

**Revised Definition of “Waters of the United States”
Response to Comments Document
SECTION 14 – DITCHES**

See the Introduction to this Response to Comments Document for a discussion of the U.S. Environmental Protection Agency and the U.S. Department of the Army’s (hereinafter, the agencies’) comment response process and organization of the eighteen sections.

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14 DITCHES

14.1 Clarity of the Ditch Exclusion

14.1.1 General support for the exclusion

Several commenters discussed whether the agencies should address ditches in the regulatory text, preamble, or guidance. Among these were several commenters who stated generally that excluding ditches would provide certainty, reduce costs, and reduce the amount of time needed to determine whether a feature is jurisdictional.

Multiple commenters identified specific stakeholders (*e.g.*, transportation, agriculture, construction, mining) for which a lack of clarity regarding jurisdiction of ditches is troublesome due to increased costs and time spent to determine whether a ditch is jurisdictional. For example, a commenter wrote that ditches are often part of green infrastructure and unclear jurisdiction of ditches may inhibit the future adoption of green infrastructure due to the increased cost and time spent on determining the ditch's exclusion status.

Several commenters stated that they need clarity, regulatory certainty, and durability and that leaving the regulatory status of ditches to guidance will lead to confusion, disagreements, and litigation. A few commenters suggested adding additional details on ditch exclusions to the regulations, not just the preamble.

Agencies' Response: The agencies agree with commenters who stated that excluding certain ditches from the definition of “waters of the United States” provides clarity. The agencies also agree with commenters who stated that codifying the ditch exclusion in the regulatory text would provide further clarity. As described in Final Rule Preamble Section IV.C.7.c.i.(1), the agencies are codifying an exclusion for ditches (including roadside ditches) excavated wholly in and draining only dry lands and that do not carry a relatively permanent flow of water. The agencies, in this rule, are continuing the approach described in the *Rapanos* Guidance¹ and are codifying that approach in the regulatory text to provide clarity and certainty. In response to the specific implementation concerns for various sectors of the regulated community (*e.g.*, agriculture, transportation, mining, etc.) created by an unclear or uncertain ditch exclusion, as discussed in Preamble Section IV.C.7.c.i.(3), the agencies believe that codifying the ditch exclusion the regulatory text aids implementation for all sectors of the regulated community. Specifically, the exclusion simplifies the approved jurisdictional determination process and makes it more straightforward for agency staff to implement the rule and for the public to determine whether certain features are subject to federal jurisdiction.

The agencies acknowledge a commenter's statement that unclear jurisdiction of ditches where the ditches are part of green infrastructure may inhibit implementation of green infrastructure practices. In response to this and other similar comments, the final rule codifies the ditch exclusion, clarifying the jurisdiction of ditches. The final rule's codification of an exclusion for ditches in the regulatory text will provide clarity and

¹ U.S. EPA and U.S. Army Corps of Engineers, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* (June 5, 2007).

certainty that will assist the public in implementing green infrastructure and stormwater best management practices where there is overlap with jurisdictional and excluded ditches.

14.1.2 Comments requesting greater clarity

Multiple commenters suggested clarifying various aspects of the ditch exclusion or generally requested that the agencies provide a definition for “ditch.”

A commenter suggested that the agencies should provide additional clarification regarding ditches unless the intent is to expand jurisdiction beyond current practice (*i.e.*, according to the *Rapanos* Guidance) because the proposed rule ditch exclusion seems to exclude all ditches with intermittent flow while the proposed rule preamble only identifies existing practice to exclude upland ephemeral ditches.

A commenter suggested that adding a separate definition for jurisdictional ditches would be helpful to provide clarity. Another commenter questioned what “excavated wholly in and draining only uplands” means and noted that the agencies do not define what “uplands” means. This commenter also asked what the phrase “do not carry relatively permanent water” means.

Several commenters discussed the relationship between tributaries and ditches. Similarly, a commenter requested a clear distinction between streams and ditches.

Another commenter questioned what happens when there are water rights over ditches that are owned by someone but run across another person’s property.

Agencies’ Response: As described in the agencies’ response to comments in Section 14.1.1, the Final Rule Preamble Section IV.C.7 explains that the final rule’s codification of the exclusion for ditches in the regulatory text promotes certainty and clarity. Final Rule Preamble Section IV.C.7.c.i provides additional information in response to the public comments requesting clarification regarding the ditch exclusion. This includes the meaning of the phrases “wholly in and draining only dry land,” “do not carry a relatively permanent flow of water,” and the Final Rule’s use of “dry land” in place of “upland,” as well as further describing the phrase “do not carry a relatively permanent flow of water” regarding the ditch exclusion and the flow conditions needed to satisfy that meaning.

The term “ditch” is not specifically defined in the rule. The agencies considered several options for addressing the definition of ditches, but ultimately concluded that a definition of ditch may increase rather than decrease potential confusion. In reviewing the comments on the proposed rule, it is clear that the terminology surrounding ditches varies widely across different regions. Instead, the agencies will continue to rely on their existing practice of addressing the regulatory status and requirements with respect to ditches on a case-specific basis, along with the additional clarity of moving the exclusion to regulatory text.

In response to commenters requesting clarification of the distinction between ditches and tributaries (or streams), the agencies recognize that tributaries, streams, and ditches are closely related, and further discussion of this distinction is found in the Final Rule Preamble Section IV.C.7.c.i.(3).

In response to the commenter’s question regarding water rights, this comment is outside the scope of this rulemaking because it relates to water rights law rather than the definition of “waters of the United States.” See also the agencies’ response to comments in Section 2.

14.1.3 Case-by-case approach to implementing the exclusion

Several commenters stated that the case-by-case nature of the ditch exclusion reduces clarity.

Of these, one commenter wrote that it appears that each ditch must be evaluated as a tributary on a case-by-case basis using the *Rapanos* Guidance which lacks clarity for landowners, and that it could become onerous and time consuming for the agencies to make jurisdictional determinations. Multiple commenters stated that counties are responsible for maintaining ditches and failing to do so promptly could lead to flooding, property damage, and loss of crops. Commenters asserted the provisions related to ditches in the proposed rule are unclear and other entities (*e.g.*, counties) will need to work with the agencies on a case-by-case basis to determine if a ditch is jurisdictional. These commenters also stated that the approach articulated in the proposed rule could have significant negative economic impacts on private property and agricultural fields; however, specific examples of such impacts were not provided.

A couple of commenters discussed the application of the significant nexus standard to ditches. A commenter argued that among the definitional issues that posed practical problems prior to the 2020 NPWR were “ditch” determinations using a two-part test (including the significant nexus standard) that created confusion with upland exclusions. Another commenter wrote that requiring jurisdictional determinations for ditches based on the relatively permanent or the significant nexus standard (excavated wholly in and draining only uplands that do not carry relatively permanent flow) would be an overreach and an unnecessary burden.

Agencies’ Response: The Agencies disagree with commenters who asserted that the ditch exclusion, which includes a case-specific analysis, reduces clarity. Under the Final Rule’s ditch exclusion, the agencies exclude ditches that were excavated wholly in and draining only dry lands and that do not carry a relatively permanent flow of water. However, even where a ditch is not excluded, it is only jurisdictional if it satisfies the terms of the categories of waters that are considered jurisdictional under this rule. For example, a ditch that is not excluded, but does not satisfy either the relatively permanent or significant nexus standard would not be jurisdictional under this rule.

The agencies acknowledge the need for case-specific analyses will continue under this rule for certain jurisdictional determinations, including jurisdictional determinations for some ditches, potentially raising some timeliness and consistency issues that the agencies’ rules in 2015 and 2020 were designed, in part, to reduce. The agencies also acknowledge that the final rule will require significant nexus standard determinations on some ditches to determine if they are jurisdictional as other categories of waters where they don’t meet the ditch exclusion criteria. Yet, as discussed in Final Rule Preamble Section IV.A.3, the agencies find that fact-based standards for determining Clean Water Act jurisdiction are appropriate and not unique to the definition of “waters of the United States.” The agencies have provided more clarity in this rule by: adding limitations to the scope of the definition to the rule text; adding a definition of “significantly affect” that identifies the functions and factors to be evaluated as part of a significant nexus analysis; adding exclusions to the rule;

restructuring and streamlining the 1986 regulations; and drawing on more than a decade of post-*Rapanos* implementation experience to provide additional implementation guidance and resources. These improvements, taken together, substantially reduce any inefficiencies that may be presented by the rule’s case-specific approach.

In response to commenters’ statements that case-specific implementation of the ditch exclusion and requiring a significant nexus determination for some ditches could have negative economic impacts, the agencies acknowledge that there are indirect costs—both monetary and temporal—associated with implementation of the final rule. Indeed, there are indirect costs associated with implementation of all prior rules defining “waters of the United States.” See also the agencies’ response to comments in Section 17. In addition, in comparison to the regulatory regime that the agencies are implementing now and have been implementing for most of the past 15 years, the agencies’ primary estimate is that the draft final rule will have *de minimis* impact. See the Economic Analysis for the Final Rule.

Where the commenters refer to concerns that stakeholders would be unable to maintain ditches appropriately, the agencies note that since 1977 the Clean Water Act section 404(f) has exempted activities such the construction and maintenance of irrigation ditches and the maintenance of drainage ditches. This rule does not affect the Act’s statutory exemptions. Comments regarding these statutory, activity-based exemptions from Clean Water Act permitting requirements are outside the scope of this rulemaking.

14.1.4 Consistency with *Rapanos*

Multiple commenters questioned whether the proposed ditch exclusion was consistent with *Rapanos*².

A commenter wrote that the proposed rule’s approach to ditches is overbroad and vague, and could lead to wide regulation of ditches, drains, and streams because the “relatively permanent” standard in the rule may be inconsistent with the *Rapanos* plurality opinion and because the duration of water flow may be interpreted as a shorter time frame under the rule than under the *Rapanos* plurality.

Another commenter questioned whether ditches connecting with a wetland are jurisdictional. This commenter indicated that asserting jurisdiction over a ditch violates the *Rapanos* Guidance because the “*Rapanos* Guidance . . . indicates that the agencies will not assert jurisdiction over swales, ditches, and gullies.”

Agencies’ Response: The agencies disagree with commenters’ assertions that the proposed rule’s treatment of ditches is inconsistent with the *Rapanos* decision or the *Rapanos* Guidance. The agencies are exercising the authority granted to them by Congress to construe and implement the Clean Water Act and to interpret an ambiguous term and its statutory definition. While the agencies’ interpretation of the statute is informed by Supreme Court decisions, including *Rapanos*, it is not an interpretation of the multiple opinions in *Rapanos*, nor is it based on an application of the Supreme Court’s principles to derive a governing rule of law from a decision of the Court in a case such as *Rapanos* where “no opinion commands a majority.” See Final Rule Preamble Section IV.A.1. With the

² *Rapanos v. United States*, 547 U.S. 715 (2006) (“*Rapanos*”)

signing of this final rule, the *Rapanos* Guidance is no longer in effect. Though the agencies are not relying on the *Rapanos* Guidance for purposes of implementing the final rule, many aspects of the final rule, including the exclusion of certain ditches, are consistent with or similar to the approaches taken in the *Rapanos* Guidance. In fact, the final rule excludes “ditches (including roadside ditches) excavated wholly in and draining only dry lands and that do not carry a relatively permanent flow of water,” which is consistent with the language in the *Rapanos* Guidance regarding ditches.

Consistent with the *Rapanos* Guidance, if a ditch does not satisfy the terms of the exclusion, it would be jurisdictional only if it otherwise meets the definition of “waters of the United States” under this rule. Likewise, the approach to flow regime and relatively permanent waters under this final rule is consistent with the *Rapanos* decision. See section IV.A.3.a.ii of the Final Rule Preamble for further discussion of the relatively permanent standard.

The agencies disagree with the commenter who asserted that the *Rapanos* Guidance indicated that the agencies would not assert jurisdiction over ditches. As noted above, the *Rapanos* Guidance indicated that *certain* ditches were not jurisdictional and the final rule continues that approach. Further, consistent with the *Rapanos* Guidance, the final rule regulatory language also excludes “[s]wales and erosional features . . .” including gullies.

In response to the commenter’s question of whether a ditch that connects with a wetland is jurisdictional, if such ditch does not meet the criteria for an exclusion category, a case-specific assessment would be made to determine if the ditch is jurisdictional under another category of “water of the United States.”

14.2 Alternative Approaches to Excluding Ditches

Several commenters suggested alternate approaches to the regulation of ditches. Suggested approaches included reinstating previous approaches, as well as novel ditch exclusion criteria and categories of excluded ditches.

14.2.1 Retaining the 2020 NWPR ditch exclusion in whole or in part

Several commenters requested that the agencies retain the 2020 Navigable Waters Protection Rule’s (2020 NWPR) provisions, or similar provisions related to ditches, which they argued provided a balanced approach to regulation, protected water quality, and respected states’ roles. A commenter requested that a ditch be excluded by rule unless it:

- Reroutes an intermittent or perennial tributary; or
- Runs through an adjacent wetland, defined as wetland that matches the definition found in the rule and existed prior to ditch development and not as a result of ditch development.

Another commenter recommended that the following ditches be considered jurisdictional, providing other qualifying criteria for regional field interpretation are met:

- Ditches created in uplands which have perennial or intermittent flow and which are connected to other waters with intermittent or perennial flow;
- Natural streams which are relocated, as may occur to protect infrastructure, should also retain status as “waters of the United States;”

- Ditches which have characteristics of regulated waters, including wetlands, which otherwise would be jurisdictional; or
- Ditches with tidal flow.

A commenter stated that ditches with intermittent or ephemeral flow that are not a relocated tributary, excavated in a tributary, or constructed to drain wetlands and should be excluded. Another commenter wrote that a ditch connecting a wetland to a traditional navigable water should not be jurisdictional just because of the connection.

Agencies’ Response: The agencies disagree with the commenters’ general assertion that the ditch exclusion criteria in the 2020 NWPR should be reinstated. In developing the final rule ditch exclusion, the agencies thoroughly considered alternatives to this rule, including the 2020 NWPR, and have concluded that the final rule’s treatment of ditches best accomplishes the agencies’ goals to promulgate a rule that advances the objective of the Clean Water Act, is consistent with Supreme Court decisions, is informed by the best available science, and promptly and durably restores vital protections to the nation’s waters. See Section IV.B.3 of the Preamble to the Final Rule and the agencies’ response to comments in Section 4 for further discussion of the agencies’ grounds for concluding that the 2020 NWPR is not a suitable alternative to the final rule. In particular, the final rule’s ditch exclusion is clearer than that in the 2020 NWPR because it will provide more consistent federal protection of ditches that function as tributaries than the 2020 NWPR, which excluded many intermittent and ephemeral ditches that exert a strong influence on the chemical, physical, and biological integrity of larger downstream waters, including traditional navigable waters, the territorial seas, and interstate waters (*i.e.*, paragraph (a)(1) waters).

Under the final rule, ditches are excluded if they are “excavated wholly in and draining only dry lands and do not carry a relatively permanent flow of water.” A ditch would not be jurisdictional based solely on its connection to a traditional navigable water. However, if a ditch does not satisfy the terms of the exclusion, it would be jurisdictional if it otherwise meets the requirements of one of the categories of jurisdictional waters under the final rule regulatory text.

The agencies recognize that some commenters prefer the 2020 NWPR flow regime criteria for the ditch exclusion (referring to intermittent and perennial flow) over the proposed rule criteria (relatively permanent flow). However, as described in final rule Preamble Section IV.C.7, the flow or standing water criteria in the final rule is consistent with the pre-2015 regulatory regime. Relatively permanent flow is further discussed in Final Rule Preamble Section IV.C.4.c.ii.

14.2.2 Alternative ditch exclusion provisions excluding more ditches

Several commenters suggested other alternatives to the proposed ditch exclusion that would exclude more ditches:

- A commenter recommended an additional exclusion for ditches that are part of a previously permitted surface or stormwater system instead of the potential broad interpretation of tributary or other water.

- Several commenters wrote that the agencies should make it clear that upland ditches are non-jurisdictional regardless of whether the ditch contributes flow, directly or indirectly, to a “water of the United States.”
- One commenter suggested excluding ditches as long as they are not constructed in “waters of the United States” and suggested excluding all water features associated with agricultural lands.
- Several commenters requested that non-tidal, upland ditches be excluded.

Agencies’ Response: The agencies disagree with commenters who suggested expanding the scope of the ditch exclusion. In developing the final rule, the agencies have concluded that the final rule’s treatment of ditches best accomplishes the agencies’ goals to promulgate a rule that advances the objective of the Clean Water Act, is consistent with Supreme Court decisions, is informed by the best available science, and promptly and durably restores vital protections to the nation’s waters.

Regarding commenters’ suggestions referring to upland ditches and contribution of flow, under the final rule regulatory text, the agencies exclude ditches that were “excavated wholly in and draining only dry lands and that do not carry a relatively permanent flow of water.” The agencies evaluate other ditches to see if they are jurisdictional as another category of “water of the United States,” such as tributaries. For example, a ditch that does not contribute flow to a “water of the United States” would likely not be jurisdictional as a tributary; however, it could still be considered for potential jurisdiction as a paragraph (a)(5) water. See Section 11 of the agencies’ response to comments for more information on paragraph (a)(5) waters.

In response to the commenter’s suggestion to exclude ditches as part of a previously permitted surface or stormwater system, as explained in Final Rule Preamble Section IV.C.7, the agencies are not including exclusions for stormwater control features and other additional features beyond those longstanding exclusions and historically non-jurisdictional features identified in the proposed rule. However, even for features that are not explicitly excluded, the agencies will continue to assess jurisdiction under this rule on a case-specific basis.

Regarding the commenter’s suggestion to exclude non-tidal, upland ditches, as mentioned above, the final rule excludes ditches that were “excavated wholly in and draining only dry lands and that do not carry a relatively permanent flow of water.” Additionally, the final rule exclusion for ditches only applies to non-tidal ditches that meet these conditions. See the description of the agencies’ consistent use of “dry land” rather than “upland” in regulatory text in Final Rule Preamble Section IV.C.7

In response to the commenter’s suggestion to exclude all water features associated with agricultural lands, the agencies note Clean Water Act section 404(f) already provides an exemption from permit requirements for normal farming activities, maintenance of drainage ditches, and construction and maintenance of irrigation ditches. There are also several statutory and regulatory exemptions from National Pollutant Discharge Elimination System (NPDES) permitting requirements related to agricultural lands, such as those for return flows from irrigated agriculture (Clean Water Act section 402(l)(1)), and

agricultural stormwater discharges (Clean Water Act section 502(14)). Comments suggesting expanding these exemptions are outside of the scope of this rulemaking.

14.2.3 Specific ditch exclusion categories

Several commenters suggested excluding ditch categories identified by their purpose, use, or other characteristic, including the following:

- Roadside ditches;
- Railroad ditches;
- Artificial channels that are used to convey water;
- Ditches or canals that carry irrigation or other water;
- Ditches associated with stormwater;
- Ditches associated with MS4 systems;
- Ditches associated with mining activities;
- Ditches used for flood control;
- Ditches associated with water supply infrastructure;
- Ditches used for agricultural purposes;
- Man-made ditches;
- Maintenance of ditches associated with public works and public safety; and
- Acequias (community irrigation ditches).

Regarding the specific category of roadside ditches, a commenter wrote that roadside ditches should not be considered “waters of the United States” but should be overseen by state and local transportation, environmental, and natural resource agencies since they are already familiar with the projects.

Agencies’ Response: Many of the categories of ditches that commenters suggested excluding are based on the use or purpose of the ditch. While the final rule excludes some ditches due to their designed use (e.g., ditches that are part of an excluded waste treatment system), the final rule generally excludes ditches based on the same criteria described in the *Rapanos* Guidance. The intent of the final rule’s ditch exclusion is to maintain consistency with the approach in the *Rapanos* Guidance and, as such, the final rule’s criteria focus on the functional indicators of the ditch (e.g., flow duration, whether it drains another “waters of the United States”) rather than the use. Nonetheless, ditches associated with the uses described by commenters may be excluded from jurisdiction if they satisfy the terms of the final rule’s ditch exclusion.

In response to the comment suggesting that ditch regulation should be overseen by state or local agencies, the agencies note states and tribes may establish more protective standards or limits than the Clean Water Act to manage waters subject to Clean Water Act jurisdiction or waters that fall beyond the jurisdictional scope of the Act and may choose to address special concerns related to the protection of water quality and other aquatic resources within their borders. Nothing in this final rule limits or impedes any existing or future state or tribal efforts to further protect their waters.

14.2.4 Other approaches to ditch jurisdiction

Several commenters suggested other potential approaches to a ditch exclusion.

- A commenter suggested a blended approach to ditches excluding some ditches, but the definition of “waters of the United States” would include ditches that have physical characteristics of a tributary or meet the significant nexus standard and provide flow to a foundational³ water.
- A few commenters suggested that there should not be an exclusion if the ditch functions as a tributary. One commenter elaborated that if a ditch is connected to another jurisdictional water, regardless of its flow regime, the ditch should be considered jurisdictional because it has the potential to affect the water quality of downstream waters. The commenter expressed that ditches that are not hydrologically connected to other jurisdictional waters can easily be excluded from jurisdiction.
- A few commenters stated that ditches were not historically under federal Clean Water Act jurisdiction and requested that ditches constructed prior to 1972 should be excluded from jurisdiction. Others suggested that ditches constructed lawfully prior to promulgation of regulations that would subject that type of ditch to coverage under a new rule should be excluded.
- A commenter recommended that unregulated ditches which nonetheless serve as connections between “waters of the United States” should be considered as providing a continuous surface connection.

Agencies’ Response: See Response 14.2.2 above describing why the agencies are generally codifying existing guidance and practice rather than creating a new approach.

The final rule’s ditch exclusion is consistent with the *Rapanos* Guidance ditch exclusion, as described in Response 14.1.4 above, and the result is that many ditches that function as tributaries, and exhibit the characteristics of a tributary, would not be excluded. However, a ditch that is not hydrologically connected to another jurisdictional water would not be jurisdictional as a tributary.

The Final Rule Preamble Section IV.C.4 on tributaries describes the agencies’ use of the term “relatively permanent waters” rather “ephemeral, intermittent, and perennial” to refer to flow regime that applies to tributaries and ditches.

The agencies disagree with the general assertion that ditches were not historically included in the definition of “waters of the United States.” Importantly, certain ditches have historically been jurisdictional as “waters of the United States” under the pre-2015 regulatory regime, 2015 Clean Water Rule, 2019 Repeal Rule, and 2020 NWPR. Accordingly, the agencies disagree that the final rule subjects ditches to regulation for the first time. Similarly, U.S. Courts of Appeals have consistently held that, for purposes of the regulatory definition of “waters of the United States,” a man-made ditch can be a jurisdictional “water of the United States.” See, e.g., *United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 805-806 (7th Cir. 2005); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993,

³ In the proposed rule, the term “foundational waters” was used to refer to traditional navigable waters, the territorial seas, and interstate waters. In this response to comments, the agencies will preserve the use of the term “foundational waters” as used by commenters; however, responses will use “traditional navigable waters, the territorial seas, and interstate waters” or “paragraph (a)(1) waters,” as the final rule does not use the term “foundational waters.”

1009 (11th Cir. 2004); *Treacy v. Newdunn Assocs.*, 344 F.3d 407, 417 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004); *United States v. Rapanos*, 339 F.3d 447, 449, 451-452 (6th Cir. 2003), cert. denied, 541 U.S. 972 (2004); *United States v. Deaton*, 332 F.3d 698, 710-712 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001); *United States v. Eidson*, 108 F.3d 1336, 1341-1342 (11th Cir.), cert. denied, 522 U.S. 899 and 1004 (1997); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325 (6th Cir. 1974). *But cf. In re Needham*, 354 F.3d 340, 347 (5th Cir. 2003) (“[T]he term ‘adjacent’ cannot include every possible source of water that eventually flows into a navigable-in-fact waterway.”). See Preamble to the Final Rule Section IV.C.7.c.i.2 for further discussion of why it would not be appropriate to exclude a broader set of ditches from the definition of “waters of the United States.”

The agencies agree with the commenter’s assertion that unregulated features, such as excluded ditches, should be considered when determining if there is a surface connection or a significant nexus to a traditional navigable water, the territorial seas, or an interstate water, and the final rule reflects this. See Preamble Section IV.C.7 on exclusions for an explanation of how non-jurisdictional features can serve as connections between “waters of the United States.”

14.3 Ditches as Point Sources

Multiple commenters argued that the proposed rule reinstates the position that a ditch can be both a “water of the United States” and a point source. These commenters suggested that a ditch that discharges to a “water of the United States” is either a tributary itself (*i.e.*, a “water of the United States”) or is a point source to “waters of the United States,” but it cannot be both.

A commenter suggested that instead of regulating more ditches, the agencies should rely on existing Clean Water Act section 402 to address discharges to navigable waters.

A commenter stated that agricultural stormwater discharges and return flows from irrigated agriculture are exempt from NPDES permitting and are excluded from the definition of “point source” under the Clean Water Act. This commenter argued that the proposed rule’s narrowing or loss of excluded ditches would make many of these ever-present and necessary farm conveyances jurisdictional, and it would make it difficult to apply fertilizers or pesticides even in dry ditches that would later carry water. This commenter stated that the agencies should follow the will of Congress and stop trying to expand their jurisdiction beyond what was granted. The commenter stated that agriculture cannot comply if every wet spot, or dry spot that can possibly carry or hold water, is regulated.

Agencies’ Response: The agencies disagree with the suggestion that a ditch can either be a point source to a “water of the United States” or a “water of the United States” itself, but not both. Final Rule Preamble Section IV.C.7.c.i.3, provides further explanation on the agencies’ position that a ditch can be both a point source and a “water of the United States.”

The agencies disagree with the commenter who suggested that instead of regulating more ditches, the agencies should rely on section 402 of the Act to address discharges to navigable waters. Importantly, the final rule maintains the approach to excluding ditches articulated

in the *Rapanos* Guidance and does not change the scope of the exclusion for ditches as the commenter suggests. Further, relying solely on section 402 of the Act would not sufficiently protect the chemical, physical, and biological integrity of the nation’s waters. For example, section 402 of the Act would not regulate the discharge of dredged or fill material into a ditch that would otherwise meet the definition of “waters of the United States.” As referenced by a commenter, there are several statutory and regulatory exemptions from NPDES permitting requirements, such as those for return flows from irrigated agriculture (Clean Water Act 402(l)(1); 502(14)); stormwater runoff from oil, gas, and mining operations (Clean Water Act 402(l)(2)); or agricultural stormwater discharges (Clean Water Act 502(14)). The final rule does not address those exemptions. Additionally, consistent with the agencies’ longstanding practice, non-exempt activities and non-exempt discharges may require Clean Water Act permits for discharges to jurisdictional waters, regardless of whether exempt activities also discharge into such waters.

The agencies disagree with the commenter’s assertion that the proposed rule’s ditch exclusion expands the scope of “waters of the United States,” hindering agricultural activities. The agencies reiterate that the final rule, including the rule’s approach to ditches, is founded on the familiar framework of the 1986 regulations and generally consistent with the pre-2015 regulatory regime. See Section 14.2.2 of this document.

14.4 Exempt Activities in Certain Ditches

Several commenters recommended keeping the 2019 guidance memo concerning exempt construction or maintenance of irrigation ditches in place regardless of any future rules. They requested that if this memo were to be rescinded, the agencies reinstate and use the “Army Corps Regulatory Guidance Letter (RGL) No. 07-02”.

A few commenters wrote that, under the proposed rule, drainage district infrastructure would potentially be under the jurisdiction of the Clean Water Act, thus requiring local entities to get permission from others (*e.g.*, state Department of Natural Resources, local trustees) to maintain, improve, or repair ditches.

Another commenter asserted that ditches are regulated under Clean Water Act section 404 with an exemption for ditch maintenance, but that has been applied inconsistently across the country and the commenter requests that this exemption be enforced under section 404.

Agencies’ Response: As described in Final Rule Preamble Section IV.C.7, the final rule does not alter requirements for permits for discharges of dredged or fill material into “waters of the United States,” nor does it alter the longstanding exemptions under Clean Water Act section 404(f) for activities such as construction and maintenance of irrigation ditches and the maintenance of drainage ditches, nor does it alter requirements for discharge permits under Clean Water Act section 402. Thus, the statutory exemptions under Clean Water Act section 404(f) (including the 2019 memo and now superseded RGL-07-2) are outside the scope of this rulemaking. Likewise, enforcement of the exemptions is outside the scope of this rulemaking. As noted in the final rule preamble, the agencies will continue to use the

2020 Ditch Exemption Memo when considering the application of exemptions from regulation under section 404(f)(1)(C) of the Clean Water Act.⁴

14.5 Other Comments Regarding Ditches

14.5.1 Historic status of the ditch

Several commenters discussed the process for ascertaining the historic status of a ditch that is used to determine if that ditch was excavated in dry land.

Among these, a few commenters asserted that the agencies should determine the historic status of a ditch by using sources such as land office maps along with input from people with local knowledge. One commenter expressed that determining whether a ditch was excavated in dry land would place an undue burden on the applicant.

Another commenter wrote that determining if a ditch was constructed in a wetland, tributary, or dry land could prove challenging, and the resulting increase in workload would lead to a reduction in efficiency in permitting and authorization determinations. Therefore, the commenter asserted that clear guidance on methods for such a determination is needed.

Agencies' Response: In response to the commenters' request for clear guidance on determining the historic status of a ditch (*i.e.*, whether it was excavated in dry land), as with any final regulation, the agencies will consider developing new guidance to facilitate implementation of the final rule should questions arise in the field regarding application of the final rule to best determine whether a ditch was excavated in dry land. Nevertheless, the agencies conclude that the final rule, together with the preamble and existing tools, provides sufficient clarity to allow consistent implementation of the final rule.

In addition, the agencies disagree with the commenter who asserted that having to demonstrate that a particular feature was constructed in dry land places an undue burden on the applicant. The exclusions in the final rule for features constructed in dry land are consistent with longstanding practice and are based on the 1980s preamble language for waters that were generally considered non-jurisdictional under pre-2015 practice. The approach in this rule thus does not represent a change in the burden of proof for determining if a particular feature has been constructed in dry land. Moreover, while the agencies evaluate whether any exclusions apply when making approved jurisdictional determinations for purposes of efficiency, the person asserting that the water at issue is excluded under the Clean Water Act or that the person's activities at issue in the case are exempt under the Act, may have information that is material to proving that the exclusion or exemption applies. There are circumstances where, absent this information from the requestor, the agency will be unable to determine that an exclusion applies. While the requestor is not required to provide information regarding applicability of the exclusions to the agencies during the jurisdictional determination process, it is to their benefit to do so

⁴ Available at https://www.epa.gov/sites/default/files/2020-07/documents/final_ditch_exemption_memo_july_2020_with_epa.pdf
https://www.epa.gov/sites/default/files/2020-07/documents/final_ditch_exemption_memo_july_2020_with_epa.pdf

because the person asserting that a water is excluded or that a person’s activities are exempt under the Act bears the burden of proving that the exclusion or exemption applies. *See, e.g., United States v. Akers*, 785 F.2d 814, 819 (9th Cir.) (“Akers must establish that his activities are exempt”). Where the agencies, based on the information that they have in the record, are unable to conclude that an exclusion applies, the agencies will assess the water to see if it meets the jurisdictional criteria of the rule under paragraphs (a)(1) through (5).

To improve implementation of the definition of “waters of the United States,” including implementation of the ditch exclusion, the Final Rule Preamble Section IV.G. includes an overview of several tools and data that have been developed or improved since 2015 that can help demonstrate how the agencies are now able to make case-specific evaluations more quickly and consistently than ever before. In particular, historic imagery and United States Geological Survey topographic maps are often useful in determining whether a ditch was excavated in dry land.

14.5.2 Scope of excluded ditches

Several commenters discussed the scope of ditches that will be excluded. Commenters wrote that the proposed rule’s ditch exclusion will likely increase the scope of regulated areas and have a negative impact on county governments, drainage districts, and the agricultural industry by increasing permit requirements. A commenter asserted that the requirement that a ditch be constructed wholly in dry lands to be non-jurisdictional is overly restrictive and very few ditches can meet this requirement. Another commenter voiced concern that only excluding ditches excavated wholly in dry lands and do not carry a relatively permanent flow will result in a large expansion of jurisdiction over areas that provide little to no ecological services.

Agencies’ Response: The agencies disagree with commenters’ assertions that the rule’s ditch exclusion would expand jurisdiction over ditches beyond those that were excluded under the pre-2015 regulatory regime, or over those that provide little to no ecological services. As stated above, rather than expanding jurisdiction, the final rule’s ditch exclusion codifies a longstanding approach and uses language that is consistent with that in the *Rapanos* Guidance regarding ditches. There is no change in scope of the ditch exclusion in comparison to the pre-2015 regulatory regime. Section 14.2.2 of this document further describes why the agencies are codifying existing practice rather than creating a new approach that might alter the scope of the ditch exclusion.

Additionally, while the functions of ditches vary, some ditches provide important functions that mirror those of natural waterbodies. See Final Rule Preamble Section IV.A for a discussion of key functions provided by tributaries, wetlands, impoundments, lakes, ponds, streams, and other types of waters that restore and maintain the chemical, physical, and biological integrity of paragraph (a)(1) waters. These key functions described in Preamble Section IV.A overlap with those of non-excluded ditches where the ditches meet the criteria of the other jurisdictional water categories. See Technical Support Document Section III.A.iv for additional supporting information on the functions of human-made and human-altered tributaries.

14.5.3 Other implementation measures

Several commenters suggested other means to improve implementation of the ditch exclusion. A commenter recommended that regional guidance be prepared by an interagency team, including federal and state partners, to clarify procedures for identifying jurisdictional ditches. A few commenters stated that farmers and landowners do not have the means to determine whether a feature is jurisdictional, and that this determination should be left to the agencies.

Agencies' Response: The agencies recognize the commenters' recommendation that regional guidance be developed to improve implementation of the ditch exclusion. As discussed in Preamble Section IV.C.7.c.i.(3), the agencies have identified a variety of implementation guidance, tools, and methods available for use to determine whether the ditch exclusion applies. The agencies are not mandating specific data or tools to implement the final rule. The agencies will assess jurisdiction based on the most applicable methods and best available sources of information for the specific site under evaluation. As with any final regulation, the agencies will consider developing additional tools to promote consistent implementation of the final rule's approach. If guidance is developed, the agencies would engage with various stakeholders, including federal and state partners, as suggested by the commenter. Nevertheless, the agencies conclude that the final rule, together with the preamble and existing tools, provides sufficient clarity to allow consistent implementation of the final rule. Refer to the agencies' response to comments in Section 18.3 for a detailed response to commenters suggesting a regional approach to the definition of "waters of the United States."

In response to comments stating that not all parts of the regulated public have the means to determine if an aquatic resource is jurisdictional, the agencies note that, as described in Final Rule Preamble Section III.A.1, property owners may obtain a jurisdictional determination from the Corps. The Corps does not charge a fee for these jurisdictional determinations. The Corps' policy to provide preliminary and approved jurisdictional determinations makes "waters of the United States" determinations more accessible to the regulated public.