Revised Definition of "Waters of the United States"

Response to Comments Document

SECTION 15 – EXCLUSIONS AND EXEMPTIONS

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.

15 EXEMPTIONS AND EXCLUSIONS

The agencies received numerous comments regarding exclusions from the definition of "waters of the United States," in addition to comments regarding the Clean Water Act's statutory permitting exemptions for certain activities. A feature that is "excluded" from the definition is *not* a "water of the United States." The agencies have historically used the term "exclusions" to refer to features expressly excluded from the definition of "waters of the United States" by regulation. This Response to Comments Document continues that usage.

By contrast, the term "exemption" refers to an addition of dredged or fill material to "waters of the United States" from a point source that is generally exempt from the Clean Water Act's general prohibition on discharges without a permit in section 301(a) and the Act's section 402 and 404 permit requirements. Exempt discharges generally are defined in relation to a specific activity, such as "normal farming." *See, e.g.*, 33 U.S.C. 1344(f)(1)(A).

15.1 General

15.1.1 General support for codifying exclusions in regulatory text

Many commenters generally supported identifying in the regulatory text features excluded from the definition of "waters of the United States," including but not limited to, those features excluded from the definition of "waters of the United States" in the 2015 Clean Water Rule and the 2020 Navigable Waters Protection Rule (2020 NWPR). Several of these commenters stated that codifying exclusions in the regulatory text would provide clarity and certainty, avoid time and cost burdens, and avoid inadvertently disincentivizing the use of green infrastructure and other important resources that may be related to clean water and water supply. A few commenters asserted that the agencies have not provided a valid reason for not codifying exclusions in the regulatory text.

One commenter stated that the use of the word "generally" (as in "generally not waters of the United States") in the preamble to the proposed rule allows variability in how the referenced features would be evaluated. The commenter argued that Congress "could not have intended" to allow the agencies to "issue vague rules and enforce them arbitrarily." One commenter stated that, if the agencies declined to codify exclusions for the waters described in the 1986 preamble or other features expressly excluded in the 2015 Clean Water Rule or the 2020 NWPR, the agencies should clarify that their decision not to codify exclusions for those features does not imply that the agencies intend to assert jurisdiction over those features or that the agencies are reversing past practice of not asserting jurisdiction over those features.

> **Agencies' Response: The agencies agree with commenters who supported codifying exclusions in the regulatory text for features identified in the proposed rule as generally non-jurisdictional under the pre-2015 regulatory regime. Accordingly, the final rule regulatory text codifies exclusions for features that the agencies generally considered non-jurisdictional under the pre-2015 regulatory regime and codifies the familiar and longstanding exclusions for waste treatment systems and prior converted croplands. Codifying these exclusions in the regulatory text is consistent with the agencies' intent to interpret "waters of the United States" to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' determination of the statutory limits**

on the scope of the "waters of the United States" informed by case law, policy determinations, and the agencies' experience and expertise. See also Final Rule Preamble Section IV.C.7.

The statement in the Proposed Rule Preamble that "the agencies have generally not asserted jurisdiction over" certain features is a reference to the statement in the preamble to the 1986 regulations explaining that the agencies "generally do not consider [these] waters to be 'Waters of the United States.'" 51 FR 41217. Under the pre-2015 regulatory regime, the referenced features were generally not considered "waters of the United States" even though they were not explicitly excluded by regulation. The final rule text provides further clarification by codifying exclusions for those features, and in so doing eliminates the authority of the agencies to determine in case-specific circumstances that some such waters are jurisdictional "waters of the United States." See also Final Rule Preamble Section IV.C.7 and the agencies' response to comments in Sections 14, 15.5, 15.6, 15.7, 15.9.

15.1.2 Support for codifying exclusions beyond those described in the proposed rule

Comments regarding requests for additional exclusions:

Several commenters requested that the agencies identify additional exclusions in the regulatory text, including exclusions for stormwater control features, wastewater and drinking water treatment systems, and water recycling structures. These commenters also requested that the agencies identify in the regulatory text exclusions for components such as constructed conveyance structures; green infrastructure; and other infrastructure to withdraw, treat, transport, store, or return water in the provision of drinking water, reuse, wastewater, and/or storm water services. These commenters stated that if these exclusions were not explicitly identified in the regulatory text, it would add uncertainty, time, and expense to their work, making it difficult for utilities to repair their facilities, sustainably maintain water quality and availability, and respond to climate change pressures, in addition to other challenges.

A few commenters requested that the agencies identify in the regulatory text exclusions for human-made canals, drains, roadside ditches, constructed wetlands, storm ponds, solely interstate waters, isolated wetlands, conservation projects, low areas in a field, and other similar infrastructure and areas.

A few commenters suggested that the agencies identify in the regulatory text exclusions for ephemeral features, ditches, quarry and sand pits, and water treatment systems (including settling ponds). The commenters expressed concern that not including these exclusions will result in increased time, costs, and effort that will impact their ability to provide construction materials.

A few commenters suggested that the agencies identify in the regulatory text exclusions for several features related to specific industries, including constructed ponds and ditches, natural depressions, clean-water diversions, wetlands not adjacent to a navigable water, and drainage ditches.

One commenter suggested that several features should be excluded, including dry washes, ephemeral streams, irrigation ditches, roadside ditches, human-made conveyances, isolated wetlands, bodies of water without a surface connection to navigable waters, prior converted cropland, artificial lakes and ponds constructed in uplands, stormwater runoff, and waste treatment systems.

One state commenter provided a list of the exclusions the state includes in local freshwater wetlands rules, including: bermed spill containment areas, commercial or industrial ponds created for the purpose of providing cooling water, concrete or poly-lined ponds and construction dewatering basins, among others. Many commenters made general statements of support for expressly excluding certain water features due to their use in water resource management for local utilities.

Commenters requested that the agencies identify in the regulatory text exclusions for the following water features:

- Aqueducts;
- Artificial conveyance infrastructure;
- Treatment systems;
- Canals;
- Water storage (including terminal reservoirs, storage ponds, water supply);
- Ditches;
- Mosquito/pesticide application;
- Drinking water;
- Impoundments;
- Constructed wetlands;
- Wastewater recycling;
- Groundwater;
- Diffuse stormwater runoff and directional sheet flow over uplands;
- Water features not identified as jurisdictional waters;
- Green infrastructure;
- Water reuse infrastructure;
- Water supply and delivery infrastructure;
- Decorative water features created in dry land or non-jurisdictional waters, or created pursuant to a section 404 permit;
- Dry desert (including common desert features like dry washes and alluvial fans);
- Water that is subject to a municipal, industrial, commercial, or agricultural use;
- Alaska permafrost wetlands, Alaska forested wetlands, Alaska wetland mosaics, and Alaska waters and lands falling under the "other waters" category;
- Post-fire remediation activities;
- Temporary settling basins;
- Artificial wastewater;
- Flood controls;
- Playa lakes;
- Tunnels;
- Water filled excavations from pre-law mine works that are not reestablishing natural drainage;
- Water management features on mine sites that are required under other regulatory schemes; and
- Certain water features on reclaimed mine land, like gullies and non-natural ditches.

One commenter stated that the agencies should clarify that areas within the 100-year floodplain that do not meet wetland criteria and wetlands that have been converted to upland do not qualify under the definition of “waters of the United States.”

One commenter specifically requested that structures located in fast land or upland/dry land should be excluded.

A commenter suggested that drains, ditches, and streams that do not significantly connect to a traditional navigable water should be exempt.

One commenter stated that stormwater detention, tail water recovery, or other environmentally beneficial practices should not be considered "waters of the United States."

One commenter provided legal argument that exclusions, specifically, exclusions for ponds and other waters on manufacturing and industrial sites that are used as part of the manufacturing process, are consistent with the intent of the Clean Water Act and that inclusion of such waters within the term "waters of the United States" would be unnecessarily burdensome and confusing and would not forward the Clean Water Act's objective of restoring and maintaining the chemical, physical and biological integrity of the nation's waters.

Comments regarding requests for additional exclusions related to wetlands and impoundments:

One commenter stated that wetlands that are not directly abutting jurisdictional waters or that do not share a direct hydrologic surface connection to jurisdictional waters should be excluded from the proposed rule. One commenter indicated that if infiltration basins that recharge underground drinking aquifers are considered as an adjacent wetland, these basins are subject to extensive regulation under the Clean Water Act.

One commenter requested an exclusion for impoundments that mirrors the language in the 2020 NWPR. A few commenters recommended that the agencies exempt impoundments that are used for conveyance and storage of water for industrial use or water supply. One of these commenters stated that these "impoundments are currently not regulated and should not be regulated as 'waters of the United States' as they are not connected to a downstream water." A few commenters stated that certain upland impoundments should be excluded from being a jurisdictional water. One of these commenters argued, "upland impoundments only releasing water in response to precipitation (ephemeral) should be exempt from being a jurisdictional water, as the connection between the impoundment and any downstream jurisdictional water is ephemeral and insufficient to create jurisdiction under [*Rapanos* Guidance]."[1] A few commenters suggested exclusions for impoundments that existed before the Clean Water Act. More specifically, one of these commenters argued that jurisdiction should not apply to impoundments that predate the Clean Water Act, or to waters that were not jurisdictional at the time the impounded feature was created. Another commenter suggested that the definition of impoundments should not apply to artificial features "constructed in accordance with the laws in existence at the time of construction."

Comments regarding other issues related to exclusions:

One commenter stated that transfers of water from one waterbody to another solely for the purposes of water supply and without intervening municipal, industrial, or agricultural use should be excluded from

[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)

jurisdiction under "waters of the United States." The commenter asserted that these transfers are an essential element of water resource management for local utilities.

One commenter asserted that the agencies must amend the regulatory text to clarify that traditional navigable waters are not subject to exclusions.

One commenter suggested that waters converted from "waters of the United States" under section 404 should be considered the same as dry land for Clean Water Act purposes, and therefore be excluded.

One commenter suggested that the agencies clarify that point sources (*e.g.*, ditches and components of permitted MS4 conveyance systems) are not "waters of the United States."

One commenter stated that the agencies should respect state categorical exclusions or else the agencies are overstepping state regulatory programs.

> **Agencies' Response**: **The agencies disagree with commenters suggesting that the agencies should exclude features from the definition of "waters of the United States" beyond those longstanding exclusions and historically generally non-jurisdictional features identified in the proposed rule.**
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> **The final rule text codifies the longstanding and familiar exclusions for waste treatment systems and prior converted croplands. The final rule text also codifies exclusions for several features that the agencies generally considered non-jurisdictional under the pre-2015 regulatory regime. See the agencies' response to comments in Section 15.1.1. Codification of these exclusions in the final rule text is consistent with the agencies' intent to interpret "waters of the United States" to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' determination of the statutory limits on the scope of the "waters of the United States" informed by case law, policy determinations, and the agencies' experience and expertise. The agencies did not propose or request comment on adding exclusions to the definition of "waters of the United States" beyond the exclusions for waste treatment systems, prior converted cropland, and the historically generally non-jurisdictional features identified in the proposed rule and codified in the final rule text.**
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> **The agencies' decision not to codify exclusions for other features that were expressly excluded by regulation in the 2015 Clean Water Rule or the 2020 NWPR does not mean that the agencies intend to assert Clean Water Act jurisdiction over those features under the final rule. The agencies will continue to evaluate Clean Water Act jurisdiction on a case-specific basis and will not assert jurisdiction over features that do not satisfy the definition of "waters of the United States" articulated in the final rule. As part of their case-specific assessment, the agencies will continue to consider whether the feature in question was constructed in dry land, the flow of water in the feature, and other factors. When a feature does not meet the definition articulated in the final rule, that feature is not a "water of the United States" and there is no need for an express exclusion. Some of the features that commenters asked the agencies to exclude may already be covered by one or more of the exclusions the agencies are including in this rule. To the extent commenters refer to features that are not waters (*e.g.*, sheetflow), those would not be considered "waters of the United**

States." Further, determinations regarding the jurisdictional status of any specific water are outside the scope of this rulemaking.

For a discussion of the exclusions set forth in the regulatory text, see Final Rule Preamble Section IV.C.7. How wetlands will be considered under the final rule is discussed in Final Rule Preamble Section IV.C.5 and the agencies' response to comments in Section 10. Impoundments are discussed in the Final Rule Preamble Section IV.C.3 and the agencies' response to comments in Section 7. Stormwater control features are discussed in the agencies' response to comments in Section 15.11. Ditches are discussed in the agencies' response to comments in Section 14 and the Final Rule Preamble Section IV.C.7. Water recycling structures are discussed in the agencies' response to comments in Section 15.12. Ephemeral features other than ephemeral streams are discussed in the agencies' response to comments in Section 15.10. Groundwater is discussed in the agencies' response to comments in Section 15.8. Wetlands are discussed in the Final Rule Preamble Section IV.C.5 and the agencies' response to comments in Section 10. To the extent commenters discuss green infrastructure, see the agencies' response to comments in Section 15.11.2. MS4s are discussed in the agencies' response to comments in Section 15.11.

The final rule does not change the agencies' approach to water transfers. *See* 40 CFR 122.3(i).

The exclusions in this rule do not apply to paragraph (a)(1) waters, and therefore, a traditional navigable water, territorial seas, or interstate water cannot be excluded under this rule. Where a feature satisfies the terms of an exclusion, it is excluded from jurisdiction even where the feature would otherwise be jurisdictional under paragraphs (a)(2) through (5) of the final rule. However, where a feature satisfies the terms of an exclusion but would otherwise be jurisdictional under paragraph (a)(1) of the final rule, the feature is not excluded. See Final Rule Preamble Section IV.C.7.

To the extent commenters suggest that waters lawfully converted to dry land pursuant to a section 404 permit or other lawful means should be treated as "dry land" for purposes of applying the exclusion, the final rule does not affect the agencies' longstanding approach to assessing features in their present conditions, assuming that present conditions represent normal circumstances and have not been altered as a result of recent unauthorized activities. *See, e.g.*, U.S. Army Corps of Engineers (Corps) RGL 86-9 at Paragraph 3 (Aug. 27, 1986)[2]; *United States v. Brace*, 2019 WL 3778394 (Aug. 12, 2019) and cases collected therein; *Corps of Engineers 1987 Wetlands Delineation Manual* Part IV.F. It is also important to note that an unauthorized discharge does not render a "water of the United States" no longer jurisdictional, nor does it sever jurisdiction upstream. Indeed, "[u]nauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States." 33 C.F.R. 323.2 (1987).

[2] U.S. Army Corps of Engineers. 1986. Clarification of "Normal Circumstances" in the Wetland Definition (33 CFR 323.2 (c)) *available at* https://www.nap.usace.army.mil/Portals/39/docs/regulatory/rgls/rgl86-09.pdf

To the extent the commenter asserts that a ditch cannot be both a jurisdictional water and a point source, see Final Rule Preamble Section IV.C.7 and the agencies' response to comments in Section 14 and Section 15.2. To the extent the commenter asserts that components of an MS4 system cannot be "waters of the United States" because the MS4 system as a whole is a point source, see the agencies' response to comments in Section 15.11.

The final rule does not change the agencies' longstanding interpretation of the Clean Water Act that it is not relevant whether a water has been constructed or altered by humans for purposes of determining whether a water is jurisdictional under the Clean Water Act. See Final Rule Preamble Section IV.C.7.

The agencies disagree with the commenter who stated that the federal government should limit jurisdiction over "waters of the United States" based on exclusions promulgated by given states. Under section 510 of the Clean Water Act, unless expressly stated, nothing in the Clean Water Act precludes or denies the right of any state or tribe to establish more protective standards or limits than the Clean Water Act. Consistent with the Clean Water Act, states and tribes retain authority to implement their own programs to protect the waters in their jurisdiction more broadly and more stringently than the federal government. *See* 40 CFR 123.1(i). However, section 510 also prohibits any state or tribe from adopting a limitation which is less stringent than the limitations of the Clean Water Act. Therefore, the Clean Water Act does not allow the exclusion of certain "waters of the United States" on a state-by-state basis.

15.1.3 General opposition to codifying exclusions in regulatory text

A number of commenters asserted that excluding features that would otherwise be jurisdictional from the definition of "waters of the United States" is not justified by law or science, with some commenters referencing reports from EPA's Science Advisory Board and other reports as support. These commenters suggested that any waters with a potential to carry pollutants downstream should not be categorically excluded. Several commenters likewise argued more that excluding any feature that would otherwise fall within the definition of "waters of the United States" is inconsistent with the Clean Water Act, regardless of how longstanding the exclusion may be.

A few commenters acknowledged a limited need for exclusions but suggested that clarity and certainty for certain utilities or industries is not a sufficient reason for an exclusion. One commenter suggested that new projects constructed in "waters of the United States" should not be excluded from jurisdiction.

Agencies' Response: The agencies disagree with commenters asserting that the agencies should not codify exclusions from the definition of "waters of the United States." See Final Rule Preamble Sections III.A., IV.A., and IV.C.7.

The final rule text codifies the familiar and longstanding exclusions for waste treatment systems and prior converted croplands. The final rule text also codifies exclusions for several features that the agencies generally considered non-jurisdictional under the pre-2015 regulatory regime and the 2019 Repeal Rule, and expressly excluded by regulation in the 2015 Clean Water Rule and 2020 NWPR. See also the agencies' response to comments in Section 15.1.1. Codification of these exclusions in the regulatory text is consistent with the

agencies' intent to interpret "waters of the United States" to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' determination of the statutory limits on the scope of the "waters of the United States" informed by case law, policy determinations, and the agencies' experience and expertise. The exclusions reflect the agencies' longstanding practice and technical judgment that certain waters and features are not subject to the Clean Water Act. The exclusions are also guided by Supreme Court precedent. While waters that do not meet the terms laid out in paragraph (a) are not "waters of the United States," the exclusions are an important aspect of the agencies' policy goal of providing clarity, certainty, and predictability for the regulated public and regulators. The categorical exclusions will simplify the process of determining jurisdiction, and they reflect the agencies' determinations of the lines of jurisdiction based on case law, policy determinations, and the agencies' experience and expertise. The exclusions in the final rule text provide a balance between protection and clarity that is reasonable and consistent with the statute's objective and the agencies' goal of maintaining consistency with the pre-2015 regulatory regime while continuing to advance the objective of the Clean Water Act. See also Final Rule Preamble Sections IV.C.7.

15.1.4 Miscellaneous general comments regarding exclusions

15.1.4.1 Support for expressly excluding all non-jurisdictional features

Several commenters requested that any water that is not explicitly identified in the final rule as jurisdictional should be expressly excluded in the regulatory text. Some of these commenters specifically stated that such an approach appropriately allows states to make decisions on waters not regulated by the Clean Water Act.

Agencies' Response: The agencies disagree with commenters asserting that the agencies should expressly exclude features that do not satisfy the definition of "waters of the United States." It is not necessary to codify in the final rule text an exclusion for features that do not satisfy the definition of "waters of the United States." The agencies will continue to conduct case-specific analyses to evaluate Clean Water Act jurisdiction as needed and will not assert jurisdiction over features that do not satisfy the definition of "waters of the United States" articulated in the final rule. When a feature does not satisfy the definition articulated in the final rule, that feature is not a "water of the United States," and there is no need for an explicit exclusion.

15.1.4.2 Support for excluding wetlands that develop within an excluded feature

Several commenters requested that wetlands that develop entirely within the confines of an excluded water feature be considered part of the excluded feature and not be considered "waters of the United States."

Agencies' Response: The agencies agree that wetlands that develop entirely within the confines of an excluded feature are not jurisdictional. This interpretation is consistent with the agencies' longstanding approach to this issue and with the agencies' rationale for

excluding these features. See Final Rule Preamble Section IV.C.7. See also the agencies' response to comments in Section 14.

15.1.4.3 The proposed rule's use of the terms "uplands" and "dry lands"

Several commenters requested that the agencies provide definitions of "uplands" and "dry lands" as used in the proposed rule.

> **Agencies' Response: The agencies have addressed this comment by using the term "dry land" consistently in the final rule text and explaining the meaning of the term "dry land" in the Final Rule Preamble. See Final Rule Preamble Section IV.C.7.**

15.1.4.4 Other general comments on the proposed rule's approach to exclusions

A few commenters requested that the agencies provide expanded guidance on exclusions, particularly those features described in the preamble as being "generally" excluded.

Several commenters requested that the agencies expressly exclude all features that may be covered by a National Pollutant Discharge Elimination System (NPDES) permit or may be part of a system the discharge from which is covered by an NPDES permit. These commenters asserted that regulation under the NPDES program already provides the necessary protection and that designating such features as "waters of the United States" would create redundancy and confusion. In addition to waste treatment systems and features that convey stormwater as part of an MS4 system, commenters also requested express exclusions for features or activities covered by the NPDES program including application of pesticides covered by an NPDES permit, water supply infrastructures that are regulated under either the NPDES program or the Safe Drinking Water Act, ready-mixed concrete operations subject to an NPDES permit, and wastewater recycling features that are subject to limitations on the discharge under the NPDES program.

A few commenters requested that the agencies consult with States and the general public to determine what additional exclusions should be included in the final rule.

A few commenters suggested removing the excluded categories of waters from the list that defines "waters of the United States" and instead placing them under a separate heading (b) of what "waters of the United States" does not include.

> **Agencies' Response: To the extent the commenters request that the agencies publish additional guidance on implementation of the exclusions in the final rule, 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 exclusions set forth in the final rule. 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.**
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> **The agencies disagree with commenters' request that the agencies expressly exclude all features that may be subject to an NPDES permit or part of a system that is subject to an**

NPDES permit. The agencies' decision not to codify exclusions for certain features does not mean that the agencies intend to assert Clean Water Act jurisdiction over those features under the final rule, particularly in circumstances where the agencies would not have asserted jurisdiction under the pre-2015 regulatory regime. The agencies will continue to evaluate Clean Water Act jurisdiction on a case-specific basis and will not assert jurisdiction over features that do not satisfy the definition of "waters of the United States" articulated in the final rule. When a feature does not meet the definition articulated in the final rule, that feature is not a "water of the United States" and there is no need for an express exclusion. Moreover, water does not lose its jurisdictional status if it is channelized, ditched, or otherwise modified so long as it continues to meet the definition of "waters of the United States." See Final Rule Preamble Section IV.C.7. The exclusion for wastewater treatment systems is discussed in Section IV.C.7 of the Final Rule Preamble and the agencies' response to comments in Section 15.2. Stormwater control features are discussed in the agencies' response to comments in Section 15.11. Wastewater recycling features are discussed in the agencies' response to comments in Section 15.12.

To the extent commenters seek exclusions based upon activities, such as pesticide application, rather than based upon the nature of the feature receiving the discharge, the comment is beyond the scope of this rulemaking. Whether a feature is a "water of the United States" is a function of the characteristics of the feature and not the nature of any particular discharge into that feature. See also the agencies' response to comments in Section 15.13 for a discussion of activity-based exemptions from the permitting requirements of the Clean Water Act.

To the extent commenters recommend that the agencies consult with States and the general public regarding codification of exclusions, the agencies engaged state and local governments over a 60-day federalism consultation period during development of this rule, beginning with an initial federalism consultation meeting on August 5, 2021, and concluding on October 4, 2021. During the input period, the agencies convened several meetings with intergovernmental associations and their state or local government members to solicit feedback on the effort to revise the definition of "waters of the United States." The agencies also engaged with state and local governments during the public comment period, including though two virtual roundtables in January 2022. A summary report on the agencies' consultation efforts with state and local governments is available in the docket for this action. For more information on the agencies' federalism consultation for this rulemaking, see Final Rule Preamble Section VI.E and the agencies' response to comments in Section 5.5 The agencies agree that stakeholder input is critical to developing a revised definition of "waters of the United States." The agencies received over 32,000 recommendation letters from the public during its pre-proposal outreach and over 114,000 comments on the proposed rule during the public comment period. The agencies also held a public hearing and listening sessions with state, tribal, and local governments during the public comment period to listen to feedback on the proposed rule from co-regulators and a variety of stakeholders. See Final Rule Preamble Section III.C. Over the course of this rulemaking process, the agencies received input from a broad range of stakeholders and thoroughly considered the many comments, suggestions, and recommendations provided by states, tribes, and stakeholders in developing the final rule and made changes to the rule in

response to those comments. The agencies intend to continue engaging with stakeholders to facilitate implementation of the rule moving forward.

To the extent commenters suggest that the regulatory text be reorganized to place excluded features under a separate subheading, the agencies agree. The final rule identifies features that are not "waters of the United States" under paragraph (b) the regulatory text. See Final Rule Preamble Section IV.C.7.

15.2 Waste Treatment System Exclusion

15.2.1 General support for the waste treatment system exclusion

Some commenters asserted that including an exclusion for waste treatment systems in the final rule's regulatory text would be consistent with the structure and goals of the Clean Water Act. Another commenter suggested that excluding waste treatment systems aligns with cooperative federalism principles in the Clean Water Act and respects the states' role in regulating water quality.

Many commenters expressed general support for codifying an exclusion in the rule's regulatory text for waste treatment systems, as well as specific support for the proposed rule's version of the exclusion, with some of these commenters stating that this exclusion has existed for decades and that certain industries have substantial financial investments in such systems. Several commenters asserted that without an exclusion for waste treatment systems, utilities and industries could face regulatory uncertainty about the jurisdictional status of certain features, in addition to regulatory delay and expenses, regulatory redundancy, and impediments to routine maintenance, which some of the commenters claimed could hamper or preclude the use of waste treatment systems to improve water quality without providing additional protection to the public or the environment.

A few commenters stated that there is no support for the view that a broad exclusion for waste treatment systems would result in more "waters of the United States" being used as waste treatment systems, adding that existing permitting requirements and the risk of enforcement against violators of the Act provides incentive not to illegally use jurisdictional waters as waste treatment systems.

Additionally, several commenters asserted that certain inconsistencies would arise if waste treatment systems are not excluded from the definition of "waters of the United States," suggesting, for example, that waste treatment systems could not serve their intended purpose of protecting downstream water quality or conserving water if portions of such systems were jurisdictional, as they could not be used to treat, move, or contain wastewater prior to discharge or in a manner that eliminates the need for any discharges. Relatedly, some commenters argued that a waste treatment system cannot be both a point source and "waters of the United States."

Agencies' Response: The agencies agree with commenters who suggested that excluding waste treatment systems from the definition of "waters of the United States" is a reasonable and lawful exercise of the agencies' authority to determine the scope of "waters of the United States." ***See Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*****, 556 F.3d 177, 212 (4th Cir. 2009) (upholding the waste treatment system exclusion as a lawful exercise of the agencies' "authority to determine which waters are covered by the CWA"). Indeed, the agencies find**

that retaining an exclusion for waste treatment systems in the final rule text is consistent with the agencies' intent to interpret "waters of the United States" to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' determination of the statutory limits on the scope of the "waters of the United States" informed by case law, policy determinations, and the agencies' experience and expertise. The final rule text retains the waste treatment system exclusion from the 1986 regulations and returns to the longstanding version of the exclusion that the agencies have implemented for decades. See Final Rule Preamble Section IV.C.7.

Application of the final rule's exclusion to waste treatment systems constructed in whole or in part in jurisdictional waters does not license dischargers to freely use "waters of the United States" as waste treatment systems. The exclusion does not exempt discharges of dredged or fill material associated with construction of a waste treatment system from the permitting requirements of section 404 of the Clean Water Act—including the requirement that the discharge represent the least environmentally damaging practicable alternative. The exclusion also does not free a discharger from the need to comply with the Clean Water Act for pollutants discharged *from* a waste treatment system to "waters of the United States"; only discharges *into* the waste treatment system are excluded from the Act's requirements. Under a Clean Water Act section 402 permit, discharges from the waste treatment system would need to meet the requirements of applicable effluent limitations guidelines and new source performance standards, as well as any required water quality-based effluent limitations.

Likewise, the waste treatment system exclusion does not free a discharger from having to comply with the permitting provisions of the Clean Water Act at the final outfall. For example, a discharger may not evade the permitting provisions of the Clean Water Act by discharging directly into a jurisdictional water and then claiming that the dilution or assimilative capacity of the receiving water is the excluded waste treatment system. See also Final Rule Preamble Section IV.C.7.

The agencies do not agree that the categories of "point source" and "waters of the United States" are necessarily mutually exclusive. The agencies have further evaluated this question and concluded that the better reading of the statute is the agencies' historic position that a ditch can be both a point source and a "water of the United States." That position dates back to 1975 in an opinion of the General Counsel of EPA interpreting the Clean Water Act. For further discussion of this issue, see Final Rule Preamble Section IV.C.7.c.i and the agencies' response to comments in Section 14 and Section 15.11.

15.2.2 General opposition to the waste treatment system exclusion

Multiple commenters expressed general opposition to excluding waste treatment systems from the definition of "waters of the United States." Some commenters discussed the history of the waste treatment system exclusion, including relevant case law, to support the assertion that the exclusion is unlawful or should at most only apply to human-made bodies of water.

A few commenters stated that it is inconsistent for the agencies to acknowledge that upstream waters can have chemical, physical, and biological effects on downstream waters through surface or subsurface

hydrologic connections and yet exclude impoundments that are used as waste treatment systems. These commenters asserted that the agencies provided no scientific basis for excluding waste treatment systems from the definition of "waters of the United States."

> **Agencies' Response: The agencies disagree that the waste treatment system exclusion is unlawful or otherwise outside the agencies' discretion under the Clean Water Act. The waste treatment system exclusion is a reasonable and lawful exercise of the agencies' authority to determine the scope of "waters of the United States."** ***See Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*****, 556 F.3d 177, 212 (4th Cir. 2009) (upholding the waste treatment system exclusion as a lawful exercise of the agencies' "authority to determine which waters are covered by the CWA"). The exclusion for waste treatment systems has been part of the agencies' regulations and implementation of "waters of the United States" for decades. Retaining an exclusion for waste treatment systems in the final rule text is thus consistent with the agencies' longstanding practice and technical judgment that certain waters and features are not subject to the Clean Water Act and reflect the agencies' determinations of the lines of jurisdiction based on the case law, policy determinations, and the agencies' experience and expertise.**
>
> **Moreover, the exclusion does not license dischargers to freely use "waters of the United States" as waste treatment systems. See Final Rule Preamble Section IV.C.7 and the agencies' response to comments in Section 15.2.1.**
>
> **Regarding limiting the scope of the exclusion for waste treatment systems to human-made waters, see the agencies' response to comments in Section 15.2.3.1.**

15.2.3 Scope of excluded "waste treatment systems"

Many commenters suggested that the agencies provide a clear definition of "waste treatment system" and identify the types of features that would be included in that definition, with some commenters expressing support specifically for relying on the 2020 NWPR's definition of "waste treatment system." Several commenters indicated support in particular for the 2020 NWPR's approach of expressly including "all components" of a system in the definition of "waste treatment system," including related conveyances, and that the 2020 NWPR's exclusion applied to both active and passive treatment and cooling ponds.

A few commenters requested that the agencies clarify that the waste treatment system exclusion remains applicable even when the closure process for a waste treatment system has begun. Other commenters expressed support for not applying the exclusion to a waste treatment system that is abandoned or that otherwise ceases to serve the treatment function for which it was designed.

Another commenter suggested that the exclusion be limited to instream waste treatment systems constructed pursuant to a Clean Water Act section 404 permit and asserted that the proposed rule's approach to the exclusion was too broad, vague, and could incentivize unnecessary impoundment of jurisdictional waters. The commenter also requested that the agencies clarify that states have the ability to apply a narrower state law version of the waste treatment system exclusion in "waters of the United States" and apply state water quality requirements to waste treatment systems that are proposed to be constructed in "waters of the United States."

A few commenters asked that the exclusion apply to all waste treatment systems whether or not they were built in or by impoundment of "waters of the United States."

Agencies' Response: With respect to commenters requesting that the rule include a definition of waste treatment systems, the agencies view the final rule text as sufficiently clear and providing an appropriate description of the scope of the exclusion for waste treatment systems. The final rule text retains the waste treatment system exclusion from the 1986 regulations, with a ministerial change to delete the exclusion's cross-reference to a definition of "cooling ponds" that no longer exists in the Code of Federal Regulations, and the addition of a comma that clarifies the agencies' longstanding implementation of the exclusion as applying only to systems that are designed to meet the requirements of the Act. Retaining in the final rule text the longstanding version of the exclusion that the agencies have implemented for decades is consistent with the agencies' intent to interpret "waters of the United States" to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' determination of the statutory limits on the scope of the "waters of the United States" informed by case law, policy determinations, and the agencies' experience and expertise.

The agencies' decision not to specify in the final rule text the components described in the 2020 NWPR does not mean that the agencies intend to assert Clean Water Act jurisdiction over those features under the final rule, particularly in circumstances where the agencies would not have asserted jurisdiction consistent with their longstanding approach under the pre-2015 regulatory regime. The agencies have applied the waste treatment system exclusion as it is reflected in the final rule text for decades. The agencies will continue to evaluate Clean Water Act jurisdiction on a case-specific basis. As part of this case-specific assessment, the agencies will continue to consider whether the feature in question is excavated or created in dry land, the flow of water in the feature, and other factors. The agencies will not assert jurisdiction over features that do not satisfy the definition of "waters of the United States" articulated in the final rule. When a feature does not meet the definition articulated in the final rule, that feature is not a "water of the United States" and there is no need for an explicit exclusion.

Regarding abandonment of waste treatment systems, consistent with the agencies' longstanding implementation of the waste treatment system exclusion, including the agencies' practice under the 2020 NWPR, a waste treatment system that is abandoned or otherwise ceases to serve the treatment function for which it was designed would not continue to qualify for the exclusion and could be deemed jurisdictional if it otherwise meets the final rule's definition of "waters of the United States." See Final Rule Preamble Section IV.C.7. *See also* Letter from Benjamin H. Grumbles, Assistant Administrator, EPA to the Hon. John Paul Woodley, Assistant Secretary of the Army (Civil Works) (March 1, 2006) ("In addition, the Corps authorization for the mining project is conditioned to require that waters adversely affected while being used as a waste treatment system are restored as soon as the mining operation is completed and the water . . . no longer requires treatment. . . . Once restoration is complete, the stream segment that was waters of the U.S. before application of the waste treatment system exclusion, resumes its jurisdictional status as a water of the U.S.").

The agencies disagree that the waste treatment system exclusion incentivizes the creation of impoundments. The exclusion does not exempt discharges of dredged or fill material from the permitting requirements of Clean Water Act section 404 of the Clean Water Act—including the requirement that the discharge represent the least environmentally damaging practicable alternative—merely because those discharges are associated with construction of a waste treatment system. Similarly, discharges from a waste treatment system remain subject to the permitting requirements of Clean Water Act section 402. The exclusion does not free a discharger from the need to comply with the Clean Water Act, including any effluent limitations guidelines and new source performance standards requirements applicable to the waste treatment system, and requirements applicable to pollutants discharged *from* the waste treatment system to "waters of the United States"; only discharges *into* an excluded waste treatment system are not subject to the Clean Water Act's requirements. See also Final Rule Preamble Section IV.C.7.

Finally, nothing in the final rule prevents or precludes states from regulating more stringently than federal requirements. Under the Clean Water Act, states and tribes retain authority to implement their own programs to protect the waters in their jurisdiction more broadly and more stringently than the federal government. *See* 40 CFR 123.1(i). Under section 510 of the Clean Water Act, unless expressly stated, nothing in the Clean Water Act precludes or denies the right of any state or tribe to establish more protective standards or limits than the Clean Water Act.

15.2.3.1 Limiting the waste treatment system exclusion to human-made waterbodies

Some commenters supported deleting the sentence formerly contained in EPA's regulations that limited application of the exclusion to human-made bodies of water. Other commenters asserted that the waste treatment system exclusion should apply only to human-made bodies of water.

<u>Agencies' Response</u>: The agencies disagree that the waste treatment system exclusion should be limited to human-made features. The final rule maintains the 2020 NWPR's deletion of a suspended sentence that limited application of the exclusion to human-made bodies of water and that had appeared only in EPA's NPDES regulations. In so doing, the final rule also maintains the agencies' longstanding approach to implementing the waste treatment system exclusion, as the agencies have not limited application of the waste treatment system exclusion to human-made bodies of water for over four decades.

The agencies' longstanding approach to excluding waste treatment systems—including those that are not constructed in human-made bodies of water is a reasonable and lawful exercise of the agencies' authority to determine the scope of "waters of the United States," *see Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 212 (4th Cir. 2009) (upholding the waste treatment system exclusion as a lawful exercise of the agencies' "authority to determine which waters are covered by the CWA").

15.2.3.2 Limiting availability of the waste treatment system exclusion to permittees

A few commenters expressed concern about the agencies' assertion in the preamble "that the waste treatment system exclusion is generally available only to the permittee using the system for the treatment function for which such system was designed," suggesting that this introduces ambiguity without contextual examples. These commenters suggested that the original design or use of a feature should have no bearing on the waste treatment system exclusion. Another commenter expressed support for the agencies' position in the proposed rule preamble on this issue.

One commenter expressed support for use of a comma to clarify that the exclusion applies only to systems created in accordance with the Clean Water Act. The commenter further requested that the final rule text clarify that the exclusion applies only when the permittee is using the system for the approved treatment process.

> **Agencies' Response: The agencies do not interpret the waste treatment system exclusion to allow any party to dispose of waste or discharge pollutants into the excluded feature without authorization. Rather, for waters that would otherwise meet the final rule's definition of "waters of the United States," the agencies' intent, consistent with prior application of the NPDES program, is that the waste treatment system exclusion is generally available only for discharges associated with the treatment function for which the system was designed. This approach is also consistent with the purpose of the exclusion. As the U.S. Court of Appeals for the Ninth Circuit stated: "The [waste treatment system exclusion] was meant to avoid requiring dischargers to meet effluent discharge standards for discharges *into* their own closed system treatment ponds." *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1002 (9th Cir. 2007), *cert. denied*, 552 U.S. 1180 (2008) (citation omitted) (emphasis in original). Finally, this approach is also consistent with the agencies' interpretation, including in the 2020 NWPR, that the waste treatment system exclusion does not apply to an abandoned waste treatment system or to ones that cease to serve the treatment function for which they were designed.**

15.2.4 Requirement that excluded waste treatment systems be "designed to meet the requirements" of the Clean Water Act

A few commenters requested clarification that discharges from waste treatment systems to "waters of the United States" would continue to be subject to regulation by the Clean Water Act section 402 permitting system. Another commenter asked that construction pursuant to a Clean Water Act section 404 permit not be a prerequisite for application of the exclusion to waste treatment systems constructed in jurisdictional waters.

Many commenters suggested that the phrase "designed to meet the requirements of the Clean Water Act" be modified or removed and that the proposed comma before this phrase should be removed to avoid confusion over systems built prior to 1972. Some of these commenters asserted that all waste treatment systems should be excluded regardless of when they were built, while others claimed that waste treatment systems built prior to 1972 should be excluded under certain circumstances. Several of these commenters provided specific regulatory text edit suggestions.

One commenter expressed concern that the discussion in the preamble could be misread to mean that a waste treatment system must have obtained certain permits or must comply with requirements of such

permits or other Clean Water Act requirements, in order for the system to be excluded from the definition of "waters of the United States."

A few commenters requested that the agencies clarify that the exclusion for wastewater treatment systems is not dependent upon the nature of the operations that generate the wastewater that is being treated.

Several commenters opposed the proposed rule's insertion of a comma after the word "lagoon" as unduly restricting the scope of the exclusion. Other commenters supported insertion of the comma to clarify that the exclusion applies only to systems designed to meet the requirements of the Clean Water Act.

> **Agencies' Response: As explained in Final Rule Preamble Section IV.C.7, Clean Water Act permitting requirements continue to apply to discharges *from* an excluded waste treatment system. Consistent with the agencies' longstanding approach, the exclusion does not free a discharger from the need to comply with the Clean Water Act for pollutants discharged *from* a waste treatment system to "waters of the United States"; only discharges *into* the waste treatment system are excluded from the Clean Water Act's requirements.**
>
> **The agencies disagree to the extent commenters asserted that a Clean Water Act section 404 permit should not be required for discharges of dredged or fill material into jurisdictional waters for the purpose of constructing a waste treatment system. The exclusion does not free a discharger from the need to comply with the Clean Water Act, including any effluent limitations guidelines and new source performance standards requirements applicable to the waste treatment system, and requirements applicable to the pollutants discharged from a waste treatment system to "waters of the United States"; only discharges into the waste treatment system are excluded from the Act's requirements. As such, any entity would need to comply with the Clean Water Act by obtaining a section 404 permit for a new waste treatment system that will be constructed in "waters of the United States," and a section 402 permit if there are discharges of pollutants from a waste treatment system into "waters of the United States." See also Final Rule Preamble Section IV.C.7 and Proposed Rule Preamble Section V.C.8.b.**
>
> **The final rule text, including the addition of a comma after "lagoons," does not alter the agencies' longstanding approach of applying the exclusion to features that were constructed prior to 1972 where such features otherwise function as waste treatment systems designed to meet the requirements of the Clean Water Act. See also Final Rule Preamble Section IV.C.7.**
>
> **Application of the exclusion does not necessarily rest on whether aspects of the waste treatment system are subject to any specific Clean Water Act permit. For example, there may be waste treatment systems that do not discharge. Nor is application of the exclusion limited to specific industries. Nevertheless, for the exclusion to apply, the system must be operating as a waste treatment system in a manner consistent with Clean Water Act section 301's command that, except in compliance with the Clean Water Act (including its permitting provisions), the discharge of any pollutant by any person is unlawful. The waste treatment system exclusion does not free a discharger from having to achieve the effluent limitations required under Clean Water Act section 301 at the final outfall. For example, a discharger may not evade the permitting provisions of the Clean Water Act by discharging**

directly into a jurisdictional water and then claiming that the dilution or assimilative capacity of the receiving water, without more, serves as an excluded waste treatment system.

15.2.5 Including stormwater controls in the waste treatment system exclusion

Several commenters requested that final rule expressly exclude stormwater management and treatment systems under the waste treatment system exclusion.

Agencies' Response: Regarding stormwater controls, see the agencies' response to comments in Section 15.11. The agencies are not including an express exclusion for stormwater management and treatment systems in the final rule. Even for features that are not explicitly excluded, the agencies will continue to assess jurisdiction under the final rule on a case-specific basis. As part of this case-specific assessment, the agencies will continue to consider whether the feature in question is excavated or created in dry land, the flow of water in the feature, and other factors. In addition, some of the features that commenters asked the agencies to exclude may be covered by one or more of the exclusions in the final rule if they satisfy the criteria for those exclusions.

15.2.6 Relationship between excluded waste treatment systems and upstream waters

A few commenters expressed agreement with the language in the preamble to the proposed rule that the presence of an excluded waste treatment system does not sever upstream waters from Clean Water Act jurisdiction. Another commenter recommended that the regulatory text expressly codify this position that the presence of an excluded waste treatment system does not sever upstream waters from Clean Water Act jurisdiction.

One commenter expressed disagreement with the language in the preamble that the presence of an excluded waste treatment system does not sever upstream waters from Clean Water Act jurisdiction.

Agencies' Response: The agencies agree with those commenters who asserted that the presence of an excluded instream waste treatment system does not sever upstream waters from Clean Water Act jurisdiction. The final rule does not change the agencies' longstanding approach to application of the waste treatment system exclusion, including the agencies' longstanding interpretation that the presence of an excluded instream waste treatment system does not sever upstream waters from Clean Water Act jurisdiction. The permitting provisions of the Clean Water Act (including under section 402 and section 404) do not cease to apply to discharges to upstream waters solely because of the presence of a downstream excluded waste treatment system. See Final Rule Preamble Section IV.C.7.

15.2.7 Comments on excluding certain components or types of waste treatment systems

One commenter requested that the final rule preamble provide an illustrative list of types of systems that would be covered under the waste treatment system.

Several commenters recommended that the waste treatment system exclusion or another exclusion be applied to groundwater recharge basins and similar facilities such as spreading grounds/basins, treatment ponds/lagoons, and constructed treatment wetlands used as part of the wastewater process and suggested that these should be expressly included in the waste treatment system or have an exclusion of their own.

A few commenters recommended that the waste treatment system exclusion extend to zero-discharge and water recycling facilities

One commenter requested that on-site maintenance of water, including transport, storage, treatment, and use, be excluded.

The same commenter suggested that the waste treatment system exclusion extend to all human-made basins and ponds.

One commenter suggested that the waste treatment exclusion extend to land applications and landfill sites for biosolids.

One commenter suggested that the waste treatment system exclusion extend to small and medium animal feeding operations that do not require NPDES permits for their discharges. Certain facilities may discharge from waste treatment systems, but those discharges may not require an NPDES permit. The commenter expressed concern that the waste treatment system exclusion as proposed may unintentionally not apply to waste treatment systems treating discharges that do not require an NPDES permit.

One commenter suggested that the waste treatment system exclusion extend to methods used at mining sites such as wastewater and stormwater retention, concentration (evaporation), settling, or active and passive treatments to remove or reduce pollutants.

One commenter suggested that the waste treatment system exclusion apply to constructed water quality treatment wetlands, along with lands which are non-irrigated except by a system of constructed wetlands designed to remove pollutants, and waste treatment plant buffer property.

One commenter suggested that the waste treatment system exclusion apply to equalizing and storing activities associated with pollutant removal, along with systems used to treat surface water that will be used as process water for manufacturing operations.

One commenter requested that drinking water treatment systems receive the same exclusion as waste treatment systems.

> **<u>Agencies' Response</u>**: **Determinations regarding the jurisdictional status of any specific water are outside the scope of this rulemaking. The agencies will assess jurisdiction under the final rule on a case-specific basis. As part of this case-specific assessment, the agencies will continue to consider whether the feature in question is excavated or created in dry land, the flow of water in the feature, and other factors. The exclusion for waste treatment systems applies to those features that meet the terms of the exclusion. The agencies will not assert jurisdiction over features that do not satisfy the definition of "waters of the United States" articulated in the final rule. A feature that does not meet the definition articulated**

in the final rule is not a "water of the United States." A feature that satisfies one of the exclusions in the final rule text is also not a "water of the United States."

The final rule does not change the agencies' longstanding framework under the pre-2015 regulatory regime for applying the waste treatment system exclusion. Given the variety of features and processes that could be employed for waste treatment, the agencies conclude that an illustrative list would run the risk of being perceived as both over- and under-inclusive. The agencies' decision not to provide an illustrative list does not mean that the agencies intend to assert Clean Water Act jurisdiction under the final rule over specific features or processes identified in the comments, particularly in circumstances where the agencies would not have asserted jurisdiction consistent with their longstanding approach to implementing this exclusion under the pre-2015 regulatory regime.

For a discussion of water recycling facilities, see the agencies' response to comments in Section 15.12. Regarding water transfers, the final rule does not change the agencies' approach to water transfers. *See* 40 CFR 122.3(i).

To the extent some commenters suggested extending the waste treatment system exclusion to all human-made basins and ponds, the final rule does not expand the exclusion beyond its longstanding parameters. The exclusion applies to human-made features that are waste treatment systems designed to meet the requirements of the Clean Water Act consistent with the final rule text. Human-made features that are not waste treatment systems designed to meet the requirements of the Clean Water Act are not within the waste treatment system exclusion.

The final rule does not change the agencies' longstanding approach to waste treatment systems constructed in connection with mining operations. See Letter from Benjamin H. Grumbles, Assistant Administrator, EPA to the Hon. John Paul Woodley, Assistant Secretary of the Army (Civil Works) (March 1, 2006); Memorandum from LaJuana S. Wilcher, Assistant Administrator, to Charles E. Findley, Director, Water Division, Region X re Clean Water Act regulation of mine tailings disposal (Oct. 2, 1992).

Further, nothing in the final rule changes the agencies' longstanding approach to drinking water systems. The absence of an express exclusion for drinking water systems does not mean that the agencies intend to assert Clean Water Act jurisdiction under the final rule over specific features or processes identified in the comments, particularly in circumstances where the agencies would not have asserted jurisdiction consistent with their longstanding approach to implementing the exclusion under the pre-2015 regulatory regime.

To the extent a commenter suggests that the exclusion for waste treatment systems should extend to features that treat waste and discharge but are not required to have a Clean Water Act permit, the agencies agree. Application of the exclusion does not necessarily rest on whether aspects of the waste treatment system are subject to any specific Clean Water Act permit. The final rule does not change the agencies' longstanding application of the waste treatment system exclusion.

15.2.8 Cooling ponds

Several commenters expressed support for deleting a reference to a definition for cooling ponds that does no longer exists in the Code of Federal Regulations.

Another commenter expressed opposition to the 2020 NWPR's definition of "waste treatment system" that the commenter stated expressly excluded all "cooling ponds" from the definition of "waters of the United States."

A few commenters contended that, as written, the exclusion for waste treatment systems could be interpreted to exclude lakes and ponds that would otherwise be considered "waters of the United States" if, for example, they are used as cooling ponds for utilities or other industries. The commenters requested that the proposed rule explicitly state that traditional navigable waters and interstate waters are not subject to the waste treatment system exclusion. Some pointed to case law to justify their arguments and contended that a "water of the United States" does not lose its federal status by being diverted and impounded.

Several commenters suggested that the regulatory text or preamble make clear that the waste treatment exclusion applies to human-made industrial or commercial holding ponds, such as those for cooling water or process water (*i.e.*, cooling ponds).

> **Agencies' Response: The agencies agree that the reference to an obsolete definition of cooling ponds should be removed from the waste treatment system exclusion as it is codified in the regulatory text.**
>
> **As explained in Final Rule Preamble Section IV.C.7, the final rule's exclusions—including the waste treatment system exclusion—do not apply to features that, at the time they are assessed, are jurisdictional under paragraph (a)(1). Note, however, that an excluded waste treatment system—such as a cooling pond—may over time take on the characteristics of a jurisdictional water, such as a paragraph (a)(1) traditional navigable water.[3] In this scenario, the exclusion continues to apply and the waste treatment system does not become a jurisdictional water under paragraph (a)(1) or any other provision of the rule, unless or until the system ceases to serve the treatment function for which it was designed (as discussed in the immediately preceding paragraph).**
>
> **While certain cooling ponds may fall within the waste treatment system exclusion, the authorized discharge of heat into a jurisdictional waterbody or the use of a jurisdictional waterbody as a source of cooling water by itself does not transform that waterbody into a waste treatment system. For the exclusion to apply, the system must be operating as a waste treatment system in a manner consistent with the requirements of Clean Water Act section 301 that, except in compliance with the Clean Water Act (including its permitting provisions), the discharge of any pollutant by any person is unlawful. The waste treatment system exclusion does not free a discharger from having to comply with the permitting provisions of the Clean Water Act at the final outfall from the system. For example, a**

[3] This situation may arise where, for example, a human-made cooling pond constructed in uplands takes on the characteristics of a traditional navigable water.

discharger may not evade the permitting provisions of the Clean Water Act by discharging directly into a jurisdictional water and then claiming that the dilution or assimilative capacity of the receiving water, without more, serves as an excluded waste treatment system. See also Final Rule Preamble Section IV.C.7.

15.2.9 Comments citing examples of excluded waste treatment systems

A few commenters provided specific examples of utilities or industries whose cooling and holding ponds, the commenters contended, have polluted nearby waters.

One commenter described the impacts of coal ash surface impoundments that the commenter asserted could be excluded as part of a waste treatment system and cited these impacts as a reason not to include the exclusion for waste treatment systems in the final rule.

Agencies' Response: The agencies acknowledge the examples provided by the commenters. The waste treatment system exclusion does not free a discharger from the need to comply with the Clean Water Act for pollutants discharged *from* a waste treatment system to "waters of the United States"; only discharges *into* the waste treatment system are excluded from the Clean Water Act's requirements. As such, any entity would need to comply with the Clean Water Act by obtaining a section 404 permit for a new waste treatment system constructed in "waters of the United States," and a section 402 permit for discharges of pollutants from a waste treatment system into "waters of the United States." See Final Rule Preamble Section IV.C.7; see also Final Rule Preamble Section IV.A.2.a (discussing the Supreme Court's decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020)).

15.3 Prior Converted Cropland

15.3.1 General support for a jurisdictional exclusion for prior converted cropland

Many commenters urge retention of an exclusion for prior converted cropland, noting that farmers have relied upon the exclusion for decades.

Agencies' Response: The agencies agree with those commenters requesting the continuation of the exclusion of prior converted croplands. In the final rule the agencies have repromulgated the regulatory exclusion for prior converted cropland first codified in 1993, which provided that prior converted cropland is "not 'waters of the United States."' The final rule restores longstanding and familiar practice under the pre-2015 regulatory regime and maintains consistency and compatibility between the agencies' implementation of the Clean Water Act and the USDA's implementation of the Food Security Act by providing that prior converted cropland under the Clean Water Act encompasses areas designated by USDA as prior converted cropland. Areas USDA has not so designated are not eligible for this Clean Water Act exclusion.

The agencies recognize that farmers and ranchers are leaders in environmental stewardship and water management and that water is essential to farmers' work to feed and fuel the

nation. The agencies agree that expressly excluding prior converted cropland from "waters of the United States" is a reasonable and lawful exercise of the agencies' authority to determine the scope of "waters of the United States." This categorical exclusion for prior converted cropland will simplify the process of determining jurisdiction while providing certainty to farmers seeking to conserve and protect land and waters pursuant to federal law. The final rule also appropriately balances the need to protect the nation's capability to produce food and fiber with the need to protect the nation's wetlands. See Final Rule Preamble Section IV.C.7; Proposed Rule Preamble Section V.C.8.a.

15.3.2 General opposition to a jurisdictional exclusion for prior converted cropland

Some commenters opposed any categorical exclusion for prior converted cropland. A few of these suggested the exclusion, even as originally promulgated in 1993, lacks a scientific basis and that even degraded prior converted cropland could still perform some wetlands functions or be restored. These commenters referenced studies showing how prior converted cropland continues to perform the functions of wetlands. Another commenter asserted that there is no legal basis for excluding prior converted croplands.

Several commenters cite to a USDA study to support their assertion that the exclusion for prior converted cropland should be eliminated or at least limited. *See* U.S. Dept. of Agric., "Role of Prior Converted Croplands on Nitrate Processing in Mid-Atlantic Agricultural Landscapes" (Sept. 2017) ("Our research suggests that prior converted cropland can substantially reduce nitrate export from agricultural watersheds in the region, an ecosystem function shared with natural and restored wetlands."), available at https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcseprd1353132.pdf.

Agencies' Response: The agencies disagree with commenters who assert that prior converted cropland should not be excluded from the definition of "waters of the United States" absent evidence that the area performs no wetland functions and cannot be restored. Expressly excluding prior converted cropland from "waters of the United States" is a reasonable and lawful exercise of the agencies' authority to determine the scope of "waters of the United States." As the agencies explained in 1993, "effective implementation of the wetlands provisions of the Act without unduly confusing the public and regulated community is vital to achieving the environmental protection goals of the Clean Water Act." 58 FR 45031. The agencies also noted that "[t]he [Clean Water Act] is not administered in a vacuum. Statutes other than the [Clean Water Act] and agencies other than the EPA and the Corps have become an integral part of the federal wetlands protection effort. We conclude that this effort will be most effective if the agencies involved have, to the extent possible, consistent and compatible approaches to insuring wetlands protection. 58 FR 45008, 45031-32. Excluding prior converted cropland serves the important purpose of maintaining consistency among federal programs addressing wetlands while furthering the objective of the Clean Water Act.

With respect to the USDA study cited by some commenters, the agencies acknowledge that the final rule's exclusions from the definition of "waters of the United States" are based on policy and implementation reasons and not based on scientific support. However, the agencies conclude that the final rule's treatment of prior converted cropland (*i.e.*, the focus on change in use for areas to no longer be eligible for the exclusion) is consistent with the

cited study. The USDA study referenced by the commenters compared nitrate export from two subwatersheds with comparable quantities of cropland within the Choptank River watershed. The study noted that the subwatershed with a higher percentage of prior converted cropland exported less nitrate than the subwatershed where the percentage of prior converted cropland was less. The study attributed this difference to denitrification being performed by the poorly drained (*i.e.*, wetlands) soils within the prior converted cropland areas. The final rule is consistent with this study because it removes incentives for farmers to manipulate prior converted cropland that otherwise would remain idle. The final rule provides assurance that a farmer can allow prior converted cropland to remain idle or fallow without concern that the area will lose its prior converted croplands status due to abandonment. Because the final rule preserves the exclusion unless there is a change in use, it removes incentives for farmers to periodically disturb prior converted cropland to avoid the risk that an area would revert to wetlands and lose its prior converted cropland designation. See agencies' response to comments Section 15.3.5.

15.3.3 Jurisdictional exclusion for prior converted cropland as set forth in the 2020 NWPR

Many commenters requested that the agencies retain the 2020 NWPR's exclusion for prior converted cropland. These commenters asserted that retaining the 2020 NWPR's version of the exclusion would reduce confusion in implementing the exclusion for prior converted cropland. Specifically, these commenters requested that the agencies (i) withdraw the 2005 Joint Memorandum between the Corps and USDA; (ii) allow areas to be identified as prior converted cropland regardless of whether USDA has designated it as prior converted cropland; and (iii) allow prior converted cropland to retain its excluded status so long as the land has been used for a broad range of agricultural purposes at least once in the preceding five years.

Many commenters stated that the version of the exclusion for prior converted cropland in the 2020 NWPR provided much-needed clarity and requested it be included in the final rule.
One commenter expressed concern that the proposed rule would require rice farmers to establish that longstanding rice lands were created on historically dry land. The commenter favored retention of the 2020 NWPR as providing greater certainty and requiring less expenditure by the landowner to demonstrate that his or her land meets the exclusion for prior converted cropland.

One commenter asserted that until the 2020 NWPR, the prior converted cropland exclusion was uncertain and confusing and required a landowner to proceed through a lengthy and costly process, without compensation. Another commenter asserted that the proposed rule's definitions are vague and overly broad and would impair farmers' ability to operate.

Other commenters did not support the definition of prior converted cropland in the 2020 NWPR and requested a less expansive exclusion.

- One commenter pointed out that the breadth of NWPR's use of the term "agricultural purpose" introduced confusion and would greatly expand the scope of the exclusion for prior converted cropland. That commenter gave an example of whether grazing by a single cow would be sufficient to meet "agricultural purpose."
- Some commenters specifically suggested that the 2020 NWPR definition be modified to include only significantly degraded lands that are unlikely to be able to revert back to wetlands. One of

these commenters suggested that the definition should be specifically tied to the production of food.

- A few commenters suggested that the 2020 NWPR standards for excluding prior converted cropland made it very unlikely that a prior converted cropland would become eligible to be jurisdictional again. These commenters requested a clearer path to jurisdictional status for prior converted cropland that revert to wetlands or are put to non-agricultural use.
- A few commenters expressed support for the original 1993 definition.

Agencies' Response: To the extent commenters request that the agencies retain the exclusion for prior converted cropland in the 2020 NWPR, the agencies disagree. As set forth in the Final Rule Preamble Section IV.C.7 and the Proposed Rule Preamble Section V.C.8.a, the agencies chose not to codify the 2020 NWPR's definition because that interpretation does not carry out the original purpose of the exclusion, which is to ensure consistency among federal wetland protection programs while protecting the integrity of the nation's waters. The agencies conclude that the final rule text best achieves the agencies' goal of maintaining consistency and compatibility between the agencies' implementation of the Clean Water Act and the USDA's implementation of the Food Security Act, minimizing disruption of farming operations, and furthering the objective of the Clean Water Act.

In response to requests from commenters to increase the clarity of the exclusions through the regulatory text, the agencies are noting in the regulations that this exclusion encompasses areas that USDA has designated as prior converted cropland, and that the exclusion will cease when the area has changed use so that it is no longer available for the production of agricultural commodities. The final rule does not reinstate the 2005 Joint Memorandum, which was rescinded on January 28, 2020. *See* https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/4288. That said, the final rule borrows certain concepts from the 2005 Joint Memorandum. See agencies' response to comments Section 15.3.5.2. With respect to the conditions that would cause the exclusion for prior converted cropland to no longer apply to an area, see the Final Rule Preamble Section IV.C.7.a and the agencies' response to comments Section 15.3.5.

To the extent a commenter asserted that the proposed rule would require a farmer to prove that rice fields were constructed in dry land, the exclusion for prior converted cropland in the 1993 preamble and in the final rule does not require that the feature be constructed in dry land. The commenter appears to be confusing the exclusion for prior converted cropland with the exclusion for "[a]rtificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing," which is codified as section (b)(5) of the final rule text. See the agencies' response to comments in Section 15.6.

15.3.4 Definition of prior converted cropland

15.3.4.1 Prior converted cropland definition

Many commenters expressed a desire to have a specific definition of prior converted cropland in the proposed rule to provide clarity.

One commenter requested that ditches, laterals, and canals within prior converted cropland-designated land also be part of the prior converted cropland exclusion.

One commenter sought to broaden the exclusion beyond the agricultural context, asserting that there was no ecological or hydrological rationale for treating wetlands converted to cropland differently than wetlands converted for industrial purposes.

A few commenters expressed support for the USDA Natural Resources Conservation Service (NRCS) definition.

> **<u>Agencies' Response</u>: The agencies agree with those commenters who support including a definition of prior converted cropland in the rule and those who support using the same definition of prior converted cropland for purposes of both the Clean Water Act and the Food Security Act. The final rule will implement the prior converted cropland exclusion so that it encompasses all areas designated by USDA, and no additional areas. USDA interprets prior converted cropland to be 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 did not meet the hydrologic criteria for farmed wetland." 7 CFR 12.2. See Final Rule Preamble Section IV.C.7. USDA defines an agricultural commodity, in turn, as "any crop planted and produced by annual tilling of the soil, including tilling by one-trip planters, or sugarcane."** ***Id.*** **at 12.2.**
>
> **The agencies chose not to codify USDA's definition of prior converted cropland, ensuring that they would retain flexibility to accommodate changes USDA might make. Instead, the final rule achieves consistency with the USDA's definition by clarifying in the regulatory text that "Prior converted cropland designated by the Secretary of Agriculture" is not "waters of the United States."**
>
> **To the extent commenters assert that the exclusion for prior converted cropland should extend to features other than wetlands, the agencies disagree. Consistent with longstanding agency practice, the water features in question on prior converted cropland are wetlands. The Clean Water Act exclusion for prior converted cropland only covers wetlands and does not exclude other types of non-wetland aquatic resources (*e.g.*, tributaries, ponds, ditches) that are located within the prior converted cropland area.**
>
> **The agencies also disagree with comments asserting that wetlands converted for industrial use also should be excluded as prior converted cropland. The purpose of the exclusion for prior converted cropland is to ensure consistency and compatibility between the agencies' implementation of the Clean Water Act and the USDA's implementation of the Food Security Act while furthering the objective of the Clean Water Act. Expanding the exclusion to wetlands converted for industrial use would not further these goals.**

15.3.4.2 Which agency should identify prior converted cropland

Several commenters suggested that prior converted cropland determination should not depend on determination by the USDA, but rather by the agencies. Some commenters noted that an affirmative determination of prior converted cropland status by USDA should not be determinative of jurisdictional status.

Conversely, a few commenters suggested that the agencies should continue their longstanding policy of consulting with the NRCS to determine these excluded areas and continue to accept NRCS prior converted cropland certifications as valid "waters of the United States" exclusions.

One commenter requested that the agencies continue to provide cross-agency prior converted cropland guidance for any new rule.

> **Agencies' Response: The agencies agree with those commenters who assert that only prior converted cropland designated by USDA should fall within the exclusion for prior converted cropland. The final rule provides clarity and maintains consistency and compatibility between the agencies' implementation of the Clean Water Act and the USDA's implementation of the Food Security Act by providing that prior converted cropland under the Clean Water Act encompasses areas designated by USDA as prior converted cropland. Areas USDA has not so designated are not eligible for this Clean Water Act exclusion under the final rule.**
>
> **Consistent with practice under the pre-2015 regulatory regime, a landowner may demonstrate that a water is a prior converted cropland by providing a USDA prior converted cropland certification. *See* 58 FR 45033 ("recognizing [NRCS]'s expertise in making these [prior converted] cropland determinations, we will continue to rely generally on determinations made by [NRCS]."). In order to maintain consistency between implementation of the Clean Water Act and the Food Security Act, the agencies have not codified USDA's definition of prior converted cropland. By codifying in the regulatory text that the exclusion covers only areas designated as prior converted cropland by USDA, the final rule makes clear that the exclusion is consistent with USDA's definition. This clarification provides certainty and transparency but also ensures flexibility to adapt to any changes USDA might make in implementing the prior converted cropland exclusion. See also Final Rule Preamble Section IV.C.7.**
>
> **That said, the final rule retains the longstanding provision that "for purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA." Thus, while the scope of the exclusion is limited to areas designated as prior converted cropland by USDA, the final authority to determine whether the exclusion applies lies with EPA. For purposes of day-to-day implementation of the permitting provisions of Clean Water Act section 404, the Corps remains the lead federal agency. Consistent with longstanding practice, the Corps will continue to make determinations regarding applicability of the exclusion on a case-specific basis as part of its implementation of its Clean Water Act section 404 permitting responsibilities and will consult with EPA as appropriate.**

To the extent commenters request that the agencies provide guidance on implementation of the exclusion for prior converted cropland, 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. 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's exclusion for prior converted cropland.

15.3.5 Comments regarding when or if an area loses its status as prior converted cropland

The agencies solicited public comment and many commenters expressed an opinion as to the appropriate principles for determining the circumstances under which the Clean Water Act exclusion would no longer apply to a prior converted cropland. These included the abandonment approach as described in the 1993 preamble (58 FR 45031-34), the abandonment approach as embodied in the 2020 NWPR (85 FR 22320-21), and the change in use approach as implemented by USDA under its regulations. The agencies received comments favoring each of the foregoing approaches.

A few commenters expressed concern that rice fields could lose prior converted cropland status under the proposed rule because rice lands may lie fallow for several years due to drought or other lack of water availability.

Agencies' Response: The agencies have decided to enhance consistency between prior converted cropland under the Food Security Act and under the Clean Water Act, without undermining the goals of the Clean Water Act, by implementing the exclusion as ceasing upon the area's "change in use." Under the final rule, a prior converted cropland would regain jurisdictional status if it meets the definition of "waters of the United States" and is subject to a "change in use," meaning that it is no longer available for production of an agricultural commodity. See Final Rule Preamble Section IV.C.7.a.

At the outset, it is important to note that the agencies agree that areas that do not meet the definition of "waters of the United States" would not be regulated regardless of their status as prior converted cropland. The final rule does not change the agencies' longstanding interpretation that no Clean Water Act authorization is needed for discharges to an area that has lost its prior converted cropland status unless the area also satisfies the definition of "waters of the United States."

As explained in the Final Rule Preamble Section IV.C.7, the agencies will implement the prior converted cropland designation as lasting so long as an area is available for the production of agricultural commodities, including being left idle for any agricultural purpose. The exclusion for prior converted cropland would no longer be available following a "change in use" occurring when prior converted cropland is no longer available for the production of an agricultural commodity.

Consistent with USDA's interpretation, a "change in use" would not occur "[a]s long as the area is devoted to the use and management of the land for production of food, fiber, or horticultural crops..." 7 CFR 12.30(c)(6). The agencies do not interpret changes in use to include discharges associated with agricultural uses identified in the Corps' and NRCS's

2005 Memorandum to the Field, such as planting of agricultural crops, production of food or fiber, haying or grazing, idling consistent with USDA programs, or diversion from crop production for purposes of preventing erosion or other degradation, as these uses keep the land available for future production of agricultural commodities. Similarly, an area may retain its prior converted cropland status if it is used for any of the agricultural purposes identified in the 2020 NWPR preamble, which "includ[e] but [are] not limited to "idling land for conservation uses (*e.g.*, habitat; pollinator and wildlife management; and water storage, supply, and flood management); irrigation tailwater storage; crawfish farming; cranberry bogs; nutrient retention; and idling land for soil recovery following natural disasters like hurricanes and drought," as well as "crop production, haying, and grazing," so long as the area remains available for the production of agricultural commodities." *See* 85 FR 22321 (April 21, 2020). Consistent with USDA practice, an area has not experienced a change in use if, for example, it transitions into a long-term rotation into agroforestry or perennial crops, such as vineyards or orchards, or if it lies idle and the landowner passively preserves the area for wildlife use. Generally speaking, idling the land retains its availability for the production of an agricultural commodity.

The change in use approach is consistent with the underlying purpose of the Clean Water Act exclusion to achieve as much consistency and compatibility as possible between the agencies' implementation of the Clean Water Act and the USDA's implementation of the Food Security Act, thereby providing certainty to farmers seeking to conserve and protect land and waters pursuant to federal law. Because the wetland conservation provisions of the Food Security Act only apply to the production of agricultural commodities, a prior converted cropland designation becomes moot for USDA purposes once land is removed from agricultural use.

The agencies' approach to prior converted cropland under the final rule imposes less of a burden on farmers than the approach under the 2020 NWPR or the abandonment approach under the 1993 preamble. Both the 1993 preamble and the 2020 NWPR versions of abandonment imposed temporal and qualitative criteria that could cause idled or fallow land to cease qualifying for the exclusion. Under the 1993 preamble, prior converted cropland that reverted to wetlands would be considered abandoned unless "once in every five years [the area] has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes, or pasture production." 58 FR 45034. Under the 2020 NWPR, "[a]bandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years." 85 FR 22341. The 2020 NWPR's preamble explained that prior converted cropland would not be considered abandoned if it were idled or lying fallow "for conservation or agricultural purposes." 85 FR 22320.

By contrast, under implementation of the final rule, a prior converted cropland would not lose its eligibility for the Clean Water Act exclusion regardless of how long it was idled or fallow or for what purpose, so long as it remains available for use as cropland. In other words, under the final rule, a farmer could maintain prior converted cropland status without needing to demonstrate that the area was used for support of agricultural purposes at least once in the immediately preceding five years or had been idled for conservation or agricultural purposes. See also Final Rule Preamble Section IV.C.7.

Under the change in use principle, there is no incentive or need for the farmer to manipulate idled or fallow fields once every five years to avoid inadvertent abandonment and loss of the exclusion. Accordingly, the change in use approach provides greater flexibility for a farmer to manage his or her lands, facilitates soil health and restoration, and less impediment to a farmer seeking to bring long-idled prior converted cropland back into crop production.

The final rule's change in use approach also closes the "loophole" identified by some commenters as associated with the abandonment approach by ensuring that discharges that would lead to making the land unavailable for crop production would require authorization under Clean Water Act. See the agencies' response to comments Section 15.3.5.2. The change in use principle, therefore, appropriately balances the need to protect the nation's capability to produce food and fiber with the need to protect the nation's wetlands.

With respect to comments regarding the effect of the final rule on rice fields left fallow for several seasons due to weather conditions, determinations regarding the jurisdictional status of any specific water are outside the scope of this rulemaking. The agencies will assess jurisdiction under the final rule on a case-specific basis. That said, as a general matter, an area would not lose its prior converted cropland status so long as it remains available for crop production, regardless of whether the purpose for idling the land was related to conservation or agricultural purposes. See the agencies' response to comments in Sections 15.3.5 and 15.3.5.2.

15.3.5.1 Abandonment

A few commenters suggested that many forms of agriculture don't require annual tillage and planting, so these should not be standards for determining abandonment.

One commenter suggested that prior converted cropland exclusion status should remain if the land is put to any non-wetland related beneficial use, until wetlands can be clearly delineated by the agencies as a result of abandonment.

One commenter suggested that it is not necessary to define "abandonment" if, when a change to a non-agricultural use is proposed, the agencies conduct the jurisdictional evaluation through a change in use analysis.

One commenter asserted that use of the abandonment principle for determining when an area ceases to be prior converted cropland for Clean Water Act purposes under either the pre-2015 regulatory regime or the 2020 NWPR creates a "gap" in the administration of the exclusion that allows dischargers of fill for non-agricultural purposes to take advantage of an exclusion that was intended to apply to agricultural uses.

Several commenters expressed support for the 2020 NWPR's standard that prior converted cropland should maintain its designation if it has been used for agricultural *purposes* at least once in the preceding five years.

A few commenters suggested that once something is determined to be prior converted cropland, it should always be considered prior converted cropland. They claimed that abandonment standards should not be necessary unless a prior converted cropland has been fully abandoned for agricultural purposes.

Some commenters suggested that prior converted cropland should not be considered abandoned so long as the land remains available for production of an agricultural commodity or for conservation purposes, or if irrigation water is denied due to drought or other reasons.

Several commenters objected to the 2020 NWPR's standard and instead suggested support for the original approach from 1993 that prior converted cropland should maintain its designation if it has been used for agricultural *production* at least once in the preceding five years. Many of these commenters objected to what they asserted was an overly broad definition of "agricultural purposes" in the 2020 NWPR and would prefer to base the standard on the production of agricultural commodities.

One commenter provided examples of developers who used the 2020 NWPR standard to exclude prior converted cropland even though they had plans to develop their lands for non-agricultural purposes.

Several commenters did not support a 5-year window for determining if prior converted cropland is abandoned, suggesting that drought, change in commodity prices, and other factors can keep agricultural lands out of use.

One commenter questioned the agencies reference in the Proposed Rule Preamble to an area out of production for six years and questioned whether that reference was inconsistent with a 5-year abandonment period.

Some commenters suggested a 10-year window would be more appropriate.

> **<u>Agencies' Response</u>: See the agencies' response to comments in Section 15.3.5. The agencies will not implement the exclusion using the "abandonment" approach used by the 2020 NWPR because the 2020 NWPR's "abandonment" approach is not consistent with USDA's approach or with the purposes of the Clean Water Act. See Final Rule Preamble Section IV.C.7. The agencies agree with those commenters who asserted that the abandonment approach creates a "gap" or "loophole" that allows dischargers to take advantage of an exclusion that was intended to apply to crop production uses. See the agencies' response to comments in Section 15.3.5.2.**
>
> **To the extent commenters assert that a five-year period may be inappropriate for determining abandonment because areas may be idled or lay fallow for longer periods for agricultural purposes, under the final rule's change in use approach, land that is idled for more than five years can retain its prior converted cropland status so long as it remains available for use in crop production, regardless of the reason why the land had been idled or has lain fallow.**

15.3.5.2 Change in use

Several commenters expressed opinions about the agencies' intent for the prior converted cropland exclusion to be consistent with the Corps-USDA 2005 Joint Guidance for prior converted cropland and its "change in use" principal.

Many commenters opposed use of the 2005 Joint Guidance and/or "change in use" principle for determining when an area would lose its status as excluded prior converted cropland. Many commenters opposed the "change in use" principle for determining when an area would lose its status as excluded prior converted cropland. These commenters expressed their understanding that the "change in use" principle would limit farmers' ability to bring an area back into crop production, would lower the value of the land for purposes of sale, or would reduce the amount of acreage available for non-farming development. Some of these commenters asserted that the change in use principle was adopted for USDA wetlands certifications and not prior converted cropland certifications. They claimed that using this principle would change nearly 30 years of consistent implementation, and therefore it should be withdrawn.

A few commenters asserted that even if land changed from agricultural to residential use, it theoretically could still be returned to commodity crop production and therefore should retain the exclusion. Several commenters expressed support for using the "change in use" principle and requested that prior converted cropland lose its status if sold for development or is no longer available for production of an agricultural commodity. Some of these commenters suggested that without the "change in use" principle, wetlands could be permanently lost to development.

> **<u>Agencies' Response</u>: For information regarding the final rule's implementation of the change in use approach, see the Final Rule Preamble Section IV.C.7.a. and the agencies' response to comments in Section 15.3.5.**
>
> **To the extent commenters oppose reinstatement of the 2005 Joint Memorandum, the final rule does not reinstate the 2005 Joint Memorandum, which was rescinded on January 28, 2020. *See* https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/4288. That said, the final rule borrows certain concepts from the 2005 Joint Memorandum. For example, among other things, the agencies do not interpret changes in use to include discharges associated with agricultural uses identified in the Corps' and NRCS's 2005 Memorandum to the Field, such as planting of agricultural crops, production of food or fiber, haying or grazing, idling consistent with USDA programs, or diversion from crop production for purposes of preventing erosion or other degradation, as these uses keep the land available for future production of agricultural commodities.**
>
> **To the extent commenters assert that land theoretically could always be returned to commodity crop production because structures could be removed, the agencies disagree. The agencies interpret availability for commodity crop production to mean that it is reasonably conceivable that the area in its current condition could be returned to crop production. Areas that will be developed for residential, commercial, or industrial use; energy infrastructure; mining; or other non-farming related activities will not meet this standard of availability for commodity crop production. A "change in use" includes areas that have undergone soil disturbance such that substantial effort, such as the removal of**

concrete or other permanent structures, would be required to enable the production of agricultural commodities.

The agencies disagree with the commenters who assert or imply that the change in use approach narrows or limits the scope of the exclusion as it relates to efforts by a farmer to bring an idle area back into crop production. To the contrary, the agencies' approach to prior converted cropland under the final rule also imposes less of a burden on farmers than the approach under the 2020 NWPR. See the agencies' response to comments in Section 15.3.5. The final rule differs from the abandonment approach as implemented under both the 1993 preamble and the 2020 NWPR because, under the change in use approach, land that is idled for more than five years can retain its prior converted cropland status so long as it remains available for use in crop production, regardless of the reason why the land had been idled or lain fallow. Under the final rule's change in use approach, land that is idled or lain fallow for more than five years, and indeed, for any other length of time, can retain its prior converted cropland status so long as it remains available for use in crop production, regardless of the reason why the land had been idled or has lain fallow.

The agencies agree with the commenters who assert that the abandonment approach created a "gap" or "loophole" that allowed dischargers to take advantage of an exclusion that was intended to apply to crop production uses to render prior converted cropland unavailable for future farming. The final rule's change in use approach will close this "loophole" because discharges associated with a non-agricultural use would require a Clean Water Act section 404 authorization even if the discharge occurs within five years of the last discharge associated with crop production. Given that the exclusion for prior converted cropland originated in the Food Security Act, closure of this "loophole" both better aligns implementation of the Clean Water Act and the Food Security Act and balances the need to protect the nation's capability to produce food and fiber with the need to protect the nation's wetlands. The Clean Water Act exclusion for prior converted cropland was not intended to provide a "loophole" that would allow dischargers to make prior converted cropland unavailable for future farming by taking advantage of an exclusion that was intended to apply to crop production uses.

15.3.5.3 Miscellaneous comments regarding when and whether an area should lose its status as prior converted cropland

Several commenters asserted that prior converted cropland should lose its excluded status if the land reverts to wetlands that meet the definition of "waters of the United States."

Many commenters asserted that the agencies should clarify that an area is not considered a "water of the United States," regardless of whether there has been abandonment or change in use, unless the area is a wetland.

Several commenters expressed concern that agency staff are unfamiliar with modern farming and conservation practices and that lack of familiarity has caused the agencies to misapply the exclusion for prior converted cropland in the past. These commenters recommend that agency staff become familiar with modern farming and conservation practices and consult regularly with NRCS staff so that approved conservation and agricultural practices are not misinterpreted as violations of the Clean Water Act.

One commenter noted that the 2020 NWPR made mining prior converted cropland easier and stated a desire to maintain this.

One commenter suggested the potential for putting converted wetlands to non-agricultural use represents billions of dollars for farmers and that this value could be lost if prior converted croplands are not excluded.

A few commenters asserted that prior converted cropland should retain its status so long as the land is put to any beneficial use, such as wildlife habitat.

A few commenters urged that the agencies ensure that, under the final rule, the exclusion for prior converted cropland would continue to apply to cropland that is left idle or fallow for conservation or agricultural purposes for any period of time, and particularly to cropland that is enrolled in conservation programs administered by USDA or by state or local governments.

A few commenters urge the agencies to adopt the "once prior converted cropland, always prior converted cropland" approach taken by USDA.

One commenter asserted that the pre-2015 regulatory regime took a "guilty until proven innocent" approach that placed too much of a burden on farmers to establish applicability of the exclusion for prior converted cropland. The same commenter also expressed concern that the agencies imposed too much of a burden on farmers to establish that rice fields were not "waters of the United States" requiring rice fields to lay fallow for years without compensation.

> **<u>Agencies' Response</u>: The agencies agree that areas that do not meet the definition of "waters of the United States" would not be regulated regardless of their status as prior converted cropland. The final rule does not change the agencies' longstanding interpretation that Clean Water Act authorization is not needed for discharges to an area that has lost its prior converted cropland status unless the area also satisfies the definition of "waters of the United States." Any area that has not reverted to a wetland that meets this rule's definitions will not be regulated as a "water of the United States." An approved jurisdictional determination (AJD), or EPA equivalent jurisdictional decision, should demonstrate that an area has reverted to a wetland under present conditions using the applicable agency delineation procedures when determining if it meets the definition of "waters of the United States."**
>
> **The final rule addresses commenters' concerns that agency staff may not understand when change in use has occurred due to lack of familiarity with farming practices. Because implementation of the final rule's change in use approach does not require determining whether an area has been idled or has lain fallow consistent with modern farming or conservation practices, the final rule addresses much of the commenters' concerns. The agencies agree that consultation with NRCS staff as necessary and appropriate is beneficial and promotes the goal of achieving as much consistency and compatibility as possible in implementation of the Clean Water Act and the Food Security Act.**
>
> **The commenter is correct that discharges associated with mining of prior converted cropland would represent a change in use and would require Clean Water Act authorization. Given that the exclusion for prior converted cropland originated in the Food**

Security Act, the change in use approach both better aligns implementation of the Clean Water Act and the Food Security Act and balances the need to protect the nation's capability to produce food and fiber with the need to protect the nation's wetlands. It is not the purpose of the Clean Water Act exclusion for prior converted cropland to release discharges associated with mining or any other non-agricultural land use from regulation under the Clean Water Act.

The agencies disagree with commenters who asserted that the agencies should maintain the 2020 NWPR's approach to implementing prior converted cropland because the ability to sell prior converted cropland for non-agricultural development could provide billions of dollars to farmers. The agencies have concluded that this potential financial benefit to persons who would no longer be using the land for farming does not effectuate the original purpose of the exclusion, which was to promote consistency among federal clean water protection programs in order to help restore and maintain the nation's waters. Moreover, the exclusion was originally intended to allow farmers to farm their land. The financial benefit the commenters cite comes from selling farmland to be developed. Further facilitating these sales does nothing to support farmers who seek to continue to farm and could even undermine their incentives to do so. The Clean Water Act exclusion for prior converted cropland was not intended to provide a financial windfall for developing prior converted cropland and making it unavailable for future farming.

To the extent a few commenters asserted that prior converted cropland should remain excluded so long as the land is put to any beneficial use, such as wildlife habitat, see the agencies' response to comments in Section 15.3.5.

To the extent commenters assert that the exclusion should apply to cropland that is left idle or fallow for conservation or agricultural purposes for any period of time, the agencies agree that prior converted cropland that is left idle would remain excluded under the final rule so long as it remains available for the production of agricultural commodities. See the agencies' response to comments in Section 15.3.5.

With respect to comments urging the agencies to adopt the "once prior converted cropland, always prior converted cropland" approach taken by USDA, the final rule is consistent with the USDA's approach that, to maintain a previously determined prior converted cropland exclusion, the landowner/operator only needs to demonstrate that land use conditions have not changed such that the land area remains available for the production of an agricultural commodity. *See* 7 CFR 12.30(c)(6) ("As long as the affected person is in compliance with the wetland conservation provision of this part, and as long as the area is devoted to the use and management of the land for production of food, fiber, or horticultural crops, a certification made under this section will remain valid and in effect until such time as the person affected by the certification requests review of the certification by NRCS").

15.4 Water Features Associated with Agricultural Activity That Do Not Qualify as Prior Converted Cropland

Many commenters generally opposed regulation of agriculture-related water features. Some of these commenters expressed concern that the final rule will lead to regulation of activities on farmlands and

pastures, including maintenance activities. These commenters made general statements of support for agricultural exclusions, and stated that the agencies should expressly exclude the following:

- Playa lakes;
- Ditches (including farm ditches, road ditches, and sediment basins);
- Canals;
- Ponds (including artificial ponds, farm ponds, and stock ponds);
- Prairie potholes;
- Irrigation canals;
- Watering impoundments;
- Water quality wetlands;
- Grass waterways; and
- Terraces, biofilters, prairie strips, saturated buffers.

Many commenters stated that the proposed rule will burden ranchers and landowners, especially with respect to the cost of permitting requirements. One commenter stated that farmers and ranchers should not have the burden of proving the historical status of agriculture related water features.

One commenter stated that the proposed rule would inhibit the use of California rice lands seasonally to benefit the environment because the rule suggests that such lands may be "waters of the United States," which would then trigger application of provisions under sections 402 and 404 of the Clean Water Act. Another commenter asserted that a particular Corps District implemented the prior converted cropland exclusion as to rice lands by requiring proof that they were constructed in dry land or requiring that they be idled.

One commenter stated that the proposed language expanding jurisdiction and limiting the exclusion for artificial lakes or ponds to those created by excavating or diking "dry land" negates the farm pond exemption.

> **Agencies' Response: The agencies disagree with commenters asserting that all features related to agriculture should be excluded from jurisdiction under the Act. As described in the final rule preamble, Congress clearly intended that some agriculture-related waters are jurisdictional under the Act and the agencies find that it would not be appropriate to exclude all agriculture-related waters, like certain ditches, from the definition of "waters of the United States." See Final Rule Preamble Section IV.C.7.c.i.2. However, as described in more detail in the final rule preamble, the agencies' final rule excludes several types of features that are commonly associated with agricultural activities (*e.g.*, prior converted cropland, certain ditches, certain artificial lakes and ponds). Further, even where a feature is not excluded, it is only jurisdictional if it satisfies the terms of the categories of waters that are considered jurisdictional under the final rule.**
>
> **To the extent commenters express concern that the final rule will negate an exemption for discharges associated with certain farming activities, the agencies note that the final rule is limited to defining what features are "waters of the United States" for purposes of the Clean Water Act (including what features are excluded from that definition). The final rule does not affect statutory exemptions for discharges into jurisdictional features associated with certain farming-related activities. For example, the fact that the prior converted cropland**

exclusion would remain available to a farmer who seeks to bring idled land back into crop production after more than five years of laying fallow is distinct from the question as to whether activities associated with any such resumption of crop production after a period of idling would qualify as 'normal' (on-going) farming activities under the exemption set forth in CWA section 404(f)(1)(A). See also the agencies' response to comments in Section 15.13.

To the extent commenters express concerns regarding whether rice fields may fall within the final rule's exclusions for prior converted cropland or artificial lakes or ponds constructed in dry land, see Final Rule Preamble Section IV.C.7 and the agencies' response to comments in Section 15.3 and Section 15.6.

The agencies disagree with the commenter who stated that the rule negates the farm pond exemption. The agencies are including in the final rule regulatory text longstanding exclusions from the definition of "waters of the United States" for features that were generally considered non-jurisdictional under the pre-2015 regulatory regime. These are consistent with the agencies' longstanding approach to these features. Further, as noted above, the final rule does not affect statutory exemptions for discharges into jurisdictional features associated with certain farming-related activities.

15.5 Artificially Irrigated Areas That Would Revert to Upland if the Irrigation Ceased ("Artificially Irrigated Areas")

Many commenters made general statements of support for expressly excluding artificially irrigated areas from the definition of "waters of the United States."

One commenter asserted that flooding and discharge from fields used for wetland crop species is regulated by states and does not need further federal regulation. The commenter further suggested that federal regulation should focus on the control and use of pesticides that may be used in this production.

One commenter contended that without this exclusion, rice fields not otherwise excluded as prior converted cropland and which are wet by nature could be designated as jurisdictional which would make rice farming virtually impossible.

<u>Agencies' Response</u>: The agencies agree with commenters who supported an express exclusion in the regulatory text for artificially irrigated areas that would revert to dry land if irrigation ceased. Consistent with the features listed in the preamble to the 1986 regulations, the agencies are codifying an exclusion for artificially irrigated area that would revert to dry land if the irrigation ceased. See also Final Rule Preamble Section IV.C.7.

To the extent commenters assert that certain discharges or flooding resulting from artificial irrigation should be excluded, the comments are outside the scope of this rulemaking. The final rule does not regulate discharges. Regulation, if any, of discharges to create an artificially irrigated area that would revert to dry land should irrigation cease and regulation of discharges from artificially irrigated areas are outside the scope of this rulemaking. Regulation of the control and use of pesticides is also outside the scope of this rulemaking.

To the extent commenters refer to rice fields, a feature may be excluded when it fits the criteria of one of the exclusions included in the final rule and would not otherwise be jurisdictional under paragraph (a)(1) of this rule. In addition to the exclusions for artificially irrigated areas and prior converted cropland, the final rule also expressly excludes artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing. In addition, the agencies will continue to evaluate Clean Water Act jurisdiction on a case-specific basis. The agencies will not assert jurisdiction over features that do not satisfy the definition of "waters of the United States" articulated in paragraph (a) of the final rule.

The final rule does not affect longstanding activity-based exemptions from the permitting requirements of the Clean Water Act, such as those found in section 404(f), including the exemption for discharges of dredge or fill material from "normal farming." See also agencies' response to comments in Sections 15.3, 15.4, 15.6, and 15.13.

15.6 Artificial Lakes or Ponds Created by Excavating or Diking Dry Land

15.6.1 General support for codifying an exclusion for artificial lakes or ponds excavated in dry land

Many commenters made general statements of support for expressly excluding artificial lakes or ponds excavated in dry land. Some commenters also noted that such features were excluded in past rules including the 2015 Clean Water Rule and the 2020 NWPR. A few commenters made general assertions that the exclusion for artificial lakes or ponds excavated in dry land from past versions of the rules defining "waters of the United States" should be maintained to provide regulatory certainty about jurisdiction, reduce regulatory delay and expenses, and ensure unimpeded routine maintenance. These commenters assert that omission of an express exclusion as in the proposed rule would lead to subjective decisions rather than a clear line as to which waters are jurisdictional and which are not.

One commenter stated that artificial lakes or ponds excavated in dry land are integral to livestock production and wildlife habitat, providing valuable environmental benefits to water quality by dispersing ungulates across the landscape and avoiding the potential impacts of animal concentration to "waters of the United States" features.

One commenter suggested that waters converted from "waters of the United States" under section 404 should be considered the same as "dry land" for Clean Water Act purposes, and therefore be excluded. Another commenter suggested that it would be helpful if the agencies provided a definition of "artificial lakes or ponds."

One commenter recommended that the agencies not consider "isolated, open waters at reclaimed mine sites" to be "waters of the United States."

Agencies' Response: The agencies agree with commenters who supported an express exclusion in the regulatory text for certain artificial lakes or ponds excavated in dry land. In the final rule, the agencies are codifying exclusions for certain features that the agencies did

not generally consider jurisdictional under the pre-2015 regulatory regime. Consistent with the features listed in the preamble to the 1986 regulations, the agencies are codifying an exclusion for artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing. The agencies conclude the exclusion in the final rule text provides sufficient clarity as to the definition of "artificial lakes or ponds."

To the extent commenters suggest that waters lawfully converted to dry land pursuant to a section 404 permit should be treated as "dry land" for purposes of applying the exclusion, while the jurisdictional status of a water is assessed on a case-specifc basis by considering the specific characteristics of the site at issue, generally a feature constructed in an area that has been lawfully filled under a Section 404 permit would not be "waters of the United States" under the rule (although, for example, if a landowner creates a ditch in authorized fill and connects that ditch to the tributary system of a paragraph (a)(1) water and the ditch carries a relatively permanent flow of water, then it does not meet the ditch exclusion). It is also important to note that an unauthorized discharge does not render a "water of the United States" no longer jurisdictional, nor does it sever jurisdiction upstream. Indeed, "[u]nauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States." 33 C.F.R. 323.2 (1987).

The agencies disagree with the commenter who recommended that the agencies categorically exclude "isolated, open waters at reclaimed mine sites" from the definition of "waters of the United States." The agencies' decision not to codify an exclusion for these features does not mean that the agencies intend to assert Clean Water Act jurisdiction over them under the final rule. The agencies will continue to evaluate Clean Water Act jurisdiction on a case-specific basis and will not assert jurisdiction over features that do not satisfy the definition of "waters of the United States" articulated in the final rule.

15.6.2 General opposition for codifying an exclusion for artificial lakes or ponds excavated in dry land

A few commenters suggested that artificial lakes and ponds should not be excluded. A commenter stated that nearly all of Missouri's abundant lakes and ponds are not formed naturally, but rather by damming streams and creeks. These artificial waterbodies are nonetheless used for fishing, swimming, and sometimes drinking, therefore it is important that they are well-protected.

Agencies' Response: The agencies disagree with commenters who opposed codifying an exclusion for certain artificial lakes and ponds. Like other features that the agencies generally have not considered jurisdictional, codifying an exclusion for certain artificial lakes or ponds excavated in dry land reflects the agencies' determinations of the lines of jurisdiction based on case law, policy determinations, and the agencies' experience and expertise. See also Final Rule Preamble Section IV.C.7. Codification of this exclusion provides important clarity on which features are and are not jurisdictional and will simplify the process of determining jurisdiction.

To the extent a commenter expresses concern regarding application of the exclusion to lakes or ponds created by impounding jurisdictional waters, the agencies note that the feature must satisfy the terms of the exclusion in order to be excluded from "waters of the United States." Here, the exclusion is limited to artificial lakes or ponds created by excavating or diking dry land. The exclusion further is limited to artificial lakes or ponds which are used exclusively for such purposes as stock watering, irrigation, settling basins. For information regarding the final rule's application to impounded waters, see Final Rule Preamble Section IV.C.3 and the agencies' response to comments in Section 7.

15.6.3 Opposition to limiting scope of an exclusion for artificial lakes or ponds to those constructed in dry land

A few commenters contended that this exclusion should not be limited to artificial lakes and ponds built in dry land, since such features generally have to be located where there is some water source. The commenters contended that this condition makes the exclusion ineffective.

One commenter asserted that the 2020 NWPR excluded artificial ponds so long as they were not impoundments of jurisdictional waters. The commenter then stated that this qualifier was not necessary because the exclusion only applied to a lake or pond created in uplands (as that term was used in the 2020 NWPR) and a natural lake or impoundment of "waters of the United States" would not meet the definition of "upland."

A few commenters asserted that it is too difficult to establish that an artificial lake or pond originally was excavated in dry land and for that reason the agencies should bear the burden of proving that an artificial lake or pond over which they seek to assert jurisdiction was not originally constructed by excavating or diking dry land.

A few commenters suggested that artificial lakes or ponds excavated in areas that previously had been lawfully converted from "waters of the United States" to dry land either pursuant to a section 404 permit or through other legal means should qualify for the exclusion.

Agencies' Response: Defining the scope of the exclusion for artificial lakes or ponds as limited to those created by excavating or diking in dry land is consistent with the agencies' intent to interpret "waters of the United States" to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' determination of the statutory limits on the scope of the "waters of the United States" informed by case law, policy determinations, and the agencies' experience and expertise. The term "dry land" appears in both the 1986 and 1988 preambles. 51 FR 41217 (Nov. 13, 1986); 53 FR 20765 (June 6, 1988).

Impoundments of jurisdictional waters are not covered under this exclusion, as the exclusion only applies to features that were excavated in dry land or were diked in dry land. For information on how the final rule applies to impounded waters, see Final Rule Preamble Section IV.C.3 and the agencies' response to comments in Sections 7 and 15.6.1. See also Final Rule Preamble Section IV.C.7.

In response to comments regarding the burden of proving that an artificial lake or pond was created by excavating or diking dry land, the agencies note that 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 features that were generally considered non-jurisdictional under pre-2015 practice. The approach in this rule does not represent a change in the burden of proof for determining if a particular feature has been constructed in dry land. 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 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. 1986) ("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 the extent commenters suggest that waters lawfully converted to dry land pursuant to a section 404 permit should be treated as "dry land" for purposes of applying the exclusion, see the agencies' response to comments in Section 15.6.2.

15.6.4 Opposition to limiting scope of an exclusion for artificial lakes or ponds excavated in dry land based upon the use of such features

Several commenters suggested that the exclusion for artificial lakes or ponds excavated in dry land should not be limited to features used "exclusively" for the activities specified in the final rule text. These commenters suggested that the agencies clarify that the list in the final rule text is illustrative and not exclusive.

Several commenters stated that the term "exclusively" should be removed to reflect the reality that artificial lakes or ponds excavated in dry land are often used for multiple purposes and that multiple uses should not remove the exclusion.

Agencies' Response: The final rule text returns to the longstanding and familiar framework set forth in the 1986 preamble, except that by codifying this exclusion, the agencies have removed the possibility that these waters could be found jurisdictional on a case-by-case basis. The agencies anticipate that, as a general matter, artificial lakes or ponds excavated in dry land that were not considered jurisdictional under the framework of the 1986 preamble would not be considered jurisdictional under the final rule.

The phrase "such as" demonstrates that the uses listed in the final rule text are illustrative, not exhaustive. Moreover, 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, artificial lakes and ponds that are created by excavating dry land to collect and retain water for stock watering are often extensively used by waterfowl and other wildlife. The agencies' historic practice, which the agencies intend to continue under the final rule, is to consider these features as excluded even when there is another incidental beneficial use of the feature. See also Final Rule Preamble Section IV.C.7.

15.6.5 Comments proposing specific types of artificial lakes or ponds that should be excluded

Several commenters described specific types of artificial lakes or ponds that the commenters request be excluded.

One commenter expressly requested that all ponds used in the forest industry be excluded, including ponds used for log storage, log conditioning prior to production of plywood veneers, and recirculating water on log decks.

One commenter requested that industrial features necessary for the safe and efficient operation of a facility, such as water storage ponds, impoundments, conveyances and other structures used for fire water, utility water, cooling water, process water, and raw water be expressly excluded. The commenter suggested that "cooling ponds" in particular should be excluded, as they were in the 2015 Clean Water Rule.

One commenter requested that temporary features, such as settling basins for storm water collection and the water they contain that are created by "mining" activity under an approved Plan of Operation, should be excluded.

One commenter requested that field tile and engineered farm drainage systems (field waterways, filter strips, etc.) should be excluded, both for agricultural and industrial purposes.

One commenter requested that water storage reservoirs and farm irrigation and livestock watering should be excluded, both for agricultural and industrial purposes even where they might have surface water connection to a downstream jurisdictional water in a typical year. The commenter went on to suggest that wetlands should be allowed to be contained inside farm reservoirs built to store surface water without jurisdiction.

One commenter requested that fire suppression ponds should be excluded.

One commenter asserted that the exclusion for artificial lakes or ponds should extend to stormwater detention/retention systems including water storage reservoirs and tailwater recovery systems, and farm, irrigation, and stock watering ponds constructed or excavated in upland or in non-jurisdictional waters.

Agencies' Response: The exclusion for artificial lakes or ponds excavated in dry land applies only to those lakes and ponds that satisfy the terms of the exclusion. See Final Rule Preamble Section IV.C.7. Determinations regarding the jurisdictional status of any specific water are outside the scope of this rulemaking. Even for features that are not explicitly excluded, the agencies will continue to assess jurisdiction under the final rule on a case-specific basis. As part of this case-specific assessment, the agencies will continue to consider whether the feature in question is excavated or created in dry land, the flow of water in the feature, and other factors. In addition, some of the features that commenters asked the agencies to exclude may be covered by one or more of the exclusions in the final rule if they satisfy the criteria for those exclusions. When a feature does not meet the definition articulated in the final rule, that feature is not a "water of the United States" and there is no need for an express exclusion.

15.7 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

15.7.1 General support for codifying an exclusion for waterfilled depressions and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel

Many commenters generally supported expressly excluding waterfilled depressions and pits excavated in dry land in the regulatory text. Many of those commenters also asserted that such features were expressly excluded in past rules including the 2015 Clean Water Rule and the 2020 NWPR.

A few commenters generally asserted that the exclusion for waterfilled depressions and pits excavated in dry land from the 2015 Clean Water Rule or the 2020 NWPR should be retained to provide regulatory certainty about jurisdiction and reduce regulatory delay and expenses. These commenters asserted that the absence of an express exclusion in the proposed rule would lead to subjective decisions rather than a clear line as to which waters are jurisdictional and which are not.

One commenter asserted that such waterfilled depressions are inevitable during construction, are rarely associated with navigable waters, and rarely provide measurable environmental benefits.

Agencies' Response: The agencies agree that codifying exclusions for certain features that the agencies did not generally consider jurisdictional under the pre-2015 regulatory regime is consistent with the agencies' intent to interpret "waters of the United States" to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' determination of the statutory limits on the scope of the "waters of the United States" informed by case law, policy determinations, and the agencies' experience and expertise. See also Final Rule Preamble Section IV.C.7. Consistent with the features listed in the preamble to the 1986 regulations, the agencies are codifying an exclusion for waterfilled 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." See also Final Rule Preamble Section IV.C.7. See also the agencies' response to comments in Section 15.7.3 and Section 15.7.4.

15.7.2 Comments proposing clarifying language for an exclusion for water-filled depressions and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel

One commenter suggested several clarifications for the agencies to make for any exclusion of water-filled depressions and pits excavated in dry land. The commenter asserted that the exclusion should:

- Broadly encompass all depressions created as part of construction, mining, and industrial activities;
- Clearly include quarries, including those related to limestone operations;
- Clarify that the excavated feature itself is excluded (for example, the commenter asserted that without clarification, this exemption could be understood to exempt a water-filled depression created to support quarry operations, but not the quarry itself); and
- Confirm the new rule will not change the non-jurisdictional status of existing water-filled depressions that were permitted or lawfully constructed under the laws at the time of construction, regardless of whether the feature was constructed in upland.

A commenter suggested specific wording for the exclusion to apply to "water-filled depressions related to mining, industrial, or construction activity, and quarries and pits excavated for the purpose of obtaining limestone, fill, sand, or gravel." One commenter asserted that quarries located on or near cement manufacturing facilities have no connections to navigable waters and should not be defined as jurisdictional waters.

One commenter specifically requested that utility corridors where compaction from construction equipment creates a localized hardpan that holds water and aquatic vegetation be included in any water-filled depression exclusion.

> **Agencies' Response: The agencies disagree with commenters' suggestions to expand the exclusion for waterfilled depressions beyond the text of the preamble to the 1986 regulations. Codification of the exclusion as set forth in the preamble to the 1986 regulations, rather than the exclusion as set forth in the text of the 2015 Clean Water Rule or the 2020 NWPR, is consistent with the agencies' intent to interpret "waters of the United States" to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' determination of the statutory limits on the scope of the "waters of the United States" informed by case law, policy determinations, and the agencies' experience and expertise.**
>
> **The exclusion for waterfilled depressions applies to features that meet the terms of the exclusion in the final rule text. For example, where a feature is a "pit[] excavated in dry land for the purpose of obtaining fill, sand, or gravel" and has not been abandoned, the exclusion applies regardless of whether that pit also could be labeled a "quarry."**
>
> **With respect to specific features suggested by commenters, determinations regarding the jurisdictional status of any specific water are outside the scope of this rulemaking. Even for features that are not explicitly excluded, the agencies will continue to assess jurisdiction under the final rule on a case-specific basis. As part of this case-specific assessment, the agencies will continue to consider whether the feature in question is excavated or created in dry land, the flow of water in the feature, and other factors. In addition, some of the**

features that commenters asked the agencies to exclude may be covered by one or more of the exclusions in the final rule if they satisfy the criteria for those exclusions. When a feature does not meet the definition articulated in the final rule, that feature is not a "water of the United States" and there is no need for an express exclusion.

To the extent commenters suggest that the exclusion should extend expressly to waterfilled depressions incidental to "mining activity," see the agencies' response to comments in Section 15.7.3. To the extent commenters suggest the exclusion should more broadly extend to waterfilled depressions incidental to industrial, agricultural, or other non-construction activities, see the agencies' response to comments in Section 15.7.4.

To the extent commenters assert that issuance of the final rule should not change the jurisdictional status of features that were lawfully constructed in reliance on an express exclusion under the 2020 NWPR or the 2015 Clean Water Rule, the agencies note that the final rule does not invalidate AJDs issued under prior definitions of "waters of the United States." As such, any existing AJD—except AJDs issued under the vacated 2020 NWPR, which are discussed below—will remain available and eligible to support regulatory actions, such as permitting, until its expiration date, unless one of the criteria for revision is met under RGL 05–02[4] or the recipient of such an AJD asks the Corps to issue a new AJD. Because agency actions are governed by the rule in effect at the time an AJD is issued and not when the request was made, all approved jurisdictional determinations issued on or after the effective date of this rule will be made consistent with this rule. Because two district courts vacated the 2020 NWPR, the agencies have received many questions regarding the validity of AJDs issued under the 2020 NWPR (hereinafter, "NWPR AJDs"). In response to such inquiries, the agencies have explained that NWPR AJDs, unlike AJDs issued under other rules that were changed pursuant to notice-and-comment rulemaking rather than vacatur, may not reliably state the presence, absence, or limits of "waters of the United States" on a parcel as a result of vacatur and cannot be relied upon by the Corps in making new permit decisions following the Arizona district court's August 30, 2021 order vacating the 2020 NWPR. The agencies also note that they will continue to evaluate potential enforcement actions using the regulations in place when the alleged violation occurred. For example, if a person excavated a ditch while the pre-2015 regulatory regime was in effect and the person complied with the terms of the pre-2015 regulatory regime, today's final rule does not create new liability. *See United States v. Lucero*, 989 F.3d 1088 (9th Cir. 2021) (explaining that the 2020 NWPR did not apply retroactively to the defendant's violations, which occurred before the 2020 NWPR became effective).

15.7.3 Comments on exclusion for waterfilled depressions and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel and mining

A few commenters asserted that waterbodies created at mining sites as part of normal mining activities should be expressly excluded.

[4] U.S. Army Corps of Engineers. 2005. Expiration of Geographic Jurisdictional Determinations of Waters of the United States *available at* https://www.nap.usace.army.mil/Portals/39/docs/regulatory/rgls/rgl05-02.pdf

One commenter requested that any water-filled depression exclusion should include language indicating that sites undergoing active reclamation under state law have not been abandoned. The commenter provided examples of what they believed to be inconsistent Corps jurisdictional determinations for such waters, when portions of an inactive mining site were inundated between operators.

That commenter suggested that 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 additional upland ground on the other side of the tributary (assuming no discharge in violation of Clean Water Act section 404). The commenter recommends that the final rule should clarify that as long as the pit in question is clearly being mined, 33 CFR 328.5 should not apply because the change is by definition transient. The commenter further claims that asserting jurisdiction over an entire pit adversely affects ongoing operations not otherwise subject to Clean Water Act section 404 by precluding the discharge of any process waste sand back into the pit, which they claim is a common industry practice.

The same commenter suggested there are environmental benefits provided by sand and gravel pits, including habitat creation for many species.

> **Agencies' Response: The agencies disagree with commenters to the extent the commenters suggest that the final rule should expressly exclude waterfilled depressions created for mining and resource extraction purposes. In this final rule, the agencies are codifying an exclusion for such features that matches the text of the 1986 preamble language and are not expanding this exclusion to also exclude depressions incidental to mining activities. Construction and mining are distinct types of activities and can create depressions with different characteristics. For example, depressions incidental to mining activities may be much larger than depressions incidental to construction activities and may exist on the landscape for a longer time. Limiting the exclusions to depressions incidental to construction activity is consistent with the agencies' longstanding practice under the pre-2015 regulatory regime.**
>
> **Determinations regarding the jurisdictional status of any specific water are outside the scope of this rulemaking. The agencies will assess jurisdiction under the final rule on a case-specific basis.**
>
> **Even for features that are not explicitly excluded, the agencies will continue to assess jurisdiction under the final rule on a case-specific basis. As part of this case-specific assessment, the agencies will continue to consider whether the feature in question is excavated or created in dry land, the flow of water in the feature, and other factors. In addition, some of the features that commenters asked the agencies to exclude may be covered by one or more of the exclusions in the final rule if they satisfy the criteria for those exclusions. The exclusion does encompass pits excavated in dry land for the purpose of obtaining fill, sand, or gravel that have not been abandoned. Moreover, consistent with longstanding agency practice, waste treatment systems constructed at mining sites are expressly excluded. See the agencies' response to comments in Section 15.2. When a feature does not meet the definition articulated in the final rule, that feature is not a "water of the United States" and there is no need for an express exclusion.**

The agencies acknowledge the commenter's statement that waterfilled features at sand and gravel operations may provide habitat and have other beneficial uses. The agencies' historic practice, which the agencies intend to continue under this rule, is to consider these features as excluded even when there is another incidental beneficial use of the feature.

15.7.4 Comments suggesting expanding the exclusion for water-filled depressions

A commenter urged the agencies to expand the exclusion for water-filled depressions to include water-filled depressions incidental to agricultural activities, such as low spots where irrigation water collects. Several commenters asserted that the exclusion for water-filled depressions should extend to quarries associated with aggregate, sand, or limestone operations.
One commenter asserted that quarries located on or near cement manufacturing facilities have no connections to navigable waters and should not be defined as jurisdictional waters.

Agencies' Response: The agencies disagree with commenters to the extent the commenters urge the agencies to expand the exclusion beyond the text in the 1986 preamble. In this final rule, the agencies are codifying an exclusion for such features that matches the text of the 1986 preamble language and are not expanding this exclusion to also exclude depressions incidental to mining activities. See Preamble Final Rule Preamble Section IV.C.7.

Determinations regarding the jurisdictional status of any specific water are outside the scope of this rulemaking. The agencies will assess jurisdiction under the final rule on a case-specific basis.

Even for features that are not explicitly excluded, the agencies will continue to assess jurisdiction under the final rule on a case-specific basis. As part of this case-specific assessment, the agencies will continue to consider whether the feature in question is excavated or created in dry land, the flow of water in the feature, and other factors. In addition, some of the features that commenters asked the agencies to exclude may be covered by one or more of the exclusions in the final rule if they satisfy the criteria for those exclusions. The exclusion does encompass pits excavated in dry land for the purpose of obtaining fill, sand, or gravel that have not been abandoned. Various features associated with agriculture may fit within one or more other exclusions. See, for example, the agencies' response to comments in Section 15.4. When a feature does not meet the definition articulated in the final rule, that feature is not a "water of the United States" and there is no need for an express exclusion.

The final rule does not affect statutory or regulatory activity-based exemptions for certain discharges to "waters of the United States" associated with specified activities. See the agencies' response to comments in Sections 15.4 and 15.13.

15.8 Groundwater

15.8.1 General support for an express exclusion for groundwater in the regulatory text

Many commenters requested that the agencies expressly exclude groundwater in the regulatory text, as opposed to stating that groundwater is not jurisdictional in the preamble. Many commenters also noted that groundwater was excluded in past rules including the 2015 Clean Water Rule and the 2020 NWPR.

Several commenters requested that the agencies clarify whether certain types of groundwater are excluded, such as groundwater drained through subsurface drainage systems and diffuse or shallow subsurface flow.

A few commenters suggested that not excluding groundwater could lead to infringements upon groundwater ownership rights, which should be an intrastate resource left to the states to manage, either alone or regionally.

A few commenters suggested that making groundwater a "water of the United States" is not necessary because it is already protected by the Safe Drinking Water Act and Resource Conservation and Recovery Act, as well as state and local laws.

One commenter stated that, because groundwater quality and supply issues vary dramatically across the United States, state and local authorities are best positioned to regulate and manage their groundwater supply.

A few commenters suggested that groundwater should be expressly excluded to provide regulatory certainty about jurisdiction and/or reduce regulatory delay and expenses. One of these commenters specifically suggested that as the nation faces increased climate challenges, including drought, communities need to pursue groundwater reuse strategies without the fear of duplicative and costly regulations.

One commenter requested that any groundwater exclusion should also exclude groundwater recharge facilities, including groundwater recharge basins, spreading grounds, infiltration basins and other reuse features and facilities.

One commenter suggested that expressly excluding groundwater from the final rule would be consistent with relevant Supreme Court decisions, including the recent *County of Maui v. Hawaii Wildlife Fund*.

> **Agencies' Response: While the agencies agree with those commenters who assert that groundwater is not "waters of the United States," the agencies disagree with those commenters who seek an express exclusion for groundwater in the final rule text. The agencies are not adding an exclusion for groundwater to the regulatory text because groundwater is not surface water and therefore does not fall within the possible scope of "navigable waters"; there is thus no need for a regulatory exclusion. The agencies have never taken the position that groundwater falls within the scope of "navigable waters" under the Clean Water Act. *See, e.g.*, 80 FR 37099-37100 (explaining that the agencies have never interpreted "waters of the United States" to include groundwater); 85 FR 22278,**

April 21, 2020 (explaining that the agencies have never interpreted "waters of the United States" to include groundwater). However, when groundwater emerges on the surface, for example when it becomes baseflow in streams or joins spring fed ponds, it is no longer considered to be groundwater under this rule. See also the Final Rule Preamble Section IV.C.7.

Groundwater that is not jurisdictional includes both shallow and deep groundwater, even where such shallow subsurface water serves as a hydrologic connection that is assessed in determining if another water is jurisdictional. Groundwater drained through subsurface drainage systems also is not jurisdictional.

While shallow subsurface waters are not "waters of the United States," shallow subsurface flow can be relevant to adjacency of a wetland or to significant nexus and may serve under the final rule as a hydrologic connection in determining whether another water is jurisdictional. See Final Rule Preamble Sections IV.C.5 and Section IV.C.6 and the agencies' response to comments in Section 10, Section 11, and Section 12.

To the extent a commenter expressed concern that the final rule could interfere with ownership over groundwater, the final rule does not impact water ownership or water rights.

For discussion of water recycling features, see the agencies' response to comments in Section 15.12.

The agencies agree that the Supreme Court in *County of Maui v. Hawaii Wildlife Fund* held that the Congress did not include groundwater within the coverage of the Clean Water Act. 140 S. Ct. at 1472. See also Final Rule Preamble Section IV.C.7. See discussion of *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), in Final Rule Preamble Section IV.A.2.a.

The agencies agree with those commenters who note that groundwater is regulated in a variety of contexts outside the Clean Water Act. Many states include groundwater in their definitions of "waters of the state" and therefore may subject groundwater to state regulation. Indeed, the Clean Water Act incentivizes state protection of groundwater. For example, grants to states under Clean Water Act section 319 may support management programs that include groundwater quality protection activities as part of a comprehensive nonpoint source pollution control program. 33 U.S.C. 1329(h)(5)(D). In addition, groundwater quality is regulated and protected through several other legal mechanisms, including the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and various state, tribal, and local laws.

15.8.2 General opposition to excluding groundwater from the definition of "waters of the United States"

Several commenters expressed support for protecting groundwater and *not* excluding it from "waters of the United States." Many of these commenters asserted that groundwater and surface water are connected and that the protection of surface water requires protection of groundwater.

Several commenters also opposed an express exclusion for groundwater because surface expression of groundwater often contributes baseflow to streams, wetlands, and other jurisdictional features. These commenters expressed concern that an exclusion for groundwater would be interpreted as extending to surface expressions of groundwater that contribute flow to or form jurisdictional surface waters. One commenter further specified that zones where groundwater emerges on the ground surface or discharges through stream channel or lake beds to provide baseflow to intermittent or perennial streams are the interfacing planes or surfaces that define the jurisdictional boundaries or limits of federal surface water control and state groundwater control, and that states and the agencies need to collaborate to identify these boundaries.

A few commenters asserted that the groundwater exclusion is not supported from a scientific perspective, because of connections between subsurface and surface water, including the flow of pollutants from one to another. These commenters suggest the agencies should go further to protect groundwater, with some suggesting that rather than a categorical exclusion, the agencies should determine significant nexus of groundwater on a case-specific basis. Some of these commenters cited specific studies to back up their assertions.

One commenter asserted that there is not enough Supreme Court precedent to suggest that groundwater can never establish a significant nexus to a jurisdictional water. The commenter pointed to *County of Maui* v. *Hawaii Wildlife Fund* and several lower court cases in which jurisdiction was established based on hydrological connections that allow pollutants to migrate from groundwater to jurisdictional waters. One commenter mentioned the recent Supreme Court decision in *Mississippi* v. *Tennessee et al*. which held that interstate aquifers are comparable to interstate rivers and that the fact that an aquifer is "located underground, as opposed to resting above ground," was of "no analytical significance." Therefore, this commenter recommended that the agencies declare the Floridan Aquifer a Sole Source Aquifer with extra protections.

One commenter questioned the need to expressly exclude groundwater to the extent such an exclusion would cover agricultural drainage tiles because that flow generally represents return flow from irrigation, which is exempt from regulation under the permitting provisions of the Clean Water Act.

> **Agencies' Response: While the final rule does not include an express exclusion for groundwater, the agencies disagree with those commenters who urge the agencies to assert jurisdiction over groundwater. The agencies are not adding an exclusion for groundwater to the regulatory text because groundwater is not surface water and therefore does not fall within the possible scope of "navigable waters"; there is thus no need for a regulatory exclusion. While the agencies agree that science plays a critical role in understanding how to protect the integrity of our nation's waters, the final rule also necessarily must conform with the statutory limits on the scope of the "waters of the United States" informed by**

relevant Supreme Court precedent. The agencies have never taken the position that groundwater falls within the scope of "navigable waters" under the Clean Water Act. See also Final Rule Preamble Section IV.C.7. For a discussion of temporary underground flow by rivers and streams, see also the agencies' response to comments in Section 15.8.3.

To the extent commenters express concern regarding Clean Water Act coverage of groundwater as a source of surface water flow, the final rule does not change the agencies' longstanding approach that, when groundwater emerges on the surface, for example when it becomes baseflow in streams or joins spring fed ponds, it is no longer considered to be groundwater. Accordingly, the agencies' interpretation that groundwater is not covered by the Clean Water Act does not affect the final rule's coverage of tributaries or wetlands that have groundwater as a source of hydrology.

While shallow subsurface waters are not "waters of the United States," they can be relevant under the final rule to assessing the adjacency of a wetland or to significant nexus, and shallow subsurface waters serve under the final rule as a hydrologic connection in determining whether another water is jurisdictional. See Final Rule Preamble Sections IV.C.5 and IV.C.6 and the agencies' response to comments in Section 10, Section 11, and Section 12.

The agencies' longstanding position that groundwater does not fall within the scope of the Clean Water Act is consistent with the Supreme Court's holding in *County of Maui* that Congress did not include groundwater within the coverage of the Clean Water Act. 140 S.Ct. at 1472. See also Final Rule Preamble Section IV.C.7. See the discussion of *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), in Final Rule Preamble Section IV.A.2.a.

The final rule does not affect ownership rights to surface or subsurface waters, including the doctrine of equitable apportionment and rights to interstate aquifers addressed in *Mississippi v. Tennessee.*

The agencies agree that return flows from irrigated agriculture are exempt from the definition of "point source" pursuant to 33 USC 1362(14). For a discussion of activity-based exemptions from the permitting requirements of the Clean Water Act, see the agencies' response to comments in Section 15.13.

15.8.3 Underground flows through karst geology or other underground formations

One commenter stated support for a groundwater exclusion except for karst features (located above or below ground). A few commenters asked for more protection within areas characterized by karst, stating that it is very easy for pollution to travel between surface water and groundwater in such areas.

Agencies' Response: The agencies recognize the unique circumstances of temporary underground flow by a river or stream through karst geology or other underground formations. Historically, the agencies have carried out case-specific analyses and generally have asserted Clean Water Act jurisdiction over the upstream portion of a river or stream where the river or stream temporarily flows underground in regions with karst geology or

other underground formations for some portion of their length and returns to the surface while maintaining the same or very nearly the same flow and volume. While the agencies generally have not asserted jurisdiction over the portion of the river or stream that flows underground, the agencies generally have not considered the temporary underground flow as severing jurisdiction over the upstream portion of the river or stream. The final rule does not change this longstanding interpretation. See Final Rule Preamble Section IV.C.4.c.i.1. See also 85 FR 22279; 80 FR 37078.

15.8.4 Groundwater as a point source

One commenter expressed concerns related to treating groundwater as a point source. This commenter did not support an interpretation of the Clean Water Act that broadly views groundwater as a functional equivalent to a point source and stated that only those occurrences when a pollutant travels a small time and distance through groundwater to surface water should be considered for permitting under the Clean Water Act. The commenter also asserted that the agencies should coordinate with local entities when making determinations as to when groundwater should be considered a point source and that states should hold primacy in determining whether groundwater is a point source. The commenter also stated that pollution sources traditionally exempt from regulations under the Clean Water Act should not be regulated when they enter groundwater that may be determined to be a point source.

Agencies' Response: Comments regarding whether the Clean Water Act's permitting provisions apply to an addition of pollutants that travels from a point source to a "water of the United States" through groundwater is outside the scope of this rulemaking. The agencies note that the "functional equivalent" standard articulated by the Supreme Court in *County of Maui* is a fact-specific inquiry. See discussion of *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), in Final Rule Preamble Section IV.A.2.a.

15.9 Swales and Erosional Features

Many commenters requested that the agencies expressly exclude swales, gullies, rills, and other erosional features formed by infrequent or short-duration precipitation and that do not satisfy the definition of tributary. One commenter noted that these features can be distinguished from tributaries by the lack of an OHWM.

Many commenters requested that the exclusion for these features be similar to the exclusion set forth in the 2015 Clean Water Rule or the 2020 NWPR.

A few commenters noted that, under the 2008 *Rapanos* Guidance, the agencies generally did not assert jurisdiction over swales or erosional features such as gullies and small washes as characterized by low, infrequent, or short duration flow. These commenters state that assertion of Clean Water Act jurisdiction over these types of features would be a departure from the pre-2015 regulatory regime. A few commenters, referring to statements in the Proposed Rule Preamble that certain features such as swales and erosional features "generally" are not considered "waters of the United States," requested an illustrative list of such features that would be the exception to this general statement and would be considered jurisdictional.

A few commenters stated that the agencies should provide an illustrative list of swales and erosional features which are clearly not jurisdictional and would not require any additional jurisdictional analysis. This commenter also suggested that the agencies should clarify that no additional OHWM analysis is required for these excluded features because these features are different from ephemeral streams and lack indicators of an OHWM. A different commenter, however, asserted that it takes little precipitation or flow to create the appearance of OHWM, and therefore the presence of an OHWM should not be definitive regarding whether an erosional feature or swale is within the scope of the Clean Water Act.

One commenter suggested that the agencies should provide more flexibility for swales, gullies, and erosional features to not be considered "waters of the United States" in order for farmers to have the ability to address them and protect water quality downstream.

One commenter requested a definition for "gullies, swales, and erosional features." This commenter noted that the distinction between ephemeral tributaries, swales, and erosional features such as rills or gullies has not been clear from the pre-2015 regulatory definition. The commenter agreed with the proposed rule approach that swales and gullies would generally not be jurisdictional and lack indicators of OHWM, whereas ephemeral streams do have these indicators. The commenter requested that this distinction be added to the regulatory definitions, since the prior lack of definition reduced predictability in permitting and led to disagreements between state agencies and the Corps.

A few commenters opposed expressly excluding swales, gullies and other erosional features because, as noted by the Science Advisory Board, such features can be important conduits for moving water between jurisdictional features. These commenters oppose exclusions from the definition of "waters of the United States" for features that can serve as conduits for moving water or pollutants to jurisdictional waters to avoid the potential for unregulated pollutants to enter waters can delay or prevent achieving the CWA goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters.

One commenter requested that the agencies assess ephemeral features beyond swales and erosional features, including gullies and small washes, to determine if there are additional categories which warrant explicit exclusion from jurisdiction. The commenter stated that providing this additional information will reduce the case-specific jurisdictional determination burden and result in a more durable rule less likely to be subject to legal challenges.

> **<u>Agencies' Response</u>: The agencies agree with comments that stated that, under the pre-2015 regulatory regime, the agencies generally did not assert jurisdiction over certain swales and erosional features, such as gullies and small washes. Consistent with the agencies' intent to return to the familiar and longstanding framework under the pre-2015 regulatory regime and to provide additional clarity and certainty regarding the definition of "waters of the United States," the final rule expressly excludes "[s]wales and erosional features (*e.g.*, gullies, small washes) characterized by low volume, infrequent, or short duration flow."**
>
> **The *Rapanos* Guidance explained that the agencies generally found "[s]wales or erosional features (*e.g.*, gullies, small washes characterized by low volume, infrequent, or short duration flow)" to be non-jurisdictional. *Rapanos* Guidance at 11-12. In the final rule, the agencies are finalizing two minor changes to the exclusion for swales and erosional features in this rule as compared to the language in the *Rapanos* Guidance. First, the final rule's regulatory text excludes "swales and erosional features" rather than "swales or erosional**

features." Second, the agencies are moving the parentheses in this provision so that only the phrase "*e.g.*, gullies, small washes" is included in parentheses. See Final Rule Preamble Section IV.C.7 for an explanation of these minor changes. Notwithstanding these two minor changes, the agencies' application of the exclusion for these features as compared to the pre-2015 regulatory regime remains substantively and operationally unchanged.

This exclusion does not extend to features other than those that meet its terms. The agencies recognize that the 2020 NWPR also excluded "ephemeral" features. To the extent commenters request that the final rule expressly exclude "ephemeral" features beyond swales and erosional features characterized by low volume, infrequent, or short duration flow, see the agencies' responses to comments in Section 15.10.

The agencies agree with commenters who assert that swales, gullies, and other erosional features can be distinguished from tributaries. Because swales and erosional features were considered to be generally non-jurisdictional features under pre-2015 practice, the agencies have extensive experience differentiating between these features and tributaries on the landscape. *See Rapanos* Guidance at 11-12. Streams are waterbodies that are typically characterized by the presence of a channel and an OHWM, and lakes and ponds are waterbodies that are also typically characterized by the presence of an OHWM, in the absence of adjacent wetlands. In contrast, erosional features like gullies and rills are typically more deeply incised than streams and lack an OHWM. Similarly, swales do not have an OHWM and typically lack a more defined channel that a stream exhibits. In addition, it should be noted that, although some low gradient depressional areas are colloquially referred to as "swales," these areas do not meet the regulatory exclusion's criteria for swales that are discrete topographic features "characterized by low volume, infrequent, or short duration flow."

To the extent commenters request an illustrative list of features that would or would not satisfy this exclusion, determinations regarding the jurisdictional status of any specific water are outside the scope of this rulemaking.

To the extent a commenter requests that the criteria for swales and other erosional features be further clarified to increase predictability in permitting and to avoid disagreement between state agencies and the Corps, see Final Rule Preamble Sections IV.C.4 and IV.C.7. As discussed further in Final Rule Preamble Section IV.A.4, the agencies have determined the final rule is both familiar and implementable. All definitions of "waters of the United States," including the pre-2015 regulatory regime, the 2015 Clean Water Rule, and the 2020 NWPR have required some level of case-specific analysis. Consistent implementation of the final rule will be aided by improved and increased scientific and technical information and tools that both the agencies and the public can use to determine whether waters are "waters of the United States." The final rule was developed to increase Clean Water Act program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act.

The agencies agree that excluded swales and erosional features can be important conduits for moving water between jurisdictional features. Even when not themselves considered jurisdictional waters subject to the Clean Water Act because they are excluded, certain

ditches, swales, gullies, erosional features, and other non-jurisdictional features may be relevant to the analysis of whether another water is a "water of the United States." For example, consistent with longstanding practice, excluded surface features may still contribute to a hydrologic connection relevant for asserting jurisdiction (*e.g.*, between an adjacent wetland and a jurisdictional water). See Final Rule Preamble Sections IV.C.5 and IV.C.7.

15.10 Ephemeral Features Other Than Tributaries or Ditches with Ephemeral Flow

Many commenters supported expressly excluding ephemeral features from the definition of "waters of the United States." Many of the commenters who supported an express exclusion for ephemeral features pointed to the express exclusion for ephemeral features in the 2020 NWPR. A few commenters stated that the 2020 NWPR exclusion provided needed clarity, especially for small business and the livestock and agricultural industries. Several commenters stated that the 2020 NWPR appropriately excluded ephemeral features, and that such an approach "balances the regulation of the Federal government with the authority of States and Tribes to more appropriately regulate certain waters within their jurisdiction." One commenter added that states may be in a better position to address issues related to regional variability of ephemeral features. A few commenters suggested that the final rule should exclude ephemeral features from the "waters of the United States" definition to be consistent with Congressional intent and Supreme Court precedent.

A few commenters expressed concern that the intermittent or seasonal nature of ephemeral streams and features could create subjective and arbitrary regulatory decisions by the agencies, which could subsequently increase costs. A few commenters stated that dry creek beds through which water flows only during extreme weather events should not be considered "waters of the United States." These commenters assert that these are not relatively permanent waters, and their nexus to traditional navigable waters is speculative. One commenter stated that ephemeral features, which only carry water temporarily in response to rainfall, serve as natural drains on agricultural land and should be excluded from the revised "water of the United States" definition. Several commenters stated that areas that are dry most of the year which may contain transitory puddles or ephemeral waters should be excluded. One commenter asserted that it is difficult to distinguish a dry wash from an ephemeral stream and that minimal precipitation should not cause an otherwise dry waterbody to become jurisdictional.

Several commenters asserted that ephemeral features should be excluded because they are common in the western and southwestern United States, where precipitation conditions vary dramatically. Some of these commenters emphasized that the need for flexibility made these types of features better regulated by the states rather than the federal government. Commenters also expressed concern regarding potential for inconsistent treatment of ephemeral features in the arid West and southwestern United States. One commenter suggested that the agencies provide regional definitions for ephemeral features, using larger traditional navigable waters as geographic boundaries to help clarify and define "waters of the United States" more clearly.

One commenter stated that any new "waters of the United States" rule should clearly define what ephemeral drainages are.

A few commenters requested that the agencies include in the regulatory text an exclusion for "non-relatively permanent waters," which the commenters defined as "waters flowing less than three

contiguous months per year, except during periods of extreme drought or precipitation according to USGS standards," including waters with ephemeral and intermittent flow regimes, stormwater run-off, directional sheet flow over upland areas, swales, erosional features, and arroyos.

A few commenters made general statements of opposition to excluding ephemeral features. One commenter stated that in the southwestern United States, and many other parts of the nation, it is commonplace for perennial flows to drain into ephemeral features, excluding perennial flows from regulation.

One commenter stated that assertion of Clean Water Act jurisdiction over intermittent streams, waterways, road ditches, and wet concave areas on farms is government overreach.

Agencies' Response: The agencies disagree with commenters who suggest that the agencies should categorically exclude ephemeral features from the definition of "waters of the United States." See Final Rule Preamble Section IV.B.3; the agencies' response to comments in Section 8, Section 11, and Section 13; and Technical Support Document Section III.A.v. In the final rule, the agencies are neither categorically including nor categorically excluding ephemeral and intermittent tributaries. Rather, the agencies are defining "waters of the United States" to include tributaries that meet either the significant nexus standard or the relatively permanent standard based on their conclusions in section IV.A of the final rule preamble. Further, there is nothing in the text of the statute or its legislative history that excludes some categories of tributaries based on their flow regime. Indeed, as discussed further below, the best available science demonstrates that ephemeral and intermittent streams can significantly affect the chemical, physical, and biological integrity of paragraph (a)(1) waters—*i.e.*, traditional navigable waters, the territorial seas, and interstate waters. The agencies have decided to explain directly the way that the relatively permanent standard should be implemented, rather than defining the phrase with these terms. As evidenced by the variety of comments proposing definitions for "perennial" and "intermittent," adding these terms to this rule could cause confusion and uncertainty. See also Final Rule Preamble Section IV.C.4. Under the final rule, tributary must flow directly or indirectly through another water or waters to a traditional navigable water, the territorial seas, or an interstate water. See Final Rule Preamble Sections IV.C.4, and IV.C.6. See also the agencies' response to comments in Section 8, Section 11, and Section 13.

To the extent commenters assert that failure to categorically exclude all ephemeral features is inconsistent with Congressional intent or Supreme Court precedent, the agencies disagree. See Final Rule Preamble Sections IV.A.3.a.ii.

Several commenters referred to specific types of features that they assert should be excluded. The agencies note that some features that may be considered "ephemeral" may fit within one of the final rule's express exclusions. For example, some of the features described by commenters may be excluded under the final rule as swales and erosional features characterized by low volume, infrequent, or short duration flow. See Final Rule Preamble Section IV.C.7 and the agencies' response to comments in Section 15.9.

The agencies acknowledge and agree with those commenters who note that ephemeral features may be common in the arid West and Southwest. As set forth in the Final Rule

Preamble Section IV.A.3.a.ii, the scientific record demonstrates many tributaries that flow for only a short duration in direct response to precipitation are regular and direct sources of freshwater for the sparse traditional navigable waters in the arid Southwest, such as portions of the Gila River.

Some of the features that commenters mentioned, like sheetflow, are not waters at all and would not be considered "waters of the United States."

Even for features that are not explicitly excluded, the agencies will continue to assess jurisdiction under the final rule on a case-specific basis. As part of this case-specific assessment, the agencies will continue to consider whether the feature in question is excavated or created in dry land, the flow of water in the feature, and other factors. In addition, some of the features that commenters asked the agencies to exclude may be covered by one or more of the exclusions in the final rule if they satisfy the criteria for those exclusions.

To the extent the commenters articulate concern that absence of an express exclusion for ephemeral features from the final rule text leaves too much room for subjective determination by individual agency personnel or may lead to inconsistent determinations, as discussed further in Final Rule Preamble Section IV.A.4, the agencies have determined the final rule is both familiar and implementable. All definitions of "waters of the United States," including the pre-2015 regulatory regime, the 2015 Clean Water Rule, and the 2020 NWPR have required some level of case-specific analysis. Consistent implementation of the final rule will be aided by improved and increased scientific and technical information and tools that both the agencies and the public can use to determine whether waters are "waters of the United States." See Final Rule Preamble Section IV.G.

To the extent commenters assert that certain types of ephemeral features are better regulated by the states, the final rule reflects consideration of provisions of the Clean Water Act referencing the role of the states. Clean Water Act jurisdiction encompasses (and is limited to) those waters that significantly affect the indisputable federal interest in the protection of the paragraph (a)(1) waters—*i.e.*, traditional navigable waters, the territorial seas, and interstate waters. Additionally, where protection (or degradation) of waters does not implicate this federal interest, such waters fall exclusively within state or tribal regulatory authority, should they choose to exercise it. The final rule appropriately draws the boundary between federal and exclusively state jurisdiction by ensuring that where upstream waters significantly affect the integrity of the traditional navigable waters, the territorial seas, and interstate waters, Clean Water Act programs will apply to ensure that those downstream waters have a baseline of protection established by federal law. Where they do not, states and tribes have authority. See also Final Rule Preamble Section. IV.A.

With respect to comments that request the agencies to define "ephemeral drainages," that term is not used in the final rule, and therefore there is no need for the agencies to provide a definition.

To the extent a commenter asserts that the absence of an exclusion for ephemeral or intermittent streams or ditches is government overreach, the agencies disagree. This rule

establishes limits that appropriately draw the boundary of waters subject to federal protection. When upstream waters significantly affect the integrity of waters for which the federal interest is indisputable—the traditional navigable waters, the territorial seas, and interstate waters—this rule ensures that Clean Water Act programs apply to protect those paragraph (a)(1) waters by including such upstream waters within the scope of the "waters of the United States." Where waters do not significantly affect the integrity of waters for which the federal interest is indisputable, this rule leaves regulation to the states and tribes.

15.11 Stormwater Controls and MS4s

15.11.1 General support for codification of an exclusion for stormwater management systems and their components

Many commenters generally supported expressly excluding stormwater systems, stormwater control measures, and/or municipal separate storm sewer systems (MS4s) in the final rule. Many pointed out that stormwater controls were expressly excluded in the 2015 Clean Water Rule and the 2020 NWPR. More specifically, several commenters recommended that the agencies expressly exclude "stormwater control systems constructed to convey, treat, infiltrate, or store stormwater," as well as sheet flow over uplands.

Several commenters stated that an express exclusion of stormwater systems will provide needed clarity and certainty for regulators, owners/operators of stormwater control features, and the public. These commenters asserted that, without an express exclusion, MS4 operators would be left uncertain as to whether certain components of the MS4 system are "waters of the United States." Many commenters asserted that, to the extent components of an MS4 or other stormwater management system are not expressly excluded, discharges of stormwater into MS4 components that meet the definition of "waters of the United States" in the final rule could require an NPDES permit, creating a situation where MS4 permittees would be regulated both when stormwater leaves the system and when it enters the system. Some of these commenters posited that lack of an express exclusion could lead to a situation where MS4 permittees would be required to achieve water quality standards in some or all parts of the MS4 system.

Many commenters suggested that an express exclusion for MS4 systems would improve regulatory clarity for MS4s and assist MS4s in the implementation of their permit conditions. Many commenters expressed concern that permit compliance measures, such as maintenance of ditches, dredging stormwater retention ponds, etc., would require a Clean Water Act permit, thereby complicating permit compliance.

One commenter suggested that the final rule should account for stormwater systems that have been built within historic drainageways, stating that this stormwater infrastructure has little resemblance to historic natural systems and would not support the biological and chemical conditions of jurisdictional waters.

One commenter stated that because the 1986 regulations pre-date the 1987 amendments to the Clean Water Act and the regulations governing stormwater, the 1986 regulations do not reference stormwater controls.

Several commenters suggested that the agencies clarify that point sources (*e.g.*, ditches and components of permitted MS4 conveyance systems) are not "waters of the United States." Many commenters expressed concern regarding the classification of human-made channels as "waters of the United States."

One commenter urged the agencies to exclude controls for stormwater associated with construction activity, particularly sedimentation ponds.

One commenter asserted that the proposed rule's lack of an express exclusion for stormwater control features would create ambiguity and invite citizen suits.

> **Agencies' Response: The agencies disagree with commenters who suggest adding an express exclusion for stormwater control features to the final rule. The final rule text codifies the familiar and longstanding exclusions for waste treatment systems and prior converted croplands. The final rule text also codifies exclusions for several features that the agencies generally considered non-jurisdictional under the pre-2015 regulatory regime and the 2019 Repeal Rule, and expressly excluded by regulation in the 2015 Clean Water Rule and 2020 NWPR. See the agencies' response to comments in Section 15.1.1. Codification of these exclusions in the final rule text is consistent with the agencies' intent to interpret "waters of the United States" to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' determination of the statutory limits on the scope of the "waters of the United States" informed by case law, policy determinations, and the agencies' experience and expertise. The proposed additional exclusions would not achieve the agencies' goals of maintaining consistency with the pre-2015 regulatory regime while continuing to advance the objective of the Clean Water Act.**
>
> **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 United States." 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 have incorporated jurisdictional waters, including otherwise jurisdictional creeks, streams, or rivers, which may be channelized, ditched, or otherwise modified within their drainage network, the agencies' longstanding approach is to view those incorporated water features as jurisdictional waters even if they are considered to be a part of the MS4. Under the final rule, the agencies retain this approach.**
>
> **The agencies' decision not to expressly exclude stormwater management controls in the final rule text does not mean that the agencies intend to assert Clean Water Act jurisdiction over those features under the final rule. The agencies will continue to evaluate Clean Water Act jurisdiction on a case-specific basis and will not assert jurisdiction over features that do not satisfy the definition of "waters of the United States" articulated in the final rule. As part of this case-specific assessment, the agencies will continue to consider whether the feature in question is excavated or created in dry land, the flow of water in the feature, and other factors. Many common stormwater control features, including green infrastructure features, would not be considered "waters" and would clearly not be "waters of the United States." For example, rain barrels, urban sidewalk planter boxes, permeable pavements, green roofs, and urban tree canopies are all effective ways to control stormwater through green infrastructure features that are clearly not "waters" and would not be "waters of the United States." Likewise, some of the stormwater control features that commenters asked**

the agencies to exclude may already be covered by one or more of the exclusions in the final rule provided they meet the criteria. For example, certain features that convey stormwater may be excluded as ditches under this rule. Similarly, bioswales, which are often found along curbs and in parking lots and use vegetation or mulch to manage stormwater flows, may be excluded under the final rule's exclusion for certain swales and erosional features if they satisfy the terms of that exclusion.

The agencies do not agree with commenters who assert that otherwise jurisdictional waters incorporated into the drainage or stormwater conveyance system of an MS4 should be excluded solely because they are used as part of the larger stormwater control system. The Clean Water Act has long been understood to encompass "natural, modified, or constructed" tributaries of other covered waters. 80 FR 37078. The past practice of using a natural, jurisdictional tributary to move stormwater through a system does not nullify that tributary's status as long as it satisfies the definition of "waters of the United States" articulated in the final rule. The agencies do not agree with the assertion by some commenters that a feature cannot be both a "point source" regulated under the NPDES program and a "water of the United States." See Final Rule Preamble Section IV.C.7 and the agencies' response to comments in Section 14 and Section 15.2.

The agencies do not agree with the commenters who assert that absence of an express exclusion for stormwater controls would increase complexity or impose additional costs on operation of MS4s. The final rule does not change the agencies' approach to stormwater controls and MS4s from the approach taken under the pre-2015 regulatory regime, which was in place for more than a decade except for the short periods during which the 2015 Clean Water Rule or the 2020 NWPR were in effect. Consequently, there is no basis to conclude that the final rule will increase the historic cost or complexity of operating MS4s.

While the pre-2015 regulatory regime pre-dates the 1987 amendments to the Clean Water Act, the agencies have found on several occasions since then and continue to find that the pre-2015 regulatory regime is an appropriate definition of "waters of the United States."

To the extent commenters assert that human-made waterbodies should be excluded, the final rule does not change the agencies' longstanding interpretation of the Clean Water Act that it is not relevant whether a water has been constructed or altered by humans for purposes of determining whether a water is jurisdictional under the Clean Water Act. See Final Rule Preamble Section IV.C.7.

To the extent commenters refer to features, such as sheetflow, that are not waters, those would not be considered "waters of the United States." See Final Rule Preamble Section IV.C.7.

15.11.2 Green infrastructure

Several commenters suggested that there should be an express exclusion for green infrastructure, including when such infrastructure is constructed as part of transportation or other facilities. Some commenters expressed concern that, although the agencies have supported the expanded use of green infrastructure, the agencies have not expressly excluded green infrastructure. These commenters stated

that not explicitly excluding green infrastructure from Clean Water Act jurisdiction will create a disincentive to implement green infrastructure practices (including constructed wetlands which are often designed to mimic wetland functions and provide habitat) and maintain them, citing costly and time-consuming permitting processes. For example, one commenter expressed concern that Clean Water Act section 404 permits could be required for maintenance of green infrastructure. One commenter asserted that additional regulatory requirements may require resources to be diverted to administrative processes rather than to water quality improvements. One commenter stated that the exclusions in the final rule need to allow room for innovative treatment approaches, such as treatment wetlands and offline or inline regional treatment facilities, and other future innovative treatment approaches.

Agencies' Response: The agencies disagree with commenters requesting an express exclusion for green infrastructure. The final rule text codifies the familiar and longstanding exclusions for waste treatment systems and prior converted croplands. The final rule text also codifies exclusions for several features that the agencies generally considered non-jurisdictional under the pre-2015 regulatory regime and the 2019 Repeal Rule, and expressly excluded by regulation in the 2015 Clean Water Rule and 2020 NWPR. See the agencies' response to comments in Section 15.1.1. Codification of these exclusions in the final rule text is consistent with the agencies' intent to return to the familiar and longstanding framework under the pre-2015 regulatory regime and provide additional clarity and certainty regarding the definition of "waters of the United States."

The agencies' decision not to expressly exclude stormwater management controls or green infrastructure in the final rule text does not mean that the agencies intend to assert Clean Water Act jurisdiction over those features under the final rule, particularly in circumstances where the agencies would not have asserted jurisdiction consistent with their longstanding approach under the pre-2015 regulatory regime. Generally, the agencies have not asserted jurisdiction over green infrastructure features that are built in dry land. The final rule does not change the agencies' approach to green infrastructure from the approach taken under the pre-2015 regulatory regime, which was in place for more than a decade except for the short periods during which the 2015 Clean Water Rule or the 2020 NWPR were in effect. Consequently, there is no basis to conclude that the final rule will increase the cost or complexity of installing or maintaining green infrastructure.

The agencies will continue to evaluate Clean Water Act jurisdiction on a case-specific basis. As part of this case-specific assessment, the agencies will continue to consider whether the feature in question is excavated or created in dry land, the flow of water in the feature, and other factors. The agencies will not assert jurisdiction over features that do not satisfy the definition of "waters of the United States" articulated in the final rule. When a feature does not meet the definition articulated in the final rule, that feature is not a "water of the United States" and there is no need for an express exclusion.

15.13.3 Miscellaneous comments discussing exemptions for discharges to "waters of the United States"

Some commenters recommended that the current guidance memo on implementing the Clean Water Act section 404(f) exemptions should remain in place.

A few commenters expressed general support for the inclusion of the exemptions included in past rules. One commenter expressed opposition to any regulatory scheme which removes, or substantively alters, existing exemptions.

One commenter stated that the agencies should review and potentially expand their nationwide permits for activities by water providers (to the extent that clear jurisdictional exemptions are not in place and for water sector activities that cannot be exempted) to guarantee limited adverse impact to water sector utilities while assuring environmental protection.

> **Agencies' Response: The final rule does not affect any of the exemptions for certain discharges from the permitting requirements of the Clean Water Act, including exemptions from section 404 permitting requirements provided by section 404(f). See also Final Rule Preamble IV.C.1.**
>
> **To the extent commenters seek clarification of or revisions to statutory or regulatory activity-based exemptions for discharges into "waters of the United States" associated with certain activities, these comments are beyond the scope of this rulemaking. Commenters' request that the agencies issue or modify nationwide or other general permits to cover discharges from certain activities also is beyond the scope of this rulemaking.**
>
> **To the extent commenters request that the agencies issue further guidance regarding either waters that are "not" "waters of the United States" (*i.e.*, exclusions) or exempted discharges based upon the activities associated with the discharge, 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. 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.**

15.11.3 Comments asserting that failure to expressly exclude MS4s will complicate NPDES permitting of MS4s and implementation of MS4s

Some commenters expressed concern that the agencies have indicated that there could be a "waters of the United States" designation within a NPDES permitted area. Commenters stated that this is especially relevant for governments that have an MS4. These commenters stated that MS4s would be responsible not only for pollutants that leave the system, but also for pollutants that enter the system, and for maintaining water quality standards at points in between.

Some commenters expressed concern that the proposed rule will impact the permitting process, resulting in increased costs and greater difficulties in managing public infrastructure, specifically stating that section 404 permits may be required for routine maintenance on stormwater conveyance systems, including when such infrastructure is designed for drainage and flood control purposes and requesting that the rule clarify impacts on MS4 permits to avoid "double regulation of permitted entities." Several commenters requested that the final rule clarify that a section 404 permit would not be required to maintain a Best Management Practice.

One commenter stated that the proposed rule provides less clarity than either the 2015 Clean Water Rule or the 2020 NWPR, which in turn makes it more difficult for MS4 operators to map their systems in compliance with the mapping requirements of their NPDES permits.

> **Agencies' Response: With respect to the agencies' decision not to codify an exclusion for stormwater management controls, see the agencies' response to comments in Section 15.11.1.**
>
> **With respect to MS4 systems, the final rule does not change the agencies' longstanding approach, including under both the 2015 Clean Water Rule and the 2020 NWPR, as well as the pre-2015 regulatory regime, that the agencies generally do not assert jurisdiction over stormwater controls constructed in dry land, and that otherwise jurisdictional waters retain their jurisdictional status even when incorporated into a stormwater management system. See also the agencies' response to comments in Section 15.11.1. Because the final rule does not change the agencies' longstanding approach, there is no basis to conclude that the final rule would add cost or complexity to operation of MS4s or compliance with NPDES terms and conditions.**

15.11.4 General opposition to codification of an exclusion for stormwater management systems and their components

One commenter expressed opposition to an exclusion of MS4s from "waters of the United States." This commenter stated that a blanket exclusion for MS4s would increase unregulated maintenance and operation activities of traditionally jurisdictional waters, increase negative impacts on jurisdictional channels and adjacent wetlands, and would not meet the intent of the Clean Water Act.

> **Agencies' Response: The final rule does not codify an exclusion for stormwater management systems and their components from the definition of "waters of the United States." See the agencies' response to comments in Section 15.11.1**

15.12 Wastewater Recycling Structures

Many commenters made general statements of support for expressly excluding wastewater recycling structures, including their distribution structures, in the final rule, whether as part of the Waste Treatment Systems exclusion or as its own exclusion. Some commenters also noted that such features were excluded in past rules, including the 2015 Clean Water Rule and the 2020 NWPR.

Several commenters asserted that, without an exclusion for wastewater recycling structures, utilities could face regulatory uncertainty about jurisdiction (including case-specific jurisdictional determinations), regulatory delay and expenses, regulatory redundancy, and/or impediments to routine maintenance, all of which would hamper or preclude the use of a very important tool for water security and resilience to climate change without providing additional protection to the public or the environment.

One commenter suggested that the agencies should add such an exclusion because such features generally must be located either where there is some existing water source or adjacent to the sandy soils near "waters of the United States" that help with percolation/filtration. Further, the commenter asserted that

wastewater recycling structures are already designed to meet Clean Water Act and Safe Drinking Water Act requirements.

One commenter noted that the showing required to establish that a wastewater recycling feature was constructed in upland creates an unnecessary regulatory burden given the fact that any discharge from the wastewater recycling feature would already be subject to CWA regulation.

One commenter suggested that the final rule should not change the non-jurisdictional status of wastewater recycling features that were lawfully constructed under the laws at the time of construction, regardless of whether the feature was constructed in upland.

One commenter suggested that wastewater recycling structures should be under state control as water recycling contributes to local water supply. This commenter also suggested that the impacts of emerging contaminants such as PFAS should be considered in this exclusion. The commenter further asserted that the extent to which contaminants survive treatment techniques in a particular case should be determined by appropriate testing before allowing wastewater recycling structures to not be regulated as "waters of the United States."

Agencies' Response: The agencies recognize the importance of water reuse and recycling and do not intend for the final rule to discourage or create barriers to water reuse and conservation practices and projects.

The agencies disagree with commenters' request for codification of an express exclusion for wastewater recycling structures. The final rule text codifies the familiar and longstanding exclusions for waste treatment systems and prior converted croplands. The final rule text also codifies exclusions for several features that the agencies generally considered non-jurisdictional under the pre-2015 regulatory regime. See the agencies' response to comments in Section 15.1.1. Codification of these exclusions in the final rule text is consistent with the agencies' intent to interpret "waters of the United States" to mean the waters defined by the familiar 1986 regulations, with amendments to reflect the agencies' determination of the statutory limits on the scope of the "waters of the United States" informed by the law, the science, and agency expertise. The agencies' decision not to expressly exclude groundwater recharge, water reuse, and water recycling structures in the final rule text does not mean that the agencies intend to assert Clean Water Act jurisdiction over those features under the final rule.

The agencies will continue to evaluate Clean Water Act jurisdiction on a case-specific basis. As part of this case-specific assessment, the agencies will continue to consider whether the feature in question is excavated or created in dry land, the flow of water in the feature, and other factors. The agencies will not assert jurisdiction over features that do not satisfy the definition of "waters of the United States" articulated in the final rule. When a feature does not meet the definition articulated in the final rule, that feature is not a "water of the United States" and there is no need for an express exclusion. The agencies also will not assert jurisdiction over features that meet the criteria for one of the exclusions expressly identified in the final rule text.

To the extent commenters assert that the absence of an express exclusion for wastewater recycling features constructed in dry land creates an unnecessary regulatory burden because any discharge from such a feature already would be subject to Clean Water Act regulation, as set forth above, the agencies will not assert jurisdiction over features that do not meet the definition of "waters of the United States" articulated in the final rule or that fit within one of the exclusions set forth in the final rule, including the exclusion for waste treatment systems.

To the extent commenters assert that issuance of the final rule should not change the jurisdictional status of wastewater recycling features that were lawfully constructed in reliance on an express exclusion for those features under the 2020 NWPR or the 2015 Clean Water Rule, regardless of whether the feature was created in upland, the agencies note that the final rule does not invalidate AJDs issued under prior definitions of "waters of the United States." As such, any existing AJD—except AJDs issued under the vacated 2020 NWPR, which are discussed below—will remain available and eligible to support regulatory actions, such as permitting, until its expiration date, unless one of the criteria for revision is met under RGL 05–02 or the recipient of such an AJD asks the Corps to issue a new AJD. Because agency actions are governed by the rule in effect at the time an AJD is issued and not when the request was made, all approved jurisdictional determinations issued on or after the effective date of this rule will be made consistent with this rule. Because two district courts vacated the 2020 NWPR, the agencies have received many questions regarding the validity of AJDs issued under the 2020 NWPR (hereinafter, "NWPR AJDs"). In response to such inquiries, the agencies have explained that NWPR AJDs, unlike AJDs issued under other rules that were changed pursuant to notice-and-comment rulemaking rather than vacatur, may not reliably state the presence, absence, or limits of "waters of the United States" on a parcel as a result of vacatur and cannot be relied upon by the Corps in making new permit decisions following the Arizona district court's August 30, 2021, order vacating the 2020 NWPR. The agencies also note that they will continue to evaluate potential enforcement actions using the regulations in place when the alleged violation occurred. For example, if a person excavated a ditch while the pre-2015 regulatory regime was in effect and the person complied with the terms of the pre-2015 regulatory regime, today's final rule does not create new liability. *See United States v. Lucero*, 989 F.3d 1088 (9th Cir. 2021) (explaining that the 2020 NWPR did not apply retroactively to the defendant's violations, which occurred before the 2020 NWPR became effective).

To the extent that a commenter suggests that wastewater recycling structures should always be solely under state control because water recycling contributes to local water supply, the agencies disagree. Many water features contribute to local water supply. In fact, approximately 117 million people in the United States get some or all of their drinking water from public water systems that rely in whole or in part on perennial, intermittent, or ephemeral streams.[5] The Clean Water Act plays an important role in protecting surface sources of drinking water. While the agencies agree that emerging contaminants such as PFAS are of concern, analysis of the efficacy of treatment techniques is outside the scope of this rulemaking.

[5] *Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S.*, U.S. EPA (last visited Oct. 12, 2022), https://www.epa.gov/cwa-404/geographic-information-systems-analysis-surface-drinking-water-provided-intermittent.

15.13 Exemptions for Discharges to Features That Are "waters of the United States"

15.13.1 Activity-based exemptions for discharges associated with agricultural activities

Many commenters requested that discharges associated with agricultural activities be exempt from the permitting provisions of the Clean Water Act.

One commenter asserted that the proposed rule is inconsistent with Congress' intent and it expands the agencies' federal jurisdiction. This commenter stated that Congress specifically included in the Clean Water Act several critical statutory exemptions for agriculture, each of which would be unlawfully undermined by the proposed rule:

- Section 404 exemption for "normal" farming and ranching activities;
- Section 404 exemption for construction of farm or stock ponds; and
- Exclusions of agricultural stormwater discharges and return flows from irrigated agriculture from the definition of "point source" and hence, from section 402 permitting.

One commenter stated that in reference to the exemption for "normal agricultural, silvicultural and ranching practices," the term "normal" should be based on the needs of the plant and soil and should not be limited to a timing or occurrence standard. Likewise, the commenter asserted that the exemption for maintenance of farm drainage ditches should not be removed because of a presence of aquatic vegetation that may have developed since the last clean out.

Many of the commenters who discussed project and operational impacts—and several others—argued that the proposed rule could or would hinder environmentally-beneficial projects. These commenters provided the following types of projects as examples:

- Farmers' ecological and conservation efforts, such as those related to water quality, wetlands, soil conservation, wildlife, sediment, and phosphorous reduction, with one commenter arguing that it would be cost-prohibitive if farmers had to apply for permits for such activities, leading to negative environmental impacts, rather than protection;
- "Environmentally beneficial projects and…routine maintenance on…farms such as installing grass waterways and riparian buffers and maintain drainage ditches and irrigation canals"; and
- Aerial spraying for "crop protection and public health."

Agencies' Response: To the extent commenters seek clarification of or revisions to statutory or regulatory activity-based exemptions for discharges associated with certain activities, the comments are beyond the scope of this rulemaking.

The agencies disagree with those commenters who assert that the final rule impacts express statutory or regulatory exemptions for discharges associated with certain activities. Some commenters appear to confuse *features* excluded from the definition of "waters of the United States" with *discharges* that are exempted from the permitting provisions of the Clean Water Act. Like the 1986 regulations, the 2015 Clean Water Rule, and the 2020 NWPR, the final rule identifies certain features as "not" "waters of the United States," *i.e.*, like the prior regulations, the final rule "excludes" certain features from the term "waters of the United States." The agencies historically have used the term "exclusions" as a short-hand way to refer to features that by regulation are "not" "waters of the United States."

By contrast, the terms "exempt" and "exemption" refer to statutory or regulatory provisions that exempt an addition of pollutants to "waters of the United States" from the permitting provisions of the Clean Water Act (*i.e.*, "exempted discharges" or "exemptions"). Whether a feature is a "water of the United States" is a function of the characteristics of the feature and not the nature of any particular discharge into that feature. By contrast, exempt discharges into jurisdictional features generally are defined in relation to a specific activity, such as "normal farming." *See, e.g.*, 33 U.S.C. 1344(f)(1)(A). Congress exempted certain discharges from the Clean Water Act or from specific permitting requirements. The final rule will not affect any of the exemptions, including exemptions from section 404 permitting requirements provided by section 404(f), such as those for normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f); 40 CFR 232.3; 33 CFR 323.4) and exemptions from the Clean Water Act section 402 NPDES permitting requirements, such as for agricultural stormwater discharges and return flows from irrigated agriculture, or the status of water transfers (33 U.S.C. 1342(l)(1), (l)(2); 33 U.S.C. 1362(14); 40 CFR 122.2, 122.3(f)). See also Final Rule Preamble Sections III.A.1.b. and IV.C.1.

The agencies disagree with those commenters who state that the agencies' assertion of Clean Water Act jurisdiction over a particular feature precludes certain activities in or near that feature. The fact that a resource is a "water of the United States" does not mean that activities such as farming, construction, infrastructure development, or resource extraction, cannot occur in or near the resource at hand. "[A]fter all, the very existence of a permit system implies that permission may be granted." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985).[6]

In addition, where waters and discharges are subject to the Clean Water Act, the agencies have adopted measures to simplify compliance with the Act such as general permits and tools for expediting the permitting process (*e.g.*, mitigation banks, in-lieu fee programs, and functional/conditional assessment tools). General permits are issued on a nationwide, regional, or state basis for particular categories of activities. The general permit process allows certain activities to proceed with little or no delay, provided the general or specific conditions for the general permit are met. Even for those general permits that require advance notice to the Corps or a state, the average processing time for applications is less than two months. See Corps, Regulatory Impact Analysis for 2021 Reissuance and Modification of Nationwide Permits at 11 (January 3, 2021). See also Final Rule Preamble Sections III.A.1.b. and IV.A.5.b. Examples include Nationwide Permit 40 (Agricultural Activities), Nationwide Permit 34 (Cranberry Production Activities), Nationwide Permit 41 (Reshaping Existing Drainage Ditches), Nationwide Permit 27 (Aquatic Habitat Restoration, Establishment, and Enhancement Activities), and Nationwide Permit 18 (Minor Discharges). The agencies intend to continue to develop general permits and other simplified procedures to ensure that projects, particularly those that offer environmental or public benefits, can proceed with the necessary environmental safeguards while minimizing permitting delays.

[6] *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131-35 (1985)

To the extent commenters refer to applicability the Clean Water Act permitting provisions to pesticide application, regulation of the control and use of pesticides is beyond the scope of this rulemaking.

15.13.2 Activity-based exemptions for discharges associated with activities other than agricultural activities

One commenter requested clarification of exemptions for the maintenance of flood control systems. This commenter requested that the proposed rule clarify that Congress intended for Clean Water Act section 404(f)(1)(B) to include routine maintenance of flood control systems, including removal of debris and trash, and vegetation management from channels critical to the functionality of the flood control structure and system. This commenter also requested clarification that Clean Water Act section 404(f)(2), which addresses incidental discharges and is often referred to as the "recapture clause," does not apply to routine maintenance activities in a flood control system.

Some commenters suggested that the agencies should exempt/exclude county public works infrastructure development, general maintenance, and repair projects to avoid delay and increased costs.

One commenter requested that any future rule include specific language clarifying the scope of the exemption from Clean Water Act jurisdiction and permitting for maintenance and emergency reconstruction of currently serviceable structures, 33 U.S.C. 1344(f)(1)(B), to explicitly recognize emergency work related to fire recovery or watershed restoration. This commenter suggested that a permitting exemption should be explicitly recognized at 33 CFR 323.4(a)(2) for these activities with impacts to "waters of the United States" that are less than 1/10 acre. The commenter asserted that implementing the exemption in this manner would improve applicant preparedness and mitigation effectiveness.

A few commenters requested that the agencies specify that routine operation and maintenance of facilities associated with excluded waters should be explicitly exempted. For example, the exemptions in section 404(f) of the Clean Water Act.

Agencies' Response: To the extent commenters seek clarification of or revisions to statutory or regulatory activity-based exemptions for discharges associated with certain activities, the comments are beyond the scope of this rulemaking.

To the extent commenters confuse features that are excluded from the term "waters of the United States" with activity-based exemptions from the permitting provisions of the Clean Water Act for discharges associated with certain activities, see the agencies' response to comments in Section 15.13.1. Whether a feature is a "water of the United States" is a function of the characteristics of the feature and not the nature of any particular discharge into that feature. Congress exempted certain discharges from the Clean Water Act or from specific permitting requirements. The final rule would not affect any of the exemptions, including exemptions from section 404 permitting requirements provided by section 404(f). 33 U.S.C. 1344(f); 40 CFR 232.3; 33 CFR 323.4. See also Final Rule Preamble Sections III.A.1.b. and IV.C.1.