Systems (MS4s) include ditches, channels, storm sewer, and gutters that under the proposed rule would flow into a "water of the U.S." and would therefore be subject to increased regulation under the Clean Water Act Section 402 stormwater permit program. If the stormwater ditches are considered a "water of the U.S." then all discharges leaving the system and all flows entering the MS4 would be subject to increased regulation as well. The MS4 would then be subject to additional water quality standards including total maximum daily loads. The proposed rule should specifically exclude MS4s from federal jurisdiction. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

National Association of County Engineers (Doc. #14981)

7.624 It is important to recognize that a water body is either regulated as an MS4 or a Water of the U.S., but it should not be both. Dual regulation would lead to competing and conflicting requirements. Counties should not have to get a 404 permit to dredge a stormwater management facility when MS4 regulations require maintenance of these facilities. For these reasons, water bodies and conveyance systems should not be dually regulated. (p. 3)

Agency Response: **Please see summary response at 7.4.4.**

Union Pacific Railroad Company (Doc. #16370)

7.625 Waste Water Treatment Systems: The Proposed Rule refers to “Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act”. Based on this text, it is not clear if a stormwater collection system in a managed stormwater basin ending in a water quality treatment structure prior to end of pipe [and regulated at end of pipe under NDPES/ MS-4] would qualify as a “waste treatment system designed to meet the requirements of the CWA”. We request that the Proposed Rule state clearly that all such stormwater basins are excluded. (p. 5)

…

h. In an effort to further understand the jurisdictional reach and related impacts of the Proposed Rule the following general questions need to be answered:

…

- Does the exclusion for "waste treatment systems" cover all likely water, stormwater and wastewater treatment systems? Is stormwater containing a pollutant a waste?
- Could a ditch that is upstream of a waste treatment system and fully treated by the system, be regulated as WOTUS? If so, would a treatment system have to be at a location that captures only waters that are not WOTUS?

… (p. 5, 6)

Agency Response: **Please see summary response at 7.4.4. See the summary response at 7.1 with respect to the waste treatment system exclusion.**

Charlotte-Mecklenburg Storm Water Services (Doc. #3431)

7.626 This comment pertains to Section 328.3 Definitions, (b)(1), Federal Register page 22263. It is not clear if "waste treatment systems, including ponds or lagoon, designed to meet the requirements of the Clean Water Act" includes stormwater treatment systems. **CMSWS recommends specifically stating that "Stormwater Management Facilities" are not "waters of the United States"**. (p. l)

Agency Response: **Please see summary response at 7.4.4.**

Department of Public Works, City of Chesapeake, Virginia (Doc. #5612.1)

7.627 4. The Rule provides an exemption for *artificial lakes or ponds used exclusively as settling basins, ditches that are excavated wholly in uplands, and ditches that do not contribute flow to a traditional navigable water.* These exemptions are not comprehensive. Specifically, the Rule should have an exemption specifically for construction, maintenance and/or retrofitting of purpose built stormwater management facilities. Without such an exemption, the City's efforts to comply with its Section 402 National Pollution Discharge Elimination System (NPDES) requirements (MS4) and compliance with future TMDL allocations will be severely limited. In addition, if these features are not exempt to the Rule, additional cumbersome reporting and resource intensive water quality standards may be applied to new WOUS under the Section 303 program. (p. 2)

Agency Response: **Please see summary response at 7.4.4. Please note that the proposed rule did not address which activities are regulated under the CWA; rather it addressed which waterbodies are jurisdictional. Comments about activities such as maintenance, construction and retrofitting are outside the scope of this rule.**

7.628 … the City of Chesapeake has identified a significant number of concerns and problems with EPA's proposed waters of tile US Rule; however, the City does support streamlining regulatory oversight by the EPA and the Corps through various sections of the CWA Other than the regulatory provisions already contained within Section 402 of the CWA (NPDES & MS4), stormwater management facilities which have been constructed

specifically for the purposes of conveyance, management, retention, and treatment of stormwarer should he specifically excluded from regulatory oversight under the CWA including, but not limited to stormwater management ponds, lakes, swales, dry or wet detention basins, constructed wetlands, bio-retention areas, rain gardens and intermittent/ephemeral ditches regardless of their proximity to a waters of the US or a traditional navigable water; regardless of being ephemeral, intermittent, perennial; regardless of having shallow subsurface groundwater connections or confined surface hydrologic connections; regardless of contributing to WOUS in storm events; and regardless of being excavated from uplands, wetlands, or agricultural lands. Without these exclusions, there may be unintended consequences for local governments subject to MS4 regulation as well as private property owners. Under the proposed Rule, the City's ability to perform required routine maintenance and retrofitting of stormwater management facilities to improve water quality could be severely limited because most of the City's facilities would be regulated as WOUS. The proposed Rule may require unnecessary and resource intensive Section 404 permitting for routine maintenance and retrofitting of the City's stormwater management facilities. (p. 7).

Agency Response: **Please see summary response at 7.4.4.**

Beaufort County Stormwater Utility (Doc. #7326.1)

7.629 **III) Man-Made or Man-Altered Tributaries"** - Under Section III, "Proposed Definition of Waters of the United States," Part F, Tributaries, Subsection (6), "Man-Made or Man-Altered Tributaries Significantly Affect the Chemical, Physical, and Biological Integrity of (a)(1) Through (a)(3) Waters", it states in part: "This proposal expressly states that a tributary, including wetlands, can be a natural, man-altered, or man-made water body and includes waters such as rivers, streams, lakes, impoundments, canals, and ditches that meet the definition of tributary and are not excluded from the definition of ''waters of the United States'' by paragraphs (b)(3) and (b)(4) of the proposed rule." The agencies' proposed rule clarifies that man-made and man-altered tributaries are ''waters of the United States'' because 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. III) Man-Made or Man-Altered Tributaries" - Under Section III, "Proposed Definition of Waters of the United States," Part F, Tributaries, Subsection (6), "Man-Made or Man-Altered Tributaries Significantly Affect the Chemical, Physical, and Biological Integrity of (a)(1) Through (a)(3) Waters", it states in part: "This proposal expressly states that a tributary, including wetlands, can be a natural, man-altered, or man-made water body and includes waters such as rivers, streams, lakes, impoundments, canals, and ditches that meet the definition of tributary and are not excluded from the definition of ''waters of the United States'' by paragraphs (b)(3) and (b)(4) of the proposed rule." The agencies' proposed rule clarifies that man-made and man-altered tributaries are ''waters of the United States'' because 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.

Many stormwater management facilities, even those designed primarily for conveyance, have been "designed with nature" in which they would intentionally function as a natural wetland, pond or stream. In addition to its many ecosystem and hydrologic benefits, it is a design concept that has been strongly encouraged by State and Federal Agencies.

Recommendation: The final rule should explicitly state that stormwater management facilities are excluded from being considered WOTUS. More generally, the Corps and EPA should work to ensure that concerns about creating jurisdictional waters do not discourage the implementation of green infrastructure or natural methods of stormwater management. (p. 2-3)

Agency Response: **Please see summary response at 7.4.4.**

7.630 **Waste Treatment Systems** - The proposed rule would identify as non-jurisdictional by rule "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act." (79 FR 22263). The preamble does not contain any explanation of this exclusion, so it is not clear how this exclusion would apply to stormwater management systems that are constructed to meet requirements of the Clean Water Act. One of the potential impediments to developing green infrastructure is the concern that wetlands created to receive stormwater runoff could themselves be deemed jurisdictional.

Recommendation: The final rule should clarify that the exclusion for waste treatment systems, including treatment ponds or lagoons also applies to stormwater management facilities. More generally, the Corps and EPA should work to ensure that concerns about creating jurisdictional waters do not discourage the adoption of natural methods of stormwater management. (p. 4)

Agency Response: **Please see summary response at 7.4.4.**

Gateway Water Management Authority, Los Angeles Gateway Region (Doc. #10032)

7.631 Curbs, street gutters, concrete or other constructed harded water conveniences such as circular or rectangular concrete storm drains in urban settings; that did not or are not replacing existing natural stream or river beds are not considered tributaries.

This wording is not inconsistent with the changes to the "ditch" rule for rural areas that are being proposed. This wording would also not impact the outfall and receiving water monitoring programs our cities have recently submitted to the Los Angeles Regional Water Quality Control Board, thus protection of the waterways would continue under the MS4 Permit. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

Department of Public Works, Snohomish County, Washington (Doc. #10749)

7.632 Federal regulations for NPDES municipal stormwater permits are set forth in 40CFR 122.26 pursuant to Section 402(p) of the Clean Water Act. 40 CFR 122.26(b)(8) defines the term "municipal separate storm sewer" as:

> "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm d rains):
>
> (i) Owned or operated by a State, city, town, borough, county , parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;
>
> (ii) Designed or used for collecting or conveying stormwater ;
>
> (ii i) Which is not a combined sewer; and
>
> (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2."

The basic purpose of the municipal storm sewer system, as operated under the NPDES permit, is to function in a manner analogous to a sanitary sewer system. The municipal storm sewer is designed, constructed, and operated to collect, convey, and properly treat stormwater prior to discharge to surface receiving waters.

The existing definition of "municipal separate storm sewer" sets forth an essential characteristic of these systems: they discharge to waters of the United States. This creates a very useful regulatory bright line: upstream of the discharge point, the system (and the water in it) are regulated by the NPDES municipal stormwater permit; downstream of the discharge point, regulations for water s of the United States apply.

The proposed language of 40 CFR 2303 creates ambiguity in distinguishing between waters of the United States and municipal separate storm sewer systems. Proposed 40 CFR 2303(s) defines a very broad set of water bodies and conveyances as "waters of the United States." Proposed 40 CFR 2303(t) excludes a number of water bodies and conveyances from this definition, including "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" (emphasis added). Thus, any ditch that contributes flow, directly or indirectly, to any of those waters of the United States is itself included in the scope of waters of the United States.

The municipal separate storm sewer system of Snohomish County includes hundreds of miles of ditches designed, constructed, operated, and maintained as part of the roadway drainage system. Virtually all of these ditches drain directly or indirectly to waters of the United States as defined in proposed 40 CFR 2303(s). Thus, while these ditches fall under the existing definition of municipal separate storm sewer set forth in 40 CFR 122.26(b)(8), they would also become classified as waters of the United States under proposed 40 CFR 230.3.

Snohomish County believes this was an unintended consequence of the proposed definition of waters of the United States. Our recommended solution is to amend the

proposed definition to include municipal separate storm sewer systems under the exemption given to waste treatment systems, as follows:

> 40 CFR 230.3
>
> (t) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (s)(1) through (7) of this section-
>
> (l) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act and infrastructure that is part of municipal separate storm sewer systems as defined in 40 CFR l22.26(b)(8).

We believe that this amendment follows the logic used in the 1987 Clean Water Act amendments that placed regulation of stormwater and stormwater infrastructure under the purview of NPDES wastewater regulations. Both types of municipal infrastructure are designed, built, and operated to remove pollutants from water prior to it discharge to waters of the United States. Our proposed amendment will retain the existing important distinction between municipal sewer infrastructure and waters of the United States provided in 40 CFR l22.26(b)(8), while allowing the necessary revision to the scope of "waters of the United States" related to ditches that are not part of a municipal separate storm sewer system. (p. 1-2)

Agency Response: **Please see summary response at 7.4.4.**

Minnesota Cities Stormwater Coalition (Doc. #14647)

7.633 1. There are many Municipal Separate Storm Sewer Systems (MS4s) in the United States. Some are cities. Others are various types of public entities (DOTs, counties, non-traditional MS4s, etc.). Some of these MS4s are regulated under the MS4 NPDES permitting program. Many more of these MS4s are not regulated and are not covered under an MS4 permit. Some MS4s (e.g.: counties and DOTs) have portions of their systems that are regulated under MS4 permits (inside an Urbanized Area) and portions that are not regulated (outside of Urbanized Areas). Taken together, all these MS4s own, operate, and maintain millions of Stormwater Control Measures (SCMs) and Best Management Practices (BMPs). These SCMs and BMPs include both structural and non-structural practices, programs, and features. In order for these MS4s to operate and maintain their systems in an efficient and cost-effective manner, the WOTUS jurisdictional status of the vast majority of these constructed SCMs and BMPs must be clear. Determining the WOTUS jurisdictional status of most of these constructed SCMs and BMPs on a case-by-case basis is not manageable or practicable. It is essential that clarity be provided by having specific and explicit exclusion language in the new rule for most of these constructed SCMs and BMPs, including roadside ditches. Broad inclusion language and reliance on agency best professional judgment and discretion regarding the WOTUS status of most urban SCMs and BMPs are not acceptable or practicable. (p. 3)

Agency Response: **Please see summary response at 7.4.4.**

7.634 3. If a significant number of urban SCMs are determined to be WOTUS, the operation and maintenance of those SCMs will become much more complicated, difficult, and expensive for the public entities responsible for these MS4s, without any corresponding positive environmental outcomes. In fact, the MS4s' work and performance to protect,

restore, and improve water quality will be diminished. Such determinations may be the result of agency judgment or the outcome of third party lawsuits, based on interpretations of rule language. This is part of the reason why an explicit exclusion for most urban SCMs is needed. (p. 3)

Agency Response: **Please see summary response at 7.4.4.**

7.635 4. Specific exclusion language is needed for urban SCMs. If, as has been stated publicly, it is EPA's intent that most of these waters and structures are not to be considered WOTUS, this should be clearly stated in the rule. Such a clear statement would formalize and clarify EPA's intent. Such a clear statement would significantly reduce the probability of unfortunate interpretations in the future. (p. 3-4)

Agency Response: **Please see summary response at 7.4.4.**

7.636 5. The current draft of the rule is almost silent about urban stormwater, in the preamble and the proposed rule language. This recommended revision language would rectify a portion of that deficiency. Adding exclusion language for urban SCMs to this rule would be appropriate, historic, and significant. (p. 4)

Agency Response: **Please see summary response at 7.4.4.**

7.637 6. Because EPA is driving construction of MS4 SCMs and BMPs as part of its regulatory function, EPA has a responsibility to define clearly the jurisdictional status of most urban SCMs in the new WOTUS rule. This is part of the reason why an explicit exclusion for most urban SCMs is needed. (p. 4)

Agency Response: Please see summary response at 7.4.4

7.638 7. The definition for the term "tributary" provided in the proposed draft rule language is breathtakingly broad, especially the language related to man-made and natural breaks. Under this language, it appears that many urban SCMs could be considered tributary to other Waters of the United States and, thus, themselves be WOTUS. This contradicts EPA's public statements that most urban SCMs are not WOTUS. This is part of the reason why an explicit exclusion for most urban SCMs is needed. Broad inclusion language and reliance on agency best professional judgment and discretion regarding the WOTUS status of most urban SCMs and BMPs are not acceptable or practicable. (p. 4)

Agency Response: Please see summary response at 7.4.4.

7.639 8. Section 1.a.vi. of the draft proposed rule ("All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section") states that all waters adjacent to WOTUS are WOTUS. The definition of the term "adjacent" includes the term "neighboring". The definition of the term "neighboring" includes waters located within the riparian area or floodplain of a WOTUS. Under this rule language, it appears that constructed urban SCMs in the riparian areas or floodplains of WOTUS would be considered WOTUS. This contradicts EPA's public statements that most urban SCMs are not WOTUS. This is part of the reason why an explicit exclusion for most urban SCMs is needed. Broad inclusion language and reliance on agency best professional judgment and discretion regarding the WOTUS status of most urban SCMs and BMPs are not acceptable or practicable. (p. 4)

Agency Response: **Please see summary response at 7.4.4.**

7.640 9. The approach with this new recommended revised rule language is to provide a broad exclusion for most types and the vast majority of urban stormwater SCMs, BMPs, and roadside ditches. The authors recognize that it may be appropriate that some types of urban SCMs are determined to be WOTUS, on a case-by-case basis. To this end, the new recommended revised language includes "exceptions to the exclusion" in the definition for "fully-constructed SCMs" (see the last three sentences). We urge EPA and the Corps to consider this approach for the final rule language. This approach allows for a categorical exclusion for most urban SCMs but also allows for some types of urban SCMs to be determined to be WOTUS, on a case-by-case basis. If additional exceptions are needed and appropriate for "fully-constructed SCMs" or exceptions are needed and appropriate for some types of roadside ditches, we urge EPA and the Corps to use this approach and add exceptions as needed. (p. 4-5)

Agency Response: **Please see summary response at 7.4.4.**

7.641 10. We urge EPA to add explanatory language to the preamble to clarify its approach for urban SCMs. The preamble should be as clear for urban SCMs and roadside ditches as it is for agricultural waters, flows, practices, and ditches. (p. 5)

Agency Response: **The preamble explains all exclusions as clearly as possible. Also, please see summary response at 7.4.4.**

7.642 11. The exclusion language in the current proposed rule ("Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.") is inadequate for urban SCMs. Many urban SCMs were constructed for and serve purposes other than "waste treatment". Many urban SCMs were designed for purposes other than meeting "the requirements of the Clean Water Act". For example, this language does not cover many SCMs constructed in non-permitted MS4s. This language would not cover urban SCMs and roadside ditches constructed prior to the passage of the CWA. The new recommended revised rule language is intended to address these deficiencies. (p. 5)

Agency Response: **Please see summary response at 7.4.4.**

7.643 16. There are many Municipal Separate Storm Sewer Systems (MS4s) in the United States. Some are cities. Others are various types of public entities (DOTs, counties, non-traditional MS4s, etc.). Some of these MS4s are regulated under the MS4 NPDES permitting program. Many more of these MS4s are not regulated and are not covered under an MS4 permit. Some MS4s (e.g.: counties and DOTs) have portions of their systems that are regulated under MS4 permits (inside an Urbanized Area) and portions that are not regulated (outside of Urbanized Areas). The exclusion language proposed here applies to all urban SCMs, regardless of whether they are covered under an MS4 permit or not. It may be appropriate to include language in this rule providing an exclusion for urban SCMs that are within the boundaries of permitted MS4s, but that is not the goal of this recommended rule revision. It is essential, for all the reasons listed above, that an exclusion be provided for the vast majority of urban SCMs, regardless of MS4 permit status. (p. 6)

Agency Response: **Please see summary response at 7.4.4.**

7.644 18. EPA has publicly stated that a water can be both part of an MS4 conveyance system and a Water of the Unites States. This is a very confusing concept, from the perspective of regulated MS4 permittees. It is particularly confusing in light of another public statement from EPA presentations on this rulemaking: "Remember: Clean Water Act permitting requirements apply ONLY when there is a discharge of a pollutant from a point source into a Water of the U.S.". How does an MS4 system discharge to a WOTUS if the WOTUS is a component of the MS4 conveyance system? If there is no discharge, do the CWA permitting requirements apply? How does an MS4 permittee meet its permit requirements for the operation and maintenance of its system when a component of its system is also WOTUS?

We request that an alternative approach be considered. A water should only be WOTUS or part of an MS4, never both simultaneously. If a water is WOTUS, the discharge points from the MS4 to the water would be clearly viewed as outfalls under the MS4 permit. The water leaving the WOTUS could reenter the MS4. This approach may be much more clear and "cleaner" than the current concept of waters being both WOTUS and MS4 components simultaneously. (p. 6)

Agency Response: The Agencies regard both approaches as essentially the same. Please see summary response at 7.4.4.

County of San Diego, California (Doc. #14782)

7.645 **Exemption for water conveyance features**

The County requests that the new rule exempt the full range of conveyances, green infrastructure, treatment, storage, and infiltration facilities necessary to comply with MS4 permits. The proposed rule should explicitly and categorically exclude from the definition of a Water of the US multiple separate storm sewer systems (MS4s), conveyances, and related infrastructure designed for stormwater management. MS4s are not mentioned in the proposed rule. This is a glaring omission. Without a clear exemption, many features of MS4s could be potentially considered Waters of the U.S. Although there is an existing exemption for "waste treatment systems," it is not clear if all features of MS4s would qualify for this exemption.

An exemption is needed for MS4s because the new rule redefines treatment and the definition of tributaries in a way that could allow many MS4 facilities to be considered Waters of the U.S. because they contribute flow downstream. This presents a conflict in complying with sections 402 and 404/401 of the CWA. MS4 facilities and conveyances require maintenance to sustain their proper water quality function; however, Sections 404 and 401 could trigger a need for permits to conduct the maintenance if these facilities are considered Waters of the U.S. Clearly, clarification is needed to exempt infrastructure and BMP features that are built and maintained to comply with MS4 permits. As explained above, the new definition of tributaries appears more expansive, which would reduce available water quality treatment options and make it difficult to locate such facilities, as Waters of the U.S. cannot be treated directly. As such, the new broad definition of tributaries would increase the cost of compliance, reduce treatment options, and make it more difficult to comply with Section 402 of the Clean Water Act.

Conveyances should be explicitly defined as drainage facilities other than sanitary sewers by which urban runoff may be conveyed to receiving waters, including, but not limited to, roads, streets, constructed channels, aqueducts, storm drain, pipes, street gutters, inlets to storm drains or pipes, and catch basins. The rule should specifically exempt stormwater conveyances, bioswales, green streets, and infiltration basins that are necessary to comply with an MS4 permit. Additionally, the exemption should include structures and features designed in pursuit of watershed-based compliance options and integrated planning for stormwater management and water supply reliability. The definitions and exclusions must ensure that the design and location of stormwater BMPs can remain consistent with the goals of stormwater management without these areas being considered Waters of the U.S.

EXAMPLE: The San Diego Regional MS4 Permit requires plans to address pollutants and impairments in jurisdictional water bodies. The Regional Water Quality Control Board has identified Chollas Creek as impaired by dissolved metals. Expanding the definition of Waters of the U.S. to include ditches and other "offline" MS4 conveyances with connectivity to the Creek would significantly limit opportunities to treat stormwater before it reaches the receiving water. (p. 2-3)

Agency Response: **Please see summary response at 7.4.4**

Southeast Metro Stormwater Authority, Centennial, Colorado (Doc. #14935)

7.646 SEMSWA finds that the proposed ruling does not adequately address urban stormwater issues, and specifically, does not allow for appropriate management of our stormwater systems under our MS4 Permit. In fact, it has the potential to directly and negatively affect the efficient implementation of our existing CWA program. In the SEMSWA service area, there are several hundred fully-constructed permanent stormwater facilities, or best management practices (BMPs) mandated by our MS4 permit. These facilities are constructed for the purpose of water quality treatment, stormwater volume reduction, stormwater discharge control, flood control, and/or conveyance. These facilities have treatment components that require routine maintenance, and have the potential to be negatively affected by the proposed Rule, including the tributary definition; significant nexus; ditches, and 'waste treatment systems' proposed directives. With respect to our MS4 Permit implementation concerns, we would like to offer the following comments for your consideration:

…

4. Additional clarification is needed to identify the type of facilities that qualify for the 'waste treatment systems' exclusion defined as those systems that are "designed to meet the requirements of the Clean Water Act (Page 22193)". SEMSWA owns and operates stormwater facilities to control the volume and quality of stormwater runoff in accordance with our MS4 permit and we are uncertain if these facilities qualify as 'waste treatment systems' as outlined in the proposed rule. We believe any facility designed and operated to treat stormwater runoff in our MS4 to meet CWA requirements should be specifically included in the 'waste treatment systems' exclusion. (p. 1, 2)

Agency Response: **Please see summary response at 7.4.4.**

Department of Public Works, City of Northglenn, Colorado (Doc. #14990)

7.647 1. Definition of Tributary. Existing regulations do not define this term. In practice, the USACE has regularly determined that many remote ephemeral drainages are not Waters of the U.S. The Proposed Rule will bring most, if not all, of these tributaries into the scope of jurisdictional Waters of the U.S. This would eliminate the USACE's flexibility in making individual determinations based on site-specific conditions. Features that would otherwise meet the definition of tributary do not lose that status if, for any length, there are natural or manmade breaks, provided that there is an ordinary high water mark upstream of the break. The Proposed Rule's definition of tributaries would increase the number of hydraulically connected features that are considered tributaries, notwithstanding exclusions such as ditches, to traditional navigable waters.

We respectfully request exclusions for MS4 features including roadside ditches, detention facilities, and detention outfalls. (p. 2)

Agency Response: Please see summary response at 7.4.4. and Compendium 6 - Ditches

7.648 5. Excluded Best Management Practices. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are not Waters of the U.S. under the current rule. Language in the 2012 Nationwide Permits and Current Guidance clarifies that permanent Best Management Practices (BMPs) that are determined to be waste treatment systems under current regulations are not WOTUS. The Proposed Rule does not significantly change the language regarding the excluded waste treatment facilities. However, there is not a categorical exclusion for BMPs. Additional clarification is required to identify the types of facilities that should qualify for this exclusion. EPA, as the regulatory authority driving the construction of many BMPs under the MS4 Stormwater Program, should have a responsibility to make the jurisdictional status of these features clear in the rule language.

Northglenn requests that any facility designed and operated to treat stormwater runoff to meet the requirements of the Clean Water Act or local regulations for managing stormwater should be included in this exclusion.

Furthermore, the existing regulations include exclusions for waste treatment facilities that are constructed to meet CWA requirements and are constructed in uplands. Currently, this exclusion is inconsistently implemented or misinterpreted by USACE and EPA staff at the national offices and regional regulatory field offices level. Clearly, additional language is necessary to restore the intent of this exclusion.

Northglenn requests that language be included in the Proposed Rule to state that treatment of stormwater runoff from rural and urban settings conforms to the exclusion and that the exclusion applies to all necessary and constructed components of the stormwater treatment system. (p. 3)

Agency Response: Please see summary response at 7.4.4.

Public Works, Orange County, California (Doc. #14994)

7.649 c. If the Agencies intend to adopt the Proposed Rule, further consideration should be given to the distinction by Congress and the U.S. Supreme Court that MS4s are separate

and distinct from waters of the U.S. *Rapanos v. United States*, 547 U.S. 715 (2006) (holding that "waters of the U.S. excludes channels containing merely intermittent or ephemeral flow, ephemeral streams, wet meadows, storm sewers and culverts, and man-made drainage ditches; and that "point source" is separately defined in Section 402 of the CWA). (p. 2)

Agency Response: Please see summary response at 7.4.4. See the Technical Support Document at Section 1 concerning the relationship between point sources and waters of the U.S.

SD1 (Doc. #15140)

7.650 **Specific Exemptions are needed for Storm Water Practices**

An increase in WOTUS could affect the construction of storm water runoff control features for SD1, co-permittees, and developers. SD1 is also concerned that routine storm water maintenance, such as sediment removal from detention ponds and routine channel maintenance and debris removal, as well as green infrastructure practices, could also be inadvertently affected. These practices therefore need to be exempted from the rule and also need to be clearly stated in the rule so there isn't confusion as to which storm water practices are exempted.

SD1 supports the approach outlined by the Minnesota Cities Stormwater Coalition. This approach recommends incorporating exclusion language into the rule for storm water control measures and BMPs that is more precise and clear. For example, the term "constructed stormwater control measures" is too broad and should be replaced with the term "fully-constructed stormwater control measures." Fully-constructed stormwater control measures would be defined as man-made structures, devices, measures, or Best Management Practices (BMPs) that are constructed for the purpose of water quality treatment, stormwater volume reduction, stormwater rate control, flood control, stormwater conveyance, or any combination of these purposes. Examples of fully-constructed stormwater measures would include: constructed stormwater ponds, constructed stormwater wetlands, rain gardens, infiltration devices and structures, swales, Low Impact Development structures and BMPs, pipes, streets, curbs, gutters, roadside ditches, man-made channels, storm drains, and other constructed stormwater control and conveyance structures, devices and features.

In this exclusion language, there must also include some exceptions to the exclusions with some types of fully-constructed stormwater control measures and BMPs which will be determined on a case-by-case basis. These types of exceptions to the exclusion could be:

a. Fully-constructed stormwater control measures that have been built at the approximate location of similar types of natural waters (such as stormwater ponds constructed at the location of natural lakes or wetlands) shall not be considered to be fully-constructed stormwater control measures.

b. Natural lakes, ponds and wetlands with stormwater conveyance pipes discharging to them and constructed outlets shall not be considered to be fully-constructed stormwater control measures.

c. Stormwater control measures that are subject to the ebb and flow of the tide shall not be fully-constructed stormwater control measures. (Neprash, 2014)

Testimony from the National Association of Counties (NACO) and the National Association of Flood and Stormwater Management Agencies (NAFSMA) illustrates the need for exemption of routine maintenance of storm water management facilities and roadside ditches (Williams 2014):

> *"Over the years, numerous local governments and public agencies have expressed concerns 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 local governments and public agencies."*

This testimony also points out that if a maintenance project is deemed jurisdictional, it is subject to many requirements of the CWA and other federal laws such as the National Environmental Policy Act and the Endangered Species Act. Negotiations over mitigation of environmental impacts and also special conditions dealing with maintenance activities ensue, which often take years. SD1 agrees that maintenance activities for existing storm water management facilities and roadside ditches, such as channels and detention basins, should be exempt from Section 404 permitting. Without these specific exemptions to the rule, municipalities and private organization may instead favor gray infrastructure over green infrastructure solutions to avoid the potential of having to obtain additional permits under WOTUS and the costs associated with delays due to permit backlog. (p. 7-8)

Agency Response: Please see summary response at 7.4.4. Please note that the proposed rule did not address which activities are regulated under the CWA; rather it addressed which waterbodies are jurisdictional. Comments about activities such as maintenance are outside the scope of this rule.

Albuquerque Metropolitan Arroyo Flood Control Authority (Doc. #15221)

7.651 **1. Regulation is Proper Under the MS4 Permit Program**

…

Nevertheless, the proposed rule would define the individual components of the MS4 system as tributaries of traditional navigable waters (TNW), and therefore, waters of the U.S. themselves. This is in conflict with the distinction made by EPA that an MS4 is a system of conveyances that *discharges to waters of the U.S.*, rather than *being* waters of the U.S. Such an interpretation creates a conundrum of inconsistency in applying the various parts of the CWA. When such an interpretation creates a conflict, the rules of statutory construction dictate that the laws and regulations must be read in a manner so as to harmonize the rules or statutes while giving them both effect. See e.g., Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 120 S. Ct. 1291, 1301 (U.S. 2000); see also 2A Sutherland Statutory Construction § 46:5 (7th ed.). As a result, AMAFCA urges the EPA to exclude MS4 systems from its definition of waters of the U.S. subject to its 404 jurisdiction.

Although concerns may arise any time jurisdiction is not asserted over a waterway, those concerns are not applicable to MS4 systems. All of AMAFCA's facilities are currently subject to detailed regulations under the MS4 Permit Program. Any water which reaches the Rio Grande River must meet EPA requirements or AMAFCA may be held liable. This includes the multitude of point sources of unknown origin which infiltrate the system. AMAFCA accepts responsibility for ensuring that the water it conveys through its storm sewers and facilities is of the proper quality when it reaches the river, including seeking out the responsible party for any unauthorized dumping or deposits as necessary. As a result, the enforcement requirements are minimized because there is only one point source for contamination: the inlet from the MS4 to the river, and water is routinely monitored at this inlet.

However, if jurisdiction is asserted under section 404 of the Clean Water Act, AMAFCA is no longer able to assume responsibility for the quality of the water that reaches the river, which is the real concern of the CWA. In fact, the quality of the water in the MS4 is only at issue because of the potential it has to eventually reach the river. This concern is addressed most properly under the MS4 Permit Program, which requires the water in the system to be of a certain quality before entering the river. The proposed rule fails to take into consideration that an MS4 system has water quality features as a matter of practice in order to comply with the CWA. While it is generally true that pollutants dumped into any part of a tributary system are eventually washed downstream to a TNW, this is not the case in an MS4 system where the pollutants are removed as a matter of practice. The intent of the CWA is thus entirely covered by the NPDES permit. Furthermore, the NPDES permit is watershed based, meaning that the quality of the water in the river is viewed on a larger scale rather than just at each discharge point. This watershed based permit ensures that the river is fully protected as the effects of discharges are evaluated not only on an individual basis, but also in the aggregate to ensure there are no detrimental effects.

In contrast, jurisdiction under Section 404 would focus not on the quality of the water reaching the river, but on the quality of the water which is actually in the MS4 system, based on the MS4 channels being classified as a "waters of the United States." This means AMAFCA could no longer implement quality control features throughout the system to prevent impacts on the river. Instead, quality control features would need to be instituted prior to water entering the MS4 system. However, MS4s are intended to capture water at any number of locations to prevent fugitive stormwater from causing floods. As a result, there is no limit to the number of inlets into the system, as unmanaged water in any location has the potential to threaten the public health and safety. Installing water quality control features prior to water entering the MS4 system would prove to be a daunting and unrealistic task given the multitude of point sources which discharge into the MS4 system. This dual regulation is not only unnecessary, but would also become cumbersome to the point of unfeasibility.

This would be detrimental to both the public safety and the environment. AMAFCA's facilities are strictly flood control facilities. They serve not only the public safety by capturing fugitive waters and conveying them safely, but they also clean the water that enters the system. While much of the water AMAFCA captures historically does not reach the river, even the water that does discharge into the river is significantly improved

by virtue of AMAFCA's intervention. The flood waters coursing the system are cleaned as they pass through the BMPs. Prior to implementation of the MS4 system, historical discharges reached the river without any water quality treatment.

More importantly, the reach of the proposed rule would make AMAFCA largely ineffective. Because many of the components of the MS4 system are inextricably linked together, assertion of jurisdiction over a portion of the MS4 system could result in assertion of jurisdiction over the entire system. Dual regulation carries increased expenses that AMAFCA could otherwise use to ensure that the water and the public safety are protected under the existing MS4 permit. Furthermore, as noted in Sections III.F.2 and III.I of the proposed rule, waters, such as geographic features, which will result in the discharges being subject to other CWA authorities, should be non-jurisdictional. MS4 systems should be treated no differently, particularly because they are heavily regulated under the CWA. (p. 3-4)

Agency Response: **Please see summary response at 7.4.4.**

Louisville and Jefferson County Metropolitan Sewer District (Doc. #15413)

7.652 2) Clarify the Effect on Municipal Separate Storm Sewer Systems (MS4)

a) J**urisdiction**: Based on the amended definition, MSD has significant concerns about the potential impacts of the rule on managing Municipal Separate Storm Sewer Systems (MS4's). Even though the term "MS4" is not mentioned in the proposed rule, it applies to all sections of the Clean Water Act including the NPDES program. Any proposed amendment should address the relationship between MS4 stormwater programs and jurisdiction over ditches. Accordingly, MSD requests that the final rule either expressly exclude MS4's from jurisdiction under Section (t) or provide additional guidance concerning the potential jurisdictional limits. As read, it appears that under the proposed rule, MS4's could qualify as "waste treatment systems" under Section (t)(I). Because MSD is responsible for managing and enforcing the MS4 system in Jefferson County, the concern is that if a MS4 becomes jurisdictional, in addition to the current regulation under 402(p), locations of outfalls, and therefore the point of regulation could be subject to change. MS4 permit holders would then not only be regulated at the point of discharge into a water of the US, but also when a pollutant initially enters the stormwater conveyance system. (p. 2-3)

Agency Response: **Please see summary response at 7.4.4.**

Central Massachusetts Regional Stormwater Coalition (Doc. #15443.1)

7.653 **2. Proposed Rule, §328.3(b)(5)**. The definition in this section of the Proposed Rule describes seven types of "features" that are not waters of the United States, including "artificial lakes and ponds" and "non-wetland swales". Many stormwater treatment BMP and green infrastructure features are similar to the seven features described, but are not specifically excluded from being considered a WOTUS. Structures like rain gardens, gravel wetlands, vegetated swales, etc. should be affirmatively included as an eighth feature under this section.

We offer wording more consistent with the MS4 Program, such as:

> "(viii) Stormwater Best Management Practices (BMPs) or other engineered control and/or treatment measures designed, installed, or constructed to mitigate the impact of nonpoint source- and in some cases point source- pollution on waters of the United States. These BMPs may be designed to reduce stormwater volume, peak flows, and/or nonpoint source pollution discharged to the environment through evapotranspiration, infiltration, detention, retention, filtration, and/or biological and chemical treatment, or a combination of these methods."

Alternately, the definition of "waste treatment system" section in §328.3(b)(1) could be revised to include this proposed definition of stormwater BMPs. (p. 2)

Agency Response: Please see summary response at 7.4.4.

7.654 **5. General:** We strongly recommend that the Proposed Rule clarify that enforcement of long term operation and maintenance of stormwater BMP features or measures (described in #2, above) should continue to be through the Clean Water Act program under which they serve a function, such as the MS4 Program, rather than through a separate parallel WOTUS jurisdiction. Otherwise, the Proposed Rule introduces the jurisdictional confusion that it aims to eliminate. (p. 2)

Agency Response: Please see summary response at 7.4.4.

City of Albuquerque, New Mexico (Doc. #15456)

7.655 …As a Phase 1 Municipal Separate Storm Sewer System permittee (NMS000101), the COA's storm water conveyance system is currently regulated under the Clean Water Act and therefore should be exempt from Waters of the U.S. status to avoid double regulation. Attempting to further regulate this system of natural tributaries supplemented by man-made channels that flow only during localized storm events will create an unnecessary and costly monitoring and maintenance burden. (p. 1)

Agency Response: Please see summary response at 7.4.4.

National Association of Clean Water Agencies (Doc. #15505)

7.656 **Stormwater Exemptions Must be Explicit**

Earlier this month, EPA's Local Government Advisory Committee (LGAC) provided the Agencies with recommendations on how the proposed rule intersects with the important issues facing local officials. One of the LGAC's main recommendations is that "manmade conveyance components of MS4s be exempt from Waters of the United States. This includes manmade green infrastructure, roads, pipes, manmade gutters, manmade ditches, manmade drains, and manmade ponds." NACWA endorses and fully agrees with the LGAC's recommendation for an exemption of manmade components of MS4s. Manmade wetlands in uplands constructed as part of an MS4 should also be included in the suggested exemption. This exemption would clarify that the rule is not intended to make MS4 collection systems jurisdictional under the CWA above the existing point of permitted discharge. This has been a point of significant concern for the municipal community, and the Agencies must clarify that MS4 collection systems are not jurisdictional in the final rule.

Green infrastructure (GI) practices are manmade and engineered components of wet weather management systems and thus should be included in the MS4 exemption. GI installations designed to meet CWA obligations or achieve water quality compliance should not be jurisdictional waters. Many stormwater utilities use permanent and temporary, iterative best management practices (BMPs) such as diversions, sedimentation basins, and constructed GI to comply with MS4 permits and the rule should reflect the range of facilities that are used to convey, capture, treat and infiltrate stormwater. To avoid any interpretation of these structures as WOTUS, they should be clearly exempted from the jurisdictional definition. EPA itself has vigorously promoted GI as a "cost-effective and resilient approach to our water infrastructure needs that provides many community benefits" but any indication that GI could be classified as a WOTUS would significantly disincentivize its continued nationwide adoption. Though EPA has verbally stated that the proposed rule is not intended to make GI installations jurisdictional, the final rule must explicitly indicate that manmade GGI and BMPs designed to meet CWA obligations or achieve water quality goals are not jurisdictional. (p. 2-3)

Agency Response: **While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dry land is appropriate. Please see summary response at 7.4.4. The agencies did not define the stormwater control feature exemption by using the term "man-made." Because jurisdictional waters can be man-made, using that term in the stormwater feature exclusion would be confusing.**

West Bay Sanitary District, Novato Sanitary District, West County Wastewater District, Union Sanitary District and West Valley Sanitation District, California (Doc. #16610)

7.657 … channels and other conveyances used as part of a municipal separate storm sewer system (MS4) should be classified as "point sources" since discharges from these conveyances require an NPDES permit to discharge pollutants to WOTUS. 33 U.S.C. §1342(P). Waters within an MS4 may be collected and possibly even treated prior to discharge, which is not an activity contemplated within WOTUS themselves. Without this distinction, retention and detention basins could be defined as WOTUS, requiring a 404 permit each time the sediment collected in those basins needed to be dredged out to maintain storage capacity, or an NPDES permit might be needed to discharge into those basins. These additional regulatory hurdles might make these Best Management Practices less attractive to local stormwater management agencies, and remove one of the best tools from the stormwater toolbox. (p. 6)

Agency Response: **While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dryland is appropriate. Please see summary response at 7.4.4.**

Sacramento Stormwater Quality Partnership (Doc. #17005)

7.658 …Combined, the new definitions and vague exclusions invite significant uncertainty with respect to how the Proposed Rule would be applied to MS4s and related structures. To avoid such a result, it is imperative that the Proposed Rule clearly distinguish MS4s as not WOTUS.

Federal regulations define a municipal separate storm sewer (i.e., MS4) to mean "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels v or . storm drains): . Designed or used for collecting or conveying storm water .. ..." (40 C.F.R. § 12220(b)(8)3 M54s are highly regulated, and NPDES permits provide legal authority and regulation for discharges from M54s to WOTUS. (See, generally, CWA, § 402(p)(3)(E); see also 40 C.F.R. §§ .12226, 12230-122.37.) MS4s are not themselves WOTUS; and, MS4s are required, at a minimum, to implement controls to reduce the discharge of pollutants to WOTUS to the maximum extent practical. (CWA, § 402(p)(3)(B)(iii).) Such controls include nonstructural best management practices, structural hest management practices (BMPs), and other related infrastructure facilities. Examples of structural BMPs can include: ",(I) storage practices such as wet ponds and extended-detention outlet structures; (2) filtration practices such as grassed swales, sand filters and filter strips; and (3) infiltration practices such as infiltration basins and infiltration trenches." (See 64 Fed. Reg. 68722, 68760 (Dec. 8, 1999)) Examples of related infrastructure facilities can include groundwater recharge basins and green infrastructure projects. Green infrastructure may include the creation of new habitat and recreational facilities and areas where runoff is infiltrated or dispersed.

Unfortunately, the Proposed Rule fails to specifically exclude MS4s (and related infrastructure and associated facilities) from being a WOTUS. Thus, many of the newly proposed definitions create significant uncertainty, and could be interpreted in a manner that could bring an MS4 and/or its related facilities into the jurisdictional 'definition of a WOTUS. The new definitions in the Proposed Rule identify Waters by category, 'and include tributaries, jurisdictional ditches, adjacent waters, and "other waters" with significant nexus to an existing WOTUS.

The type of stormwater. facilities and other related infrastructure projects of an MS4 system that are potentially vulnerable to jurisdiction under these new categories, include, but are not limited to:

- MS4 conveyance facilities
- Detention and settling basins
- Storm water treatment systems
- Infiltration/Detention facilities ,
- Bioswales
- Groundwater recharge facilities
- Green infrastructure projects

…the Partnership recommends that the Proposed Rule be revised to clearly indicate that the definition of tributary does not, and is not intended to, include MS4 facilities. The Agencies can accomplish this by ensuring that, the exclusions…are clear, concise, and specifically address storm water management facilities. The Agencies also need to include text within the descriptive portion of the final rule that clearly and definitively, states that MS4 facilities are not a WOTUS. Such a clarification is consistent with

previous EPA findings. (See 53 Fed. Reg. 49416, 49442 (Dec. 7, 1988) ["[W]aters of the United States are not storm sewers for purposes of this rule."].)

…

Under the expansive ecoregion approach, many "other waters" throughout California will be included under CWA jurisdiction, unless specifically excluded. Arguably, any surface water body on the landscape that is not categorically exempted may be treated as a WOTUS if either Agency. determines that the surface water body in question, or in combination with other similarly situated waters, affects the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or territorial sea. Hydrologic connection (surface-or subsurface) would be unnecessary to create significant nexus. Under such an approach, stormwater agencies in California will face significant uncertainty with respect to CWA jurisdiction for MS4 conveyance facilities as well as other stormwater related facilities. Further, the vagueness in the exclusions will only add to this uncertainty, which will not further the overall clarity goals of the Proposed Rule.

Moreover, the Proposed Rule states that functions of waters that might demonstrate a significant nexus include sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, export of organic matter, export of food resources, and provision of aquatic habitat. (79 Fed. Reg. 22,188, 22213 (April 21, 2014)) Many of these functions are identical to functions provided by stormwater structural BMPs. Thus, based on the Proposed Rule, many stormwater facilities could be found jurisdictional under the "other waters" category. Yet again, however, such facilities were specifically created to serve these functions, and are implemented to ensure compliance with CWA NPDES MS4 permit requirements. Considering the broad and expansive nature of the "other waters" category, it is imperative that the exclusions…specifically call out and include stormwater facilities. (p. 2-3, 4, 6)

Agency Response: **While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dry land is appropriate. See summary response at 7.4.4. Groundwater recharge basins are covered under the exclusion at (b)(7) for "wastewater recycling structures created in dry land: detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling" or under the stormwater control feature exclusion at (b)(6), depending on the source of water. In effect, both have the same result, i.e., the infiltration basin is not a jurisdictional water as long as it was built in dry land. Please note that the final rule does not change the applicability of the Underground Injection Control program for Class V injection wells or subsurface fluid distribution systems under the Safe Drinking Water Act. See 40 CFR Part 144.**

Ventura County Watershed Protection District (Doc. #18762)

7.659 The Proposed Rule's suggestion that some types of storm water facilities, infrastructure projects, and associated facilities could be regulated within the scope of a definitional WOTUS poses uncertainty and potential confusion among both the regulating entities

and the regulated entities, and may increase the regulatory burden associated with implementation of MS4 permit requirements. The Ventura Countywide Stormwater Quality Management Program supports the California Stormwater Quality Association's (CASQA) recommendations that the Agencies revise the Proposed Rule to clarify that MS4s are not WOTUS, and that certain types of storm water related facilities discussed herein are also not considered to be WOTUS. Specifically, certain exclusions within the Proposed Rule need to be expanded to include MS4 conveyance facilities and other related facilities. Exclusions needing expansion include: waste treatment system, artificial lakes, ditches, and swales. The Program also supports the revisions to the Proposed Rule provided in CASQA's comment letter. These issues are summarized below:

1. MS4s are not WOTUS

2. New definition of 'tributary' could improperly include MS4 facilities

3. New definition of 'adjacent' could improperly include MS4 and other important water resource facilities

4. 'Other waters' approach goes beyond the case-by-case significant nexus test

5. The exclusions for waters that are not WOTUS must be revised to incorporate MS4 conveyance and other related facilities. (p. 1-2)

Agency Response: While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dryland is appropriate. Please see summary response at 7.4.4.

Northern Arizona Municipal Waters Users Association (Doc. #9730)

7.660 …Storm water systems should be clearly identified as not being "waters of the United States." (p. 1)

Agency Response: Please see summary response at 7.4.4.

Northwest Colorado Council of Governments Water Quality/ Quantity Committee (Doc. #10187)

7.661 QQ supports the continued exemption for tributary ditches and canals that are part of wastewater treatment systems. However, we propose that tributary ditches or canals that are part of stormwater management systems and water treatment systems also should be expressly excluded from the definition of tributaries in particular, and waters of the United States more generally. (p. 4)

Agency Response: Please see summary responses at 7.1 and 7.4.4.

Duke Energy (Doc. #13029)

7.662 **b. The Proposed Rule Should Expressly Exclude Stormwater Management Facilities and Their Conveyances**

Since stormwater management activities are not explicitly exempt under the proposed rule and it is unclear if they would be meet the requirements for the waste treatment exclusion, Duke Energy has concerns that man-made conveyances and facilities for stormwater management could now be classified as a "water of the United States."

Stormwater control structures are located at many of Duke Energy's various sites, from generation sites to individual substations. These entities are not currently considered "waters of the United States." Duke Energy owns and maintains hundreds of electrical substations, the majority of which include some form of stormwater control structure, which include wet retention/detention basins. These basins are used to capture, control, and treat the stormwater runoff from the substations and are necessary to ensure reliability of electrical equipment. A picture of one facility is included as an example.

Currently, these stormwater features are not regulated as "waters of the United States" because they are isolated, man-made stormwater control and treatment structures. They are regulated, however, through state programs such as the Environmental Resource Permit (ERP) program in Florida. The ERP program in Florida was created in 1995 as a merger between two specific state programs, the wetland resource permitting program (WRP) and the management and storage of surface waters (MSSW) program. The intent was to streamline these regulatory programs without any loss of environmental protection.

The stormwater structures regulated under the ERP program must be designed and constructed to meet water quality (such as suspended solids and oil/grease) and water quantity (flood control) criteria. While industry and state officials within Florida consider these features to be waste treatment facilities, they arguably could not fit within the scope of the waste treatment system exclusion because they were designed to meet state requirements, not "the requirements of the Clean Water Act," as courts could narrowly construe applicability of the exclusion.

Consequently, under the proposed rule, these isolated features could be deemed jurisdictional as either "adjacent waters," if constructed within a floodplain[398] of a jurisdictional water, or as "other waters" through aggregation of similarly situated waters. Additionally, more recently constructed control and treatment basins are often required by the state permitting authority to include a shallow littoral zone utilizing wetland vegetation to facilitate additional treatment. The impact of capturing such treatment systems as "waters of the United States" would be enormous. The stormwater treatment systems would no longer be able to serve their essential purpose (which is to treat stormwater), necessitating alternative control and treatment structures (which, themselves, could then be considered "waters of the United States"). Capturing such stormwater treatment systems cannot possibly be part of the aquatic inventory that Congress intended to protect under the CWA.

Lastly, if these stormwater control features, which include swales, detention/retention ponds, or surrounding littoral zones, were classified as "waters of the United States," additional permitting burdens would apply. For example, substation SPCC Oil Spill Response Plans could require significant revision to account for the increased notification and response requirements that would be mandatory if there were a spill to the newly designated "water of the United States." Additionally, a general permit would be needed

[398] Determining the floodplain would be through the best professional judgment of the regulating agency and could be of a larger flood interval (i.e. 100 year) that would encompass a greater amount of surface area than what the retention pond was designed for (i.e. 20 or 50 floodplain).

for herbicide or pesticide application for vegetation control. Moreover, a CWA § 404 permit could be required to remove vegetation when maintaining the pond.

While some of these impacts may only result in minor cost increases or regulatory burdens to any one substation or other electrical facility, the aggregate cost for hundreds of these facilities could be significant with no consequential environmental benefit. Since these entities were designed and constructed for specific stormwater management activities, additional regulation is not appropriate and will not result additional environmental protection.

The agencies have stated that MS4 systems would not change status and would not become "waters of the United States."[399] It seems the agencies' intent is to exclude these systems under the waste treatment exclusion, however, this is not evident in the language in the proposed rule. In addition, there is no justification why MS4 systems would be included within the exclusion and other stormwater systems designed and constructed under state or local requirements would not.

Duke Energy recommends that all stormwater structures (retention ponds, detention ponds and conveyances), not just MS4 systems, be expressly excluded from the definition of "waters of the United States" or for the agencies to clarify that these entities are included under the waste treatment exclusion. (p. 46-48)

Agency Response: **While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dry land is appropriate. Please see summary response at 7.4.4.**

7.663 Section 402(p) of the CWA specifies that an NPDES permit is required for any "storm water discharge associated with industrial activity." EPA has historically recognized that collected stormwater is not a "water of the United States" and, in some cases, regulated as a "point source". If a facility discharges or has the potential to discharge stormwater to a municipal separate storm sewer system or directly to "waters of the United States," then that facility requires authorization under a NPDES industrial stormwater permit.

Stormwater management features are located everywhere, including in floodplains. With the proposed fundamental change in jurisdictional determinations (jurisdictional unless excluded), stormwater collection systems could be considered jurisdictional "adjacent" or "other waters." The conveyances associated with these systems could exhibit characteristics that would classify them as jurisdictional tributaries per the proposed rule's definition. This is disconcerting since there is not a specific exclusion included in the proposed rule for any stormwater collection system. EPA has mentioned that MS4 systems would qualify for the waste treatment exclusion, but this is not clarified in the rule. In addition, there are several other non-industrial/non-municipal systems in service that are regulated by the state and perform the same functions (collecting rainwater for safety and flood control). Duke Energy recommends that the agencies clearly assert that all water collected in stormwater management systems are not "waters of the United States" until discharged into such a water. (p. 53-54)

[399] EPA *Questions and Answers About Waters of the U.S. Proposal*, September 6, 2014 (Q13)

Agency Response: **While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dry land is appropriate. Please see summary response at 7.4.4.**

Colorado Water Congress Federal Affairs Committee (Doc. #14569)

7.664 **VI. Unanswered Questions**

Despite the proposal's stated objective to add clarity to the regulatory process, the proposal in fact creates great confusion and uncertainty…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 (should have exemption);

(p. 6-7)

Agency Response: **Please see summary response at 7.4.4.**

EcoSynthesis Scientific & Regulatory Services (Doc. #14586)

7.665 Another important subject, alluded to above, that needs to be clarified, is the Proposed Rule's intent and effect on regulation of constructed roadside ditches in locations where there is no antecedent historical drainage feature… application of the actual language of the Proposed Rule would include them. This would have massive regulatory implications for municipalities of every size. The disincentive to implement stabilization of long-standing roadside erosion posed by the costs and timeline of delineating and obtaining permits for such improvements would have negative consequences for water quality.

This concern extends also to every kind of permanent water quality BMP such as sediment basins with no continuous tributary connection to downstream waters: maintenance of such facilities would presumably require a verified delineation, notification, and a permit, which also means NHPA Section 106 consultation and sometimes also ESA Section 7 consultation. This is impossibly onerous for small entities. Delineation verifications alone take 3-18 months from submittal. Added to the permit timeline, this would mean that, if it became evident that a large event (say an exceptional 10- or 20-year one) had filled a basin with sediment, it would usually be impossible to complete the regulatory process prior to the beginning of the ensuing rainy season, when that sediment capacity will be sorely needed. The Rule absolutely needs to have exclusions for MS4 features of every kind except those that are realignments of identifiable historic drainageways. (p. 5-6)

Agency Response: **Please see summary response at 7.4.4.**

National Rural Water Association (Doc. #14623)

7.666 Community storm sewer systems (MS4s) should be excluded from the final rule in a similar manner as waste treatment systems. Some communities' storm sewer system

conveyance facilities include channels that may discharge to traditional "Waters of the U.S." (p. 4)

Agency Response: **Please see summary response at 7.4.4.**

Tarrant Water Regional Water District, Fort Worth, Texas (Doc. #14643)

7.667 The proposed rules jeopardize our ability to build cost-effective BMPs because stormwater retention basins, constructed wetlands, bio swales, etc. could become part of the proposed definition of waters of the U.S., making permitting, construction, and maintenance more costly and time consuming. We therefore recommend that the rules exclude these and other stormwater BMPs so that we can continue to insist that developers implement stormwater quantity and quality controls. (p. 3)

Agency Response: **Please see summary response at 7.4.4.**

Santa Clara Valley Water District (Doc. #14776)

7.668 The Proposed Rule is also inconsistent with stormwater regulation. In the West, open channels are often used to convey stormwater to ambient waters. Sometimes, portions of surface streets are used to convey stormwater. Both EPA and California typically treat these artificial conveyances as part of the stormwater system, and require NPDES permits for discharges from the downstream end of these conveyances to ambient waters. But the Proposed Rule suggests that these conveyances may actually be tributaries classified as waters of the United States. The final rule should clarify that the waste *conveyance* systems, as well as waste treatment systems, are excluded from the definition. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

Washington County Water Conservancy District, St. George, Utah (Doc. #15536)

7.669 **Municipal Stormwater Control Facilities.** It appears that the Proposed Rule would regulate most Municipal Separate Storm Sewer System (MS4) as jurisdictional tributaries. If various components of MS4s are treated as jurisdictional, local governments would be responsible for meeting additional requirements throughout the local system, which includes traditional components such as ditches, channels, pipes, and gutters, as well as "green" stormwater infrastructure such as rain gardens. These additional requirements include numeric nutrient criteria applicable to Class III ("recreational") water bodies, anti-degradation requirements and other permit conditions. Ironically, green stormwater infrastructure, which is designed to clean water before a discharge to waters of the United States, would itself need to meet water quality standards. Local governments would also be subject to permitting requirements for any dredge and fill activities associated with MS4 components, including some routine maintenance activities. The Agencies should categorically exempt MS4s from regulation under the Proposed Rule. (p. 29-30)

Agency Response: **Please see summary response at 7.4.4.**

Kentucky Stormwater Association (Doc. #18912)

7.670 Our KSA membership communities are already responsible, via the MS4 regulations, for maintaining the manmade stormwater drainage system / Stormwater Control Measures

(SCMs) in an environmentally sustainable manner. The extent to which SCMs and other management practices are to be double-regulated with the respective financial burden upon our local governments without additional benefit to our waterways is a primary concern. KSA requests that additional detail be provided for exclusion of manmade stormwater drainage / Stormwater Control Measures (SCMs). (p. 1)

Agency Response: Please see summary response at 7.4.4.

National Association of Flood & Stormwater Management Agencies (Doc. #19599)

7.671 The proposed rulemaking is also silent on Low Impact Development (LID). Many LID features will fit the definitions outlined in the proposal and NAFSMA requests that EPA explicitly exempt LID / green infrastructure features from WOTUS. The vague language in the proposed rule could contradict the existing waste water treatment exemption and inadvertently recapture MS4s, including treatment BMPs, back under WOTUS. Commingling MS4s and WOTUS will forcibly misapply costly compliance requirements intended for receiving water bodies to the vast water collection and conveyance network. One of the many unanticipated consequences will be deterring the regulated community from implementing green infrastructure. NAFSMA acknowledges permit requirements for new construction activities, however, the maintenance of LID, green infrastructure, and MS4 features should all be explicitly exempt from WOTUS. (p. 1-2)

Agency Response: Please see summary response at 7.4.4. . Please note that the proposed rule did not address which activities are regulated under the CWA; rather it addressed which waterbodies are jurisdictional. Comments about activities such as maintenance are outside the scope of this rule.

American Rivers (Doc. #15372)

7.672 4. Specifically Exclude Stormwater Treatment Systems

The proposed rule currently excludes waste treatment systems but it does not discuss what that term encompasses.[400] The definition of "waters of the United States" categorically excludes from CWA jurisdiction, "waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA."[401] We request that the Agencies better define 'waste treatment systems' and in doing so include stormwater treatment systems, specifically systems that rely on infiltration and bioretention to replicate natural hydrology.[402] "Green infrastructure," so far as it is defined as engineered stormwater management systems and practices that use or mimic natural processes to infiltrate or evapotranspirate stormwater runoff on the site where the runoff is generated, generally is employed as a stormwater management practice permitted under MS4 and other stormwater permits. Given EPA's consistent interest in encouraging the use of "green infrastructure" as a preferred approach to reducing runoff volumes and water quality impacts, it would be inconsistent to imply, or assert, that use of these practices incurs additional permitting obligations. (p. 30)

[400] *Id*. at 22217 [*Definition of WOTUS*, 79 Fed. Reg. at 22219.]
[401] 33 CFR 328.3(a) (2013).
[402] *See also, SAB review of the proposed rule, supra* note 89 at 3-4.

Agency Response: **Please see summary responses at 7.1 and 7.4.4.**

Association of State Floodplain Managers, Inc. (Doc. #19452)

7.673 **6. The proposed rule includes language reiterating current exemptions for waste treatment systems. However, the regulation of natural or artificial waters that are used to convey or treat stormwater is not clear; this is a long standing issue that is further complicated by the proposed rule.**

Regulations and exemptions for waters conveying stormwater should be clarified in the final rule and in implementing guidance. In additions, any distinctions between §404 dredge and fill requirements, and the regulatory scheme under §402 – including stormwater treatment – should be clarified.

- The basic underlying question of whether stormwater collection and treatment systems are considered to be wastewater treatment systems must be clarified. In some circumstances, artificial stormwater treatment ponds have reportedly been identified by federal agency staff as wastewater systems, but in other cases that have been treated as waters of the United States. Situations where natural waters are used to collect, store, convey, or filter stormwater become even more complicated.

…

- A number of questions have been raised regarding jurisdiction over natural waters used to convey and filter stormwater. In some instances, these waters have been used to convey stormwater since prior to regulation under the CWA.
- The distinction between wetlands or other waters that store or convey stormwater, and those wetlands used specifically to treat or filter stormwater, also raises questions regarding the scope of the wastewater system exemption. (p. 9)

Agency Response: **Please see summary response at 7.4.4.**

Florida Stormwater Association (Doc. #14613)

7.674 The Regulations be re-proposed to confirm that ditches, canals and other waterways that convey wastewater or treated water to or from features where treatment occurs are covered by the wastewater treatment exclusion, including all sections of NPDES-permitted Municipal Separate Storm Sewer Systems (MS4s) that are upstream from the point of discharge. (p. 2)

Agency Response: **Please summary response at 7.4.4.**

7.675 …unless there is a specific exclusion pursuant to the very limited exceptions as contained in the proposed regulations, one could interpret the regulations as making all ditches, stormwater conveyances and attenuation ponds jurisdictional waters. (p. 4)

Agency Response: **Please see summary response at 7.4.4.**

7.676 Exclusions – We recommend that subsection 40 CFR 230.3(t)(1) (concerning exclusions from the definitions of "waters of the United States") be revised as follows:

> Waste treatment and flood control systems, including treatment ponds or lagoons, stormwater retention and detention ponds, and man-made and made-altered structures, devices and conveyances that are designed to meet the requirements of the Clean Water Act, the conditions of an MS4 permit or to provide flood control services.

Such an exclusion would be consistent with existing distinctions in the Clean Water Act and EPA regulations. Specifically, such a distinction would confirm that sections of an MS4 upstream from a discharge point are not jurisdictional; that the MS4 system itself is not waters of the United States; that the features of an MS4 are clearly and unequivocally subject to the waste treatment exclusion and are distinct from waters of the United States. *See, e.g.* 33 U.S.C. § 1342(3)(B) (requiring NPDES permits to limit pollutant "discharges *from* municipal storm sewers")(emphasis added); 40 C.F.R. §122.26(b)(9)(defining an MS4's "outfall" as "*the point where a municipal separate storm sewer discharges to waters of the United States…*") (emphasis added); Id. at § 122.26(d) (providing requirements for MS4 permittees to manage their systems to limit pollutants to jurisdictional waters); Id. at § 122.1(b) ("The NPDES program requires permits for the discharge of 'pollutants' from any 'point source' into waters of the United States."). (p. 8)

Agency Response: While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dry land is appropriate. Please see summary response at 7.4.4.

Iowa Stormwater Education Program MS-4 (Doc. #14511)

7.677 The draft proposed rule includes changes to twelve portions of the Clean Water Act. In general terms, the draft proposed rule includes the same changes to all twelve sections. 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.

Added to PART 328—DEFINITION OF WATERS OF THE UNITED STATES § 328.3 (c) "Definitions" (and other similar sections)

Fully-constructed Stormwater Control Measures. The term *fully-constructed stormwater control measures* (SCMs) means man-made structures, devices, measures, or Best Management Practices (BMPs) that are constructed for the purpose of water quality treatment, stormwater volume reduction, stormwater rate control, flood control, stormwater conveyance, or any combination of these purposes. Fully-constructed SCMs include the following man-made features: constructed stormwater ponds, constructed stormwater wetlands, rain gardens, infiltration devices and structures, groundwater recharge facilities, stormwater reuse facilities, swales, bioswales, Low Impact Development structures and BMPs, pipes, streets, curbs, gutters, roadside ditches, man-made channels, storm drains, and other constructed stormwater control and conveyance structures, devices, and features. SCMs that have been built at the approximate location of similar types of natural waters (such as stormwater ponds constructed at the location of natural lakes or natural wetlands, ditches constructed at the location of natural streams or

creeks, or stormwater channels constructed at the location of natural rivers) shall not be considered fully-constructed SCMs. Natural lakes, natural ponds, and natural wetlands with stormwater conveyance pipes discharging to them and constructed outlets shall not be considered fully-constructed SCMs. SCMs that are subject to the ebb and flow of the tide shall not be considered fully-constructed SCMs. (p. 1)

Agency Response: Please see summary response at 7.4.4.

7.678 **Comments Directly Related to the New Recommended Revised Rule Language Provided Above**

1. There are many Municipal Separate Storm Sewer Systems (MS4s) in the United States. Many more of these MS4s are not regulated and are not covered under an MS4 permit. Some MS4s (e.g.: counties and DOTs) have portions of their systems that are regulated under MS4 permits (inside an Urbanized Area) and portions that are not regulated (outside of Urbanized Areas). Taken together, all these MS4s own, operate, and maintain millions of Stormwater Control Measures (SCMs) and Best Management Practices (BMPs). These SCMs and BMPs include both structural and non-structural practices, programs, and features. In order for these MS4s to operate and maintain their systems in an efficient and cost-effective manner, the WOTUS jurisdictional status of the vast majority of these constructed SCMs and BMPs must be clear. Determining the WOTUS jurisdictional status of most of these constructed SCMs and BMPs on a case-by-case basis is not manageable or practicable. It is essential that clarity be provided by having specific and explicit exclusion language in the new rule for most of these constructed SCMs and BMPs, including roadside ditches. Broad inclusion language and reliance on agency best professional judgment and discretion regarding the WOTUS status of most urban SCMs and BMPs are not acceptable or practicable.

2. If a significant number of urban SCMs are determined to be WOTUS, the operation and maintenance of those SCMs will become much more complicated, difficult, and expensive for the public entities responsible for these MS4s, without any corresponding positive environmental outcomes. In fact, the MS4s' work and performance to protect, restore, and improve water quality will be diminished. Such determinations may be the result of agency judgment or the outcome of third party lawsuits, based on interpretations of rule language. This is part of the reason why an explicit exclusion for most urban SCMs is needed.

3. Specific exclusion language is needed for urban SCMs. If, as has been stated publicly, it is EPA's intent that most of these waters and structures are not to be considered WOTUS, this should be clearly stated in the rule. Such a clear statement would formalize and clarify EPA's intent. Such a clear statement would significantly reduce the probability of unfortunate interpretations in the future.

4. The current draft of the rule is almost silent about urban stormwater, in the preamble and the proposed rule language. This recommended revision language would rectify a portion of that deficiency. Adding exclusion language for urban SCMs to this rule would be appropriate, historic, and significant.

5. Because EPA is driving construction of MS4 SCMs and BMPs as part of its regulatory function, EPA has a responsibility to define clearly the jurisdictional status of most urban

SCMs in the new WOTUS rule. This is part of the reason why an explicit exclusion for most urban SCMs is needed.

6. The definition for the term "tributary" provided in the proposed draft rule language is breathtakingly broad, especially the language related to man-made and natural breaks. Under this language, it appears that many urban SCMs could be considered tributary to other Waters of the United States and, thus, themselves be WOTUS. This contradicts EPA's public statements that most urban SCMs are not WOTUS. This is part of the reason why an explicit exclusion for most urban SCMs is needed. Broad inclusion language and reliance on agency best professional judgment and discretion regarding the WOTUS status of most urban SCMs and BMPs are not acceptable or practicable.

7. Section 1.a.vi. of the draft proposed rule ("All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section") states that all waters adjacent to WOTUS are WOTUS. The definition of the term "adjacent" includes the term "neighboring". The definition of the term "neighboring" includes waters located within the riparian area or floodplain of a WOTUS. Under this rule language, it appears that constructed urban SCMs in the riparian areas or floodplains of WOTUS would be considered WOTUS. This contradicts EPA's public statements that most urban SCMs are not WOTUS. This is part of the reason why an explicit exclusion for most urban SCMs is needed. Broad inclusion language and reliance on agency best professional judgment and discretion regarding the WOTUS status of most urban SCMs and BMPs are not acceptable or practicable.

8. The approach with this new recommended revised rule language is to provide a broad exclusion for most types and the vast majority of urban stormwater SCMs, BMPs, and roadside ditches. The authors recognize that it may be appropriate that some types of urban SCMs are determined to be WOTUS, on a case-by-case basis. To this end, the new recommended revised language includes "exceptions to the exclusion" in the definition for "fully-constructed SCMs" (see the last three sentences). We urge EPA and the Corps to consider this approach for the final rule language. This approach allows for a categorical exclusion for most urban SCMs but also allows for some types of urban SCMs to be determined to be WOTUS, on a case-by-case basis. If additional exceptions are needed and appropriate for "fully-constructed SCMs" or exceptions are needed and appropriate for some types of roadside ditches, we urge EPA and the Corps to use this approach and add exceptions as needed.

9. We urge EPA to add explanatory language to the preamble to clarify its approach for urban SCMs. The preamble should be as clear for urban SCMs and roadside ditches as it is for agricultural waters, flows, practices, and ditches.

10. The exclusion language in the current proposed rule ("Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.") is inadequate for urban SCMs. Many urban SCMs were constructed for and serve purposes other than "waste treatment". Many urban SCMs were designed for purposes other than meeting "the requirements of the Clean Water Act". For example, this language does not cover many SCMs constructed in non-permitted MS4s. This language would not cover urban SCMs and roadside ditches constructed the passage of

the CWA. The new recommended revised rule language is intended to address these deficiencies.

…

14. The terms "stormwater control measures" and "best management practices" are widely used and very broadly defined, in common usage among stormwater management professionals and regulators. They are used to describe both non-structural and structural practices, programs, and constructed features. A portion of the range of non-structural and structural BMPs can be found at a Web site developed by USEPA for the MS4 permitting program: "National Menu of Stormwater Best Management Practices" at this Web URL: http://water.epa.gov/polwaste/npdes/swbmp/

15. There are many Municipal Separate Storm Sewer Systems (MS4s) in the United States. Some are cities. Others are various types of public entities (DOTs, counties, non-traditional MS4s, etc.). Some of these MS4s are regulated under the MS4 NPDES permitting program. Many more of these MS4s are not regulated and are not covered under an MS4 permit. Some MS4s (e.g.: counties and DOTs) have portions of their systems that are regulated under MS4 permits (inside an Urbanized Area) and portions that are not regulated (outside of Urbanized Areas). The exclusion language proposed here applies to all urban SCMs, regardless of whether they are covered under an MS4 permit or not. It may be appropriate to include language in this rule providing an exclusion for urban SCMs that are within the boundaries of permitted MS4s, but that is not the goal of this recommended rule revision. It is essential, for all the reasons listed above, that an exclusion be provided for the vast majority of urban SCMs, regardless of MS4 permit status.

16. The term "stormwater control measures" (SCMs) is used in this recommended revised rule language because of its use in the National Research Council's report from 2008 "Urban Stormwater Management in the United States". (p. 2-6)

Agency Response: **Please see summary response at 7.4.4.**

Water Environment Federation (Doc. #16584)

7.679 Impacts on MS4 Communities: The proposed rule will impact MS4 communities as it relates to the issue of waste treatment system exclusions in the context of stormwater management. Currently, exclusions listed in 40 CFR 122.3 specifically target discharges associated with pest control, nonpoint sources and agricultural activities, sewage and industrial wastes, water transfer activities5, and even sewage discharged from vessels.

Not included here are stormwater management and treatment systems. The proposed rule plainly states that it "does not change regulatory exclusions for waste treatment systems." However, EPA and the Corps do not intend for traditional stormwater practices, such as detention ponds, or green infrastructure practices, such as bioretention facilities and permeable pavements, to be considered jurisdictional Waters of the United States, but the lack of language explicitly outlining the exclusion of these systems leaves the rule open for interpretation as to whether stormwater controls are considered jurisdictional. WEF asks that EPA specifically exempts these so to avoid their inclusion.

To clarify that waters associated with stormwater infrastructure are not considered Waters of the United States, WEF suggests that specific terms, such as "stormwater control measures" or "best management practices," be integrated into the regulations and clearly exempted. This would help to codify that infrastructure used to treat, manage, infiltrate, or retain urban stormwater runoff is covered under the waste system treatment exclusions. The rule also should further define the systems to which the exemption applies and could include man-made structures and devices as well as treatment measures used to improve water quality, reduce stormwater volume, control flow rate and flooding, convey stormwater, or any combination of these purposes. WEF suggests the following language to address this issue:

Added to (c) "Definitions"

"Fully-constructed Stormwater Control Measures. The term fully-constructed stormwater control measures (SCMs) means man-made structures, devices, measures, or Best Management Practices (BMPs) that are constructed by the purpose of water quality treatment, stormwater runoff volume reduction, stormwater runoff rate control, flood control, or any combination of these purposes. Fully-constructed SCMs include constructed stormwater ponds, constructed stormwater wetlands, rain gardens, infiltration devices and structures, Low Impact Development structures and BMPs, and other stormwater control and conveyance structures, devices, and features. SCMs that have been built at the approximate location of similar types of natural waters (such as stormwater ponds constructed at the location of natural lakes or wetlands, ditches constructed at the location of natural streams or creeks, or stormwater channels constructed at the location of natural rivers) shall not be considered to be fully-constructed SCMs. Natural lakes, ponds, and wetlands with stormwater conveyance pipes discharging to them and constructed outlets shall not be considered to be fully-constructed SCMs."

Added to "(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:"

(viii) Fully-constructed stormwater control measures.

The term "Stormwater Control Measures" is used in the 2008 National Research Council report "Urban Stormwater Management in the U.S." and would present a simple exclusion language to a now unclear provision. WEF finds that the use of the term "fully-constructed SCMs" is narrow enough to allow a reasonable application of what otherwise could be a broad term. We also intend for this to be narrow and by listing examples, achieve such narrow objective. (p. 7-8)

Agency Response: **Please see summary response at 7.4.4.**

California Stormwater Quality Association (Doc. #16606)

7.680 The Proposed Rule's suggestion that some types of stormwater facilities, infrastructure projects, and associated facilities could be regulated within the scope of a definitional "waters of the United States" (WOTUS) poses uncertainty and potential confusion among

both the regulating entities and the regulated entities, and may increase the regulatory burden associated with implementation of MS4 permit requirements. CASQA recommends the Agencies revise the Proposed Rule to clarify that **MS4s are *not* WOTUS**, and that **certain types of stormwater related facilities** discussed herein **are also *not* considered to be WOTUS**. Specifically, CASQA recommends that certain exclusions within the Proposed Rule be expanded to include MS4 conveyance facilities and other related facilities. Exclusions needing expansion include: waste treatment system, artificial lakes, ditches, and swales.

…the Proposed Rule states that functions of waters that might demonstrate a significant nexus include sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, export of organic matter, export of food resources, and provision of aquatic habitat. (79 Fed. Reg. 22,188, 22,213 (April 21, 2014).) Many of these functions are identical to functions provided by stormwater treatment control BMPs. Thus, based on the Proposed Rule, many stormwater facilities could be found jurisdictional under the "other waters" category. Yet again, however, such facilities were specifically created to serve these functions, and are implemented to ensure compliance with CWA NPDES MS4 permit requirements. Considering the broad and expansive nature of the "other waters" category, it is imperative that the exclusions, discussed below in section II, specifically identify and include stormwater facilities. (p. 2, 6)

Agency Response: While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dry land is appropriate. Please see summary response at 7.4.4.

National Association of Flood & Stormwater Management Agencies (Doc. #19599)

7.681 The broad definitions in the proposed rulemaking, especially the definition of Tributary in conjunction with Adjacent, can lead to the conclusion that MS4s would be deemed Waters of the US. The distinction between MS4s and WOTUS is critical and begs the question of how CWA Sections 303 and 402 will be applied to historic MS4s deemed to be WOTUS. NAFSMA requests that the EPA clearly define what is considered to be an MS4 and what is determined to be a WOTUS, and reaffirm that an MS4 cannot be WOTUS. (p. 1)

…

The (b)(1) Waste Treatment Systems exemption does not clearly address stormwater treatment systems such as bioswales and constructed wetlands treatment systems. NAFSMA urges the federal agencies to clarify that such water quality treatment systems constructed to meet the requirements of the CWA are exempt. In addition, off- channel groundwater recharge basins, constructed adjacent to WOTUS should also be exempt. (p. 1, 2)

Agency Response: Please see summary response at 7.4.4.

Honorable Congressman Ed Perlmutter and Honorable Congressman Mike Coffman (Doc. #17456)

7.682 Additionally, we are hearing concerns about Municipal Separate Storm Water Sewer Systems (MS4s). It is common for ditches and other stormwater components to be connected to an MS4 in efforts to reduce and recycle stormwater runoff. Clarity is needed on exemptions for these systems as they are already permitted under the National Pollution Discharge Elimination System. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

Honorable Representative Frankel, Honorable Representative Napolitano and Honorable Representative Dina Titus (Doc. #17458)

7.683 The Florida Department of Environmental Protection currently regulates surface water management systems under statewide environmental resource permitting programs that additionally provide certification under Section 401 of the Clean Water Act that the systems comply with the applicable provisions of the Clean Water Act. While the proposed rule preserves the existing exemption for wastewater treatment systems from being considered WOTUS, currently permitted surface water management systems could arguably fall within the definitions articulated under the proposed rule. Will the agencies explicitly exempt surface water management systems that are permitted under state law and meet state water quality standards from being considered WOTUS? If not, why not?

…

If the agencies feel as though the above concerns [stormwater management practices] currently fit under the existing waste treatment exemption to the "Waters of the United States" rule, please provide citations to existing regulations, guidance documents or other sources to support such a proposition. (p. 2, 3)

Agency Response: **Please see summary response at 7.4.4.**

7.4.5. Other

Summary Response

Please see Summary Response above for New Exclusions/Language from Commenters

Specific Comments

Oak Ridge National Laboratory (Doc. #14463)

7.684 The definition should not deter the beneficial, non-CWA use of water management features by failing to clearly exclude them from jurisdiction. The proposed definition raises jurisdictional uncertainty for some voluntary water management features.

1. Water management features required to be constructed by a CWA program but have ceased to function for the purposes of the CWA compliance but are voluntarily left in place. Example: Storm water runoff associated with construction activity is discharged to a project-related storm water detention basin. After the construction

activity is completed, the basin is not removed and serves the purpose of detaining storm water runoff from the area of the completed project.

2. Water management features required by a non-CWA program such as a state or local requirement.

   Example: Wetlands constructed to mitigated impacts under a state program.

3. Water management features not required but voluntarily constructed to achieve sustainability goals.

   Example: A water feature is constructed in uplands to help achieve LEED certification for a new building or development by capturing roof runoff. As time passes, the water feature develops flora and fauna common to ponds or wetlands. (p. 1)

Agency Response: **With respect to items 1 and 3, see summary response at 7.4.4. With respect to point 2, the rule excludes stormwater and wastewater treatment features constructed in dry land. If the waters in question meet these criteria, they would not be considered waters of the United States.**

U.S. House of Representatives Committee on Science, Space and Technology (Doc. #16386)

7.685 The fact that your rule covers all waters in a flood plain calls into question the municipal, industrial and agricultural use of water. Water from rivers or groundwater aquifers is appropriated or withdrawn (under state law controlling the ownership of water) by municipalities, industry, farmers, and others for use. It may be stored in ponds. It may be conveyed in ditches all year round. But, until it is discharged back into a water of the U.S., any water that is in use should not be considered a water of the U.S. If it is treated, then the water might be considered part of an exempt waste treatment system, but not all water that has been used needs to be treated and some water is never discharged back to a water of the U.S.

In your outreach sessions, EPA and the Corps have told people that you did not intend to regulate these waters. Staff has even suggested that the role does not reach water that is in use because it is no longer considered "waters" or because a pond or ditch was excavated in uplands.

Unfortunately, there is no clear exemption in the proposed rule that supports these assurances. However, a 2005 EPA General Counsel memo on water transfers says that it is EPA's longstanding position that water that when is withdrawn from navigable waters for an intervening industrial, municipal or commercial use and then reintroduced to navigable waters, that reintroduction requires a permit, So, water loses its status as "waters of the United States" when it is being used.

Will the final rule will clearly explain that it does not regulate water that is withdrawn, collected, transported, stored, or used for an intervening industrial, municipal, or commercial use, and this includes all management of water internal to a particular site? (p. 16-17)

Agency Response: **Please see summary response at 7.4.4. The 2005 memo referred to in this comment concerns whether there is an "addition" of pollutants in this situation, not the jurisdictional status of a waterbody.**

Alaska State Legislature, Alaska Senate Leadership (Doc. #7494.1)

7.686 **IV. Permafrost should be excluded from CWA jurisdiction as it is a "subsoil" entity without a "continuous surface connection" that maintains or improves "downstream water quality."**

The agencies are seeking comment on other categories of water which do not have a significant nexus and are not jurisdictional.[403]

We recommend that permafrost be added to 33 C.F.R. § 328.3(b), because permafrost is cryogenically isolated, does not have a significant nexus to other water, and is not jurisdictional under the CWA.[404]

As most Alaskans know, permafrost, as a permanently frozen material underlying the solum[405] or a perennially frozen soil horizon, does 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. It is cryogenically isolated. As a result, permafrost does not have a "significant nexus" and is beyond jurisdiction pursuant to the *Rapanos* decision.[406]

The *Rapanos* decision specifically stated that only wetlands with a "continuous surface connection" to bodies that are waters of the United States in their own right are adjacent to such waters and covered by the CWA.[407] As permafrost is, per se, a "subsoil" entity without a "continuous surface connection," it should properly be excluded from CWA jurisdiction.

Noteworthy: Instead of providing flow, permafrost inhibits flow.

Rivers crossing vast permafrost regions are hydrologically isolated by the underlying permafrost. Isolated patches of permafrost effectively seal surface vegetative materials from underlying groundwater. There is no recharge through permafrost. Nor does permafrost serve to maintain or improve water quality (or beneficially affect the chemical, physical or biological integrity of traditional navigable rivers, streams, tributaries, lakes, or ponds).

Permafrost does not demonstrate a significant function to the watershed by serving as a sediment trap. Because it is a nutrient sink, it is not a source of nutrient recycle. It does not trap pollutants but is, instead, an emitter of carbon monoxide and methane.

[403] Per Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,252 (April 21, 2014), and concurrent to the broad policy objectives of the CWA, permafrost should properly be included under 33 C.F.R. § 328.3(b).
[404] The agencies must take this opportunity (without relying on "regional supplements" produced in violation of the Administrative Procedure Act ("APA")) to correctly designate permafrost as non-jurisdictional under the CWA.
[405] "Solum" is the upper layers of a soil profile. See http://dictionarv.reference.com/browse/solum.
[406] *Rapanos*, 126 S.Ct. 2208, 547 U.S. 715.
[407] See *Rapanos*, 126 S.Ct. at 2212-2213 , 547 U.S. at 716-717 .

Permafrost does not serve to retain floodwaters. Nor does it provide organic matter to the organic-starved arctic and subarctic rivers and streams.

Permafrost does not provide food resources, nor aquatic habitat. The upland habitat it provides for birds is neither unique nor linked specifically to endangered species.

The lack of hydrologic connection to traditional streams and waters is not a function of man-made ditches or canals; it is a factor of it being permanently frozen. Permafrost ice lenses have persisted through not only the current periglacial period, but are preserved in underlying strata from the prior 30 to 40,000 year old ice age (having persisted through this and the prior periglacial period).

The nexus, at best, between permafrost and traditional waters is limited to runoff of snow melt. It occurs in a very limited timeframe that precedes the growth season. The shallow and insignificant nature of the connection is best illustrated by the improved functionality of disturbed watersheds. It is not a continuous surface connection. The drainage can vary from season to season depending on snow drift and the erratic pattern of a given year's snowmelt.

Isolated areas of permafrost otherwise surrounding by uplands have even less connection to traditional waters, often impeding or preventing groundwater flow.

Permafrost is not "surface water." The minimal phreatic "groundwater" that forms a few inches below the surface is not a "significant connection" that provides beneficial functions to the waters of the United States. (p. 5-6)

Agency Response: **The agencies agree that permafrost is not "surface water." As noted, it is a term that refers to subsurface conditions, specifically, permanently frozen soil. As such, permafrost is not, in and of itself, a water of the U.S. Similarly, permafrost itself is not a "surface connection," continuous or otherwise.**

Office of Water Management, Pennsylvania Department of Environmental Protection (Doc. #7985)

7.687 **The proposed definitions do not exclude wet weather/stormwater conveyance or treatment systems**. The proposed rule would include wet weather or storm water conveyance and treatment systems as regulated waters of the US. This result is unrealistic and unsound from the scientific perspective. The application to current regulated efforts to treat and manage storm water through pipes, conveyances, and other engineered structures, or through passive green infrastructure practices, would result in these activities being categorized as waters of the US. EPA has indicated in the Q&A related to the rule that this is not the intention, but language in the rule should be added to the exemptions in order to clarify this. (p. 6)

Agency Response: **Please see summary response at 7.4.4.**

State of Idaho (Doc. #9834)

7.688 3. Exclusions

The Proposed Rule should specifically exclude additional waters and features generally considered to be outside the scope of CWA jurisdiction, including:

a. Farm ponds, stock ponds, irrigation ditches, and the maintenance of drainage ditches, as currently excluded under the CWA's agricultural exemption;

b. Man-made dugouts and ponds used for stock watering or irrigation in upland areas that are not connected to surface waters; and

c. Dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement. (p. 5)

Agency Response: **Recognizing the vital role of farmers in providing the nation with food and fiber, the Clean Water Act in Section 404(f)(1) (33 U.S.C. § 1344(f)(1)) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. "Normal" farming, silviculture, and ranching is clarified in the agencies' implementing regulations (40 C.F.R § 232.3(c)(1)) to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. Nothing in this rule changes the implementation of the exemptions under 404(f).**

The final rule also contains an exclusion for "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 the exclusion for artificial lakes or ponds, the agencies have changed "exclusively" to "primarily" in describing the uses. Artificial lakes and ponds are often not used exclusively for one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. The change to the exclusion reflects Agency practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use, such as temporary ponds constructed in dry land for the purpose of combating wildfires.

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

7.689 …green infrastructure, which includes existing stormwater treatment systems and low impact development stormwater treatment systems, is not explicitly exempt under the proposed rule. HDOT uses green infrastructure as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes to treat stormwater runoff. The proposed rule could inadvertently impact a number of these facilities by requiring Section 404 permits for green infrastructure construction projects that are jurisdictional under the new definitions in the proposed rule. Additionally, it is unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

New Mexico Department of Agriculture (Doc. #13024)

7.690 Closed Basins

According to consultation with the New Mexico Environment Department, waters within closed basins do not drain into any navigable or interstate waters and have not historically been under the jurisdiction of the CWA Instead, these waters are under state jurisdiction. In New Mexico closed basins are defined as "closed with respect to surface flow if its topography prevents the occurrence of visible outflow. It is closed hydrologically if neither surface nor underground outflow can occur." Therefore, NMDA requests the addition of waters within "closed basins" to the list of exclusions presented in this proposed rule, as they cannot satisfy any criteria required for a water to be jurisdictional.

Also, the former definition of Waters of the U.S. includes in part (c), "All other waters such as... playa lakes." Will playa lakes be excluded due to their hydrologic disconnect from major waterways or are they assumed to be included under one of the new Waters of the U.S. categories? (p. 10)

Agency Response: **The agencies did not exclude closed basins as a category by rule from coverage under the final rule, but recognize that all categories of waters covered require a significant nexus to traditional navigable waters, interstate waters, or territorial seas. If that nexus is absent, then the waters in question are not considered "waters of the United States."**

Although some commenters suggested additional subcategories of waters for consideration, such as playa lakes and kettle lakes, the agencies at this time are not able to determine that the available science supports that the suggested additional subcategories of waters as a class have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas. However, to be clear, under the rule, individual waters of the suggested additional subcategories are jurisdictional where they meet the requirements of (a)(1) through (a)(6) or (a)(8) (e.g., a playa lake that is an interstate water, a kettle lake that is an adjacent water, or one that is 2,000 feet from a jurisdictional tributary and is determined on a case-specific basis to have a significant nexus to a traditional navigable water, interstate water, or the territorial seas).

Division of Aviation, North Carolina Department of Transportation (Doc. #14766)

7.691 The Division of Aviation (DoA) proposes an additional exclusion by regulation based on existing Federal Aviation Administration Orders and Advisory Circulars regarding safety of the traveling public. The following are the documents DoA refers to:

- 14 CFR 139. Title 14: Aeronautics and Space. PART I39- CERTIFICATION OF AIRPORTS http://www.faa.gov/airponslairporl_satety/part139_cert/
- FAA Advisory Circular J50/5200-32 Reporting Wildlife Aircraft Strikes
- FAA Advisory Circular 150/5200-33 Hazardous Wildlife Attractants On or Near Airports
- Memorandum of Understanding between the United States Department of Transportation Federal Aviation Administration and the United States Department of Agriculture Animal and Plant Health Inspection Service Wildlife Services. June 2005

http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1015&context=birdstrikeother

- Significant Wildlife Strikes to Civil Aircraft in the United States (1990-2014) http://www.faa.gov/airports/airport_safety/wildlife/resources/media/sig_strikes_1990_2014.pdf
- Wildlife Hazard Management at Airports- A Manual for Airport Personnel http://www.faa.gov/airports/airport_safety/wildlife/resources/media/2005_FAA_Manual_complete.pdf

Though these resources regulations and guidance refer to "wildlife hazards," birds makeup 97% of the reported strikes to aircraft. Approximately 61% of bird strikes occur when the aircraft is at a height of 100 feet or less above ground level (AGL). 74% occur at 500 feet or less AGL, and 92% occur at or below 3,000 feet AGL. These numbers clearly show the vast majority of bird strikes occur within the airport property during take-off and landing. Research has also proven that standing water on airport property and surrounding properties attract hazardous birds and that these birds f1y at altitudes hazardous to aircraft operating in the same areas. (p. 1-2)

Agency Response: **The agencies believe the current regulations, policy guidance, and memoranda adequately address this issue. Therefore the agencies did not add a specific exclusion relating to wildlife hazards.**

7.692 In North Carolina, the Department of Environment and Natural Resources (NCDENR) and DoA partnered with several other agencies to assist in the passing of legislation prohibiting the siting of any stormwater BMPs that promotes standing water on or near North Carolina airports. The legislation is based upon FAA separation criteria, wildlife hazard guidance, the FAA Wildlife Strike Database trends, and other relevant research showing how some stormwater BMPs can be extremely hazardous to aircraft operating in the area of the airport property. The NCDENR Stormwater BMP manual has added Chapter 13 "Public Airports" and can be accessed here: http://portal.ncdenr.org/c/document_library/get_file?uuid=c7a8e5a2-f141-4612-817a-43c48c2f108b&groupId=38334.

This document supports the legislation, G.S. 143-214.7(3c) & (c4) located here: http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-217.7.html.

DoA is proud to have been involved with this effort, as it is immediately working to make public airports in NC safer. In order to continue this trend, we respectfully request to haw BMPs located on public airports added as excluded by the definition of "waters of the U.S." Additionally DoA requests extremely wide latitude be given to BMPs within the FAA defined separation distance for wildlife attractants of five miles. We ask for as few as possible of these BMPs be labeled as "waters of the U.S."

Several factors contribute to the rising number of bird/aircraft strikes. Successful wildlife conservation efforts and quieter aircraft engines are two such factors. The U.S. Army Corps of Engineers in North Carolina is very aware of Bird Aircraft Strike Hazard (BASH) issues. NCDENR is now also aware of the unique challenges Airports have to preserve water quality. DoA feels EPA may lack visibility on this issue and therefore this

exclusion would serve to educate further how dangerous standing water can be on airports. Just as strike reporting is rising, the number of deadly and damaging strikes is going down. This is a direct result of following a protocol of managing hazardous wildlife at airports that includes wildlife population management, habitat modification, land use planning, training, harassment, and depredation on and near the airport property. The exclusion we seek fits into the category of "habitat modification", specifically, avoiding construction of, or removing area s of standing water, which are proven attractive to birds. (p. 1-3)

Agency Response: **The final rule includes a new exclusion in paragraph (b)(6) for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. Features that meet these criteria are not considered "waters of the United States." The agencies believe the current regulations, policy guidance, and memoranda adequately address this issue. Therefore the agencies did not add a specific exclusion relating to habitat modification.**

Florida Department of Environmental Protection (Doc. #15080)

7.693 Regulated Discharge Systems

The federal agencies propose no changes to the agencies' regulations that exclude from the definition of "waters of the United States" waste treatment systems designed to meet Clean Water Act requirements. 79 Fed. Reg. 22,217. In addition, the federal agencies intend no change to the statutory and regulatory exemptions from National Pollutant Discharge Elimination System ("NPDES") permitting requirements under section 402 of the Act. 79 Fed. Reg. at 22,218. The proposal does not, however, appear to expressly address stormwater management or treatment systems that discharge through outfalls permitted pursuant to section 402. These systems, which often consist of municipally-owned or operated stormwater treatment systems, traditionally have been regulated as "point sources" that discharge to "waters of the United States." These systems serve a critical pollution treatment role in Florida and treating them as "waters of the United States" subject to water quality criteria within their permitted boundaries could limit their viable use in treating urban and agricultural area runoff.

Similarly, Florida's large Everglades Stormwater Treatment Areas, which function as a major component of Everglades restoration, were built and are operated to remove excess nutrients from stormwater runoff before discharging into the Everglades and other natural areas. These constructed wetlands have an effective treatment area of 57,000 acres and are permitted as point sources through the NPDES program.

- The Department asks that the federal agencies clarify whether water bodies that could be considered tributaries or adjacent waters under this proposal, but that comprise a system having an outfall that is permitted under section 402 of the Act, particularly stormwater treatment systems, would constitute "waters of the United States."
- The Department asks that the federal agencies clarify whether the agencies intend states to apply water quality standards or develop total maximum daily loads under section 303 of the Act for water bodies that comprise a system having an

outfall that is permitted under section 402 of the Act, but that also may meet the proposed definition of "waters of the United States." (p. 7)

Agency Response: **Please see summary response at 7.4.4**.

7.694 Dispersed Water Storage

The federal agencies propose to exclude from the definition of "waters of the United States" 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 or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing. 79 Fed. Reg. at 22,218. The proposal does not appear to expressly address artificial water bodies created by excavating or diking dry land as part of water quality or water quantity improvement projects.

Since2005, the State of Florida, through its regional water management districts, has been working with a coalition of agencies, environmental organizations, ranchers, and researchers to enhance opportunities for storing excess surface water on private and public lands. Managing water on these lands, known as the Dispersed Water Management Program, reduces the amount of excess water ultimately discharged to coastal estuaries during the wet season. Dispersed water is defined as shallow water distributed across parcel landscapes using relatively simple structures. Shallow water retention also provides valuable groundwater recharge for water supply, opportunities for water quality improvement, and rehydration of drained systems. Through July 2014, in the greater Everglades system, approximately 47,400 acre-feet of water retention and storage has been made available through cooperative agreements, interim lands or environmental services projects.

In addition, the Department and the South Florida Water Management District committed a total $3 million this year for three pilot projects in the St. Lucie River watershed to test the concept of storing excess surface water on privately-owned fallow citrus lands. In February 2014, the first of these pilot projects became operational on property owned by a private citrus company. Under the pilot program, water will be pumped onto 450 acres of private property in Martin County, capturing an average of 6,780 acre-feet of water a year that would otherwise flow from lake Okeechobee and surrounding basins into the St. Lucie River and Estuary. Two more pilot projects on other privately-owned property are under construction or being designed. These two projects will provide more than 4,500 acre-feet of additional water storage in the St. Lucie watershed.

- The Department asks that the federal agencies clarify whether dispersed water storage systems would constitute "waters of the United States" if, during periods of water storage, the systems otherwise meet the definitions of tributaries or adjacent waters under the proposal.
- The Department asks that the federal agencies clarify whether the agencies intend agricultural permitting exemptions under sections 402 and 404 of the Act to apply to any dispersed water storage systems that may meet the definition of "waters of the United States" under this proposal, but that are utilized during fallow agricultural periods. (p. 7-8)

Agency Response: **The final rule contains an exclusion for "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 the exclusion for artificial lakes or ponds, the agencies have changed "exclusively" to "primarily" in describing the uses. Artificial lakes and ponds are often not used exclusively for one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. The change to the exclusion reflects Agency practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use. Provided the features discussed in this comment meet the conditions states in the final rule, they would not be considered "waters of the United States." However, if not constructed in dry land, these features may be jurisdictional under (a)(4), (a)(6), or (a)(8).**

"Normal" farming, silviculture, and ranching is clarified in the agencies' implementing regulations (40 C.F.R § 232.3(c)(1)) to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. Nothing in this rule changes the implementation of the exemptions under 404(f).

7.695 Reclaimed Water Storage

7.696 Similar to the artificial water bodies created for dispersed water management, the proposal does not appear to expressly address water bodies created for the purpose of reclaimed water storage. Reclaimed water plays an important role in water resource, wastewater, and ecosystem management in Florida. When reclaimed water is used, it eases the demand on traditional, often limited, sources of water. The storage and subsequent reuse of reclaimed water also reduces discharges to surface waters and recharges groundwater.

- The Department asks that the federal agencies clarify whether reclaimed water storage systems would constitute "waters of the United States" if the systems otherwise meet the definitions tributaries or adjacent waters under the proposal. (p. 8)

Agency Response: **The final rule contains exclusions for stormwater and wastewater management features constructed in dry land. Provided the features discussed in this comment meet the conditions states in the final rule, they would not be considered "waters of the United States." However, if not constructed in dry land, these features may be jurisdictional under (a)(4), (a)(6), or (a)(8).**

Tennessee Department of Environment and Conservation (Doc. #15135)

7.697 Storm water treatment systems are traditionally considered exempt as waste water treatment systems, assuming not created in a water of the U.S., if they are being actively maintained. Storm water systems, however, are evolving as EPA and the states encourage the use of constructed wetlands, green infrastructure, and other similar features. We request that the agencies make clear in this rulemaking that such systems will remain exempted under the waste water treatment exemption. (p. 28)

Agency Response: **Please see summary response at 7.4.4.**

North Carolina Department of Transportation (Doc. #15179)

7.698 …we especially call attention to AASHTO's [American Association of State Highway and Transportation Officials] comments on the proposed rules' potential effects on stormwater management constructed to support transportation facilities. Clarification of the criteria to exclude the stormwater treatment systems associated with green infrastructure is necessary to negate any concerns over potentially creating jurisdictional waters. (p. 2)

Agency Response: Please see summary response at 7.4.4.

Arizona Game and Fish Department (Doc. #15197)

7.699 7. State fish and wildlife agencies have unique jurisdictional authority over their state trust resources and maintain the expertise to determine actions necessary to protect those resources. The uncertainties of the proposed Rule may create excessive financial burdens on state public fiscal resources to accomplish fish and wildlife management objectives. The Department therefore requests the development of a clearly-expressed exemption for actions and activities in WUS conducted by State fish and wildlife agencies for the benefit of watershed habitats and fish and wildlife resources. Alternatively, a new permitting process could be developed similar to the ACOE's Section 404 Regional General Permits. At a minimum, the EPA must analyze and disclose the financial impacts to state fish and wildlife agencies. (p. 3)

Agency Response: The agencies have historically encouraged habitat enhancement activities, and have been open to the development of streamlined permitting options, such as the current Nationwide Permit #27 for Aquatic Habitat Restoration, Establishment, and Enhancement Activities. Therefore, the agencies do not believe it is necessary to add a specific exclusion for enhancement activities conducted by State agencies.

While the rule imposes no direct costs as a definitional rule, the agencies prepared an economic analysis for informational purposes. The agencies conducted this economic analysis to provide the public with information on the potential indirect costs and benefits associated with this definitional rule. The economic analysis was done for informational purposes only, and the final decisions on the scope of "waters of the United States" in this rulemaking are not based on consideration of the information or analysis in the economic analysis. Please see the Economic Analysis for more details.

California Department of Water Resources (Doc. #15245)

7.700 …the policy for excluding some features, activities, and waters from CWA regulation is to recognize that there are certain facilities over which the USACE and EPA have generally not asserted jurisdiction as a policy matter and in order to provide greater regulatory clarity. (79 Fed. Reg. at p. 22189.) DWR requests that other facilities with functions similar to the features in the Proposed Rule be added to the definition of features. These proposed additional features include:

Flood By-Pass System. As described above, the primary California flood management system depends in part on multiple by-pass systems that divert high flood flows through

wide channels protected by artificial levees and berms away from cities and important agriculture areas to mostly uninhabited upland areas. When the flooding stops, the water drains from the by-pass regions, which reverts back to uplands. The main activity on these uplands during the non-rainy periods is irrigated agriculture. Similar to the concept of including artificially irrigated areas that would revert to uplands upon cessation of irrigation, DWR requests the USACE and EPA consider expanding the definition of features to include areas that are part of the flood control systems, including by-pass areas, that would revert to uplands when the flood waters are no longer being diverted and water drains from the lands. (p. 5-6)

Agency Response: **The final rule does contain an exclusion for artificial, constructed lakes and ponds created in dry land. See response at 7.3.2. See also response at 7.4.**

7.701 b. Artificial Water Supply Delivery Facilities. As elaborated above, the SWP water supply system includes numerous artificial conveyance structures, such as concrete-lined aqueducts, canals, pipes, tunnels, above-ground storage tanks, forebays, afterbays, and pumping plants that are used to transport water around the state after it is diverted. The SWP uses these artificial systems to transport and deliver water, both surface waters that would be diverted from traditionally navigable waters and groundwater, to its customers around the state. These types of facilities that are used for water deliveries are different than some canals and aqueducts found on the East Coast that are used for transportation and recreation and should be treated differently for jurisdictional purposes.

The definition of features recognizes that certain artificial water facilities should be excluded from the definition of jurisdictional waters as a matter of policy, recognizing that such waters have been separated from jurisdictional waters by legal means and such activities do not affect the chemical, physical, or biological integrity of waters of the United States. DWR requests that this rulemaking consider expanding the definition of features to include other water delivery facilities that are equivalent in function to those already listed as features in the Proposed Rule, especially artificial water conveyance systems like aqueducts, pipelines, and canals. Although DWR does not believe these artificial water facilities should be considered jurisdictional under the Proposed Rule, adding them to the list of features would provide important regulatory clarity for DWR and other operators of water supply systems. (p. 6)

Agency Response: **As noted in the preamble, 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 have not in practice asserted jurisdiction over these types of features when created in dry land.**

Sealaska Corporation (Doc. #15356)

7.702 **Water Supply Systems**. It appears that the proposed rule would treat most water supply systems, ranging from major federal and State water delivery systems to smaller reservoirs and other water system components managed by local governments, as "tributaries." This would unduly increase the regulatory burden on small villages in Southeast Alaska that are already struggling, and on temporary water systems for logging

camps for an industry that is already near collapse. The rule exempts wastewater treatment systems from jurisdiction, but does not include a similar exemption for water supply systems. Regulation of water system components under the CWA would impose a needless burden on water purveyors. The Agencies should categorically exempt water supply systems (including treatment systems) from regulation under the proposed rule. (p. 21)

Agency Response: **Although the agencies have modified the definition of "tributary" in the final rule, the preamble states that 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 have not in practice asserted jurisdiction over these types of features when created in dry land.**

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

7.703 The waste treatment system exclusion only covers systems designed to meet the requirements of the CWA. The same rationale for excluding waste treatment systems required for the CWA applies to such systems and supporting drain control structures constructed to comply with laws other than the CWA. This exclusion should be clarified and broadened to cover drainage control ditches or conduits constructed to comply with other environmental laws, including state counterparts to federal environmental laws. For example, surface and underground coal mining are regulated indirectly by the federal Surface Mine Control and Reclamation Act of 1977 ("SMCRA"). *Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 3 10 (3d Cir. 2002); *Bragg v. West Virginia Coal Association*, 248 F.3d 275 (4th Cir. 2001). State law counterparts to SMCRA that provide for regulation in accordance with SMCRA and consistent with federal regulations promulgated pursuant to SMCRA, 30 C.F.R. 9 732.15(a), directly apply to the coal industry.' Pursuant to these state laws, mine operators are required to build diversion ditches for fresh water, drainage control ditches and structures to control and direct runoff that has been exposed to un-weathered rock and coal in the mine area, as well as sediment ponds, water treatment ponds, fresh water impoundments, and waste storage impoundments. On an individual basis, the purpose of some of these features cannot be deemed to be solely waste treatment. Some are merely conveyances, while others are for storage. Generally, however, they are constructed to comply with regulatory requirements under the state counterparts to SMCRA having to do with ensuring water quality that go well beyond the requirements of the CWA. Some of these features are temporary and will be removed when no longer necessary. Some of them will be retained after mining is completed. In all cases, reclamation will be conducted according to a plan approved in the mine operator's permit. The reclamation usually results in some alteration of these features to make them compatible with the surrounding landscape and drainage patterns in the post-mining scenario. Where a mine operator fails to perform its duties under these laws, state government must step in to perform the mine operator's duties. A bond is posted by the mine operator to assure compliance and to fund the state's effort in the event it is called upon to perform reclamation. Each surface mining permit covers a defined permit area. The WVDEP urges the EPA to further exempt features that are built within this permit area to comply with the requirements of state counterparts to SMCRA.

Other mines are regulated under the State's Quarry Reclamation Act, W.Va. Code § 22-4-1, et seq. Similar to the regulatory regime under SMCRA, these mining operations are required to have drainage control systems within a defined permit area, the individual features of which may not all be deemed to be purely for compliance with the CWA. As with coal mines, some of these features will become permanent, some are temporary, and all are subject to maintenance requirements during mining and some form of reclamation following mining. The features of these on-site drainage control structures should also be exempt. (p. 12-13)

Agency Response: **As stated in the SMCRA statute, SMCRA "shall not be deemed in any way to repeal or supersede any portion of the Federal Water Pollution Control Act and no control or treatment under this subsection shall in any way be less than that required under the Federal Water Pollution Control Act." The agencies believe that the two statutes have complementary, but differing, mandates and therefore is not appropriate to add a specific exclusion for features authorized under SMCRA.**

With respect to stormwater control features, please see the summary response at 7.4.4.

Ohio Department of Natural Resources et al. (Doc. #15421)

7.704 Ohio EPA Comments:

Some confusion has been created by the proposed rule because, by rule, all tributaries (defined as having a bed, bank and ordinary high water mark) are defined as waters of the U.S. The agencies should explicitly clarify in the final rule that constructed storm water best management practices (BMPs) including, but not limited to, retention basins, detention basins, infiltration basins/trenches, constructed wetlands and bioretention permitted under Section 402 of the CWA that connect to a downstream jurisdictional receiving water through a constructed outlet having a bed, bank and ordinary high water mark are not considered waters of the U.S. (p. 24)

Agency Response: **Please see summary response at 7.4.4.**

San Gabriel Basin Water Quality Authority (Doc. #15642)

7.705 WQA respectfully requests that groundwater recharge basins be excluded from jurisdiction under the proposed rule. We note that the proposed rule definition of "waters of the United States" now includes, "*...all waters, including wetlands, adjacent to traditional navigable water*..." Although EPA has also listed several exceptions, we believe the definition should be modified to also allow an exception for groundwater recharge basins created specifically for the discharging, capturing and infiltrating of groundwater, storm water and non-storm water runoff. Such an exception would allow for the efficient discharge and reuse of water in infiltration basins without additional layers of onerous regulatory reviews - a scenario, which WQA envisions, could apply to discharges throughout the San Gabriel Valley regardless of whether or not the discharges are covered by an NPDES permit.

More than 30 groundwater treatment facilities are operating in the San Gabriel Basin today and many of them require the ability to discharge large volumes of water to flood

control channels over short periods of time to facilitate plant start-up (including complying with the State Water Resources Control Board's Division of Drinking Water permit requirements), operations and maintenance. Earlier this year the WQA, in furtherance of its mission, sponsored a basinwide Los Angeles Regional Water Quality Control Board discharge permit for the efficient discharge and reuse of water not otherwise available for direct potable use. This permit also allows for the future construction and use of groundwater recharge basins to allow direct recharge to the San Gabriel Valley groundwater basin. Additionally, these basins are envisioned to be multi-benefit by also serving as integrated stormwater capture basins. Much of the land available for these newly constructed recharge basins located adjacent to facilities and waterways considered waters of the U.S. Therefore, if the proposed rule were implemented as proposed these constructed basins could be subject to additional permitting that is time-consuming, burdensome and costly with no additional benefit or improvement of water quality for San Gabriel Valley residents. (p. 2)

Agency Response: In the final rule, the agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling.

Environmental Protection Division, Georgia Department of Natural Resources (Doc. #16348)

7.706 The presence of one or more man-made or natural breaks does not affect the jurisdictional status of a tributary. Further clarity should be provided in this rule to prevent redundant regulation and the potential for conflict from existing facilities that are regulated under CWA Section 402 (i.e. Municipal Stormwater Systems, Natural Wastewater Treatment Facilities such as constructed wetlands, etc.). It is further suggested that clarity be provided in the proposed rule regarding exemptions for green infrastructure. (p. 1-2)

Agency Response: Please see summary response at 7.4.4.

Pyramid Lake Paiute Tribe (Doc. #17472)

7.707 As the rule reads, § 328.3 - Definitions, describes water bodies which are subject to the exclusions of waters of the United States, which includes, but is not limited to: artificial reflecting pools, swimming pools, small ornamental waters, water-filled depressions created incidental to construction activity, etc. However, the exclusions do not include storm-water Best Management Practices (BMPs). Language should be added to § 328.3 Definitions to include storm-water BMPs and define them by using specific examples, such as: rain gardens, infiltration basins, storm-water wetlands, and other storm-water BMPs that improve water quality. (p. 1)

Agency Response: Please see summary response at 7.4.4.

Lee County, Florida (Doc. #1346.1)

7.708 As Lee County is a proponent of water reuse we require more time for a complete analysis of the potential impacts to our reuse efforts. We recognize that the proposed rule reiterates the exemption for wastewater treatment facilities under the CWA, however,

water reuse infrastructure, at times, will not fall into this category and thus could become jurisdictional. (p. 2)

Agency Response: **The final rule specifically excludes constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling.**

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

7.709 To prevent the proposed rule from adding another layer of permitting delays to companies that are already excessively burdened by time delays, Sweetwater County strongly encourages the EPA, in its proposed rule, to explicitly exempt local streets, gutters, and manmade ditches from the definition of the waters of the United States. (p. 2)

Agency Response: **Please see summary response at 7.4.4.**

City of Thornton, Colorado (Doc. #7328.1)

7.710 **Thornton operates a drinking water supply system that could be impacted by the proposed rule.**

Thornton diverts water from Clear Creek and the South Platte River, both of which are considered "waters of the United States". The South Platte River is an effluent dominated stream in a heavily urbanized area, with discharges from centralized wastewater treatment plants contributing significantly to the flow of the river. This treated effluent is typically high in nutrients and BOD. Thornton stores some of this water in reclaimed gravel pit reservoirs that have been lined in accordance with Colorado state standards to prevent them from leaking. The water stored in the gravel pit reservoirs is used as a source for Thornton's drinking water.

As part of Thornton's pre-treatment program for the effluent dominated water, to control algae and taste and odor problems and to help meet SDWA standards, particularly for disinfection by-products, Thornton adds algaecide, oxidizers and/or activated carbon to the water in the lined gravel pit reservoirs. This pre-treatment process occurs in a closed system within the lined facility. This pre-treatment process has never been regulated by the EPA or the Corps, and Thornton requests that the proposed rule provide that this pre-treatment process in its lined gravel pit reservoirs be exempted as described below.

Another reason this pre -treatment process should not be regulated is that after the water from the lined gravel pit reservoirs is used in Thornton's municipal water supply system, it is discharged in compliance with a CDPS permit, under Colorado's program

administering the federal NPDES program, at t he Robert W. Hite Treatment Plant operated by the Metro Wastewater Reclamation District. (p. 2)

Agency Response: **Many commenters asked for an exclusion for drinking water supply systems, similar to exclusions for wastewater treatment and stormwater control. Because water supply networks can be both complex in structure and extensive in size, involving the use of tributaries as well as a variety of other features, the agencies determined that a complete exclusion of such systems is not appropriate. However, not all portions of these systems would be regulated under the final rule. Some portions of these systems are tributaries, or even traditional navigable waters, and so would be regulated under this rule for the same reasons that all such waters are subject to regulation as "waters of the United States." At the same time, there are some portions of these systems that would be excluded from regulation under the paragraph (b) exclusions, including (b)(3) (ditches that do not flow into a navigable water, interstate water or territorial sea) or (4)(B)(artificial, constructed lakes and ponds created in dry land).**

7.711 Thornton requests an additional new exemption for municipal water suppliers for lined gravel pits.

The proposed rule would maintain exemptions for certain facilities or activities. Thornton's concern could be addressed with an additional exemption under the "features" section of the proposed rule § 328.3(b)(5) for lined gravel pit reservoirs. It appears that the basis for the proposed rule is the scientific recognition of "connectivity" and the nexus between various bodies of water. As described above, the connectivity is not present because of the liner in the gravel pit reservoirs. There is no nexus or connection.

Accordingly, Thornton requests that a new exemption under § 328.3(b)(5) be added to the proposed rule . We propose the following language:

"(viii) lined water storage facilities, including lined gravel pit reservoirs."

This narrow exemption is similar to the other "features" that are proposed in rule § 328.3(b)(5). It is justified because the lined gravel pit reservoirs have not been previously regulated and the USEPA has indicated, according to AWWA, that drinking water suppliers' infrastructure is not intended to be regulated under the proposed rule. Moreover, it is justified by the lack of "connectivity" which is the science behind the proposed rule. (p. 3)

Agency Response: **See prior response.**

Transportation and Storm Water Department, City of San Diego, California (Doc. #7950.2)

7.712 *Comment Number:* 9

Section: 22206-G

Topic: Adjacent Waters

Comment: New construction and flood control activities could result in the unintended creation of a WOTUS. The installation of baffles and weirs to facilitate removal of pollutants such as sediment in storm water (as required by storm water permits) would now require complex 404 permitting procedures. Additional storm water permitting for

construction and development activities for all departments would be required and could delay infrastructure maintenance and municipal services from being constructed and will certainly increase costs.

Recommendation: Allow an exemption for installation and maintenance of water quality improvement structures or streamlined permitting for activities that will contribute to increasing water quality. (p. 3)

Agency Response: **Please see summary response at 7.4.4.**

Office of Environmental Programs, City of Phoenix, Arizona (Doc. #7986)

7.713 **Green Infrastructure**

Green infrastructure includes creative, less intensive methods of controlling and utilizing stormwater. For example, instead of directing stormwater immediately into the underground stormwater pipe conveyance system, swales could be constructed and planted with vegetation to utilize stormwater before the excess makes its way to the conveyance system. Under the proposed definition, these swales would likely meet the requirements to be considered WOTUS, which would add an unnecessary permitting requirement for efforts that are constructed specifically to benefit the environment. Therefore, we respectfully request the inclusion of "green infrastructure" in the list of features identified as "not waters of the United States" in §328.3 (b). (p. 3)

Agency Response: **Please see summary response at 7.4.4.**

7.714 **Water Transfers**

Water transfers are integral to Phoenix's water supply and are handled in environmentally responsible ways. The Colorado River supplies a significant percentage of the City's water supply and is delivered by the Central Arizona Project (CAP) through a series of dams, reservoirs, and canals. Although there is a rule in place exempting water transfers from Clean Water Act National Pollution Discharge Elimination System (NPDES) permitting requirements, that rule is undergoing legal challenge.

It would be enormously costly and provide no additional benefit to the environment to require the CAP to treat its water at any point, since the water is already treated by City of Phoenix water treatment plants prior to delivery to its customers.

As any diminution of its water supplies could have a devastating effect on the City, we respectfully request that EPA specifically indicate that water transfers will not require Clean Water Act permits. (p. 1-2)

Agency Response: **Please see summary response at 12.3.**

Aurora Water (Doc. #8409)

7.715 **2. The new and expanded definition of "tributary" in the proposed rule adds ambiguity in its application in the western U.S.**

The existing regulations do not fully define "tributary"; in practice, "tributary" has usually been restricted to a water feature with an active channel designated by ordinary high-water marks and connection to traditional navigable waters.

Under the proposal, all tributary and adjacent waters would now be "jurisdictional by rule". The definition of "tributary" and the scope of what is "adjacent" would both expand, including a new concept of "neighboring waters". Under the proposed rule, "neighboring" is defined for the first time to include waters located within the riparian area or floodplain of a WOTUS or waters with a confined surface or shallow subsurface hydrological connection. While typical shallow subsurface flows are not considered a WOTUS under the proposed rule, those flows may define a connection, establishing jurisdiction to a "jurisdictional" water. The western U.S. faces additional critical issues due to the absolute lack of connection (as currently defined) of many of its ephemeral water bodies and the seasonal fluctuations in the water resource itself.

Many water treatment features, such as Aquifer Recharge and Recovery (ARR) and Aquifer Storage and Recovery (ASR) sites, may be unintentionally and inappropriately considered jurisdictional under the "adjacent" or "neighboring" definitions. As sources of water in the West continue to become scarce due to over appropriation and effects of climate variability, many western water utilities are either currently using or are evaluating the opportunities to utilize ARR and ASR for drought protection measures and/or water treatment. Many of these features utilize large man-made basins that allow the water to slowly infiltrate into the subsurface aquifer. Specifically, Aurora utilizes an ARR site to provide direct natural treatment to its raw source water through a man-made system of infiltration basins and medium amendment.

The proposed rule also asserts that all tributaries in a watershed will be considered in combination to assess whether they have a significant nexus to a WOTUS. The significant nexus test allows for a watershed scale determination of jurisdiction. Many of the dry arroyos, washes, and ephemeral or intermittent water bodies so common in the arid West could become the subject of federal oversight upon adoption of the proposed rule.

Additionally, the proposed rule states that determination of jurisdiction using the terms "riparian area," "flood plain," and "hydrologic connection" will be based on best professional judgment and experience applied to the definitions proposed in this rule. There is no limiting scope to the size of a riparian area or a definition of the types of animal, plant and aquatic life that may trigger this definition.

Lastly, the rule does not clearly define how water must be geographically proximate to the adjacent water, nor how waters outside the floodplain or riparian zone are jurisdictional if they are reasonably proximate. This lack of clarity creates uncertainty about whether these waters would be considered a WOTUS because it leaves it up to the local ACOE office to determine jurisdiction in these instances.

Recommendations: Man-made water treatment facilities should be explicitly exempted in the rule regardless of whether they are utilized for drinking water, sewer, or stormwater.

Dry arroyos, washes, ephemeral or intermittent water bodies should be exempted from the rule. (p. 2)

Agency Response: **The final rule has modified the proposed definition of "tributary." In addition, the final rule specifically excludes constructed detention**

and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling.

With respect to stormwater control features, please see the summary response at 7.4.4.

7.716 4. The current and proposed rules under section 404(f)(1)(A) allow an exemption for "Normal farming, silviculture and ranching activities ... " and lists fifty-six (56) specific conservation practices which are and would continue to be exempted, but does not address similar watershed best management practices by urban water providers.

Aurora Water adopts a best management practices approach in the protection of its watersheds, headwaters, stormwater retention areas and ditches. These maintenance activities can often be accomplished under an existing nationwide permit. Under the proposed rule, some of these conservation practices may require a full Section 404 permit, increasing costs and delaying or eliminating some maintenance and operations activities. In addition, Aurora Water works closely with federal, state and local agencies to improve the conditions of our watersheds.

Recommendation: New exemptions for activities related to stream and habitat improvements should be included in the rule, allowing a more immediate response to wildfires, floods and other natural disasters as an "urban corollary" to the similar agricultural best conservation practices exemptions. (p. 3)

Agency Response: Based on the existence of regulatory procedures for emergency authorizations, as well other streamlined permitting options, such as Nationwide and Regional Permits, the agencies do not believe it is necessary to add a specific exclusion for these activities.

Board of Supervisors, Imperial County, California (Doc. #10259)

7.717 **Waste Treatment Systems:** The proposed rule should expand exemption for waste treatment systems if they are designed to meet any water quality requirements, not just the requirements of the CWA. (p. 5)

Agency Response: Please see summary response at 7.4.4. Also, see summary response 7.1 concerning the waste treatment system exclusion.

Mecklenburg County Government, North Carolina (Doc. #10946)

7.718 BMPs should be categorically excluded from "waters of the United States." BMPs are often constructed at the perimeter of sites in low lying areas. Many of these BMPs are constructed wet ponds and wetlands. With these features possibly becoming "waters of the United States" it becomes much more difficult to do repair work to these BMPs. As development continues to increase, the size of these BMPs may need to increase to treat the additional impervious areas.

Capital Improvement Projects for flooding are typically located adjacent to "waters of the United States." If these improvement projects are damaged and need to be repaired or significantly altered in the future, this may become more difficult as the BMPs would be considered "waters of the United States." (p. 2)

Agency Response: **Please see summary response at 7.4.4. While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dry land is appropriate.**

City of Escondido, California (Doc. #11116)

7.719 It has also been suggested that a tributary could include a water conveyance system such as the Escondido Canal which transports water from the San Luis Rey Watershed to the Water Treatment Plant at Lake Dixon. If the water in the Escondido Canal is determined to be a Waters of the U.S., then all the requirements of the Clean Water Act would be triggered, including water quality standards and total maximum daily loads (TMDLs) could be applied to this man-made infrastructure. These are not discretionary requirements. This definition would expand the authority (and obligations) not only of the Army Corps of Engineers, but the State and Regional Water Quality Control Board. Potable water supply and recycled/reclaimed water conveyance systems should be excluded from the definition. (p. 2)

Agency Response: **Although the agencies have modified the definition of "tributary" in the final rule, the preamble states that 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 have not in practice asserted jurisdiction over these types of features when created in dry land.**

City of Palo Alto, California (Doc. #12714)

7.720 **Water Reuse**

Palo Alto is an active participant in the Regional Water Quality Control Plant Water Reuse Program. Since 1980 this program has reused over 10 billion gallons of water for irrigation and cooling, reducing the need to import potable water and reducing discharges of wastewater into San Francisco Bay. Water reuse in California is an essential requirement to meet demand, particularly at a time of recurring droughts. Investing in the necessary infrastructure and facilities to increase water reuse is expensive, and while government must ensure public safety and environmental compliance, it should not discourage the investment. Unfortunately, the proposed rule introduces impediments to water reuse and does not protect investments made in water reuse, even though federal agencies encourage such activity.

Recycled water is treated and distributed in ancillary infrastructure to a wastewater treatment system and can include channels to convey wastewater, settling or retention basins, and a separate pipe system to deliver the recycled water. Some of these facilities could fall under the definition of "tributary" of the proposed rule, could be located within a floodplain or riparian area, and would not necessarily be covered by the wastewater treatment exemption in the rule, which stipulates the exemption only for "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act." While water recycling provides further treatment of wastewater, the purpose for its treatment is not "designed to meet the requirements of the Clean Water Act." Further, the rule's exemption for settling basins does not afford sufficient protection

for water reuse facilities because it does not cover detention basins, reservoirs, or associated infrastructure such as channels, ditches, or other conveyances.

At a minimum, we ask that the final rule include a clear exemption for all water reuse and water reclamation facilities. (p. 3-4)

Agency Response: The final rule specifically excludes constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling.

Charlotte County, Florida (Doc. #13061)

7.721 The rule must explicitly exempt water quality treatment systems permitted via Florida Department of Environmental Protection/Southwest Florida Water Management District/South Florida Water Management District from the Clean Water Act Standards because these systems were created to capture pollutants and protect downstream waterways. These systems typically include stormwater treatment/attenuation facilities and associated conveyances including roadside ditches, vaults, bioswales, rain gardens, and other green infrastructure. We suggest you significantly modify the proposed rule to address these obvious issues; or simply exclude similar features from any future definition of WOTUS. (p. 2-3)

Agency Response: While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dry land is appropriate. Please see summary response at 7.4.4.

Waters of the United States Coalition (Doc. #14589)

7.722 Application to terminal water supply reservoirs – The Proposed Rule will potentially classify many water supply reservoirs as waters of the United States. Throughout the west, many reservoirs are constructed on canyons or gullies that at one time may have been bisected by an ephemeral stream. Many such reservoirs simply act as forebays to surface water treatment plants, storing imported water that is not native to the underlying stream. They are isolated and/or lack any significant nexus to waters of the United States in the watershed where the reservoir is located. Classifying these reservoirs as waters of the United States will interfere with water operations as permitting and other water quality requirements could severely limit the utility of the reservoirs.

To address these concerns the Public Infrastructure Waters of the US Coalition request the following changes to 40 C.F.R § 122.2:

> Waste treatment, flood control and water supply systems, including but not limited to aqueducts, water supply canals not used for navigation, treatment ponds, ~~or~~ lagoons, storage ponds, pipelines, open channels, agricultural drains, manmade treatment wetlands, swales, or other low impact design infrastructure ~~designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition)~~ are not waters of the United States. This exclusion applies only to manmade bodies of water which were not created in waters of the United States ~~(such as disposal area in wetlands[See Note 1 of this section.]~~ Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA. (p. 5)

Agency Response: **The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional.**

With respect to stormwater control features, please the summary response at 7.4.4

7.723 **Recycled water**

> The Proposed Rule will hinder recycled water projects. Water supply agencies rely on percolation ponds like those described above to add recycled water to the potable and non-potable supply. If man-made percolation ponds are classified as waters of the United States, then the percolation ponds will be required to attain designated Water Quality Standards. Though highly clean, recycled water can have TDS and nutrient levels that are higher than what regulatory agencies including EPA have determined is necessary for waters of the United States to attain their designated Water Quality Standards. If percolation ponds are considered waters of the United States, discharges of recycled water into the percolation ponds could require an NPDES permit, and the discharge itself could be prohibited because of high TDS and other constituent levels in the source water.
>
> These restrictions will hinder the use of recycled water and put limits on the ability of water purveyors to develop new, responsible supplies. In Southern California, every gallon of recycled water that can be used is a gallon that does not have to be brought south through the Sacramento San Joaquin Delta or taken from the Colorado River. Likewise, in south Texas, every gallon of recycled water used allows more water to stay in the Rio Grande. There are very real ecological benefits to increasing the use of recycled water across the country, and the Proposed Rule could hinder those efforts. (p. 140)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like**

California where water supplies can be limited and droughts can exacerbate supply issues.

7.724 We additionally request that the Proposed Rule's changes to 40 C.F.R § 122.2 and other relevant sections of the federal regulations be modified as follows:

(a) Clean Water Act, 33 U.S.C. 1251 et. seq. and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term ''waters of the United States'' means:

(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
(2) All interstate waters, including interstate wetlands;
(3) The territorial seas;
(4) All impoundments of waters identified in paragraphs (a)(1) through (3) and (5) of this section excluding man-made water supply reservoirs that lack a significant nexus to downstream waters;

(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 –

(1) Waste treatment systems, including treatment ponds, treatment wetlands, storage ponds or lagoons, and percolation ponds designed to meet the requirements of the Clean Water Act, or designed to reuse treated effluent.
(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.
(3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.
(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.
(5) The following features:
(i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;
(ii) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, water supply storage, groundwater recharge, or rice growing;
(iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
(iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;
(v) Water-filled depressions created incidental to construction activity;
(vi) Groundwater, including groundwater ~~drained~~ conveyed to waters of the United States through open channels and subsurface drainage systems; and
(vii) Gullies and rills and non-wetland swales.

(viii) Any wastewater recycling facilities and all appurtenances thereto, including but not limited to conveyances, pumping facilities, discharge pipes, holding ponds, spreading grounds, and percolation ponds.

(6) Manmade flood control and water supply systems, including but not limited to aqueducts, water supply canals not used for navigation, treatment ponds, storage ponds, lagoons, pipelines, open channels, agricultural drains, manmade treatment wetlands, swales, or other low impact development infrastructure.

(c) The term "upland" shall mean all lands that are not classified as waters of the United States. (p. 5-7)

Agency Response: The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional. See the preamble for the agencies' rationale for changes to the final rule.

With respect to stormwater control features, please the summary response at 7.4.4

Valley Center Municipal District, California (Doc. #14752)

7.725 Water infrastructure, such as recycled water facilities, groundwater recharge basins, storm water retention basins, and constructed wetlands adjacent to "waters of the United States," should be excluded from jurisdiction under the proposed rule. (p. 2)

Agency Response: The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional.

With respect to stormwater control features, please the summary response at 7.4.4 Groundwater recharge basins are covered under the exclusion at (b)(7) for "wastewater recycling structures created in dry land: detention and retention basins built for wastewater recycling, groundwater recharge basins, and percolation ponds built for wastewater recycling, and water distributary structures built for wastewater recycling" or under the stormwater control feature exclusion at (b)(6), depending on the source of water. In effect, both have the same result, i.e., the infiltration basin is not a jurisdictional water as long as it was built in dry land. Please note that the final rule does not change the applicability of the Underground Injection Control program for Class V injection wells or subsurface fluid distribution systems under the Safe Drinking Water Act. See 40 CFR Part 144.

Washington County Commission, Utah (Doc. #14991)

7.726 A. Proposed amendment to definition of tributaries. Washington County proposes that dry washes located throughout the southwestern United States be excluded-by name-s-from jurisdiction if waters only flow in the dry wash intermittently or ephemerally and

tile primary flow from the dry wash or arroyo is drainage immediately following rainfall.[408] This proposal would (1) provide a bright-line rule to determine jurisdiction, (2) prevent the new rule from significantly expanding the Agencies' jurisdiction, (3) prevent the Agencies from imposing significant costs on Washington County, and (4) follow congressional intent in ensuring the unprotected lands in Washington County remain open for travel and multiple use.

In the proposed rule, the Agencies specifically request comments regarding recommendations which will provide greater clarity to the proposed definition of jurisdictional tributaries as compared to non-jurisdictional gullies. As stated above, the county has expertise in maintaining roads in an area with frequent and localized flash flooding. Consequently, the county respectfully provides additional information to the Agencies with the intent of showing the need to not include dry washes or arroyos as jurisdictional by rule.

… The county respectfully requests that the Agencies' modify the proposed rule to not establish tributaries and other waters as jurisdictional by rule. Additionally, the county has significant experience with dry washes or arroyos as commonly found in the southwestern United States. The county strongly recommends that these dry washes not be considered jurisdictional by rule. Jurisdiction of dry washes is not permitted under the law. Additionally, approving the proposed rule without specifically excluding dry washes from the Agencies' jurisdiction will likely impose significant costs on the county and restrict access to public lands in the county. More importantly, the proposed rule would likely put the health, safety, and welfare of travelers at risk because it would hinder the county's regular repair of roads damaged by flash flooding. (p. 3, 4)

Agency Response: **The agencies modified the definition of "tributary" in the final rule to "a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1) through (3) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark." 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. "Tributaries" as defined are jurisdictional by rule.**

The rule identifies all erosional features, including gullies and rills, as non-jurisdictional features. While the proposed rule specifically identified gullies and rills, the agencies intended that all erosional features would be excluded. The final rule makes this clear. Erosional features are not jurisdictional under the terms of paragraph (a) and the definitions in paragraph (c), especially the definition of tributary, and would be non-jurisdictional in any case.

City of Glendale, Arizona (Doc. #15054)

7.727 **Water Transmission Canals**

[408] *See Rapanos v U.S.*, 547 U.S. 715, 739 (2006)

The City of Glendale receives most of its water supplies via the Central Arizona Project's or the Salt River Project's canals. Water quality standards for Phoenix area canals have been established in Arizona Administrative Code, Title 18 Environmental Quality.

These canals often discharge to a groundwater recharge basin or return flow, either directly or through another water, to a jurisdictional water. Under the proposed rule, man-made conveyances meet the definition of "tributary" if they have a bed, a bank, and an ordinary high water mark and contribute flow either directly or indirectly to an (a)(1) through (a)(4) water. These water transmission canals may meet the definition of "tributary" under the proposed rule.

Maintenance activities to operate the distribution canals, such as mechanical and chemical controls for aquatic plants and animals and removal of silt and debris from the channels, will become subject to state and federal permit requirements. Financial resources of the Central Arizona Project and Salt-River Project would be spent on permits without additional benefit to the environment. Water transmission canals should be specifically excluded from the definition of "waters of the United States." (p. 4)

Agency Response: **Although the agencies have modified the definition of "tributary" in the final rule, the preamble states that 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 have not in practice asserted jurisdiction over these types of features when created in dry land. The final rule also specifically excludes constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling.**

New York City Law Department (Doc. #15065)

7.728 **Green Infrastructure:** It is the City's understanding that bioswales, rain gardens, and similar green infrastructure would not be considered jurisdictional, and thus subject to regulation under the Clean Water Act, under the Proposed Rule. Several City agencies, including DEP, the Department of Transportation, and the Department of Parks and Recreation, among others, install and manage green infrastructure to manage stormwater in the City. The City appreciates that EPA and the Corps view the Proposed Rule as not defining green infrastructure as jurisdictional. To ensure clarity on this issue, the City suggests that EPA and the Corps add a subsection expressly exempting green infrastructure from jurisdiction. (p. 3)

Agency Response: **Please see summary response at 7.4.4.**

7.729 **Water Transfers:** EPA and the Corps should take advantage of this rulemaking as an opportunity to clarify the applicability of the Clean Water Act to water transfers. This is particularly important in light of the recent decision in *Catskill Mountains Chapter of Trout Unlimited, Inc., et al. v. U.S. Environmental Protection Agency, et al.*, in which the court struck down EPA's 'Water Transfers Rule, 40 CFR § 122.3(i). 8 F. Supp. 3d 500 (S.D.N.Y. March 28, 2014). In that case, the court explicitly questioned the status of water transfers in connection with the definition of "waters of the United States," The City believes that this rulemaking is an appropriate context in which to address the

applicability of the Clean Water Act to water transfers. Accordingly, the City proposes the following additions, which are underlined, to the definitions in 40 C.F.R. Section 122.2:

"Discharge of a pollutant" means

(a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or

(b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

(c) For purposes of water transfers and impoundments. the source water and the receiving water shall be considered unitary. For navigable waters that are unitary, an addition of pollutants to navigable waters occurs only when pollutants first enter the navigable waters from a point source, not when pollutants are impounded or moved between navigable waters."

This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channelized by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger,"

"Water transfer" means an activity that conveys or connects waters of the United States." (p. 3-4)

Agency Response: **Please see summary response at 12.3.**

Flood Control and Water Conservation, Alameda County, California (Doc. #15074)

7.730 Green Infrastructure projects, such as bio-swales and artificial wetlands, are constructed to restore natural hydrological features and promote multiple environmental benefits. These systems are covered under the NPDES permit and should be excluded from Waters of the US. (p. 2)

Agency Response: **While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dryland is appropriate. Please see summary response at 7.4.4.**

National Association of Counties (Doc. #15081)

7.731 **Ensuring that Local Governments Are Able to Quickly Recover from Disasters**

In our nation's history, our citizens have experienced both manmade and natural disasters. Counties are the initial line of defense, the first responders in protection of its residents and businesses. Since local governments are responsible for much of what constitutes a community—roads and bridges, water and sewer systems, courts and jails, healthcare, parks, and more—it is important that local governments quickly recover after

disasters. This includes removing wreckage and trash from ditches and other infrastructure that are considered jurisdictional.[409]

Counties in the Gulf Coast states and the mid-west have reported challenges in receiving emergency waivers for debris in ditches designated as "waters of the U.S." after natural and manmade disasters. This, in turn, damages habitat and endangers public health. NACo would urge the EPA and the Corps to revisit that policy, especially if more waters are classified as "waters of the U.S." (p. 18)

Agency Response: The need for emergency action for a specific time and place is not related to the issue of whether a water is a defined "water of the United States" under the Clean Water Act. Rather, the agencies believe that such situations are better addressed through implementation actions, such as streamlined permitting procedures, that can provide the tailored oversight necessary to protect vital water resources while adequately responding to unusual emergency circumstances

Painesville Township, Ohio (Doc. #15183)

7.732 "Waste Treatment Systems and Other Exclusions"

The proposed rule excludes "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" among other features listed in the section. While such systems have traditionally been excluded from CWA jurisdiction, we believe that other constructed water management and treatment infrastructure with similar attributes to these waste treatment systems should be exempted. (p. 2)

Agency Response: Waste treatment systems have been excluded from this definition since 1979, and they remain substantively and operationally unchanged. Only ministerial changes to delete an outdated cross reference are made to the exclusion for waste treatment systems. Continuing current practice, any waste treatment system built in a "water of the United States" would need a section 404 permit to be constructed and a section 402 permit for discharges from the waste treatment system into "waters of United States. Because the agencies are not making any substantive changes to the waste treatment system and these comments are outside the scope of the proposed rule, the final rule does not reflect changes suggested in public comments. See summary response at 7.1

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

7.733 **Impacts to Water and Power Suppliers, Such as LADWP**

The proposed rule has the potential to impact LADWP's water rights, sources of water, transmission projects , water transfers , spill containment areas, evaporation cooling ponds, forebays used for water pass through for generating hydro-electric power, intake channels used for once-through cooling, and operation and maintenance activities by an

[409] Disaster Mitigation: Reducing Costs & Saving Lives: Hearing before the Subcomm. on Econ. Dev., Pub. Bldgs. & Emergency Mgmt., H. Comm. on Transp. & Infrastructure, 113th Cong. (2014) (statement of Linda Langston, President, Nat'l Ass'n of Counties).

increased need for more permits and permit requirements. Projects will be subject to individual permits versus the Corps Nationwide Permits and expansion of National Pollutant Discharge Elimination System (NPDES) permits that may have total maximum daily loads (TMDLs) associated as effluent limitations. The Agencies will have jurisdiction and may conflict with agreements for flow requirements in order to maintain beneficial uses of streams, creeks, and/or rivers that have already been established. The proposed rule has the potential to interfere with already established water rights, and threatens the ability to maintain water and electricity demands as well as system reliability.

Science shows that including waters previously not classified as WOUS would not improve the quality of these waters; updating the definition of WOUS as proposed would only serve to place more waters under more regulations due to increased oversight. For example, drinking water meets potable water standards, which is its primary beneficial use, there is no benefit to being under the jurisdiction of the CWA; the environmental benefits do not outweigh the increased regulatory burden.

In addition, generating stations that are powered by coal or natural gas may have impoundments that hold cooling water from a WOUS prior to use in some form of cooling process. All of these impoundments are man-made. In some cases, sea water is drawn into an intake channel that was built solely for the operations of the plant. The water has been taken into the control and onto private property out of the public domain. Thus, the WOUS classification should be waived in this example. For inland generating stations that draw freshwater as cooling water, a man-made impoundment is also needed. As with the intake channel example, this type of impoundment does not harm any aquatic life or beneficial uses of a downstream water body and should not be classified as a WOUS. Generating stations also have lined ponds within the property, which are used either to accumulate wastewater or evaporate excess water as a part of treatment processes. These ponds should also not be classified as WOUS. If necessary, they will be permitted for discharge, which would protect any nearby waters.

Some hydroelectric power plants use a pump-back process so they can reuse water that was used to generate power. The water is held in a forebay until electricity demand is low, and then the water is pumped up to a reservoir at a higher elevation to be reused when the demand is high. The forebay is an enclosed man-made impoundment that should not be classified as a WOUS.

Aqueducts should not be considered WOUS. Aqueducts have a primary purpose to provide reliable water to the citizens that have water rights. Aqueducts often require maintenance in order to remove sediment or repair the sidewalls of the open channels, and also to maintain enclosed sect ions made of metal or concrete. In addition manmade ditches should not be WOUS because of the frequent maintenance that often requires flow adjustments for aqueduct system reliability that do not harm beneficial uses but are necessary for maintaining the operation of the aqueduct.

Spreading grounds used to recharge groundwater supply should not be considered WOUS. If the proposed regulation includes the significant nexus test, then an entire groundwater basin might be considered to be the connectivity between the spreading grounds and a river that is perhaps miles away from the spreading grounds.

The definition of WOUS should not inadvertently interfere with implementing existing water rights by hindering maintenance activities on facilities used to deliver water in a reliable and efficient manner. Maintenance activities on conveyances such as ditches and facilities such as flow regulating structures need to be done very quickly - much faster than the turnaround time for NPDES and/or Corps permits - in order to ensure uninterrupted supplies. Some activities are highly dependent on weather as well as flow requirements downstream in the water supply system. Thus, water supply conveyances, ditches , and facilities must be left out of WOUS classification. (p. 6-7)

Agency Response: **In the final rule, the agencies have expanded and clarified the features not considered "waters of the United States" for the purposes of the Clean Water Act. In the exclusion for artificial lakes or ponds, the agencies have changed "exclusively" to "primarily" in describing the uses. Artificial lakes and ponds are often not used exclusively for one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. The change to the exclusion reflects Agency practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use. The agencies have also added cooling ponds to the list of uses in the rule. The list of uses has always been illustrative rather than exhaustive, and this addition responds to many requests to clarify that cooling ponds created in dry land are excluded.**

Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

Although the agencies have modified the definition of "tributary" in the final rule, the preamble states that 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 have not in practice asserted jurisdiction over these types of features when created in dry land.

7.734 LADWP recommends that the Proposed Rule be modified to:

…

- Exclude ephemeral streams from the definition of WOUS and allow the States to regulate them;
- Clarify in the Rule that groundwater basins are not to be considered a tributary;

…

- Exclude aqueducts and water supply features from the definition of WOUS;

- Exclude storm water ponds, detention basins, spreading grounds, puddles, reservoirs, or other standing waters from the definition of WOUS by virtue of being adjacent or with a significant nexus;
- Exclude impoundments for holding cooling water or power plant pump back water from the definition of WOUS;
- Exclude lined ponds within a facility from the definition of WOUS; and

… (p. 8, 9)

Agency Response: **The agencies have modified the definition of "tributary" to require the presence of a bed and bank and other indicator of ordinary high water mark. A bed and banks and other indicators of ordinary high water mark are physical indicators of water flow and are only created by sufficient and regular intervals of flow. These physical indicators can be created by perennial, intermittent, and ephemeral flows. The rule includes ephemeral streams that meet the definition of tributary as "waters of the United States" because the agencies determined that such streams provide important functions for downstream waters, and in combination with other covered tributaries in a watershed significantly affect the chemical, physical, and biological integrity of traditional navigable waters, interstate waters, and the territorial seas.**

The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional.

With respect to stormwater control features, please see the summary response at 7.4.4.

Water and Sewer Department, City of Greeley, Colorado (Doc. #15258)

7.735 B. Exclusion for Water Treatment Systems

…Greeley provides drinking water to its citizens through two treatment plants. The City must therefore comply with the stringent requirements of the Colorado Primary Drinking Water Regulations.[410]

Ponds and related treatment system components are typically located on plant property having no public access. It would be contrary to Safe Drinking Water Act requirements to allow contaminants to enter these waters prior to treatment and distribution. It would also be impractical to require drinking water these waters prior to treatment and distribution. It would also be impractical to require drinking water providers to obtain Corps authorization before performing necessary work on treatment system components where such work may involve a discharge of fill material.

[410] 5 CCR 1002-11. Colorado is authorized to implement its own drinking water program that complies with the Safe Drinking Water Act.

The definition of Waters the United States has long excluded "waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act." The Agencies should add a similar exclusion in 40 CFR §122.2(b) for "Drinking water treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Safe Drinking Water Act." (p. 6-7)

Agency Response: **In the exclusion for artificial lakes or ponds, the agencies have changed "exclusively" to "primarily" in describing the uses. Artificial lakes and ponds are often not used exclusively for one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. The change to the exclusion reflects Agency practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use. The agencies have also added cooling ponds to the list of uses in the rule. The list of uses has always been illustrative rather than exhaustive, and treatment ponds or lagoons constructed in dry land may also be excluded.**

Many commenters asked for an exclusion for drinking water supply systems, similar to exclusions for wastewater treatment and stormwater control. Because water supply networks can be both complex in structure and extensive in size, involving the use of tributaries as well as a variety of other features, the agencies determined that a complete exclusion of such systems is not appropriate. However, not all portions of these systems would be regulated under the final rule. Some portions of these systems are tributaries, or even traditional navigable waters, and so would be regulated under this rule for the same reasons that all such waters are subject to regulation as "waters of the United States." At the same time, there are some portions of these systems that would be excluded from regulation under the paragraph (b) exclusions, including (b)(3) (ditches that do not flow into a navigable water, interstate water or territorial sea) or (4)(B)(artificial, constructed lakes and ponds created in dry land.

District of Columbia Water and Sewer Authority (Doc. #15379)~

7.736 **3. Combined Sewer System**

As is the case with many combined sewer systems constructed over a century ago in cities undergoing urbanization, parts of DC Water's combined sewer system incorporate small streams and stream segments that were tributaries to larger streams and rivers leading to the Anacostia, Potomac, or Rock Creek. DC Water is currently spending billions of dollars on the District's combined sewer system to control discharges from the system, and we are concerned that the Rule could be interpreted to extend CWA jurisdiction over flows in the combined sewer system itself where the system incorporates streams and stream segments. Therefore, the term "tributary" needs to be amended in the Rule to make it clear that piped or buried sections incorporated into a combined system, o not meet the definition of "waters of the United States."

The Rule is unclear regarding the treatment of combined sewer systems and DC Water cannot support a final rule that does not specifically exempt combined systems and infrastructure that are part of a combined system as non-jurisdictional. Stream segments

that flow through pipes that are part of a combined system should be specifically exempted and should not be considered "waters of the U.S." (p. 4)

Agency Response: **With respect to stormwater control features, please see the summary response at 7.4.4. Also, please see Summary response at 12.3 concerning the NPDES program.**

7.737 4. Green Infrastructure

DC Water's ongoing and proposed green infrastructure ("GI") projects incorporate a variety of measures, including green roofs (gardens on rooftops), rain gardens, rain barrels, and pervious pavements, removing impervious surfaces, and using other natural means to capture and infiltrate rain water. Man-made wetlands may be developed along with canals, ditches, and retention systems associated with GI. DC Water has made a significant investment in its commitment to GI that will capture and convey water to the GI before it can enter the combined system. In this way, combined sewer overflows will be reduced and controlled.

Stormwater and green infrastructure are not explicitly exempt under the proposed rule. This infrastructure is vital to DC Waters commitment to clean water and without clarification, DC Water will be open to adverse agency determinations and the possibility of citizen suits under the CWA. DC Water seeks a rule that states affirmatively that GI infrastructure is not classified as a "water of the U.S." and that GI projects and infrastructure are not meant to be included in the proposed rule.

…

DC Water recommends that the definition of waters of the U.S. be narrowed and/or the exemptions expanded as set out below:

1. Exempt by definition of tributary or by definition of waste treatment system all sanitary and combined system facilities, the impoundments, ditches, and infrastructure related to them, from the definition "waters of the U.S," This would include sections of streams that flow through pipes that are part of a sanitary sewer system or combined systems;

…

Exempt by definition GI installations the impoundments, ditches, and infrastructure related to them, from the definition "waters of the U.S." This would also include sections of streams that flow through pipes that are part of a GI system. (p. 4, 5, 6).

Agency Response: **Please see response to previous comment.**

County of Los Angeles and Los Angeles County Flood Control District, California (Doc. #15620)

7.738 ***3. Green Infrastructure Projects***

EPA's System of Registries describes "Green Infrastructure" as "an adaptable term used to include an array of product, technologies, and practices that use natural systems – or engineered systems that mimic natural processes – to enhance overall environmental quality and provide utility services."2 Green Infrastructure projects provide multiple

benefits such as groundwater replenishment, water quality improvement, and enhancement of wildlife habitats and recreational opportunities. In July 2014, EPA launched the Green Infrastructure Collaborative, which in part aims to advance green stormwater management techniques.3 The President's Office of Management and Budget also has acknowledged that Green Infrastructure, including wetlands, can be a cost-effective way to manage stormwater and meet Clean Water goals.4 In a press release and fact sheet dated October 8, 2014, the President's Council on Environmental Quality identified creek and wetland restoration and wetland protection as examples of Green Infrastructure projects.3 The County and LACFCD share EPA's commitment to Green Infrastructure as a way to attain more sustainable and livable communities. In recent years, the LACFCD has begun to incorporate Green Infrastructure elements, including constructed wetlands and engineered soft bottom, low-flow channels, as part of its flood control infrastructure. While some of these Green Infrastructure projects are intended for compliance with requirements in municipal stormwater permits required under Section 402(p) of the CWA and are part of a larger stormwater quality improvement strategy, others are simply reflective of a "greener" approach to flood protection aimed at more livable communities. Following are two examples of Green Infrastructure projects recently constructed by the LACFCD. We are concerned that under the Proposed Rule, projects like these could be deemed WOTUS, which could discourage future Green Infrastructure projects.

The first example is the Dominguez Gap Wetlands, a constructed wetland located within the City of Long Beach and operated by the LACFCD. The wetlands project maintains the integrity of flood protection along Los Angeles River (a jurisdictional WOTUS), while introducing new water quality elements, groundwater recharge, restoration of native habitat, pedestrian and equestrian trails, environmental education, and river bike trail enhancements. The wetlands naturally treat from 2-3 cubic feet per second (1.3 to 3.2 million gallons a day) of stormwater and urban runoff — enough water to fill five Olympic-size swimming pools, which results in a significant reduction in the amount of fecal coliform, nutrients, heavy metals, organic carbons, and oil and greases in the runoff.

The second example is the Tujunga Wash Greenway, a meandering stream constructed by the LACFCD as part of the Tujunga Wash Ecosystem Restoration Project, located in the City of Los Angeles. The Greenway is a man-made stream adjacent to the concrete-lined Tujunga Wash flood control channel, which is a jurisdictional WOTUS. The Greenway has brought plant and animal habitat, water quality enhancement, groundwater replenishment, and passive recreation to a one mile reach of the Tujunga Wash. Both sides of the Wash now feature vibrant native vegetation and pathways for walking and biking. During an average rain year, as much as 325,000 gallons a day will flow through the Wash's new naturalized streambed, resulting in improved water quality for the region and enough groundwater recharge to provide 760 families of four with drinking water for an entire year.

The County and the LACFCD are concerned that projects such as these could be broadly interpreted to be WOTUS under the Proposed Rule, as they are located adjacent to existing WOTUS and do not clearly qualify for any of the current exclusions. As with the infiltration basins, designating waterway-based Green Infrastructure projects such as Dominguez Gap Wetlands and Tujunga Wash Greenway as a WOTUS would discourage

the future development of these types of projects. Requiring CWA Section 404 and 401 permits or applying water quality standards to these types of projects would raise their cost beyond feasible funding sources. The County and the LACFCD believe that a specific exclusion for Green Infrastructure projects in the Proposed Rule is needed to avoid ambiguity and to promote Green Infrastructure projects that help improve water quality or create water features where none existed before. Such exclusion is especially crucial now because many Los Angeles area municipalities are currently in the planning stages of various Green Infrastructure projects, reflecting a larger trend towards using green stormwater management techniques. (p. 8-9)

Agency Response: **Please see summary response at 7.4.4.**

City of Riverside, California (Doc. #15824)

7.739 The City of Riverside has several facilities such as holding ponds, constructed wetlands, and water and wastewater infrastructure located adjacent to "water of the United States." The City of Riverside also has several projects on the horizon to capture and recharge storm water. These are projects that will be constructed in the foreseeable future. In addition, we plan to expand our recycled water system which may include the recharge of our groundwater basins with recycled water.

The City of Riverside requests water infrastructure facilities (including construction, maintenance, and operation) adjacent to traditionally navigable waters be excluded from the proposed definition of "waters of the United States." (p. 4)

Agency Response: **With respect to stormwater control features, please see the summary response at 7.4.4.**

The final rule specifically excludes constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling.

Colorado Springs Utilities (Doc. #16351.1)

7.740 No exemption is offered for water treatment systems or water reuse facilities which oftentimes employ pits, ponds, lagoons and recharge basins. These features may be found jurisdictional under the rule (unlike wastewater treatment systems). (p. 2)

Agency Response: **The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or**

impounding, waters of the United States, these features may still be considered jurisdictional.

7.741 There is no exemption for emergency work, such as post-fire drainage remediation activities of the type Colorado Springs and its neighbors had to construct after recent devastating forest fires. On a similar note, there is no exemption for stormwater control facilities necessary to meet MS4 obligations. (p. 2)

Agency Response: With respect to stormwater control features, please see the summary response at 7.4.4. See also summary response at 7.4.

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

7.742 The Federal Agencies' proposal could also place a significant amount of previously non-jurisdictional water infrastructure under the CWA. Municipal water providers depend on much of this infrastructure to meet water needs in a responsible and environmentally conscious manner. The proposed rule expands the CWA jurisdiction from "adjacent wetlands" to "adjacent waters". This unnecessary expansion will capture a large amount of infrastructure not previously jurisdictional. Infrastructure that could be implemented includes a large number of water recycling and reuse facilities, groundwater recharge facilities, retention basins, and constructed wetlands. These facilities, often by necessity, are constructed in areas that the proposed rule would make jurisdictional for the first time. To address the issues identified in this letter the Federal Agencies should:

…

- Clarify that jurisdictional "impoundments" do not include manmade, off-stream facilities that lawfully appropriate and remove water from the natural environment, such as a drinking water system, off-stream storage pond, intake canal for any use;

…

- Clarify in the text of any final rule that nothing in the proposal changes the regulatory status of water transfers;

… (p. 2, 3)

Agency Response: While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dry land is appropriate. Please see summary response at 7.4.4. Regarding water transfers, please see response at 12.3.

City of Beaverton, Oregon (Doc. #16466)

7.743 We recognize that EPA and the Corps may claim these outcomes are unanticipated. However, there is so much gray area in the proposed rule that the rise of third-party citizen suits are likely to define all these described waters as WOTUS. The agency's so-called intent will not matter, because where there is gray, there will be a lawyer to file a lawsuit. Ultimately, the aggressive reach of this rule and its ambiguous provisions and terminology introduces uncertainty, requires more agency analysis and intervention, and will create increased litigation.

With that in mind, the rule must include the following provisions that are priority concerns for local governments:

…

- Green infrastructure developed to improve water quality or achieve multiple public benefits shall be encouraged and given priority consideration that does not impose additional financial and regulatory burdens of permittees and shall not be considered waters of the U.S.;
- Water delivery, reuse, and reclamation systems and facilities shall not be considered waters of the U.S.;

… (p. 2-3)

Agency Response: With respect to stormwater control features, please see the summary response at 7.4.4.

The final rule specifically excludes constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling.

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

7.744 In section (b), the proposal excludes 'waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" among other features listed in the section. While such systems have traditionally been excluded from CWA jurisdiction, we believe that due to the expansive nature of the proposal, the agencies should also exclude other constructed water management and treatment infrastructure with similar attributes to these waste treatment systems. These facilities could include water reuse and recycling ponds, treatment lagoons, and other - appurtenances; artificially constructed wetlands designed to treat agricultural or stormwater runoff (*e.g. green infrastructure*) used and managed to improve water quality; arid artificially constructed groundwater recharge basins designed to percolate surface water into groundwater basins. All of these features would revert to dry land if the application of water were to cease and should be included in the list of features identified in the proposed rule as excluded from the definition of "waters of the U.S." (p. 5)

Agency Response: With respect to stormwater control features, please see the summary response at 7.4.4.

The final rule specifically excludes constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge

basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling.

Palm Beach County, Florida (Doc. #16647)

7.745 The proposed rule, in section (b), excludes "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" among other features listed in the section. Due to the expansive nature of the proposed, the agencies should also exclude other constructed water management and treatment infrastructure with similar attributes to traditionally waste treatment systems, as well as constructed or managed water reuse and recycling systems that may not have been designed to meet the requirements of the Clean Water Act, but that serve a vital purpose for water recycling and provide marked water supply benefits. These facilities could include water reuse and recycling ponds, conveyance systems, treatment lagoons, and other appurtenances; artificially constructed wetlands designed to treat agricultural or stormwater runoff (e.g. green infrastructure) used and managed to improve water quality; and artificially constructed groundwater recharge basins designed to percolate surface water into groundwater basins. Simply put, as the agencies update and "clarify" the definition of what constitutes a "water of the US," they should also take the opportunity to update the language of the water treatment exclusion to recognize the advancements that have been made in wastewater design and treatment, as well as the innovative measures being undertaken by wastewater utilities to embrace a "one water" framework and incorporate water reuse into local and regional goals. (p. 10)

Agency Response: With respect to stormwater control features, please see the summary response at 7.4.4.

The final rule specifically excludes constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling.

7.746 The Palm Beach County Water Utilities Department (PBCWUD) is the third largest water and wastewater utility in Florida and operates one of the largest and most mature reclaimed water networks in the State. PBCWUD treats wastewater at its Southern Region Water Reclamation Facility and supplies reuse to a number of different golf courses and residential communities for irrigation use. The facility is permitted under Florida DEP NPDES Permit FL0041424. Under the conditions of the permit, PBCWUD discharges reclaimed water into existing stormwater treatment systems that are owned, operated and maintained by the various golf courses and homeowner's associations and have previously been permitted under Florida's environmental permitting programs. The storage of reclaimed water in the stormwater systems are subject to DEP Program Guidance Memo DOM 96-01 and the associated TBEL that have previously been approved by EPA.

Under the conditions of its permit, PBCWUD is limited to discharging reclaimed water into the systems up to an agreed upon control elevation. Due to Florida's wet weather and groundwater/surface water interface, water within the ponds and lakes that make up the stormwater systems is a blend of groundwater, stormwater and reclaimed water. In wet weather periods, there may be intermittent discharges of this blended water from the systems into "waters of the State." PBCWUD is required to monitor and report these intermittent discharges to DEP as part of its permit requirements. The privately owned systems are not considered to be "waters of the state" and are only included in the definition of "waters" in state statutes for the purposes of discharge from the system onto property or into other "waters."[411]

The lack of clarity in the proposed rule creates broad interpretive possibilities and uncertainties regarding water reuse and recycling infrastructure. Were the proposed rule to result in the stormwater management systems being designated jurisdictional "waters of the US/' PBCWUD would be required to meet water quality standards prior to the discharge of reclaimed water into systems under the existing approved permitting regime. This requirement would result in skyrocketing costs to implement a vital water reuse program that has been promoted by both the Florida DEP and USEPA as an effective way to address water supply concerns and could result in the abandonment of the program as not cost effective. Palm Beach County believes that water reuse and recycling infrastructure should be expressly included in the waste treatment exemption, along with previously permitted stormwater management systems that are utilized for reclaimed water distribution. (p. 12-13)

Agency Response: With respect to stormwater control features, please see the summary response at 7.4.4

7.747 To avoid regulatory uncertainty, legal deficiencies and the practical consequences that will result from finalization of the proposed rule, Palm Beach County proposes the following amendments to the rule language:

…

[411] See Section 403.301, Florida Statutes, and Guidance Memo DOM-96-01 (April 26, 1996) at p. 3 (describing golf course lakes and other lakes of ponds as "not waters of the state" and "part of the stormwater management system").

5) Clarify the waste treatment exemption to further clarify that innovative features other than treatment ponds or lagoons clearly fit within the exemption, including features that are designed to facilitate the delivery or disposal or reclaimed water that may not have been explicitly designed to meet the requirements of the Clean Water Act. In the case of Palm Beach County, these systems are included in the NPDES permit for the facilities, however, there are other situations where this is not the case and facility owners may see increased liability without an explicit change in the exemption.

6) Explicitly exempt green infrastructure from jurisdiction under the rule. (p. 13, 14)

Agency Response: With respect to stormwater control features, please see the summary response at 7.4.4

City of Portland, Bureau of Environmental Services (Doc. #16662)

7.748 2. Please clarify that the wastewater treatment system exclusion includes recycled water and innovative treatment technologies. Some innovative treatment technologies, such as wetland systems, do not fall within the traditional boundaries of a wastewater treatment plant. Please clarify that these types of treatment technologies are included in the exclusion for treatment systems" designed to meet the requirements of the Clean Water Act" even if they are located in areas that would otherwise make them jurisdictional. This requested change is consistent with longstanding Corps of Engineers practice that excludes constructed treatment wetlands from jurisdiction. (p. 2)

Agency Response: The final rule specifically excludes constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling.

Office of the Mayor and City Council, City of Palo Alto, California (Doc. #16799)

7.749 **Water Reuse**

Palo Alto is an active participant in the Regional Water Quality Control Plant Water Reuse Program. Since 1980 this program has reused over 10 billion gallons of water for irrigation and cooling, reducing the need to import potable water and reducing discharges of wastewater into San Francisco Bay. Water reuse in California is an essential requirement to meet demand, particularly at a time of recurring droughts. Investing in the necessary infrastructure and facilities to increase water reuse is expensive, and while government must ensure public safety and environmental compliance, it should not discourage the investment. Unfortunately, the proposed rule introduces impediments to

water reuse and does not protect investments made in water reuse, even though federal agencies encourage such activity.

Recycled water is treated and distributed in ancillary infrastructure to a wastewater treatment system and can include channels to convey wastewater, settling or retention basins, and a separate pipe system to deliver the recycled water. Some of these facilities could fall under the definition of "tributary" of the proposed rule, could be located within a floodplain or riparian area, and would not necessarily be covered by the wastewater treatment exemption in the rule, which stipulates the exemption only for "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act." While water recycling provides further treatment of wastewater, the purpose for its treatment is not "designed to meet the requirements of the Clean Water Act." Further, the rule's exemption for settling basins does not afford sufficient protection for water reuse facilities because it does not cover detention basins, reservoirs, or associated infrastructure such as channels, ditches, or other conveyances.

At a minimum, we ask that the final rule include a clear exemption for all water reuse and water reclamation facilities. (p. 3-4)

Agency Response: **The final rule specifically excludes constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling.**

7.750 **Water Supply**

The City of Palo Alto purchases its water supply from the San Francisco Regional Water Supply System, a system of reservoirs and aqueducts that delivers water from the Sierra Mountains to San Francisco and surrounding communities. The quality of the water from the SF Regional Water Supply System is such that it requires minimal to no pre-treatment. The system of reservoirs and many of the associated rivers and streams are already considered "Waters of the United States" under the Clean Water Act. We are unaware of any consultation that has taken place with state and regional entities that own and manage these water supply facilities with respect to any changes that may occur as a result of this proposed rule. We urge the agencies to carefully consider the impact of this rule on water supply systems and make the appropriate changes in the final rule to ensure that the public can continue to rely upon these sources for dependable and affordable water supply.

…

Potential for Litigation

The City of Palo Alto prides itself on environmental stewardship and exceeds state and federal mandates for the utility services we provide our residents. We consider ourselves a partner with the federal and state governments in achieving the objectives of the Clean Water Act. However, the proposed rule fails to provide the necessary clarity that gave impetus to this rule. We support a rulemaking process that interprets court decisions and ensures future progress in meeting the requirements of the Act. Unfortunately, the aggressive reach of this rule and its ambiguous provisions and terminology introduces uncertainty, requires more agency analysis and intervention, and creates increased potential for litigation. In order to avoid bureaucratic delays and litigation, we provide the following examples of ambiguity that require clarification:

…

The wastewater treatment exemption has a history of legal challenge. Its application to water reuse facilities and storm water features must be clearly defined. (p. 4, 5)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

With respect to stormwater control features, please see the summary response at 7.4.4

Board of Supervisors, Amador County, California (Doc. #17450)

7.751 Changes to the terms "navigable water" or "waters of the United States" will likely alter the way many water bodies arc regulated and trigger new unfunded mandates on local governments. Additionally, the expanded definition will subject counties to additional enforcement actions, including civil and criminal penalties, and place local governments at great risk of third-party litigation. Some examples include:

…

- Water supply systems, including local and private systems would likely qualify as waters of the U.S. as they convey flow to downstream waters.
- Water reuse facilities are separate from fresh water supply systems and never designed with the objective to meet the parameters of the CWA. The application of water reuse facilities to the proposed definition of Waters of the U.S. is unclear. Reclaimed water is often used for landscape irrigation but in some cases becomes part of the water supply system. It appears the intent was not to include such facilities and if so, should be explicitly exempted.

… (p. 2)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

Board of Supervisors, Lassen County, California (Doc. #17461)

7.752 …even though your agencies have maintained that there is no intent to impact water reuse facilities, the rule does not clearly address reuse facilities associated with wastewater treatment systems. Reuse facilities were constructed to augment water supply for irrigation and sometimes drinking water, and were not designed with the objective to meet the parameters of the CWA. The rule needs to clearly state your agencies' intent for water reuse facilities. (p. 2)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

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

7.753 The continued exclusion of wastewater treatment systems is wholly appropriate. It is likewise appropriate that water supply or municipal systems are not excluded. Many domestic water supply systems and infrastructure systems are simply too large and potentially involve multiple river drainages to be safely excluded as a matter of rule. (p. 2)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

California State Association of Counties (Doc. #9692)

7.754 **Water Quality Treatment Features**: Any constructed feature built for the purpose of water quality treatment or runoff control as required by any agency should be exempt from regulation under the CWA. It is important that counties are able to construct and maintain or cause to be constructed and maintained these features in a manner that is consistent with the overall goal and public good of stormwater management without subjecting themselves and property owners to federal regulation that can delay or interfere with the features public safety or water supply protection functions. Hindrances and delays regarding this function, and discouragement to build treatment features, that will result from federal permit processes and compensatory mitigation requirements will, ironically, conflict with the goals of the CWA.

As examples:

- Permanent settling basins that are constructed on a site to decant sediment-laden runoff from the site itself or properties above it prior to running off the property or into a storm drain.
- Green Infrastructure projects, such as bioswales and artificial wetlands, which are intended to impose or restore natural hydrological features and promote multiple benefits, have been embraced by many counties and municipalities. The Los Angeles County Flood Control District, for example, has constructed an artificial wetland next to a concrete flood control channel and an artificial "natural stream" adjoining an existing concrete channel. Additionally, in many areas, such a Los Angeles County, counties and municipalities are combining their efforts in designing facilities to treat and infiltrate stormwater and urban runoff in facilities that provide other community benefits. Such facilities are artificially created and will be subject to sediment accumulation that will need to be removed; vegetation taking root in the sediment will also need to be removed and replaced. These actions are needed to maintain the facilities' water quality function. To encourage the development of such projects, which create water features where none existed before, Green Infrastructure projects should not be designated as WOUS.
- Bioswales arc constructed to serve a filtering function. Such facilities are artificially created and will be subject to sediment accumulation that will need to be removed, along with vegetation taking root in the sediment, in order to maintain their water quality function. (p. 7-8)

Agency Response: With respect to stormwater control features, please see the summary response at 7.4.4

7.755 **Artificial Groundwater Recharge Basins**: Under the current proposal, off-channel groundwater recharge basins that are located adjacent to a WOUS may be considered jurisdictional via the agencies "adjacent waters" language. In keeping with the spirit of the agencies stated intent not to regulate groundwater, language should be added that exempts these types of basins.

For example, starting almost 100 years ago, counties in southern California have constructed artificial basins for the purpose of replenishing local area aquifers. Today, the counties in southern California are home to over 20 million people, and the population is

expected to increase. Groundwater serves a significant portion of the water supply for the inhabitants of these counties. In many communities, groundwater actually makes up the majority of their water supply. Counties in southern California are under pressure from the federal and State governments to lessen their dependence on water imported from the Sacramento/San Joaquin Delta and the Colorado River for the sake of environmental concerns at these source areas. The State of California declared a drought emergency in early 2014 that is still in effect; there are projections that drought conditions may continue for a very long period of time, even decades. It is therefore vital that groundwater recharge in these counties is not only maintained but enhanced.

An exemption for these groundwater recharge basin s is consistent with exemptions the agencies have already given for artificial stock ponds and waters "created for purely aesthetic reasons." The recharge basins were artificially created. Although the basins may be located adjacent to a river or channel that is designated a WOUS, the basins have no significant hydrologic connection to a WOUS; the waters entering the basins go down into groundwater aquifers, which are not WOUS.

CSAC strongly believes subjecting artificial groundwater recharge basins to federal permits will result in reducing groundwater recharge at a time when it is vital to increase recharge. Permit processes will result in delays in maintenance necessary to maintain the basins' operability and water storage and percolation capacity. The costs associated with groundwater recharge will significantly increase due to: increased staff time for permit acquisition; increased monitoring and reporting; the imposition of compensatory mitigation; and increased amount of work to remove accumulations in the basins that increased while waiting for the permits to be processed. Similar impacts can be expected for any project, including "drought buster" projects being sought by the State of California, to enhance operations, storage or percolation at existing groundwater recharge basins or create new basins. In addition to adversely impacting the water supply of millions of people and conflicting with the State's goal to alleviate the impact of prolonged droughts, the imposition of federal permits will, ironically, result in increased demand for imported water that will conflict with federal goals to reduce dependence on imported water. (p. 8-9)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

Association of California Water Agencies (Doc. #12978)

7.756 California's Water Conveyance and Delivery Systems should be Excluded from the Proposed Definition of "Waters of the United States"

The proposed rule would define "waters of the United States" to include "tributaries." (79 Fed. Reg. No. 76, 22198 (April 21, 2014)). It would define "tributaries" as "water physically characterized by the presence of a bed and banks and ordinary high water mark. . . , which contributes flow, either directly or through another water" to waters of the United States (Id. at 22201). Although the proposed rule includes narrow exceptions for some types of man- made, non- stream conveyance facilities, the proposed rule states specifically that, "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 . . . . 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 paragraphs (b)(3) or (4) (Id. at 22199, 22201- 22202). This definition is so broad that numerous man- made, non-stream conveyances would constitute tributaries and become subject to unnecessary permitting. ACWA requests that water conveyance systems be excluded from the definition of "waters of the U.S." in the proposed rule. Additionally, the proposed rule should explicitly exempt Federal Energy Regulatory Commission relicenses. (p. 3-4)

Agency Response: Although the agencies have modified the definition of "tributary" in the final rule, the preamble states that 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.

7.757 ACWA does not believe it is EPA's intent to regulate water re- use facilities, retention and detention basins, groundwater recharge basins, constructed wetlands and similar water and wastewater infrastructure that is often located adjacent to "waters of the United States". ACWA requests water infrastructure facilities (including construction, maintenance, and operation) adjacent to traditionally navigable waters be excluded from the proposed definition of "waters of the United States". (p. 13)

Agency Response: The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional.

7.758 While the proposed rule includes an exemption for artificial lakes and ponds used exclusively for settling basins, this language does not cover water reuse facilities. Reuse facilities can function or take on the characteristics of a wetland and can receive and discharge water into surface ditches that are not exempt. In addition, the proposed rule's wastewater treatment exemption would not extend to water reuse facilities because such facilities are not expressly "designed to meet the requirements of the Clean Water Act," a

condition stipulated in the exemption, nor do the facilities treat wastewater. ACWA requests the construction, operation and maintenance of water recycling facilities, including associated storage ponds and percolation basins, be excluded from the proposed definition of "waters of the United States". (p. 15)

Agency Response: Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

7.759 ***3. The proposed rule increases the regulatory burden to construct wetlands for water treatment increased.***

Constructed wetlands are designed to treat urban runoff and remove pollutants before they enter a traditional navigable water. These projects are often integrated into water agencies' existing Clean Water Act compliance permits. The constructed wetland ponds are currently non- jurisdictional, but are often located in floodplains and adjacent to "water of the United States." Under the proposed rule, the ponds themselves would become jurisdictional. ACWA requests the proposed rule exclude man- made treatment wetlands. (p. 17-18)

Agency Response: Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act are listed as one of the specific features not considered "waters of the United States", even where they would otherwise meet the terms of the rule. See summary responses at 7.1 and 12.3.

California Association of Sanitation Agencies (Doc. #12832)

7.760 ***The Waste Treatment Exemption Should Specifically Include Water Recycling Facilities and Effluent Storage Ponds***

In order to address the historic drought conditions currently plaguing the western states, water and wastewater agencies must rely on a full suite of flexible options to provide potable and recycled water supplies for a variety of ongoing uses. Thus, CASA opposes any direct or indirect regulatory impacts on water recycling, water storage, and other mechanisms that play a part in recycled water infrastructure and processes as a result of the proposed rule.

As noted above, we appreciate the explicit acknowledgement and codification of the waste treatment exemption in the proposed rule. However, we believe it is important that the proposed rule expressly states that the waste treatment exemption extends to recycled

water facilities. California water recycling projects often depend upon artificially created wetlands and storage ponds to treat millions of gallons of water a day. If these features are considered waters of the U.S. and are excluded from the waste treatment exemption, they could theoretically no longer be used as an integral component of the waste treatment systems, forcing the closure of important recycled water projects critical to California's water supply. Moreover, a lack of clarity on this issue may stall or halt the development of recycled water projects at a time when recycling is needed the most to address climate resiliency priorities.

Because recycled water demand is variable with time of day and season, recycled water agencies maintain reservoirs or storage basins/ponds to store recycled water during periods of low usage in anticipation of peak demands. These features are an essential component of the recycled water process and integral to an agency's ability to continue reliably producing and supplying recycled water in many instances. The proposed rule should affirm that such reservoirs along with influent and treated effluent storage ponds are within the scope of the waste treatment exemption, consistent with the regulatory definition of "complete waste treatment system" found in existing federal regulations.[412] As the proposed rule and existing practice acknowledge, waste treatment systems designed to meet the requirements of the Clean Water Act are not waters of the U.S., and treatment systems should include any facilities, including storage ponds and basins, related not only to traditional treatment facilities and processes, but also to the production of recycled water.

In the alternative, recycled water facilities and features (including storage ponds, basins, artificially created wetlands, recycled water reservoirs and other features associated with water recycling) should be expressly exempted as part of the specifically identified features that are not considered waters of the U.S. within the proposed rule. In this case, recycled water facilities would be treated similar to artificial lakes, ponds, swimming pools, ornamental waters, and groundwater, which are specifically identified and expressly exempted. In either case, whether recycled water facilities are considered part of the waste treatment exemption or have their own specifically identified exemption, it is essential that the proposed rule not interfere with recycled water production and treatment by making those features jurisdictional.

The failure to include an explicit statement in the final rule would leave open the question of whether these features are considered "waters of the U.S." Such a situation could lead to regulatory disincentives to produce recycled water in California and other western states, compounding a water scarcity situation that is already dire. Pending and adopted federal and state legislation to address the impacts of our historic drought contain a number of approaches to encourage recycled water projects. Transforming components of the recycled water process (including integral systems such as storage ponds) into jurisdictional waters would completely undercut efforts to address the drought and have

[412] See 40 C.F.R. §35.2005(b)(12), defining "complete waste treatment system" as "all the treatment works necessary to meet the requirements of title III of the [CWA], involving . . . the ultimate disposal, including recycling or reuse, of the treated wastewater and residues which result from the treatment process." (Emphasis added); see also 40 C.F.R. §35.2005(b)(49) [definition of "treatment works" includes "storage of treated wastewater in land treatment systems before land application" among other things].

resoundingly negative water supply ramifications across the state. We concur with the comments of Representative Grace Napolitano (D-CA) delivered to the House Committee on Transportation and Infrastructure Committee at the hearing held on June 11, 2014, as she questioned why in light of the severe drought in California, USEPA would not expressly include recycled water within the scope of the waste treatment exception. Given the drought and dire need to develop recycled water facilities in the arid west, clarification that excludes recycled water facilities from additional federal regulation is absolutely vital. (p. 2-3)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

7.761 In addition, many CASA member agencies utilize spreading grounds or basins in order to facilitate groundwater replenishment; a vital part of water management throughout California. Others utilize artificially created effluent storage ponds as part of their treatment process. Many agencies maintain reservoirs or storage basins/ponds to store recycled water. These artificially created features and spreading grounds have not previously been defined or regulated as "waters of the United States," and should remain separate. For this reason, the proposed rule should expressly include…, spreading grounds/basins, …within the scope of the Waste Treatment Exception,… (p. 3)

Agency Response: **In the exclusion for artificial lakes or ponds, the agencies have changed "exclusively" to "primarily" in describing the uses. Artificial lakes and ponds are often not used exclusively for one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. The change to the exclusion reflects Agency practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use. The list of uses has always been illustrative rather than exhaustive.**

7.762 If these "adjacent" wastewater and recycled water facilities, including spreading grounds, are defined to be within the jurisdiction of the CWA, it would adversely impact CASA's member agencies' ability to augment groundwater supplies and to effectively provide wastewater treatment services. The plethora of additional and unnecessary requirements, regulations, and permitting associated with making these areas into jurisdictional waters, including but not limited to the procurement of an NPDES permit, assigning designated uses, exposure to penalties and potential third party liability for effluent violations, and impairment of the ability to operate and maintain these areas, would erect new mandates with no benefit to the surrounding ecosystems and waterbodies. Such a result represents

an extreme disincentive to sustainable water supply development and a significant impairment of wastewater agencies' ability to protect public health and safety through innovative and effective wastewater treatment.

Within the proposed rule, there are two specific exemptions that could potentially address this issue. Pursuant to section 328.3(b)(5)(i) and 122.2(b)(5)(i)2, a spreading ground could fall under the definition of "[a]rtificially irrigated areas that would revert to upland should application of irrigation water to that area cease" (79 FR 22263 and 22268) Spreading grounds utilized by wastewater treatment facilities are generally artificially created and might not otherwise exist aside from the application of wastewater effluent to the area. However, without being explicitly stated, it is not clear enough that this definition would apply to upland wastewater spreading grounds. Similarly, pursuant to section 328.3(b)(5)(ii) and 122.2(b(5)(ii), wastewater and recycled water ponds and spreading grounds could fall under an expanded definition of "[a]rtificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock water, irrigation, settling basins, or rice growing." (79 FR 22263 and 22268) The word "such" seems to indicate that these are merely examples, not an exhaustive list, and thus spreading grounds utilized in conjunction with and/or as part of the overall wastewater treatment process could fall under this exclusion. However, without specific references within these provisions to treatment ponds and spreading grounds, CASA and its members are very concerned that these facilities could become jurisdictional and create significant problems for agencies attempting to protect public health and the environment. This, we would request the explicit inclusion of the terms such as "spreading grounds" and "wastewater and recycled water storage," within this section. (p. 4-5)

Agency Response: **See the two previous responses.**

Colorado Stormwater Council (Doc. #12981)

7.763 Furthermore, the existing regulations include exclusions for waste treatment facilities that are constructed to meet CWA requirements and are constructed in uplands. Currently, this exclusion is inconsistently implemented or misinterpreted by USACE and EPA staff at the national offices and regional regulatory field offices level. Clearly, additional language is necessary to restore the intent of this exclusion.

The CSC requests that language be included in the Proposed Rule to state that treatment of stormwater runoff from rural and urban settings conforms to the exclusion and that the exclusion applies to all necessary and constructed components of the stormwater treatment system. (p. 4)

Agency Response: **The final rule includes a new exclusion in paragraph (b)(6) for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. See summary response at 7.4.4. The agencies' longstanding practice is to view stormwater water 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 jurisdictional currently even where used as part of a stormwater management system. Nothing in the proposed rule was intended to change that practice.**

Many commenters, particularly municipalities and other public entities that operate storm sewer systems and stormwater management programs, expressed concern that various stormwater control measures—such as stormwater treatment systems, rain gardens, low impact development/green infrastructure, and flood control systems—could be considered "waters of the United States" under the proposed rule, either as part of a tributary system, an adjacent water, or as a result of a case-specific significant nexus analysis.

This exclusion should clarify the appropriate limits of jurisdiction relating to these systems. A key element of the exclusion is whether the feature or control system was built in dry land and whether it conveys, treats, or stores stormwater. Certain features, such as curbs and gutters, may be features of stormwater collection systems, but have never been considered "waters of the United States."

7.764 7. Constructed Wetlands. There is language in the Proposed Rule that would appear to make a large number of constructed stormwater ponds and constructed wetlands fall under the "tributary" definition. *"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 paragraphs (a)(1) through (3) of this section. 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 in paragraph (b)(3) or (4) of this section."* (Proposed Rule at 40 CFR 230.3(u)(5)) It seems inappropriate and undesirable to have a large number of constructed stormwater ponds and constructed wetlands fall under the "tributary" definition and be considered WOTUS.

The CSC requests that the Proposed Rule clarify the rule language and/or provide a categorical exclusion for most types of constructed stormwater ponds and constructed wetlands. (p. 5)

Agency Response: The agencies have modified the definition of tributary in the final rule. With respect to stormwater control features, please see the summary response at 7.4.4

Association of Clean Water Administrators (Doc. #13069)

7.765 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…further clarity is needed on whether, when, or what parts of stormwater collection and treatment systems fall within the exclusion of "waste treatment systems", and therefore, a definition of these systems, or better criteria through which these systems will be identified, is warranted. (p. 3)

Agency Response: **Please see summary response at 7.4.4.**

National Association of Flood & Stormwater Management Agencies (Doc. #13613)

7.766 The (b)(1) Waste Treatment Systems exemption does not clearly address stormwater treatment systems such as bioswales and constructed wetlands treatment systems. NAFSMA urges the federal agencies to clarify that such water quality treatment systems constructed to meet the requirements of the CWA are exempt. In addition, off- channel groundwater recharge basins, constructed adjacent to WOTUS should also be exempt. (p. 2)

Agency Response: **Please see the summary response at 7.4.4. Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

Western Coalition of Arid States (Doc. #14407)

7.767 2. Exclude all stormwater retention and groundwater recharge basins from the proposed definition of waters of the U.S. Although, artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as settling are currently excluded from the proposed definition, it is unclear from the preamble whether the agencies intend to exclude basins that are designed to discharge to the subsurface. Also, stormwater retention basins may be excluded as "waste treatment systems" since they are used to prevent or reduce sediment discharges from stormwater systems to waters of the U.S. (p. 2)

Agency Response: **With respect to stormwater control features, please see the summary response at 7.4.4 Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

7.768 4. Exclude all isolated impoundments and upland tributaries connected to them from the proposed definition of waters of the U.S. When all upland flow is terminated in a flood control structure and there is no discernible surface connection to an (a)(1) through (a)(3) water, CWA jurisdiction is not warranted, (p. 3)

Agency Response: **The final rule includes a new exclusion in paragraph (b)(6) 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 water 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 jurisdictional currently even where used as part of a stormwater management system. Nothing in the proposed rule was intended to change that practice A key element of the exclusion is whether the feature or control system was built in dry land and whether it conveys, treats, or stores stormwater. See also summary responses 8.1.2 and 8.3 for discussion of tributaries and breaks in flow.**

7.769 Groundwater recharge basins should be exempt from jurisdiction since the recharge/storage activity and water quality requirements of the water (if recycled water) are regulated by State laws and protected by CWA Sect. 101(b). Also, the basins are specifically designed and operated to maximize recharge to the subsurface and, therefore, minimize discharge to the (a)(1)-(a)(4) waters. (p. 9)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

Florida Rural Water Association (Doc. #14897)

7.770 Unless significantly revised, the proposed waters of the United States rule will significantly increase cost of reusing reclaimed water in Florida. Another exemption should be developed for reuse and use of reclaimed waters. EPA should categorically exempt all components of a functioning reuse system from the rule as they address and provide significant benefits in areas such as alternative water supplies and aquifer recharge. Reuse in Florida occurs statewide and takes many forms. Public access reuse systems irrigate 343,782 residences, 536 golf courses, 948 parks, and 358 schools. Also, electric utilities and domestic wastewater treatment utilities in Pensacola, Miami-Dade County, Polk County, and elsewhere have partnered (or are partnering) to deliver reclaimed water to electric power plants for cooling water and other industrial purposes. Meanwhile, other utilities use rapid infiltration basins, percolation ponds, and other reuse facilities to recharge the aquifer, offset the impacts of groundwater withdrawals, and

increase groundwater supplies for public use. The sum effect is that reclaimed water is viewed a positive environmental action, as a commodity in Florida and a critical piece of Florida's future water supply plans, not as a mere waste product of the domestic wastewater treatment process…

… A primary goal of the CWA is to abate surface water discharges, as outlined in 33 U.S.C. § 1251(a)(1). The reuse of reclaimed water is the realization of this goal. Accordingly, it seems that EPA would not want to adopt a rule that would impede reuse infrastructure in any way. Florida reuse utilities hold state-issued permits that govern their reuse systems, and applicable State rules prohibit reclaimed water irrigation practices or discharges to groundwater that cause or contribute to surface water impairments (p. 2-3)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional.

7.771 Any final rule should retain the current exclusion (33 CFR 328.3(a) and 40 CFR 122.2) for "waste treatment systems" and clarify that that the exclusion includes similar practices implemented by drinking water treatment systems. (p. 4)

Agency Response: **The existing exclusion for waste treatment systems moves to paragraph (b)(1) with no substantive changes. One ministerial change is the deletion of a cross-reference in the current language to an EPA regulation that no longer exists. Because the agencies are not addressing the substance of the exclusion, the agencies do not make conforming changes to ensure that each of the existing definitions of the "waters of the United States" for the various CWA programs have the exact same language with respect to the waste treatment system exclusion, with the exception of deleting the cross-reference. See Summary response at 7.1.**

Western Urban Water Coalition (Doc. #15178)

7.772 The statement that "[t]he agencies propose . . . no change to the regulatory status of water transfers" appears multiple times in the Preamble. 79 Fed. Reg. at 22189; see also id. at 22193, 22199 and 22217. EPA's Water Transfers Rule excludes any "activity that

conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use" from the National Pollutant Discharge Elimination System ("NPDES") created by CWA. 40 C.F.R. § 122.3(i) ("Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use . . ."). The Water Transfers Rule does not define "waters of the United States," although EPA relied on one of the definitions the agencies propose to change in the Proposed Rule. See 40 C.F.R § 122.2. 73 Fed. Reg. 33,697, at 33,699, note 2 (June 13, 2008). In addition to the statements in the preamble, the final rule should expressly state in regulatory text that it does not change the regulatory status of water transfers. (p. 7-8)

Agency Response: **Regarding water transfers, please see summary response at 12.3.**

Pennsylvania Municipal Authorities Association (Doc. #15374)

7.773 PMAA would support wastewater treatment systems and drinking water systems, and their auxiliary operations, to be specifically excluded from the definition of tributary.

a. We suggest that the exemption for wastewater treatment systems be expanded to include all facets of that treatment, such as recycled water storage ponds, reconstructed wetlands associated with water reuse, connecting trenches, etc.

b. Likewise, some of the same "natural" infrastructure mentioned above, as well as ground water recharge basins, are also applicable to water treatment systems for storage and retention, and should be included under the exemption provision. (p. 1)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

The United States Conference of Mayors et al. (Doc. #15784)

7.774 The proposed rule provides that "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" (emphasis added) are not "waters of the U.S." In recent years, local governments and other entities have moved toward a holistic approach in treating stormwater by using ponds, swales and wetlands. Traditionally, such systems have been exempt from the CWA, but due to the broad nature of the proposed rule we believe the agencies should also exempt other constructed wetland and treatment facilities which may inadvertently fall under the

proposed rule. This would include, but not be limited to, water and water reuse, recycling, treatment lagoons, setting basins, ponds, artificially constructed wetlands (i.e. green infrastructure) and artificially constructed groundwater recharge basins. Therefore, we ask the agencies to specifically include green infrastructure techniques and water delivery and reuse facilities under this exemption.

A. Green Infrastructure

With the encouragement of EPA, local governments across the country are utilizing green infrastructure techniques as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes to treat stormwater runoff, These more beneficial and aesthetically pleasing features, which include existing stormwater treatment systems and low impact development stormwater treatment systems, are not explicitly exempt under the proposed rule, Therefore, these sites could be inadvertently impacted and require Section 404 permits for green infrastructure construction projects if they are determined to be jurisdictional under the new definitions in the proposed rule.

Additionally, it is unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established. Moreover, if these features are defined as "waters of the U.S.," they would be subject to all other sections of the CWA, including monitoring, attainment of water quality standards, controlling and permitting all discharges in these features, which would be costly and problematic for local governments.

Because of the multiple benefits of green infrastructure and the incentives that EPA and other federal agencies provide for local governments to adopt and construct green infrastructure techniques, it is ill-conceived to hamper local efforts by subjecting them to 404 permits or other requirements that would come with being considered a "waters of the U.S."

B. Water Delivery and Reuse Facilities

Across the country, and particularly in the arid west, water supply systems depend on open canals to convey water. Under the proposed rule, these canals would be considered "tributaries." Water reuse facilities include ditches, canals and basins, and are often adjacent to jurisdictional waters. These features would also be "waters of the U.S." and as such subject to regulation and management that would not only be unnecessarily costly, but discourage water reuse entirely. Together, these facilities serve essential purposes in the process of waste treatment and should be exempt under the proposed rule.

Requests:

Clarify the waste treatment exemption by stating that green infrastructure practices and water delivery and reuse facilities meet the requirements of the exemption."

Expand the waste treatment exemption to include systems that are designed to meet *any* water quality requirements, not just the requirements of the CWA.

Provide a specific exemption for green infrastructure and water delivery and reuse facilities from the "waters of the U.S." definition. (p. 6-7)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

With respect to stormwater control features (e.g., green infrastructure), please see the summary response at 7.4.4

7.775 Emergency Exemptions

In the past several years, local governments who have experienced natural or man-made-disasters" have expressed difficulty obtaining emergency clean-up waivers for ditches and other conveyances. This, in turn, endangers public health and safety and jeopardizes habitats. We urge the EPA and the Corps to revisit that policy, especially as more waters are classified as "waters of the U.S." under the proposed rule.

Request:

- Set clear national guidance for quick approval of emergency exemptions. (p. 7-8)

Agency Response: **The need for emergency action for a specific time and place is not related to the issue of whether a water is a defined "water of the United States" under the Clean Water Act. Rather, the agencies believe that such situations are better addressed through implementation actions, such as streamlined permitting procedures, that can provide the tailored oversight necessary to protect vital water resources while adequately responding to unusual emergency circumstances.**

Washington State Water Resources Association (Doc. #16543)

7.776 **A. Real World Consequences Associated with the Proposal**

The previously noted "expansion" will, in turn, have negative real world consequences without any concomitant environmental benefits. Adoption of the proposal would significantly increase the time required before an entity can construct or modify necessary infrastructure; significantly increase the costs associated with the permitting, construction and potentially the operation of such infrastructure; unnecessarily increase post-permitting mitigation costs; and potentially even preclude the construction and operation of the infrastructure, placing at risk the ability to timely meet essential consumptive use and environmental/recreational water needs. For example:

…

To the extent water supply agencies desire to maximize the use of scarce water resources through innovative recharge, reuse and recovery projects, many of which involve the

construction and operation of holding basins and recharge ponds, as well as connecting canals and ditches, they will find that there is no exemption for such "water supply" activities comparable to that available to wastewater treatment facilities. Hence, employment of these necessary facilities faces a new regulatory hurdle.

… (p. 7, 8)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

7.777 **C. Examples of Proposal's Impact on Municipal Water Suppliers**

Municipalities have a responsibility to meet water supply, wastewater treatment and stormwater control needs. Meeting these needs often requires significant investments in water storage reservoirs; water recycling and reuse facilities; desalinization plants; pump-back projects; groundwater recharge facilities; and reverse osmosis water treatment plants. Putting this water to beneficial use will also require the operation, maintenance and expansion of miles and miles of delivery and distribution pipelines.

As the demand for water continues to rise, NWRA's members are committed to undertaking a variety of efforts to meet this need. These efforts include extensive water conservation efforts as well as the reclamation and reuse of water – i.e. water recycling. Reclaimed and reused water is a beneficial use that fully utilizes local water resources and reduces the demand for imported water. The processes for reclaiming and reusing water are costly, but are becoming increasingly feasible in areas of the country where groundwater and surface water sources are strained and the cost or availability of imported water are prohibitive. Water authorities across the country are investing millions of dollars in infrastructure to utilize this drought proof water resource. Treatment and distribution costs of recycled water are already high, making this valuable resource marginally cost effective in some places. Any significant increase in regulation will escalate the cost of utilizing this water and discourage its development.

Under the proposed rule, water reclamation and reuse facilities are not exempt from being designated "waters of the U.S." As noted earlier, ditches that transport effluent or discharged water could also be considered a "tributary" under the proposed rule and be categorically regulated. The proposed rule defines as a "tributary" any natural or manmade feature that has a bed, bank, ordinary high water mark, and conducts flow to another water. In addition, reclamation and reuse facilities are frequently located in a floodplain or otherwise adjacent to jurisdictional water where all waters are categorically defined as "waters of the U.S." While the proposed rule includes an exemption for

artificial lakes and ponds used exclusively for settling basins, such reuse facilities can function or take on the characteristics of a wetland and can receive and discharge water into surface ditches that are not exempt. The proposed rule's wastewater treatment exemption would not extend to an associated water reuse facility because such facilities are not expressly "designed to meet the requirements of the Clean Water Act," a condition stipulated in the rule. Many states have acknowledged the value of recycled water. Some states like California have established a statewide goal (California Water Plan) of recycling 2.5 million acre feet of water by 2030. In 2009, .67 MAF was recycled; increasing to 2.5 MAF is ambitious, but necessary to help drought-proof the state. Currently, 3.5 MAF of treated wastewater is being discharged to the ocean, and not beneficially reused.

The proposed rule's impact on recycled water projects of this nature can be highlighted by one of NWRA's members, the Eastern Municipal Water District (EMWD). EMWD is a water and wastewater agency in Southern California that utilizes nearly 100 percent of the water it generates, with recycled water constituting 30 percent of its entire water supply portfolio – over 35,000 acre feet annually. In recent years EMWD, in cooperation with federal partners at the Bureau if Reclamation, has developed 5,714 acre-feet of seasonal storage, five million gallons of elevated storage (to pressurize the system), 200 miles of recycled distribution water pipeline, and 19 pumping facilities. EMWD currently has greater demand than supply for recycled water, and in response has prepared unique allocations for customers.

We are concerned that under the proposed rule, 10 EMWD recycled water storage sites could become jurisdictional because they are located in floodplains, are adjacent to jurisdictional water, and likely possess a subsurface hydrologic connection. After becoming jurisdictional, regular maintenance and vegetation removal of these 500 acres of ponds would require Sec. 404 permits. This added regulatory burden would not only increase the cost of recycled water, and potentially delay further development of recycled water storage ponds, but could hamper the development of this drought-proof water supply. Numerous agencies in the arid southwest share this scenario, concern, and dilemma.

Water reclamation and reuse facilities should be expressly exempt from this rule. The importance of this point is particularly evident in times of drought such as the one that currently affects most western states. Developing new sources of water for consumption should be encouraged. This rule could discourage water reuse and interfere with the successful deployment of water recycling programs.

This issue was highlighted during several hearings in the U.S. House of Representatives where NWRA members testified. During a June 11, 2014 House Committee on Transportation and Infrastructure Committee Hearing, then EPA Deputy Administrator Robert Perciasepe responded to questions from Congresswoman Grace Napolitano that it was not EPA's intention to regulate water recycling facilities. It is our hope that the Agencies follow through on this assertion and clearly exempt water recycling facilities and associated infrastructure. (p. 11-13)

<u>Agency Response:</u> Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the

agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

7.778 **D. Examples of Proposal's Impact on Groundwater Banking and Recharge**

The Agencies have consistently stated that the proposed rule will not regulate groundwater. However, concern remains that the proposal could inadvertently envelope some groundwater banking and recharge projects. Multiple NWRA members operate groundwater banking and recharge projects. These projects can capture unused irrigation water and treated effluent from municipal treatment plants and divert it into basins designed to allow incoming flows to be "banked" in shallow aquifers for future use. Some of these facilities are located immediately adjacent to rivers. On occasion these sites were specifically selected based in part on adjacency to ensure operation efficiency and maximize water savings. However, these facilities have never been subject to CWA jurisdiction. Groundwater banking is an efficient water storage method that helps to conserve water by reducing water loss due to evaporation. The Agencies should provide additional clarity that the rule will not apply to groundwater, shallow subsurface aquifers and groundwater banking and recharge projects. (p. 13)

Agency Response: **The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling.**

Iowa League of Cities (Doc. #18823)

7.779 **Green Infrastructure**

Another area within storm-water systems that has raised concerns is the utilization of green infrastructure for the management of storm-water runoff. This includes projects that include permeable paving, dike systems, vegetation, soils and natural processes. Some cities within the Iowa have been lauded by the EPA for their usage of this type infrastructure to control storm-water and gaining additional benefits important to the EPA of nutrient reduction and flood mitigation. These cities now have to question whether these projects will need to meet WQS or if maintenance of the systems will require a Section 404 permitting process. Neither, the proposed rule language nor the preamble guidance address these systems for storm-water management.

City Example: *After the 2008 flooding, some cities in Iowa have been utilizing green infrastructure, such as newly constructed wetlands, to control flooding and act as a part of their storm water system. They are concerned that these efforts that have been praised could now be brought under further regulation.*

Request for EPA Response: We request that the EPA specifically exclude green infrastructure and outline the Agency's understanding of what is included within green infrastructure similar to what was done for agricultural practices under the joint interpretive rule with the Department of Agriculture. (p. 4-5)

Agency Response: With respect to stormwater control features (e.g., green infrastructure), please see the summary response at 7.4.4

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

7.780 An additional exclusion should be provided for within the rules. This exclusion should relate to the development of municipal and residential water supplies that are utilized within the same natural river drainage from which the water is developed. This exclusion would recognize the at times exigent need for the development of domestic water supplies and the anticipated large percentage of this developed water resource returning to the natural stream channels from which it was developed after it is used than occurs in other uses. This exclusion would be a logical extension of the waste treatment systems exclusion. Including the requirement that development and utilization of water supplies for domestic needs be within the same drainage as the water naturally occurs recognizes that, if a water supply is developed and then exported away from the natural drainage of its origin, the water quality of the originating based could be severely degraded. As a consequence, the Agencies reviews would be relevant in such circumstances. (p. 3)

Agency Response: Many commenters asked for an exclusion for drinking water supply systems, similar to exclusions for wastewater treatment and stormwater control. Because water supply networks can be both complex in structure and extensive in size, involving the use of tributaries as well as a variety of other features, the agencies determined that a complete exclusion of such systems is not appropriate. However, not all portions of these systems would be regulated under the final rule. Some portions of these systems are tributaries, or even traditional navigable waters, and so would be regulated under this rule for the same reasons that all such waters are subject to regulation as "waters of the United States." At the same time, there are some portions of these systems that would be excluded from regulation under the paragraph (b) exclusions, including (b)(3) (ditches that do not flow into a navigable water, interstate water or territorial sea) or (4)(B)(artificial, constructed lakes and ponds created in dry land).

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

7.781 The Agencies are proposing for the first time by rule to exclude some waters and features that have by longstanding practice generally considered not to be WOTUS. Specifically, the Agencies propose that the following are not WOTUS notwithstanding whether they would otherwise be jurisdictional:

- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes of stock watering, irrigation, settling basins, or rice growing;
- Ditches excavated wholly in uplands that drain only uplands and have less than perennial flow;
- Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons; and
- Gullies, rills, and non-wetland swales.

The way the Agencies have defined tributary, adjacent waters, and "other" waters is in direct conflict with the listed exemptions...Although these features (certain ditches, groundwater, gullies, rills, and non-wetlands, etc.) are not WOTUS under the proposed rule, they can serve to establish a connection under the proposed rule (e.g. connection that demonstrates adjacency to jurisdictional or demonstrates that an "other water" has a significant nexus to a traditional navigable water, interstate water including wetlands, and territorial sea). The way the Agencies have defined tributary, adjacent waters, and "other" waters is in direct conflict with the listed exemptions, as outlined in our above comments. Although these features (certain ditches, groundwater, gullies, rills, and non-wetlands, etc.) are not WOTUS under the proposed rule, they can serve to establish a connection under the proposed rule (e.g. connection that demonstrates adjacency to jurisdictional or demonstrates that an "other water" has a significant nexus to a traditional navigable water, interstate water including wetlands, and territorial sea).

The golf industry asks EPA and the Corps to make explicit that, except for coverage expressed under the CWA and presently applicable regulation, golf courses are exempted from the new WOTUS rule. Alternatively, we ask that the above features on a golf course are not considered WOTUS. The agency has suggested it is not their intention to regulate these features on a golf course setting as WOTUS. The Agencies should make the intent specific. It is important to have clear guidelines and examples for what is exempt and not rely upon general and vague terminology or intentions that will impact features on a golf course. (p. 17-18)

Agency Response: **The final rule has modified the definitions of tributary and adjacent waters. The final rule also states that the excluded features not considered "waters of the United States" are excluded even where they otherwise meet the terms of paragraphs (a)(4) through (a)(8).**

American Chemistry Council (Doc. #15186)

7.782 **II. Cooling and Firewater Ponds**

Many ACC members use cooling or firewater ponds to store and manage water for industrial purposes, often exclusively for the purpose of cooling some part of the facility itself. As such, these ponds are not part of a wastewater production or treatment system. Historically, the agencies' policy and practice have not considered these ponds as "waters of the U.S.," particularly where the cooling ponds predate the CWA. Given the agencies' repeated assurances that the Proposal's rulemaking is intended only to clarify policy and practices and specifically not to expand CWA jurisdiction, these systems should be

explicitly excluded. However, potentially broad interpretations of the federal government's jurisdiction under the Proposal could create ambiguity as to whether these ponds would be included. If the agencies consider these ponds "waters of the U.S.," they would be subject to the requirements of an applicable State water quality standard. To comply with the applicable standard, the cooling ponds would need to be designated for a specific use and would have to meet accompanying water quality criteria. Given their intended use in industrial processes, many, if not all, of these cooling ponds may not be able to meet either narrative or specific water quality criteria for dissolved oxygen, temperature, and turbidity.

More to the point, if the cooling ponds used for industrial water systems were not able to meet the designated use and water quality criteria, facilities would be required to list these waters as "impaired" according to the state-specific CWA 303(d) list. Alternatively, the State would need to develop new designated use categories and water quality criteria. These additional CWA requirements would result in a significant new burden on EPA to develop new standards and criteria appropriate for the cooling ponds' uses, as well as new NPDES or CWA 404 permits for discharges into or activities related to maintenance of those waters.

Some ACC members use cooling water returns to send water back to manmade ponds or ditches. As discussed above, if cooling water ponds were considered "waters of the U.S.", each individual return to the pond would also be considered a point source under the CWA's NPDES program. This requirement would be particularly problematic and inefficient in the case of an internal recycle pond system. In some of these systems, water is recirculated through the pond to be used again in the facility process while a side stream gets discharged to an existing NPDES system. The regulation of this type of pond and its connected feed streams under the NPDES program would likely require, among other things, the installation of flow measuring and sampling devices.

Additional requirements for these recycle ponds would be especially onerous when one considers that any cooling water pond it returns to must already be maintained to ensure a pond discharge is fully compliant with its authorized NPDES permit. Thus, including cooling ponds not currently regulated under the NPDES program as "waters of the U.S" would result in a potentially massive burden and substantial compliance costs on the regulated community, and an increased administrative burden on regulatory authorities, all with no environmental benefit.

For these cooling ponds and related industrial systems, ACC supports and incorporates by reference the proposed exemption language provided in the comments of the American Forest and Paper Association. Specifically, the regulatory exemptions listed in proposed 33 C.F.R. § 328.3(b) should be revised as follows:

> (6) Man-made or man-altered bodies of water (including adjacent wetlands) that (i) are used for commercial purposes by a facility that owns or occupies the property on which the water is located and (ii) have no surface discharge to a water of the United States, other than through an NPDES-permitted outfall or as a result of a catastrophic or unusual sustained rainfall event. As used in this paragraph, "used for commercial purposes" means use in the production,

distribution, or sale of goods or services, including both direct uses and uses that support the commercial facility.

The exemption provided in this paragraph does not affect the scope, application or implementation of any other exemption provided in this section.

This exemption would assure that those industrial or commercial waters that have a potential direct impact on "waters of the U.S." are regulated, either through limitations in an NPDES permit (individual or general) at the point of discharge or because the exemption would not extend to waters with an unpermitted discharge. Any water not designed to discharge to "waters of the U.S." would not lose its exemption, however, if a discharge occurred because of flooding or overflow caused by an unusual sustained rainfall event, e.g. a 100-year flood event. (p. 3-4)

Agency Response: **In the final rule, the agencies added exclusions for groundwater and erosional features, as well as exclusions for some waters that were identified in public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies' intent, such as cooling ponds that are created in dry land. These exclusions reflect current agencies' practice, and their inclusion in the rule as specifically excluded furthers the agencies' goal of providing greater clarity over what waters are and are not protected under the CWA.**

7.783 **III. Other Industrial Water Systems**

ACC members use other industrial water systems that have been and should continue to be excluded from the definition of "waters of the U.S." Based on longstanding policy and on the language and structure of the statute, the final rule should specify that water that is subject to a municipal, industrial, commercial, or agricultural use is not a "water of the U.S", and that such use includes water that is being collected and treated prior to discharge to a "water of the U.S.", or water that is stored or otherwise managed, without discharge. For example, one ACC member uses a quarry that has been converted into a cooling water intake. This quarry is a manmade structure holding water that is being used for production processes. The water used in this system is not discharged back into the original quarry; instead, it is used exclusively within the facility. Given the industrial purpose of the water held in the quarry and the fact that no water is discharged back into it, it should not be considered a "water of the U.S."

ACC urges the agencies to clarify in the final rule that all systems that hold, manage, or move water for collection, use, reuse, treatment, evaporation, infiltration or injection to groundwater, and aquifer storage, are excluded from the definition of "waters of the U.S."

ACC is very concerned that some of the statements contained in EPA's Draft Connectivity Report will lead the agencies unlawfully to expand its CWA authority over the structures and water systems discussed in our comments above. For example, EPA discusses certain features such as impoundments that potentially could be "connected" to downstream waters based solely on the fact that they hold water.[413] If the agencies were

[413] Draft Connectivity Report at 4-45.

to use this rationale to conclude that any structure that holds water affects and controls the supply of water and is thereby a "water of the U.S.", it would radically and unlawfully sweep in industrial water systems that should not be regulated as "waters of the U.S."

For instance, ACC members often use impoundments to settle out solids in water prior to the water's use and primary treatment. The impoundments are currently not regulated and should not be regulated as "waters of the U.S." as they are not connected to a downstream water. However, applying the rationale used in the Draft Connectivity Report, the agencies could assert jurisdiction over impoundments based on the simple fact that they hold water, concluding that they could affect and control the supply of water and thus are connected to them for the purposes of the CWA (despite how remote the connection is). This could lead again to many of the regulatory complications and negligible environmental benefits discussed above. (p. 4-5)

Agency Response: **The existing exclusion for waste treatment systems moves to paragraph (b)(1) with no substantive changes. One ministerial change is the deletion of a cross-reference in the current language to an EPA regulation that no longer exists. See summary response at 7.1. Because the agencies are not addressing the substance of the exclusion, the agencies do not make conforming changes to ensure that each of the existing definitions of the "waters of the United States" for the various CWA programs have the exact same language with respect to the waste treatment system exclusion, with the exception of deleting the cross-reference.**

Paragraph (b)(7) of the rule also clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

7.784 **IV. Green Infrastructure Features**

Some ACC members employ "green infrastructure features" in the form of rain gardens or low impact stormwater management, none of which are currently listed in the proposed rule's exemptions. These "green infrastructure" facility features follow EPA's definition and are used for "protecting and restoring natural landscape features and use natural systems (or systems engineered to mimic natural processes) to manage rain water as a resource."[414] EPA has stated that it "supports expanded use of green infrastructure to protect and restore waters while creating more environmentally and economically

[414] See www.epa.gov/greeninfrastructure.

sustainable communities" and sees green infrastructure as part of its "strategic agenda to protect waters."[415]

In its stakeholder outreach related to the proposed rule, EPA staff publicly informed stakeholders that "rain gardens and similar green infrastructure would not be under the proposed rule because they are not wetlands or built in waters protected by the CWA."[416] However, the stated position is not reflected in the Proposal.

If left unaddressed, the Proposal's broad definitions of "tributary" and adjacent" could sweep in green infrastructure features as "waters of the United States" based on a remote connection. If these facilities are subject to CWA requirements, the agencies would create unnecessary compliance obligations and no incremental environmental benefits. For instance, if a bioswale that conveys stormwater to downstream waters meets the overbroad "tributary" definition, it would be a water of the United States. Similarly, if a stormwater infiltration pond is constructed in the floodplain or riparian area of an (a)(1) through (5) water, it would be categorically jurisdictional.[417]

The imposition of CWA requirements on these features would require landowners and operators to obtain costly and burdensome permits to perform simple maintenance (e.g. sediment and debris removal) on them. Additionally, many green infrastructure devices will be left unmaintained while the applicant awaits a permit, leading to reduced effectiveness of the features. Thus, ACC urges the inclusion of green infrastructure features in the final rule's waste treatment systems exemption. Excluding these features makes good policy sense and is in keeping with EPA's public statement that green infrastructure features would not be considered "waters of the U.S." (p. 5-6)

Agency Response: While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dry land is appropriate. Please see summary response at 7.4.4.

Aluminum Association (Doc. # 15388)

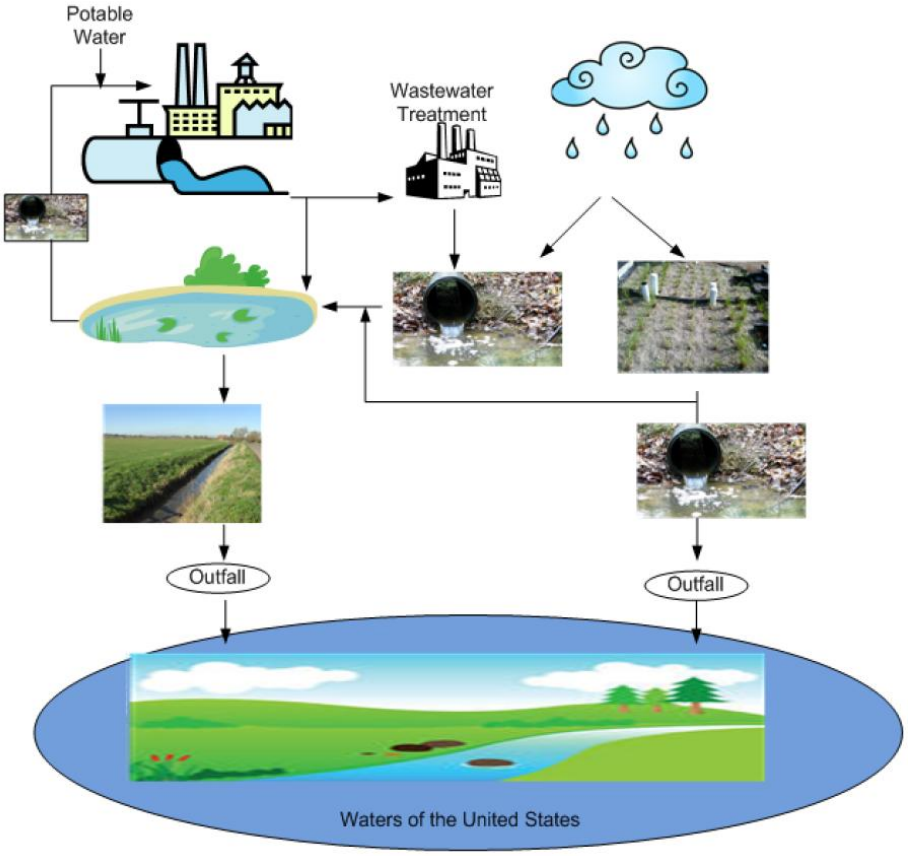
7.785 Because the Proposed Rule does not delineate the starting point of the WUS, it may be interpreted to be any and all water at any time. This would create a regulatory quagmire. Moreover, it creates significant concerns for planning, capital utilization, and compliance for the regulated community.

A straightforward way of avoiding these problems is to create an exclusion for all waters upstream of a designated permitted monitoring point (that is, an outfall authorized under a valid National Pollutant Discharge Elimination System (NPDES) permit). Today a manufacturing facility has the flexibility to use or reuse waters within its processes until

[415] EPA, "A Strategic Agenda to Protect Waters and Build More Livable Communities Through Green Infrastructure." April 2011.
http://water.epa.gov/infrastructure/greeninfrastructure/upload/gi_agenda_protectwaters.pdf
[416] EPA and U.S. Army Corps of Engineers, Questions and Answers – Waters of the U.S. Proposal at 6 (Sept. 9, 2014), http://www2.epa.gov/sites/production/files/2014-09/documents/q_a_wotus.pdf (hereinafter, September 2014 Q & A).
[417] 79 Fed. Reg. 22198.

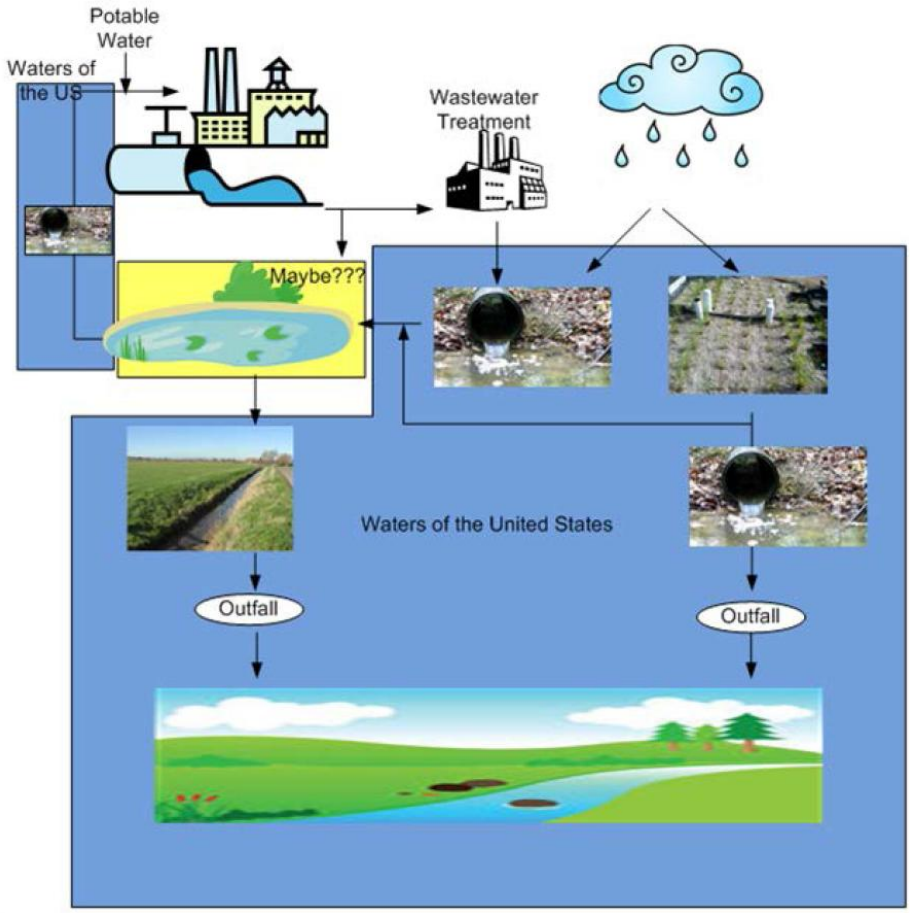
such time as the water is discharged from the facility, usually from an authorized discharge point, which is regulated under the CWA through a NPDES permit.

The following diagram illustrates this concept:



Under the current regulatory interpretation of WUS a facility can use and reuse storm water, process water, heated water, etc. for the purposes of manufacturing requirements to minimize raw water use with few, if any, regulatory limitations. The discharge from the facility due to either normal operations or excessive rainfall is managed under the current water regulatory permit programs including, but not limited to, the storm water program, the NPDES program, general permits, and pretreatment programs. These activities are disclosed to the agency and permitted accordingly.

The Proposed Rule has the potential to alter this regulatory scheme and regulate waters prior to the discharge point as illustrated in the following figure:



We believe that this is an unintended consequence of the rule. Facilities that wish to recycle water, send water to treatment systems, or simply conserve water, may be required to install expensive and cost prohibitive treatment systems to clean water to meet water quality criteria prior to reusing the water or putting that water into a pond or ditch for reuse or transfer. Facilities that once were able to reuse/recycle on-site water may have to then utilize other sources of water such as potable water to meet their needs. This may affect other users in areas where water supplies are scarce, which is becoming a rising concern. This is particularly true of storm water that can be easily harvested and reused within a facility. (p. 2-4)

Agency Response: **While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dry land is appropriate. Please see summary response at 7.4.4.**

Dow Chemical Company (Doc. #15408)

7.786 **3) Dow is particularly concerned that expanding the scope of the CWA would result in the additional regulation of non-navigable waters or man-made structures that are part of our facility infrastructure. Dow believes that facility infrastructure such as waste treatment systems were never intended to be regulated as jurisdictional waters under the CWA and that the final rule needs to clearly state this. At a**

minimum, the proposed rule leaves much uncertainty about whether industrial water systems/infrastructure will be subject to the CWA. Regulation of these systems would have little environmental benefit.

As written, the proposal would potentially include the following non-navigable or manmade elements of facility infrastructure that are not currently considered jurisdictional under the CWA:

- retention and containment ponds;
- cooling water ponds;
- stormwater retention basins or ponds;
- ditches and canals;
- fire water basins or ponds; and
- brine ponds.

The proposed rule states that these infrastructure elements can be identified as waters of the United States. Dow is concerned that asserting jurisdiction over retention and containment ponds, cooling water ponds, stormwater retention basins or ponds, gravel pits and ditches and canals, and fire water basins and other similar infrastructure waters will result in an undue burden on the regulated community, unnecessary paperwork for government agencies through permitting the maintenance activities of the infrastructure needed to safely and reliably run the facilities. This additional work for both industry and for the governmental agencies charged with permitting will have little environmental impact on our nation's water resources.

If these industrial water systems are identified as waters of the U.S., then the applicable State water quality standard would apply. Designated uses of the above identified waters would need to be established along with appropriate water quality criteria. This would negatively impede our ability to properly maintain our facilities as well as unnecessarily increase the cost of maintenance.

In 1986, EPA proposed guidance that attempted to address the issue of man-made water bodies at industrial facilities and excluded them from CWA Section 404 jurisdiction. EPA specifically addressed the damming of tributaries for industrial water use purposes (such as once-through cooling water ponds, fire water sources, stormwater management, etc.) where water bodies were created in water drainage areas (e.g., drainage channels, intermittent creeks, and etc.). A significant number of these water bodies are associated with once-through cooling water systems, where the major use of the water body is for thermal cooling or infrastructure/support systems that are not currently subject to the Section 404 CWA jurisdiction.

In the case of cooling water ponds, if the agencies now decide to assert jurisdiction, all the individual returns to the cooling water pond would be considered point sources under. These returns would have to be permitted individually as opposed to a single point source from the discharge of the cooling water pond. If subject to NPDES regulations, each individual return would most likely require the installation of flow measuring devices, sampling devices, and electric utilities, in some cases. Any cooling water pond must

already be maintained at a condition to ensure that any discharge from the pond is fully compliant with the authorized NPDES permit. Any additional requirements as a result of the proposed rule would not benefit the environment but would clearly result in more paperwork/permitting for both the regulated entity and the agency responsible for the permitting.

In the past, EPA has designated some waters as non-jurisdictional. The proposed rule appears to allow for the reopening of previous jurisdictional determinations, contrary to EPA's stated intent. These previously classified bodies of water are not specifically excluded from the proposed rule.

Dow Recommendation: As stated above, the Agencies need to withdraw and rewrite the fundamental definitions included in the rule so that these definitions make it clear that non-navigable or manmade infrastructure elements continue to be non-jurisdictional waters under the CWA. At a minimum, the proposed definitions need to be fundamentally revised to more narrowly define and clearly exempt retention and containment ponds, cooling water ponds, aeration basins, stormwater retention basins or ponds, effluent holding basins, gravel pits and other groundwater access systems, ditches and canals, fire water basins or ponds, and any other industrial water system already designated as non-jurisdictional. (p. 5-6)

Agency Response: The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional.

In the final rule, the agencies also added exclusions for groundwater and erosional features, as well as exclusions for some waters that were identified in public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies' intent, such as cooling ponds that are created in dry land. These exclusions reflect current agencies' practice, and their inclusion in the rule as specifically excluded furthers the agencies' goal of providing greater clarity over what waters are and are not protected under the CWA.

With respect to stormwater control features, please see the summary response at 7.4.4.

Rubber Manufacturers Association (Doc. #15419)

7.787 **III. RMA recommends that EPA clearly exempt permitted industrial ponds**

In the proposed rule, there are three exemptions that could potentially apply to RMA members' industrial ponds. Section 122.2(b)(1) exempts waste treatment systems such as "treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act." 76 Fed. Reg. 22268. Sections 122.2(b)(3) and 122.2(b)(5)(ii) exempt uplands ditches and artificial ponds used exclusively as settling basins. *Id*. But because "designed," "uplands," and "settling basin" are not defined, again it is not clear whether industrial ponds at RMA member facilities meet any of these exclusions.

RMA members' industrial ponds comply with numeric and non-numeric limits in NPDES permits. As similarly noted supra, industrial ponds are typically lined with impermeable layer of clay or plastic to prevent untreated water from leaching into other waters and have control measures such as baffles, weirs, and skimmers to remove solids, oils, and other contaminants. RMA members also monitor pH levels, remove chlorine, and control biological oxygen demand. The purpose of these industrial ponds is to treat water used in the manufacturing process.

To clarify the rule, RMA recommends that EPA explicitly exempt industrial ponds covered by NPDES permits. If these ponds are considered waters of the U.S., there will be a significant regulatory burden on RMA members with no additional environmental benefit since these ponds are already permitted. As noted supra, NPDES permits require RMA members to control floating solids, settled solids, suspended solids, oil sheen, and other indicators of pollution. (p. 2-3)

Agency Response: **The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional.**

7.788 **V. RMA also supports the commercial waters exemption as proposed by the American Forest and Paper Association (AF&PA)**

AF&PA recommends that the following exemption be added to proposed 33 C.F.R. §328.3(b), which designates certain waters as not waters of the U.S.:

> (6) Man-made or man-altered bodies of water (including adjacent wetlands) that (i) are used for commercial purposes by a facility that owns or occupies the property on which the water is located and (ii) have no surface discharge to a water of the United States, other than through an NPDES-permitted outfall or as a result of a chronic or catastrophic rainfall event. As used in this paragraph, "used for commercial purposes" means use in the production, distribution, or sale of goods or services, including both direct uses (such as for log conditioning) and uses that support the commercial facility (such as fire protection or raw water treatment).
>
> The exemption provided in this paragraph does not affect the scope, application or implementation of any other exemption provided in this section.

RMA supports this exemption because it would cover the different types of RMA member ponds outlined in these comments. AF&PA's proposal would reduce regulatory burden and clarify which ponds are exempted. (p. 3)

Agency Response: **The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment, artificial ponds, and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional.**

Texas Chemical Council (Doc. #15433)

7.789 **3. TCC Members Facilities Would be Unduly Impacted By the Additional Regulation of Non-Navigable Waters and Man-made Structures That Are Part of the Facilities' Infrastructure**

TCC is concerned that, as written, the proposed rule would for the first time bring under federal CWA jurisdiction a number of non-navigable or manmade features incorporated into facility infrastructure. These features include various impoundments (retention and containment ponds; cooling water ponds; stormwater retention basins; fire water basins and ponds; brine ponds), as well as ditches and canals, including those for transportation of water used solely for manufacturing purposes. EPA has historically not subjected such systems to CWA regulation, and it should not back away from that interpretation today: this would place an unreasonably high burden on both the regulated community and the state regulatory agency.

The potential impact on the industrial community in this regard would be substantial, taking into consideration the breadth of the CWA's requirements and charges. These water features and systems would become subject to state water quality standards, and those newly established "waters of the U.S." would then need to obtain designated uses and comply with water quality criteria established by the state regulatory agency. Should such facilities remain unable to meet these requirements – which would be highly likely in light of narrative criteria or specific water quality criteria for dissolved oxygen, temperature, and turbidity – they would have to list the waters as impaired.[418]

TCC members are particularly concerned about the impacts the proposed rule would have on industrial ponds, as well as ditches used for conveyance.

a. Industrial Cooling and Firewater Ponds & Industrial Water Systems

One particular area of concern for chemical manufacturing facilities is the impacts the proposed rule would have on their use of cooling ponds for thermal cooling. These are widely used within the industry, and facilities currently have to obtain National Pollution Discharge Elimination Systems (NPDES) permits for the discharges from such ponds. Historically, EPA has not considered these cooling ponds "waters of the U.S." However, if the agencies were to include cooling ponds in the definition of "waters of the U.S.," they would be subject to state water quality standards, as indicated above. Additionally, every individual return into the pond would have to be permitted under an individual permit for being designated a point source, rather than solely the discharge from the cooling water pond itself. This could require the imposition of additional technology and monitoring that is unnecessary to maintain compliance with the currently authorized NPDES permits.

Furthermore, the applicable state regulatory agency would incur the additional burden of developing new designated use categories and water quality criteria. EPA would also have to take on new tasks, such as developing new standards and criteria specifically applicable to the cooling ponds, along with additional NPDES or CWA §404 permits tailored to activities surrounding the use of cooling ponds. All of these actions would

[418] CWA §303(d) (33 U.S.C. §1313(d)).

enhance the cost of compliance and increase the burdens on regulatory agencies without any environmental benefit. (p. 8-9)

Agency Response: **The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional.**

In the final rule, the agencies also added exclusions for groundwater and erosional features, as well as exclusions for some waters that were identified in public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies' intent, such as cooling ponds that are created in dry land. These exclusions reflect current agencies' practice, and their inclusion in the rule as specifically excluded furthers the agencies' goal of providing greater clarity over what waters are and are not protected under the CWA.

With respect to stormwater control features, please see the summary response at 7.4.4

CLUB 20 (Doc. #15519)

7.790 The rule should exclude, "water withdrawn from a stream for beneficial use" and "water collected from natural sources and conveyed through a ditch." (p. 2)

Agency Response: **Please see the summary response at 7.4 and Compendium 6 on ditches.**

Federal Water Quality Coalition (Doc. #15822.1)

7.791 **10. Puddles**

The version of the proposed rule that was submitted to OMB for interagency review included an exemption for puddles.[419] However, the agencies dropped that exemption before publishing the proposed rule in the Federal Register. According to the agencies, the exemption was deleted because ''puddles'' is not a sufficiently precise hydrologic term or a hydrologic feature capable of being easily understood.[420] The agencies also claim that:

> In addition, one commonly understood meaning for the term ''puddle'' is a relatively small, temporary pool of water that forms on pavement or uplands immediately after a rainstorm, snow melt, or similar event. Such a puddle cannot reasonably be considered a water body or aquatic feature at all, because usually it exists for only a brief period of time before the water in the puddle evaporates or sinks into the ground. Puddles of this sort obviously are not, and have never been thought to be, waters of the United States subject to CWA jurisdiction. Listing

[419] *See* OMB Review Draft, EPA-HQ-OW-2011-0880-0007.
[420] 79 Fed. Reg. at 22218.

> puddles also could have created the misapprehension that anything larger than a puddle was jurisdictional. That is not the agencies' intent. *Id*.

Unfortunately, because the agencies are proposing to assert jurisdiction over ephemeral features, puddles may in fact be viewed as jurisdictional if not excluded. Furthermore, because the agencies are proposing to establish jurisdiction based on biological connections, any water where biota, even insects, spend a part of their lifecycle, could be considered connected in a significant way to a navigable or interstate water or territorial sea. Moreover, the preamble language quoted above suggests that standing water that does not sink into the ground in a brief period of time could be a water of the U.S. Of course, how quickly water sinks into the ground is a function of how saturated the ground is already. Finally, EPA describes vernal pools as "puddles,"[421] claims the authority to exercise jurisdiction over vernal pools on a case-by-case basis, and seeks comment on whether they should, as a category, be waters of the U.S.[422] Unless the agencies provide a rationale to distinguish between what is or is not "thought to be" waters of the U.S., all adjacent waters, including puddles, could become subject to federal jurisdiction, causing significant confusion and concern. (p. 21-22)

Agency Response: **The final rule adds an exclusion for puddles. The proposed rule did not explicitly exclude puddles because the Agencies have never considered puddles to meet the minimum standard for being a "water of the United States," and it is an inexact term. 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. However, numerous commenters asked that the agencies expressly exclude them in a rule. The final rule does so.**

7.792 ***3. Water Used for Municipal, Industrial, or Commercial Purposes.***

Another example of non-jurisdictional water is water that is used or managed for municipal, industrial, or commercial purposes. Courts have held that water that is in use is not regulated.[423] EPA also has long recognized the distinction between water that is in use and water that is part of the waters of the U.S.[424] This policy is embedded in EPA's water transfer rule, which draws the line between waters of the U.S. and water that is subject to a municipal, industrial or commercial use. "For example, if the water is withdrawn to be used *as cooling water, drinking water, irrigation, or any other use such that it is no longer a water of the U.S.* before being returned to a water of the U.S., the water has been subjected to an intervening use."[425] As EPA explains:

[421] http://water.epa.gov/type/wetlands/vernal.cfm
[422] 79 Fed. Reg. at 22216.
[423] *American Iron and Steel Inst. v. EPA*, 155 F.3d 979, 996 (D.C. Cir. 1997) ("The statute is clear: The EPA may regulate the pollutant levels in a waste stream that is discharged directly into the navigable waters of the United States through a "point source"; it is not authorized to regulate the pollutant levels in a facility's internal waste stream.").
[424] *See* August 5, 2005, Memorandum From Anne Klee and Benjamin Grumbles to Regional Administrators, "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers," at 18.
[425] 73 Fed. Reg. 33697, 33704 (June 13, 2008) (emphasis added).

> [A water transfer] differs from a situation in which, for example, an industrial facility takes in water for the purpose of cooling some part of the facility itself. In such cases, the water used for cooling *loses its status as a water of the United States when subjected to an intervening industrial use* .....[426]

If water that is being used were somehow a water of the U.S, then EPA could subject that use to permitting, gaining complete control of water supply and water use, contrary to the stated purpose of the CWA, discussed above.

Based on longstanding policy and on the language and structure of the statute, the agencies should specify that water that is subject to a municipal, industrial, commercial, or agricultural use is not a water of the U.S, and that such use includes water that is being collected, stored, managed, used, or treated prior to discharge to a water of the U.S. or without discharge. This is the legal rationale for the waste treatment system exemption. It is the legal rationale that would clarify a number of areas of confusion. This clarification also would address concerns raised by some of the SAB Panel members.[427]

For example, clarifying that water that is in use is not jurisdictional makes it clear that a ditch that moves cooling water or process water or waste water around an industrial facility every month of the year is not a water of the U.S. Similarly, a canal used by an irrigation district to move water or hold water every month of the year would not be a water of the U.S.

This recommendation clarifies that all systems that hold, manage, or move water for collection, reuse, treatment, evaporation, infiltration or injection to groundwater, and aquifer storage, would be outside the definition of waters of the U.S. This exclusion would continue to apply even if a storage pond began to grow cattails or if an aquifer storage and recovery system recharges to surface water. Water that is being used by municipalities, industries, and farmers and ranchers are not federal waters. (p. 67-68)

Agency Response: **The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional.**

In the final rule, the agencies also added exclusions for groundwater and erosional features, as well as exclusions for some waters that were identified in public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies' intent, such as cooling ponds and groundwater recharge ponds that are created in dry land. These exclusions reflect current agencies' practice, and their inclusion in the rule as specifically excluded furthers the agencies' goal of providing greater clarity over what waters are and are not protected under the CWA.

[426] *Id*. at 33705 n.10 (emphasis added).
[427] *See supra* pp. 49-50.

Minnesota Chamber of Commerce (Doc. #16473)

7.793 …the Agencies should amend the exclusion for waste treatment systems in proposed section (b)(1)-or add a new exclusion-to expressly exclude water-management systems at mining and related industrial facilities. These features tend to serve the same beneficial purposes as t hose covered by the proposed rule but for various reasons-e.g., being designed to meet state or other federal-law legal requirements rather than being specifically designed to "meet the purposes of the Clean Water Act"-may not qualify for the waste-treatment system exemption as proposed. (p. 5)

Agency Response: The existing exclusion for waste treatment systems moves to paragraph (b)(1) with no substantive changes. See summary response at 7.1. One ministerial change is the deletion of a cross-reference in the current language to an EPA regulation that no longer exists. Because the agencies are not addressing the substance of the exclusion, the agencies do not make conforming changes to ensure that each of the existing definitions of the "waters of the United States" for the various CWA programs have the exact same language with respect to the waste treatment system exclusion, with the exception of deleting the cross-reference.

However, the final rule does include several refinements to the exclusion for water-filled depressions created as a result of certain activities. In addition to construction activity, the agencies have also excluded water-filled depressions created in dry land incidental to mining activity. This change is consistent with the agencies' 1986 and 1988 preambles, which generally excluded pits excavated for obtaining fill, sand or gravel, and there is no need to distinguish between features based on whether they are created by construction or mining activity.

7.794 The Minnesota Chamber recommends that the Agencies make the following changes to the Proposed Rule:

1. The Agencies should amend the exclusion for waste-treatment systems in proposed section (b)(l)-or alternatively, add a separate exclusion-to expressly include holding basins, settlement ponds, tailings basins, and other water-management systems at mining and related facilities, as well as the on-site ditches and conduits that connect them.

… (p. 6)

Agency Response: The final rule does include exclusions related to mining sites, ditches and wastewater recycling structures. See discussion of these exclusions elsewhere in this Compendium.

7.795 C. The Proposed Rule Would Create Other Impediments to the Efficient Operation of Minnesota Mining Facilities.

…

2. Mine Pit Sumps

The pits of open-pit mines in Minnesota and other states frequently reach depths below t he natural water table. To avoid groundwater inundating the pit and destabilizing pit walls, mine operators employ systems of pumps to dewater the mine pit sumps. These

sumps have not been subject to regulation as "waters of the United States" in Minnesota; they are simply inherent in the operational process of open-pit mining. Discharges of pumped water are subject to appropriate regulatory controls, but the sumps themselves are not jurisdictional waters. The Minnesota Chamber is concerned that under t he Proposed Rule's broad definition of "significant nexus," the sumps could be deemed jurisdictional as "other waters" on account of their interaction with other waters flowing into the sump. Operation of open-pit mines would become significantly more difficult and expensive if dewatering activities in sumps were subject to 404 permitting requirements.

Recommendation:

The Agencies should make clear-in the preamble to the Final Rule or in the Final Rule itself- that open-pit mine sumps are not "waters of the United States." (p. 7)

Agency Response: **The existing exclusion for waste treatment systems moves to paragraph (b)(1) with no substantive changes. See summary response at 7.1. One ministerial change is the deletion of a cross-reference in the current language to an EPA regulation that no longer exists. Because the agencies are not addressing the substance of the exclusion, the agencies do not make conforming changes to ensure that each of the existing definitions of the "waters of the United States" for the various CWA programs have the exact same language with respect to the waste treatment system exclusion, with the exception of deleting the cross-reference.**

However, the final rule does include several refinements to the exclusion for water-filled depressions created as a result of certain activities. In addition to construction activity, the agencies have also excluded water-filled depressions created in dry land incidental to mining activity. This change is consistent with the agencies' 1986 and 1988 preambles, which generally excluded pits excavated for obtaining fill, sand or gravel, and there is no need to distinguish between features based on whether they are created by construction or mining activity.

American Society of Civil Engineers (Doc. #19572)

7.796 **Clarify Potential Jurisdiction Over Man-Made Recycled Water Conveyance And Storage Features**

Similarly, there are other man-made water conveyance and storage features, such as those used for recycled water management and use, which should be expressly excluded from CWA jurisdiction. There are instances of recycled water conveyance or storage occurring in natural or previously natural waterbodies that understandably may not warrant exemption. Therefore, the use of "dedicated" and "man-made" in an exemption could provide distinction and clarification. There are instances where recycled water is impounded or conveyed in dedicated man-made facilities that have a bed, bank, and OHWM and contribute flow to waters of the U.S. or meet the proposed rule's definition of "adjacent" to jurisdictional waters. However, these features these should be expressly exempted from the definition of "waters of the U.S." Otherwise, the intended uses of these features for which they were built would be severely hindered or possibly abandoned. (p. 10)

Agency Response: **Paragraph (b)(7) of the rule also clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

Although the agencies have modified the definition of "tributary" in the final rule, the preamble states that 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 have not in practice asserted jurisdiction over these types of features when created in dry land.

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

7.797 … the exclusion for waste treatment systems and non-wetland swales is not clear in that it fails to encompass the full array of green infrastructure devices (i.e., rain gardens) and other systems installed voluntarily on private property that should be exempt from federal oversight. (p. 2)

Agency Response: **With respect to stormwater control features, (for example, green infrastructure, please see the summary response at 7.4.4**

Kingsport Horizontal Property Regime and Kingsport Homeowners Association, et al. (Doc. #4847)

7.798 …I have another property on the Intracoastal Waterway that the Corps issued a permit to someone other than the property owner and that person excavated my property without my consent. Here, the Corps authorized someone other than the property owner to turn my property into what is considered today, to be waters of the United States. I believe that something like this should also be exempted from any definition of water of the United States. Here the Corps through some sort of negligence, has created waters of the United states where none existed prior to the improper permitting by the Corps. This would also reduce future lawsuits and reduce regulatory costs of Corps.

I have several properties that have been disturbed by the Local Mosquito Control District from the 1920's throught 1960's. These were part of a Statewide program to eradicate a dangerous health hazard. The State of Florida in there state statutes has a provision to allow these properties that were once uplands, to not be considered waters of the State. The rule is contained in 62-340.750 FAC. Which, if you can prove the property was an upland previous to the mosquito control ditching, performed by the Agency, then the property is not considered a wetland today. I beleive the Corps should also adopt the same type of rule, as it relates to the definition fo waters of the United States. This could

easily be included as an exemption to the definition, to state that any property exempted by the State under it's statutes or rules is also exempted from the definition of waters of the United States. This would also reduce future lawsuits and reduce regulatory costs of Corps. (p. 1-2)

Agency Response: **This definitional rule does not change the agencies' longstanding practices or regulations governing the implementation of this rule and are outside the scope of this rule. Nothing in this rule affects the enforcement of the CWA and is outside the scope of this rule.**

Kerr Environmental Services Corp. (Doc. #7937.1)

7.799 **328.3(b)(5) Should Include an additional listing for: "Pits Excavated in Dry Land for the Purpose of Obtaining Fill, Sand or Gravel Unless and Until Construction or Excavation Operation is Abandoned and the Resulting Body of Water meets the Definition of Waters of the United States (See 33 CFR 328.3(a))".**

This is the only general exemption stated in the preamble of November 13, 1986 (page 41217) not included in the proposed list at 33 CFR 328.3(b). These areas have traditionally not been regulated unless abandoned. We recommend continuing the existing practice by the USEPA and USACE of not regulating these areas. Localities and States regulate the movement of sand, gravel and fill within construction sites. Such pits may be used as a construction related Erosion and Sediment Control practice, required by state law, and then refilled after construction. The NPDES program regulates the stormwater discharges from such facilities. While not "waste treatment systems... designed to meet the requirements of the Clean Water Act" they may well be constructed to comply with state water quality and/or erosion and sediment control requirements and therefore should be exempt by expanding the wording at 33 CFR 328.3(b)(1). For simplicity we recommend creating a separate category for this type of non-water of the US and/or erosion and sediment control requirements and therefore should be exempt by expanding the wording at 33 CFR 328.3(b)(1).

For simplicity we recommend creating a separate category for this type of non-water of the US. (p. 4-5)

Agency Response: **The final rule includes several refinements to the exclusion for water-filled depressions created as a result of certain activities. In addition to construction activity, the agencies have also excluded water-filled depressions created in dry land incidental to mining activity. This change is consistent with the agencies' 1986 and 1988 preambles, which generally excluded pits excavated for obtaining fill, sand or gravel, and there is no need to distinguish between features based on whether they are created by construction or mining activity.**

7.800 **Ponds**

Ponds should not, by their definition, necessarily be a default water of the United States via their inclusion as tributaries. As stated in the preamble, the USEPA and USACE are considering tributaries to be waters of the US by rule (page 22188). Man-made ponds, wholly in uplands and draining only uplands should not be considered waters of the US, and per proposed exclusions stated at 328.3(b)(5)i-iv are not considered waters of the US. Ponds should be subject to the Significant Nexus test when the government considers

them to be other than not a water of the US. Alternatively the government can assert it is an Adjacent Water, and so has alternative avenues for jurisdiction and does not need the added confusion of assuming that all are tributaries. (p. 7)

Agency Response: **The final rule states that artificial lakes or ponds created by excavating and/or diking dry land and used primarily for such purposes as stock watering, irrigation, settling basins, or rice growing are not "waters of the United States." In this exclusion, the agencies have changed "exclusively" to "primarily" in describing the uses. Artificial lakes and ponds are often not used exclusively for one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. The change to the exclusion reflects Agency practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use. The agencies have also added cooling ponds to the list of uses in the rule. The list of uses has always been illustrative rather than exhaustive, and this addition responds to many requests to clarify that cooling ponds created in dry land are excluded.**

Vulcan Materials Company (Doc. #14642)

7.801 Categorically, flood plains and associated riparian areas should be exempted from consideration as jurisdictional waters, unless such areas qualify as jurisdictional based on current criteria. (p. 4)

Agency Response: **In response to comments received, the final rule has made changes to the proposed definitions of "neighboring", "floodplains", and "riparian area." In the rule the agencies establish a definition of neighboring which provides additional specificity requested by some commenters, including establishing a floodplain interval and providing specific distance limits from traditional navigable waters, interstate waters, the territorial seas, impoundments, and tributaries. See the preamble for more information on the factors used to evaluate adjacent waters.**

West Valley Planned Communities (Doc. #18906)

7.802 **IV. Several Exemptions Are Necessary For The Rule To Be Clearer, Not Lead To The Illegal Expansion Of The Jurisdiction Of The CWA, And To Avoid Causing A Significant Burden On And Cost To Planned Communities.**

In stakeholder meetings, EPA has requested that stakeholders identify which exemptions they need in order to achieve the intention of the rule to provide clarification. The following is a list of exemptions that planned communities would need in order to avoid the rule causing an undue economic and regulatory burden:

- A "grandfathering" provision to allow existing water features, primarily drainages, associated with planned communities and its recreation features to continue to be utilized and, by rule, not within the jurisdiction of the CWA.
- An exemption for flood control or erosion control features. These control features serve an important role in preventing pollution. However, as written, the proposed rule could allow the Army Corps or EPA to assert jurisdiction over a flood or erosion control feature if it directly, or through any other waters, discharges into an interstate or traditionally navigable water.

- There should be a general exemption for golf courses, specifically water features such as lakes and ponds, as well as drainage ditches. Golf courses serve an important purpose in protecting headwaters. This is accomplished through best management practices and, typically, by designing the course such that waters, which could otherwise cause costly flooding, are directed into a flood control district canal or system.
- An exemption for constructing, modifying, or decommissioning man-made or man-altered water features if the construction, modification, or decommissioning will eliminate or prevent a significant nexus into a downstream interstate or traditionally navigable water.

There are three exemptions in the current proposal which seemingly attempt to accomplish some of the scope contemplated by these proposed exemptions. See, Proposed Rule at (t)(5)(ii)-(v) ("(ii) 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; (iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land; (iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons; (v) Water-filled depressions created incidental to construction activity. . ."). However, these exemptions are too narrow and do not address the practical operation of most planned communities or its recreational features. More focused exemptions, which explicitly exempt certain water features, are necessary to achieve the intended "clarification" of the proposed rule. (p. 4-5)

Agency Response: **The final rule includes a new exclusion in paragraph (b)(6) for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. See summary response at 7.4.4. This exclusion responds to numerous commenters who raised concerns that the proposed rule would adversely affect municipalities' ability to operate and maintain their stormwater systems, and also to address confusion about the state of practice regarding jurisdiction of these features at the time the rule was proposed. The agencies' longstanding practice is to view stormwater water 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 jurisdictional currently even where used as part of a stormwater management system. Nothing in the proposed rule was intended to change that practice.**

The agencies do not believe it is appropriate to exclude features created as part of a golf course. However, there are streamlined permitting options, such as certain Nationwide Permits for residential or recreational development that may be utilized to authorize certain of these activities. Similarly, the agencies do not feel it is appropriate to add an exclusion to eliminate or prevent significant nexus. The available science indicates that many man-made features can have a significant effect on downstream waters and should be evaluated for coverage as "waters of the United States."

With regard to the comment on the need for a "grandfathering provision", this rule is effective 60 days after Federal Register publication. Under existing Corps'

regulations and guidance, Corps' approved jurisdictional determinations generally are valid for five years. The agencies will not reopen existing approved jurisdictional determinations unless requested to do so by the applicant. All jurisdictional determinations made on or after the effective date of this rule will be made consistent with this rule. Similarly, consistent with existing regulations and guidance, jurisdictional delineations associated with issued permits and authorizations are valid until the expiration date of the permit or authorization.

National Association of Home Builders (Doc. #19540)

7.803 **ii. Green Infrastructure Features are not "Waters of the United States."**

EPA defines green infrastructure as a means of "protecting and restoring natural landscape features and using natural systems (or systems engineered to mimic natural processes) to manage rain water as a resource," and touts its many benefits, including increased climate resiliency, reduced urban heat island effects, lowered building energy demands, and sustainable communities.[428] The Agency "supports expanded use of green infrastructure to protect and restore waters while creating more environmentally and economically sustainable communities" and sees green infrastructure as part of its "strategic agenda to protect waters."[429] Additionally, President Obama's Council on Climate Preparedness and Resilience promotes green infrastructure, stating, "By weaving natural processes into the built environment, green infrastructure provides not only stormwater management, but also improved water quality, greenhouse gas reduction, flood mitigation, and recreational opportunities."[430] To further promote its widespread use, EPA along with HUD, DOT, USDA, DOI, DOD, and DOE recently announced the development of a broad-based, multi-sector Green Infrastructure Collaborative, and in 2015, EPA plans to provide green infrastructure technical assistance grants to at least 25 communities.[431] Clearly, there is broad federal support of green infrastructure.

In spite of this, EPA and the Corps do not recognize green infrastructure features, including rain gardens and low impact development stormwater management, under the waste treatment systems exclusion. This omission is unsettling to NAHB's 140,000 members, who regularly employ low impact development devices and other stormwater waste control technologies to reduce runoff and associated pollutant discharges from construction sites. The Agencies must acknowledge that on-site stormwater control systems do not contain waters of the United States and, furthermore, are explicitly excluded from CWA jurisdiction under the waste treatment systems exception.

[428] *See* www.epa.gov/greeninfrastructure (last accessed Nov. 6, 2014).
[429] EPA, "A Strategic Agenda to Protect Waters and Build More Livable Communities Through Green Infrastructure" (April 2011) available at http://water.epa.gov/infrastructure/greeninfrastructure/upload/gi_agenda_protectwaters.pdf
[430] Office of the President, Priority Agenda: Enhancing the Climate Resilience of America's Natural Resources. Council on Climate Preparedness and Resilience (October 2014) at 34, available at http://www.whitehouse.gov/sites/default/files/docs/enhancing_climate_resilience_of_americas_natural_resources.pdf
[431] *Id*. at 42.

Regrettably, the closest the Agencies have come to suggesting green infrastructure is excluded from CWA jurisdiction came in the form of an unofficial Q & A regarding the proposed rule that EPA posted on its website in September 2014:[432]

> [QUESTION] 22. Is my rain garden regulated as a 'water of the US' under the proposal?
>
> ANSWER: No. Rain gardens and similar green infrastructure would not be regulated under the proposed rule because they are not wetlands or built in waters protected by the CWA.

EPA's answer is problematic for several reasons. First, and most importantly, if this is truly the case, why haven't the Agencies included green infrastructure and similar stormwater management devices explicitly under the proposed rule's waste treatment systems exclusion? Indeed, this informal Q & A is not a regulatory document and will not be published in the CFR. What's more, under the proposed broad definitions of "tributary," "adjacent waters," and "other waters," green infrastructure and other stormwater management features could quite readily be deemed waters of the United States, either categorically or on a case-by-case basis. For instance, if a bioswale that conveys stormwater to downstream waters meets the overbroad tributary definition, it would be a water of the United States. Similarly, if a stormwater infiltration pond is constructed in the floodplain or riparian area of an (a)(1) through (5) water, it would be categorically jurisdictional. Second, green infrastructure devices, namely rain gardens, although they may not have wetland characteristics (e.g., wetland hydrology, wetland plants, and hydric soils) when first constructed, can readily develop these traits over time – traits that can actually help them perform better in reducing flows and removing pollutants. Further, contrary to EPA's answer in the Q & A, rain gardens and bioswales are commonly built within wet weather conveyances that could meet the Agencies' proposed "tributary," "adjacent waters," or "other waters" definitions. So, to state that green infrastructure features are not waters of the United States because they are "not wetlands or built in waters protected by the CWA" is relatively cold comfort for the regulated community.

Equally troublesome is that while EPA proclaims green infrastructure's many environmental and economic benefits, by not explicitly excluding green infrastructure from CWA jurisdiction, the Agencies create a disincentive to employ such practices. If rain gardens, bioswales, and other stormwater treatment devices are waters of the United States, landowners and operators will have to obtain costly and time intensive permits in order to perform simple maintenance on them including the removal of sediment and debris. This will be unnecessarily burdensome. Additionally, many green infrastructure devices will be left unmaintained while the applicant awaits a permit, leading to reduced effectiveness of the features and increased pollutant loading to downstream waters.

Home builders in Houston, Texas, recognize this conundrum in their comment letter on the proposed rule.[433] Houston is known as the Bayou City. The City, Harris County, and

[432] September 2014 Q & A at 6.

[433] Letter from the North Houston Association, the West Houston Association, and the Woodlands Development Company to the Proposed Rule "Definition of 'Waters of the United States' Under the Clean Water Act" docket.

the drainage districts with authority over development in this region have begun to embrace a wide variety of low impact development and green infrastructure as the best method to accommodate drainage. Houston has awoken to the fact that being the Bayou City gives it a unique corridor system for a wide range of desirable urban and suburban uses that both relies upon and promotes better water quality. But if rain gardens, bioswales, and biofilters become waters of the United States as a result of today's proposed jurisdictional expansion, these green initiatives will require costly permits for routine maintenance and impose unwarranted burdens on the state (e.g., development of water quality standards, water quality monitoring requirements, development of TMDLs for green infrastructure features not attaining water quality standards). Ultimately, the use of green infrastructure will come to a screeching halt.

Additionally, if green infrastructure features are waters of the United States, all other CWA programs will apply to them. As a result, states will, among other requirements, have to monitor water quality, designate beneficial uses, establish water quality standards, and establish TMDLs for any green infrastructure features under the jurisdiction of the CWA. This is absurd.

The Agencies must confirm that green infrastructure features, such as rain gardens, bioswales, and treatment wetlands, are not waters of the United States. Additionally, the Agencies should specifically include green infrastructure features in the waste treatment system exclusion. (p. 109-111)

Agency Response: While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features (e.g., green infrastructure) built in dry land is appropriate. Please see summary response at 7.4.4.

Texas Mining and Reclamation Association (Doc. #10750)

7.804 4. The Agencies Should Create a New Exclusion for On-Site Waters at Mine Sites Mandated by Other Regulatory Schemes

The Agencies should also add an exclusion for water management features on mine sites that are required under other regulatory schemes, including CWA compliance. Even if on-site waters might otherwise meet the new definition of "waters of the United States," such an exclusion is warranted to avoid putting mine operators in a position where they would be unable to meet the requirements of other regulatory schemes.

In addition to the CWA requirements, including permitting, monitoring, and reporting TMRA's members with coal mining operations must conduct all mining and reclamation activities in accordance with SMCRA and state laws (as with the CWA, Texas is a primacy state under SMCRA and operates its own state surface coal mining regulatory program). In particular, SMCRA requires that mining and reclamation activities be conducted to protect the hydrologic balance within the mine site and adjacent areas.[434] The close relationship between surface coal mining and CWA rules, and even overlap, for water quality protection standards is evident in Texas' surface mining regulations that

[434] *See, e.g.*, 30 U.S.C. § 1265(b)(10)(B)(i); 30 C.F.R. § 816.41.

state "In no case shall federal and state water-quality statutes, regulations, standards, or effluent limitations be violated.[435]

To meet SMCRA requirements, mine operators rely on "siltation structures," which include sediment ponds, permanent and temporary ditches, permanent and temporary impoundments, diversions, and other water management features.[436] Because of the dynamic nature of mining operations, siltation structures are often modified or moved to ensure that water draining from disturbed areas is handled and treated appropriately prior to discharge. And SMCRA requires that "[s]iltation structures shall be maintained until removal is authorized by the regulatory authority and the disturbed area has been stabilized and revegetated."[437] SMCRA also requires mine operators to remove siltation structures after disturbed areas are reclaimed.[438] If these sorts of structures are now deemed "waters of the United States" under the proposed rule, mine operators may face situations where they cannot meet SMCRA requirements because they are unable to obtain Section 404 permit coverage for whatever reason. In other words, mine operators could be impeded from fulfilling their obligation to remove sediment ponds and diversions, and reclaiming the site, because of delays or problems getting 404 permit approvals. To avoid this conundrum, the Agencies should include an exclusion for siltation structures that are constructed, maintained, and reclaimed in accordance with SMCRA or other regulatory requirements. (p. 18-19)

Agency Response: **As stated in the SMCRA statute, SMCRA "shall not be deemed in any way to repeal or supersede any portion of the Federal Water Pollution Control Act and no control or treatment under this subsection shall in any way be less than that required under the Federal Water Pollution Control Act." The agencies believe that the two statutes have complementary, but differing, mandates and therefore is not appropriate to add a specific exclusion for features authorized under SMCRA. However, it is important to note that current agencies' practices often consider some features described in this comments as "waste treatment systems" during the active period of mining, and are therefore excluded from coverage until reclaimed.**

7.805 The proposed rule is silent regarding the potential impact on old works. These include old sediment ponds, diversions and other water management structures built on coal mine sites prior to enactment of SMCRA. It also includes impounded water in old abandoned and unreclaimed sites, such as between spoil piles and abandoned pits. They are often referred to as "orphan spoils" areas. Some of these areas may be reclaimed or reworked under the Office of Surface Mining's Abandoned Mine Lands Program, and some may be redisturbed for new mining activities under the current SMCRA regulatory program. Under the existing regulatory framework, Corps staff has indicated that these old works are not jurisdictional waters, but this could change under the proposed rule for all of the

[435] Texas Administrative Code Title 16, Part 1. Rule § 12.339(c). Permanent Program Performance Standards — Surface Mining Activities. Hydrologic Balance.
[436] *See* 30 U.S.C. § 1265(b)(10)(B)(i); see also 30 C.F.R. §§ 816.43 to 816.49.
[437] See 30 C.F.R. § 816.46(b)(4).
[438] *See* 30 U.S.C. § 1265(b)(10); see also 30 C.F.R. § 816.43(a)(3) ("Temporary diversions shall be removed promptly when no longer needed to achieve the purpose for which they were authorized.").

reasons discussed above in Section I.B. The Agencies should clarify that these features are ***not*** jurisdictional. This can be accomplished by adding language to the effect that waters created through historic mining activities, either purposefully or inadvertently, including impounded waters in abandoned or partly reclaimed mine sites, and waters in old diversions and other water management structures, are excluded from the definition of waters of the United States. (p. 22)

Agency Response: The rule includes several refinements to the exclusion for water-filled depressions created as a result of certain activities. In addition to construction activity, the agencies have also excluded water-filled depressions created in dry land incidental to mining activity. This change is consistent with the agencies' 1986 and 1988 preambles, which generally excluded pits excavated for obtaining fill, sand or gravel, and there is no need to distinguish between features based on whether they are created by construction or mining activity. A number of commenters indicated that these water-filled depressions created in dry land are often left on a site after construction or mining activity is complete in order to provide beneficial purposes, such as water retention, recreation, and animal habitat.

For features that do not meet these criteria, an jurisdictional determination is necessary to evaluate if the waters meet any of the criteria for coverage under (a)(1)-(a)(8), regardless of origin. The available science indicates that many man-made features can have a significant effect on downstream waters and should be evaluated for coverage as "waters of the United States."

Wyoming Mining Association (Doc. #14460)

7.806 In addition to streams, ditches, and ponds, playas are common features at many Wyoming mines. These playas may be large or small, may contain minor functional wetlands, and may provide recharge of deeper groundwater or be supported by discharge of groundwater. However, most water in the playas is lost to evapotranspiration. Currently, playas and internally draining depressions are not jurisdictional based on the U.S. Supreme Court decision in Solid Waste Agency of Northern Cook County v U.S. Army Corps of Engineers, (No. 99-1178 (January 9, 2001). However, a strict interpretation of the Connectivity Report would determine that the playas are hydraulically connected to nearby streams and wetlands. In fact, the connections between nearly all playas and nearby stream channels and wetlands is tenuous at best and these playas should not be assumed to be hydraulically connected and should not be jurisdictional under the proposed rule. (p. 5)

Agency Response: The agencies at this time are not able to determine that the available science supports that playa lakes as a class have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas. However, to be clear, under the rule, individual waters of the suggested additional subcategories are jurisdictional where they meet the requirements of (a)(1) through (a)(6) or (a)(8) (e.g., a playa lake that is an interstate water, a kettle lake that is an adjacent water or one that is determined on a case-specific basis to have a significant nexus to a traditional navigable water, interstate water, or the territorial seas). See the Technical Support Document, section I, for a discussion of the SWANCC decision's effect on jurisdiction.

CONSOL Energy, Inc. (Doc. #14614)

7.807 Sediment ponds, slurry ponds, impoundments, ditches, and other water control features found on mining sites not currently considered jurisdictional could be covered by the proposed definition of "water of the US". These features are necessary for the functionality of mining operations in an environmentally sound way. If these features are included as a "water of the US" it has the potential to vastly increase water usage at mining facilities. These features are often times already regulated by state and federal authorities such as the Surface Mining Control and Reclamation Act (SMCRA). CONSOL requests that language be included to clearly state that these features intended for the management of run-off and mining wastes are exempt from inclusion in the final definition of "waters of the US". (p. 3)

Agency Response: Current agencies' practices often consider some features described in this comments as "waste treatment systems" during the active period of mining, and are therefore excluded from coverage until reclaimed. Nothing in the rule is intended to alter the current application of the waste treatment exclusion. See summary response at 7.1.

7.808 Additional inclusions of mining features previously determined to be non-jurisdictional would trigger Section 303 requirements for total maximum daily loads (TMDLs). Individual states have the primary obligation of establishing TMDLs, and expanding Section 303 requirements to previously exempted mining features would create considerable burden on these agencies to establish water quality standards. (p. 3)

Agency Response: Current agencies' practices often consider some features described in this comments as "waste treatment systems" during the active period of mining, and are therefore excluded from coverage until reclaimed. Nothing in the rule is intended to alter the current application of the waste treatment exclusion. See summary response at 7.1

Virginia Coal and Energy Alliance and Virginia Mining Issues Group (Doc. #14619)

7.809 *A. The Agencies Should Clarify and Confirm That Features Associated With On-Site Stormwater and Surface Water Systems Will Remain Exempt in All Cases*

Water management features such as temporary and permanent diversion ditches and onsite ponds (e.g., sediment ponds, slurry impoundments) are absolutely critical to mining operations within the SVC. Mine operators rely on these features to manage, store, treat, and reuse water within the mine site, often as part of statutorily-mandated requirements under SMCRA. Given the nature of these requirements, the purpose and design of these systems and the dynamic nature of mining activities, these kinds of water management features must remain non-jurisdictional.

There are numerous changes within the Proposal that might have the unintended effect of altering the jurisdictional status of these features. For instance, we can envision many instances where these features might fall within the broad new definitions of "tributary" and/or "adjacent," and thus be treated as *per se* jurisdictional. Alternatively, the expanded concept of "significant nexus" set forth in the Proposal would also allow for jurisdictional lines to be extended to these features on a case-by-case or eco-regional basis. All of these new openings create the need for clarity, *within the rule itself*, regarding the non-

jurisdictional status of these features. This would logically come by way of clarifications to the waste treatment system exclusion (addressing uncertainty regarding jurisdiction over the various components of stormwater and surface water management systems employed at mine sites)[439] and the artificial lakes and ponds exclusion (confirming that the exclusion applies to sediment and bench ponds, slurry impoundments, and other operational ponds). Without these critical clarifications, the Proposal will continue to pose an enormous threat to VMIG, VCEA and the mining industry as a whole. (p. 5-6)

Agency Response: **The final rule includes a new exclusion in paragraph (b)(6) for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. See summary response at 7.4.4. The agencies' longstanding practice is to view stormwater water 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 jurisdictional currently even where used as part of a stormwater management system. Nothing in the proposed rule was intended to change that practice. Nonetheless, the agencies recognize that the proposed rule brought to light confusion about which stormwater control features are jurisdictional waters and which are not, and agree that it is appropriate to address this confusion by creating a specific exclusion in the final rule for stormwater controls features that are created in dry land.**

In addition, current agencies' practices often consider some features described in this comments as "waste treatment systems" during the active period of mining, and are therefore excluded from coverage until reclaimed. Nothing in the rule is intended to alter the current application of the waste treatment exclusion. See summary response at 7.1.

National Mining Association (Doc. #15059)

7.810 **C. As Currently Written, the Definitions in the Proposed Rule Could Inappropriately Extend CWA Jurisdiction to On-Site Water Management Features at Mine Sites**

The Agencies state in the preamble to the proposed rule that they are narrowing, rather than expanding, CWA jurisdiction in comparison to existing regulations. Based on our meetings with EPA and Corps representatives, we understand the Agencies do not intend to define previously non-jurisdictional on-site water features as jurisdictional waters in the proposed rule. Such a position is consistent with the scope of the Agencies' economic analysis, which did not appear to take these on-site water management features into account in estimating that the proposed rule will result in "an approximate 3 percent increase in assertion of jurisdiction when compared to 2009-2010 field practices."[440] Nevertheless, certain terms in the proposed rule are defined so broadly that most on-site

[439] These clarifications are discussed at length in the National Mining Association 's comments, which VMIG and VCEA endorse.

[440] See U.S. EPA (primary authority) & U.S. Army Corps of Eng'rs (contributing author), "Economic Analysis of Proposed Revised Definition of Waters of the United States," at 2 (Mar. 2014). NMA also notes that it shares the concerns expressed by both Dr. David Sunding and WAC with respect to the economic analysis, including its failure to fully and accurately evaluate many of the costs associated with the proposed rule.

water management features at mine sites could be erroneously deemed jurisdictional under the proposed language. The very real threat of third party litigation over the application of the rule to such features underscores the critical need for clarity concerning this issue.

First, the Agencies define "tributary" as any water "physically characterized by the presence of a bed and banks and ordinary high water mark . . . which contributes flow, either directly or through another water," to a traditional navigable water, interstate water, territorial sea, or jurisdictional impoundment.[441] Then the proposal declares tributaries are per se jurisdictional regardless of whether they contribute perennial, intermittent, or ephemeral flow.[442] And for the first time, "waters of the United States" explicitly includes ditches that meet the new definition of tributary.[443] Even "wetlands, lakes, and ponds" that lack a bed, bank, and ordinary high water mark can be tributaries (and hence per se jurisdictional), so long as they "contribute flow, either directly or through another water" to a traditional navigable water, interstate water, or territorial sea.[444] Adding to the confusion, the Agencies have, completely outside this rulemaking process, re-defined guidance on identifying OHWM.[445] The new OHWM guidance revises the criteria the Corps has historically relied upon for identifying OHWM by replacing longstanding OHWM indicators with new, subjective, criteria and by requiring that only one such criterion be met to determine the existence of OHWM. The OHWM concept is especially important because, historically, existence of an OHWM was used to determine the lateral and upstream limits of Corps' jurisdiction, i.e. the Corps' jurisdiction stops where the OHWM is no longer perceptible.[446]

It is likely that many, if not most, ditches, as well as certain ponds and other water management features on mine sites, would fall within the definition of "tributary" based solely on contribution of flow, no matter how insubstantial or indirect. Indeed, many on-site water features are permitted under Section 402 to discharge to "waters of the United States" because of such connections. As explained in greater detail below, many such features do not fit neatly into any of the exclusion categories in the proposal without additional clarification, and as such could inappropriately become federal waters under the new rule.

Second, on-site waters in the mining industry could constitute "adjacent" jurisdictional waters because the Agencies have broadly defined the term "neighboring" (as used in the definition of "adjacent") such that every water feature located within the riparian area or floodplain of a traditional navigable water, interstate water, territorial sea, jurisdictional impoundment, or tributary could be deemed a "water of the United States."[447] Indeed,

[441] 79 Fed. Reg. at 22,263.
[442] *Id.* at 22,202.
[443] *See id.* at 22,263.
[444] *Id.*
[445] Mersel, M.K., Lichvar, R.W. 2014. 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. U.S. Army Corps of Engineers, Engineer Research and Development Center, Cold Regions Research and Engineering Laboratory, TR-14-13. http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/west_mt_finalsupp_aug2014.pdf.
[446] See 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).
[447] *Id.* at 22,263.

some water management structures on mine sites are constructed adjacent to jurisdictional waters, but are specifically designed and operated to sever any surface connection between mining water inside the permitted area and offsite undisturbed waters, or to limit any surface connection to a permitted NPDES discharge point.

Furthermore, any water feature that has a "shallow subsurface hydrological connection or confined surface hydrologic connection to such a jurisdictional water" would also itself be per se jurisdictional.[448] Given that application of these definitions is left to the "best professional judgment" of agency staff,[449] and that therefore agency staff are free to choose, among other things, which flood interval to use in applying the definition of "neighboring" and "floodplain," many on-site waters that bear little or no connection to downstream "waters of the United States" are likely to be captured. Likewise, insubstantial subsurface hydrologic connections between water features on mine sites and remote, downstream "waters of the United States" could give rise to claims of CWA jurisdiction, whether by agency personnel or citizen plaintiffs.

Third, even if on-site waters at mines are somehow outside of the definitions of "tributary" or "adjacency," which are per se jurisdictional, they could nevertheless be deemed jurisdictional "other waters" on a "case-specific basis" through application of the "significant nexus" test in the proposed rule.[450] An on-site water management feature at a mine, either alone or when aggregated with "similarly situated" waters in the same region, could be deemed to significantly affect the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or territorial sea so long as it has more than a speculative or insubstantial effect on such a downstream jurisdictional water in the judgment of Agency staff. As an example, biota movement among otherwise isolated on-site water management features such as settling ponds and a jurisdictional water may be all that is needed to trigger CWA jurisdiction under this new test.[451] Ironically, even the reduction in sediment load to meet NPDES effluent limitations to below natural background concentrations could be deemed a more than a "speculative or insubstantial" effect on downstream waters due to the improvements made to stream water quality.

These examples show how on-site waters could become "waters of the United States" under the proposed rule, and exemplify the need for the rule to include specific language that clarifies that once a water feature is determined to be part of a waste treatment system or another type of excluded water, that water may not be "recaptured" by application of another concept such as "tributary," "adjacent," or "other waters." In other words, the agencies should explicitly state their intent as explained to NMA members that once a water is determined to be excluded, that water may not be deemed a jurisdictional water by any other means. (p. 13-15)

[448] *Id*.
[449] *Id*. at 22,209.
[450] *See id.* at 22,263.
[451] *See id*. at 22,214.

Agency Response: **The agencies have modified the definitions of "tributary" and "neighboring" in the final rule. See the preamble for further information regarding jurisdiction under (a)(5) and (a)(6).**

The final rule also includes a new exclusion in paragraph (b)(6) for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. See summary response at 7.4.4.The agencies' longstanding practice is to view stormwater water 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 jurisdictional currently even where used as part of a stormwater management system. Nothing in the proposed rule was intended to change that practice. Nonetheless, the agencies recognize that the proposed rule brought to light confusion about which stormwater control features are jurisdictional waters and which are not, and agree that it is appropriate to address this confusion by creating a specific exclusion in the final rule for stormwater controls features that are created in dry land.

In addition, current agencies' practices often consider some features described in this comments as "waste treatment systems" during the active period of mining, and are therefore excluded from coverage until reclaimed. Nothing in the rule is intended to alter the current application of the waste treatment exclusion. See summary response at 7.1.

American Petroleum Institute (Doc. #15115)

7.811 **C. The exclusion for waste treatment systems is incomplete**

…API concurs with the comments of the National Association of Homebuilders concerning the Proposed Rule's lack of an explicit exclusion of green infrastructure from jurisdiction. EPA promotes green infrastructure – "protecting and restoring natural landscape features and using natural systems (or systems engineered to mimic natural processes) to manage rain water as a resource" as a means to achieve sustainability, offset effects of climate change, and lower energy demands, among other benefits. And yet the agencies do not explicitly recognize green infrastructure and low impact stormwater management under the waste treatment exclusion in the 2014 Proposed Rule. Notwithstanding the waste treatment and artificial pond exclusions, rain gardens, bioswales, and other sustainable stormwater systems may very well be found jurisdictional, requiring permits and compliance with the Clean Water Act requirements. The uncertainty as to whether green infrastructure is considered jurisdictional is a clear disincentive to employ such practices. API members applying green infrastructure at point-of-sale locations such as retail gasoline outlets do not wish to find themselves facing burdensome permitting and other regulatory requirements in response to their efforts at water conservation and sustainability. API recommends the agencies incorporate into the 2014 Proposed Rule an explicit exemption from jurisdiction for green infrastructure projects. (p. 31)

Agency Response: **With respect to stormwater control features, including green infrastructure, please see the summary response at 7.4.4**

7.812 **D. The exclusion for artificial lakes or ponds is too narrow**

The 2014 Proposed Rule would exclude from jurisdiction "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."125 This exclusion is incomplete. The exclusion could be interpreted to apply only to the specific activities identified. There are a number of other purposes, however, for which artificial lakes or ponds are created by excavating and/or diking dry land. Examples in the industrial sector include fire water ponds (to supply water in an emergency), raw water storage ponds, cooling water ponds (which should also be excluded as wastewater treatment units), small ponds for temporarily storing produced water from hydraulic fracturing operations, and storm water retention ponds designed not primarily for treatment but to protect against flooding or to serve as water supply storage. These types of industrial ponds, and any other similar industrial ponds, and all ditches and conduits to and from these ponds should be explicitly excluded from jurisdiction under the 2014 Proposed Rule because these ponds have no impact on navigable waters and are necessary for a range of industrial operations. Inflow of surface runoff to these ponds should in no way alter the exclusion. (p. 31-32)

Agency Response: **In the exclusion for artificial lakes or ponds, the agencies have changed "exclusively" to "primarily" in describing the uses. Artificial lakes and ponds are often not used exclusively for one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. The change to the exclusion reflects Agency practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use. The agencies have also added cooling ponds to the list of uses in the rule. The list of uses has always been illustrative rather than exhaustive.**

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

7.813 **The Agencies Should Clearly Exempt Waters on Manufacturing Facilities Used for Commercial Purposes**

Even if our suggested revisions to clarify definitions were included in a final rule, the broad language of the proposal still would leave mills subject to unwarranted claims of jurisdiction for water bodies on mill property that are part of the commercial activities on that property. The final rule needs to unequivocally avoid that result, for three reasons:

- First, treating such water bodies as subject to federal jurisdiction and covered by the various requirements of the CWA would be contrary to decades of agency practice in application of the CWA. It also would be contrary to both the agencies' stated intentions with respect to the Proposal and the reasonable expectations of those who own and operate industrial and other commercial facilities.
- Second, treating such water bodies as WOTUS would greatly interfere with the operation of industrial and other commercial facilities, imposing excessive costs, regulatory delays, and other constraints. In many cases, literal application of CWA requirements to such a water body could render its use for commercial purposes difficult or impossible. (As just one example, a pond used for flocculation of suspended solids as part of a raw water treatment system might by

definition violate state narrative water quality standards concerning floating materials or turbidity.)

- Thirdly, and most importantly, treating such water bodies as WOTUS would do little, if anything, to further the goals of the CWA, and it would impose excessive regulatory burdens on both facility operators and CWA permitting and enforcement authorities.

A prohibition on discharge of fill material into, or dredging fill material out of, a water body without a permit makes no sense when that water body was created for the purpose of storing water containing suspended solids, or of settling solids out of that water, for example. Water quality standards designed to protect aquatic life in, or to assure the aesthetics of, a natural water body serve no purpose if applied to a water body that is part of an industrial operation. Maintaining healthy aquatic organisms in a water body may be the opposite of what is needed in ponds used to store water to be used for commercial purposes, such as for cooling water or for water used to process food or manufacture drugs. If EPA were to claim WOTUS jurisdiction over such ponds, EPA and state agencies would take on a tremendous burden of having to develop new water quality standards that would be appropriate for such uses, as well as issue NPDES or section 404 permits for discharges into or activities related to maintenance of those waters—and for little or no regulatory benefit.

As the Supreme Court explained in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), EPA, when interpreting the extent of a statute's regulatory program, must consider whether a broad interpretation would be consistent with "the Act's structure and design," and whether it "would be incompatible with the substance of Congress' regulatory scheme." *Id*. at 2442-43 (citation and quotations marks omitted). The Court has also emphasized, in that case and others, that EPA should not impose regulations where doing so would have only a *de minimis* regulatory benefit. See *id*. at 2449. That certainly would be the case if EPA tried to force the square peg of industrial and commercial water bodies into the round whole of a regulatory scheme designed for the protection of natural water bodies.

Accordingly, the agencies should adopt the following additional exemption from the definition of WOTUS that would work in tandem with the existing exemptions (as revised or clarified in accordance with our comments below) to clearly exempt waters, the regulation of which can expose our facilities to high compliance costs, while providing little to no water quality benefit.

Add to proposed 33 C.F.R. § 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 definition—") and to similar provisions of other proposed definitions of "waters of the United States":

> (6) Man-made or man-altered bodies of water (including adjacent wetlands) that (i) are used for commercial purposes by a facility that owns or occupies the property on which the water is located and (ii) have no surface discharge to a water of the United States, other than through an NPDES-permitted outfall or as a result of a chronic or catastrophic rainfall event. As used in this paragraph, "used for commercial purposes" means use in the production, distribution, or sale of

goods or services, including both direct uses (such as for log conditioning) and uses that support the commercial facility (such as fire protection or raw water treatment).

The exemption provided in this paragraph does not affect the scope, application or implementation of any other exemption provided in this section.

This exemption would assure that those industrial/commercial waters that have a potential direct impact on a WOTUS are regulated, either through limitations in an NPDES permit (individual or general) at the point of discharge, or because the exemption would not extend to waters with an unpermitted discharge. (A water that is not designed to have a discharge to a WOTUS would not lose the exemption, however, if a discharge occurred because of flooding or because an unusual sustained rainfall event caused the water body to overflow its banks. EPA took a similar approach in its regulation of ponds associated with Concentrated Animal Feeding Operations.) Therefore the exemption would remain in the event of usual events. (p. 7-9)

Agency Response: **The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment, artificial ponds, and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional.**

7.814 Stormwater

There should be no question that any stormwater management facilities (such as green infrastructure, storm water retention 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, any final rule should specifically state that this is the case to remove any doubt or among all stakeholders. Due to the concern about ditches (see below), the preamble should clarify ditches that are conveying stormwater to or from stormwater management facilities also are covered by the waste water treatment exemption. (p. 11-12)

Agency Response: **Please see summary response at 7.4.4.**

Coeur Mining, Inc. (Doc. #16162)

7.815 **D. Ditches and Conveyances Should Not Be Regulated as Waters of the U.S.**

…

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... (p. 5, 6)

Agency Response: **Current agencies' practices often consider some features described in this comments as "waste treatment systems" during the active period of mining, and are therefore excluded from coverage until reclaimed. Nothing in the rule is intended to alter the current application of the waste treatment exclusion. In addition, the final rule has expanded and clarified the types of ditches not considered "waters of the United States."**

Virginia Coal and Energy Alliance and Virginia Mining Issues Group (Doc. #18016)

7.816 **A. The Agencies Should Clarify and Confirm That Features Associated With On-Site Stormwater and Surface Water Systems Will Remain Exempt in All Cases**

Water management features such as temporary and permanent diversion ditches and onsite ponds (e.g. , sediment ponds, slurry impoundments) are absolutely critical to mining operations within the SVC. Mine operators rely on these features to manage, store, treat, and reuse water within the mine site, often as part of statutorily-mandated requirements under SMCRA. Given the nature of these requirements, the purpose and design of these systems and the dynamic nature of mining activities, these kinds of water management features must remain non-jurisdictional.

There are numerous changes within the Proposal that might have the unintended effect of altering the jurisdictional status of these features. For instance, we can envision many instances where these features might fall within the broad new definitions of "tributary" and/or "adjacent," and thus be treated as per se jurisdictional. Alternatively, the expanded concept of "significant nexus" set forth in the Proposal would also allow for jurisdictional lines to be extended to these features on a case-by-case or eco-regional basis. All of these new openings create the need for clarity, within the rule itself, regarding the non-jurisdictional status of these features. This would logically come by way of clarifications to the waste treatment system exclusion (addressing uncertainty regarding jurisdiction over the various components of stormwater and surface water management systems employed at mine sites)" and the artificial lakes and ponds exclusion (confirming that the exclusion applies to sediment and bench ponds, slurry impoundments, and other operational ponds). Without these critical clarifications, the Proposal will continue to pose an enormous threat to VMIG, VCEA and the mining industry as a whole. (p. 5-6)

Agency Response: **Current agencies' practices often consider some features described in this comments as "waste treatment systems" during the active period of mining, and are therefore excluded from coverage until reclaimed. Nothing in the rule is intended to alter the current application of the waste treatment exclusion. In addition, the final rule has expanded and clarified the types of ditches not considered "waters of the United States." With respect to stormwater control features, please see the summary response at 7.4.4**

7.817 **C. The Agencies Should Clarify That "Old Works" Are Not Jurisdictional**

"Old works" are excavations and depressions left from historic mining activities conducted prior to the passage of the CWA and SMCRA. These features are generally considered non-jurisdictional and are reclaimed according to current SMCRA regulatory requirements. Nearly 80% of all surface mining conducted in Virginia involves remining; thus, these features are encountered at the majority of mine sites in the SVC. Active mining operations in the SVC utilize these "old works" - pre-law relic drainage ditches and depressions that have filled with water over time - for drainage and sediment basins, slurry impoundments and other operational purposes. Mining operations also frequently cross over and impact these features.

For the most part, these "old works" have remained outside of CWA jurisdiction under the exemption for "water-filled depressions created incidental to construction activity." But the Proposal threatens to erode or eliminate the applicability of this exemption to old works. We urge the Agencies to clarify that old works are not jurisdictional, either categorically or otherwise. (p. 7)

Agency Response: **The rule includes several refinements to the exclusion for water-filled depressions created as a result of certain activities. In addition to construction activity, the agencies have also excluded water-filled depressions created in dry land incidental to mining activity. This change is consistent with the agencies' 1986 and 1988 preambles, which generally excluded pits excavated for obtaining fill, sand or gravel, and there is no need to distinguish between features based on whether they are created by construction or mining activity. A number of commenters indicated that these water-filled depressions created in dry land are often left on a site after construction or mining activity is complete in order to provide beneficial purposes, such as water retention, recreation, and animal habitat.**

For features that do not meet these criteria, a jurisdictional determination is necessary to evaluate if the waters meet any of the criteria for coverage under (a)(1)-(a)(8), regardless of origin. The available science indicates that many man-made features can have a significant effect on downstream waters and should be evaluated for coverage as "waters of the United States."

Alameda County Cattlewomen (Doc. #8674)

7.818 Agencies Should Exclude Playa Lakes from Waters of the United States

ACCW request that the agencies create an exclusion for playa lakes from the category "waters of the United States." The proposed rule requests comment on the exclusion or

inclusion of playa lakes within "waters of the United States,"[452] (Proposed Rule at 22216), and ACCW have concluded that due to their isolated nature, these waters fall squarely in the realm of those isolated ponds that were found to be beyond the Corps' authority in SWANCC and as such should be specifically excluded in the regulation.[453] Due to the fact that these waters are geographically isolated and fall outside the jurisdiction of the CWA, we would also submit that a specific exclusion not include a caveat wrapping playas back into the category of regulated waters through the "interstate waters," "adjacent waters," or any other category as suggested in the proposed rule.[454] Not only would this subcategory exclusion be in line with Supreme Court rulings, it would provide much needed clarity to the regulated public.

The reports cited by EPA conclude that playas are "geographically isolated wetlands" that "…represent the lowest points on the landscape in closed watersheds" and "derive water from rainfall and local runoff (including irrigation water), while very few receive ground-water inputs (Haukos and Smith 1994)."[455] Another report describes them as "shallow depressional recharge wetland occurring primarily in the High Plains region of the western Great Plains. Each occurs within a closed watershed and, as the term recharge implies, only receives water naturally from precipitation and its associated runoff."[456] These characteristics clearly resemble those of the isolated ponds that were considered to be beyond the Corps' jurisdiction in SWANCC, therefore making it appropriate for clarity and legal purposes for the agencies to specifically exclude playas from the "waters of the U.S." regulation.

The agencies also seek comment, data, and information on whether there are subcategories of "other waters" or specific combinations of characteristics that are "likely, in the majority of cases, to perform important functions for an aquatic ecosystem incorporating navigable waters," and, thus, should be per se jurisdictional (page 22252). Again, the reports cited by EPA provide support for demonstrating that there is separation between playas and navigable waters and that a majority of playas do not meet the criteria to be considered jurisdictional "waters of the U.S.":

1. There is a clear distinction between geographically isolated wetlands, such as playas, and adjacent wetlands, where the reports specifically state, "The closed watersheds and isolated environmental events (e.g., precipitation,

[452] Proposed Rule at 22216, ("In addition, the agencies could determine that other subcategories of waters are not jurisdictional and lack a significant nexus to an (a)(1) through (a)(3) water. Under this option the agencies could conclude that ''other waters'' such as playa lakes in the Great Plains, even in combination with other playa lakes in a single point of entry watershed, lack a significant nexus and therefore are not jurisdictional.").
[453] *SWANCC*, at 163, 168 (describing the waters in question as "seasonal ponds of varying sizes;" and noting that to "rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water").
[454] Proposed Rule at 22216 ("Under this approach, where a playa lake, or other excluded category of water, would be within a category established by paragraphs (a)(1) through (a)(6) of the proposed rule (e.g., the playa is an interstate water or the playa is adjacent to an (a)(1) through (a)(5) water), the playas would be jurisdictional.").
[455] Tiner, Geographically Isolated Wetlands of the United States, Wetlands 23(3): 494-516, 496 & 500 (2003).
[456] Haukos & Smith, Playa Wetland Regulation, Wetlands 23(3): 577-589, 577 (Sept. 2003).

runoff) defining playas contributes to spatial and temporal difference in the importance of ecosystem functions even among adjacent wetlands,"[457] and

2. EPA suggests that a key criterion for jurisdiction should include "specific combinations of characteristics" that would include or be applicable to "…the majority of cases…" The reports cited by EPA state, "The remaining requirements for declaration of jurisdiction under the CWA apply to just a few playas. Indeed, we believe that <1% of the playas could meet the remaining jurisdictional criteria: interstate location, adjacent or connected to navigable waters, or a significant nexus to interstate commerce." Clearly <1% is not indicative of "…the majority of cases…" and as such provides strong support for EPA to determine that playas are not be jurisdictional.[458]

It is clear from the science and the Supreme Court's holding in SWANCC that playa lakes are the closed, isolated watersheds that are the prime candidates for exclusion under the "waters of the U.S." rule. To provide the needed certainty and clarity to the ranchers utilizing these features, ACCW request the agencies categorically exclude playa lakes from the category of "waters of the U.S." (p. 27-28)

Agency Response: **The agencies at this time are not able to determine that the available science supports that playa lakes as a class have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas. However, to be clear, under the rule, individual waters of the suggested additional subcategories are jurisdictional where they meet the requirements of (a)(1) through (a)(6) or (a)(8) (e.g., a playa lake that is an interstate water, a kettle lake that is an adjacent water or one that is determined on a case-specific basis to have a significant nexus to a traditional navigable water, interstate water, or the territorial seas). See the Technical Support Document, section I, for a discussion of the SWANCC decision's effect on jurisdiction.**

Illinois Corn Growers Association (Doc. #13996)

7.819 **None of the following should be categorically considered jurisdictional waters of the United States:** intermittent and ephemeral tributaries; man-made ditches, including ditches constructed in dry lands and drain only dry lands or ditches dug in dry lands which do not flow all the time or do not flow into a jurisdictional water; normal farming and ranching water-related activities such as irrigation which are not regulated under the CWA; wet areas on fields or erosional features on fields; farm ponds; impoundments with any of the foregoing features; and adjacent wetlands or any other waters adjacent to such features (whether in floodplain or riparian areas or otherwise physically proximate with some hydrological connection). (p. 3)

Agency Response: **The agencies have expanded and clarified the features not considered to be "waters of the United States" in the final rule. These include some types of ditches, artificially irrigated areas that would revert to dry land should application of water to that area cease, artificial lakes and ponds created in dry land**

[457] Playa Wetland Regulations, at 579.
[458] *Id*. at 585.

and used primarily for uses such as stock watering, irrigation, settling basins, rice growing, or cooling ponds, and erosional features. Nothing in this rule affects the exemptions under 404(f) for normal farming activities. Also, see the preamble for the revised definition of "adjacent."

The rule definition of "tributary" requires that flow must be of sufficient volume, frequency, and duration to create the physical characteristics of bed and banks and an ordinary high water mark. If a water lacks sufficient flow to create such characteristics, it is not considered "tributary" under this rule. While some commenters expressed concern that a feature that flowed very infrequently could meet the proposed definition of "tributary," it is the agencies' judgment that such a feature is not a tributary under the rule because it would not form the physical indicators required under the definitions of "ordinary high water mark" and "tributary." To further emphasize this point, the rule expressly indicates in paragraph (b) that ephemeral reaches that do not meet the definition of tributary are not "waters of the United States." As noted by the SAB, and consistent with the scientific literature, tributaries as a group exert strong influence on the chemical, physical, and biological integrity of downstream waters, even though the degree of connectivity is a function of variation in the frequency, duration, magnitude, predictability, and consequences of chemical, physical, and biological processes. *See, e.g.*, SAB 2014b. These significant effects on traditional navigable waters, interstate waters, and the territorial seas occur even when the tributary is small, intermittent, or ephemeral.

USA Rice Federation (Doc. #13998)

7.820 …USA Rice Federation requests the agencies to revise the exemptions from the definition of waters of the U.S. as follows:…

(ii) Artificial lakes or ponds created by excavating and/or diking dry land and used ~~exclusively~~ for such purposes as stock watering, irrigation, ~~or~~ settling basins~~, or rice growing~~;

(iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;

(iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(v) Water-filled depressions created incidental to construction activity;

(vi) Groundwater, including groundwater drained through subsurface drainage systems; ~~and~~

(vii) Gullies and rills and non-wetland swales;

and

(viii) Fields and ponds used for growing rice or rice and other crops in rotation and all manmade ditches, canals, and reservoirs used to hold water for, carry water to, or remove water from such fields and ponds. (p. 10)

Agency Response: **The agencies do not believe it is appropriate to separate out rice growing as stated in the comment. In the exclusion for artificial lakes or ponds, the agencies have changed "exclusively" to "primarily" in describing the uses. Artificial lakes and ponds are often not used exclusively for one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. In many cases, the other features listed in the comment would not be regulated due to 404(f) exemptions for normal farming activities.**

The Mosiac Company (Doc. #14640)

7.821 …Mosaic agrees playa lakes should be a subcategory of "Other Waters" that are non-jurisdictional', unless they would fall within a category established by paragraphs (a)(l) through (a)(6) of the proposed rule.

EPA's review of the available scientific literature supports this conclusion for playa lakes. The available scientific literature on playa lakes indicates playas typically occur in closed basins. (79 Fed. Reg. at 22,251). The agencies conclude that the scientific literature regarding the physical, chemical, and biological connection of playa lakes to traditional navigable waters is limited and of a tenuous nature (79 Fed. Reg. at 22,251). The agencies rely on the scientific literature reviewed in the draft EPA Connectivity Report to make determinations that categories of waterbodies (adjacent waters, tributaries, etc.) have a significant nexus to traditional navigable waters and therefore warrant jurisdiction by rule. The agencies also state that "Other Waters" require a case-by-ease significant nexus determination because the degree of connection and effect on downstream waters are too uncertain to make these waterbodies jurisdictional by rule. The same body of literature indicates that playa lakes are isolated and have little to no connection to downstream waters (79 Fed. Reg. at 22,251 - citing D.A. Haukos, and L.M. Smith, "Past and Future Impacts of Wetland regulations on Playas," Wetlands 23(3):577-589 (2003)). The draft EPA Connectivity Report concludes the scientific literature lacks sufficient information to evaluate the type or degree of connectivity or the variability in connectivity for those unidirectional wetlands (of which playa lakes are categorized) that lack surface water connections to downstream waters (EPA Connectivity Report page 5-40, lines 30 - 35), Thus, the scientific evidence is lacking to claim playa lakes either alone or in combination with other playas have a significant nexus with downstream waters.

Based on the available literature and the agencies' conclusions, playa lakes should be determined to be non-jurisdictional by rule. A case-by-case significant nexus evaluation would not be needed for playa lakes. (p. 27-28)

Agency Response: **The agencies at this time are not able to determine that the available science supports that playa lakes as a class have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas. However, to be clear, under the rule, individual waters of the suggested additional subcategories are jurisdictional where they meet the requirements of (a)(1) through (a)(6) or (a)(8) (e.g., a playa lake that is an interstate water, a kettle lake that is an adjacent water or one that is determined on a case-specific basis to have a significant nexus to a traditional navigable water, interstate water, or the territorial seas). See the**

Technical Support Document, section I, for a discussion of the SWANCC decision's effect on jurisdiction.

Irvine Ranch Water District (Doc. #14774)

7.822 C. Water Conveyance Systems and Man-Made Structures Should Not be Defined As "Tributaries".

The proposed rule defines "Tributary" as "a water physically, characterized by the presence of a bed and banks and ordinary high water mark ... which contributes flow, either directly or through another water." The proposed rule then goes further to incorporate all streams, underground flows, wetlands, lakes, ponds, and impoundments into the definition of tributary, if they contribute any amount of flow to a WOTUS, even if they lack a bed and bank or an ordinary high water mark. The proposed rule specifically expands the definition of tributary to include man-altered or man-made water conveyances. Through its use of a broad and sweeping definition of tributary, the proposed rule defines man-made, non-stream conveyances as WOTUS and makes them subject to the full spectrum of CWA permitting. Additionally, the rule presumes that all water conveyances have a significant nexus to a WOTUS, which is not true, and uses sweeping language to define these facilities as WOTUS themselves.

…**IRWD requests that water conveyance systems be excluded from the definition of WOTUS in the proposed rule, and that the proposed definition of "Tributary" be narrowed.** The requirement to include all tributaries by rule, including underground conveyances of a tributary is overreaching. Such a generalized requirement is not based on physical properties, such as an ordinary high water mark and is therefore subject to a wide range of interpretation. In the rule, federal jurisdiction should be specifically limited to the surface expression of a drainage that has connectivity to a downstream receiving water and an ordinary high water mark. (p. 4)

Agency Response: The agencies have modified the definition of "tributary" in the final rule. 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 have not in practice asserted jurisdiction over these types of features when created in dry land.

7.823 The list of excluded categories of waters should be expanded to specifically include:

- Raw, potable, and recycled water storage and water banking facilities, including reservoirs.
- Raw, potable, and recycled water conveyance systems, including canals, channels and ditches.
- Underground pipes and culverts for the conveyance of potable, recycled, and storm water.
- Detention basins excavated in uplands and used for the purpose of detaining storm flows. (p. 6)

Agency Response: Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies

recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling.

With respect to stormwater control features, please see the summary response at 7.4.4

Browns Valley Irrigation District, California (Doc. #14908)

7.824 To better balance the broad interest of the CWA in protecting the nation's surface waters while not unduly interfering with the ability of water agencies to provide water, the Browns Valley Irrigation District recommends the following:…

- Water infrastructure, such as recycled water facilities, groundwater recharge basins, stormwater retention basins, and constructed wetlands, adjacent to "waters of the United States" should be excluded from jurisdiction under the proposed rule. (p. 2)

Agency Response: Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling.

With respect to stormwater control features, please see the summary response at 7.4.4

7.825 Under the proposed rule, the Browns Valley Irrigation District would be subject to all the permitting requirements in the CWA including needing to obtain a section 404 dredge and fill permit when, for example maintenance work is conducted on our canal? The Browns Valley Irrigation District recommends water conveyance systems be excluded from the definition of tributary. (p. 2)

Agency Response: The agencies have modified the definition of "tributary" in the final rule. 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 have not in practice asserted jurisdiction over these types of features when created in dry land.

7.826 The Browns Valley Irrigation District requests water infrastructure facilities (including construction, maintenance, and operation) adjacent to traditionally navigable waters be excluded from the proposed definition of "waters of the United States". (p. 3)

Agency Response: See two previous responses.

Georgia Paper & Forest Products Association (Doc. #14924)

7.827 4) The rule should exempt waters that are used at commercial facilities for commercial purposes, whether used directly or indirectly, as explained in greater detail in the AF&PA comment letter. (p. 3)

Agency Response: The agencies disagree that "commercial purposes" should be a basis for exclusion from jurisdiction.

Klamath Water Users Association (Doc. #15063)

7.828 Subsection (b)(1) of the proposed rule excludes "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" among other features listed later in the section. While such systems have traditionally been excluded from CWA jurisdiction, we believe that, due to the expansive nature of the proposal, the agencies should also exclude other constructed water management and treatment infrastructure with similar attributes to these waste treatment systems. These facilities could include water reuse and recycling ponds, treatment lagoons, and other appurtenances; artificially constructed wetlands designed to treat agricultural, stormwater or other municipally treated return flows (e.g. "green infrastructure") that are used and managed to remove nutrients and improve water quality; and artificially constructed groundwater recharge basins designed to percolate surface water into groundwater basins. All of these features would revert to dry land if application of water were to cease and, even though they usually contain plants and shrubs known to grow in wetlands, they should be added to the list of features identified in subsection (b) as excluded from the definition of "waters of the U.S." (p. 4)

Agency Response: Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse

and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion also covers water distributary structures that are built in dry land for water recycling.

With respect to stormwater control features, please see the summary response at 7.4.4

Beet Sugar Development Foundation (Doc. #15368)

7.829 e. Stormwater Exemptions

BSDF encourages the agencies to retain the current and proposed non-jurisdictional agricultural exemptions in the final rule. The agencies should, however, expand and clarify industrial stormwater exemptions. Although the proposed rule purports to leave intact exemptions for agricultural stormwater discharges,[459] these exemptions are often inconsistently applied and difficult to predict. The agencies must clarify the exemptions to ensure BSDF farmers that their stormwater systems are non-jurisdictional. Failure to clarify these exemptions will frustrate the efforts of farmers and processing facilities to comply with stormwater regulations. (p. 14-15)

Agency Response: **See summary response at 12.3.**

Weyerhaeuser Company (Doc. #15392)

7.830 III. Water Features and Treatment Systems on Mill Sites Should Remain Exempted

Some of the proposed changes and definitions could result in claims of Clean Water Act jurisdiction for water features and treatment system components that currently are not considered waters of the U.S. and that are necessary to manage the flow and quality of waters leaving the site or being discharged to jurisdictional waters. This would be an unreasonable and extremely burdensome result, turning the physical features and operations necessary to maintain both the commercial mill processes and the quality of

[459] *See id*. at 22193–94 ("Exempted discharges are established under CWA sections 402, 502, and 404 and include Agricultural stormwater discharges . . . . ."). [*Rapanos*]

jurisdictional waters receiving permitted discharges into jurisdictional waters themselves that have to meet water quality criteria and standards.

For example, because many forest products mills are located on or near traditional navigable waters, fire and storm water control ponds that are maintained at many mills could, under the proposed rules and definitions for tributaries or other waters, be claimed as within jurisdictional scope. These should be clearly exempted from jurisdiction. (p. 15)

Agency Response: The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment, artificial ponds, and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional.

Similarly, for operations that have large wastewater treatment systems utilizing lagoons or ponds that may have been established decades ago the agencies' jurisdictional interpretations should not change the existing regulatory provision that provides an exemption. EPA should recognize that all portions of a wastewater or stormwater treatment system regulated under an NPDES permit are exempt. For example, an NPDES permit for a large land area such as a mill site can cover both wastewater treatment systems and stormwater management systems, including conveyances such as ditches and swales that direct wastewater or stormwater to structural source controls and treatment but which may or may not be specifically listed in an NPDES permit for the site. The proposals that would expand jurisdiction to most ditches as tributaries while severely limiting their exclusion, as discussed previously in these comments, would counter their use on mill sites in protecting operations and downstream water quality. Best Management Practices systems for stormwater may include ditches, settling basins, vegetated swales, infiltration ponds, etc., that are mandated by the terms of the stormwater management plan and/or NPDES permit for the site. It would be unreasonable to deem any of these conveyances jurisdictional waters of the U.S. because they are locations where, for example, maintenance is routinely completed, different Best Management Practices are added, or more active treatment approaches are tried to improve the managed water and protect the receiving water bodies.

EPA should also clarify that zero discharge systems, including land application systems, fall within the exemption. At wood products mills where Timber Products effluent guidelines call for zero discharge, ponds and other systems used to implement the zero discharge requirement clearly are designed to meet the requirements of the Clean Water Act. In some cases land application systems are used to meet the effluent guideline or to avoid an unpermitted discharge, and these typically involve storage/pretreatment ponds and acres of spray-fields. Spray fields may develop wetland-like areas or have ditches to collect run off. These systems are designed to meet the requirements of the Clean Water Act but not to be jurisdictional waters, and should be recognized as such in any final rule. (p. 15-16)

Agency Response: Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse

and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. The exclusion also covers water distributary structures that are built in dry land for water recycling.

With respect to stormwater control features, please see the summary response at 7.4.4

Kitchen Cabinet Manufacturers Association et al. (Doc. #15418)

7.831 **III. The Agencies Should Clearly Exempt Waters on Manufacturing Facilities Used for Commercial Purposes**

The broad language of the Proposal would leave mills subject to unwarranted claims of jurisdiction for water bodies on mill property that are part of the commercial activities on that property. The final rule needs to unequivocally avoid that result, for three reasons:

(1) Treating such water bodies as subject to federal jurisdiction and covered by the various requirements of the CWA would be contrary to decades of agency practice in application of the CWA. It also would be contrary to both the agencies' stated intentions with respect to the Proposal and the reasonable expectations of those who own and operate industrial and other commercial facilities.

(2) Treating such water bodies as WOTUS would greatly interfere with the operation of industrial and other commercial facilities, imposing excessive costs, regulatory delays, and other constraints. In many cases, literal application of CWA requirements to such a water body could render its use for commercial purposes difficult or impossible. (p. 3)

Agency Response: The agencies disagree that "commercial purposes" should be a basis for exclusion from jurisdiction.

The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment, artificial ponds, and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional.

American Forest & Paper Association (Doc. #15420)

7.832 **IV. The Agencies Should Clearly Exempt Waters on Manufacturing Facilities Used for Commercial Purposes**

Even if the revisions we suggest in Section V., below, were included in a final rule, the broad language of the Proposal still would leave mills subject to unwarranted claims of

jurisdiction for water bodies on mill property that are part of the commercial activities on that property. The final rule needs to unequivocally avoid that result, for three reasons:

(1) Treating such water bodies as subject to federal jurisdiction and covered by the various requirements of the CWA would be contrary to decades of agency practice in application of the CWA. It also would be contrary to both the agencies' stated intentions with respect to the Proposal and the reasonable expectations of those who own and operate industrial and other commercial facilities. (2) Treating such water bodies as WOTUS would greatly interfere with the operation of industrial and other commercial facilities, imposing excessive costs, regulatory delays, and other constraints. In many cases, literal application of CWA requirements to such a water body could render its use for commercial purposes difficult or impossible. As just one example, a pond used for flocculation of suspended solids as part of a raw water treatment system might by definition violate state narrative water quality standards concerning floating materials or turbidity.

(3) Most importantly, treating such water bodies as WOTUS would do little, if anything, to further the goals of the CWA, and it would impose excessive regulatory burdens on both facility operators and CWA permitting and enforcement authorities. A prohibition on discharge of fill material into, or dredging fill material out of, a water body without a permit makes no sense when that water body was created for the purpose of storing water containing suspended solids, or of settling solids out of that water, for example. Water quality standards designed to protect aquatic life in, or to assure the aesthetics of, a natural water body serve no purpose if applied to a water body that is part of an industrial operation. Maintaining healthy aquatic organisms in a water body may be the opposite of what is needed in ponds used to store water to be used for commercial purposes, such as for cooling water, or for water used to process food or manufacture drugs. If EPA were to claim WOTUS jurisdiction over such ponds, EPA and state agencies would take on a tremendous burden of having to develop new water quality standards that would be appropriate for such uses, as well as issue NPDES or section 404 permits for discharges into or activities related to maintenance of those waters— and for little or no regulatory benefit.

Further, Dr. Michael Josselyn, a member of the Science Advisory Board panel reviewing the Proposal, noted that:

> "[T]he Science Report might also discuss how some man-made features are designed to avoid connectivity in order to protect the environment from toxic or polluted water sources that are present in some of these features. The construction of any facility designed to retain, store, pond, treat, or process water used in industrial processes and to assure that such liquids do not enter the environment should be excluded from jurisdiction as a matter of rule."[460]

As the Supreme Court explained in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), EPA, when interpreting the extent of a statute's regulatory program, must

[460] September 2, 2014, Memorandum from Dr. Amanda D. Rodewald, to Dr. David Allen, "Comments to the chartered SAB on the adequacy of the Scientific and Technical Basis of the Proposed Rule Titled "Definition of 'Waters of the United States' Under the Clean Water Act," at 48.

consider whether a broad interpretation would be consistent with "the Act's structure and design," and whether it "would be incompatible with the substance of Congress' regulatory scheme." *Id*. at 2442-43 (citation and quotations marks omitted). The Court has also emphasized, in that case and others, that EPA should not impose regulations where doing so would have only a *de minimis* regulatory benefit. See *id*. at 2449. That certainly would be the case if EPA tried to force the square peg of industrial and commercial water bodies into the round hole of a regulatory scheme designed for the protection of natural water bodies.

Accordingly, the agencies should adopt the following additional exemption from the definition of WOTUS that would work in tandem with the existing exemptions (as revised or clarified in accordance with our comments in section V., below) to clearly exempt waters, the regulation of which would expose AF&PA members and owners or operators of other industrial or commercial facilities to high compliance costs, while providing little to no water quality benefit.

> Add to proposed 33 C.F.R. § 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 definition—") and to similar provisions of other proposed definitions of "waters of the United States":
>
> (6) Man-made or man-altered bodies of water (including adjacent wetlands) that
>
> (i) are used for commercial purposes by a facility that owns or occupies the property on which the water is located and (ii) have no surface discharge to a water of the United States, other than through an NPDES-permitted outfall or as a result of a chronic or catastrophic rainfall event. As used in this paragraph, "used for commercial purposes" means use in the production, distribution, or sale of goods or services, including both direct uses (such as for log conditioning) and uses that support the commercial facility (such as fire protection or raw water treatment).
>
> The exemption provided in this paragraph does not affect the scope, application or implementation of any other exemption provided in this section.

This exemption would assure that those industrial/commercial waters that have a potential direct impact on a WOTUS are regulated, either through limitations in an NPDES permit (individual or general) at the point of discharge, or because the exemption would not extend to waters with an unpermitted discharge. A water that is not designed to have a discharge to a WOTUS would not lose the exemption, however, if a discharge occurred because of flooding or because an unusual sustained rainfall event caused the water body to overflow its banks. EPA took a similar approach in its regulation of ponds associated with Concentrated Animal Feeding Operations.[461] (p. 5-7)

Agency Response: **The agencies disagree that "commercial purposes" should be a basis for exclusion from jurisdiction.**

[461] See, e.g., 40 C.F.R. § 412.12(b); 58 Fed. Reg. 7620; EPA Guidance Manual and Example NPDES Permit for Concentrated Animal Feeding Operations, Review Draft, Aug. 6, 1999 pp. 3-8, F-6, F-24.

The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment, artificial ponds, and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional.

Packaging Corporation of America (Doc. #15515)

7.833 **3) The agencies should clearly exempt waters used at manufacturing facilities for commercial purposes (consistent with AF&PA comments).**

Mills that have historically used various water features on their property as part of the commercial activities on that property should be protected from potential jurisdiction under the rule for several reasons: First, treating such water bodies as subject to federal jurisdiction and covered by the various requirements of the CWA would be contrary to decades of agency practice in application of the CWA, which have influenced operational practices of regulated entities. It also would be contrary to both the agencies' stated intentions with respect to the Proposal and the reasonable expectations of those who own and operate industrial and other commercial facilities. Secondly, treating such water bodies as WOTUS would greatly interfere with the operation of industrial and other commercial facilities, imposing excessive costs, regulatory delays, and other constraints. In many cases, literal application of CWA requirements to such a water body could render its use for commercial purposes difficult or impossible. Thirdly, and most importantly, treating such water bodies as WOTUS would do little, if anything, to further the goals of tile CWA, and it would impose excessive regulatory burdens on both facility operators and CWA permitting and enforcement authorities.

Accordingly, the agencies should adopt the following additional exemption from the definition of WOTUS that would work in tandem with the existing exemptions.

> Add to proposed 33 C.F.R. § 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 definition-") and to similar provisions of other proposed definitions of "waters of the United States":
>
> *(6) Man-made or man-altered bodies of water (including adjacent wetlands) that (i) are used for commercial purposes by a facility that owns or occupies the property on which the water is located and (ii) have no surface discharge to a water of the United States, other than through an NPDES-permitted outfall or as a result of a chronic or catastrophic rainfall event. As used in this paragraph, "used for commercial purposes" means use in the production, distribution, or sale of goods or services, including both direct uses (such as for log conditioning) and uses that support the commercial facility (such as fire protection or raw water treatment).*
>
> *The exemption provided in this paragraph does not affect the scope, application or implementation of any other exemption provided in this section.* (p. 3-4)

Agency Response: The agencies disagree that "commercial purposes" should be a basis for exclusion from jurisdiction.

The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment, artificial ponds, and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional.

Dairy Cares (Doc. #16471)

7.834 Dairy Cares requests that the Agencies revise the Proposed Rule in a manner that clearly excludes man-made lagoons, ponds, ditches, and the like from being considered jurisdictional even in circumstances where such facilities would be considered to be "adjacent" to a traditional WOTUS. (p. 5)

Agency Response: The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment, artificial ponds, and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional.

Anderson-Cottonwood Irrigation District (Doc. #17085)

7.835 …To better balance the broad interest of the CWA in protecting the nation's surface waters while not unduly interfering with the ability of water agencies to provide water, Anderson-Cottonwood Irrigation District recommends the following:

- Water conveyance systems, including ditches, should be excluded from the proposed definition of "waters of the United States."
- Water infrastructure, such as recycled water facilities, groundwater recharge basins, stormwater retention basins, and constructed wetlands, adjacent to "waters of the United States" should be excluded from jurisdiction under the proposed rule. (p. 2)

Agency Response: Paragraph (b)(7) of the rule also clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

Although the agencies have modified the definition of "tributary" in the final rule, the preamble states that 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 have not in practice asserted jurisdiction over these types of features when

created in dry land With respect to stormwater control features, please see the summary response at 7.4.4

Hampton Roads Planning District Commission, Virginia (Doc. #9612)

7.836 **4. Manmade flood control and drainage conveyance structures should be excluded from the definition of WOTUS**. These structures are constructed to prevent loss of life and protect property from flooding. A jurisdictional designation will result in more costly and time consuming permitting requirements to maintain or expand these structures to mitigate flooding. This may discourage flood control projects and may cause harm to the public, especially in coastal communities. (p. 2)

Agency Response: Please see summary response at 7.4.4.

Lake County Division of Transportation, Lake County, Illinois (Doc. #14743)

7.837 Under the proposed rule, stormwater management facilities and green infrastructure are not explicitly exempt. Lake County encourages the use of green infrastructure as a stormwater best management practice (BMP) to lessen flooding and protect water quality by using vegetation, soils, and natural processes. The proposed rule could impact these County maintained sites by requiring Section 404 permits for maintenance activities once the areas are established. This could inadvertently encourage the installation of less desirable stormwater management facilities. The proposed rule should specifically exclude stormwater management facilities and green infrastructure from federal jurisdiction. (p. 1-2)

Agency Response: Please see summary response at 7.4.4.

Airlines For America (Doc. #15439)

7.838 **2. Application of the Proposed Rule**

EPA and the Corps repeatedly have assured stakeholders that the proposal does not expand CWA jurisdiction but simply revises agency regulations to reflect the Agencies' longstanding interpretations. A4A [Airlines For America] supports this aim. Unfortunately, however, the Proposed Rule appears sweepingly broad in its reach. Moreover, it invites broad interpretation by reason of the subjective standard of "significant nexus" that the Agencies have employed when seeking to describe the proper reach of the Act.[462] Most important, it would operate unpredictably in the context of airports. An example is illustrative.

The Proposed Rule's treatment of tributaries is expansive. In the abstract, the proposal would define as a "tributary" and confer jurisdictional status on virtually any channelized feature, natural or manmade, that contributes flow.[463] This broad universe of "tributaries"

[462] '''Significant nexus' is not itself a scientific term. The relationship that waters can have to each other and connections downstream that affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas is not an all or nothing situation. The existence of a connection, a nexus, does not by itself establish that it is a 'significant nexus.' There is a gradient in the relation of waters to each other, and this is documented in the Report." 79 Fed. Reg. at 22193, col.2.
[463] 79 Fed. Reg. at 22263.

could, under the Agencies' proposal, be interpreted to include any feature that conveys stormwater away from or below an airport because manmade features designed to convey water offsite are engineered to have a "bed and bank" and to "contribute flow." In the absence of an applicable exclusion, such features would be deemed to be Waters of the U.S.

In some cases, it appears that certain of these on-airport features might fit within one of the proposed exclusions. Certain open conveyance ditches, for example, might be excluded as "ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow."[464] Where such ditches also receive flow from groundwater, however, or are not created wholly in uplands, they presumably would fail these tests and would remain categorically jurisdictional tributaries.[465] In those cases, permit authorization could be required for discharges into a ditch that was never intended as anything more than a simple, engineered conveyance.

Similarly, some detention and retention ponds frequently found within airport collection systems may fall within the exclusion for "artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as..., settling basins,...."[466] This exclusion (as well as the existing exclusion for wastewater treatment systems) might not apply, however, where ponds were not expressly designed or are not expressly relied upon for their settling characteristics, but rather are used simply as repositories for water that must be removed from runways and taxiways or to provide equalization for off-site treatment. Ponds in these latter categories are present at the nation's airports, including at some of the nation's largest facilities. Rendering such ponds jurisdictional waters would oblige operators to obtain permits for discharges into the ponds, likely necessitating treatment in locations where system designers and current permit writers never intended for treatment to exist.

Case-by-case assessment of "other waters" under the same "significant nexus" test will yield the same patchwork of jurisdictional and non-jurisdictional findings in the airfield environment.

Overall, it is reasonable to assume that the Proposed Rule would result in the incidental characterization of individual drainage ditches or detention/retention ponds as WOTUS within airport sites. Such characterizations would vastly and unpredictably reshuffle the systems that airports, airlines, and their permitting authorities have put in place to meet the requirements of the Act. By potentially requiring outfalls within the aircraft operations area to be permitted the Proposed Rule would – inadvertently, we assume –

[464] 79 Fed. Reg. at 22269, proposed Section 122.2(b)(3).

[465] The proposal's treatment of "ditches" is equally broad and will allow for similarly disruptive subjective determinations by federal regulators. The Agencies have proposed only two exemptions from the definition of "ditch": (1) ditches entirely in uplands, that drain only uplands (for their entire length) and have less than perennial flow, and (2) ditches that do not contribute flow. 79 Fed. Reg. at 22263. These exemptions are poorly worded, however. For example, from a hydrologic perspective, it is unclear what constitutes a ditch entirely in uplands or how a ditch that drains only uplands could ever have perennial flow. Similarly, it is unclear how a ditch that does not convey any flow could be considered a water in the first instance. In addition, the rule does not address the common occurrence of ditches that are constructed in uplands but which develop spotty wetland characteristics from drainage water pooling within the feature.

[466] 79 Fed. Reg. at 22269, proposed Section 122.2(b)(5)(ii).

render many choices of treatment technology unavailable. On the other hand, by requiring permits at on-airfield sites where no treatment can feasibly be placed, the Proposed Rule would make it impossible to meet water quality-based effluent limitations and, thereby, threaten the sustainability of air service (a result that clearly is impermissible under the Federal Aviation Act).

3. Proposed Resolution

The Agencies should consider how to avoid these problems in the current rulemaking. Specifically, the Agencies should consider an aviation-specific exclusion of on-airport water bodies from the definition of WOTUS to avoid the arbitrary and capricious obligation to abandon existing, sufficient, costly pollution control systems where those systems already operate under the authorization of NPDES permits. (p. 5-6)

Agency Response: With respect to stormwater control features at airport facilities, please see the summary response at 7.4.4

WateReuse Association (Doc. #1349.1)

7.839 Water recycling and reuse remains the one reliable and readily available new source of fresh water across the nation. The infrastructure and technologies used to recycle and reuse water often incorporate features that could become jurisdictional under the CWA if the new rule defining "waters of the U.S." is not properly promulgated. This issue deserves additional consideration and we must have the opportunity to understand the potential unintended consequences of the proposed rule- especially at a time when the nation is clearly moving towards utilizing water reuse to help make our communities drought resistant and resilient….

While the proposed rule reiterates the exemption for wastewater treatment facilities under the CWA, water reuse and recycling infrastructure many times will not fall into this category and thus could become jurisdictional. We believe by making water reuse and recycling infrastructure and related facilities jurisdictional under the CWA through this rule, it will substantially hinder our ability to access this major new source of fresh water supply so important to the future of many communities in the U.S. (p. 1, 3)

Agency Response: Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. The exclusion also covers water distributary structures that are built in dry land for water recycling.

City of Omaha, Nebraska (Doc. #9733)

7.840 The City of Omaha strongly objects to any expansion of jurisdiction as proposed with this rule change. If the proposed rule passes, we request at a minimum projects needed to comply with NPDES programs and CSO control policies should be explicitly exempt from falling under the expanded CWA jurisdiction. (p. 2)

Agency Response: With respect to stormwater control features, please see the summary response at 7.4.4

Las Virgenes - Triunfo Joint Powers Authority, California (Doc. #13847)

7.841 We wish to emphasize that the proposed rule should specifically state that the waste treatment exemption extends to recycled water (RW) facilities. Further, the proposed rule should affirm that recycled water reservoirs, along with influent and treated effluent storage ponds are included within the scope of the waste treatment exemption.

Failing to apply the waste treatment exemption to water recycling facilities could lead to regulatory disincentives to produce RW, which is a significant portion of the JPA's water portfolio. Last year, nearly 20 percent of the water delivered by the JPA agencies was RW used to irrigate parks, school grounds, highway landscapes, golf courses and common areas of multi-family housing developments. Using RW for these purposes reduces the demand for potable water resources in drought-stricken California and other western states. EPA should ensure any future rules encourage, rather than impede, the development of this valued resource. (p. 1)

Agency Response: Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. The exclusion also covers water distributary structures that are built in dry land for water recycling.

County of San Diego, California (Doc. #14782)

7.842 **Exemption for water quality treatment features**

Any constructed feature built for the purpose of water quality treatment and/or runoff control as required by any federal, state, or local agency, including those with wetland indicators, connectivity and/or within a floodplain or riparian area, should be specifically defined as being non-jurisdictional by rule. In the Federal Register posting, the agencies' request comment on which waters should be determined non-jurisdictional by rule; this is an important example of such. It is imperative that the County, and other local agencies,

be able to construct and maintain water quality treatment facilities to ensure that the design and location of such facilities can remain consistent with the goals of stormwater management. If these facilities are left undefined, counties and stakeholders would be vulnerable to broad application of federal jurisdiction as these facilities would be open to being considered jurisdictional by local regulators. If these water quality treatment features are considered jurisdictional, then lengthy permitting and possible costly mitigation would be required to construct and maintain these features.

EXAMPLE: The County implements bridge replacement projects administered by the Federal Highway Administration. These bridge replacement projects are commonly located at stream crossings and typically include an increase in impervious surface to bring the bridge up to current standards. The increase in impervious surface area would trigger a requirement to install detention basins or a similar water quality treatment facility pursuant to Clean Water Act Section 402 and the corresponding MS4 permit. In this scenario, the water quality treatment facility must be installed adjacent to the new impervious surface in order to filter the water, which would also be adjacent to the stream. Thus, such a water quality treatment system would likely have direct connectivity, be within the floodplain, and within the riparian area. This example illustrates the importance of insuring that such facilities can be constructed and maintained unimpeded by potentially being considered to impact Waters of the U.S. by a significant nexus, wetland, or other determination. (p. 4)

Agency Response: **Please see summary response at 7.4.4.**

Public Works, Orange County, California (Doc. #14994)

7.843 2. The Agencies should provide specific exemptions:

a. Green infrastructure and other structural Best Management Practices (BMP) required by the CWA for water quality protection should be explicitly exempt for the purposes of maintenance.

b. Roadside ditches, draining only roadway runoff, should be explicitly exempt.

c. Constructed flood control channels, excavated in upland, should be considered part of the MS4 and explicitly exempted. Many such channels have been constructed in portions of Orange County (Stanley W. Trimble, Journal of Historical Geography, 29, 3 (2003) 422-444 Historical hydrographic and hydrologic changes in the San Diego creek watershed, Newport Bay, California) and have been inappropriately regulated as waters of the U.S. rather than part of the MS4, requiring Section 401/404 certifications/permits and being subject to Section 303 requirements (See 1.e above regarding Peters Canyon Channel).

d. Routine maintenance of ditches should be explicitly exempt pursuant to CWA 3 404(f)(l)(b) and (c). To this end, the County supports the recommendation made by others to define the term "Fully Constructed Stormwater Control Measures" ("SCMs") as follows: "SCMs are human-made structures, devices, measures or Best Management Practices (BMPs) that are constructed for the purpose of water quality treatment, stormwater volume reduction, stormwater rate control, flood control, stormwater conveyance, or any combination of these purposes." The County further supports

modifications to the Rule's Preamble that defines an exclusion for stormwater that is as clear as that for agriculture. (p. 3)

Agency Response: **The final rule include exclusions relevant to this comment, including exclusions for certain ditches and stormwater control features built in dry land. See summary response at 7.4.4.**

National Association of Clean Water Agencies (Doc. #15505)

7.844 **Water Reuse Exemption Needed**

The draft rule does not sufficiently address the issue of recycled water and reuse projects, in particular those using constructed treatment wetlands to treat millions of gallons of water a day. Under the draft rule these treatment wetlands could be declared WOTUS, potentially stifling development of or shutting down innovative recycled water projects. Lawmakers and the public alike are recognizing the integral role water reuse will play in regions facing severe drought, as demonstrated by California's recently passed ballot measure Water Quality, Supply and Infrastructure Act of 2014, which provides more than $7 billion for water infrastructure projects including investments in reuse. Clarifying the exemption of these projects designed to reuse treated effluent will ensure that jurisdictional questions will not impede their development and help to provide a sustainable water supply where it is most critical. There are multiple ways to clarify a regulatory exemption of these recycled water projects, which is currently unclear. Manmade features, like treatment wetlands, which are components of the water reuse process, could be easily included as a component of the waste treatment exemption with additional language. A separate exclusion specifically for water reuse and recycling elements would also work. (p. 3)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. The exclusion also covers water distributary structures that are built in dry land for water recycling.

7.845 EPA and USACE also have the opportunity to clarify the applicability of the CWA to water transfers in this rulemaking. Transferring water from one basin to another is a tool used by clean water utilities; it is often an essential element of water resource management and warrants close attention as to the jurisdiction of the CWA. In defining WOTUS, EPA and the USACE should be clear that jurisdiction does not extend to waters transferred from one water body to another without intervening municipal, industrial, or agricultural use, for purposes of water utility operations and maintenance.

Also, the final definition of WOTUS will have a direct impact on wastewater utilities and other entities engaged in construction, maintenance, repair, and expansion of water infrastructure. The rule should incorporate generally accepted practices to assure protection of WOTUS, while minimizing regulatory burden and allowing routine operation and maintenance of wastewater and stormwater conveyances. For wastewater utilities, the ability to engage in timely construction and other maintenance and improvement projects has significant implications for infrastructure function, public health, local economies, and community quality of life. It is critical that jurisdictional changes not delay wastewater system maintenance, repair, and construction activities. (p. 4)

Agency Response: Regarding water transfers, please see summary response at 12.3. With respect to stormwater control features, please see the summary response at 7.4.4

South Orange County Wastewater Authority, California (Doc. #15619)

7.846 … the proposed rule lacks sufficient clarity to protect all elements of recycled water production and use as fully within the waste treatment exemption. As a recycled water producer, SOCWA is keenly aware of the importance of recycled water as a source of supply to our agencies and cities. The expansion of jurisdictional waters under the proposed rule could complicate and interfere with wastewater treatment processes and with new water reuse opportunities. Integral to recycled water projects is a clear expression from USEPA that recycled water and appurtenant facilities for the reuse of water are within the scope of the waste treatment exception. For sample, in our area, south Orange County, California it may become important in the very near future, and in light of the ongoing drought conditions to use spreading grounds or basins to facilitate groundwater replenishment. We support the request of the CASA organization that the proposed rule should expressly include treatment ponds/lagoons, spreading grounds/basins , constructed treatment wetlands, effluent storage reservoirs and recycled water storage facilities within the scope of the waste treatment exception. All of these of facilities are vital to the reuse of the water resources in California.

We are concerned that revisions to the category of "adjacent wetland" to include "all adjacent waters" will bring in areas of stored water and water treatment systems regardless of whether any sort of nexus or hydraulic connection is shown, and without consideration of separations by berms or levees. We do not believe it is the Agencies' intent to regulate water reuse facilities, retention and detention basins, groundwater recharge basins, constructed wetlands, and similar water and wastewater infrastructure that is often simply located adjacent to "waters of the United States." For agencies such as SOCWA, the reuse and treatment of wastewater is a valuable resource to improve overall water supply and the "all adjacent waters" language will raise issues for projects as to whether existing or planned facilities are now jurisdictional waters . This action will bring less clarity to public agencies and inhibit their development of water reuse projects. Public agencies will be impaired by additional and unnecessary requirements, regulations and permitting associated with jurisdictional waters, including the potential for exposure to penalties and potential third party liability for effluent violations. This will set up a strong disincentive to sustainable water supply development and reduce the ability of

clean water agencies to act with innovation to put water resources to immediate drought relieving uses. We request that EPA consider a similar approach to that given to artificial lakes and ponds used for stock water, irrigation and other "such purposes" to include "existing, planned and new features of wastewater treatment systems using spreading grounds/recharge basins" and "wastewater and recycled water storage and conveyance systems". We also suggest that in order to alleviate the water crisis for California innovative water reuse/storage systems that put to beneficial reuse treated brackish, impaired/urban waters and wastewater resources should be considered for that exemption. (p. 1-2)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. The exclusion also covers water distributary structures that are built in dry land for water recycling.

Orange County Sanitation District, California (Doc. #16335.1)

7.847 In order to address the historic drought conditions currently plaguing the western states, water and wastewater agencies must rely on a full suite of flexible options to provide potable and recycled water supplies for a variety of ongoing uses. Thus, OCSD opposes any direct or indirect regulatory impacts on water recycling, water storage, and other mechanisms that playa part in recycled water infrastructure and processes as a result of the proposed rule.

As noted above, we appreciate the explicit acknowledgement and codification of the waste treatment exemption in the proposed rule. However, we believe it is important that the proposed rule expressly states that the waste treatment exemption extends to recycled water facilities. California water recycling projects often depend upon artificially created wetlands and storage ponds to treat millions of gallons of water a day. If these features are considered waters of the U.S. and are excluded from the waste treatment exemption, they could theoretically no longer be used as an integral component of the waste treatment systems, forcing the closure of important recycled water projects critical to California's water supply. Moreover, a lack of clarity on this issue may stall or halt the development of recycled water projects at a time when recycling is needed the most to address climate resiliency priorities.

Because recycled water demand is variable with time of day and season, recycling water agencies maintain reservoirs or storage basins/ponds to store recycled water during periods of low usage in anticipation of peak demands. These features are an essential

component of the recycled water process and integral to an agency's ability to continue reliably producing and supplying recycled water in many instances. The proposed rule should affirm that such reservoirs along with influent and treated effluent storage ponds are within the scope of the waste treatment exemption, consistent with the regulatory definition of "complete waste treatment system" found in existing federal regulations.[467] As the proposed rule and existing practice acknowledge, waste treatment systems designed to meet the requirements of the Clean Water Act are not waters of the U.S., and treatment systems should include any facilities, including storage ponds and basins, related not only to traditional treatment facilities and processes, but also to the production of recycled water.

In the alternative, recycled water facilities and features (including storage ponds, basins, artificially created wetlands, recycled water reservoirs and other features associated with water recycling) should be expressly exempted as part of the specifically identified features that are not considered waters of the U.S. within the proposed rule. In this case, recycled water facilities would be treated similar to artificial lakes, ponds, swimming pools, ornamental waters, and groundwater, which are specifically identified and expressly exempted. In either case, whether recycled water facilities are considered part of the waste treatment exemption or have their own specifically identified exemption, it is essential that the proposed rule not interfere with recycled water production and treatment by making those features jurisdictional.

The failure to include an explicit statement in the final rule would leave open the question of whether these features are considered "waters of the U.S." Such a situation could lead to regulatory disincentives to produce recycled water in California and other western states, compounding a water scarcity situation that is already dire. Pending and adopted federal and state legislation to address the impacts of our historic drought contain a number of approaches to encourage recycled water projects. Transforming components of the recycled water process (including integral systems such as storage ponds) into jurisdictional waters would completely undercut efforts to address the drought and have resoundingly negative water supply ramifications across the state. We concur with the comments of Representative Grace Napolitano (D-CA) delivered to the House Committee on Transportation and Infrastructure Committee at the hearing held on June 11, 2014, as she questioned why in light of the severe drought in California, USEPA would not expressly include recycled water within the scope of the waste treatment exception . Given the drought and dire need to develop recycled water facilities in the arid west, clarification that excludes recycled water facilities from additional federal regulation is absolutely vital. (p. 2-3)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse**

[467] See 40 C.F.R. §35.2005(b)(12), defining "complete waste treatment system" as "all the treatment works necessary to meet the requirements of title III of the [CWA], involving . .. the ultimate disposal, including recycling or reuse, of the treated wastewater and residues which result from the treatment process." (Emphasis added); see also 40 C.F.R. §35.2005(b}(49) [definition of "treatment works" includes "storage of treated wastewater in land treatment systems before land application" among other things]

and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. The exclusion also covers water distributary structures that are built in dry land for water recycling.

7.848 **The Proposed Amendments to What is Considered an "Adjacent Water" Must be Reexamined to Consider Wastewater Treatment Processes**

Many wastewater treatment processes, including man-made spreading basins, are located near or even "adjacent" to rivers and tributaries that have been (or under the proposed rule, would be) designated as waters of the U.S. and may be located in the riparian or floodplain areas of these rivers. Because the proposed rule defines "adjacency" and includes the incorporation of waters within the flood plain or riparian area of a designated water of the U.S. as also being a jurisdictional water (see section 328.3(c)(2)-(4), FR 22263), this could lead to an interpretation that such spreading basins and artificial storage ponds are jurisdictional.

Specifically, the proposed rule would revise the current category of an "adjacent wetland" to include all "adjacent waters." (FR 22206) As a result, numerous treatment ponds, recycled water reservoirs, and spreading grounds/basins across California could become jurisdictional, creating a significant problem and interference with existing wastewater treatment processes . For example, under the proposed rule, the Montebello Forebay spreading grounds in Southern California would appear to become jurisdictional. Under existing rules, regulations and case law, a waterbody is considered a water of the U.S. if it is a wetland adjacent to a water of the U.S. In contrast, under the proposed rule, all waterbodies (of many types) adjacent to a water of the U.S. could be considered themselves waters of the U.S., regardless of whether any sort of nexus or hydraulic connection has been shown and without any consideration of whether a berm or levee separates them. Under the proposed rule, a significant nexus appears to be assumed, as it states "...even in cases where a hydrologic connection may not exist, there are other important considerations .. .that result in a significant nexus between the adjacent wetlands or waters and the nearby "waters of the United States" and (a)(1) through (a)(3) waters." (79 FR 22244) As one seeming justification for this expanded interpretation, the proposed rule states that "many major species that prefer habitats at the interface of wetland and stream ecosystems remain able to utilize both habitats despite the presence of such a berm." (Id. at 22245) This use of species preference and behavior to justify incorporation of a water with no proven hydrologic connection as a water of the U.S. closely resembles the previously invalidated migratory bird rule. As such, terrestrial species preference is not an acceptable basis for the assertion of jurisdiction.

If these "adjacent" wastewater and recycled water facilities, including spreading grounds, are defined to be within the jurisdiction of the CWA, it would adversely impact water and wastewater agencies' ability to augment groundwater supplies and to effectively provide wastewater treatment services . The plethora of additional and unnecessary requirements, regulations, and permitting associated with making these areas into jurisdictional waters, including but not limited to the procurement of an NPDES permit, assigning designated uses, exposure to penalties and potential third party liability for effluent violations, and impairment of the ability to operate and maintain these areas, would erect new mandates with no benefit to the surrounding ecosystems and waterbodies. Such a result represents an extreme disincentive to sustainable water supply development and a significant impairment of wastewater agencies' ability to protect public health and safety through innovative and effective wastewater treatment.

Within the proposed rule, there are two specific exemptions that could potentially address this issue. Pursuant to section 328.3(b)(5)(i) and 122.2(b)(5)(i)[468], a spreading ground could fall under the definition of "[a]rtificially irrigated areas that would revert to upland should application of irrigation water to that area cease" (79 FR 22263 and 22268) Spreading grounds utilized by wastewater treatment facilities are generally artificially created and might not otherwise exist aside from the application of wastewater effluent to the area. However, without being explicitly stated, it is not clear enough that this definition would apply to upland wastewater spreading grounds. Similarly, pursuant to section 328.3(b)(5)(ii) and 122.2(b(5)(ii), wastewater and recycled water ponds and spreading grounds could fall under an expanded definition of "[a]rtificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock water, irrigation, settling basins, or rice growing." (79 FR 22263 and 22268) The word "such" seems to indicate that these are merely examples, not an exhaustive list, and thus spreading grounds utilized in conjunction with and/or as part of the overall wastewater treatment process could fall under this exclusion. However, without specific references within these provisions to treatment ponds and spreading grounds, OCSD is very concerned that these facilities could become jurisdictional and create significant problems for agencies attempting to protect public health and the environment. This, we would request the explicit inclusion of the terms such as "spreading grounds" and "wastewater and recycled water storage," within this section. (p. 4-6)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

[468] All references are to Part 328 and Part 122, however the language suggestions contained herein similarly apply to other regulatory sections that have the potential to impact wastewater entities, including Part 230 (79 FR 22268-22269), Part 232 (79 FR 22269-22270), and Part 401 (79 FR 22273 -22274).

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. The exclusion also covers water distributary structures that are built in dry land for water recycling.

Sacramento Stormwater Quality Partnership (Doc. #17005)

7.849 With respect to stormwater related facilities, this expanded definition of "adjacent" could result in structural BMPs, green infrastructure projects, and other multi-purpose benefit projects being classified as a WOTUS if such projects are installed in a floodplain &riparian zone, or are otherwise determined to be "adjacent" to a traditional navigable water. As indicated previously, such facilities are installed so that stormwater agencies can reduce pollutants to the maximum extent practical, and many such facilities provide for multiple benefits to the environment. For example, green infrastructure projects improve water quality, enhance recreational uses, and help to infiltrate water to groundwater basins for future municipal and domestic uses. However, under the Proposed Rule, such projects could become jurisdictional. Thus, facilities designed and implemented to comply with NPDES MS4 permit requirements would be subject to further regulation as a WOTUS. Such a result undermines the intent and purpose of such facilities and the stormwater program in general, and exposes municipalities to litigation.

Other types of facilities that could be impacted are spreading grounds. In California, many municipal agencies operate infiltration basins that are commonly referred to as "spreading grounds." Generally, spreading grounds consist of "spreading" recycled water, imported water, stormwater, and other water across basins for infiltration. These spreading grounds recharge aquifers, and are an essential part of California's efforts to manage its water resources. If they fall within' the "adjacent" category, these spreading grounds could become a WOTUS and become subject to extensive regulation, under the CWA.

Accordingly, it is necessary to specifically exclude stormwater structural BMPs, spreading grounds, and other beneficial projects such as green infrastructure from the definition of "adjacent." ... (p. 5)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. The exclusion also covers water distributary structures that are built in dry land for water recycling.

With respect to stormwater control features, please see the summary response at 7.4.4

Central Arizona Project (Doc. #3267)

7.850 We have heard in conversations with our federal partners that it was not the intention of the EPA nor the Corps of Engineers to include closed public water supply systems such as CAP in the new rule. I am writing in the hope that you will confirm this intention in writing. This matter has become a major issue in the State of Arizona, and we hope that this is an unnecessary concern. It is also our intention to submit formal comments to the rulemaking…

…It is with this background on the importance of the CAP to the citizens of Arizona that we seek clarification on your agencies' intention to include our closed water canal system in the proposed rulemaking. Furthermore, we strongly believe that an appropriate remedy would be to include closed aqueduct or diversion canals used in the operation of a public water supply system in the exclusions listed with the rule. The attached fact sheet further details how tins might be accomplished. (p. 1, 3)

Agency Response: 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 have not in practice asserted jurisdiction over these types of features when created in dry land.

7.851 To address the concerns of the Central Arizona Project, and other major western water supply projects, in the expansion of the definition through the U.S. Army Corps of Engineers, we propose to amend 33 C.F.R. § 328.3(b)(5) by inserting the following exclusion, '(viii) Aqueducts or diversion canals used in the operation of a public water supply system.' (p. 6)

Agency Response: See previous response.

Clearwater Watershed District et al (Doc. #9560.1)

7.852 …the level of significance of water's nexus to traditionally navigable waters, interstate waters, and the territorial seas varies across a wide spectrum. We encourage the agencies to consider the scientific evidence available on common discharges and work to clearly define as exempt those discharge activities that, either due to their minimal level of impact directly to navigable water's integrity, or due to the relation of connectivity between the impacted water and navigable waters, do not degrade the integrity of waters of the United States. (p. 4)

Agency Response: The rule reflects the judgment of the agencies when balancing the science, the statute, the Supreme Court opinions, the agencies' expertise, and the regulatory goals of providing clarity to the public while protecting the environment and public health. The rule excludes certain waters and features over which the agencies have generally not asserted CWA jurisdiction, as well as groundwater, which the agencies have never interpreted to be a "water of the United States" under the CWA. Codifying these longstanding practices supports the agencies' goals of providing greater clarity, certainty, and predictability for the regulated public

and regulators, and makes rule implementation clear and practical. The final rule provides clear exclusions for certain types of ditches. The final rule also expressly excludes stormwater control features created in dry land and certain wastewater recycling structures created in dry land. Waters and features that are excluded under paragraph (b) of the rule cannot be determined to be jurisdictional under any of the categories in the rule under paragraph (a).

Northwest Colorado Council of Governments Water Quality/ Quantity Committee (Doc. #10187)

7.853 In both the existing rule and proposed rule, wastewater treatment systems, including treatment ponds and lagoons are not considered "waters of the United States." This exemption is only listed for wastewater treatment, which means that water treatment systems could fall under CWA jurisdiction. Local governments and water providers own and manage treatment ponds and lagoons that are uses for drinking water treatment and stormwater management. QQ recommends including all water treatment systems, not just wastewater, under this exemption. (p. 7)

Agency Response: Many commenters asked for an exclusion for drinking water supply systems, similar to exclusions for wastewater treatment and stormwater control. Because water supply networks can be both complex in structure and extensive in size, involving the use of tributaries as well as a variety of other features, the agencies determined that a complete exclusion of such systems is not appropriate. However, not all portions of these systems would be regulated under the final rule. Some portions of these systems are tributaries, or even traditional navigable waters, and so would be regulated under this rule for the same reasons that all such waters are subject to regulation as "waters of the United States." At the same time, there are some portions of these systems that would be excluded from regulation under the paragraph (b) exclusions, including (b)(3) (ditches that do not flow into a navigable water, interstate water or territorial sea) or (4)(B)(artificial, constructed lakes and ponds created in dry land).

Southeast Florida Utility Council (Doc. #11879)

7.854 Under these definition categories, constructed storage ponds which are part of a stormwater/wastewater system (i.e. stormwater or wastewater treatment ponds, storage ponds) in Florida could be considered navigable waters because of Florida's flat landscape and broad floodplains or under the significant nexus theory. SEFLUC is concerned that storage ponds located within the traditional navigable water's floodplain would be included as navigable waters and require a NPDES permit for discharges that may occur under flood conditions. Similarly, SEFLUC is concerned that reclaimed water reuse with a direct discharge to stormwater ponds which already requires an NPDES permit; may be required to meet water quality standards at the point of discharge, thus making the practice cost prohibitive.

SEFLUC is aware of the existing exemption for "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.", however, the limiting language that the system be "designed to meet the requirements of the Clean Water Act" raises significant concerns as to whether these storage ponds will

actually be exempt from the navigable waters definition. The written guidance on the scope of this exemption inadequately addresses the issue. Therefore, we recommend the exemption should be revised to specifically include, at a minimum, the following: water storage facilities; aquifer storage and recovery facilities; stormwater management systems that are permitted under federal or authorized state programs; reclaimed water storage and conveyance systems; and man-made wetlands that are permitted as part of waste water treatment system. Without these revisions, navigable waters may be interpreted to include a number of water systems that are clearly outside the scope of the intended definition and utility operations will suffer significant adverse impacts. (p. 3)

Agency Response: With respect to stormwater control features, please see the summary response at 7.4.4. The rule also includes exclusions for wastewater recycling structures created in dry land and waste treatment systems. See discussion of those exclusions earlier in this Compendium.

Duke Energy (Doc. #13029)

7.855 Implementation

…Stipulate that on-site waters at electrical generation sites that were not previously determined as "waters of the Unites States" remain non-jurisdictional through all decommissioning processes. (p. 13)

Agency Response: This rule does not affect the implementation process for determining jurisdictional determinations in the field. Typically, these determinations are valid for five years, absent significant new information.

Florida Power & Light Company (Doc. #13615)

7.856 Utilities also use man-made intake and supply canals that deliver water to power plant sites, essentially via open-top pipeline. These are not natural systems as water supply can disappear within hours if the river authority limits or stops flow. These features, which can be miles long, are not currently classified as WOTUS and serve a similar function to irrigation canals. Additionally, man-man discharge canals convey treated water offsite and may be considered distinct from a waste treatment system; however, they are not WOTUS. It will be important that the final rule clarify that these features are non-jurisdictional.

To that end, we further recommend the following regulatory revision to 33 CFR 328.3(b),[469] with additions in **underlined bold**.

> (b) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (a)(I) through (7) of this section-
>
> …
>
> **(6) Cooling water impoundments, canals, and water conveyances, including, but not limited to:**
>
> **(i) Cooling water impoundments and reserve cooling water ponds;**

[469] As proposed at 79 Federal Register 22263 (April 2 1, 20 14).

(ii) Intake and supply canals, including open-top canals, pipelines, and other man-made sources;

(iii) Discharge canals, including those used for heat dissipation.

The final rule should expressly confirm that explicit exemptions such as the waste treatment systems exemption and an exemption for reserve coo ling water impoundments, canals, and water conveyances apply regard less of the jurisdictional language for WOTUS. We also recommend that the agencies make clear that any man-made structures that are not created from WOTUS or whose construction pre-dates the CWA, should not be considered jurisdictional. (p. 6-7)

Agency Response: In the exclusion for artificial lakes or ponds, the agencies have changed "exclusively" to "primarily" in describing the uses. Artificial lakes and ponds are often not used exclusively for one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. The change to the exclusion reflects Agency practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use. The agencies have also added cooling ponds to the list of uses in the rule. The list of uses has always been illustrative rather than exhaustive, and this addition responds to many requests to clarify that cooling ponds created in dry land are excluded. In contrast, 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 have not in practice asserted jurisdiction over these types of features when created in dry land.

Calleguas Municipal Water District, Thousand Oaks, California (Doc. #13959)

7.857 As with any other water provider, in order to achieve our water quality and reliability goals, Calleguas needs predictability and certainty in determining if a water body is subject to jurisdiction of the CWA, and the Agencies need to be specific about the degree of regulation that accompanies that designation. Regulatory certainty is essential not only for water agencies to understand how to plan for and meet water quality objectives, but also protects water agencies from potential litigation for CWA violations. Unfortunately, the proposed rule does little to address these issues. Instead, it introduces new concepts, definitions, and tests that would vastly expand the universe of waters defined as "waters of the United States." To better balance the broad interest of the CWA in protecting the nation's surface waters while not unduly interfering with the ability of water agencies to provide water, Calleguas recommends the following:

- Components of water conveyance systems, including ditches, should be excluded from the proposed definition of "waters of the United States."
- Water infrastructure, such as terminal reservoirs, recycled water facilities, groundwater recharge basins, stormwater retention basins, and constructed wetlands, adjacent to "waters of the United States" should be excluded from jurisdiction under the proposed rule.

Calleguas requests water infrastructure facilities (including construction, maintenance, and operation) adjacent to traditionally navigable waters be excluded from the proposed definition of "waters of the United States". (p. 1-2)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water.

The exclusion also covers water distributary structures that are built in dry land for water recycling. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, 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 have not in practice asserted jurisdiction over these types of features when created in dry land. With respect to stormwater control features, please see the summary response at 7.4.4.

Southern Company (Doc. #14134)

7.858 The primary function of stormwater retention impoundments, or other green infrastructure related features, e.g., bioswales, is to detain stormwater and facilitate pollutant removal through settling and biological uptake. EPA should clarify that conveyances of any kind leading into such structures designed to protect water quality are not jurisdictional. Such clarification is needed to avoid added confusion and regulatory burdens imposed upon environmentally optimal features, many of which are required in the first place for compliance with the CWA. (p. 48-49)

Agency Response: **Please see previous response. With regard to green infrastructure, see summary response at 7.4.4.**

Southern Nevada Water Authority (Doc. #14580)

7.859 Dry lake beds, or playas, are common in the desert southwest. These geographic low areas may occasionally contain water from seasonal rain events, and are the terminal location for water from ephemeral washes. By their nature, they do not contribute flow to traditional WOTUS. SNWA recommends the Proposed Ru1e clarify that isolated dry lake beds (playas), and their associated tributaries, are not jurisdictional, even if they are located in a basin that may contain other jurisdictional waters. (p. 2)

Agency Response: **The agencies at this time are not able to determine that the available science supports that playa lakes as a class have a significant nexus to traditional navigable waters, interstate waters, or the territorial seas. However, to be clear, under the rule, individual waters of the suggested additional subcategories are jurisdictional where they meet the requirements of (a)(1) through (a)(6) or (a)(8) (e.g., a playa lake that is an interstate water, a kettle lake that is an adjacent water or one that is determined on a case-specific basis to have a significant nexus to a traditional navigable water, interstate water, or the territorial seas). See the Technical Support Document, section I, for a discussion of the SWANCC decision's effect on jurisdiction.**

7.860 The EPA and Corps did not propose any changes to the existing exclusion from jurisdiction for waste treatment systems designed consistent with the requirements of the CWA. However, SNWA is concerned the broad definition of "tributaries" under the Proposed Rule could result in components of public water supply and wastewater treatment systems, such as man-made ditches, canals, and off-river storage ponds, becoming subject to regulation as WOTUS. This additional regulation would be unnecessarily burdensome, as the delivery of water through these systems is already subject to CWA permitting. SNWA recommends ditches, canals, ponds, and other man-made features used in the operation of public water treatment and supply and wastewater treatment and discharge systems be specifically excluded from jurisdiction as WOTUS. (p. 2)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects.

Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water.

The exclusion also covers water distributary structures that are built in dry land for water recycling. These features often connect or carry flow to other water recycling structures, for example a channel or canal that carries water to a percolation pond. The agencies have not considered these water distributary systems jurisdictional where they do not have surface connections back into, and contribute flow to, "waters of the United States." In contrast, 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 have not in practice asserted jurisdiction over these types of features when created in dry land.

Central Arizona Water Conservation District (Doc. #14585)

7.861 CAWCD stresses that the concerns expressed in this comment letter are not specific to the CAP [Central Arizona Project]. Many public water supply systems with features similar to the CAP have raised like concerns over the impact of the proposed rulemaking. Therefore, any solution that addresses the concerns of CAWCD should be broad enough to exempt both the CAP and other public water supply systems. With that understanding in mind, CAWCD proposes the following language be inserted into the definition of WOTUS proposed in 33 C.F.R. § 328.3(b)(5), 40 C.F.R. § 110.1, 112.2, 116.3, 117.1, 122.2, 230.3, 232.2, 300.5, part 300 App. E, 302.3, and 401.11:

> "(viii) Aqueducts or diversion canals used in the operation of a public water supply system and related conveyance, storage, and distribution facilities."

Alternatively, CAWCD requests that the Agencies provide a specific exemption from the rulemaking for the CAP system and related conveyance, storage, and distribution facilities. CAWCD believes that such a categorical or specific exclusion is consistent with the intentions of the Agencies in promulgating the proposed rule and consistent with the EPA's Water Transfers Rule. (p. 6-7)

Agency Response: **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 have not in practice asserted jurisdiction over these types of features when created in dry land.**

The Clean Energy Group Waters Initiative (Doc. #14616)

7.862 …it is unclear if man-made intake canals that respectively deliver water to power sites would be regulated as WOTUS…if the rule is not clarified. These are not natural systems as water supply can disappear within hours if the river authority limits or stops flow, but

some are unlikely to be considered part of a waste treatment system. Thus, it will be important that the final rule clarify that these features are exempted from WOTUS. Furthermore, any waste treatment system that has a discharge to a WOTUS is already regulated through limits on the receiving waters. (p. 2)

Agency Response: **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 have not in practice asserted jurisdiction over these types of features when created in dry land. The rule makes no substantive change to the existing exclusion for waste treatment systems designed consistent with the requirements of the CWA.**

Metropolitan Water District of Southern California (Doc. #14637)

7.863 Metropolitan understands that the Agencies do not intend the proposed rule to change the regulation of water supply facilities and infrastructure, including groundwater basins, or the regulatory status of water transfers. (See 79 Fed. Reg. at 22189, 22193,22199, 22218). Metropolitan fully supports the Agencies' intent not to change the regulation of water supply facilities and infrastructure because it is concerned about the proposed rule's potential expansion of CWA jurisdiction beyond existing guidance. However, the proposed rule defines a "tributary" for the first time and states that 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) .... " (79 Fed. Reg. 22263). Under this definition, some of the water-related features in the arid west that make up Metropolitan's drinking water infrastructure could be interpreted to be tributaries of a water of the United States. Accordingly, Metropolitan requests that the Agencies provide clear exclusions for water delivery facilities and infrastructure, including groundwater basins. Otherwise, if sections of Metropolitan's drinking water infrastructure were to be considered waters of the United States, expensive, complex, and time-consuming CWA permits could be required, except if the water transfers rule applied.

…

In order to meet water supply needs, western water utilities and providers such as Metropolitan must make substantial infrastructure investments. Such investments include new or expanded storage reservoirs; reuse facilities; treatment plants; and water collection, delivery, and distribution pipelines or other types of conveyances. Many of these facilities will, of necessity, be in somewhat close proximity to the types of "waters" described in the proposed rule. It is essential that these critical activities, which may be undertaken in direct response to emergency conditions related to drought, fire, or post-fire damage, do not unnecessarily trigger a federal nexus and the associated lengthy and costly permitting procedures. (p. 4-5, 10)

Agency Response: **The final rule has modified the definition of "tributary" and "neighboring" for the purposes of determining adjacency. In addition, the final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment, artificial ponds, and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry**

land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional.

Santa Clara Valley Water District (Doc. #14776)

7.864 **C. Artificial Ditches, Canals, or Channels Used For Public Water Supply Operations Should Be Excluded**

The District operates several ditches, channels, and canals whose function is to deliver water from one artificial water-supply management facility to another. These ditches, channels, and canals are artificial, in whole or in part. The Proposed Rule excludes numerous artificial features: "[a]rtificially irrigated areas," "[a]rtificial lakes or ponds," "[a]rtificial reflecting pools or swimming pools," "[s]mall ornamental waters," and "depressions created incidental to construction." (79 Fed.Reg. 22263.) These artificial features are excepted in apparent recognition of the fact that, but for human control, they would not have water in them. The same principle applies to the type of artificial ditches, canals, and channels operated by the District: They generally operate via human intervention, and would not have water flowing through them but for control mechanisms. The artificial segments of ditches, channels, and canals used for water-supply operations should likewise be excluded.

To put it another way, surface channels that function as pipelines should not be distinguished from pipelines. The Proposed Rule seems to recognize, for instance, that a sewer is not a tributary. An artificial channel used to move water from place to place in substantially the same manner as a pipeline is in all relevant respects no different than a sewer, and should not be classified as a water. Congress could not have intended sewers or sewer-equivalent channels to be waters of the United States.

A new sub-sub-paragraph to the Proposed Rule should be added to (b)(5) as follows: "(viii) Artificial segments of ditches, channels, or canals used for public water supply operations." (p. 7-8)

Agency Response: Many commenters asked for an exclusion for drinking water supply systems, similar to exclusions for wastewater treatment and stormwater control. Because water supply networks can be both complex in structure and extensive in size, involving the use of tributaries as well as a variety of other features, the agencies determined that a complete exclusion of such systems is not appropriate. However, not all portions of these systems would be regulated under the final rule. Some portions of these systems are tributaries, or even traditional navigable waters, and so would be regulated under this rule for the same reasons that all such waters are subject to regulation as "waters of the United States." At the same time, there are some portions of these systems that would be excluded from regulation under the paragraph (b) exclusions, including (b)(3) (ditches that do not flow into a navigable water, interstate water or territorial sea) or (4)(B)(artificial, constructed lakes and ponds created in dry land).

7.865 **D. Other Artificial Water Treatment And Supply Facilities Should Be Excluded**

The District operates artificial treatment ponds, lagoons, wetlands, bioswales, water supply storage facilities, aquifer storage and recovery facilities, water conveyance facilities, stormwater management and capture facilities (municipal separate storm sewer

systems or MS4), and recycled water storage and conveyance facilities. These artificial water treatment and supply facilities should be excluded from the Proposed Rule for two reasons.

First, they further the goals and policies of the CWA. In the CWA, Congress's policy was to respect and protect State-level efforts to manage water use: It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources ... (33 U.S.C. § 1251(b).)

In apparent recognition of this policy, the Proposed Rule already would exclude "[w]aste treatment systems ... designed to meet the requirements of the Clean Water Act." (79 Fed. Reg. 22263.) But the other facilities designed by local public agencies to ensure safe; clean, and reliable water services also further this policy. They, too, should be excluded from the Proposed Rule.

Second, these facilities are artificial, and should be excluded just as other artificial facilities are. As noted above, the Proposed Rule would already exempt numerous artificial features, in apparent recognition of the fact that, but for human intervention, they would not have water in them. Under the same principle, artificial water-supply facilities should also be excluded.

Another new sub-sub-paragraph to the Proposed Rule should be added to (b)(5) as follows: "(ix) Artificial facilities used for water treatment or supply by State or local public agencies." (p. 8)

Agency Response: **The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment, artificial ponds, and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional. With regard to stormwater management facilities, see summary response 7.4.4.**

The Fertilizer Institute (Doc. #14915)

7.866 …many water management systems at both mining and industrial sites have features that could be included under the definition of WOTUS as proposed. On-site containment and treatment ponds, diversion and conveyance ditches, closed loop systems, and mine pits that are critical to both mining and industrial processes, and are used to manage, contain, and treat on-site waters generally must comply with existing state and federal environmental standards. These existing standards can include the CWA, Surface Mining Control and Reclamation Action, and the Mine Safety and Health Act. Additionally, if and when water leaves a mine site, or industrial facility, it is generally subject to CWA Section 402 standards. Because these various water containment and treatment features are already subject to both state and federal permitting requirements, including them under the definition of WOTUS would not provide any additional environmental benefit, would increase compliance costs, and may create competing permitting regimes, thus creating confusing and/or conflicting compliance obligations. Accordingly, EPA should

specifically exempt from the definition of WOTUS any water management systems or treatment ponds, impoundments, or systems at mining and/or industrial facilities that are already subject to environmental permitting requirements or have a CWA permitted outfall for discharge. (p. 4-5)

Agency Response: **As stated in the SMCRA statute, SMCRA "shall not be deemed in any way to repeal or supersede any portion of the Federal Water Pollution Control Act and no control or treatment under this subsection shall in any way be less than that required under the Federal Water Pollution Control Act." The agencies believe that the two statutes have complementary, but differing, mandates and therefore is not appropriate to add a specific exclusion for features authorized under SMCRA.**

Current agencies' practices often consider some features described in this comments as "waste treatment systems" during the active period of mining, and are therefore excluded from coverage until reclaimed. Nothing in the rule is intended to alter the current application of the waste treatment exclusion.

With respect to stormwater control features, please see the summary response at 7.4.4.

Salt River Project Agricultural and Power District and the Salt River Valley Water Users Association (Doc. #14928)

7.867 2. Explicitly exclude all man-made stormwater retention and groundwater recharge basins from the proposed definition of Waters of the U.S. Although artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as "settling" are proposed to be excluded from the proposed definition, it is unclear from the preamble whether the agencies intend to exclude basins that directly discharge to the subsurface. (p. 16)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry

land, they are also often located in close proximity to tributaries or other larger bodies of water.

With respect to stormwater control features, please see the summary response at 7.4.4.

7.868 3. Explicitly exclude all non-tidal roadside, stormwater, and agricultural ditches from the proposed definition of tributary. Moreover, the agencies should reiterate in the final rule that MS4s are not Waters of the U.S. (p. 17)

Agency Response: The final rule clarifies and expands the ditches not considered "Waters of the United States." With respect to stormwater control features (e.g. those that part of MS4s), please see the summary response at 7.4.4.

7.869 4. Exclude all isolated impoundments, including upland connecting tributaries, from the proposed definition of Waters of the U.S. When all upland flow is terminated at a flood control structure or diverted for beneficial uses and there is no discernible surface water connection to §328.3 (a)(l) through (a)(3) waters, CWA jurisdiction is not warranted. (p. 17)

Agency Response: In the exclusion for artificial lakes or ponds, the agencies have changed "exclusively" to "primarily" in describing the uses. Artificial lakes and ponds are often not used exclusively for one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. The change to the exclusion reflects Agency practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use. The agencies have also added cooling ponds to the list of uses in the rule. The list of uses has always been illustrative rather than exhaustive, and this addition responds to many requests to clarify that cooling ponds created in dry land are excluded.

Nucor Corp. (Doc. #14963)

7.870 …many manufacturing facilities utilize on-site stormwater retention systems and closed-loop process water recycling systems, including retention ponds, which may be located in floodplains. Under the proposed rule and the far-reaching extension of jurisdiction to "adjacent" waters located in floodplains and "other waters" (i.e., waters that can be aggregated with other "similarly situated" waters), the Agencies likely could consider many of these systems categorically "waters of the United States" despite the fact that they are entirely man-made and/or not originally located in jurisdictional waters. Such systems should be categorically excluded from jurisdiction under any new version of the definition of "waters of the United States". (p. 13)

Agency Response: Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water

reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water.

With respect to stormwater control features, please see the summary response at 7.4.4.

7.871 …the proposed rule provides that "adjacent waters" (presumably including "other waters") will be considered jurisdictional even if separated from "(a)(l) through (a)(3)" waters "even where the two waters may be separated by features that are not jurisdictional, such as uplands, berms, roads, levees and similar features ." 79 Fed. Reg. 22210. In other words, where stormwater and process water ditches and other water management features such as retention ponds are located in a flood plain separated from an "(a)(l) through (a)(3)" jurisdictional water, such features will be "waters of the United States". This provision has the effect of including isolated waters (similar to those at issue in *SWANCC*) as jurisdictional waters, even though they are intentionally isolated from the "(a)(l) through (a)(3)" water. When applied to industrial process water systems and stormwater management systems, the proposed rule stretches jurisdiction "beyond parody". The rule should be revised to exclude such waters. (p. 13)

Agency Response: The agencies have modified the definition of "neighboring" with respect to evaluating adjacency in the final rule. The final rule also states that waters excluded in paragraph (b) are not considered "waters of the United States", even where they otherwise meet the terms of paragraphs (a)(4)-(a)(8). With respect to stormwater control features, please see the summary response at 7.4.4.

American Public Power Association (Doc. #15008)

7.872 …The proposed rule will impose federal CWA regulation on features that are constructed and used pursuant to other federal and state regulatory programs. For example, power plants that do not use "once through" cooling often have onsite tempering ponds to assist in the transfer of waste heat to the atmosphere in order to meet CWA National Pollutant Discharge Elimination System (NPDES) permit limits on thermal shock to navigable waters. While similar enclosures within a wastewater treatment plant are specifically excluded from the definition of a WOTUS, that same exemption does not appear to apply to power plant structures within the fence-line. (p. 6)

Agency Response: In the exclusion for artificial lakes or ponds, the agencies have changed "exclusively" to "primarily" in describing the uses. Artificial lakes and

ponds are often not used exclusively for one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. The change to the exclusion reflects Agency practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use. The agencies have also added cooling ponds to the list of uses in the rule. The list of uses has always been illustrative rather than exhaustive, and this addition responds to many requests to clarify that cooling ponds created in dry land are excluded.

Utility Water Act Group (Doc. #15016)

7.873 **VI. Other Important Water Management Systems Lawfully Created to Serve Power Plants and Other Industrial Facilities Also Should Be Exempted from the WOTUS Definition.**

Power plants also rely on raw water and other service water ponds that store rain water, stormwater runoff, and water withdrawn from other waterbodies for eventual use by the facility. In some cases, the pond is large enough to allow sedimentation to occur, effectively cleaning the water for later use. Some facilities may discharge treated effluent to such ponds for re-use, in which case the same permitting issues noted above may pertain.

For those ponds that do not qualify as waste treatment systems, classifying this type of man-made water feature as a WOTUS could have at least four important and costly impacts.

The first stems from EPA's § 316(b) regulations, which impose extensive data collection, technology, and monitoring requirements for "cooling water intake structures" that withdraw water from waters of the United States. The second concerns the need for an NPDES permit to transfer water from a source water to the raw or service water. Although EPA's NPDES rules include a provision exempting the transfer of water from one water of the United States to another without any intervening industrial, municipal or commercial use, the U.S. District Court for the Southern District of New York recently remanded and partially vacated that rule.[470] While the district court's decision is under appeal, the threat remains real. The third concerns the need for § 404 permits for any maintenance or expansion of the pond or impoundment. And the fourth concerns safety implications for service water ponds.

Imposing § 316(b) requirements on cooling water withdrawals from ponds and reservoirs purpose-built to supply water for steam electric plants, requiring NPDES permits to transfer water into such ponds or reservoirs, or requiring § 404 permits to perform maintenance activities on such ponds would impose enormous costs without any corresponding environmental benefit. Consider this example (one of many). A UWAG member constructed a raw water reservoir to serve its steam electric generating station. The reservoir is man-made, purpose-built, and inextricably linked to power plant operations. Raw water from the river intake is pumped to the reservoir for storage; raw water from the reservoir is then pumped to the power station for use as cooling water.

[470] *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 8 F. Supp. 3d 500, 567 567 (S.D.N.Y. 2014).

Cooling water intake structures ("CWISs") are located at both the river and the reservoir. While the company has been planning for § 316(b) requirements to apply to the river CWIS, it has not done the same for the reservoir CWIS, because historically the raw water reservoir has not been deemed to be a WOTUS. Under the Proposed Rule, the reservoir may be deemed a WOTUS under the Agencies' expansive definitions of "tributary," "adjacent" or "other waters." If the WOTUS rule is finalized as proposed and the reservoir is deemed to be a WOTUS, then the reservoir CWIS will be subject to the § 316(b) rule, and discharges of raw water to or withdrawals from the reservoir, as well as maintenance of the reservoir, will be subject to other CWA regulatory programs (e.g., §§ 402 and 404 permitting, § 401 water quality certification, water quality standards and TMDLs).

Classifying service water ponds as jurisdictional could create similarly significant burdens and create safety concerns. For example, a UWAG member has a nuclear generating facility with a service water pond that withdraws water from an adjacent reservoir. To prevent biofouling and reduce corrosion of safety-related components, aggressive chemical treatment of service water in this pond is required. If this pond were classified as a WOTUS, and the use of treatment chemicals was restricted, such restrictions could impact safety systems at the facility.

To avoid substantial and unnecessary impacts of this kind, UWAG requests that the Agencies add an exclusion to clarify that ponds and impoundments used for raw water storage and transfer are not WOTUS, in order to allow their continued use without creating significant issues. (p. 86-88)

Agency Response: **In the exclusion for artificial lakes or ponds, the agencies have changed "exclusively" to "primarily" in describing the uses. Artificial lakes and ponds are often not used exclusively for one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. The change to the exclusion reflects Agency practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use. The agencies have also added cooling ponds to the list of uses in the rule. The list of uses has always been illustrative rather than exhaustive, and this addition responds to many requests to clarify that cooling ponds created in dry land are excluded.**

Edison Electric Institute (Doc. #15032)

7.874 Water withdrawn from a water of the U.S. for industrial use should be excluded from itself being a water of the U.S., even if impounded or conveyed via a ditch or other open-air conveyance. Likewise, ditches that discharge to a water of the U.S. already are regulated as point sources, within the existing statutory and regulatory provisions governing such sources, and should not themselves be waters of the U.S.[471] With these changes, it will be clearer that the agencies are not regulating the movement of

[471] If ditches were waters of the U.S., water flowing from the ditch to lake or river or stream would be a water transfer that is not subject to NPDES permit regulations, reducing water quality protection. 40 C.F.R § 122.3(i). This result is not consistent with the CWA.

stormwater runoff, cooling water, and process water, and electric utilities can continue to move water about their facilities using open, man-made surface conveyance systems. Utilities also will be able to continue to rely on nationwide permits such as Nationwide Permits 12 and 51 to conduct activities, such as installation and maintenance of transmission lines and renewable energy facilities. (p. 29)

Agency Response: **In the exclusion for artificial lakes or ponds, the agencies have changed "exclusively" to "primarily" in describing the uses. Artificial lakes and ponds are often not used exclusively for one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. The change to the exclusion reflects Agency practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use. The agencies have also added cooling ponds to the list of uses in the rule. The list of uses has always been illustrative rather than exhaustive, and this addition responds to many requests to clarify that cooling ponds created in dry land are excluded. With regard to stormwater, see summary response 7.4.4.**

However, the agencies disagree that these exclusions should be broadened to the point that they encompass all industrial uses or all features that contain waters subject to regulation as point sources.

Chino Basin Watermaster (Doc. #15046)

7.875 We appreciate EPA's position that the Proposed Rule does not change the existing regulatory exclusion for wastewater treatment systems that have been designed to meet the requirements of the CWA. Nonetheless, Section (b) of the Proposed Rule (40 C.F.R. § 328.3(b)) does not expressly exclude water reuse and recycling infrastructure that is part of wastewater treatment systems from CWA jurisdiction. To unequivocally provide that such infrastructure is excluded from the definition of "waters of the United States," the facilities that must be clearly listed in the wastewater system exclusion include: water reuse and recycling ponds, water treatment lagoons, and other appurtenances; artificially constructed wetlands designed to treat agricultural or stormwater runoff (e.g., "green infrastructure") that can be used to manage the removal of sediment, nutrients and improve water quality for water reuse and recycling; and artificially constructed groundwater recharge basins designed to percolate surface water into groundwater basins for reuse and recycling. (p. 2)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins

and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water.

With respect to stormwater control features, please see the summary response at 7.4.4.

7.876 …we therefore request that: (1) the categorical exclusion for wastewater systems specified in Section (b) of the proposed regulation be expanded to expressly include water reuse and recycling ponds, water treatment lagoons, artificially constructed wetlands designed to treat agricultural or stormwater runoff, and artificially constructed groundwater recharge basins…(p. 3)

Agency Response: **See response above.**

San Diego County Water Authority, California (Doc. #15089)

7.877 The proposed rule presumes that all impoundments of waters of the United States are jurisdictional. The San Diego Region has a number of local man-made reservoirs, constructed for the purpose of drinking water supply that are owned, operated and maintained by the water utility and have no downstream discharges. A number of the reservoirs simply act as forebays to surface water treatment plants, storing imported water or other local supplies that are delivered by pipeline to the reservoirs. They are isolated or lack any significant nexus to waters of the United States in the watershed where the reservoir is located. Because the reservoirs store water that is delivered from waters of the United States, in the proposed rule they are presumed to be jurisdictional. This definition in the rule is based on case law related to reservoirs that are integral to a stream or river system where the court found that once a water is of national concern, diversion or storage does not eliminate it from national concern. This approach was inappropriately expanded to include all impoundments without regard to the exclusion of isolated waters as described by the court in Solid Waste Agency of Northern Cook County v. US Army Corps of Engineers (SWANNC),531 U.S 159(2001), or application of the significant nexus test in Rapanos v. United States, 547 U.S. 715(2006). We ask that a specific exclusion be added to the rule for water supply impoundments that are isolated or have no significant nexus to waters of the United States within the watershed where the impoundment is located. (p. 3)

Agency Response: **The rule states that all impoundments of waters otherwise identified as waters of the United States are considered "waters of the United States", unless otherwise excluded. However, the final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment, artificial ponds, and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land.**

7.878 The proposed rule would significantly expand Federal Clean Water Act jurisdiction over recycled water projects that are currently regulated by the States. Under the proposed definition, all waters "adjacent" to waters of the United States will be presumed to be jurisdictional having a substantial impact on the chemical, biological or physical integrity of traditional navigable waters or interstate waters. "Adjacent" is further defined to mean bordering or neighboring, which includes waters located within the riparian area, where surface or subsurface hydrology influences the ecological processes, or a flood plain. The State of California has been targeting long-term groundwater storage and recharge projects to create more sustainable supplies. The proposed definition, if strictly interpreted, would include percolation basins used to recharge the groundwater for potable reuse and many recycled water impoundments. Given the local geology in the San Diego Region (narrow, shallow alluvial deposits make up most groundwater basins) the enhancement of natural groundwater supplies using man-made conveyances, such as infiltration basins and injection wells would likely need to be co-located near a riparian corridor or flood plain. The expansion of the rule to cover "bordering or neighboring" waters located within the riparian area, if interpreted broadly, would make groundwater storage and recharge projects, including recharge with recycled water, in the region largely infeasible due to interference with jurisdictional waters.

In California, recycled water groundwater recharge projects and recycled water impoundments are currently permitted under extensive and comprehensive State regulations. These include criteria for groundwater recharge and non-potable reuse of recycled water that balance the need for water supply development with water quality standards that support other beneficial uses. Recycled water projects constitute a significant source of water supply for the State of California. The San Diego region currently has several recycled water groundwater recharge projects being proposed to augment our local water supplies and reduce our dependence on imported water. California issues waste discharge permits or water reclamation criteria that are consistent with state criteria and other basin plan objectives. The local recycled water supplies have not historically been considered waters of the United States.

The expansion of the definition to include all waters, and not just wetlands, as addressed by the Supreme Court, could bring many of the recycled water uses that have been effectively regulated by California for over 50 years into the definition of waters of the United States. An additional regulatory layer requiring National Pollutant Discharge Elimination System permits will add requirements that are not necessary and will interfere with the State's ability to maintain use of existing water sources and develop additional critical water supplies. We recommend that specific exclusions be added to the rule for recycled water recharge basins, recycled water impoundments, and aquifer storage and recharge projects. (p. 3-4)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water**

reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water.

7.879 As a water supplier, we encourage the use of watershed-based water quality solutions – including natural treatment systems, constructed wetlands and green infrastructure – to protect the chemical, biological and physical integrity of our source water supplies. Our local lakes and reservoirs that are waters of the United States are impacted by nutrient loadings from urban and agricultural runoff. Implementation of integrated solutions in conjunction with the dischargers on the watershed has been impeded by the prescriptive requirements of the Clean Water Act. Natural treatment facilities can improve water quality and have the added benefit of providing interim habitat, but would not necessarily be designed specifically for that purpose. In addition, routine mechanical maintenance, including the periodic removal of excess plant growth or sediment, would be required.

The proposed rule could be interpreted to include natural treatment systems, constructed wetlands, and green infrastructure as waters of the United States. This will be a deterrent to using natural watershed based treatment systems for management of nutrients and improving downstream water quality. If these constructed natural treatment systems are independently considered a water of the United States, then it would add an extra layer of regulatory requirements that would create permitting delays and barriers to implementation, limit the ability to maintain the facilities, and would reduce the viability of natural treatment systems as cost effective solutions to improve water quality. We ask that a specific exclusion be added to the rule for natural treatment systems, constructed wetlands, and green infrastructure. (p. 4-5)

Agency Response: With respect to stormwater control features (e.g., green infrastructure), please see the summary response at 7.4.4.

7.880 The proposed rule also says that "a tributary, including wetlands can be man-altered or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals and ditches." It also says that certain types of ditches are not waters of the United States. It is unclear if water supply and wastewater infrastructure, storm drain systems, concrete channels or other water-related infrastructure would be considered waters of the United States. Including these man-made aqueducts, canals, channels, pipelines or storm drains as waters of the United States would interfere with the ability to operate and maintain water infrastructure. We ask that the rule specifically

exclude man-made aqueducts, canals, channels, pipelines and storm drains from the definition of waters of the United States. (p. 5)

Agency Response: 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 have not in practice asserted jurisdiction over these types of features when created in dry land. The rule makes no substantive change to the existing exclusion for waste treatment systems designed consistent with the requirements of the CWA. With respect to stormwater control features, please see the summary response at 7.4.4.

Luminant (Doc. #15100)

7.881 The Proposed Rule should be revised to ensure that previously non-jurisdictional water features remain excluded from the definition of "waters of the United States." Under the proposed rule, water features commonly found on power plant and mine sites which are currently not considered jurisdictional could be included in the definition of "waters of the United States." Ditches, on-site ponds, impoundments, and other water management features are integral to power generation and mining operations, and are used to manage on-site waters in an environmentally sound and frequently statutorily mandated manner. (p. 3)

Agency Response: The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment, artificial ponds, and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional.

This rule does not affect the implementation process for determining jurisdictional determinations in the field. Typically, these determinations are valid for five years, absent significant new information.

7.882 Luminant urges that many water features such as ditches, other conveyances and facilities that are designed, constructed and used to manage, store and treat water that are currently excluded from CWA jurisdiction should be clearly excluded in any final rule. At steam electric generating facilities and surface mines, these conveyances and facilities (including canals, swales, containment basins and ponds, cooling ponds, spill diversion ditches, raw water and service water ponds, wastewater collection/treatment ponds, intake and discharge canals, construction ponds, and roadside and other ditches) are engineered and constructed specifically to protect waters of the U.S. by maintaining separation. Maintenance is routinely performed on these features in addition to those associated with coal piles, waste disposal areas; building or equipment pads; roads or rail spurs; and above ground pipelines. These conveyances are typically a part of a larger treatment system designed to prevent spills and other contamination from reaching waters of the U.S. and are often authorized under a federal- or state-implemented NPDES program. Such conveyances may also be part of engineered safety systems used to insure the integrity of dikes and dams. If these manmade features become subject to regulation as waters of the U.S. the resulting requirements for permitting routine maintenance,

cleanout, or emergency repairs could require significant time and actually compromise the environments they were engineered (and often required by other federal and/or state rules) to protect. (p. 6-7)

Agency Response: **See previous response.**

Northern Colorado Water Conservancy District, Berthoud, Colorado (Doc. #15114)

7.883 **EPA's Water Transfers Rule**. The preamble to the proposed rule states, multiple times, that "[t]he agencies propose ... no change to the regulatory status of water transfers."[472] EPA's Water Transfers Rule excludes any "activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use" from the National Pollutant Discharge Elimination System (NPDES) created by the CWA.[473] The Water Transfers Rule does not define "waters of the United States," although EPA relied on one of the definitions the agencies propose to change.[474]

The proposed rule should be revised to expressly state in the text of the Code of Federal Regulations (ill addition to the Preamble) that it does not change the regulatory status of water transfers. (p. 10)

Agency Response: **Regarding water transfers, please see summary response at 12.3.**

Bella Vista Water District, Redding, California (Doc. #15149)

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

Agency Response: **See the preamble and Technical Support Document for a discussion of the ditches excluded from being considered "waters of the United States."**

7.885 Water infrastructure, such as recycled water facilities, groundwater recharge basins, stormwater, retention basins, and constructed wetlands, adjacent to "waters of the United States" should be excluded from jurisdiction under the proposed rule. (p. 2)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

[472] 79 Fed. Reg. at 22 189; *see also id.* at 22193, 22199 and 22217.
[473] 40 C.F.R. § 122.3(i) ("Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use . . .").
[474] *See* 40 CFR § 122.2. 73 Fed. Reg. 33,697, at 33,699, note 2 (June 13, 2008).

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water.

With respect to stormwater control features, please see the summary response at 7.4.4.

7.886 Bella Vista Water District facilities include backwash settling/water recycling ponds, water storage tank overflow ditches, and emergency discharge ditches at its wells. Bella Vista Water District requests water infrastructure facilities (including construction, maintenance, and operation) adjacent to traditionally navigable waters be excluded from the proposed definition of "waters of the United States." (p. 2)

Agency Response: The agencies have modified the final definition of "neighboring" with regard to adjacency. The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment, artificial ponds, and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional.

Association of Metropolitan Water Agencies et al. (Doc. #15157)

7.887 Infrastructure used to transport and store water are critical components of the systems used to provide drinking water, process wastewater, and manage storm water. With limited exceptions, current and past practice under the CWA has been not to treat water system infrastructure as subject to WOTUS restrictions when carrying out normal operational and maintenance activities. In particular, water supply and treatment operations and maintenance activities conducted by a water utility within or associated with water supply conveyances, storage, and treatment facilities should be specifically exempted from WOTUS restrictions.

Similarly, the final rule should retain the current exclusion (33 CFR 328.3(a) and 40 CFR 122.2) for "waste treatment systems" and it should be clear that that the exclusions include residual management systems associated with drinking water treatment. The current rulemaking also presents an opportunity to clarify that release of drinking water or wastewater to dry land, such as through a sanitary sewer overflow (SSO), do not constitute a discharge to a jurisdictional water body.

Water infrastructure facilities encompass a broad range of structures and activities, ranging from green infrastructure (e.g., infiltration trenches, swales, artificial wetlands, etc.) to ground-water recharge basins and percolation ponds, constructed wetlands, and

ground-water wells, water recycling facilities, and stormwater retention basins. The final rule exclusion for water infrastructure should clearly and explicitly encompass the full breadth of water utility operations.

This request for an exclusion, which is consistent with historical practice, speaks directly to the rulemaking goal of a clear definition of WOTUS and consistent implementation of the CWA. For situations that fall outside of any exclusions for ongoing operations and maintenance activities, further efforts also need to be made to eliminate the ambiguity introduced by a number of important terms in the proposed definition. Terms like "adjacent", "tributary" and "wetland" must be clearly defined to ensure that they are not construed as applying to water utility infrastructure, including facilities and practices such as those listed above. (p. 2-3)

Agency Response: **The agencies have revised and clarified the proposed definition of "tributary" and "neighboring" in the final rule. The final rule makes no substantive changes to the existing exclusion for waste treatment systems. The final rule has also expanded the features not considered "waters of the United States" to include certain wastewater treatment, artificial ponds, and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional. With respect to stormwater control features, please see the summary response at 7.4.4.**

Alameda County Flood Control and Water Conservation District, Zone 7, California (Doc. #15259)

7.888 Water resource infrastructure, such as recycled water facilities, water treatment facilities (and associated basins), groundwater recharge basins, stormwater retention basins and constructed wetlands, adjacent to "waters of the United States" should be excluded from jurisdiction under the proposed rule. (p. 2)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into

groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water. With respect to stormwater control features, please see the summary response at 7.4.4.

7.889 Zone 7 requests that water, wastewater and stormwater infrastructure facilities (including those used for construction, maintenance, detention, storage, settling and operation) adjacent to traditionally navigable waters be excluded from the proposed definition of "waters of the United States. (p. 2)

Agency Response: The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment, artificial ponds, and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or impounding, waters of the United States, these features may still be considered jurisdictional. With respect to stormwater control features, please see the summary response at 7.4.4.

Beaver Water District, Lowell, Arkansas (Doc. #15405)

7.890 Water system infrastructure should generally be exempt from WOTUS jurisdiction when normal operational and maintenance activities are carried out using best management practices. (p. 2)

Agency Response: See previous response.

Eastern Municipal Water District, Perris, California (Doc. #15409)

7.891 Under the proposed rule, water recycling and reuse facilities are not explicitly excluded from being designated waters of the U.S. Ditches that transport effluent or conduct discharged excess water are essential features of a water recycling facility and would meet the definition of "tributary" under the proposed rule and therefore be categorically regulated as waters of the U.S. Water recycling facilities also include storage ponds and percolation basins that would also be considered jurisdictional waters under the rule. The proposed rule defines a "tributary" as any natural or man-made feature that has bed and banks and an ordinary high water mark, and conducts flow to another water. The rule goes further to clarify that wetlands, lakes, and ponds that do not have ordinary high water marks are also waters of the U.S. According to the proposed rule, these tributaries remain waters of the U.S. even if piped or obstructed for any length so long as tributary characteristics can be identified upstream of the break.

Water recycling and reuse facilities are frequently located in a floodplain or otherwise adjacent to jurisdictional water, where the rule proposes that all "waters" would be categorically defined as waters of the U.S. While the proposed rule includes an exemption for artificial lakes and ponds used exclusively for settling basins, water recycling facilities can receive and discharge water into surface ditches that would not be exempt under the rule, therefore making the water recycling facilities subject to jurisdiction. Similarly, detention basins that hold potable water for future treatment and distribution would also be jurisdictional under this interpretation. It is not unusual for a water district to have hundreds of acres of these environmentally benign manmade

settling and storage basins which have historically not been jurisdictional. Additionally, the proposed rule's wastewater treatment exemption would not extend to an associated wastewater recycling facility because such facilities to not treat waste, and are not expressly "designed to meet the requirements of the Clean Water Act," a condition stipulated in the proposed rule that would not cover a beneficial use not addressed in the Act.

… ***EMWD requests that water recycling and reuse facilities should be expressly excluded from this rule. The exclusion must be clear and included in the text of the rule, not merely discussed in the preamble.*** With the effects of climate change and drought in the western U.S., developing new environmentally superior drought-proof sources of water must be encouraged by the federal government. This rule could discourage water reuse and interfere with the successful deployment of U.S. Bureau of Reclamation Title XVI and other programs. Unfortunately, the economic analysis that accompanies the proposed rule completely ignores the potential impact on water recycling and reuse. (p. 3-4)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water.

7.892 Exclusion for Water Delivery Systems

EMWD's customers, as with most Californians, depend upon imported water to supplement limited local water supply. These systems are comprised of canals and reservoirs that transport water across watersheds to urban areas and traverse much of the state to deliver water for agriculture, municipal, and industrial uses. Like the State Water Project, the Central Valley Project, and the Colorado River Aqueduct in California, other regions of the country have state and federal water delivery systems whose surface water features meet the definition of "tributary" and could be defined as waters of the U.S. The Central Arizona Project (CAP) governing board recently adopted a resolution opposing

the rule: *"…because [the] outcome could be disastrous for CAP and its customers; treatment methods for that volume of water are technically impractical and the costs of compliance are prohibitively expensive."*

EMWD echoes these concerns, and notes that these water delivery systems exist not only in the arid west but in many other parts of the country where storm water flows are diverted and stored for later treatment for drinking water and other beneficial uses. Again, the man-made reservoirs, delivery canals and overflow channels meet the definition of a tributary and could be defined as waters of the U.S. under the proposed rule. Such designation could dramatically affect the operations and management of these systems and impose new regulatory requirements that would increase operation costs or possibly impede the optimal performance of these water delivery systems—with no discernible environmental benefit. As with water recycling and reuse facilities, EPA has stated repeatedly that regulating these facilities is not the intent of the proposed rule. ***As such, EMWD requests a clear categorical exclusion for water conveyance facilities to ensure that these systems can continue to efficiently meet water supply needs.*** (p. 4-5)

Agency Response: 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 have not in practice asserted jurisdiction over these types of features when created in dry land. The rule makes no substantive change to the existing exclusion for waste treatment systems designed consistent with the requirements of the CWA.

Grand Valley Water Users Association et al. (Doc. #15467)

7.893 The proposed rule continues the explicit exemption for ditches, canals and retention/detention/treatment ponds, that are part of wastewater treatment systems, but the rule should also categorically exempt the same structures associated with permitted stormwater management and drinking water treatment systems. (p. 3)

Agency Response: With respect to stormwater control features, please see the summary response at 7.4.4. Many commenters asked for an exclusion for drinking water supply systems, similar to exclusions for wastewater treatment and stormwater control. Because water supply networks can be both complex in structure and extensive in size, involving the use of tributaries as well as a variety of other features, the agencies determined that a complete exclusion of such systems is not appropriate. However, not all portions of these systems would be regulated under the final rule. Some portions of these systems are tributaries, or even traditional navigable waters, and so would be regulated under this rule for the same reasons that all such waters are subject to regulation as "waters of the United States." At the same time, there are some portions of these systems that would be excluded from regulation under the paragraph (b) exclusions, including (b)(3) (ditches that do not flow into a navigable water, interstate water or territorial sea) or (4)(B)(artificial, constructed lakes and ponds created in dry land.

Aqua America, Inc. (Doc. #15529)

7.894 …Aqua supports the exclusions for "waste treatment systems", but believes this exclusion needs to be expanded to include all water and wastewater infrastructures.

Water and wastewater facilities are already heavily regulated under the Safe Drinking Water Act (SDWA) and CWA. An important goal of the proposed rulemaking should be to avoid duplicate regulations that impede environmental improvements. Examples of highly regulated activities that should be included in the exclusions are municipal separate storm systems (MS4s), stormwater retention basins, "green infrastructure" practices (e.g., infiltration trenches, swales and artificial wetlands), water reuse, recycling, and reclamation operations, ground water wells, and water treatment systems. The exclusion for water infrastructure should clearly and explicitly encompass the full breadth of water and wastewater utility operations. (p. 1-2)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water.

With respect to stormwater control features, please see the summary response at 7.4.4.

Washington County Water Conservancy District, St. George, Utah (Doc. #15536)

7.895 **Water Supply Systems.** It appears that the Proposed Rule would treat most water supply systems, ranging from major federal and state water delivery systems to smaller reservoirs and other water system components managed by local governments, as "tributaries." The rule exempts wastewater treatment systems from jurisdiction, but does not include a similar exemption for water supply systems. Regulation of water system components under the CWA would impose a needless burden on water purveyors. The Agencies should categorically exempt water supply systems (including treatment systems) from regulation under the Proposed Rule. (p. 29)

Agency Response: **Many commenters asked for an exclusion for drinking water supply systems, similar to exclusions for wastewater treatment and stormwater control. Because water supply networks can be both complex in structure and**

extensive in size, involving the use of tributaries as well as a variety of other features, the agencies determined that a complete exclusion of such systems is not appropriate. However, not all portions of these systems would be regulated under the final rule. Some portions of these systems are tributaries, or even traditional navigable waters, and so would be regulated under this rule for the same reasons that all such waters are subject to regulation as "waters of the United States." At the same time, there are some portions of these systems that would be excluded from regulation under the paragraph (b) exclusions, including (b)(3) (ditches that do not flow into a navigable water, interstate water or territorial sea) or (4)(B)(artificial, constructed lakes and ponds created in dry land.

7.896 **Water Reuse and Recharge Facilities.** It appears that the Proposed Rule would regulate many water reuse and recharge facilities, even facilities that do not discharge to any other jurisdictional waters. These types of facilities often include recharge ponds or recycled water impoundments that abut traditional navigable waters. The Agencies should categorically exempt water reuse and recharge facilities from regulation under the Proposed Rule. (p. 29)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water.

7.897 Off-Site Storage Facilities. As discussed in Section III.A above, the Proposed Rule could be interpreted to regulate manmade facilities that lawfully appropriate and remove water from the natural environment, such as an off-river storage pond, an intake canal or cooling pond for a power plant, or forebay for a hydro-electric plant. The Agencies should categorically exempt such facilities from regulation under the Proposed Rule. (p. 31)

Agency Response: **In the exclusion for artificial lakes or ponds, the agencies have changed "exclusively" to "primarily" in describing the uses. Artificial lakes and**

ponds are often not used exclusively for one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. The change to the exclusion reflects Agency practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use. The agencies have also added cooling ponds to the list of uses in the rule. The list of uses has always been illustrative rather than exhaustive, and this addition responds to many requests to clarify that cooling ponds created in dry land are excluded.

7.898 **Waste Impoundments.** The Proposed Rule could be interpreted to regulate waste impoundments historically regulated under Resource Conservation and Recovery Act. The Agencies should clarify that the Proposed Rule does not regulate such areas under the CWA. (p. 32)

Agency Response: **The rule makes no substantive change to the existing exclusion for waste treatment systems designed consistent with the requirements of the CWA.**

San Luis & Delta-Mendota Water Authority, Los Banos, California (Doc. #15645)

7.899 F: Disincentives to the necessary expansion of recycled and reclaimed water development

Under the proposed rule, water reclamation and reuse facilities are not exempt from being designated "waters of the U.S." Added regulatory burdens would not only increase the cost of recycled water, a vitally important emerging new water source throughout the West, but could unnecessarily hamper the development of this water supply. Water reclamation and reuse facilities should be expressly exempt from this rule. (p. 4)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water.

SCANA Services, Inc. (Doc. #15660)

7.900 We believe that language in the proposed rule needs to clearly state that stormwater management facilities, such as stormwater retention ponds, constructed under a stormwater pollution prevention plan are excluded from regulation as "waters of the United States." (p. 2)

Agency Response: Please see summary response at 7.4.4.

7.901 SCANA would like to see language included that exempts ponds or impoundments constructed to perform reactor safety functions at nuclear generating facilities (such as the Service Water Pond at the Virgil C. Summer Nuclear Station, Unit 1) from being identified as waters of the United States. Such ponds perform a critical safety function and needed repairs to dikes or other structures should be allowed to occur without CWA Section 404 permitting. (p. 2)

Agency Response: In the exclusion for artificial lakes or ponds, the agencies have changed "exclusively" to "primarily" in describing the uses. Artificial lakes and ponds are often not used exclusively for one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. The change to the exclusion reflects Agency practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use. The agencies have also added cooling ponds to the list of uses in the rule. The list of uses has always been illustrative rather than exhaustive, and this addition responds to many requests to clarify that cooling ponds created in dry land are excluded.

Association of Electronic Companies of Texas, Inc. (Doc. #16433)

7.902 The electric industry involves the construction, operation, and maintenance of electric generation facilities, and the decommissioning of other electric generation facilities. The Proposed Rule would trigger new and/or revised regulatory requirements for the construction, operation, maintenance, and decommissioning of electric generation facilities. Permitting and compliance costs to address those new and/or revised regulatory requirements would result in delays to adding new electric power to the grid, which is necessary to meet the electric power needs of a growing population.

Further, the operation of electric generation facilities usually involves cooling water and wastewater conveyance, storage, and treatment systems that are critical for providing adequate water to cool electric generating units and for the appropriate treatment and then recycling and/or discharge of wastewater generated by those units. Wastewater treatment systems (except for cooling ponds) that are designed to meet the requirements of the CWA have long been excluded by rule from the definition of WOTUS.[475] As explained below, AECT is concerned that the Proposed Rule would eliminate such regulatory exclusions, despite the EPA's and the Corps' statement that the Proposed Rule "does not

[475] *See for example* 33 C.F.R. § 328.3(a)(8), 40 C.F.R. § 117(i)(6), 40 C.F.R. § I22.2(g), 40 C.F.R. § 230.3(s)(7), 40 C.F.R. § 232.2, 40 C.F.R. § 300.5, and Appendix E to Part 300, section 1.5.

change regulatory exclusions for waste treatment systems"[476] and that such exclusion would remain "even if they would otherwise fall within one of the categories [of WOTUS]."[477]

Unlike the exclusion for wastewater systems, there is no express exclusion that the EPA and the Corps say would be preserved for cooling water systems. Although EPA and the Corps state that "[t]he agencies propose, for the first time, to exclude by regu1ation certain waters and features over which the agencies have as a policy matter generally not asserted CWA jurisdiction," it is not clear whether the agencies are referring to part or all of a cooling water system (e.g., ditches or other features associated with a cooling water system at an electric generating facility) that have historically been excluded from CWA jurisdiction.[478]

…AECT requests that EPA and the Corps expressly exempt all parts of such cooling and wastewater systems. Any impact to the water in such a cooling and/or wastewater system would have no impact on the chemical, physical, or biological characteristics of waters outside the site boundary, and if the water in such a cooling and/or wastewater system would ever be discharged outside the site boundaries, their discharges would be subject to strict water quality standards and effluent limitations. (p. 4, 5)

Agency Response: **In the exclusion for artificial lakes or ponds, the agencies have changed "exclusively" to "primarily" in describing the uses. Artificial lakes and ponds are often not used exclusively for one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. The change to the exclusion reflects Agency practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use. The agencies have also added cooling ponds to the list of uses in the rule. The list of uses has always been illustrative rather than exhaustive, and this addition responds to many requests to clarify that cooling ponds created in dry land are excluded.**

Inland Empire Utilities Agency, California (Doc. #16520)

7.903 We appreciate EPA's explanation that the proposed rule would not change the existing regulatory exclusion for wastewater treatment systems that have been designed to meet the requirements of the CWA. However, Section (b) of the proposed rule does not clearly state that water reuse and recycling infrastructure that are part of wastewater treatment systems are excluded. The types of facilities that need to be clearly listed in the wastewater system exemption include water reuse and recycling ponds, water treatment lagoons, and other appurtenances; artificially constructed wetlands designed to treat agricultural or stormwater runoff (e.g. "green infrastructure") that can be used to manage the removal of sediment and nutrients and improve water quality for water reuse and recycling; and, artificially constructed groundwater recharge basins designed to percolate surface water into groundwater basins for reuse and recycling.

[476] 79 Fed. Reg, 22193; *see a similar statement* at79 Fed. Reg. 22189.
[477] 79 Fed. Reg. 222 17.
[478] 79 Fed. Reg. 22189.

Given the severity of the current drought throughout the west and rising concerns about the impact of climate change on the nation's long-term water supply reliability, it is vital that the steps that are being taken by the EPA and the Corps to protect the "waters of the United States" not impede the development and use of recycled water and stormwater for groundwater replenishment and direct use as a water supply.

On behalf of IEUA, we request that the wastewater systems exemption specified in Section (b) of the proposed regulation be expanded to include water reuse and recycling ponds, water treatment lagoons, artificially constructed wetlands designed to treat agricultural or stormwater runoff, and artificially constructed groundwater recharge basins as listed above… (p. 2)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water.

With respect to stormwater control features (e.g., green infrastructure), please see the summary response at 7.4.4.

ARIPPA (Doc. #16545.1)

7.904 Most existing legacy coal refuse stock piles are found on Abandoned Mine Lands. In order to reclaim these lands back to their natural state coal refuse to alternative energy plants must first acquire permitting to remove and re-mine legacy stockpiled coal refuse. ARIPPA Members have a major concern as to the economic impacts the rule will have on such permitting and re-mining. Many of these legacy coal refuse stockpile sites impacted surface waters (since in the past coal refuse was often stockpiled in swales, drainage ways, and streams prior to laws and regulations disallowing such activity).

Today, these legacy "stockpile sites" are the source of fuel for the ARIPPA Member electric generating plants. As such, the sites are re-mined under the state delegated SMCRA Permits and state delegated NPDES Program. However, ARIPPA is concerned

that the rule as written will hinder and delay ARIPPA Members' ability to obtain the necessary permits to remove these legacy stockpiles that are a major source of acid mine pollution and stream degradation.

These sites are currently well regulated under Pennsylvania's Surface Mine and the Beneficial Use of Ash Regulations. ARIPPA Members work closely with the PADEP [Pennsylvania Department of Environmental Protection] Mining Bureau to eliminate these sources of mine drainage, sedimentation, and air pollution in both a safe and environmentally responsible manner. In fact many plants have won environmental steward awards for their work in re- mining legacy coal refuse stock piles and reclaiming the correlating abandoned mine sites.

At a minimum these projects should be clearly excluded from the rule and should be left under the jurisdiction of the Office of Surface Mining and Reclamation (OSMRE). Further, Congress has directed. OSMRE to develop regulations encouraging the re-mining of coal refuse sites and piles. (p. 4-5)

Agency Response: **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.**

Cucamonga Valley Water District, California (Doc. #16556)

7.905 Water reclamation and reuse facilities are not exempt from being designated waters of the U.S. Ditches that transport effluent or discharged water can easily meet the definition of "tributary" under the proposed rule and be categorically regulated as waters of the U.S. The proposed rule defines a "tributary" as any natural or man-made feature that has a bed, bank, ordinary high water mark, and conducts flow to another water. Reclamation and reuse facilities are frequently located in a floodplain or otherwise adjacent to jurisdictional water where all waters are categorically defined as waters of the U.S. While the proposed rule includes an exemption for artificial lakes and ponds used exclusively for settling basins, such reuse facilities can function or take on the characteristics of a wetland and can receive and discharge water into surface ditches that are not exempt. The proposed rule's waste water treatment exemption would not extend to an associated water reuse facility because such facilities are not expressly "designed to meet the requirements of the Clean Water Act," a condition stipulated in the rule that would not cover a beneficial use not addressed in the Clean Water Act.

California acknowledges the value of recycled water and established a statewide goal (California Water Plan) of recycling 2.5 million acre feet of water by 2030. In 2009, 0.67 MAF was recycled; and increasing to 2.5 MAF is ambitious, but necessary to help drought-proof the state. Currently, 3.5 MAF of treated wastewater is being discharged to the ocean that could be developed for beneficial reuse. Obstacles such as designating some water reuse facilities as waters of the U.S. will further delay achieving that goal.

Water reclamation and reuse facilities should be expressly exempt from this rule, particularly in times of drought such as the one that currently affects most western states; developing new sources of water for consumption should be encouraged. This rule could

discourage water reuse and interfere with the successful deployment of U.S Bureau of Reclamation Title XVI programs. Of equal concern is that the economic analysis that accompanies the propose rule completely ignores the potential impact on water reuse. (p. 2)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water.

Castaic Lake Water Agency, Santa Clarita, California (Doc. #17061)

7.906 The proposed rule revises the existing jurisdictional category of "adjacent wetlands." The proposed "adjacent waters" category would replace "adjacent wetlands" and would thus include other neighboring water bodies, including those located in the adjacent flood plain or having a shallow subsurface hydrologic connection or confined surface hydrologic connection to a jurisdictional water. As stated above, CLWA relies on water banking programs in the San Joaquin Valley. Some of these programs rely on man-made spreading facilities that would appear to fall under the new definition of adjacent waters. Further, to reduce reliance on environmentally sensitive imported water such as that being conveyed through the Sacramento San Joaquin Bay Delta, CLWA is investigating the feasibility of using highly treated recycled water to recharge groundwater basins adjacent to the Santa Clara River. Such groundwater recharge facilities may share storm water capture facilities being considered by the City of Santa Clarita. Thus, CLWA joins ACWA in requesting that water infrastructure facilities including construction, maintenance and operation adjacent to traditionally navigable water be excluded from the proposed definition of "waters of the U.S." (p. 2)

Agency Response: **The final rule has expanded the features not considered "waters of the United States" to include certain wastewater treatment, artificial ponds, and stormwater facilities that may address some of the features discussed in this comment, where constructed in dry land. However, when constructed in, or**

impounding, waters of the United States, these features may still be considered jurisdictional.

Cloud Peak Energy (Doc. #18010)

7.907 Under the proposed rule it is not clear whether these on-site water management systems will remain non-jurisdictional. We are concerned that inclusion of these treatment and conveyance systems will significantly impact mining operations. If the rule is not clarified, the unintended consequence will be that many of these traditional, effective treatment systems will no longer be available to the mining industry. Moreover, the mining industry requests a clear statement in the rule that these mine site water management systems are non-jurisdictional.

If the onsite treatment systems are considered jurisdictional, mines will face additional permitting requirements related to these treatment systems. Mines will no longer be able to relocate the systems as needed without additional permitting requirements and associated delays. System maintenance and clean-out may be delayed or stopped because of the jurisdictional status and the inability to impact the system without triggering possible mitigation requirements. These onsite treatment systems must remain non-jurisdictional if they are to remain effective treatment systems.

Many of these onsite treatment systems 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. As such possible, violations of the applicable water quality standards are covered through NPDES regulations. Often times these treatment systems are designed to be zero discharge, further safeguarding that there are no environmental impacts. The need to include these as jurisdictional waters is unwarranted because the discharges from these systems are already regulated through other CWA regulations. (p. 4)

Agency Response: Current agencies' practices often consider some features described in this comments as "waste treatment systems" during the active period of mining, and are therefore excluded from coverage until reclaimed. Nothing in the rule is intended to alter the current application of the waste treatment exclusion.

Xcel Energy (Doc. #18023)

7.908 … Constructed stormwater conveyances (such as swales, channels, ditches, and engineered storm water management ponds), water supply ditches, and ephemeral drainages should not be treated as jurisdictional Waters of the U.S…." (p. 7-8)

Agency Response: With respect to stormwater control features, please see the summary response at 7.4.4.

WateReuse Association (WateReuse) (Doc. #12758)

7.909 We believe the agencies should exclude all other constructed or managed water reuse and recycling treatment infrastructure. Such facilities have related attributes to waste treatment systems by providing an important mechanism for the beneficial disposition of treated effluent. Additionally, these systems also provide an important and environmentally superior water supply function. As such, excluded facilities should

encompass all water reuse and recycling conveyance systems, storage impoundments, water treatment lagoons, and other appurtenances; artificially constructed wetlands designed to treat agricultural or stormwater runoff (e.g. "green infrastructure") that can be used to manage the removal of sediment, nutrients and improve water quality for water reuse and recycling; and artificially constructed groundwater recharge basins designed to percolate surface water into groundwater basins for reuse and recycling.

Even though many of these man-made features can contain plants and shrubs known to grow in wetlands or meet the proposed rule's definition of "tributary" or "adjacent," they should be included in the list of features identified in the proposed rule as excluded from the definition of "waters of the U.S." We believe that if water reuse and recycling infrastructure and related facilities are made jurisdictional under the CWA through the proposed rule, it would substantially hinder our ability to access this major source of fresh water supply so important to the current and future water supply reliability of many communities across the Nation. (p. 2-3)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water.

With respect to stormwater control features, please see the summary response at 7.4.4.

Eastern Municipal Water District, Perris California (Doc. #15544)

7.910 **Exclusion for Water Recycling and Reuse Facilities**

Recycled water is a beneficial use that develops reliable local water resources and reduces demand for imported water supplies. In addition, it is one of the highest forms of water use efficiency because water is literally used twice. Moreover, recycled water is an environmentally benign supply that is a key component of the present and future water

supply portfolio not only for EMWD, southern California and the arid west, but for every region of the country seeking to more effectively manage water resources.

The processes for recycling and reusing water are costly but are becoming more widely implemented in areas of the country where groundwater and surface water sources are strained, and the cost or availability of imported water are prohibitive or limited. Water authorities across the country, especially those in the arid west, are investing millions of dollars in infrastructure to utilize recycled water because it is a drought-proof water resource. Treatment and distribution costs of recycled water are already high, making this valuable resource marginally cost-effective in many places. Any significant increase in regulation and the associated costs for compliance, such as defining recycled water infrastructure as waters of the U.S., will escalate the cost of utilizing this water and discourage its development.

Under the proposed rule, water recycling and reuse facilities are not explicitly excluded from being designated waters of the U.S. Ditches that transport effluent or conduct discharged excess water are essential features of a water recycling facility and would meet the definition of "tributary" under the proposed rule and therefore be categorically regulated as waters of the U.S. Water recycling facilities also include storage ponds and percolation basins that would also be considered jurisdictional waters under the rule. The proposed rule defines a "tributary" as any natural or manmade feature that has bed and banks and an ordinary high water mark, and conducts flow to another water. The rule goes further to clarify that wetlands, lakes, and ponds that do not have ordinary high water marks are also waters of the U.S. According to the proposed rule, these tributaries remain waters of the U.S. even if piped or obstructed for any length so long as tributary characteristics can be identified upstream of the break.

Water recycling and reuse facilities are frequently located in a floodplain or otherwise adjacent to jurisdictional water, where the rule proposes that all "waters" would be categorically defined as waters of the U.S. While the proposed rule includes an exemption for artificial lakes and ponds used exclusively for settling basins, water recycling facilities can receive and discharge water into surface ditches that would not be exempt under the rule, therefore making the water recycling facilities subject to jurisdiction. Similarly, detention basins that hold potable water for future treatment and distribution would also be jurisdictional under this interpretation. It is not unusual for a water district to have hundreds of acres of these environmentally benign man-made settling and storage basins which have historically not been jurisdictional. Additionally, the proposed rule's wastewater treatment exemption would not extend to an associated wastewater recycling facility because such facilities to not treat waste, and are not expressly "designed to meet the requirements of the Clean Water Act," a condition stipulated in the proposed rule that would not cover a beneficial use not addressed in the Act.

Under the proposed rule, ten EMWD man-made recycled water storage ponds could become jurisdictional because they are located in floodplains, are adjacent to jurisdictional waters, and potentially possess a minor subsurface hydrologic connection. These facilities have no hydraulic connection to waters of the U.S. and are not subject to flooding or spill into such waters. Should these facilities become jurisdictional under the proposed rule, regular maintenance and vegetation removal of these 500 acres of man-

made and maintained ponds would require 404 permits. Even more problematic and costly would be the additional regulatory requirements associated with these features being designated as waters of the U.S., namely the potential requirements to meet water quality standards for fishable and swimmable waters and to control all discharges into these waters.

These added regulatory burdens would not only increase the cost of recycled water and potentially delay further development of recycled water storage ponds, but could hamper the development of a critically important drought-proof water supply for the region. These water storage facilities are essential to maximize the use of recycled water because recycled water is in greater demand in warmer months and less in the winter, requiring storage in the winter in order to meet the demand in summer. Such a system is required anywhere in the arid west that utilizes recycled water, as well as other areas of the country that store water for later treatment and delivery.

EMWD requests that water recycling and reuse facilities should be expressly excluded from this rule. The exclusion must be clear and included in the text of the rule, not merely discussed in the preamble. With the effects of climate change and drought in the western U.S., developing new environmentally superior drought-proof sources of water must be encouraged by the federal government. This rule could discourage water reuse and interfere with the successful deployment of U.S. Bureau of Reclamation Title XVI and other programs. Unfortunately, the economic analysis that accompanies the proposed rule completely ignores the potential impact on water recycling and reuse. (p. 3-4)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water.

7.911 **Exclusion for Water Delivery Systems**

EMWD's customers, as with most Californians, depend upon imported water to supplement limited local water supply. These systems are comprised of canals and

reservoirs that transport water across watersheds to urban areas and traverse much of the state to deliver water for agriculture, municipal, and industrial uses. Like the State Water Project, the Central Valley Project, and the Colorado River Aqueduct in California, other regions of the country have state and federal water delivery systems whose surface water features meet the definition of "tributary" and could be defined as waters of the U.S. The Central Arizona Project (CAP) governing board recently adopted a resolution opposing the rule: "…because [the] outcome could be disastrous for CAP and its customers; treatment methods for that volume of water are technically impractical and the costs of compliance are prohibitively expensive."

EMWD echoes these concerns, and notes that these water delivery systems exist not only in the arid west but in many other parts of the country where storm water flows are diverted and stored for later treatment for drinking water and other beneficial uses. Again, the man-made reservoirs, delivery canals and overflow channels meet the definition of a tributary and could be defined as waters of the U.S. under the proposed rule. Such designation could dramatically affect the operations and management of these systems and impose new regulatory requirements that would increase operation costs or possibly impede the optimal performance of these water delivery systems—with no discernible environmental benefit. As with water recycling and reuse facilities, EPA has stated repeatedly that regulating these facilities is not the intent of the proposed rule. ***As such, EMWD requests a clear categorical exclusion for water conveyance facilities to ensure that these systems can continue to efficiently meet water supply needs.*** (p. 4)

Agency Response: **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 have not in practice asserted jurisdiction over these types of features when created in dry land. The rule makes no substantive change to the existing exclusion for waste treatment systems designed consistent with the requirements of the CWA.**

George Washington University Regulatory Studies Center (Doc. #13563)

7.912 The Agencies should expand their exclusions from the Waters of the United States to include, not just wastewater systems, but also municipal separate storm systems (MS4s), especially "green infrastructure" practices; water reuse, recycling, and reclamation operations; and commercial, industrial and manufacturing water treatment systems.

The Agencies affirm, without explanation, the long-standing exclusion of wastewater systems from the Waters of the United States and the proposed rule, presumably, on the grounds that these entities are already adequately regulated under the CWA as to permitting, water quality standards, enforcement, and the like. This is sensible and appropriate.

Yet, it is fair to ask if this same rationale might be extended to other highly regulated activities which also generate environmental and water quality benefits such as MS4s, along with "green infrastructure" practices; water reuse, recycling, and reclamation operations; and commercial, industrial and manufacturing water treatment systems. At the very least, extending the wastewater system exclusion to these other activities merit consideration and comment. In the case of MS4s, any new proposal for exclusion and

solicitation of public comment should extend to their conveyances that channel and discharge stormwater runoff as well as "green infrastructure" approaches which attempt to infiltrate, reuse, retain and evaporate stormwater flows. Constructed wetlands should also be considered for exclusion.

In addition to avoiding double or redundant regulation, such exclusions are conducive to these other activities, all of which benefit the environment and water quality including its chemical, physical and biological components.

The goal should be to avoid double regulation and remove obstacles to environmental improvement by private entities and citizens.

Recommendation

The Agencies should propose and seek public comment on additional exclusions from the Waters of the United States to include, not just wastewater systems, but also municipal separate storm systems (MS4s) and their conveyance network as well "green infrastructure" practices; water reuse, recycling, and reclamation operations; and commercial, industrial and manufacturing water treatment systems. (p. 8-9)

Agency Response: While the agencies may not agree with all points raised in this comment, they agree that a specific exclusion for stormwater control features built in dryland is appropriate. Please see summary response at 7.4.4. With respect to waste treatment systems, see summary response at 7.1.

Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water.

Water Environment Federation (Doc. #16584)

7.913 ***The Waste Treatment Exemption Should Specifically Include Water Recycling Facilities and Effluent Storage Ponds***

In order to address the historic drought conditions currently plaguing the western states,water and wastewater agencies must rely on a full suite of flexible options to provide potable and recycled water supplies for a variety of ongoing uses. Thus, WEF opposes any direct or indirect regulatory impacts on water recycling, water storage, and other mechanisms that play a part in recycled water infrastructure and processes as a result of the proposed rule.

As noted above, we appreciate the explicit acknowledgement and codification of the waste treatment exemption in the proposed rule. However, we believe it is important that the proposed rule expressly states that the waste treatment exemption extends to recycled water facilities. States' water recycling projects often depend upon artificially created wetlands and storage ponds to treat millions of gallons of water a day. If these features are considered waters of the U.S. and are excluded from the waste treatment exemption, they could theoretically no longer be used as an integral component of the waste treatment systems, forcing the closure of important recycled water projects critical to states's water supply. Moreover, a lack of clarity on this issue may stall or halt the development of recycled water projects at a time when recycling is needed the most to address climate resiliency priorities.

Because recycled water demand is variable with time of day and season, recycled water agencies maintain reservoirs or storage basins/ponds to store recycled water during periods of low usage in anticipation of peak demands. These features are an essential component of the recycled water process and integral to an agency's ability to continue reliably producing and supplying recycled water in many instances. The proposed rule should affirm that such reservoirs along with influent and treated effluent storage ponds are within the scope of the waste treatment exemption, consistent with the regulatory definition of "complete waste treatment system" found in existing federal regulations.[479] As the proposed rule and existing practice acknowledge, waste treatment systems designed to meet the requirements of the Clean Water Act are not waters of the U.S., and treatment systems should include any facilities, including storage ponds and basins, related not only to traditional treatment facilities and processes, but also to the production of recycled water.

In the alternative, recycled water facilities and features (including storage ponds, basins, artificially created wetlands, recycled water reservoirs and other features associated with water recycling) should be expressly exempted as part of the specifically identified features that are not considered waters of the United States within the proposed rule. In this case, recycled water facilities would be treated similar to artificial lakes, ponds, swimming pools, ornamental waters, and groundwater, which are specifically identified and expressly exempted. In either case, whether recycled water facilities are considered part of the waste treatment exemption or have their own specifically identified

[479] *See* 40 C.F.R. §35.2005(b)(12), defining "complete waste treatment system" as "all the treatment works necessary to meet the requirements of title III of the [CWA], involving . . . the ultimate disposal, including recycling or reuse, of the treated wastewater and residues which result from the treatment process." (Emphasis added); *see also* 40 C.F.R. §35.2005(b)(49) [definition of "treatment works" includes "storage of treated wastewater in land treatment systems before land application" among other things].

exemption, it is essential that the proposed rule not interfere with recycled water production and treatment by making those features jurisdictional.

The failure to include an explicit statement in the final rule would leave open the question of whether these features are considered "waters of the United States." Such a situation could lead to regulatory disincentives to produce recycled water in western states, including California, compounding a water scarcity situation that is already dire. Pending and adopted federal and state legislation to address the impacts of our historic drought contain a number of approaches to encourage recycled water projects. Transforming components of the recycled water process (including integral systems such as storage ponds) into jurisdictional waters would undercut efforts to address the drought. (p. 2-3)

Agency Response: **Paragraph (b)(7) of the rule clarifies that wastewater recycling structures created in dry land are excluded. This new exclusion clarifies the agencies' current practice that such waters and water features used for water reuse and recycling are not jurisdictional when constructed in dry land. The agencies recognize the importance of water reuse and recycling, particularly in areas like California where water supplies can be limited and droughts can exacerbate supply issues. This exclusion responds to numerous commenters and encourages water reuse and conservation while still appropriately protecting the chemical, physical, and biological integrity of the nation's water under CWA.**

The agencies specifically exclude constructed detention and retention basins created in dry land used for wastewater recycling as well as groundwater recharge basins and percolation ponds built for wastewater recycling. Many commenters noted the growing interest in and commitment to water recycling and reuse projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and percolation ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water which then infiltrates into groundwater via permeable soils. Though these features are often created in dry land, they are also often located in close proximity to tributaries or other larger bodies of water.

In the exclusion for artificial lakes or ponds, the agencies have changed "exclusively" to "primarily" in describing the uses. Artificial lakes and ponds are often not used exclusively for one purpose and can have other beneficial purposes, such as animal habitat, water retention or recreation. The change to the exclusion reflects Agency practice and ensures that waters the agencies have historically not treated as jurisdictional do not become so because of another incidental beneficial use. The agencies have also added cooling ponds to the list of uses in the rule. The list of uses has always been illustrative rather than exhaustive, and this addition responds to many requests to clarify that cooling ponds created in dry land are excluded.

7.5. SUPPLEMENTAL COMMENTS ON FEATURES AND WATERS NOT JURISDICTIONAL

Summary Response

The substantive issues raised in this section are addressed in the summary responses and individual responses above, and commenters should review those sections. Additional references and information are provided below.

Specific Comments

Anonymous (Doc. #2893)

7.922 Problem: This rule can be wrongly utilized in claiming jurisdiction over eroded storm water outfall such as gullies because it has a bed and bank formation (although it was never historically a ephemeral channel). Jurisdiction may be pushed up the gully so far that it may also take jurisdiction over MS-4 structures and SWMP. This could result in a delay and increase expense in retrofit projects since a permit would be required as well as possible mitigation.

This rule wants to clarify the difference between a man made gully and a natural channel but it is not as obvious in the field to determine the difference.

Problem Resolution: Must have a specific definition of what a OHWM is and guidance on how to properly field identify the feature in order to determine if the gully is a WOUS.

The soil profile of the gully must exhibit old channel bed characteristics somewhere in the profile strata (layer of sorted cobble, pebbles and stone) to prove it was a natural drainage. (p. 1)

Agency Response: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. See summary response 7.3.7 for discussion of gullies.

Department of Public Works, City of Harrisonville, Missouri (Doc. #4038.2)

7.923 Our interpretation of the current rule, and its implications for existing EPA and USACOE rules, is that many tasks associated with routine municipal maintenance would now require additional interaction with both federal agencies. Applications would have to be completed and filed with the appropriate agency for work within the "Waters of the United States", coupled with additional monitoring, and reporting for such routine maintenance as:

Removal of vegetation (mowing) in and along roadside ditches.

Installing or replacing utility poles, street signs and traffic control devices (signage or lights) on the banks of ditches following motor vehicle accidents or natural disasters.

Placing stone (riprap) into or removing stone from ditches and stormwater channels to facilitate, control, and mitigate damage from stormwater transport.

Removing plant or mineral debris from ditches or stormwater channels as part of a program of regular maintenance to avoid flooding streets and other city property, and reducing private property owner damages as well as reducing soil erosion.

Re- contouring bank cuts for existing ditches and stormwater channels to reduce soil erosion even with the required land disturbance permits and an approved erosion control program for the state environmental agency. (p. 1 – 2)

Agency Response: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. With regard to maintenance and upkeep of existing structures, the agencies note that there are several options for streamlined permitting alternatives, such as Regional General Permits and Nationwide Permits 3 and 13.

7.924 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. Further we ask that both agencies carefully examine the 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. (p. 2)

Agency Response: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. For discussion of excluded ditches and the implications for roadside ditches, please see discussion in preamble and the summary response at 6.2.

William P. Minervini (Doc. #4040.2)

7.925 **Exclusion of Waste Treatment Systems Designed to Meet the Requirements of the Clean Water Act**

The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) should confirm that these "waste treatment systems" include stormwater treatment systems designed to meet the requirements of National Pollutant Discharge Elimination System (NPDES) permits for stormwater discharges issued under section 402 of the Clean Water Act (CWA). Such discharges include, for example (see 40 CFR 122.26 and 122.32), stormwater discharges associated with industrial activity or small construction activity, and stormwater discharges from some municipal separate storm sewer systems (MS4s). Examples of such stormwater treatment systems include (i) sediment basins that treat some stormwater discharges associated with construction activity; and (ii) dry detention ponds, wet ponds, infiltration basins, and stormwater wetlands that treat stormwater runoff from some new development and redevelopment projects that discharge into some MS4s.

The CWA uses the phrase "waste treatment" very broadly. For example, section 201(c) of the CWA declares that "to the extent practicable, waste treatment management shall be on an areawide basis and provide control or treatment of all point and nonpoint sources of pollution, including in place or accumulated pollution sources" (emphasis added). Section 208 of the CWA requires "areawide waste treatment management plans" (emphasis added) to include, among other things, the necessary "urban storm water runoff systems,"

and the establishment of a regulatory program to "implement the waste treatment management requirements of section 201(c)" (see section 208(b)(2)(A) and (C)). (p. 1)

Agency Response: **See summary response on waste treatment systems at 7.1. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4.**

7.926 **Relation to Natural Buffers and the Construction and Development Point Source Category (NPDES)**

The EPA and the Corps assert that through their proposed rule they "are providing clarity to regulated entities as to whether individual water bodies are jurisdictional and discharges are subject to permitting, and whether individual water bodies are not jurisdictional and discharges are not subject to permitting" (79 FR 22188). In the NPDES program, however, the definition of "waters of the United States" serves an additional regulatory purpose not mentioned either in the April 21, 2014 rule proposal notice or in the ''Economic Analysis of Proposed Revised Definition of Waters of the United States'' cited in that notice (79 FR 22220).

This purpose is to provide clarity as to which individual water bodies require provision and maintenance of "natural buffers" (unless infeasible) pursuant to EPA's Effluent Limitations Guidelines and Standards for the Construction and Development point source category (as amended in 2014; see 79 FR 12661). See 40 CFR 450.21(a)(6), which uses the term "waters of the United States." Even where it is indisputable (whether the definition of "waters of the United States" is changed or not) that stormwater from a construction site discharges to "waters of the United States" (which in many instances are located offsite), the definition of "waters of the United States" can still be important in establishing which (if any) individual water bodies at the construction site are subject to the "natural buffers" requirement. EPA should consider and discuss the aquatic resource, implementation, and economic implications of a definition of ''waters of the United States'' as they pertain to the "natural buffers" requirement in 40 CFR 450.21(a)(6). (p. 1 – 2)

Agency Response: **The final rule does not address the buffer requirements that may apply through various CWA programs, and comments about 40 CFR 450.21(a)(6) are outside the scope of this rulemaking. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. Also, please see Economics Analysis section 8 regarding costs and benefits for the NPDES program.**

7.927 **NPDES Permits and Ground Water**

The EPA and the Corps assert that "the agencies have never interpreted 'waters of the United States' to include groundwater and the proposed rule explicitly excludes groundwater" (79 FR 22218). EPA asserted in 1990, however, that "discharges to ground waters" are subject to NPDES permitting if "there is a hydrological connection between the ground water and a nearby surface water body." See 55 FR 47990, 47997 (Nov. 16, l990) (storm water permit application regulations). Although this 1990 assertion was not the same as an assertion that this groundwater is "waters of the United States," this 1990

assertion nevertheless alleged a significant link between NPDES permitting and some groundwater.

What is EPA's current position in this regard? Are releases of waste from discernible, confined, and discrete conveyances into groundwater "hydrological connected" to "nearby" "waters of the United States" subject to NPDES permitting? If so, how close is "nearby"? (Specify number of feet or other suitable units.) The answers to these questions affect the practical significance of explicitly excluding groundwater from the "waters of the United States" definition. (p. 2)

Agency Response: Please see summary response at 7.3.6 (groundwater) and summary response at 12.3.

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

7.928 **8. BE IT FURTHER RESOLVED**, that the rule include the following provisions that are priority concerns for local governments:

- Separate municipal storm sewers will continue to be regulated and permitted under Section 402 of the Clean Water Act, and shall not be considered, either in their entirely or any individual feature thereof, Waters of the U.S.; and
- Green infrastructure developed to improve water quality or achieve multiple public benefits shall be encouraged and given priority consideration that does not impose additional financial and regulatory burdens of permittees and shall not be considered Waters of the United States; and
- Water delivery, reuse, and reclamation systems and facilities shall not be considered waters of the U.S.; and
- Wastewater treatment systems and all associated infrastructure shall not be considered waters of the U.S.; and (p. 2)

Agency Response: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. With respect to water delivery, reuse, and reclamation systems, please see summary response at 7.4.2.

Black Hills Corporation (Doc. #6248)

7.929 Black Hills recommends that at a minimum, the definition of WOTUS (Section 40 CFR 230.3) should be expanded to specifically exclude man-made stormwater conveyances and other BMPs implemented for stormwater compliance. (p. 4)

Agency Response: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4.

Amber Earnhardt (Doc. #6761)

7.930 **I. Any rule that exempts all groundwater from CWA jurisdiction clearly violates the purpose, intent, and science grounded in the Act and is inconsistent with the language of the proposed rule.**

A. Purpose and Legislative Intent of the Clean Water Act Support the Inclusion of "Tributary" Groundwater:

The objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[480] Congress's broad purpose, along with their recognition of the hydrologic connection between surface and groundwater and the importance of controlling pollution at its source, makes it critical for the EPA/Corps to include "shallow" or "tributary" groundwater under "other waters" in order to be consistent with the goals of the CWA.[481] Congress did not explicitly exempt groundwater within the language of the Act, as it did for agricultural return flows.[482] Therefore, with the broad definition of "waters of the U.S." the statute demonstrates that Congress intended to include some forms of groundwater in regulating point source pollution.[483] Statutory language may vary when referring to groundwater throughout sections of the CWA, but the objective of the CWA is clear.

The Senate Committee Report 92-414 reveals that Congress recognized the connection between surface and groundwater, stating that "it must be remembered that rivers, streams, and lakes themselves are largely supplied with water from the ground—not surface runoff."[484] The Report explicitly shows that Congress understood the complexity of groundwater and its connection to other surface waters. (p. 2 – 3)

Agency Response: The agencies have consistently interpreted the CWA to exclude shallow or deep groundwater from the geographic scope of the waters of the United States. The exclusion for groundwater in the final rule does not affect this longstanding interpretation as the agencies have never considered the groundwater itself to be a "water of the United States." See summary response for section 7.3.6 of this RTC and the Technical Support Document.

7.931 B. Scientific Evidence Supports "Tributary" Groundwater:

Science is clear about the impacts of "shallow" or "tributary" groundwater on the chemical, physical, and biological integrity of downstream waters. "Tributary" groundwater is groundwater that discharges into surface water.[485] The EPA's scientific evidence acknowledges that wetlands provide temporary storage of local groundwater that supports baseflow in rivers,[486] and references aquifers and "shallow groundwater" as a major source of annual flow in rivers, especially in the southwestern U.S.[487] Isolated wetlands can also be connected to downstream waters through groundwater connections.[488] The scientific evidence clearly demonstrates the critical role that groundwater plays in the health of adjacent, tributary, and downstream "waters of the U.S."

[480] 33 U.S.C. § 1251(a).
[481] Brian Knutsen, Asserting Clean Water Act Jurisdiction Over Isolated Waters: What Happens After the SWANCC Decision, 10 Alb. L. Envtl. Outlook J. 155, 194 (2005).
[482] Mary Christina Wood, Regulating Discharges into Groundwater: The Crucial Link in Pollution Control Under the Clean Water Act, 12 Harv. Envtl. L. Rev. 569, 576 (1988).
[483] *Id.*
[484] S. Rep. No. 92-414, reprinted in 1972 U.S.C.C.A.N. 3668, 3739.
[485] Mary Christina Wood, supra note 6, at 570.
[486] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. at 22188, 22223.
[487] *Id.* at 22224.
[488] *Id*. at 22226.

Further, the US Geological Survey is currently encouraging more significant interdisciplinary research that includes research about the relationship between groundwater and surface water resources.[489] The USGS acknowledges that "we need enough ground water of good quality to sustain our lives, our economy, and our aquatic ecosystems."[490] Another challenge of managing our water resources is the slow movement of groundwater—the effects of pumping can take years to measure, leading to groundwater mistakenly seeming less critical compared to surface water.[491]

Different regions of the U.S. will be adversely impacted if groundwater is excluded from federal jurisdiction under the CWA. For instance, the IJC Great Lakes Science Advisory Board stated that "the Great Lakes cannot be protected without protecting the groundwater resources in the Basin."[492] "Tributary" groundwater in the Great Lakes Basin requires protection, as groundwater contributes over 50 percent of the water flowing to streams that discharge into the Great Lakes,[493] supplies drinking water for 8.2 million people,[494] and sustains the industry and ecology of the region.[495] (p. 3 – 4)

Agency Response: **The agencies have consistently interpreted the CWA to exclude shallow or deep groundwater from the geographic scope of the waters of the United States. The exclusion for groundwater in the final rule does not affect this longstanding interpretation as the agencies have never considered the groundwater itself to be a "water of the United States." See summary response for section 7.3.6 of this RTC and the Technical Support Document.**

7.932 C. Purpose of Proposed Rule Supports "Tributary" Groundwater:

When referencing scientific evidence for its purpose, the proposed rule states that "tributaries and adjacent waters play an important role in maintaining the chemical, physical, and biological integrity of traditional navigable waters…because of their hydrological and ecological connections to and interactions with those waters."[496] However, as evident in the scientific literature, groundwater connections are as if not *more* critical to the integrity of downstream waters. The term groundwater was significantly used (over 55 times) and discussed at length within Appendix A in demonstrating the hydrologic connection to downstream waters,[497] but the mentioning of

[489] W.E. Sanford, J.S. Caine, D.A. Wilcox, H.C. McWreath, & J.R. Nicholas, Research Opportunities in Interdisciplinary Ground-Water Science in the U.S. Geological Survey (January 11, 2013), available at: http://pubs.usgs.gov/circ/circ1293/circ1293.html.
[490] *Id*.
[491] N.G. GRANNEMANN, R.J. HUNT, J.R. NICHOLAS, T.E. REILLY, & T.C. WINTER, U.S. GEOLOGICAL SURVEY: THE IMPORTANCE OF GROUND WATER IN THE GREAT LAKES REGION 1 (2000).
[492] INTERNATIONAL JOINT COMMISSION GREAT LAKES SCIENCE ADVISORY BOARD, GROUNDWATER IN THE GREAT LAKES BASIN 1 (2010).
[493] N.G. GRANNEMANN, ET AL. , supra note 15, at 12.
[494] INTERNATIONAL JOINT COMMISSION GREAT LAKES SCIENCE ADVISORY BOARD, supra note 16, at 1
[495] N.G. GRANNEMANN, ET AL. , supra note 15, at 12.
[496] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. at 22188, 22194.
[497] U.S. Environmental Protection Agency, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (2013), available at: http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershed Connectivity Report?OpenDocument.

groundwater was virtually ignored in the proposed rule as having no impact or role in the hydrologic system when, in reality, it is absolutely crucial. Therefore, to fulfill the purposes of the CWA and the proposed rule the inclusion of "shallow" or "tributary" groundwater is necessary and cannot be exempt.

Similarly, within the discussion of "other waters," the agencies correctly determined that the "watershed is a reasonable and technically appropriate extent on which to identify waters that together may have an effect on the chemical, physical, or biological integrity of a particular (a)(1), through (a)(3) water."[498] When defining the term watershed, the EPA's website states that "a watershed is the area of land where all of the water that is under it or drains off of it goes into the same place" (emphasis added).[499] Therefore, if the EPA/Corps use a watershed to define Justice Kennedy's remark of "in the region," then they must include specific groundwater types by adjacent or tributary jurisdiction or within the "other waters" category. (p. 4 – 5)

Agency Response: **The agencies have consistently interpreted the CWA to exclude shallow or deep groundwater from the geographic scope of the waters of the United States. The exclusion for groundwater in the final rule does not affect this longstanding interpretation as the agencies have never considered the groundwater itself to be a "water of the United States." See summary response for section 7.3.6 of this RTC and the Technical Support Document.**

7.933 **II. The EPA/Corps have the authority under the CWA to include certain forms of groundwater within the definition of "waters of the U.S."**

A. Case Law Supports "Tributary" Groundwater:

Courts have reached inconsistent conclusions over the issue of groundwater—most courts find the language of the CWA to be ambiguous.[500] Courts have traditionally acknowledged that the CWA does not generally regulate discharges to groundwater; however, courts have held that the CWA can extend federal jurisdiction to groundwater that is hydrologically connected to surface waters designated as "waters of the U.S."[501]

The Supreme Court, citing Senate Committee Report 92-414 in *United States v. Riverside Bayview Homes*,[502] stated that Congress broadly defined the term "waters of the U.S." and that Congress recognized the importance of controlling pollution at its source to restore the integrity of our nation's waters.[503] According to the court's interpretation in *Riverside Bayview Homes, Inc*. and *SWANCC*, CWA jurisdiction reaches to all waters linked to navigable waters.[504] Therefore, groundwater connections constitute a

[498] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. at 22188, 22212.
[499] EPA, What is a Watershed? (2012), available at: http://water.epa.gov/type/watersheds/whatis.cfm .
[500] 66 Fed. Reg. 2960, 3016 (Jan. 12, 2001).
[501] Robert L. Glicksman & Matthew R. Batzel, Science, Politics, Law, and the Arc of the Clean Water Act: The Role of Assumptions in the Adoption of a Pollution Control Landmark, 32 Wash. U. J.L. & Pol'y 99, 112 (2010).
[502] *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).
[503] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. at 22188, 22191.
[504] Brian Knutsen, supra note 5, at 188.

"significant nexus" within the meaning of the caselaw if they can be determined to have a significant connection to jurisdictional surface waters.[505]

Many courts have found sufficient justification for CWA jurisdiction over "tributary" groundwaters, and this proposed rule provides an opportunity to clarify the position of the agencies and allow for greater consistency.[506] For instance, as stated by the court in *Idaho Rural Council v. Bosma*, "whether pollution is introduced by a visible, above-ground conduit or enters the surface water through the aquifer matters little to the fish, waterfowl, and recreational users which are affected by the degradation of our nation's rivers and streams."[507] As Susan Griffithe analyzed, after reviewing the purpose of the CWA, the *Bosma* court held that "there is little doubt that any polluted water ultimately affecting the quality of regulated waters should also be regulated."[508]

More recently, in *Hernandez v. Esso Standard Oil Company*, the court held that the CWA extended federal jurisdiction over groundwater that was hydrologically connected to surface waters designated as "waters of the U.S."[509] The *Hernandez* court stated that previous cases concluding that the CWA provides no federal jurisdiction over groundwater do "not preclude the act from applying to the regulation of 'tributary groundwater'…which allegedly migrates from groundwater back into surface water."[510] The *Hernandez* court explains that although Congress did not generally regulate groundwater under the CWA, they did not exclude any regulation if the introduction of pollutants in groundwater would have adverse impacts to surface waters.[511] (p. 5 – 6)

Agency Response: The agencies have consistently interpreted the CWA to exclude shallow or deep groundwater from the geographic scope of the waters of the United States. The exclusion for groundwater in the final rule does not affect this longstanding interpretation as the agencies have never considered the groundwater itself to be a "water of the United States." However, it has also been the longstanding interpretation of the agencies that discharges of pollutants to "waters of the United States" via groundwater with a direct hydrologic connection to surface waters may be subject regulation by the CWA. See summary response for section 7.3.6 of this RTC and the Technical Support Document.

7.934 B. Agency History Under the CWA Supports "Tributary" Groundwater:

The statement within the proposed rule that the "agencies have never interpreted 'water of the United States' to include groundwater and the proposed rule explicitly excludes groundwater" contradicts agency history.[512] The EPA, in their regulations for NPDES permits of storm water discharges explained that groundwater will be regulated if it is

[505] *Id*.
[506] Brian Knutsen, supra note 5, at 192.
[507] *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1179 (D. Idaho 2001).
[508] Susan Griffithe, Isolating the Problem by Finding the Connection: The Proper Approach to Regulating Groundwater Under the Clean Water Act: *Idaho Rural Council v. Bosma*, 143 F. Supp. 2D 1169 (D. Idaho 2001), 27 S. Ill. U. L.J. 437, 450 (2003).
[509] *Hernandez v. Esso Standard Oil Company*, 599 F. Supp. 2d 175, 180 (D.P.R. 2009).
[510] *Id.*
[511] *Id*. at 181.
[512] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. at 22188, 22218.

hydrologically connected to a nearby surface water.[513] In their proposed regulation regarding NPDES permits to CAFO's, the EPA explained that "[a]t the least, there is no evidence that in rejecting the explicit extension of the NPDES program to all ground water Congress intended to create a ground water loophole through which the discharges of pollutants could flow, unregulated, to surface water."[514] The EPA explicitly stated that the "EPA repeatedly has taken the position that the CWA can regulate discharges to surface water via ground water that is hydrologically connected to surface waters."[515] The EPA clearly has taken the position of interpreting "waters of the U.S." to include certain types of groundwater. The agency has provided no justification for its change in policy to allow for the public to have the opportunity to comment on the change.

Ultimately, if the EPA/Corps provide such clarity over "waters of the U.S." to include groundwater connections in the proposed rule, then the courts will be able to extend Chevron deference in upholding the rule.[516] The EPA has the authority, under the CWA, to include and clarify jurisdiction over the matter of groundwater.[517] (p. 6 – 7)

Agency Response: **Please see summary response at 7.3.6, the Technical Support Document, and 12.3. The issue of whether a discharge to groundwater that is hydrologically connected to a waters of the U.S. is regulated as a point source discharge under NPDES is distinct from the question of whether the groundwater itself is a jurisdictional waters of the U.S.**

7.935 **III. Recommendations for groundwater to be included in the "other waters" category of the proposed rule.**

A. Need for Clarity in Defining "Isolated" versus "Tributary" Groundwater:

The rule needs to clarify the distinction between "isolated" groundwater and "shallow" or "tributary" groundwater, and the latter term(s) must be included into the jurisdiction of "waters of the U.S.," or at least included in the category "other waters," as defined in the proposed rule. Only "isolated" groundwater, defined as without hydrologic connection to downstream "waters of the U.S.," should be included in the exemptions [section (b)] of the proposed rule.[518] As described in the comments above, the agencies have a longstanding tradition of regulating groundwater with hydrologic connections to downstream surface waters on a case by case basis.

Groundwater with hydrologic connection to surface waters could be defined in the rule either as "shallow," as scientific studies define them, or as "tributary," as the courts have referred to them. The EPA/Corps could classify groundwater as "tributary" according to the time a pollutant would reach surface waters within a specific number of years (e.g., forty).[519] Including "tributary" groundwater under "other waters" would leave the

[513] Susan Griffithe, supra note 32, at 453.
[514] 66 Fed. Reg. 2960, 3016 (Jan. 12, 2001).
[515] *Id.*
[516] Brian Knutsen, supra note 5, at 188.
[517] 33 U.S.C. 1251, et seq.
[518] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. at 22188, 22218.
[519] Mary Christina Wood, supra note 6, at 618. Forty is the number of years recognized by the Supreme Court of Colorado for groundwater to be considered "tributary."

flexibility of the EPA to issue, under section 402, NPDES permits for point source pollution into groundwater that would have a significant impact for jurisdictional surface waters. (p. 7 – 8)

Agency Response: Please see summary response at 7.3.6, the Technical Support Document, and 12.3. The issue of whether a discharge to groundwater that is hydrologically connected to a waters of the U.S. is regulated under the NPDES program as a point source discharge is distinct from the question of whether the groundwater itself is a jurisdictional waters of the U.S.

7.936 B. Need for Inclusion of "Tributary" Groundwater in "Other Waters" Category:

The EPA/Corps need not extend broad general authority over groundwater. Rather, certain groundwater types should be listed under the "other waters" category in the proposed rule. The proposed rule states that "the agencies propose that 'other water' (those not fitting in any of the above categories) could be determined to be 'waters of the United States' through a case-specific showing that, either alone or in combination with similarly situated 'other waters' in the region, they have a 'significant nexus' to a traditional navigable water, interstate water, or the territorial seas."[520] The "significant nexus" test would be satisfied if water flowed through groundwater to surface waters (i.e., "shallow" or "tributary") which would significantly impact the chemical, physical, or biological integrity of "waters of the U.S."

If the EPA/Corps wants to clarify wetlands, adjacent waters, and tributaries as being "waters of the U.S.," then they must list "tributary" groundwater under the "other waters," allowing case by case analysis of groundwater jurisdiction under the CWA. Groundwater is fundamental to the hydrology of watersheds. Groundwater is a primary source of streamflow for some waters of the U.S., and the southwestern U.S. relies heavily on groundwater to feed surface water streams. The USGS states that much of the groundwater contamination occurs in shallow aquifers making groundwater a major contributor to the contamination of surface waters.[521] Collaborating with USGS, EPA/Corps could use the best available base-flow methods to calculate the amount of streamflow derived from groundwater within certain watersheds, thereby assisting in defining which groundwater should be included in the "other waters" category.[522] (p. 7 – 8)

Agency Response: The agencies have consistently interpreted the CWA to exclude shallow or deep groundwater from the geographic scope of the waters of the United States. The exclusion for groundwater in the final rule does not affect this longstanding interpretation as the agencies have never considered the groundwater

[520] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. at 22188, 22189.
[521] Thomas C. Winter, Judson W. Harvey, O. Lehn Franke, & William M. Alley, Ground Water and Surface Water: A Single Resource: U.S. Geological Survey Circular 1139, VI (1998), available at: http://pubs.usgs.gov/circ/circ1139/pdf/circ1139.pdf .
[522] *Id* at 12. The USGS conducted research about the "groundwater component of streamflow" and was able to conclude from a sampling of 24 regions nationwide (54 streams over a thirty-year period) that an average of 52% of the streamflow was contributed by groundwater; one basin actually received 90% of its average annual flow from groundwater.

itself to be a "water of the United States." See summary response for section 7.3.6 of this RTC and the Technical Support Document.

7.937 **Conclusion:**

As water resources become more scarce, flexible administrative water management systems under the CWA are necessary to protect the future of our economy, drinking water supplies, and aquatic ecosystems. Ultimately, groundwater under the CWA should not be exempted because of its difficulty or due to the negative comments of past rulemaking procedures. Accurate science, case law, and legislative and agency history reveal that not allowing for a case by case review of "tributary" groundwater will weaken the proposed rule and the CWA by creating a groundwater loophole.

If the EPA/Corps exempts groundwater during this rulemaking procedure they will put themselves in the contradictory position of being responsible for protecting surface waters without the authority to protect those waters that provide the streamflow for their existence, groundwaters—you cannot protect one without the other. The agencies should not undermine the intent and broad goals of the CWA by exempting all groundwater, setting a dangerous precedent for future management of our nation's waters. (p. 8)

Agency Response: The agencies have consistently interpreted the CWA to exclude shallow or deep groundwater from the geographic scope of the waters of the United States. The exclusion for groundwater in the final rule does not affect this longstanding interpretation as the agencies have never considered the groundwater itself to be a "water of the United States." See summary response for section 7.3.6 of this RTC and the Technical Support Document.

Sunny Washburn (Doc. #7368)

7.938 In the proposed rule I see that you clarified ditches that dry out, systems that are irrigated and return to upland, and wastewater treatment system as not being waters of the state unless they meet a certain criteria. I propose you add green infrastructure to the list. Green infrastructure is a stormwater treatment and conveyance system that is vegetated and consists of facilities such as swales, ponds, rain gardens, and vegetated filters or basins. They are used in both public and private infrastructure to treat rain water (stormwater) that is created by impervious surfaces such as parking lots and roadways. Green infrastructure typically infiltrates into the ground water and will have an overflow that discharges to either a piped storm system or directly to a waterway or ditch. These systems should not be considered waters of the state as defined by your definition and it should be made clear (er) since they are seasonal in nature and only hold water temporary and tend to dry out. (p. 1)

Agency Response: With respect to the jurisdictional status of stormwater control features, including green infrastructure, as waters of the U.S., please see summary response at 7.4.4.

City of Pittsfield (Doc. #7629)

7.939 At a minimum, the rule should include the following provisions that are priority concerns for local governments:

- Separate municipal storm sewers will continue to be regulated and permitted under Section 402 of the Clean Water Act, and shall not be considered, either in their entirely or any individual feature thereof, Waters of the U .S .
- Water delivery, reuse, and reclamation systems and facilities shall not be considered waters of the U.S.
- Wastewater treatment systems and all associated infrastructure shall not be considered waters of the U.S. (…) (p. 1)

Agency Response: **With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. With respect to water delivery, reuse, and reclamation systems, please see summary response at 7.4.2. Finally, please see summary response 7.1 concerning the waste treatment system exclusion.**

Merrill Hewson Smith (Doc. #8323)

7.940 The proposed rule will codify for the first time what types of waters and features are outside the purview of CWA, including artificial reflecting pools, small ornamental waters, water-filled depressions at construction sites and the like. But the agencies have also added groundwater, an elemental part of the hydrological cycle and an essential link between wetlands, tributaries and other waters. Why in a list that borders on insignificance was something this significant added? The proposed excise language is final in its import, "Specifically, the agencies propose that the following are not "waters of the United States" *notwithstanding whether they would otherwise be jurisdictional under section (a)*.[523] Even if groundwater is part of a group of waters "similarly situated where they perform similar functions and are located sufficiently close together or when they are sufficiently close to a jurisdictional water"[524] groundwater will, by hydrologic alchemy, be separated and outside the protection of CWA. The agencies appear to have lost sight of the objectives of CWA. A categorical elimination of groundwater from CWA protection puts the nation's water quality and supply, public health and environment at risk. (p. 1)

Agency Response: **The agencies have consistently interpreted the CWA to exclude shallow or deep groundwater from the geographic scope of the waters of the United States. The exclusion for groundwater in the final rule does not affect this longstanding interpretation as the agencies have never considered the groundwater itself to be a "water of the United States." See summary response for section 7.3.6 of this RTC and the Technical Support Document.**

7.941 This comment letter will show how jurisdictional scope, scientific research, policy ramifications, and ecological need support removing groundwater from the proposed rule's list of "waters and other features" in the section entitled "Waters that are not 'waters of the United States'[525].

[523] Id. I. Waters that are not "Waters of the United States", fourth paragraph. Reference to "(a)" is within the section "Other Waters" that are defined as, those that are not jurisdictional as a single category.
[524] Id. Language under "H. "Other Waters".
[525] Definition, supra note 3.

- Courts have extended CWA protections to groundwater, especially in cases where the discharge of pollutants affect the waters of the United States that are directly subject to CWA regulation.[526]
- EPA's scientific compilation of data from 1,000 peer-reviewed reports emphasize groundwater's integrated role throughout the hydrology and biogeochemical functions of wetlands and other waters. [527]
- EPA's SAB has specifically counseled the agencies to eliminate groundwater from the list of "Waters that are not 'waters of the United States." [528]
- Groundwater is a national resource that supplies over 50% of our drinking water, more than 90% in rural areas. It supplies over 50% of agricultural irrigation and it supplies between 30-40% of the flow of the nation's streams.[529]
- Groundwater is not sufficiently protected or managed.[530] It is a resource critical to the nation's future, both as the primary source of drinking water, agricultural irrigation and as a significant source of stream flow. Because of these crucial human welfare and ecological functions, and because of the acknowledged difficulty of groundwater remediation, protecting and maintaining the quantity and quality of the nation's groundwater supplies must receive a high priority.[531]
- Lines of demarcation regarding CWA have been blurred by recent Supreme Court rulings. While states can enact or amend laws to protect water resources that have lost federal protection over two-thirds of states, 36 in all, have laws that restrict authority of state agencies to regulate waters left unprotected by CWA.[532] These restrictions take the form of absolute or qualified prohibitions that require state law to be 'no more stringent than' federal law. If groundwater is deemed not 'a water of the United States' and outside the scope of CWA it could fall outside the scope of any additional state protection. The proposed rule will leave groundwater less protected at a time when we need to protect it more.

The agencies' proposed rule is an ambitious attempt to cohere the language and intent of legal rulings and scientific principles that govern gradations of the interconnectedness of our water system. This is not a seamless composition, in part because the Supreme

[526] Anna Makowski, Beneath the Surface of the Clean Water Act: Exploring the Depth of the Act's Jurisdictional Scope of Groundwater Pollution, Oregon Law Review, volume 91, issue 2, 2012. p. 507
[527] Claudia Copeland, EPA and the Army Corps' Proposed Rule to Define "Waters of the United States", Congressional Research Service, September 10, 2014, p. 6.
[528] SAB draft comments addressed to EPA Administer Gina McCarthy, dated September 17, 2014. EPA-SAB-14_00X. The report considers "the adequacy of the scientific and technical basis of the EPA's proposed rule titled Definition of Waters of the United States Under the Clean Water Act."
[529] Committee on Valuing Ground Water, National Research Council, Valuing Ground Water: Economic Concepts and Approaches, 1997. p. 122.
[530] NASA and University of California, Irvine, study, "Satellite Study Reveals Parched U.S. West Using up Underground Water", press release, July 24, 2014http://www.nasa.gov/press/2014/july/satellite-study-reveals-parched-us-west-using-up-underground-water/#.VDmcg0vHiQQ. Last visited, October 13, 2014.
[531] Committee on Valuing Ground Water, supra note 12, p. 122.
[532] Environmental Law Institute, State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act, May 2013. p. 12.

Court[533] rulings do not provide consistent guidance, and in part because scientific principles of hydrology governing water do not support imposed or finite borders. Water flows. By its very nature water needs to be evaluated on both an ecologically macro and micro level. The language of science is not the language of law as is readily apparent in the agencies' attempt (of necessity) to frame "significant nexus" as a scientific term. That the agencies must act is understood; they have lost jurisdiction over integral parts of our water system, and litigation is stymying their ability to manage our waters.

In the proposed rule the agencies have attempted to clarify the interconnectedness of tributaries, wetlands, and other waters and effects these connections have on the health of downstream waters.[534] The agencies must avoid expediencies and insure that their actions reflect the CWA's primary purpose, "to restore and maintain the chemical, physical, and biological integrity of the nation's waters."[535] Congress articulated that the intent of the Act was "to establish a comprehensive long-range policy for the elimination of water pollution." It directed the EPA Administer to, "prepare and develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and *underground waters*."[536]

In the quest to provide the public with clarity, certainty and predictability as to what waters are and are not subject to the jurisdiction of CWA, the agencies have erred in eliminating the potential protection of groundwater, an essential component of Congress's original directions to the EPA. This is in direct conflict with the scientific principles they espouse.

Groundwater and surface water flow into one another; pollute one and the discharge can contaminate the other.[537] They are a single resource; one cannot be developed without affecting the other. (p. 2 – 4)

Agency Response: The agencies have consistently interpreted the CWA to exclude shallow or deep groundwater from the geographic scope of the waters of the United States. The exclusion for groundwater in the final rule does not affect this longstanding interpretation as the agencies have never considered the groundwater itself to be a "water of the United States." See summary response for section 7.3.6 of this RTC and the Technical Support Document.

7.942 The agencies' contention that groundwater has never been considered "waters of the United States" does not hold up to jurisdictional and legal history.

"The agencies have never interpreted "waters of the United States" to include groundwater and the proposed rule explicitly excludes groundwater, including groundwater drained through subsurface drainage systems."[538]

[533] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), *Rapanos v. United States*, 547 U.S. 715 (2006).
[534] Copeland, supra note 9, summary, first page.
[535] 33 U.S.C. §1251(a)
[536] 33 U.S.C. §1252(a)
[537] Makowski, supra note 8, p. 2.
[538] Definition, supra note 1, in section I. Waters that are not "waters of the United States."

Without a doubt, CWA does not regulate groundwater comprehensively[539], but the goal and purpose of CWA includes groundwater as needing of protection. And court cases have supported that. These rulings do not reflect a majority of cases but they remove 'never' from the agencies' justification to exile groundwater.

Plaintiffs have successfully sought redress for contaminated groundwater since CWA was enacted.[540] A number of courts have interpreted the scope of CWA using Congressional intent and have found that NPDES permits are required when discharges to groundwater result in the migration of pollutants to hydrologically connected surface waters.[541] In Idaho Rural Council v. Bosma[542], the court stated, "whether pollution is introduced by a visible, above-ground conduit or enters the surface water through the aquifer (groundwater) matters little to the fish, waterfowl, and recreational users which are affected by the degradation of our nation's rivers and streams."[543] Courts have weighed in with the understanding that the relationship between groundwater and surface water is porous and CWA protection inclusive.[544] In particular the agencies would excise groundwater even in cases where comingling and function is obvious.[545] In light of the agencies' professed interest in synthesizing current scientific understanding of hydrologic connectedness into the proposed rule, a permanent excising of groundwater does not hold up to scrutiny.

Congress's intent for CWA was broad; it recognized that protecting navigable streams and rivers from pollution and other degradation requires protecting the whole watershed, not piecemeal parts. (p. 4 – 5)

Agency Response: The agencies have consistently interpreted the CWA to exclude shallow or deep groundwater from the geographic scope of the waters of the United States. The exclusion for groundwater in the final rule does not affect this longstanding interpretation as the agencies have never considered the groundwater itself to be a "water of the United States." See summary response for section 7.3.6 of this RTC and the Technical Support Document.

7.943 The proposed rule would be different if the agencies relied on a deliberative science-driven rulemaking process.

[539] Id. Footnote #3, p. 496. Other federal statutes that cover groundwater include: Safe Drinking Water Act, 42 U.S.C. §§300f-300j, Resource Conservation and Recovery Act, 42 U.S.C. §§6901-6992k, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601-9675.
[540] Id. p. 496.
[541] *North California River Watch v. City of Healdsburg*, No. 04-15442, (2006); *Idaho Rural Council v. Bosma*, 143 F.Supp. 1169, 1180 (D. Idaho 2001); *United States v. Banks*, 115 F.3d 916 (11th Cir. 1997); *Friends of Santa Fe County v. LAC Minerals*, 892 F. Supp. 1333, 1357 (D.N.M. 1995); *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983,989 (E.D. Wash. 1994); *Sierra Club v. Colorado Refining Co*., 838 F. Supp. 1428, 1434 (D.Colo. 1993). *United States Steel Corp. v. Train*, 556 F.2d 822(7th Cir. 1977). Southern Environmental Law Center just gave notice to Duke Energy that it plans to enforce CWA to clean up coal ash pits on the Cape Fear River.
[542] *Idaho Rural Council v. Bosma.*
[543] Idaho Rural Council, 143 F. Supp. 2d at 1179-80, as reported in Makowski, supra note 8, p. 512.
[544] SWANCC and Rapanos may be interpreted to affect these determinations but I am addressing the incorrect use of 'never'.
[545] Id. Language under "H. "Other Waters".

This statement is supported by the scientific studies used to inform the agencies in the drafting of this rule. As stated before, the necessity to coalesce legal rulings and scientific standards does not flow together easily.

In developing the proposed rule, the agencies committed to a science-driven process. To begin, they "relied on a draft synthesis of more than 1,000 peer-reviewed scientific reports detailing the current scientific understanding of the connections or isolation of streams and wetlands."[546] The report integrates groundwater and surface water throughout its 331 pages. It states that "specific types of connections considered in this review include transport of physical materials such as water, wood, and sediment; chemicals such as nutrients, pesticides, and mercury; movement of organisms or their seeds or eggs; and hydrologic and biogeochemical interactions occurring in surface and groundwater flows, including hyporheic zones and alluvial aquifers." To be clear about its scope, it states, "Information about connections among water bodies of the same type that do not influence the condition of downstream waters, are considered out of scope, as are non-peer-reviewed sources."[547] Groundwater is included because it is integral to the report's purpose, a study of connectivity.

Groundwater is scientifically proven to be an inseparable component in our watersheds, including wetlands that may have no visible connection with downstream waters. Nowhere in the compilation of the 1,000 reports is there discussion or cause to reflect dividing surface water and groundwater, in fact it is just the opposite. The specific references to the overlap of groundwater and surface water are too extensive to list but I would call attention to the clear visual representation that appears in figure 3-5, figure 3-6 of the report.[548]

The agencies sent the connectivity assessment report to the EPA's own Science Advisory Board (SAB) for review and a final report.[549] They have stated that they would not publish a final report until the SAB report was completed.[550] In its second draft of comments, dated September 17, 2014, the SAB speaks directly to groundwater connectivity and biological connectivity. Specifically, the SAB recommendations and findings include:

- "The available science supports defining adjacency or determination of adjacency on the basis of functional relationships, not on how close an adjacent

[546] U.S. EPA, Office of Research and Development, connectivity of streams and wetlands to downstream waters. (Italics added) While the report is very in depth, I would direct your attention to pages 48-51 as an example of the integration of surface and groundwater.
[547] Id. p. 35. Italics added.
[548] EPA report, supra 28, pp. 48-51. Figure 3-5, Cross-section showing major hydrologic flow paths in a stream-watershed system, Figure 3-6, Hyporheic zone.
[549] SAB. See *supra* note 8. SAB's draft, addressed to EPA Administer Gina McCarthy, is dated September 17, 2014. EPA-SAB-14_00X. In an earlier draft, dated June 5, 2014, SAB recommended that the report more explicitly address the cumulative and aggregative effects of streams, groundwater systems, and wetlands on downstream waters. "In particular, the Report should contain a discussion of the spatial and temporal scales at which streams, groundwater systems, and wetlands *are functionally aggregated*." And later, it states, "There should be more emphasis in the conceptual framework on the importance of groundwater connectivity and biological connectivity." EPA-SAB-14-xxx.
[550] 32Copeland, supra note 9, at p. 6.

water is to a navigable water. The Board also notes that local shallow subsurface water sources and regional groundwater sources can strongly affect connectivity."[551]

- "Some of the exclusions listed in the proposed rule do not have strong scientific justification and the SAB recommends that several should be reconsidered. For example, the proposed rule excludes groundwater. The available science, however, shows that groundwater connections, particularly via shallow flow paths in unconfined aquifers, are critical in supporting the hydrology and biogeochemical functions of wetlands and other waters. Groundwater also connects waters and wetlands that have no visible surface connections."[552]

That is a clear statement for inclusion. But, the proposed rule is not only a deliberative science-driven assessment. (p. 5 – 6)

Agency Response: The agencies have consistently interpreted the CWA to exclude shallow or deep groundwater from the geographic scope of the waters of the United States. The exclusion for groundwater in the final rule does not affect this longstanding interpretation as the agencies have never considered the groundwater itself to be a "water of the United States." See summary response for section 7.3.6 of this RTC and the Technical Support Document.

7.944 "If politics were to trump science in the rulemaking process, the likelihood of a protective rule would not be promising."[553]

Our groundwater is being overused and under-protected. I will highlight just one of the leading factors in the health of our groundwater: non-point agricultural pollution. In a 2008-9 national rivers and streams assessment, EPA reported that the most comprehensive indicator of water body health is the biological condition. When the stream is healthy, the chemical and physical components of the stream are also in good condition. The current data on the biological condition of our nation's rivers and streams are:

- 21% of the nation's rivers and stream length are in good biological condition,
- 23% are in fair condition,
- 55% are in poor condition.[554]

Levels of phosphorus and nitrogen are widespread: 40% of rivers and streams have high levels of phosphorus, and 28% have high levels of nitrogen. The report states that "our rivers and streams are under significant stress and more than half exhibit poor biological condition. Phosphorus, nitrogen, and streambed sediments have widespread and severe

[551] From SAB's September draft comments, p. 3.
[552] Id. p. 3.
[553] Copeland, supra note 9, at p. 14, quoting James Murphy, "Rapanos v. United States: Wading through Murky Waters," National Wetlands Newsletter, vol. 28, no. 5, 2006, p. 19.
[554] EPA, Office of Wetlands, Oceans and Watersheds, National Rivers and Streams Assessment 2008-9. EPA/841/D-13/001.

impacts; reducing levels of these constituents will significantly improve the biological health of rivers and streams."[555]

A recent U.S. Geological Survey found that industrial agriculture is the source of more than 70% of the pollution in the Mississippi River basin, which extends from the Appalachians to the Rockies.[556]

In a new study conducted by NASA and the University of California, Irvine, scientists found that between December 2004 and November 2013, the Colorado River Basin lost nearly 53 million acre feet of freshwater, of which three-quarters of the total was from groundwater. One specialist was quoted as saying, "We thought that the picture could be pretty bad, but this is shocking."[557] The Colorado River Basin is the water lifeline of the western United States. "The rapid depletion rate will compound the problem of short supply by leading to further declines in stream flow in the Colorado River. Combined with declining snowpack and population growth, this will likely threaten the long-term ability of the basin to meet its water allocation commitments to the seven basin states and to Mexico."[558]

Our two major river basins are under critical stress, one from nonpoint agricultural pollution and one from overuse. Without looking more deeply or broadly, we see that this is not the time for the agencies to step back from their responsibility, to attempt to make a problem go away through hydrologic alchemy. As a nation, we have failed to be good stewards of the CWA. This is not the time to step away from its goals but to step toward them. (p. 6 – 7)

Agency Response: **The agencies have consistently interpreted the CWA to exclude shallow or deep groundwater from the geographic scope of the waters of the United States. The exclusion for groundwater in the final rule does not affect this longstanding interpretation as the agencies have never considered the groundwater itself to be a "water of the United States." See summary response for section 7.3.6 of this RTC and the Technical Support Document.**

7.945 How can the agencies better reflect the goals and purposes of CWA? The statute was ambitious in scope and specific about deadline for implementation, but we, agencies, people, industries, have not coalesced around the importance of this task.

In 1984, the Office of Technology Assessment issued a report entitled "Protecting the Nation's Groundwater" stated, "groundwater legislation is critical because this is the last part of the hydrological cycle to be regulated, and the hydrological imperatives require it to be integrated into the pattern of management immediately."

Until we can effectively establish comprehensive protection of groundwater we must support the goals of CWA in ways that are available to us and not further diminish control over this critical resource. I urge the agencies to strike "groundwater" from the proposed rule's language regarding "waters that are not 'waters of the United States'."

[555] Id.
[556] U.S. Geological Survey. http://www.ewg.org/agmag/2013/04/epa-study-points-ag-pervasive-river-pollution.
[557] NASA, supra note 13.
[558] Id.

That part is an easy excise. We need to clearly show that the main constituent is the American people. We, the people, cannot live without water. (p. 8)

Agency Response: The agencies have consistently interpreted the CWA to exclude shallow or deep groundwater from the geographic scope of the waters of the United States. The exclusion for groundwater in the final rule does not affect this longstanding interpretation as the agencies have never considered the groundwater itself to be a "water of the United States." See summary response for section 7.3.6 of this RTC and the Technical Support Document.

Franconia Township (Doc. #8661)

7.946 The proposed rule, in section (b), excludes "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" among other features listed in the section. While such systems have traditionally been excluded from CWA jurisdiction, we believe that, due to the expansive nature of the proposal, the agencies should also exclude other constructed water management and treatment infrastructure with similar attributes to these waste treatment systems. These facilities could include water reuse and recycling ponds, treatment lagoons, and other appurtenances; artificially constructed wetlands designed to treat agricultural or stormwater runoff (e.g. green infrastructure) used and managed to improve water quality; and artificially constructed groundwater recharge basins designed to percolate surface water into groundwater basins. All of these features would revert to dry land if application of water were to cease and should be included in the list of features identified in the proposed rule as excluded from the definition of "waters of the U.S." (p. 5)

Agency Response: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. With respect to water delivery, reuse, and reclamation systems, please see summary response at 7.4.2. Also please see summary response at 7.1 concerning the waste treatment system exclusion.

Paul Wetzel (Doc. #9219)

7.947 Man-made waters are not waters of the US even if wetland vegetation develops in them (pond, upland ditch, detention pond, farm pond, waters resulting in uplands due to ongoing construction, etc.). I have yet to see a man-made pond or upland ditch that does not contain at least some wetland vegetation. This includes aesthetic ponds, farm ponds, water detention ponds and ditches excavated in upland areas. These areas containing wetland vegetation should not be considered WOUS, even if they meet the definition of a wetland. Although a hydric soil may not be present, soils could be assumed under the 1987 manual if dominated OBL veg. or OBL and FACW veg. with an abrupt wetland boundary. If a hydric should does develop, which it will eventually, these wetlands that develop in non-jurisdictional waters should NOT be considered WOUS, even if they meet the definition of a wetland. This should hold true for any man-made wetlands created in upland areas, whether it is for habitat or water detention, it should not be considered a water of the US.

If these waters (ponds, ditches) are constructed in a WOUS, then, yes, they should be considered a WOUS as well and jurisdictional (e.g. pond excavated in a jurisdictional wetland, impounded tributary, etc.).

Non-jurisdictional man-made waters should become WOUS ONLY if they are abandoned and become naturalized. However, we need a comprehensive definition of abandonment, e.g. XX number of years have passed since put to intended use. This should not apply to an abandoned development that sat idle for several years before someone purchased it though. For example, an old industrial plant site containing water detention ponds and other man-made non-jurisdictional waters. If this site were left idle for several years before someone purchased it, these nonjurisdictional waters should remain non-WOUS. I am not sure at what point a non-WOUS could be considered abandoned, this should be addressed in some manner. If a farm pond was abandoned 50 years ago and a woods developed around it and wetlands reverted adjacent to it and the area is effectively naturalized, this would be considered truly abandoned. This is exactly the situation I have seen firsthand in NW Ohio. Somewhere between sitting idle and truly abandoned is a big gray area that needs to be described/defined in terms of abandonment and man-made non-WOUS. (p. 1)

Agency Response: **The agencies do not feel that it would be appropriate to create an exclusion specific to "man-made waterbodies", as the term "man-made" would potentially apply to a large number of aquatic features and exclude many waters the agenices have historically considered jurisdictional. Given the extensive human modification of watercourses and hydrologic systems throughout the country, it is often difficult to distinguish between natural watercourses and watercourses that are wholly or partly modified or constructed. Many features that potentially convey waters and/or pollutants to (a)(1)-(a)(3) waters have been historically created or altered, such as channelized streams and impounded areas, and to add a broad exclusion for these waters to the list of excluded features would not improve regulatory clarity, nor be consistent with the goals of the statute. The agencies believe the expanded exclusions for cooling ponds, stormwater control features, and wastewater recycling structures created in dry land, as well as certain types of ditches, provide clarity regarding many of the features that prompted these comments, as well as the necessary environmental safeguards.**

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

7.948 Another area of great concern is the creation of "exemptions" for agriculture. When Congress passed the Clean Water Act, it put many exemptions in place, including several for agriculture. It is our view that the proposed exemptions in the rule are much narrower than those provided by Congress. By creating these new exemptions for permitting, the agencies have created the appearance that they are defining and limiting the protections provided by the Clean Water Act. Further, the exemptions provided in the interpretive rule are extremely onerous and run the risk of pushing farmers away from voluntary conservation programs. (p. 2)

Agency Response: **The proposed rule does not change or add new permitting exemptions for agriculture. The CWA statutory and regulatory exemptions still apply. See summary response at 12.3 regarding how the final rule does not change**

permitting requirements for agriculturally-related NPDES discharges. Additionally, the Interpretive Rule was withdrawn and such comments are outside the scope of the final rule. See compendium section 14.2 for responses to comments on the Interpretive Rule.

Minnesota Association of County Agricultural Inspectors (Doc. #10970)

7.949 Our group's primary concern is the control of noxious weeds and invasive species. If the change in the definition results in landowners needing to get permits to use pesticides to control weeds, insects and diseases it would result in less effective control being done. This would create greater negative impacts on water quality, than what is currently being allowed. There has been some clarification on this issue, but as we read the wording, we feel that this exemption is far from guaranteed in the area of noxious weeds and other agricultural pest controls. In general it would also generally potentially make farming much more costly and difficult. (p. 1 – 2)

Agency Response: See summary response at 12.3. The final rule does not change or impose new requirements for complying with the NPDES regulations for pesticides and the pesticide general permit (PGP).

Weld County (Doc. #12343)

7.950 *Under [the new] 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. Fed. Reg. Vol. 79 No. 76 at 22203.*

However, this does not clarify how long the water may stand or pool before it becomes regulated. This exclusion also does not clarify whether water which stands and pools in places and flows in others would be regulated. As a part of the irrigation necessary to farm in Colorado, water often pools when fields are being irrigated. The roads that are maintained by the county and laid out in a grid pattern provide barriers where this water collects. Pursuant to the definition above regarding standing or pooling water, the County's borrow pits should be exempt. (p. 9)

Agency Response: See summary response for section 6.2 in this RTC.

7.951 In a further exclusion the agencies state:

> *Ephemeral features located on agricultural lands that do not possess a bed and bonk are not tributaries. The defined bed and bank no longer exists due to past normal farming practices such as plowing or discing and these practices often pre-dote the CWA. Such farm field features are not tributaries even though they may contribute flow during some rain events or snowmelt. Fed. Reg. Vol. 79 No. 76 at 22204.*

However, this also does not take into account that the flow of water and the extent to which that flow contributes to the general hydrological cycle is not controlled simply by weather events. In the Western United States, large amounts of water are relocated through complex irrigation systems. This transforms land that would otherwise be unused into productive farmland.

The rule further states that areas which would revert to uplands if irrigation ceased are to be excluded. In Colorado, the majority of land is arable only because of the irrigation that brings water to it. With the exception of natural waterways which existed prior to the settlement of Colorado, all of the land is upland. If this is the case, then essentially all agricultural land and all water conveyances that serve agriculture would be exempt. Further, roadside ditches and borrow pits that are built through this farmland and are full of irrigation tail water would be exempt. The difficulty with this is again, the lack of a clear definition of the term "upland." (p. 9)

Agency Response: **The agencies have deleted the term "uplands" in response to the confusion the term created and have instead utilized the term "dry land." This phrase appears in the 1986 and 1988 preambles, and the agencies believe the term is well understood based on the more than 30 years of practice and implementation. But in keeping with the goal of providing greater clarity, the agencies clarify 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. The agencies also here clarify their longstanding view that only the specific land being directly irrigated that would revert dry land should irrigation cease is exempt; it is not the case that all waters within watersheds where irrigation occurs are exempt. See 7.3.1.**

North Carolina Water Quality Association (Doc. #12361)

7.952 **I. Add an Express Exclusion for Stormwater Treatment and Conveyance Systems**

Many common features of MS4s and other stormwater treatment and conveyance systems including many stormwater conveyance ditches and settling basins-are expressly excluded from regulation under the proposed definition of waters of the United States. However, the jurisdictional status of some stormwater management features is potentially unclear. One example is constructed wetlands. These BMPs often are virtually indistinguishable from natural wetlands, notwithstanding that they are constructed in uplands and carefully engineered to perform important stormwater management functions. The rule must clarify that constructed wetlands, and all other stormwater BMPs, are not subject to regulation as jurisdictional waters of the United States.

Stormwater management systems are vitally important to public safety and water quality. They warrant an express and unambiguous exclusion in the rule. The exclusion should clarify that no purposefully constructed stormwater management feature will be regulated as a water of the United States. The exclusion -should apply whether the feature is part of a larger stormwater system or is a standalone BMP, and irrespective of whether it is part of an MS4. The definition must also be and the many different and innovative types of stormwater BMPs. To meet these objectives, NCWQA proposes that the following exclusion (italicized text) be added to the rule:

> (2) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (l)(i) through (vii) of this definition-

(vi) Stormwater management systems or features, including all portions of a municipal separate storm sewer, constructed in uplands and designed or used for the purpose of collecting, treating, infiltrating, evaporating, or conveying stormwater.

This definition would add essential clarity to any final rule. (p. 2)

Agency Response: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4.

Florida Water Environment Association (Doc. #12856)

7.953 Intuitively, this exemption would seem to apply to any feature of a functioning reuse system. See 33 USC§ 1251(a). But the rule's preamble does not explain how this exemption applies to reuse systems, including systems that may not even require NPDES permits. Accordingly, for the first time ever, FWEA Utility Council members are concerned that reclaimed water storage ponds, aquifer recharge systems, and other necessary features of functioning reuse systems could now be considered jurisdictional waters and/or require NPDES permits.

Utilities' concerns appear to be well-founded. In addition to the broadly worded rule proposal, a federal appellate court recently applied the waste treatment system exemption in a manner that calls into question the availability of the exemption for treatment systems that have a state permit but lack an NPDES permit. In City of Healdsburg v. Northern California River Watch, 496 F.3d 993 (9th Cir. 2007), the Ninth Circuit Court of Appeals determined that the City of Healdsburg needed an NPDES permit to discharge treated wastewater into an abandoned rock quarry pit.

Applying the "significant nexus" test, the court found that the quarry pit was a water of the United States on two independent grounds: quarry waters would seep into the nearby Russian River via overland wetland flow and the surficial aquifer, and the quarry waters significantly affected the river's "physical, biological, and chemical integrity." Id. at 995, 1001. Having made an initial determination that the quarry pit was jurisdictional, the Court then analyzed whether the quarry pit nevertheless qualified as a "waste treatment system designed to meet the requirements of the Clean Water Act." After a brief analysis, the Court determined that the pond "may be part of a waste treatment system, but it does not fall under the exemption because it is neither a self-contained pond nor is it incorporated in an NPDES permit as part of a treatment system." I d. at 1002 (emphasis added). Based on the unique facts of that case, the Court seemed to interpret the waste treatment exemption as only applying to treatment systems that hold an NPDES permit. This is a nonsensical outcome for utilities that operate reuse systems, which by definition are designed to limit discharges to surface waters as a means of disposal. (p. 3 – 4)

Agency Response: See summary response at 7.1 which addresses the waste treatment system exclusion. With respect to water delivery, reuse, and reclamation systems, please see summary response at 7.4.2.

7.954 ***EPA should categorically exempt all components of a functioning reuse system from the rule.***

A primary goal of the Clean Water Act is to abate pollutant discharges. 33 U.S.C. § 1251(a)(l). In addition to treatment, the continued expansion of the reuse of reclaimed water is a primary means of realizing this goal. Accordingly, it seems that EPA would not want to adopt a rule that would impede reuse infrastructure. Florida reuse utilities hold state-issued permits that govern their reuse systems, and applicable State rules prohibit reclaimed water irrigation practices or discharges to groundwater that cause or contribute to surface water impairments. See Rules 62-610.850(1)(a); 610.800(1), F.A.C. Thus, there appears to be no legitimate environmental objective served by including reclaimed water storage ponds, percolation ponds, or other features of reclaimed water system within the jurisdictional reach of the Clean Water Act jurisdiction based on the absence of an NPDES permit or for any other reason. Unfortunately, the rule proposal does not address these issues; instead, the proposal provides that the "agencies do not propose to address the substance of the waste treatment system exclusion and thus will leave each regulation as is .. . . " 79 Fed. Reg. at 22217. This issue needs to be addressed. The FWEA Utility Council requests that EPA categorically exempt all components of a functioning reuse system from the scope of the waters of the U.S. rule. (p. 4)

Agency Response: **See summary response at 7.1 which addresses the waste treatment system exclusion. With respect to water delivery, reuse, and reclamation systems, please see summary response at 7.4.2.**

Family Farm Alliance (Doc. #12983)

7.955 **Arroyos**

In some parts of the Southwest, water spilled from canal delivery systems ends up in the natural arroyo system, which can link to downstream tributaries of clearly navigable rivers. For example, in Southwest Colorado, water in the Dolores Water Conservancy District can drain back to the natural arroyo system, which physically links to a tributary to the San Juan River (an interstate river which meets the definition of "navigable"). Past experience of some District managers is that the Corps would claim regulatory oversight over all dry arroyos, placing additional regulatory requirements on the local municipalities and flood control agencies tasked with keeping residents safe from flooding.

The EPA and the Corps proposal would exempt some seasonal flow paths that might provide coverage for main irrigation canal systems. However, some irrigation districts have interceptor ditches (full of cattails sustained by adjacent farming) in existing rights-of-way that sometimes lead to natural arroyos. These interceptor ditches are similar to any roadside ditch, but lie within district rights of way and may be perceived as point sources. Likewise, some canal waste-ways can overflow occasionally (during rain events or from canal operational problems) into the natural drainage system. In other areas, dam structures release water into century-old ditch systems that can very quickly become indistinguishable from natural drainage areas as they flow into larger arroyos.

Many of our member organizations who have been managing irrigation for 100 years have effectively made arroyos that once traditionally only flowed seasonally into perennial flowing streams. We are also concerned that many acres of artificially created wetlands that were established after years of irrigation now might be considered "natural"

by regulators. Western water managers are fearful of how on-the-ground regulators will apply the proposed rule to areas like these in the future, long after the policy has been crafted in distant Washington, D.C. Some of our ranchers are especially concerned about the probability of requirements for Section 404 permits and the prohibitive cost of acquiring a permit. Many arroyos that run through Western ranches have fences that must be repaired or replaced after every high rainfall event. Others are equally concerned about the probability of a requirement for an EPA-approved grazing plan because of cattle grazing within a drainage area. These are but a few of the very real concerns that have arisen as a result of the lack of clarity and certainty in the proposed rule. (p. 11)

Agency Response: See summary response 6.0 and 6.2 for discussion of jurisdictional and excluded ditches. See summary response 7.3.1 for discussion of artificially irrigated areas.

Ground Water Protection Council (Doc. #13055)

7.956 The recognition that groundwater is not a jurisdictional water under the CWA should not prevent the continued commitment by EPA to integrate groundwater as part of the planning approaches to municipal wastewater and stormwater management. GWPC points out that guidance and implementation of this proposed rule needs to be protective of groundwater quality. There should be a common purpose for protecting drinking water sources under both the CWA and the Safe Drinking Water Act. The infiltration of stormwater runoff to groundwater should also be protective of groundwater quality. If polluted stormwater is redirected to groundwater for either disposal or shallow recharge, GWPC recommends that the two Acts not be implemented at cross purposes and that proposed rule changes should not be interpreted to allow groundwater to be contaminated. (p. 2)

Agency Response: Nothing in the final rule changes application of the Safe Drinking Water Act. See also response at 7.3.6.

Tamara Choat (Doc. #13701)

7.957 If the proposed rule cannot be dropped, the following concerns and recommendations should be addressed.

(…) 4. The exclusions and exemptions provided under the proposed rule are unclear and too narrow to provide protections for landowners. Clarification is needed prior to moving forward with a rule. (p. 1)

Agency Response: In the final rule, the agencies have provided clarified information regarding features that are not considered "waters of the United States", even where those features would otherwise meet the criteria for jurisdiction under paragraphs (a)(4) though (a)(8).

Board of County Commissioners, Lewis and Clark County (Doc. #14065)

7.958 (…) Additionally, the proposed or potential increase in the scope of those waters considered under EPA jurisdiction is alarming. Intermittent streams, low lying areas, roadside ditches, or occasional conveyances of water should not be considered "waters of the US". (p. 1)

Agency Response: **The agencies disagree that intermittent streams are currently not considered jurisdictional. See the tributary section of the preamble for a discussion of stream flow regime. The agencies are unclear what the commenter is referring to in the statement "…run-on from low-lying agricultural areas, and water discharges from similar lands being reclassified as jurisdictional." See Response to Comments Compendium 7 Summary Response and list of exclusions.**

A. Romberg (Doc. #14096)

7.959 I urge the EPA to modify the proposed updated definition of Waters of the U. S. to EXCLUDE stormwater ponds and drainage ditches, and municipal stormwater systems. These systems are currently entirely adequately regulated by the National Pollution Discharge Elimination System, administered by the Texas Commission on Environmental Quality. (p. 1)

Agency Response: **With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4.**

El Dorado Holdings, Inc. (Doc. #14285)

7.960 The proposed exemption for "gullies and rills" is potentially significant for the arid West, but the scope of the exemption is unclear. There is no obvious way to distinguish between (exempt) gullies and rills and (non-exempt) small ephemeral tributaries. (p. 7)

Agency Response: **See summary response 7.3.7.**

Westlands Water District (Doc. #14414)

7.961 The Supreme Court's decisions in Miccosukee and Los Angeles County Flood Control District recognized the fundamental difference between waters of the United States and a point source that discharges into waters of the United States. A feature or system cannot fall into both categories. If a man-made conveyance meets the definition of point source under the Act, the EPA and the Army Corps of Engineers cannot properly classify it as a water of the United States based on an expansive definition of the term not found in the text of the Act itself. (p. 15)

Agency Response: **With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. Also see the Technical Support Document, Section I. for an explanation of the legal basis for the final rule. That section explains the rationale behind the longstanding position that point source and waters of the U.S. are not mutually exclusive.**

7.962 Treatment Works with ponds in close proximity to a Tributary or Traditional Navigable waste treatment systems frequently rely on percolation ponds and basins as a critical part of the sewage treatment process. Many waste treatment systems are developing wetland type treatment systems to reduce nutrient and other pollutant levels in the final effluent discharged from the system. These ponds and wetlands are almost always connected to traditional navigable waters or their tributaries because the effluent needs somewhere to go.

In many cases the effluent must be returned to a surface stream so that it can contribute to overall stream flow and be used by downstream water rights holders. Because of their location and function, these ponds could be classified as "waters of the United States" under the Proposed Rule. The Proposed Rule should expressly exempt all aspects of the waste treatment system, I including "hack end" ponds and treatment wetlands, to ensure that the existing exemption is carried forward and to avoid infringing on operation of this critical infrastructure. (p. 25)

Agency Response: See summary response at 7.1 concerning the waste treatment system exclusion. With respect to groundwater recharge ponds, please see summary response at 7.4.2.

7.963 **IV. REQUEST FOR MODIFICATION**

As indicated in these Comments, the Proposed Rule would have significant impacts on water supply projects and flood control systems in the western states. To address these concerns, the following changes should be made to 40 C.F.R § 122.2:

> Waste treatment, flood control and water supply systems, including but not limited to aqueducts, water supply canals not used for navigation, treatment ponds, or lagoons, storage ponds, pipelines, open channels, agricultural drains, manmade treatment wetlands, swales, or other low impact design infrastructure are not waters of the United States. This exclusion applies only to manmade bodies of water which were not created in waters of the United States Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Additionally, the following changes should be made to 40 C.F.R § 122.2(b) and other relevant sections of the federal regulations that will be modified by the Proposed Rule:

(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 –

> (1) Waste treatment systems, including treatment ponds, treatment wetlands, storage ponds or lagoons, and percolation ponds designed to meet the requirements of the Clean Water Act, or designed to reuse treated effluent.
>
> (2) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.
>
> (3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.
>
> (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.
>
> (5) The following features:

(i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;

(ii) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, water supply storage, groundwater recharge, or rice growing;

(iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land; (iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(v) Water-filled depressions created incidental to construction activity;

(vi) Groundwater, including groundwater conveyed to waters of the United States through open channels and subsurface drainage systems; and

(vii) Gullies and rills and non-wetland swales.

(6) Manmade flood control and water supply systems, including but not limited to aqueducts, water supply canals not used for navigation, treatment ponds, storage ponds, lagoons, pipelines, open channels, agricultural drains, manmade treatment wetlands, swales, or other low impact development infrastructure which were not originally created in waters of the United States. (p. 32 – 33)

Agency Response: Please see summary response 7.1 concerning the waste treatment system exclusion. With respect to water delivery, reuse, and reclamation systems, please see summary response at 7.4.2. With respect to the jurisdictional status of stormwater control features, including green infrastructure, as waters of the U.S., please see summary response at 7.4.4.

Union for Reform Judaism (Doc. #14560)

7.964 This proposed new definition is necessary because of the legal ambiguity created by the Supreme Courts' 2001 ruling in Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) and again in 2006 under *Rapanos vs. United States*, 547 U.S. 715 (2006). These decisions raised questions about the scope of waters protected by the Clean Water Act. Legal uncertainty and the resources required to argue jurisdiction have made Clean Water Act enforcement narrower than rightfully allowed under law. Now, for example, when crude oil is discharged into a creek and pollutes the water, the prohibitive resource requirements of establishing jurisdiction can prevent EPA from exerting its authority to pursue a cleanup action and protect the area that provides water to the region and a habitat for local wildlife. (p. 1)

Agency Response: Comment noted. See the Technical Support Document Section I.C for a discussion of the Supreme Court decisions.

State of Oklahoma (Doc. #14625)

7.965 As noted particularly in the preamble to the draft WOTUS rule, groundwater is outside the reach and scope of the CWA. In fact, it's a great example of an equally important

source of freshwater for our citizens and industries that is well protected and managed solely within the purview of States. We appreciate the proposed rule's exclusion of groundwater, both in the preamble and now in the regulatory text, including the exemption of "groundwater drained through subsurface drainage systems." Still, given the proposed rule's use of "shallow subsurface hydrologic connections" as a possible means to establish jurisdiction, we believe the regulatory exemption should be extended to cover such shallow subsurface water. In Oklahoma and a number of other states, any water under the surface, no matter how shallow, is groundwater and is a property right of the overlying landowner. While the discussion in the preamble states that subsurface hydrologic connections will not become jurisdictional themselves, we remain concerned about the fact that preamble language often becomes unplugged from the regulatory language upon final codification in the CFR. Accordingly, we propose that the groundwater exclusion in paragraph (t)(5)(vi) of the proposed rule be amended as follows:

"Groundwater, including but not limited to groundwater drained through subsurface drainage systems and shallow subsurface hydrologic connections used to establish jurisdiction between surface waters under this section." (proposed changes underlined) (p. 5)

Agency Response: The agencies believe that the final rule language and accompanying preamble sufficiently and accurately describe the intent of the agencies in regard to the groundwater exclusion. See section (IV)(G) of the preamble to the final rule and section 7.3.6.

State of Oklahoma (Doc. #14773)

7.966 Another area of serious concern from the proposed WOTUS rule is the introduction of "shallow sub-surface connections" and the potential for groundwater to be regulated for the first time under the CW A. Oklahoma defines groundwater as " ... fresh water under the surface of the earth regardless of the geologic structure in which it is standing or moving outside the cut bank of any definite stream." (82 OKLA. STAT. §1020.1(1)). The CWA specifically excludes any regulation of groundwater, but the Agencies appear to be ignoring this intentional exclusion. In order to correct this issue, the Agencies should remove any doubt and clarify groundwater or connections below ground will not be regulated under the proposal. (p. 2)

Agency Response: Groundwater is specifically excluded in the final rule. The agencies believe that the final rule language and accompanying preamble sufficiently and accurately describe the intent of the agencies in regard to the groundwater exclusion. See section (IV)(G) of the preamble to the final rule and section 7.3.6.

Santa Clara Valley Water District (Doc. #14776)

7.967 The Proposed Rule should not be internally inconsistent, and should not be inconsistent with the and actions applied to wastewater discharges. For example, the Proposed Rule excludes groundwater in many sections (as it should), but groundwater is not excluded when jurisdiction is defined by shallow subsurface hydrologic connections. Neighboring and riparian areas use subsurface hydrologic connections to determine adjacent waters.

Erosion features (e.g., gullies, rills, swales, ditches) are excluded, but yet considered connections in different sections of the Proposed Rule. There should not be contradictions in a final rule. (p. 2)

Agency Response: Groundwater is specifically excluded in the final rule, and the rule does not include a provision defining "neighboring" based on shallow subsurface flow. The agencies believe that the final rule language and accompanying preamble sufficiently and accurately describe the intent of the agencies in regard to the groundwater exclusion. See section (IV)(G) of the preamble to the final rule and section 7.3.6.

Region 10 Tribal Caucus (Doc. #14927)

7.968 First, the Tribal Caucus believe that many waters will still be threatened because of loopholes in 'the CWA that allow mining waste to be dumped directly into streams, rivers and lakes. The rule should be expanded to close the "fill" loophole to clarify that mining waste cannot be used to fill in waters of the United States, and the "waste treatment system" loophole that simply allows mining companies to rename water a "waste treatment system" to escape CWA responsibilities. (p. 3)

Agency Response: See summary response at 7.1. Comments on the definition of "fill material" are outside the scope of the proposed and final rules.

City of Minneapolis Water Resources (Doc. #14975.1)

7.969 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.

Added to PART 328-DEFINITION OF WATERS OFTHE UNITED STATES § 328.3 (c) "Definitions" (and other similar sections)

Fully-constructed Stormwater Control Measures. The term *fully-constructed stormwater control measures* (SCMs) means man-made structures, devices, measures, or Best Management Practices (BMPs) that are constructed for the purpose of water quality treatment, stormwater volume reduction, stormwater rate control, flood control, stormwater conveyance, or any combination of these purposes. Fully-constructed SCMs include the following manmade features: constructed stormwater ponds, constructed stormwater wetlands, rain gardens, infiltration devices and structures, groundwater recharge facilities, stormwater reuse facilities, swales, bioswales, Low Impact Development structures and BMPs, pipes, streets, curbs, gutters, roadside ditches, man-made channels, storm drains, and other constructed stormwater control and conveyance structures, devices, and features. SCMs that have been built at the approximate location of similar types of natural waters (such as stormwater ponds constructed at the location of natural lakes or natural wetlands, ditches constructed at the location of natural streams or creeks, or stormwater channels constructed at the location of natural rivers) shall be considered fully constructed SCMs. Natural lakes, natural ponds, and natural wetlands with stormwater conveyance pipes discharging them and constructed outlets shall not be

considered fully-constructed SCMs. SCMs that are subject to the ebb and flow of the tide shall not be considered fully-constructed SCMs.

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 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: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. Ditches are also addressed in compendium 6.

7.970 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.

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

Comments directly related to the New Recommended Revised Rule Language Provided Above

1. There are many Municipal Separate Storm Sewer Systems (MS4s) in the United States. Some are cities. Others are various types of public entities (DOTs, counties, non-traditional MS4s, etc.). Some of these MS4s are regulated under the MS4 NPDES permitting program. Many more of these MS4s are not regulated and are not covered under an MS4 permit. Some MS4s (e.g.: counties and DOTs) have portions of their systems that are regulated under MS4 permits (inside an Urbanized Area) and portions that are not regulated (outside of Urbanized Areas). Taken together, all these MS4s own, operate, and maintain millions of Stormwater Control Measures (SCMs) and Best Management Practices (BMPs). These SCMs and BMPs include both structural and non-structural practices, programs, and features. In order for these MMs to operate and maintain their systems in an efficient and cost-effective manner, the WOTUS

jurisdictional status of the vast majority of these constructed SCMs and BMPs must be clear. Determining the WOTUS jurisdictional status of most of these constructed SCMs and BMPs on a case-by-case basis is not manageable or practicable. It is essential that clarity be provided by having specific and explicit exclusion language in the new rule for most of these constructed SCMs and BMPs, including roadside ditches. Broad inclusion language and reliance on agency best professional judgment and discretion regarding the WOTUS status of most urban SCMs and BMPs are not acceptable or practicable. It is essential that clarity be provided by having specific and explicit exclusion language in the new rule for most of these constructed SCMs and BMPs, including roadside ditches. Broad inclusion language and reliance on agency best professional judgement and discretion regarding the WOTUS status of most urban SCMs and BMPs are not acceptable or practicable.

2. There is a price paid for lack of clarity. if MS4ownefs and operators are unclear or unsure about the WOTUS " jurisdictional status of their constructed SCMs and BMPs, their work will be more difficult and less efficient. Staff resources and time will be diverted to this status issue. MS4s will be less confident about their operations and maintenance programs. MS4s' work and performance to protect, restore, and improve water quality will b be diminished.

3. If a significant number of urban SCMs are determined to be WOTUS, the operation and maintenance of those SCMs will become much more complicated, difficult, and expensive for the public entities responsible for these MS4s, without any corresponding positive environmental outcomes. In fact, the MS4s' work and performance to protect, restore, and improve water quality will be diminished. Such determinations may be the result of agency judgment or the outcome of third party lawsuits, based on interpretations of rule language. This is part of the reason why an explicit exclusion for most urban SCMs is needed.

4. Specific exclusion language is needed for urban SCMs. If, as has been stated publicly on many occasions, it is EPA's intent that most of these waters and structures are not to be considered WOTUS, this should be clearly stated in the rule. Such a clear statement would formalize and clarify EPA's intent. Such a clear statement would significantly reduce the probability of unfortunate interpretations in the future.

5. The current draft of the rule is almost silent about urban stormwater, in the preamble and the proposed rule language. This recommended revision language would rectify a portion of that deficiency. Adding exclusion language for urban SCMs to this rule would be appropriate, historic, and significant.

6. Because EPA is driving construction of MS4 SCMs and BMPs as part of its regulatory function, EPA has a responsibility to define clearly the jurisdictional status of most urban SCMs in the new WOTUS rule. This is part of the reason why an explicit exclusion for most urban SCMs is needed.

7. The definition for the term "tributary" provided in the proposed draft rule language is breathtakingly broad, especially the language related to man-made and natural breaks. Under this language, it appears that many urban SCMs could be considered tributary to other Waters of the United States and, thus, themselves be WOTUS. This contradicts EPA's public statements that most urban SCMs are not WOTUS. This is

part of the reason why an explicit exclusion for most urban SCMs is needed. Broad inclusion language and reliance on agency best professional judgment and discretion regarding the WOTUS status of most urban SCMs and BMPs are not acceptable or practicable.

8. Section 1.a.vi. of the draft proposed rule ("All waters, including wetlands, adjacent to a water identified in paragraphs (a)(l) through (5) of this section") states that all waters adjacent to WOTUS are WOTUS. The definition of the term "adjacent" includes the term "neighboring". The definition of the term "neighboring" includes waters located within the riparian area or floodplain of a WOTUS. Under this rule language, it appears that constructed urban SCMs in the riparian areas or floodplains of WOTUS would be considered WOTUS. This contradicts EPA's public statements that most urban SCMs are not WOTUS. This is part of the reason why an explicit exclusion for most urban SCMs is needed. Broad inclusion language and reliance on agency best professional judgment and discretion regarding the WOTUS status of most urban SCMs and BMPs are not acceptable or practicable.

9. The approach with this new recommended revised rule language is to provide a broad exclusion for most types and the vast majority of urban stormwater SCMs, BMPs, and roadside ditches. The authors recognize that it may be appropriate that some types of urban SCMs are determined to be WOTUS, on a case-by-case basis. To this end, the new recommended revised language includes "exceptions to the exclusion" in the definition for "fully-constructed SCMs" (see the last three sentences). We urge EPA and the Corps to consider this approach for the final rule language. This approach allows for a categorical exclusion for most urban SCMs but also allows 1 for some types of urban SCMs to be determined to be WOTUS, on a case-by-case basis. If additional exceptions are needed and appropriate for "fully-constructed SCMs" or exceptions are needed and appropriate for some types of roadside ditches, we urge EPA and the Corps to use this approach and add exceptions as needed.

10. We urge EPA to add explanatory language to the preamble to clarify its approach for urban SCMs. The preamble should be as clear for urban SCMs and roadside ditches as it is for agricultural waters, flows, practices, and ditches.

11. The exclusion language in the current proposed rule ("Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.") is inadequate for urban SCMs. Many urban SCMs were constructed for and serve purposes other than "waste treatment". Many urban SCMs were designed for purposes other than meeting "the requirements of the Clean Water Act". For example, this language does not cover many SCMs constructed in non-permitted MS4s. This language would not cover urban SCMs and roadside ditches constructed the passage of the CWA. The new recommended revised rule language is intended to address these deficiencies.

12. The first exclusion provision in the proposed draft rule for ditches ("Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.") is inadequate. In many types of landscapes, it is impossible to construct a system of roadside ditches that does not pass through, drains, is adjacent to, or has a significant nexus with one or more wetlands. Many roadside ditches have constant flows -

because of significant groundwater inputs. This means that a significant portion of the millions of miles of roadside ditches in the United States would not be covered under this exclusion. This is unmanageable and unacceptable. The new recommended revised rule language proposed here is intended to address this deficiency.

13. 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)(l) 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.

14. 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.

15. The terms "stormwater control measures" and "best management practices" are widely used and very broadly defined, in common usage among stormwater management professionals and regulators. They are used to describe both non-structural and structural practices, programs, and constructed features. A portion of the range of non-structural and structural BMPs can be found at a Web site developed by USEPA for the MS4 permitting program: "National Menu of Stormwater Best Management Practices" at this Web URL: http://water.epa.~ov/polwaste/npdes/swbm/

16. There are many Municipal Separate Storm Sewer Systems (MS4s) in the United States. Some are cities. Others are various types of public entities (DOTS, counties, non-traditional MS4s, etc.). Some of these MS4s are regulated under the MS4 NPDES permitting program. Many more of these MS4s are not regulated and are not covered under an MS4 permit. Some MS4s (e.g.: counties and DOTS) have portions of their systems that are regulated under MS4 permits (inside an Urbanized Area) and portions that are not regulated (outside of Urbanized Areas). The exclusion language proposed here applies to all urban SCMs, regardless of whether they are covered under an MS4 permit or not. It may be appropriate to include language in this rule providing an exclusion for urban SCMs that are within the boundaries of permitted MS4s, but that is not the goal of this recommended rule revision. It is essential, for all the reasons listed above, that an exclusion be provided for the vast majority of urban SCMs, regardless of MS4 permit status.

17. The term "stormwater control measures" (SCMs) is used in this recommended revised rule language because of its use in the National Research Council's report from 2008 "Urban Stormwater Management in the United States". (p. 2 – 45)

Agency Response: **This comment parallels comments addressed elsewhere. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. See compendium 6 for discussion of ditches.**

Clean Water Action (Doc. #15015)

7.971 **We recommend that gullies, rills and non-wetland swales not be categorically excluded from CWA jurisdiction, and suggest the agencies instead classify them as "other waters" and evaluate their jurisdictional status on a case specific basis**. In the preamble of the proposed rule, the agencies address the difficultly of distinguishing gullies from ephemeral streams and further note that these water features are often conduits for moving water between streams, wetlands and other adjacent waters that are clearly jurisdictional.[559] We agree with the SAB panel's assessment that water features like gullies, rills and non-wetland swales can have a significant impact on the physical, biological and chemical integrity of downstream waters, and to automatically exclude all of these features from CWA protections is not scientifically sound.[560]

Such a decision is particularly concerning given that the rule as proposed lacks a recapture provision, so if any of these types of water features were in the future found to have a significant impact on downstream water quality, the agencies would be unable to step in to protect them. We recommend that the agencies take a closer look at the wealth of literature on human-modified stream ecosystems, as described by the SAB in it comments on EPA's Connectivity Report.[561] This literature could help inform the agencies as to which human or naturally altered water features have a significant impact on downgradient water quality, and which do not. As the science of stream connectivity, especially as it relates to impacts caused by human alterations and natural events evolves, it is essential that the agencies continue to have the ability to evaluate the potential impact of these water features on a case specific basis. (p. 3 – 4)

Agency Response: See summary response 7.3.7 and TSD section VII.A.

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

7.972 "Waste Treatment Systems and Other Exclusions"

The proposed rule, in section (b), excludes "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" among other features listed in the section. While such systems have traditionally been excluded from CWA jurisdiction, we believe that, due to the expansive nature of the proposal, the agencies should also exclude other constructed water management and treatment infrastructure with similar attributes to these waste treatment systems. These facilities could include water reuse and recycling ponds, water treatment lagoons, and other

[559] 79 Fed. Reg. at 22219 (April 21, 2014).

[560] Memorandum from Dr. Amanda Rodewald to Dr. David Allen, Comments to the chartered SAB on the Adequacy of the Scientific and Technical Basis of the Proposed Rule Titled "Definition of 'Waters of the United States" Under the Clean Water Act." (September 2, 2014). Available at: http://yosemite.epa.gov/sab/sabproducts.nsf/F6E197AC88A38CCD85257D49EDC/$File/Rodewald_Memorandum_WOUS+Rule_9_2_14.pdf (Hereinafter SAB Review Memo) and SAB Rule Review Letter.

[561] U.S. EPA Science Advisory Board, SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, EPA-SAB-15-001, at 46 (Oct 17, 2014) (hereinafter "SAB Connectivity Review"), available at http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/AF1A28537854F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf

appurtenances; artificially constructed wetlands designed to treat agricultural or stormwater runoff (e.g. "green infrastructure") used and managed to remove nutrients and improve water quality; and artificially constructed groundwater recharge basins designed to percolate surface water into groundwater basins.

All of these features would revert to dry land if application of water were to cease and, even though they usually contain plants and shrubs known to grow in wetlands, they should be included in the list of features identified in the proposed rule as excluded from the definition of "waters of the U.S." (p. 8)

Agency Response: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. With respect to water delivery, reuse, and reclamation systems, please see summary response at 7.4.2. Finally, see summary response at 7.1 which addresses the waste treatment system exclusion.

Idaho Conservation League (Doc. #15053)

7.973 ICL is also, however, very concerned about EPA's efforts to categorically exclude a large number of waters, often with little grounding in the science and law. ICL believes categorical exclusions are not dictated by the statute or the case law and are likely to lead to waters being subject to pollution that should be protected. In particular, EPA's approach to groundwater is plainly not warranted by the science as demonstrated by the many comments on this point by individual members of the SAB. (p. 1)

Agency Response: The agencies have consistently interpreted the CWA to exclude shallow or deep groundwater from the geographic scope of the waters of the United States. The exclusion for groundwater in the final rule does not affect this longstanding interpretation as the agencies have never considered the groundwater itself to be a "water of the United States." See summary response for section 7.3.6 of this RTC.

7.974 II. ICL OBJECTS TO EPA'S PROPOSAL TO CATEGORICALLY EXCLUDE CERTAIN WATERS FROM THE PROTECTIONS OF THE CLEAN WATER ACT.

ICL objects to EPA's proposal to exclude whole categories of water from receiving Clean Water Act protections. Such a result is not dictated by Supreme Court case law nor the language of the Clean Water Act. While some members of the Supreme Court expressed concern over ensuring that certain waters, specifically wetlands, had a connection to waters of the U.S., at no time has the Court addressed wholesale exclusion of certain types of waters. While EPA may desire to categorically exclude some waters for the sake of convenience, such a result is not driven by case law. Because it is also contrary to the intent and purpose of the Clean Water Act, categorically excluding certain types of waters on the basis of administrative convenience would fail both tests under Chevron: it would violate clearly expressed congressional intent under Step One, and it is an unreasonable and impermissible interpretation of the Act under Step Two.

Moreover, such an exclusion would not constitute reasoned decision-making supported by the record.

A. Groundwater Should Not Be Categorically Excluded.

ICL strongly objects to EPA's categorical exclusion of groundwater from Clean Water Act protection. EPA's proposal will leave important waters exposed to pollution. The groundwater exclusions are unsupported from a scientific perspective and may lead to regulatory confusion. The better-supported approach would be to identify groundwater as a subcategory of "other waters" for which jurisdictional status will be determined on a case-by-case basis. In that fashion, EPA will ensure that the full purpose and intent of the Clean Water Act is realized and that it will not leave waters unprotected.

As noted by various individual members of the SAB, groundwater connections to surface water do not separate along ill-defined and fairly unscientific lines such as "shallow" or "deep." Rather, connections occur as a result of topography, geology, geography, and time. In late summer and fall, many western rivers are almost entirely dependent upon groundwater. Sometimes connections through geographic features such as lava tubes or karst formations are very deep, but nonetheless very direct between groundwater and surface waters. See Member Comments Aldous connections between wetland types and open waters; pointing out that inclusion of groundwater in connectivity should not simply be a function of distance; and questioning exclusion of shallow subsurface flows); Brooks at 17 (exclusion of groundwater "seems ill-advised because of the likely connectivity" through different features with a potential to contaminate drinking water and connections with surface water a reasonable distance away); Gooseff at 21 (strongly questioning exclusion of groundwater and giving examples of significant connectivity between surface and subsurface waters and problems with EPA's definitions); Kolm at 31-32 ("regional ground water flows commonly interact with the surface environment at sinks and springs"; giving examples in the Floridian aquifer), at 33 ("In general, the role of regional groundwater systems in neighboring systems is not addressed by this Rule and leaves the waters of the US vulnerable"), at 34 ("Care should be taken not to imply that bedrock is impermeable because ground water flows through bedrock are important flowpaths that connect hydrologic landscapes over long distances and often across watershed boundaries"), at 39 ("as indicated with the Karst references, deep groundwater should be included as well for connectivity and include not only Karst, but certainly sedimentary systems, fractured rock systems, and volcanic systems as well…[t]he real issue is both temporal and spatial as the SAB has clearly and thoroughly discussed"), at 43 (pointing out that the role of regional groundwater is inappropriately ignored in the proposed rule), and at 46; and Sullivan at 87 (ensuring the mechanism of connectivity is protected—even if that is groundwater—is critical). Plainly, EPA's categorical exclusion of groundwater from the protections of the Clean Water Act (or its general exclusion with the ill-defined "shallow subsurface connection" exception) is not supported by the science and the science advisors.

EPA should therefore revise the proposed rule to provide that groundwater shall be protected as a water of the U.S. where it is hydrologically connected to surface water in a way that is not de minimis. This approach makes sense given the decision in *Hawai'i Wildlife Fund v. County of Maui*, __ F.Supp.2d __ (D. Ha. 2014) 2014 WL 2451565, where the court found "[t]here is nothing inherent about groundwater conveyances and surface water conveyances that requires distinguishing between these conduits under the Clean Water Act. Id. at *13. The court found that where treated effluent was injected into groundwater and months later emerged from seeps into the ocean, the groundwater aquifer served as a conduit for discharges of pollution into the ocean and the discharge

required a National Pollutant Discharge Elimination System ("NPDES") permit. Id. at *18. At the same time, the court understood that the groundwater aquifer would also meet the significant nexus test being used by EPA here, because it has a hydrologic connection with the ocean, and the groundwater "significantly affects the physical, chemical, and biological integrity of the ocean water." Id. at *21-23.

While a discharge of pollutants into groundwater may be regulated under the "conduit" approach, it makes more sense, consistent with the approach advocated by members of the SAB, that the groundwater itself be protected as a water of the U.S. because of its hydrologic connection with the ocean. See, e.g. Member Comments, Aldous at 4, Brooks at 17, Kolm at 49. The water is plainly hydrologically connected to and affects another water of the U.S. and should be protected in its own right both for human consumption and for the obvious ultimate impact to aquatic ecosystems. It is nonsensical to protect water in a stream, then not protect it if the water molecules change to a subsurface flow, and then protect it again when those molecules surface in the ocean or a spring-fed stream. And, as the court noted in Hawai'i Wildlife Fund, "[n]either logic nor case law supports distinguishing between 'shallow' and 'deep' groundwater." 2014 WL 2451565 at *17.While groundwater might not in every instance be a water of the U.S., excluding groundwater from ever being considered a water of the U.S. would not be a reasonable interpretation of the Act, nor would it be reasoned decision-making supported by the record. EPA should revise the rule accordingly.

ICL urges EPA to conform the groundwater sections of the proposed rule to the existing law and science to ensure that waters of the U.S. are fully protected as intended under the Clean Water Act. EPA should revise the rule to remove groundwater as a categorical exclusion and either fully include it in the "other waters" analysis of subsection (s) or create a new subpart in subsection (s) to ensure that groundwater that is connected to surface water, regardless of its "depth," is protected as a water of the U.S. (p. 10 – 12)

Agency Response: **The agencies have consistently interpreted the CWA to exclude shallow or deep groundwater from the geographic scope of the waters of the United States. The exclusion for groundwater in the final rule does not affect this longstanding interpretation as the agencies have never considered the groundwater itself to be a "water of the United States." See summary response for section 7.3.6 of this RTC and the Technical Support Document.**

7.975 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 ICL 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. 13)

Agency Response: See summary response 7.3.7 and TSD section 7.A.

7.976 C. Subsection (t)(5)(i), (ii)—"Artificially" Irrigated or Created Areas.

This part of the rule is simply unclear. What is meant by "artificially" irrigated areas that would return to upland? This implies that there are areas that are so heavily irrigated they turn into wetland or other bodies of water that might be considered a water of the U.S. It is unclear what fact pattern this language is trying to address. The next subsection specifically refers to rice growing, so it appears (t)(5)(i) does not refer to the kind of flood irrigation that might occur in a rice operation.

This exclusion (and the exclusion for ditches) also raises a question with respect to point sources and protected waters. EPA knows that many of the categorical exclusions are also significant sources of pollutants to water of the U.S. Artificial irrigation, rice growing operations (that fill and then later drain fields) and other "artificially" created areas such as settling basins, flush huge amounts of sediments, nutrients and chemicals such as pesticides into our waters. If they are not themselves protected waters subject to meeting water quality standards or protected by permit requirements if someone is to discharge to them, then EPA must ensure that the pollutants that the artificial areas contribute to waters of the U.S. do not escape regulation and continue to jeopardize downstream waters, currently severely polluted with agricultural runoff wastes. If they are not waters of the U.S. and they are not regulated as discrete point source conveyances of pollutants, then a very large problem for our waters will be unaddressed and wholly unregulated. (p. 13 – 14)

Agency Response: As stated in the preamble, the features discussed under exclusions may function as "point sources" under CWA section 502(14)), such that discharges of pollutants to waters through these features could be subject to other CWA regulations (e.g., CWA section 402).

7.977 III. WASTE TREATMENT EXCLUSION

ICL strongly objects to the proposal to retain the "waste treatment system" exclusion, particularly given that EPA has never allowed for public notice and comment on the current version of this section of the rule. EPA lacks authority to exempt waters of the U.S. from the protections of the Clean Water Act. This exclusion is a major affront to the Clean Water Act and should be deleted. If not, at a minimum EPA must add a proviso in the text of the rule explicitly barring its application to waters of the U.S. If this exclusion is retained, it can only be applied to manmade waste treatment systems constructed in uplands that are not waters of the U.S. As it stands, the waste treatment system exclusion contravenes the clearly expressed congressional intent to protect all waters of the U.S., including impounded waters, and it therefore fails Step One of Chevron. Moreover, it is an unreasonable and therefore impermissible interpretation under Step Two, and also does not represent reasoned decision-making supported by the record.

In various parts of the country—mountainous regions of Appalachia, Iron Range states in the Great Lakes, mining and agricultural areas of the west and in Alaska—the "waste treatment system" exclusion is routinely invoked by federal and state agencies to allow the impoundment of natural streams or wetlands, or the filling or excavation of lakes and wetlands, to drain runoff from surface mines and/or to hold tailings or overburden from mining operations.[562] Playa lakes have been used as animal waste retention ponds for confined animal feeding operations.[563] Generally (almost always) the natural stream, lake, or wetland would be considered a water of the U.S. under the existing or proposed rules.

Under current practice and the so-called "waste treatment system" exception, the now impounded/excavated/filled waterbody loses its status as a protected water under the Clean Water Act, meaning that it does not have to meet basic water quality standards and the mining or coal or utility is free to dump pollutants into the stream or lake or wetland without the basic protections and requirements of a Clean Water Act NPDES permit. These waste treatment ponds are often filled with things like toxic coal ash, acid-leaching mine tailings or overburden from sulfide ore deposits that will also leach acid, selenium, and other toxic metals. The ponds are often filled with sediment that can decimate spawning areas and that can affect light and temperature necessary for aquatic life. The impounded wastes typically are not isolated from waters of the U.S., and in most cases are designed to discharge directly into protected waters. The "treatment" that occurs in these impoundments is frequently a farce, and often consists of nothing more than allowing the heaviest sediments in the discharges to settle to the bottom of the pond while the remaining untreated effluent is discharged into downstream waters. This practice causes serious water quality degradation downstream, even when discharges from the waste ponds are covered by permits. Usually water quality constituents such as hardness, conductivity, chlorides, sulfates, temperature and pH are adversely affected. This practice and result is utterly absurd and plainly contrary to law.

First, EPA and the Corps lack authority to adopt a regulation that empowers the agencies to exclude waters that qualify as "waters of the U.S." from statutory coverage under § 502(7), as well as from all of the safeguards that would otherwise protect that water under the Clean Water Act. *National Ass'n of Manufacturers v. Dept. of Labor*, 159 F.3d 597, 600 (D.C. Cir. 1998) ("There is, of course, no such 'except' clause in the statute, and we are without authority to insert one."). This exclusion goes well beyond EPA's authority to interpret and apply the Act. Cf. *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1372 (D.C. Cir. 1977) (striking down an EPA rule that attempted to exempt certain categories of point sources from the permit requirements of Clean Water Act section 402). Since EPA cannot exempt categories of point sources from NPDES permit requirements, EPA lacks the authority to do so here by creating an artificial exclusion from the definition of waters of the U.S. Furthermore, the exclusion is breathtakingly

[562] See Bernhardt and Palmer, The Environmental Costs of Mountaintop Mining Valley Fill Operations for Aquatic Ecosystems of the Central Appalachians, Ann. N.Y. Acad. Sci. 1223, 39–57, at 43 (2011).
[563] See EPA Region 6, National Pollutant Discharge Elimination System General Permit and Reporting Requirements for Discharges From Concentrated Animal Feeding Operations, 58 Fed. Reg. 7610, 7620-21 (February 8, 1993).

broad, with no apparent limit on the use of our nation's waters as waste dumps. This is unlawful. See *Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839, 861 (D.C. Cir. 2006) (rejecting reading of a statute where "there is no stopping point"); *Valdes v. United States*, 475 F.3d 1319, 1328 (D.C. Cir. 2007) (rejecting a legislative interpretation that "appears to lack a limiting principle").

This exclusion is particularly arbitrary in light of the fact that, in almost all other circumstances, impoundments are assiduously guarded within the definition of waters of the U.S. under subsection (s)(4). ICL agrees that the inclusion of impoundments under (s)(4) is justified because "as a legal matter an impoundment of a 'water of the United States' remains a 'water of the United States'…." 79 Fed. Reg. at 22201 (discussing *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 379 n.5 (2006) and *U.S. v. Moses*, 496 F.3d 984 (9th Cir. 2007)). The only difference between the impoundments that are covered under subsection (s)(4) and those that are excluded through the artifice of the "waste treatment system" exclusion is the fact that the latter are intended to be filled with waste.[564] This is not a reasonable or permissible interpretation of the Act, and it therefore also fails Step Two of Chevron. Nor does it constitute reasoned decision-making supported by the record.

Second, the proposal to retain the so-called waste treatment system exclusion in its current form violates the notice-and-comment requirements of the Administrative Procedure Act. 5 U.S.C. § 553. The history of the current rule shows that this exclusion was not originally intended to allow the current practice of using the nation's waters as waste dumps. The 1980 regulatory definition of waters of the U.S. clearly provides that the waste treatment exclusion "applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States." Several months later, EPA published notice purporting to "suspend" the operation of this language, but not replacing it with anything else or further explanation. The omission of the language was never the subject of a notice and comment public rulemaking process despite the fact that it plainly significantly alters the law with respect to application of the protections of the Clean Water Act. Now the proposed rule specifically discourages members of the public from commenting on the proposal to retain the exclusion without the limiting language, stating that because the agencies "do not address" this and other exclusions they "do not seek comment" on them. 79 Fed. Reg. at 22190. Even assuming for the sake of argument that this exclusion is lawful under the Clean Water Act (and it is not), a decision to exclude natural bodies of water from the definition of waters of the U.S. must be subject to public process. EPA and the Corps' retention and application of this disastrous and unauthorized exclusion must be suspended pending proper process.

Third, it is simply ludicrous that this brazen give-away to some of the most polluting industries is allowed. Providing this exclusion violates the very fundamentals of the Act to eliminate toxic discharges and to preserve and protect the physical, chemical and

[564] The impoundments themselves are also sources of pollution. Regardless of whether impoundments and the pollutants therein (including heavier sediment) are intended to 'stay put,' runoff and overflow from these areas can pollute traditional navigable waters. See attached memo ("The Rapanos Plurality: 'Mobile' § 402 Pollutants and 'Stationary' § 404 Pollutants"), at 15-20.

biological integrity of the nation's waters. As noted repeatedly by the SAB members, even small tributaries, including wetlands and lakes that are in headwaters of watersheds, provide critical function and value in protecting downstream waters. Indeed, the proposed rule acknowledges that "scientific literature demonstrates that impoundments continue to significantly affect the chemical, physical, or biological integrity of downstream waters[,] traditional navigable waters, interstate waters, or the territorial seas." 79 Fed. Reg. at 22201. To allow them to be obliterated by polluting industrial activity and then polluted further with wastes based on the fiction that they are no longer waters of the U.S. is completely contrary to every single comment regarding tributaries, wetlands, and waters of the U.S. submitted by the members of the SAB and the general conclusions of the Connectivity Report. (Moreover, it does not appear that the SAB was given sufficient, or any, information about this exclusion and the way it is applied in practice to enable the SAB to advise EPA on the scientific merit or lack of merit underlying the waste treatment exclusion.) This further illustrates why the waste treatment system exclusion is unreasonable and therefore fails Step Two of Chevron, and does not constitute reasoned decision-making supported by the record.

ICL presses EPA to eliminate this exclusion entirely. At a minimum, EPA must provide full opportunity for notice and comment rulemaking for this polluting and damaging practice. (p. 14 – 16)

Agency Response: **See summary response at 7.1.**

Lea Soil and Conservation District Board of Supervisors (Doc. #15144.1)

7.978 To accomplish the ambitious, but noble, goals the agencies propose the following amendments to their existing regulations[565]:

New SubSection (b)—i.e. Non-Jurisdictional by Rule

- Maintains traditional exemptions for "prior converted cropland" and "waste treatment systems";
- Proposes to include additional categories of waters that are not "waters of the United States," including (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 water identified in paragraphs (a)(1) through (4) of this section.";
- Subsection (b)(5) proposes to include the following specific waters:
    - Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;
    - Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
    - Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;
    - Water-filled depressions created incidental to construction activity;

[565] The referenced amendments are reflected as changes to the Corps' definition in 33 C.F.R. § 328.3; however, USACE and EPA are proposing to adopt the same regulatory definition for both agencies.

- Groundwater, including groundwater drained through subsurface drainage systems; and
- Gullies and rills and not-wetland swales. (p. 2)

Agency Response: **This comment describes the proposed rule but does not appear to raise any issues that need a response.**

Destin Water Users, Inc. (Doc. #15357)

7.979 The proposed rule provides an exclusion for wastewater treatment facilities; however, that exclusion requires more explanation to determine if it applies to an entity like DWU. The issue of connectivity and significant nexus seems to eliminate the DWU wastewater treatment facility form the exclusion. Because our wastewater discharges to the land surface and then percolates to the groundwater which then discharges to navigable waters all around us, it is certain that EPA will determine than an NPDES permit is needed or that EPA will determine that it is needed under pressure from the environmental organizations. (p. 1)

Agency Response: **See summary response at 7.1 concerning the waste treatment system exclusion. Also see summary response at 12.3. The Agencies are unable to address site specific situations in this response to comments and in light of the limited information available.**

7.980 DWU requests that EPA elaborate on the exclusions for wastewater treatment plants for groundwater. Alternatively, EPA should, at least, state unequivocally that under any and all circumstances, present and future, the exclusions apply to wastewater treatment plants and groundwater conditions forming DWU process. (p. 1)

Agency Response: **Please see the response to the previous comment.**

Steel Manufacturers Association and Specialty Steel Industry of North America (Doc. #15416)

7.981 In addition to the ambiguity of the adjacency requirements, the definition of tributaries is ambiguous and, therefore, creates a great deal of confusion and jurisdictional uncertainty. The proposed rule defines tributaries as waterbodies that have beds, banks, and an ordinary high water mark. But stormwater structures and retention ponds often have a bed, banks, and an ordinary high water mark, thus potentially classifying them as "tributaries." Fully constructed stormwater measures, however, should clearly be part of the class of waters excluded from jurisdiction by rule, and any waterbodies EPA and the Army Corps wish to regulate could be specifically named as not being exempted by rule. This would decrease the number of waters that necessitate a case-by-case analysis, and promote green infrastructure projects like storm water retention and detention structures.

Our associations are concerned about these ambiguities because our member companies' facilities often have these types of waterbodies on their properties. Under this ambiguous proposed rule, their jurisdictional status would be profoundly uncertain. For example, retention ponds at steel mills are not intended to serve ecological interests. Most are process-related and serve to ensure a continuous and reusable source of process water. These ponds are, in fact, isolated and have minimal to no effect on navigable or interstate waters; however, they may now be jurisdictional waters of the United States. Through the expansive definitions for terms like "tributary," "adjacent," and "neighboring," EPA and

the Army Corps have enabled themselves to create far-reaching authority much in the same way they did prior to the *Rapanos* case, when the regulators continued to look farther and farther upstream to establish shared ecological features. (p. 8-9)

Agency Response: See summary response at 7.1 concerning the waste treatment system exclusion. With respect to jurisdiction of artificial ponds, please see summary response at 7.4.2. See also compendium 8 on tributaries.

Massachusetts Water Resources Authority (Doc. #15546)

7.982 MWRA supports the current regulatory practice with respect to inter-basin water transfers. The transfer of water for purposes of water supply is essential to effective and efficient water resource management. The current proposal does not directly deal with this issue; MWRA urges that the final rule be perfectly clear that waters transferred from one water body to another without intervening municipal, industrial, or agricultural use are not be subject to CW A restrictions. This rule making should provide direct regulatory language to maintain clarity that inter-basin transfers for the purpose of water supply without intervening municipal, industrial, or agricultural use are not be subject to CW A restrictions. Preambles and guidance do not have the force of law that direct regulatory language would provide. (p. 2)

Agency Response: See summary response at 12.3 regarding water transfers. As noted, the rulemaking does not address the question whether water transfers need an NPDES permit.

7.983 Storing and moving water are key parts of our mission to provide drinking water and manage wastewater. Water infrastructure facilities can encompass a broad range of structures and activities, ranging from green infrastructure (e.g., infiltration trenches, swales, artificial wetlands, etc.) to ground water well discharges, and artificial aquifer recharge. MWRA urges that the final rule provide a specific exemption for water infrastructure that clearly and explicitly encompasses the full breadth of water utility operations. MWRA believes that water supply or wastewater conveyances, storage and treatment facilities, and the associated operations and maintenance activities conducted by a water utility should be specifically exempted in all sections of the Clean Water Act, 33 U.S.C. 1251 et seq., and its implementing regulations by inclusion of a specific paragraph within the list of exclusions in every section of the definitions proposed for amendment. (p. 2)

Agency Response: See summary response at 12.3 regarding water transfers. With respect to water delivery, reuse, and reclamation systems, please see summary response at 7.4.2. With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4.

7.984 EPA and the Corps should add municipal separate storm sewer systems components/infrastructure upstream of a permitted MS4 discharge point to the list of waters that are not considered "waters of the United States", and exempt these stormwater components from Section 404 requirements for maintenance and repair activities. (p. 4)

Agency Response: 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 Portland, Maine (Doc. #15582)

7.985 The final rule must clarify that municipal separate storm sewer systems (MS4's) are covered by the waste treatment system exemption and will not be jurisdictional under the CWA above any existing point of perrnkted discharge, including any ditches that are part of MS4.(p. 2)

Agency Response: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. See also 7.1 regarding the waste treatment system exclusion.

7.986 EPA has verbally stated that the proposed rule is not intended to make green infrastructure (GI) installations jurisdictional, indicating that any GI installation or GI practice designed to meet CWA obligations or achieve water quality goals is not meant to be included. However, EPA and the Army Corp of Engineers need to specifically clarify this in the final rule. The City of Portland is expanding plans for green infrastructure projects as a means to enhance water quality as part of our approved Tier III LTCP for CSO abatement projects, and does not want added regulations under the new proposed Rule as a means to mandate CWA results. (P. 2-3)

Agency Response: With respect to the jurisdictional status of stormwater control features, including green infrastructure, as waters of the U.S., please see summary response at 7.4.4.

7.987 The rule fails to provide intended level of clarity, certainty and predictability. Appears to increase the EPA's reach in an unpredictable way. Are drainage ditches, catch basins, swales, and other man made Ponds (such as the Deering Oaks Pond) exempt from the Rule? (p. 3)

Agency Response: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. With respect to artificial lakes and ponds, please see summary response at 7.3.2.The agencies are unable to make case-specific determination about the status of any particular feature, such as Deering Oaks Ponds mentioned in this comment, in this response to comments.

7.988 Waste treatment systems are excluded so clarity is needed if MS4's are covered under "systems" and thus exempt? (p. 3)

Agency Response: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. Summary response 7.1 further discusses the waste treatment system exclusion.

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

7.989 Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

(2) Water located on the site of a residential, municipal, industrial, commercial, or agricultural facility that is being managed for water supply. for use. or to control runoff and that –

(i) Remains at the facility, or

(ij) Leaves the facility and contributes flow to a water identified in paragraphs (s)(1) through (5) through a discharge point that is regulated under section 402 or would be regulated under section 402 but for an exemption from that section, and

(iii) Includes but is not limited to stormwater management ponds, farm ponds, stock watering ponds, cooling ponds, manmade water conveyances, manmade water storage features, manmade ditches. manmade irrigation canals. rice fields. swimming pools. sett ling basins. ornamental waters. reflecting pools. and other manmade water management features. [566]

(3) Water that is not located in a wetland or that is not confined in a surface channel or natural lake. including rainwater and snow melt that moves across the land as sheet flow .

(4) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA .

(3) Ditches that arc excavated wholly in uplands , drain only uplands, and have less than perennial flow.

(4) Ditches that do not contribute flow , either directly or through another water, to a water identified in paragraphs (s)(I) through (4) of this section.

(5) The following features:

(i) Artificially irrigates areas that would revert to upland should application of irrigation water to that area cease;

(ii) 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;

(iii) Artificial reflecting pools or swimming pools created by excavating ad/or diking dry land;

(iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;

(v) Water-filled depressions created incidental to construction activity;

[566] See 40 Fed. Reg. 3 1,320.3 1,321 (July 25, 1975) ("[d]rainage ditches have been excluded" from CWA jurisdiction); 42 Fed. Reg. 37,122, 37,144 (July 19,1 977) (drainage ditches that feed a water of the U.S. is a point sources); 48 Fed. Reg. 2 1,466,2 1,474 (May 12, 1983) ("waters of the United States do not include the following man-made waters; (I) Non-navigable drainage and irrigation ditches excavated on dry land"); 5 1 Fed. Reg. 4 1,206, 4 1,217 (Nov. 13, 1986) ("We generally do not consider [drainage and irrigation ditches excavated on dry land] to be waters of the United States.").

(vi) Groundwater, including groundwater drained through subsurface drainage systems; and

(vii) Gullies and rills and non-wetland swales. (p. 14-15)

Agency Response: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. See response at 7.1 regarding waste treatment systems.

Pennsylvania Grade Crude Oil Coalition (Doc. #15773)

7.990 Exclusions - The exclusions to the definition of "waters of the United States" are very specific and seemingly arbitrary. PGCC asks that the exclusions for (1) "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" and (2) "artificial reflecting pools or swimming pools created by excavating and/or diking dry land" be expanded to include other types of ponds excavated in dry land, including impoundments and stormwater ponds. (p. 11)

Agency Response: With respect to the jurisdictional status of stormwater control feature, including stormwater ponds, as waters of the U.S., please see summary response at 7.4.4.

Indiana Department of Environmental Management (Doc. #16440)

7.991 The Final rule must clarify the full scope of the exemption for a waste treatment system and other waste management systems. Indiana agrees that "waste treatment systems, including treatment ponds and lagoons, designed to meet the requirements of the Clean Water Act" are not waters of the U.S. Yet, the proposed rule creates confusion over this provision by adding a comma after "lagoons" thereby implying that all waste treatment systems must be designed to meet Clean Water Act requirements. This is not true today as waste treatment systems that do not discharge to waters of the U.S. are not subject to Clean Water Act requirements. The comma after "lagoons" must be removed.

Also, further definition of what is and is not included as a waste treatment system must be added. We suggest language such as: "all components located behind the outfall of an NPDES permit" be inserted after "lagoons" in the Proposed Rule language. Additionally, it must be clearly stated that permitted storm water collection systems (particularly MS4s) fall within the exclusion of "waste treatment systems." (p. 4)

Agency Response: 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 waste treatment system exclusion is discussed in the preamble and in summary response 7.1.

Pershing County Water Conservation District (Doc. #16519)

7.992 The comments to follow pertain specifically to the sections of the proposed rule which may affect water used exclusively for agriculture. Although there are certain agricultural exemptions built into the proposed rule, these comments are meant to point out

inconsistencies, lack of legal standing, and lack of finite definitions regarding such exemptions. (p. 2)

Agency Response: **The commenter's substantive issues are addressed below.**

7.993 The proposed rule does attempt to put farmers and rancher's minds at ease by stating "Nile rule does not affect longstanding permitting exemptions in the CWA for farming, silviculture, ranching and other specified activities." While this is a good thing, the rule itself leaves a lot of rule, it is unclear just how much protection those in agriculture will have. In a publication the EPA released discussing the continued agricultural exemptions, they state that exemptions apply to "Normal Farming." It is unclear what is meant by "normal." Additionally, this wording does not exist in the rule. Normal Farming practices in one part of the state or country are different than those in other parts of the same state and country.

The exemptions intended to benefit farmers and ranchers in the rule state the following as exempt: 1) Prior converted cropland; 2) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow; 3) 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; 4) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease. (p. 3 – 4)

Agency Response: **"Normal" farming, silviculture, and ranching is clarified in the agencies' implementing regulations (40 C.F.R § 232.3(c)(1)) to mean established and ongoing activities to distinguish from activities needed to convert an area to farming, silviculture, or ranching and activities that convert a water to a non-water. Nothing in this rule changes the exemptions covered in 404(f) or current agency implementation of the exemptions. The commenter appears to refer to the agencies' interpretive rule regarding 404(f), but that has been withdrawn.**

7.994 The primary concern of the District is the vague nature of the proposed rule. While there does exist hundreds of pages of explanation for a half page rule, little of this will have much bearing should the rule be implemented. There needs to be more concise definitions of the water not considered "Waters of the United States" within the rule itself, and an express exemption in the rule for agriculture. Additionally, the rule should expressly exempt waterways that do not have a continuous flow of water. (p. 4)

Agency Response: **In the final rule, the agencies have provided clarified information regarding features that are not considered "waters of the United States", even where those features would otherwise meet the criteria for jurisdiction under paragraphs (a)(4) though (a)(8). Regarding the rationale why a continuous flow of water is not a requirement to have a significant nexus, see the Technical Support Document.**

Kaweah and Tule Water Managers (Doc. #16544)

7.995 Further, the exclusion should be expanded to include agricultural ponding basins that are not connected to any other water body. Agricultural operations often have need for temporary ponding of irrigation or tail water, and basins for these purposes have no logical or functional connection to any navigable waterway, and should simply be

excluded by rule. Currently, such basins can trigger the need for a full jurisdictional determination, requiring costly and lengthy review by USACE. Again, such processes have little to no value in meeting the core intent of the CWA (the preservation of the nation's navigable waterways), and therefore a simple exclusion for these basins would serve the public interest. (p. 6)

Agency Response: Artificial lakes or ponds created in dry land such as stock watering pond, irrigation pond, settling basins, etc. are specifically excluded under paragraph (b) of the final rule. See section 7.3.2.

7.996 **The proposed rule should exclude groundwater recharge basins and stormwater management facilities, together with their infrastructure, because it places them at risk.**

The Tule and Kaweah Commenters use surface infiltration as a management tool to prevent flooding, store excess water for future use, replenish groundwater supplies, or abate land subsidence. The most economical manner of groundwater recharge is to construct a basin in alluvial material immediately adjacent to a stream, almost all of which are intermittent or ephemeral within the boundaries of the Tule and Kaweah Commenters. This allows water to rapidly infiltrate through the basin to the unsaturated zone where it is added to the aquifer below. In addition to the basins, flood control levies, swales and ditches are used to capture and convey stormwater to protect public safety. In addition to sometimes being adjacent to "waters of the United States", all of these features may contain hydric soil, wetland vegetation, and have an ordinary high water mark. Currently, these facilities have not been deemed to have a significant nexus with traditional navigable waters. Under the proposed rule these facilities would meet the definition of "waters of United States". Accordingly, the Tule and Kaweah Commenters request that groundwater recharge facilities and stormwater retention basins, together with all related infrastructure (including construction, operations, and maintenance), be explicitly excluded from the proposed definition of "waters of the United States". (p. 6 – 7)

Agency Response: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. For a discussion of groundwater recharge facilities, please see summary response at 7.4.2.

Judy Petersen (Doc. #16580)

7.997 In Kentucky, coal mines often request a "permit" for in-stream ponds as a part of their "waste treatment". This happens in both the eastern and western Kentucky coalfields. It is completely counter intuitive that an industry could "take" a part of the headwaters of our streams to use as waste treatment and then for EPA and/or the Corp to rule that the stream is no longer a water of the US. While I acknowledge that it is legal to use in-stream waste treatment under certain circumstances, new waste treatment systems in-stream must be considered as Waters of the US. (p. 1)

Agency Response: See summary response 7.1.

Kentucky Waterways Alliance (Doc. #16581)

7.998 We have considerable concern with the agencies' current practice with regard to this exemption for waste treatment systems. Since the exemption was written into the regulations, EPA and the Corps have attempted to expand it to cover waters for which it plainly was not intended. In 1980, EPA amended its regulations to provide that:

> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act … are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as a disposal area in wetlands) nor resulted from the impoundment of waters of the United States.[567]

Clearly, the exclusion was limited. In view of the fact that the Act "was not intended to license dischargers to freely use waters of the United States as waste treatment systems, the definition makes clear that treatment systems created in those waters or from their impoundment remain waters of the United States."[568]

Although the second sentence of the regulatory exclusion was suspended in order to dispel concerns that preexisting treatment systems would be improperly brought into the regulatory system,[569] the exemption was not meant to be a wholesale authorization of anything described as a "waste treatment system." To the contrary, EPA's initial implementation of the rules rejected a sweeping interpretation; the agency argued in litigation that in-stream disposal of coal mining waste did not qualify for the exemption.[570]

Unfortunately, over time, EPA and the Corps have reversed this interpretation, and now allow sources to use the regulatory exemption to treat new waste treatment facilities in protected waters excluded from the Clean Water Act. Under the agencies' revised interpretation, a new impoundment of waters of the United States is able to qualify for the

[567] W.Va. Coal Ass'n v. Reilly, 728 F. Supp. 1276, 1289 (S.D. W.Va. 1989) (quoting 40 C.F.R. § 122.3 (1980)).
[568] Id. (quoting 45 Fed. Reg. 33,298 (May 19, 1980)).
[569] Id. (citing 45 Fed. Reg. 48,620 (July 21, 1980)).
[570] Id. at 1289-90 (deferring to EPA's interpretation that treatment ponds were regulated "impoundments," not excluded "waste treatment systems"). See also Memorandum from Marcia Williams, EPA Office of Solid Waste Director, to James H. Scarbrough, EPA Region IV Residuals Management Branch Chief, attachment B (Apr. 2, 1986) ("EPA applies a standard which treats newly created impoundments of waters of the U.S. as 'waters of the U.S.,' not as 'waste treatment systems designed to meet the requirements of the CWA,' whereas impoundments of 'waters of the U.S.' that have existed for many years and had been issued NPDES permits for discharges from such impoundments are 'wastewater treatment systems designed to meet the requirements of the CWA' and therefore are not 'waters of the U.S.'"), available at http://yosemite.epa.gov/osw/rcra.nsf/documents/4BD7508AD59EA15F852565DA006F0A63.

waste treatment system exclusion if it is established via a section 404 permit.[571] This position has been upheld in litigation.[572]

We strongly oppose this approach – nothing is more inconsistent with the basic premise of the Clean Water Act than allowing polluters to convert the nation's waters into waste dumps. The agencies should use the opportunity of this rulemaking to explicitly limit the application of the waste treatment systems exemption to pre-existing facilities. (p 12 – 13)

Agency Response: **See summary response 7.1.**

Lake County Stormwater Management Commission (Doc. #16893)

7.999 We acknowledge and support the proposed exemptions for agricultural lands and the specific exclusion of prior-converted cropland from regulation as WOUS in §328.3(b)(2). (p. 2)

Agency Response: **See paragraph (b) of the final rule and section IV(I) of the preamble for a discussion of all of the exclusions in the rule.**

7.1000 We recommend clarifying the exclusion related to water-filled depressions in §328.3(b)(5)(v) to include a timeframe for this exclusion (e.g., abandoned for the past 5 years). (p. 2)

Agency Response: **See summary response in 7.3.5.**

D. Gillham (Doc. #16906)

7.1001 (…) B. What if a structure is used for two or more purposes, one of which is not exempt? Example: a stock pond also used for erosion control; a stock pond in an ephemeral or intermittent tributary of a WOUS? (p. 2)

Agency Response: **As stated in the rule, even where an excluded feature meets the terms of (a)(4)-(a)(8), it is not considered to be "waters of the United States." See also section 7.3.2.**

Arizona Rock Products Association (Doc. #17055)

7.1002 **Several Exemptions are Necessary to Allow the Construction Materials Sector to Operate Feasibly and Economically.**

The EPA has routinely asked, in stakeholder meetings, for regulated stakeholders to identify which exemptions they need in order to successfully operate. Under the expansive definition set forth in the proposed rule, the following is a list of exemptions

[571] Memorandum from LaJuana S. Wilcher, EPA Assistant Administrator, to Charles E. Findley, Director, Water Div., Region X, U.S. Army Corps of Eng'rs, on Clean Water Act Regulation of Mine Tailings Disposal (Oct. 2, 1992); see also State Program Requirements; Approval of Application to Administer the NPDES Program; Texas, 63 Fed. Reg. 51,164, 51,183-84 (Sept. 24, 1998); U.S. EPA, Guiding Principles for Constructed Treatment Wetlands at 16 (Oct. 2000), available at http://water.epa.gov/type/wetlands/constructed/upload/guiding-principles.pdf.
[572] See Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 211-16 (4th Cir. 2009) (upholding the agencies' interpretation).

the construction materials industry would need in order to operate feasibly and economically

- A "grandfathering" provision to allow existing and proposed operations that are currently permitted or have existing jurisdictional determinations the ability to operate under these existing plans. An exemption for flood control or erosion control features associated with mining operations. These flood control features serve an important role in preventing pollution. However, as written, the proposed rule could allow the Corps or EPA to assert jurisdiction over a flood control feature if it is within a floodplain. By having a specific exemption, the proposed rule would recognize that these flood control features help prevent and control pollution.
- There should be a general exemption for aggregate mining operations provided that they have erosional and flood control features designed to prevent water from flowing away from the mine site and into traditionally navigable water or interstate water. This exemption should be applicable even if water leaves the mine site during ephemeral events.

- An exemption for constructing, modifying, or decommissioning man-made or manaltered water features which might otherwise be considered jurisdictional under the proposed rule if the construction, modification, or decommissioning will eliminate or prevent flows into an interstate or traditionally navigable water. This exemption is necessary given the expansive definition of tributary. (p. 3 – 4)

Agency Response: 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 final rule includes a new exclusion in paragraph (b)(6) for stormwater control features constructed to convey, treat, or store stormwater that are created in dry land. See section 7.4.4. This exclusion responds to numerous commenters who raised concerns that the proposed rule would adversely affect municipalities' ability to operate and maintain their stormwater systems, and also to address confusion about the state of practice regarding jurisdiction of these features at the time the rule was proposed. The preamble to the final rule addresses "grandfathering."

D. Solem (Doc. #17627)

7.1003 The rule should exempt irrigation district facilities period. The Agencies should make clear that manmade irrigation canals, ditches and drains are not navigable waters, are not "waters of the U.S.", are not "tributary" to the waters of the U.S. and are not subject to CWA jurisdiction. This is the only way the rule can be clarified without creating a huge impact to the agricultural economy of the United States. (p. 1)

Agency Response: There are several exclusions in paragraph (b) of th rule that may apply to irrigation features. For example, the rule excludes certain ditches in paragraphs (b)(3). See compendium 6. Recognizing the vital role of farmers in providing the nation with food and fiber, the Clean Water Act in Section 404(f)(1) (33 U.S.C. § 1344(f)(1)) exempts many normal farming activities such as seeding, harvesting, cultivating, planting, soil and water conservation practices, and other activities from the Section 404 permitting requirement. Nothing in this rule changes

the exemptions covered in 404(f) or current agency implementation of the exemptions.

Anonymous (Doc. #18770)

7.1004 #3 All Man-made stormwater conveyance systems, ditches, ponds, and treatment devices should be exempt from regulations. Jurisdictions operating regulated MS4s are working hard to protect the environment and natural resources. Their programs and procedures should provide sufficient protection to safeguard water quality during necessary and often required maintenance operations. Additional permits should not be required when one is required to conduct maintenance. Jurisdictions that are not regulated under NPDES should be able to comply with regular Best Management Practices and not a complex and costly permitting process (and yes I include general permits in this action). (p. 1)

Agency Response: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4.

7.1005 #6 blue lines. There are many places in our community where blue lines on maps from the 1980s (only maps available) are no longer relevant or meet any current definitions of protected waters. Over time, and with permits, drainage systems have rerouted and in some cases abandoned or eliminated rerouted areas. The flow patterns are often completely changed but not the maps. Upland of these lines are manmade ponds and lakes used for stormwater treatment from flood and water quality improvement. Many of these blue lines started out along man-made channels to drain farmland by the often exempted agriculture industry. In re-development, these canals are used to convey suburban run-off. So as a man-made channel, how are they considered blue lines or jurisdictional? If agriculture can operate and alter the environment with exemptions, why not provide the same exemptions to the MS4s who are working diligently to protect water quality. (p. 2)

Agency Response: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. See also compendium 6 regarding ditches.

Alliant Energy Corporate Services, Inc. (Doc. #18791)

7.1006 EPA and the Corps have acknowledged that WTS are not jurisdictional and should r e main excluded from any definitions of WOTUS and thus have "proposed no change to the exclusion for waste treatment systems designed consistent with the requirements of the CWA " (79 Fed. Re g. at 22,189). Alliant Energy supports the EPA and the Corps' desire to maintain the WTS exclusion. However, a subtle change to the WTS exclusion is noted in the proposed rule as follows: "Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act" (79 Fed . Reg . at 22,193). Adding a comma after " lagoons" implies that all systems, not just treatment ponds and lagoon s, would have to be "designed to meet the requirements of the Clean Water Act" in order to fall within the exclusion. This creates confusion. For example, a facility may have a WTS with components constructed prior to and after the enactment of the CWA which are covered under the same NPDES permit. It's uncle a r how the proposed WTS exclusion language, with the additional comma, would apply to such a facility. (p. 3)

Agency Response: **The preamble discusses the waste treatment system exclusion as does summary response 7.1.**

7.1007 Alliant Energy has the following suggestions for EPA and the Corp s to consider when editing the proposal:

- Clearly define all WTS structures and water features, including influent conveyance and effluent discharge, on -site storage, treatment, and site maintenance (e.g., stormwater management) or otherwise "in-use" waters, which are non-jurisdictional and, therefore, covered by the WTS exclusion. (p. 3-4)

Agency Response: **With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. See summary response 7.1 for a discussion of the waste treatment system exclusion.**

7.1008 Alliant Energy has the following suggestions for EPA and the Corps to consider when editing the proposal:

- Clarify that cooling ponds are considered Waste Treatment Systems and therefore, excluded from WOTUS. See the Federal Water Quality Coalition's comments for further detail. (p. 3-4)

Agency Response: **With respect to cooling ponds, please see summary response at 7.3.2.**

Anonymous (Doc. #18801)

7.1009 1) MS4's need to have the same exemption as waste treatment. The proposed rule is too vague and confusing for small MS4's. (…) (p. 1)

Agency Response: **See summary responses at 7.4.4 and 7.1.**

Valley County (Doc. #18918)

7.1010 Valley County is in favor of clean water, but this could create some real hardships for the County and our livestock producers. Common sense would say this does not apply to road right-of-ways or dry drainages, but past experiences tells us that Federal agencies and the courts do not always use common sense. We ask that you remove this from the definition. (p. 1 - 2)

Agency Response: **The rule identifies all erosional features, including gullies and rills, as non-jurisdictional features. While the proposed rule specifically identified gullies and rills, the agencies intended that all erosional features would be excluded. The final rule makes this clear. Erosional features are not jurisdictional under the terms of paragraph (a) and the definitions in paragraph (c), especially the definition of tributary, and would be non-jurisdictional in any case. These features are specifically excluded in the rule to avoid confusion, because preceding guidance identified them as non-jurisdictional and many commenters stated these exclusions were important to maintain in the rule. Tributaries can be distinguished from erosional features by the presence of bed and banks and an ordinary high water mark. Concentrated surface runoff can occur within erosional features without**

creating the permanent physical characteristics associated with bed and banks and ordinary high water mark. See also compendium 6 regarding ditches.

Anonymous (Doc. #18943)

7.1011 1. The proposed definition of tributary will, for the first time, result in stormwater lines within manufacturing plants being included in the definition of waters of the U.S. because such lines may have a bed, a bank and a high water line. Therefore any chemical spill into those lines in excess of reportable quantities or any oil spill that causes a sheen within those lines will be reportable to the National Response Center, even if the spill never exits the lines before being cleaned up. This will greatly increase the number of reportable spills and increase the manpower burden on small manufacturing plants and on the NRC for spills that have no actual impact on the environment. Therefore, we suggest that underground artificial stormwater lines on private property be explicitly excluded from the definition of waters of the U.S. (p. 1)

Agency Response: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4.

7.1012 2. Other waters are proposed for inclusion as waters of the U.S. if a case-specific analysis shows a significant nexus to waters of the U.S. This will for the first time include rainwater puddles within the definition of waters of the U.S. This is so because the case-specific analysis is not really case specific because it is allowed to include similarly situated waters in the same region. Although a single puddle may not have a significant nexus to waters of the U.S., the single puddle in combination with thousands of other similarly situated puddles in the same region could be demonstrated to have the required significant nexus. Thus, as an example, if a plant owner objects that the rain puddle in his plant yard needs a case-specific analysis before EPA can regulate it, EPA can simply include all similarly situated yards in the region in their analysis in order to demonstrate a significant nexus to a water of the U.S. Once the inclusion of rainwater puddles in the definition of waters has been justified by this so-called case-specific analysis, any greater-than-RQ release or oil sheen in any rainwater puddles will be immediately reportable to the National Response Center, whether or not the release is contained or cleaned up before leaving the property or entering the environment. This will greatly increase the manpower cost burden on both small manufacturers and the National Response Center. We therefore suggest that rainwater filled depressions that dissipate within 3 days of the last rainfall be excluded from the definition of waters. (p. 2)

Agency Response: As stated in the rule, even where an excluded feature meets the terms of (a)(4)-(a)(8), it is not considered to be "waters of the United States." The rule does not affect the reporting requirement for spills and the procedures for reporting are outside the scope of this rule.

Anonymous (Doc. #18955)

7.1013 2. Specific exclusion language is needed for urban SCMs. If, as has been stated publicly, it is EPAs intent that most of these BMPs are not to be considered WOTUS, this should be clearly stated in the rule. Such a clear statement would formalize and clarify EPAs intent and would significantly reduce the probability of unfortunate interpretations in the future. (p. 1)

Agency Response: **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 Olathe Kansas (Doc. #18982)

7.1014 The proposed rule exempts some water bodies including "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act". This exemption needs to be expanded to include all green infrastructure (extended wet detention ponds, constructed wetlands, rain gardens, bio-retention cells, etc.) required by NPDES post construction stormwater control regulations. (p. 2)

Agency Response: **See summary responses at 7.1 and 7.4.4.**

Kevin and Nicole Keegan (Doc. #19128)

7.1015 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:

- "Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;"
    - This has a negative impact on farming, ranching and the general food supply in the United States. We already have issues in feeding American citizens, let alone the hundreds of thousands of legal and illegal immigrants.
- "Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;" AND "Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons"
    - Why should the EPA be able to regulate a citizens or property owner's ability to own or maintain their pool or a reflection pond or the aesthetics of their property? Isn't this why there are so many homeowners associations across the country?
- "Water-filled depressions created incidental to construction activity" o Construction crews can barely set up and use portable toilets let alone regulate or investigate their own construction activity related to "depressions" of water. Does this include their self made "toileting" areas? (p. 2)

Agency Response: **The features listed were determined to be excluded from coverage under the final rule. See Summary response in the Topic 7 compendium.**

Western States Water Council (Doc. #19349)

7.1016 D. Exclusions

The Council understands that the draft rule may specifically exclude certain waters from its definition of WOUS. The Council supports the intent of such a provision and requests that your agencies also include other waters and features that are generally considered to be outside the scope of the CWA.

In addition to groundwater, the following should also be excluded:

1. Farm ponds, stock ponds, irrigation ditches, and the maintenance of drainage ditches, as currently excluded under the CWA's agricultural exemption;

2. Man-made dugouts and ponds used for stock watering or irrigation in upland areas that are not connected to surface waters;
3. Dip ponds that are excavated on a temporary, emergency basis to combat wildfires and address dust abatement;
4. Man-made pits and quarries that have been excavated in uplands and that fill with groundwater but are not connected to surface waters; and
5. Prairie potholes and playa lakes.

The preamble for the rule should also recognize that the states have authority pursuant to their "waters of the state" jurisdiction to protect excluded waters, and that excluding such waters from federal CWA jurisdiction does not mean that they will be exempt from regulation. The preamble should further recognize that the states are best suited to understand the unique aspects of their geography, hydrology, and legal frameworks, and are therefore in the best position to provide the most feasible and effective protections for excluded waters. (p. 3)

Agency Response: **As the preamble states, 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. See Summary response in the Topic 7 compendium and the preamble for discussion of prairie potholes and playa lakes.**

Coachella Valley Water District, Riverside County, California (Doc. #19455)

7.1017 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.

CVWD's 1,000 acres of groundwater replenishment and 330 acres of stormwater retention basins, 73 miles of flood control dikes, and over 100 miles of swales and ditches are currently not jurisdictional, but under the proposed rule it is our understanding that these facilities meet the definition of Waters of the U.S. These facilities are critical to life in the desert because they capture and infiltrate water into the drinking water aquifer. In addition to capturing and infiltrating storm flows, CVWD's flood control facilities protect property and public safety. Groundwater replenishment and flood control facilities should be excluded from the definition of Waters of the U.S. (p. 2)

Agency Response: **See Summary response in the Topic 7 compendium.**

Maui County (Doc. #19543)

7.1018 Municipal Separate Storm Water Systems

1. The rule's new definitions for "tributaries" and "other waters" are abstract and contingent on variable field conditions. Under the proposed rule many stormwater systems and features could be considered WOTUS.

2. Waters associated with storm water infrastructure should be specifically excluded from the WOTUS definition.

3. Under the proposed rule, these stormwater channels could be considered jurisdictional even though they are part of the MS4 and regulated under an NPDES permit. Regulating such waters under both an NPDES permit and Section 404 of the CWA is overly burdensome and unworkable from a regulatory and compliance standpoint.

4. If stormwater conveyances are deemed WOTUS, they will be subject to water quality standards. The costs of complying with water quality standards could be extreme.

5. Stormwater or stream channels could be considered "tributaries" or "roadside ditches" under the proposed rule, and including tributaries by rule is not practical. The proposed rule should be revised to state unequivocally that the definitions of tributary and roadside ditch do not include MS4 facilities, and MS4 facilities are not "waters of the U.S."

6. Waste treatment systems, excluded under 40 CFR 122.3, should include stormwater management and treatment systems. The lack of such language leaves the rule open to interpretation as to whether stormwater controls are considered jurisdictional.

7. Infrastructure used to treat, manage, infiltrate or retain urban stormwater runoff should be specifically included in the "waste system treatment" exclusions.

8. The rule should define the systems to which the exemption applies, including manmade structures and devices as well as treatment measures to improve water quality, reduce stormwater volume, control flow rate and flooding, convey stormwater, or a combination of these purposes. (p. 3)

Agency Response: With respect to the jurisdictional status of stormwater control features as waters of the U.S., please see summary response at 7.4.4. See also summary response at 7.1 regarding the waste treatment system exclusion.

7.1019 Other Waters

3. Reclaimed/recycled water bodies, infrastructure, and uses (land application and groundwater recharge or disposal) should categorically excluded.

4. While the proposed rule excludes "groundwater, including groundwater drained through subsurface draining systems" there is ambiguity as to the depth of "subsurface hydrology" and at what depth groundwater is included or excluded. "Shallow" groundwater hydrologically connected to WOTUS appears to be included in definition of "other water."

5. Discharges to groundwater of any depth, permitted by an Underground Injection Control permit issued pursuant to the Safe Drinking Water Act should be categorically exempt. 9p. 4 – 5)

Agency Response: See Summary response in the Topic 7 compendium. With respect to water delivery, reuse, and reclamation systems, please see summary response at 7.4.2.

7.1020 Existing non-jurisdictional determinations and existing permits

3. All development associated with mitigation banking should be exempt for the duration of the banking agreement. (p. 5)

Agency Response: **The agencies disagree that excluding development associated with mitigation banking would be appropriate, but note that such development may be eligible for authorization under streamlined permitting, such as Nationwide Permits.**

Las Vegas Valley Watershed Advisory Committee (Doc. #19570)

7.1021 The EPA and Corps did not propose any changes to the existing exclusion from jurisdiction for waste treatment systems designed consistent with the requirements of the CWA. However, the LVVWAC is concerned that the broad definition of "tributaries" under the Proposed Rule would result in man-made ditches, canals, and off-river storage ponds that are located on water and wastewater facility sites, but may not formally be part of waste treatment systems, to be subject to regulation as WOUS. This additional regulation would be unnecessarily burdensome, and affect LVVWAC members' ability to conduct timely maintenance of those features.

The EPA and Corps specifically excluded certain waters from its definition of WOUS under the Proposed Rule. The LVVWAC supports the intent of these exclusions, and requests that a clear exemption also be provided for all water management features that are located within water and wastewater facility sites. The LVVWAC requests the following exclusion be added to the Proposed Rule:

- Ditches, canals, ponds, and other man-made features used in the operation of water or wastewater treatment and supply systems. (p. 2)

Agency Response: **See summary response at 7.1 regarding the waste treatment system exclusion. As discussed in compendium 7 the rule excludes a number waters including many features created in dry land. See compendium 6 regarding ditches.**

Chicken & Egg Association of Minnesota (Doc. #19584)

7.1022 We are concerned that the interpretive rule clarifying permit exemption for certain NRCS approved practices is inadequate. Further, practices that work well in one region may actually have negative consequences in another region, rendering a national list of approved practices unworkable. (p. 2)

Agency Response: **While not relevant to the this rule, the Interpretive Rule Regarding the Applicability of Clean Water Act Section 404(f)(1)(A) was withdrawn on January 29, 2015.**

San Luis Water District (SLWD), Los Banos, California (Doc. #20488)

7.1023 To better balance the broad interest of the CWA in protecting the nation's surface waters, while not unduly interfering with our ability to provide water, SLWD recommends the following:

- Water conveyance systems, including ditches, should be excluded from the proposed definition of "waters of the United States."
- Water infrastructure, such as recycled water facilities, groundwater recharge basins, storm water retention basins, and constructed wetlands, adjacent to

"waters of the United States", should be excluded from jurisdiction under the proposed rule. (p. 1)

Agency Response: See summary response at 7.1 regarding the waste treatment system exclusion. With respect to water delivery, reuse, and reclamation systems, please see summary response at 7.4.2. See summary response at 7.4.4 regarding the final rule's policy on storm water control features.

Alpine County Board of Supervisors, County of Alpine, California (Doc. #20492)

7.1024 In addition, water supply systems could be defined as Waters of the U.S. under the new definition of a tributary as they convey flow to downstream water. These could include not only large federal and state water delivery systems, such as the California Aqueduct and the Colorado River Aqueduct, but also reservoirs and other water supply features constructed and managed by local and private interests.

Furthermore, even though your agencies have maintained that there is no intent to impact water reuse facilities, the rule does not clearly address reuse facilities associated with wastewater treatment systems. Reuse facilities were constructed to augment water supply for irrigation and sometimes drinking water, and were not designed with the objective to meet the parameters of the CWA. The rule needs to clearly state your agencies' intent for water reuse facilities. (p. 2)

Agency Response: With respect to water delivery, reuse, and reclamation systems, please see summary response at 7.4.2.

Highlands Ranch Metropolitan District, Highlands Ranch, Colorado (Doc. #20499)

7.1025 The Proposed Rule also impacts Highlands Ranch by creating uncertainty regarding the waste treatment exclusion. The District respectfully requests that this exclusion be clarified to include stormwater facilities constructed to comply with CWA requirements. The operation and maintenance of these stormwater facilities should not be encumbered with the additional requirements of the Proposed Rule. (p. 1)

Agency Response: See summary response at 7.1 regarding the waste treatment system exclusion. See summary response at 7.4.4 regarding the final rule's policy on storm water control features.

Atascadero Mutual Water Company (Doc. #20508)

7.1026 AMWC feels that water infrastructure adjacent to "Waters of the U.S." should be excluded from the definition of "Waters of the United States". AMWC currently operates a groundwater recharge basin in the riparian area adjacent to the Salinas River and is concerned that the proposed rule would place a substantial regulatory burden on operating and/or expansion of this facility. (p. 1)

Agency Response: With respect to water delivery, reuse, and reclamation systems, please see summary response at 7.4.2.

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:

Anderson, William A., Hunton & Williams. June 8, 1980. Letter to Douglas M. Costle, Adm'r, EPA (July 8, 1980), with attached UWAG Briefing Paper, The Waste Treatment System Exclusion from EPA's Definition of Waters of the United States. (Doc. #15016.1)

Associated General Contractors of America. Exhibit 1: Examples of Ponds as a Best Management Practice To Protect Surface Waters (Doc. #14602, p. 20-21)

County of Los Angeles and Los Angeles County Flood Control District (LACFSD), California "Attachment B – Typical Detention Basin" (Doc. #15620, p. 15)

Florida Administrative Code. 62-340.750 Exemption for Surface Waters or Wetlands Created by Mosquito Control Activities. (Doc. #4847.2)

Patagonia Area Resource Alliance and Earthworks. October 2014. *The Hermosa Mine Proposal: Potential Impacts to Patagonia's Water Supply*. (Doc. #16394.6)

Southeast Stormwater Association. Exhibit A: 9 Mile Irrigation Reservoir. (Doc. #16534, p. 18)

Southeast Stormwater Association. Exhibit C: Stock Watering Pond. (Doc. #16534, p. 19)

S.S. Papadopulos & Associates, Inc. et al. March 2014. *Environmental Impact Report Golden Sands Dairy Saratoga Township Wisconsin*. (Doc. #16645.2)

USGS & US Department of the Interior. *Trends in Streamflow of the San Pedro River, Southeastern Arizona, and Regional Trends in Precipitation and Streamflow in Southeastern Arizona and Southwestern New Mexico*. Professional Paper 1712. (Doc. #16394.5)

Winter, Thomas C., Judson W. Harvey, O. Lehn Franke and William M. Alley. 1998. *Ground Water and Surface Water A Single Resource: U.S. Geological Survey Circular 1139*. (Doc. #16394.4)

In addition, commenters submitted the following relevant references. These are copied into this document as they were submitted by commenters. HW has not verified the references, or the validity of hyperlinks.

30 C.F.R. § 816.43 to 816.49. (Doc. #10750, p. 19)

30 C.F.R. § 816.41 (Doc. #10750, p. 19)

40 C.F.R. § 35.2005 (Doc. #16584, p. 2)

40 C.F.R. 122.2. (Doc. #14589, p. 26)

40 C.F.R. § 122.26 (Doc. #15822.1, p. 68; Doc. #14589, p. 25)

77 CFR at 10,269-10,273 (Doc. #15254, p. 23)

33 C.P.R. § 328.5 (Doc. #14420, p. 13)

45 Fed. Reg. 33290, 33298 (May 19, 1980) (Doc. #15377, p. 3)

51 Fed. Reg. at 41206, 41217. (Doc. #10750, p. 17; Doc. #15059, p. 14)

53 Fed. Reg. at 20765. (Doc. #10750, p. 17)

63 Fed. Reg. 51164, 51183-84. (Doc. #15123, p. 13; Doc. #16537, p. 6)

64 FR 39252, 39332 (Doc. #10750, p. 18)

73 Fed. Reg. 33697, 33704 (June 13, 2008) (Doc. #15822.1, p. 68)

79 Fed. Reg. at 48,300, 48,383-401 (Aug. 15, 2014). (Doc. #15016, p. 29)

30 U.S.C. § 1265(b)(10) (Doc. #10750, p. 19)

33 U.S.C. § 1631 (14) (Doc. #14589, p. 26)

33 U.S.C. § 1365(a). (Doc. #15431, p. 15)

Administrative Procedure Act. 5 U.S.C. § 553 (Doc. #14564, p. 16)

Alaska Statute §27.19.020 (Doc. #14412, p. 50)

Adler, Robert W. 2014. *The Decline and (Possible) Renewal of Aspiration in the Clean Water Act*, 88 Wash. L. Rev. (Doc. #15431, p. 19)

Allen, David et al. Science Advisory Board. September 17, 2014. Consideration of the Adequacy of the Scientific and Technical Basis of the EPA's proposed rule titled Definition of Waters of the United States Under the Clean Water Act. (Doc. #15233, p. 2)

American Iron and Steel Inst. v. EPA, 155 F.3d 979, 996 (D.C. Cir. 1997) (Doc. #15822.1, p. 67 & 68)

American Water Works Association. 1990. *Water Quality and Treatment* (4th ed.). (Doc. #15016, p. 68)

Arizona Department of Environmental Quality §402 Construction General Permit Guidance (Doc. #14407, p. 12)

Arizona Revised Statutes §27-921 (Doc. #14412, p. 50)

Bernhardt and Palmer. 2011. The Environmental Costs of Mountaintop Mining Valley Fill Operations for Aquatic Ecosystems of the Central Appalachians. Ann. N.Y. Acad. Sci. (Doc. #14564, p. 14)

Bomberger, Brown and Jorgensen. 2010. Interior Least Tern and Piping Plover Monitoring, Research, Management, and Outreach Report/at the Lower Platte River, Nebraska. (Doc. #14420, p. 14)

Bowen, Mark W., et al. 2010. "A GIS-based approach to identify and map playa wetlands on the High Plains, Kansas, USA." *Wetlands* 30.4. (Doc. #14599, p. 2)

Bragg v. West Virginia Coal Association. 248 F.3d (4th Cir. 2001). (Doc. #15415, p. 12)

Bulter, Henry N. and Jonathan R. Macey. 1996. Using Federalism to Improve Environmental Policy. (Doc. #15431, p. 15)

California Public Resources Code §2770(a) and (c)(8)(A) (Doc. #14412, p. 50)

California Sportfishing Protection Alliance v. California Annonia Company, 2007 WL 273847 (E.D.Cal) (Doc. #19540, p. 112)

California Water Code § 13050(e) (Doc. #15620, p. 7)

Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n. 449 F.2d (D.C. Cir. 1971) (Doc. #15431, p. 15)

Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA. 8 F. Supp. 3d (S.D.N.Y. 2014). (Doc. #15016, p. 86; Doc. #15018.1, p. 13; Doc. #15065, p. 3; Doc. #15161, p. 11)

CERCLA, 42 U.S.C. § 9604(a)(1)(A)-(B) (2006). (Doc. #15431, p. 11)

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. (1984) (Doc. #14564, p. 14, 15, & 16; Doc. #15377, p. 2; Doc. #15431, p. 14 & 15; Doc. #16394, p. 12 & 14)

Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 129 S. Ct. (2009) (Doc. #19540, p. 108)

Colorado Code of Regulations. 5 CCR 1002-11. (Doc. #15258, p. 6)

Crumpton, William, Arnold van der Valk, Will Hoyer, and David Osterberg. May 2012. "Wetland Restoration in Iowa Challenges and Opportunities." *The Iowa Policy Project*. www.IowaPolicyProject.org (Doc. #14738.1, p. 8)

Davis, Mackenzie, and David Cornwell. 1991. *Introduction to Environmental Engineering* (2d ed.). (Doc. #15016, p. 68)

DeSimone, Leslie A., Pixie A. Hamilton, and Robert J. Gilliom, *Quality of Water from Domestic Wells in the United States*. United States Geological Society (USGS) National Water-Quality Assessment Program. http://water.usgs.gov/nawqa/studies/domestic_wells/. (Doc. #15431, p. 5)

Dreisen, David M. 2014. *Purposeless Construction*. Wake Forest L. Rev. (Doc. #15431, p. 19)

Envt'l Def. Ctr. v. EPA, 344 F. 3d (9th Cir. 2003) (Doc. #15161, p. 8 & 9; Doc. #19540, p. 107)

Federal Aviation Administration. Advisory Circular J50/5200-32: Reporting Wildlife Aircraft Strikes. (Doc. #14766, p. 2)

Federal Aviation Administration. Advisory Circular 150/5200-33: Hazardous Wildlife Attractants On or Near Airports. (Doc. #14766, p. 2)

Federal Aviation Administration. *Significant Wildlife Strikes to Civil Aircraft in the United States (1990-2014)*. http://www.faa.gov/airports/airport_safety/wildlife/resources/media/sig_strikes_1990_2014.pdf. (Doc. #14766, p. 2)

Federal Aviation Administration. *Wildlife Hazard Management at Airports- A Manual for Airport Personnel*. http://www.faa.gov/airports/airport_safety/wildlife/resources/media/2005_FAA_Manual_complete.pdf. (Doc. #14766, p. 2)

Florida Administrative Code 62-520.310. (Doc. #13029, p. 45)

Florida State Statutes, Section 403.301 and Guidance Memo DOM-96-01. April 26, 1996. (Doc. #16647, p. 13)

Fracfocus.org. Nov. 12, 2014. What Chemicals are Used, Frac Focus Chemical Disclosure Registry. https://fracfocus.org/chemical-use/what-chemicals-are-used. (Doc. #15431, p. 12)

Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. (U.S. 2000) (Doc. #15221, p. 3)

Food Security Act. 1985. (Doc. #15023, p. 22)

Foster vs. EPA (Doc. #15192.1, p. 3)

Glennon, Robert. 2009. *Unquenchable: America's Water Crisis and What to Do About It.* (Doc. #15431, p. 4)

Gogebic Taconite, LLC. June 17, 2013. Preapplication Notice to the Wisconsin Department of Natural Resources. Available at http://dnr.wi.gov/topic/Mines/documents/gogebic/GTACPreapplicationNotice20130617.pdf. (Doc. #16645, p. 7)

Goldenberg, Suzanne. February 8, 2014. *Why Global Water Shortages Pose Threat of Terror and War.* The Guardian. Available at http://www.theguardian.com/environment/2014/feb/09/global-water-shortages-threat-terror-war (Doc. #15431, p. 5)

Golden Gate Audubon Society, Inc. v. U.S. Army Corps of Engineers (N.D. Cal. 1988) 717 F.Supp. (Doc. #18793, p. 4)

Green, Timothy R. et al. 2011. *Beneath the Surface of Global Change: Impacts of Climate Change on Groundwater*. Journal of Hydrology. (Doc. #15431, p. 4)

Groffman, P.M., E.A. Holland, D.D. Myrold, G.P. Robertson, and X. Zou. 1999. *Denitrification. In: Standard soil methods for long-term ecological research* (Robertson, G.P., D.C. Coleman, C.S. Bledsoe, and P. Sollins, eds.). Oxford University Press, New York (Doc. #19540, p. 114)

Grumbles, Benjamin H. Mar. 1, 2006. Memorandum to Hon. John Paul Woodley Assistant Secretary of the Army (Civil Works). (Doc. #10750, p. 6; Doc. #15016, p. 82; Doc. #15377, p. 4)

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. 484 U.S. (1987) (Doc. #15431, p. 15)

Haukos and Smith. September 2003. Playa Wetland Regulation, Wetlands 23(3). (Doc. #15540, p. 28)

Hawai'i Wildlife Fund v. County of Maui. F.Supp.2d (D. Ha. 2014). (Doc. #14564, p. 12; Doc. #15431, p. 15, 20, & 21; Doc. #16394, p. 14; Doc. #16413, p. 57)

Howard, J. and Merrifield, M. 2010. *Mapping Groundwater Dependent Ecosystems in California*. (Doc. #15233, p. 10; Doc. #16394, p. 14)

Hughes Aircraft Co. v. U.S. (1997) 520 U.S (Doc. #18793, p. 4)

Hughes, Catherine E. et. al. 2011. *Climate Change and Groundwater*. (Doc. #15431, p. 4)

Institute for Groundwater Ecology: info@groundwaterecology.de (Doc. #16935, p. 6)

IPCC. 2014. *Climate Change 2014: Synthesis Report*. Available at http://www.ipcc.ch/pdf/assessmentreport/ar5/syr/SYR_AR5_SPM.pdf. (Doc. #15431, p. 4)

Klee, Ann R., Former General Counsel, and Benjamin H. Grumbles, Former Assistant Administrator for Water, EPA. August 5, 2005. Memo to Regional Administrators. (Doc. #14407, p. 12; Doc. #15822.1, p. 68; Doc. #19540, p. 108)

Langston, Linda, President, Nat'l Ass'n of Counties . 2014. Disaster Mitigation: Reducing Costs & Saving Lives: Hearing before the Subcomm. on Econ. Dev., Pub. Bldgs. & Emergency Mgmt., H. Comm. on Transp. & Infrastructure, 113th Cong. (Doc. #15081, p. 18)

Legal Environmental Assistance Foundation v. U.S. EPA 276 F.3d 1253 (11th Cir. 2001) (Doc. #15431, p. 12)

Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc., 568 U.S. 133 S. Ct. (2013). (Doc. #15620, p. 11; Doc. #15161, p. 8 & 11)

Malone, Linda A. 1990. *The Necessary Interrelationship Between Land Use and Preservation of Groundwater Resources.* UCLA J. Envtl. L. Pol'y. (Doc. #15431, p. 11)

Makowski, Anna. *Beneath the Surface of the Clean Water Act*. Oregon Law Review, Vol. 91. (Doc. #16935, p. 9)

Mersel, M.K., Lichvar, R.W. 2014. *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.* U.S. Army Corps of Engineers, Engineer Research and Development Center, Cold Regions Research and Engineering Laboratory, TR-14-13. http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/reg_supp/west_mt_finalsupp_aug2014.pdf. (Doc. #15059, p. 14)

Michigan Department of Environmental Quality. January 2010. Update on Selenium Projects at Tilden and Empire Mines, Vol. 1. Available at http://www.michigan.gov/documents/deq/wrd-npdes-EmpireTilden-Vol1_364698_7.pdf. (Doc. #16645, p. 7)

Mining Contamination of Groundwater: The Need for Legislation and Reform. 1998. U. Denv. Water L. Rev. (Doc. #15431, p. 11)

Montana Code §82-4-336 (Doc. #14412, p. 50)

National Ass'n of Manufacturers v. Dept. of Labor. 159 F.3d (D.C. Cir. 1998) (Doc. #14564, p. 15)

National Pork Producers Council v. EPA, 635 F.3d (5th Cir. 2011) (Doc. #15822.1, p. 67)

National Research Council. 2008. "Urban Stormwater Management in the United States". (Doc. #14511, p. 6)

Nat'l Treasury Emps. Union v. Chertoff. 452 F.3d (D.C. Cir. 2006) (Doc. #14564, p. 15)

Natural Resources Defense Council, Inc. v. Costle. 568 F.2d (D.C. Cir. 1977) (Doc. #14564, p. 15)

Natural Resources Defense Council, Inc. v. County of Los Angeles, 673 F.3d (9th Cir. 2011), (Doc. #15620, p. 11; Doc. #15431, p. 15; Doc. #19540, p. 108)

Natural Resources Conservation Service. November 2010. National Food Security Act Manual. M_180_NSFAM_514_D, Fifth Edition. (Doc. #14738.1, p. 6)

Natural Resources Conservation Service. "Guidance on Conducting Wetland Determinations for the Food Security Act and Section 404 of the Clean Water Act." http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_007868.pdf. (Doc. #14738.1, p. 8)

Natural Resources Conservation Service. "Wetland Fact Sheet - Prior Converted Cropland." http://www.nrcs.usda.gov/wps/portal/nrcs/detail/vt/programs/?cid=nrcs142p2_010517 (Doc. #13024, p. 8)

National Research Council. 1995. "Wetlands: Characteristics and Boundaries." National Academy Press. Washington D.C. (Doc. #14738.1, p. 5)

Neprash, R. (Presenter). November 6, 2014. Viewpoints: Potential Impacts of the Waters of the U.S. Rulemaking on Stormwater Infrastructure [Webcast]. Alexandria, VA: Water Environment Federation. Retrieved from http://www.wef.org/MS4_WOTUS/. (Doc. #15140, p. 7)

New Hope Power Company and Okeelanta Corporation v. U.S. Corps of Engineers and Stockton, 746 F. Surma 2d (S.D. Fla. 2010) (Doc. #14081, p. 15)

New York State Department of Environmental Conservation. Definition of groundwater. (Doc. #16935, p. 6)

Nolan, Bernard T., Barbara C. Ruddy, Kerie J. Hitt, and Dennis R. Helsel. January 1998. "A National Look at Nitrate Contamination of Ground Water." *Water Conditioning and Purification,* v. 39, no. 12. (Doc. #6981, p. 1)

Northern California River Watch v. City of Healdsburg. 496 F. 3d. (9th Cir) (2007) (Doc. #14412, p. 50; Doc. #16645, p. 7; Doc. #19540, p. 112)

North Carolina Department of Environment and Natural Resources. Stormwater BMP manual, Chapter 13 "Public Airports." http://portal.ncdenr.org/c/document_library/get_file?uuid=c7a8e5a2-f141-4612-817a-43c48c2f108b&groupId=38334 (Doc. #14766, p. 2)

N.C.G.S. 143-214.7(3c) & (c4) http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-217.7.html (Doc. #14766, p. 2)

Office of the President. October 2014. Priority Agenda: Enhancing the Climate Resilience of America's Natural Resources. Council on Climate Preparedness and Resilience. Available at http://www.whitehouse.gov/sites/default/files/docs/enhancing_climate_resilience_of_americas_natural_resources.pdf (Doc. #19540, p. 110)

Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. (1941) (Doc. #15233, p. 2)

Ohio Administrative Code 3745-1-02(13)(77) (Doc. #15246, p. 2)

Ohio Revised Code R.C. 6111.01(F) and (G) (Doc. #15246, p. 2)

Ohio Valley Environmental Coal v. Aracoma Coal Co., 556 F.3d (4th Cir. 2009) (Doc. #10750, p. 7 & 15; Doc. #13074, p. 12; Doc. #15123, p.13; Doc. #15437, p. 60; Doc. #15377, p. 4 & 5; Doc. #16537, p. 6; Doc. #17921.1, p. 71; Doc. #19540, p. 113)

Oregon Revised Statutes §517.750 (Doc. #14412, p. 50)

Pennsylvania Federation of Sportsmen's Clubs, Inc. v. Hess, 297 F.3d (3d Cir. 2002) (Doc. #15415, p. 12)

Pennsylvania State University. 2011.

Porter-Cologne Act (California). (Doc. #17920, p. 4)

Quivira Min. Co. v. E.P.A., 765 F.2d (10th Cir. 1985). (Doc. #15050, p. 103; Doc. #15431, p. 19; Doc. #16460, p. 25)

Ranjan, Priyantha, So Kazama and Masaki Sawamoto. 2006. *Effects of climate change on coastal fresh groundwater resources.* Global Environmental Change. Available at http://espace.library.curtin.edu.au/cgi-bin/espace.pdf?file=/2011/01/25/file_1/135411 (Doc. #15431, p. 4)

Rapanos v. United States 547 U.S. 715 (2006) (Doc. #14564, p. 15; Doc. #15233, p. 2; Doc. #15368, p. 14; Doc. #15540, p. 24; Doc. #9842, p. 30; 15016, p. 72; Doc. #15089, p. 3; Doc. #7494.1, p. 5 & 6; Doc. #16645, p. 6; Doc. #18793, p. 5 & 6; Doc. #15822.1, p. 17; Doc. #19540, p. 107)

RCRA, 42 U.S.C. § 6973(a) (2011). (Doc. #15431, p. 11)

Regas, Diane, et al. May 17, 2002. Memo to EPA Director Region X CWA Regulation of Mine Tailings. (Doc. #10750, p. 6)

Robinson Township v. Commonwealth of Pennsylvania, 83 A.3d (Pa. 2013) (Doc. #15431, p. 12)

Rodewald. September 2, 2014. Comments to the chartered SAB on the Adequacy of the Scientific and Technical Basis of the Proposed Rule Titled "Definition of 'Waters of the United States' Under the Clean Water Act. (Doc. #15233, p. 2)

Rodgers, Jr., William H. 2014. Environmental Law § 4.8. (Doc. #15431, p. 13)

Salzman, James. 2013. *Drinking Water: A History*. (Doc. #15431, p. 5)

S. Conf. Rep. No. 92-1236, p.144 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3776, 3822, 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell) (Doc. #15233, p. 2)

Safe Drinking Water Committee, Drinking Water and Health. 1989. V. 9: Selected Issues in Risk Assessment. National Academy Press. (Doc. #15431, p. 12)

SDWA, 42 U.S.C. §300. 2012. (Doc. #15431, p. 11 & 13)

S.D. Warren Co. v. Maine Bd. of Envtl. Prot., 547 U.S. 370, 379 n.5 (2006) (Doc. #14564, p. 15)

Sheldon, Dyanne, Tom Hruby Ph.D., Patricia Johnson, Kim Harper, Andy McMillan, Teri Granger, Stephen Stanley, Erik Stockdale. "Wetlands in Washington State Volume 1: A Synthesis of the Science." *Ecology* Publication #05-06-006. Department of Ecology Publications Distribution Office. http://www.ecy.wa.gov/biblio/0506006.html (Doc. #14738.1, p. 6)

Solley and others. 1993 (Doc. #6981, p. 1)

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (Doc. #13596, p. 23; Doc. #14460, p. 5; Doc. #14963, p. 13; Doc. #15089, p. 3; Doc. #15188.2, p. 1; Doc. #15540, p. 27; Doc. #16652, p. 4)

Spalding and Exner. 1993 (Doc. #6981, p. 1)

S. Rep. No. 92-414 (1971), reprinted in 2. A Legislative History of the Water Pollution Control Act Amendments of 1972 (Doc. #15016, p. 71; Doc. #15431, p. 15)

S. Rep. No. 92-1236 (1972) (Conf. Rep.), reprinted in 1. A Legislative History of the Water Pollution Control Act Amendments of 1972 (Doc. #15016, p. 71)

S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. (2004) (Doc. #15161, p. 9 & 11)

Stoner, Nancy. Jul. 7, 2014. Setting the Record Straight on Waters of the US, EPA CONNECT BLOG. http://blog.epa.gov/epaconnect/2014/06/setting-the-record-straight-on-wous/. (Doc. #15536, p. 30)

Surface Mine Control and Reclamation Act of 1977 ("SMCRA") (Doc. #15415, p. 12)

Texas Administrative Code Title 16, Part 1. Rule § 12.339(c). Permanent Program Performance Standards - Surface Mining Activities. Hydrologic Balance. (Doc. #10750, p. 19)

Title 14: Aeronautics and Space, Part 139- Certification of Airports, 14 CFR 139. http://www.faa.gov/airponslairporl_satety/part139_cert/ (Doc. #14766, p. 2)

Tiner. 2003. "Geographically Isolated Wetlands of the United States." *Wetlands* 23(3). (Doc. #15540, p. 27)

Uddameri, Venkatesh. *Importance of Groundwater to the US Economy.* National Ground Water Association presentation. Available at http://water.epa.gov/action/importanceofwater/upload/21-Uddameri.pdf . (Doc. #15431, p. 4)

U.S. Army Corps of Engineers. 1987. Wetland Delineation Manual. (Doc. #15141, p. 3; Doc. #18793, p. 5)

U.S. Army Environmental Center. 2002. Guidance to Site Managers at Army Installations: Groundwater Evaluation and Development of Remediation Strategies where Aquifer Restoration may be Technically Impracticable. (Doc. #15431, p. 11)

U.S. Defense Intelligence Agency. 2012. *Global Water Security*. Available at http://www.dni.gov/files/documents/Newsroom/Press%20Releases/ICA_Global%20Water%20Security.pdf. (Doc. #15431, p. 6)

U.S. Department of Defense. 2014. *2014 Climate Change: Adaptation Roadmap*. Available at http://www.acq.osd.mil/ie/download/CCARprint.pdf. (Doc. #15431, p. 5)

U.S. Environmental Protection Agency. Development Document for Final Effluent Limitations Guidelines, New Source Performance Standards, and Pretreatment Standards for the Steam Electric Point Source. (Doc. #15016, p. 67)

U.S. Environmental Protection Agency. National Menu of Stormwater Best Management Practices. http://water.epa.gov/polwaste/npdes/swbmp/ (Doc. #14511, p. 5)

U.S. Environmental Protection Agency http://water.epa.gov/scitech/wastetech/guide/steamelectric/upload/Steam-Electric_DD_1982.pdf (Doc. #15016, p. 68)

U.S. Environmental Protection Agency. http://water.epa.gov/scitech/wastetech!guide/steam-electric/proposed.cfm. (Doc. #16413, p. 64)

U.S. Environmental Protection Agency http://water.epa.gov/type/watersheds/monitoring/upload/2003_07_03_monitoring_305bguide_v1ch5.pdf (Doc. #16935, p. 6)

U.S. Environmental Protection Agency. Coal Combustion Residuals - Proposed Rule. http://www.epa.govjoswjnonhazjindustrialjspecialjfossiljccr-rulej (last visited Nov. 12, 2014). (Doc. #16413, p. 63)

U.S. Environmental Protection Agency. Ground Water Cleanup at Superfund Sites. http://www.epa.gov/superfund/health/conmedia/gwdocs/ brochure.htm (Doc. #15431, p. 11)

U.S. Environmental Protection Agency. www.epa.gov/greeninfrastructure. (Doc. #15186, p. 5; Doc. #19540, p. 109)

U.S. Environmental Protection Agency. http://water.epa.gov/type/wetlands/vernal.cfm (Doc. #15822.1, p. 22)

U.S. Environmental Protection Agency. http://water.epa.gov/polwaste/npdes/stormwater/Municipal-Separate-Storm-Sewer-System-MS4-Main-Page.cfm. (Doc. #19540, p. 106)

U.S. Environmental Protection Agency. Sept. 1988. *EPA/625/1-88/022, Design Manual: Constructed Wetlands and Aquatic Plant Systems for Municipal Wastewater Treatment*. Available at http://water.epa.gov/type/wetlands/upload/design.pdf. (Doc. #15016, p. 69)

U.S. Environmental Protection Agency. May 3, 1990. *Memorandum: Clean Water Act Section 404 Regulatory Program and Agricultural Activities.* http://water.epa.gov/lawsregs/guidance/wetlands/cwaag.cfm.

U.S. Environmental Protection Agency Region 6. February 8, 1993. National Pollutant Discharge Elimination System General Permit and Reporting Requirements for Discharges From Concentrated Animal Feeding Operations. 58 Fed. Reg. 7610, 7620-21. (Doc. #14564, p. 14)

U.S. Environmental Protection Agency. Sept. 1993. *EPA/832-R-93-005, Constructed Wetlands for Waste Water Treatment and Wildlife Habitat, 17 Case Studies*. Available at http://www.epa.gov/owow/wetlands/pdf/ConstructedWetlands-Complete.pdf. (Doc. #15016, p. 70)

U.S. Environmental Protection Agency. Sept. 24, 1998. *State Program Requirements; Approval of Application to Administer the NPDES Program: Texas*. 63 Fed. Reg. 51,164, 51,183-84. (Doc. #15437, p. 60)

U.S. Environmental Protection Agency. September 1999. Storm Water Technology Fact Sheet: Wet Detention Ponds. Office of Water. EPA 832-F-99-048. Available at http://water.epa.gov/scitech/wastetech/upload/2002_06_28_mtb_wetdtnpn.pdf (Doc. #19540, p. 113)

U.S. Environmental Protection Agency. Oct. 2000. *Guiding Principles for Constructed Treatment Wetland*. Available at http://water.epa.gov/type/wetlands/constructed/upload/guiding-principles.pdf. (Doc. #15123, p. 13; Doc. #15437, p. 60; Doc. #16537, p. 6)

U.S. Environmental Protection Agency. 2001. Ground Water Report to Congress. Available at http://www.epa.gov/safewater/sourcewater/pubs/rpt-congress_gw_2001.pdf. (Doc. 15431, p. 3)

U.S. Environmental Protection Agency Region 4. November 14, 2001. *Final Region 4 Guidelines for Reconciling Storm Water Management and Water Quality and Resource Protection Issues*. (Doc. #16647, p. 12)

U.S. Environmental Protection Agency. July 2005. *EPA-841-B-05-003, National Management Measures to Protect and Restore Wetlands.* Available at http://www.epa.gov/owow/nps/wetmeasures/ (Doc. #15016, p. 69)

U.S. Environmental Protection Agency. July 2005. *Riparian Areas for the Abatement of Nonpoint Source Pollution*. Available at http://www.epa.gov/owow/nps/wetmeasures/ (Doc. #15016, p. 69)

U.S. Environmental Protection Agency. December 1999, rev. December 2005. Fact Sheet 2.2 (EPA 833-F-00-004), *Storm Water Phase II Final Rule, Urbanized Areas: Definition and Description.* Available at http://cfpub.epa.gov/npdes/stormwater/swfinal.cfm. (Doc. #19540, p. 107)

U.S. Environmental Protection Agency. 2011. "A Strategic Agenda to Protect Waters and Build More Livable Communities Through Green Infrastructure." http://water.epa.gov/infrastructure/greeninfrastructure/upload/gi_agenda_protectwaters.pdf (Doc. #15186, p. 5; Doc. #19540, p. 109)

U.S. Environmental Protection Agency. Apr. 2011. *Draft Guidance on Identifying Waters Protected by the Clean Water Act.* Available at http://www.epa.gov/tp/pdf/wous_guidance_4-2011.pdf. (Doc. #15536, p. 27)

U.S. Environmental Protection Agency. 2012. Drinking Water Contaminants. http://water.epa.gov/drink/contaminants/#List; SDWA, 42 U.S.C. § 300(f)(1)(c)-(d) (Doc. #15431, p. 12)

U.S. Environmental Protection Agency. April 2013. *Environmental Assessment for the Proposed Effluent Limitation Guidelines and Standards for the Steam Electric Power Generating Point Source Category 3-14,* Docket No. EPA-HQ-OW-2009-0819-2260. (Doc. #16413, p. 63)

U.S. Environmental Protection Agency, September 2013. *Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (External Review Draft, EPA/600/R-11/098B). (Doc. #14564, p. 16; Doc. #9842, p. 30; Doc. #13029, p. 49; Doc. #15372, p. 29)

U.S. Environmental Protection Agency Science Advisory Board Review (Doc. #14564, p. 11, 12, & 13; Doc. #15372, p. 29 & 30; Doc. #19569, p. 5; Doc. #15210, p. 2; Doc. #15383, p. 4; Doc. #16394, p. 12; Doc. #16413, p. 56; Doc. #17444)

U.S. Environmental Protection Agency. May 2014. *EPA-821-R-14-001, Economic Analysis for the Final Section 316(b) Existing Facilities Rule*. Available at http://water.epa.gov/lawsregs/lawsguidance/cwa/316b/upload/Cooling-Water_Phase-4_Economics_2014.pdf. (Doc. #15016, p. 29)

U.S. Environmental Protection Agency. July 2, 2014. *Water: Best Management Practices, Post-Construction Stormwater Management in New Development & Redevelopment.* http://water.epa.gov/polwaste/npdes/swbmp/PostConstruction-Stormwater-Management-in-New- Development-and-Redevelopment.cfm. (Doc. #15016, p. 69)

U.S. Environmental Protection Agency. 2014. Sole Source Aquifer Protection Program. http://water.epa.gov/infrastructure/drinkingwater/sourcewater/protection/solesourceaquifer.cfm (Doc. #15431, p. 13)

U.S. Environmental Protection Agency & U.S. Army Corps of Engineers. *Questions and Answers – Waters of the U.S. Proposal.* Available at http://www2.epa.gov/uswaters/questions-and-answers-about-waters-us-proposal-pdf. (Doc. #13029, p. 44; Doc. #15186, p. 6; Doc. #19540, p. 106; Doc. #19540, p. 108)

U.S. General Accounting Office. February 2004. *Waters and Wetlands: Corps of Engineers Needs to Evaluate its District Office Practices in Determining Jurisdiction*. (Doc. #16652, p. 5)

U.S. Geological Survey. Comparison of Dissolved Atrazine in Select Principal Aquifers, http://water.usgs.gov/nawqa/studies/praq/images/ComparisonGraphics/atrazine.jpg. (Doc. #15431, p. 5)

U.S. Geological Survey. 1998. Ground Water and Surface Water, A Single Resource. U.S. Geological Survey Circular 1139. Available at http://pubs.usgs.gov/circ/circ1139/#pdf. (Doc. #15431, p. 3)

U.S. Geological Survey. 1999. Sustainability of Ground-water Resources: U.S. Geological Survey Circular 1186. (Doc. #15431, p. 14)

U.S. Geological Survey. 2009. Southwest Principal Aquifers Regional Ground-Water Quality Assessment. Available at http://pubs.usgs.gov/fs/2009/3015/pdf/fs2009-3015.pdf. (Doc. #15431, p. 5)

U.S. Government Accountability Office. 2011. Improvements in Implementation are Needed to Better Assure the Public of Safe Drinking Water GAO-11-803T. Available at http://www.gao.gov/products/GAO-11-803T. (Doc. #15431, p. 13)

U.S. Government Accountability Office. 2014. EPA Has Improved Its Unregulated Contaminant Monitoring Program, but Additional Action Is Needed GAO-14-103. Available at http://www.gao.gov/products/GAO-14-103. (Doc. #15431, p. 13)

U.S. House of Representatives. http://science.house.gov/epa-maps-state-2013#overly-context. (Doc. #16170, p. 3)

U.S. v. Moses. 496 F.3d (9th Cir. 2007) (Doc. #14564, p. 15)

United States v. Riverside Bayview Homes, 474 U.S. (1985). (Doc. #15233, p. 2; Doc. #18793, p. 5)

United States v. TGR Corp., 171 FJd (2d Cir. 1999) (Doc. #10750, p. 15; Doc. #17921.1, p. 71)

Utility Air Regulatory Group v. EPA, 134 S. Ct. (2014) (Doc. #15228, p. 8)

U.S. Department of Agriculture , Farm Service Agency. "Conservation Reserve Program ." http://www.fsa.usda.gov/FSA/webapp?area=home&subject=copr&topic=crp (Doc. #13024, p. 8)

U.S. Department of Agriculture. "2012 Census of Agriculture." http://www.agecensus.usda.gov/Publications/2012/Full_Report/Volume_1_Chapter _1_US/. (Doc. #13024, p. 21)

United States Department of Transportation Federal Aviation Administration and United States Department of Agriculture Animal and Plant Health Inspection Service Wildlife Services. Memorandum of Understanding. June 2005 http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1015&context=birdstrikeother (Doc. #14766, p. 2)

Valdes v. United States. 475 F.3d (D.C. Cir. 2007) (Doc. #14564, p. 15)

Vermont NRCS. *Wetland Fact Sheet - Prior Converted Cropland.* http://www.vt.nrcs.usda.gov/programs/Wetland_Compliance/Wetland%20Fact%20Sheet%20-%20Prior%20Converted%20Cropland.htm (Doc. #14738.1, p. 6)

Virginia Administrative Code. 9 VAC 25-31-10. (Doc. #18821, p. 3)

Virginia DOT v. EPA, 2013 WL 53741 (E.D. Va., Jan. 3, 2013) (Doc. #15161, p. 8)

Votteler, Todd H. and Thomas A. Muir. "Wetland Management and Research - Wetland Protection Legislation." *National Water Summary on Wetland Resources*. United States Geological Survey Water Supply Paper 2425. http://water.usgs.gov/nwsum/WSP2425/legislation.html (Doc. #14738.1, p. 4)

Washington Revised Code §78.44.111 (Doc. #14412, p. 50)

Williams, Marcia, EPA Office of Solid Waste Director. Apr. 2, 1986. Memo to James H. Scarbrough, EPA Region IV Residuals Management Branch Chief, attachment B. (Doc. #15123, p. 12; Doc. #15437, p. 59; Doc. #16537, p. 5)

Williams, W. June 11, 2014. Potential Impacts of the Proposed Changes to the Clean Water Act Jurisdictional Rule. Written Statement On Behalf of the National Association of Counties and the National Association of Flood and Stormwater Management Agencies Before the House Transportation and Infrastructure Committee's Subcommittee on Water Resources and the Environment. Washington, DC. (Doc. #15140, p. 10)

Wilcher, LaJuana S., EPA Assistant Administrator. Oct. 2, 1992. Memorandum to Charles E. Findley, Director, Water Div., Region X, U.S. Army Corps of Eng'rs, on Clean Water Act Regulation of Mine Tailings Disposal. (Doc. #10750, p. 6; Doc. #15123, p 13; Doc. #15437, p. 60; Doc. #15377, p. 4; Doc. #16537, p. 6)

Wisconsin Department of Natural Resources, Gogebic Taconite, LLC, potential mining project, available at http://dnr.wi.gov/topic/mines/gogebic.html. (Doc. #16645, p. 7)

Wisconsin Department of Natural Resources. October 2006. Waters designated in 2006 as Exceptional or Outstanding Resource Waters. Available at http://dnr.wi.gov/topic/SurfaceWater/oerw/list1006.pdf (Doc. #16645, p. 7)

West Virginia Coal Association v. Reilly. 728 F. Supp. (S.D. W.Va. 1989). (Doc. #15123, p. 12; Doc. #15437, p. 59; Doc. #15377, p. 3 & 4; Doc. #16537, p. 5; Doc. #17921.1, p. 71; Doc. #19540, p. 112)

West Virginia Code 8 22-3-1 (Doc. #15415, p. 14)

West Virginia Code 22-4-1 (Doc. #15415, p. 14)

West Virginia Horizontal Well Control Act, W.Va. Code 9 22-6A-1 (Doc. #15415, p. 14)

West Virginia Quarry Reclamation Act, W.Va. Code § 22- 4-1, et seq. (Doc. #15415, p. 13)

http://wisconsinwatch.org/2014/10/judge-blames-toxic-kewaunee-county-wells-on-massive-regulatory-failure/. (Doc. #16344, p. 5)

Wood, Mary Christina. 1988. *Regulating Discharges into Groundwater: The Crucial Link in Pollution Control Under the Clean Water Act*. Harv. Envtl. L. Rev. (Doc. #15431, p. 20)

SUPPLEMENTAL REFERENCES:

Anna Makowski, Beneath the Surface of the Clean Water Act: Exploring the Depth of the Act's Jurisdictional Scope of Groundwater Pollution, Oregon Law Review, volume 91, issue 2, 2012. p. 507 (Doc. #8323, p. 2)

Brian Knutsen, *Asserting Clean Water Act Jurisdiction Over Isolated Waters: What Happens After the SWANCC Decision*, 10 Alb. L. Envtl. Outlook J. 155, 194 (2005). (Doc. #6761, p. 2)

Claudia Copeland, EPA and the Army Corps' Proposed Rule to Define "Waters of the United States", Congressional Research Service, September 10, 2014, p. 6. (Doc. #8323, p. 2)

Committee on Valuing Ground Water, National Research Council, Valuing Ground Water: Economic Concepts and Approaches, 1997. p. 122. (Doc. #8323, p. 2)

Environmental Law Institute, State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act, May 2013. p. 12. (Doc. #8323, p. 3)

Hawai'i Wildlife Fund v. County of Maui (Doc. #15053, p. 12)

Hernandez v. Esso Standard Oil Company, 599 F. Supp. 2d 175, 180 (D.P.R. 2009). (Doc. #6761, p. 6)

Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1179 (D. Idaho 2001). (Doc. #6761, p. 6)

Mary Christina Wood, *Regulating Discharges into Groundwater: The Crucial Link in Pollution Control Under the Clean Water Act*, 12 Harv. Envtl. L. Rev. 569, 576 (1988). (Doc. #6761, p. 2)

Memorandum from Dr. Amanda Rodewald to Dr. David Allen, Comments to the chartered SAB on the Adequacy of the Scientific and Technical Basis of the Proposed Rule Titled "Definition of 'Waters of the United States" Under the Clean Water Act." (September 2, 2014). Available at: http://yosemite.epa.gov/sab/sabproducts.nsf/F6E197AC88A38CCD85257D49EDC/$File/Rodewald_Memorandum_WOUS+Rule_9_2_14.pdf
(Hereinafter SAB Review Memo) and SAB Rule Review Letter. (Doc. #15015, p. 4)

NASA and University of California, Irvine, study, "Satellite Study Reveals Parched U.S. West Using up Underground Water", press release, July 24, 2014,

http://www.nasa.gov/press/2014/july/satellite-study-reveals-parched-us-west-using-up-underground-water/#.VDmcg0vHiQQ. Last visited, October 13, 2014. (Doc. #8323, p. 2)

National Ass'n of Manufacturers v. Dept. of Labor (Doc. #15053, p. 15)

Natural Res. Def. Council, Inc. v. Costle (Doc. #15053, p. 15)

Nat'l Treasury Emps. Union v. Chertoff (Doc. #15053, p. 15)

N.G. GRANNEMANN, R.J. HUNT, J.R. NICHOLAS, T.E. REILLY, & T.C. WINTER, U.S. GEOLOGICAL SURVEY: THE IMPORTANCE OF GROUND WATER IN THE GREAT LAKES REGION 1 (2000). (Doc. #6761, p. 4)

Rapanos v. United States, 547 U.S. 715 (2006) (Doc. #8323, p. 3)

Robert L. Glicksman & Matthew R. Batzel, Science, Politics, Law, and the Arc of the Clean Water Act: The Role of Assumptions in the Adoption of a Pollution Control Landmark, 32 Wash. U. J.L. & Pol'y 99, 112 (2010). (Doc. #6761, p. 5)

S.D. Warren Co. v. Maine Bd. of Envtl. Prot., 547 U.S. 370, 379 n.5 (2006) (Doc. #15053, p. 15)

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC), 531 U.S. 159 (2001) (Doc. #8323, p. 3)

Susan Griffithe, Isolating the Problem by Finding the Connection: The Proper Approach to Regulating Groundwater Under the Clean Water Act: *Idaho Rural Council v. Bosma*, 143 F. Supp. 2D 1169 (D. Idaho 2001), 27 S. Ill. U. L.J. 437, 450 (2003). (Doc. #6761, p. 6)

Thomas C. Winter, Judson W. Harvey, O. Lehn Franke, & William M. Alley, *Ground Water and Surface Water: A Single Resource: U.S. Geological Survey Circular 1139*, VI (1998), available at: http://pubs.usgs.gov/circ/circ1139/pdf/circ1139.pdf. (Doc. #6761, p. 8)

U.S. v. Moses (Doc. #15053, p. 15)

U.S. EPA Science Advisory Board, SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, EPA-SAB-15-001, at 46 (Oct 17, 2014) (hereinafter "SAB Connectivity Review"), available at http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/AF1A28537854F8AB85257D74005003D2/$File/EPA-SAB-15-001+unsigned.pdf (Doc. #15015, p. 4)

U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (2013), available at: http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Watershed Connectivity Report?OpenDocument . (Doc. #6761, p. 4)

U.S. Environmental Protection Agency, What is a Watershed? (2012), available at: http://water.epa.gov/type/watersheds/whatis.cfm. (Doc. #6761, p. 5)

U.S. Geological Survey. http://www.ewg.org/agmag/2013/04/epa-study-points-ag-pervasive-river-pollution. (Doc. #8323, p. 7)

United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) (Doc. #6761, p. 5)

Valdes v. United States (Doc. #15053, p. 15)

W.E. Sanford, J.S. Caine, D.A. Wilcox, H.C. McWreath, & J.R. Nicholas, *Research Opportunities in Interdisciplinary Ground-Water Science in the U.S. Geological Survey* (January 11, 2013), available at: http://pubs.usgs.gov/circ/circ1293/circ1293.html. (Doc. #6761, p. 3)