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AND REGULAR MAIL

Environmental Protection Agency
Water Docket, Mail Code 2822T
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460
Attn: Docket ID No. EPA-HQ-OW-2011-0880

Re: “Waters of the United States” under the Clean Water Act

Dear Sir or Madam:

Enclosed please find the American Association of Railroads’ comments regarding the United States Environmental Protection Agency’s proposed Rule of April 21, 2014 to define “Waters of the United States” under the Clean Water Act, 33 U.S.C. §§ 1251 et seq., EPA-HQ-OW-2011-0880. We appreciate EPA’s consideration of these comments and the American Association of Railroads stands ready to answer any questions regarding our comments.

Thank you.

Sincerely,

David M. Moore, Esq.

DMM/db
w/encl.
cc: Matthew A. Gernand
     Michael J. Rush
     Louis P. Warchot
Association of American Railroads


Waters of the United States


Filed November 14, 2014
I. Introduction and Summary


The proposed rule impermissibly expands jurisdiction under the CWA in an unprecedented manner. Specifically:

- The Agencies must remove “ditch” from the definition of Waters of the United States. The proposed rule includes any “ditch” with “presence” of water even during an “above normal” rainfall year. The proposal will potentially subject hundreds of thousands of miles of ditches to CWA jurisdiction.
- Maintenance of ditches is critical to safe rail transportation. Identifying rail ditches as Waters of the United States would create regulatory hurdles that would make it almost impossible for railroads to perform prompt rail ditch maintenance, leading to less safe rail transportation.
- The Agencies must remove “floodplain” areas from the definition of Waters of the United States, as this term is undefined and includes features that exceed the scope of the CWA and constitutional limitations.
- The proposed rule does not satisfy Due Process and Fair Notice doctrines because it fails to define critical terms such as “upland,” “waters,” and “floodplain.”
- The Agencies must remove “riparian” from the definition of Waters of the United States, as this term is so poorly defined it does not satisfy Due Process and Fair Notice doctrines and will create excessive uncertainty and cost for the regulated community.
- AAR supports the continued waste treatment exception. However, the exception language fails to acknowledge channels and conduits and storm water management systems as part of the exception.
- Regulating “fill and spill” features—any water feature that would release water after an adequate storm event—expands CWA jurisdiction to essentially any and all depressions and low spots that would collect and release water, such as rail operating property, yards, and including uplands.
II. Overview of Rail Operations in the United States and Impact of Proposed Rule

Railroads are critical to the Nation's transportation system, providing for the movement of freight and passengers throughout the continental United States and Alaska. Railroads operate over approximately 139,000 miles of right-of-way. In the nearly 200 year history of railroad activity in the United States, rail has become established as one of the most efficient and environmentally friendly forms of transportation. Railroads reduce greenhouse gas emissions by lowering fuel consumption. On average, a train can move one ton of freight 473 miles on a single gallon of fuel. Because greenhouse gas emissions are directly related to fuel consumption, moving freight by rail rather than truck can reduce greenhouse gas emissions significantly. Moving freight by rail also reduces gridlock and wear and tear on American highways. A functioning railroad system is critical to the nation's transportation system and its environmental health.

As discussed in detail below, the effect of the proposed rule on railroad construction and operations, and as a result on the national economy, will be substantial. This is due to the Agencies addition of ditches, riparian, and floodplain areas as Waters of the United States.

Due to safety and engineering requirements for flat terrain, many of today's rail transportation corridors were placed near or along waterways, well before the CWA came into existence. The proposed rule vastly expands the definition of Waters of the United States to include riparian areas and floodplains where rail corridors are located. Rail operations and maintenance, including federal requirements for rail safety, mandate that railroads construct and maintain ditches, access roads, signals, and other operating equipment within rail right-of-ways. Interstate commerce and achievement of the nation's greenhouse gas goals for transportation require a
vibrant and efficient rail system. Accordingly, rail operations within riparian areas and floodplains must be maintained and expanded to meet national goals.

Ditches have been an integral part of rail construction since the start of the rail industry in the 1800s. Ditches play a critical role in rail safety by ensuring proper drainage, thus preventing the undermining of rail road bed material and potential sloughing, shifting, and uneven trackage. Ditches also avoid washouts and ensure safe travel at speed. Rail drainage is required under federal regulations and is subject to detailed industry specifications. See 49 C.F.R. Part 213. Given the ubiquitous presence of ditches along railroad rights-of-way, well over 100,000 miles of rail ditches may potentially be affected by the proposed rule and may be considered Waters of the United States for purposes of permitting, mitigation, and enforcement as Waters of the United States. Rail ditches are implicated because the proposed rule erroneously defines ditches as perennial tributaries based merely upon presence of water, even during above-normal rain years. Applying EPA's mitigation figure of $177 to $265 per linear foot (which is well below what Railroads have paid in some areas of the country), the potential mitigation costs for mitigating rail ditches as tributaries under the proposed rule would exceed $100 billion. This would be in addition to the full costs of additional permitting and consultation should the proposed rule move forward.

As discussed below, rail ditches are not and cannot be identified as Waters of the United States.

III. Comments Regarding Proposed Rule

A. Ditches are not Waters of the United States and Cannot Be Listed in the Proposed Rule as Waters of the United States

The Agencies have proposed a new definition of “tributary” to Waters of the United States that specifically includes ditches. “A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.” 79 Fed. Reg. at 22,262-22,274 (amending 33 C.F.R. Part 328, 40 C.F.R. Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401 (emphasis added)). However, the CWA statute and regulations already define a ditch as a point source.

1. Ditches are Point Sources, Not Waters of the United States

(a) The CWA defines ditches as Point Sources

The text of the CWA explicitly states that a ditch is a point source. A “point source” is “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch...from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14) (emphasis added). As the Supreme Court and many courts have noted, point source and navigable waters

2 Identification of the exclusion differs for several Code of Federal Regulation Sections. For example, 33 C.F.R. Part 328 and 40 C.F.R. Part 117 ditch exclusion is located at sections (b)(3) and (4); 40 C.F.R. Parts 110, 112, 116, 232, 300 and 302 ditch exclusion is located at sections (2)(iii) and (iv); 40 C.F.R. Part 230 ditch exclusion is located at sections (l)(3) and (4); 40 C.F.R. Part 401 ditch exclusion is located at sections (l)(2)(iii) and (iv).

Aside from the citation, the language for each exclusion is identical.
are “two separate and distinct categories.” The proposed rule eliminates any meaningful distinction between point sources and Waters of the U.S. in contravention of these court decisions.

(b) EPA Regulations and reports define ditches as Point Sources

Similarly, EPA regulations explicitly define a ditch as a point source. “Point source means any discernible, confined, and discrete conveyance, including but not limited to, any...ditch...from which pollutants are or may be discharged.” See 40 C.F.R. § 122.2 (emphasis added). The Agencies have consistently interpreted “ditch” as a point source. EPA recently affirmed that a ditch is a point source in its 2012 re-issuance of the EPA General Construction Permit. Specifically, EPA’s Question and Answer document, as well as text of the permit itself, confirms that a ditch is point source. Therefore, the Agencies’ proposal to identify ditches as Waters of the United States contradicts not only the CWA text at 33 U.S.C. § 1362(14) and Supreme Court jurisprudence, but also the text of EPA promulgated regulations.

Similarly, EPA’s scientific report issued in September 2013 in support of the proposed rule supports the position that ditches are not Waters of the United States. The EPA Connectivity Report states “pollutants enter wetlands via various pathways that include ... point sources such as outfalls, pipes, and ditches.” EPA Connectivity Report at Section 1.4.2, Key Findings, Page 1-9, line 22 (emphasis added).

(c) Ditches Cannot be Both a Point Source and Waters of the United States

Under the Agencies’ proposed rule, a ditch would be both a point source under Section 502(7) of the Act and regulations at 40 C.F.R. § 122.2 and a Water of the United States under the proposed rule. Of course, a ditch cannot be both a “point source” and a “Water of the United States” at the same time. “Discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.” As the United States Supreme Court explained:

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5 Frequently Asked Questions on EPA’s 2012 NPDES Construction General Permit, at Page 1 (“Point sources are defined at CWA section 502(14) and, generally speaking, are discrete conveyances including but not limited to any pipe, ditch, channel, or conduit from which pollutants may be discharged.”)


7 See also Section 5.3.2, The Chemical-Nutrient Influence of Riparian Areas on Streams, page 5-10, line 7 (referring to “point sources such as outfalls, pipes and ditches.”).

8 As the Agencies note in the proposed rule, the definition of ‘navigable waters’ is Waters of the United States, including the territorial seas. 42 U.S.C § 1362(7), CWA § 502(17). 79 Fed. Reg. at 22,195.
Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from ‘navigable waters,’ by including them in the definition of ‘point source.’ The Act defines ‘point source’ as ‘any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.’ 33 U.S.C. § 1362(14). It also defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source,” § 1362(12)(A) (emphasis added). **The definitions thus conceive of “point sources” and “navigable waters” as separate and distinct categories.** The definition of ‘discharge’ would make little sense if the two categories were significantly overlapping. The separate classification of “ditch[es], channel[s], and conduit[s]”—which are terms ordinarily used to describe the watercourses through which intermittent waters typically flow—shows that these are, by and large, not “waters of the United States.”


By defining Waters of the United States so as to include ditches, which are by definition a point source, the Agencies have done precisely what the Supreme Court instructed against—created an overlap in the definition of point source and Waters of the United States. The proposed rule’s interpretation therefore contradicts the plain language of two provisions of the CWA—Sections 502(7) and 502(14)—and numerous judicial precedent including the Supreme Court.

2. The Agencies have Not Established a Definition of Ditch

“Ditch” is not defined under the proposed rule or in existing regulations. The term “ditch” is used, undefined, within the proposed rule’s definition of “tributary.” The definition states: “A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (2)(iii) or (iv) of this definition.” 79 Fed. Reg. at 22,262-22,274 (emphasis added).

“Tributary” is further defined in the proposed rule as “water physically characterized by the presence of a bed and banks and ordinary high water mark.” However, it is clear that the definition of ordinary high water mark (“OHWM”) is intended to reference natural systems, not ditches. **OHWM is defined as a “line on the shore” such that a “clear, natural line” is present and where changes in the character of soil, destruction of terrestrial vegetation, and litter and debris are present. Ditches have no shore, any “line” is either constructed or the result of erosion, and any changes in soil and vegetation are physical changes resulting from the engineering and

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9 *See also* 547 U.S. at 759 (“as relevant here, the term “discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.”); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137, 1141 (C.A.10 2005) (2.5 miles of tunnel separated the “point source” and “navigable waters”).

10 “The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.” 33 C.F.R. § 328.3(e).
construction of the ditch. If litter and debris are present they are the result of the configuration of the ditch and its design to collect organic and other materials.

The fact that a “tributary” is intended to refer to a natural system, not a ditch, is also evident from the EPA Connectivity Report, which defines tributary as a “stream or river that flows into a higher-order stream or river.” EPA Connectivity Report, at A-20, line 5. Of course, a ditch is not a stream or river and therefore could not be a tributary under the EPA Connectivity Report, which constitutes the primary technical support document for the proposed rule.

The Agencies’ definition is also contrary to the U.S. Supreme Court holding in Rapanos. Justice Kennedy specifically pointed out that applying OHWM by itself was too broad and would specifically capture ditches as Waters of the United States even where their contribution would be minor. 547 U.S. at 780. Justice Kennedy also addressed the use of OHWM by stating that the definition might be appropriate so long as “this standard presumably provides a rough measure of the volume and regularity of flow.” Id. The Agencies have not, however, introduced any concept of volume and flow in the proposed rule despite flow being requisite according to the EPA Connectivity Report. The proposed rule in fact requires only the “presence” of water, not flow, as is discussed in Section III.A.3(b), below. There is no concept of flow or volume in the proposed rule contrary to Justice Kennedy’s holding in Rapanos.

Further, the proposed rule has failed to acknowledge that ditches excavated in Waters of the United States which do not result in discharge of dredged or fill material do not require Section 404 permits. The rule must acknowledge that ditches excavated in Waters of the United States meeting incidental fallback provisions do not require a permit under Section 404 of the CWA, and are otherwise not subject to the rule.

3. Proposed Ditch Exclusions are Meaningless and Establish Jurisdiction Over Ditches That Are Not Waters of the United States

The Agencies propose to exclude ditches “that do not contribute flow” to other waters, or “that are excavated wholly in uplands, and have less than perennial flow.” 79 Fed. Reg. at 22,262-22,274. AAR supports exclusions for ditches. However, the proposed exclusion is meaningless because: (1) most, if not all, ditches are designed to contribute flow of water downstream[11] and therefore no ditches will qualify for this exclusion; (2) “perennial” is defined as “presence” of water “at any time” including “above normal” precipitation years; and (3) the Agencies have not defined “upland” leaving the regulated community without notice and meaningful guidelines. As a result, the ditch exclusion would cover few ditches.

(a) The Exclusion for Ditches “that do not contribute flow, either directly or indirectly” is Meaningless as Virtually All Ditches Contribute Flow

Because there are very few ditches that do not, during some qualifying precipitation event, contribute flow either directly or indirectly to another water body, the proposed rule’s exclusion for ditches not contributing flow is virtually meaningless.

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[11] Including infiltration trenches which must, by engineering standards, account for outlet of water during precipitation events exceeding design criteria.
Further, Corps’ guidance describes a drainage ditch as a feature that “conveys water (other than irrigation related flows) from one place to another.” Regulatory Guidance Letter 07-02 (July 4, 2007). Additionally, identifying ditches that contribute flow as Waters of the United States not only defies common sense, but is contrary to longstanding court decisions. As the Supreme Court noted, lower courts have not found conduits to and from Waters of the United States to be Waters of the United States themselves by virtue of their flow. See, Rapanos, 547 U.S. at 744. Thus, the concept that contribution of flow qualifies a ditch as a Water of the United States under the CWA has already been rejected by the Supreme Court and cannot form the basis of the proposed rule.

It is clear from Agency guidance, court decisions, and legal positions taken by the Agencies that ditches that contribute flow do not constitute Waters of the United States. 12

(b) Because “Perennial Flow” is Defined as “Presence” of Water Even During an “Above Normal” Precipitation Year, the Exclusion is Meaningless

The proposed rule identifies ditches with the “presence” of water as “perennial” and therefore jurisdictional. 79 Fed. Reg. at 22,203. By stating that water need only be “present” the Agencies are creating a new definition of perennial stream, expanding the reach of the CWA. The term perennial normally indicates presence of a stream with flow year round (which is typically measured in units such as cubic feet per second13 or in the case of the EPA Connectivity Report cubic meters per second). Even the EPA Connectivity Report specifies there must be flow each day of 365 days to constitute “perennial.” The Report states, “[p]erennial clearly requires establishment of flow, not mere presence of water...a single day observation of presence of water in a ditch, or tributary, is inadequate to constitute perennial flow.” Thus, the proposed rule and Connectivity Report conflict.

Further, defining perennial as the “presence” of water is not supported by science. The United States Geological Service (USGS) has developed models that result in an equation which can only correctly predict the transition point from an intermittent to perennial stream (e.g. the ‘break point’) in natural systems about 75 percent of the time.14 Thus, the USGS models can only achieve a 75 percent level of accuracy in predicting a perennial stream in a natural setting. The proposed rule would designate a ditch as perennial if it had presence of water (not necessarily flow), even during an “above normal” precipitation year. This position is clearly not supported by science.

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13 See, e.g. U.S. Army Corps of Engineers, defining headwaters as those areas with less than 5 cubic feet per second (cfs) flow. See also 56 Fed. Reg. 59,112 (November 22, 1991).
(c) The Agencies Have Not Defined ‘Upland’ and Therefore the Ditch Exclusion is Ambiguous

To qualify for the ditch exclusion, a ditch must be *excavated wholly in uplands* for its entire length. The agencies have not provided a definition of “upland” and even though various definitions of “upland” exist. The EPA Connectivity Report references “uplands” as higher elevation lands surrounding streams and their floodplains, or any area that is not a water body and does not meet the Cowardin three-attribute wetland definition. Connectivity Report at A-21. The terms “higher lands,” “surrounding streams” and “floodplains” are ambiguous and violate Due Process and Fair Notice principles because there is no ability for the regulated community to determine what constitutes a ditch excavated in an upland area.

(d) The Requirement That a Ditch Drain only Uplands and be Excavated Only in Upland is Impossible for Rail Ditches

Additionally, the proposed rule would require excavation of a ditch in upland “for its entire length.” This requirement is impossible to meet for railroad ditches, which span thousands of miles and cross numerous states and often receive drainage from large areas.

4. Including “Ditches” as Waters of the United States Vastly and Impermissibly Expands the CWA to Include Hundreds of Thousands of Human-Made Ditches

The Agencies justification for identifying ditches is that ditches provide the same chemical, physical, and biological functions as other water bodies defined as tributaries under the proposed rule. See, 79 Fed. Reg. at 22,206. This is not correct with respect to rail ditches, however.

Rail ditches do not “provide the same chemical, physical, and biological functions as other water bodies” for several reasons. First, rail ditches are designed to manage stormwater and therefore receive flashy and unpredictable volumes of storm water, not suitable for establishment of a chemical, physical, and biological goal as contemplated by the CWA.

Second, rail ditch substrata consists of excavated material and in many cases rock or ballast. These ditches are also designed to protect the rail line by collecting soil, dirt, rock and other man-made and natural materials. Accordingly, they do not have the type of chemical, physical, and biological habitat contemplated and protected by the CWA. Vegetation may come to be temporarily located in rail ditches, but these are of poor quality and often invasive.

Third, ditch contours and configuration are mandated by engineering criteria and consist of straight, narrow channels, sometimes lined with rock, and without the complexes (riffle, pool) found in tributaries and the natural “S” shape found in ecosystems. Rail ditches exhibit none of the features of natural systems and cannot even be assessed under typical scientific assessment criteria (e.g. Rosgen scale).

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15 On stakeholder calls, the agencies have said uplands are anything that are not waters of the U.S.
Fourth, rail ditches are required by engineering standards and regulatory criteria to be regularly disturbed for maintenance and other purposes. As a result of their design and maintenance, rail ditches do not have the biological habitat contemplated and protected by the CWA.

5. Impacts of the Proposed Rule on Rail Ditches, Rail Safety, Rail Operations

Identifying rail ditches as Waters of the United States would restrict railroads' ability to maintain ditches for safe operations, adjust ditch capacity or flow to manage the previously referenced stormwater encroachments, and would result in extensive permitting delay and expense should a ditch need to be removed or significantly altered. For example, herbicide use for the maintenance of rail ditches could be prohibited even in the absence of water in the ditch. In Nat'l Cotton Council of Am. v. U.S. E.P.A., 553 F.3d 927, 940 (6th Cir. 2009), the 6th Circuit held that pesticide residues that enter a Water of the United States are “pollutants” entering a water from a “point source” and are subject to CWA regulations. Many herbicides leave residues, and are potentially subject to NPDES regulation. Therefore, if ditches are classified as Waters of the United States, a release of pesticides to a rail ditch—even one without water at the time of release—could become a reportable event subject to penalties under Section 311 of the CWA, because the residues would “enter” a jurisdictional water during a storm or other event.

The exclusions to the proposed rule are so narrow that hundreds of thousands of miles of rail, road, MS4s, and other ditches currently unregulated will become Waters of the United States. The result will be (1) a substantial number of new and revised/modified NPDES and Section 404 permits, (2) the need to change SWPPPs at substantial costs, expense and uncertainty, (3) extensive costs to mitigate any time any of the nation’s hundreds of thousands of miles of road, railway, and other drainage ditches require relocation, expansion, or in some cases maintenance, and (4) a large increase in associated regulatory burdens on both the regulated community and governmental agencies because historic resource, protected species, and other consultation would be required before moving or construction on any rail ditch.

B. The Proposed Rule Adds Riparian Areas, Floodplain, Neighboring and Adjacent Areas to the Definition of Waters of the United States

The proposed rule determines that all “waters” within the floodplain or riparian area of a jurisdictional water or that have a shallow subsurface hydrological connection to a jurisdictional water categorically have a significant nexus and will be jurisdictional by rule. 79 Fed. Reg. at 22,207. The addition of floodplain and riparian areas represents a substantial expansion of the definition of Waters of the United States, is not supported or justified by science or the administrative record, exceeds the Agencies’ authority under the enabling CWA statute, and applicable Constitutional provisions, is arbitrary, capricious, and constitutes an abuse of discretion.

1. “Adjacent waters” is Undefined and Vastly Expands CWA Jurisdiction.

The Agencies are expanding the definition of Waters of the United States to include “neighboring” waters as Waters of the United States. The proposed rule asserts jurisdiction over “[a]ll waters, including wetlands, adjacent to” a traditional navigable water, interstate water, territorial sea, impoundment, or tributary. 79 Fed. Reg. at 22,263 – 22,274 (emphasis added).
There is nothing in the proposed rule that limits or explains what is meant by the term “adjacent waters.” In the proposed rule, “adjacent” is defined as “bordering, contiguous, or neighboring.” *Id.* The proposed rule expands the meaning of “adjacency” with its new, broader definition of the word “neighboring” and undefined terms “bordering” and “contiguous” and the addition of the terms “floodplain,” “riparian areas” and “subsurface” connections. This broad language allows the agencies to treat essentially any feature adjacent to a Water of the United States as a jurisdictional “water” by virtue of its adjacency.

2. “Waters” Must be Defined and Limited in Accordance with the CWA and Constitutional Limitations, or Withdrawn from the Rule

As a basic principal matter, the Agencies have expanded what is a “water” without defining “water.” Without a definition of “waters,” virtually any feature that is “neighboring” could conceivably constitute a Water of the United States. The Agencies use the term “wetland” which is defined in some references to waters, but have not proposed a definition of waters. EPA’s Connectivity Report sets forth a definition of “water body”—any sizable accumulation of water on the land surface, including but not limited to streams, rivers, lakes, and wetlands—but does not define “waters.” The Agencies must either define “waters” or withdraw the concept that “waters” located within adjacent, floodplain, and neighboring areas are jurisdictional from the rule.

3. ‘Floodplains’ are undefined and inappropriate for establishing CWA jurisdiction

The proposed rule defines “neighboring” as, among other things, “waters located in floodplains.” However, the definition of floodplain is defined broadly to include areas “inundated during periods of moderate to high water flows” under “present climatic conditions.” The failure to more clearly define “floodplain” renders the proposed rule unworkable and ambiguous. The Agencies suggest that a 500-year return interval could be used to delineate a floodplain. 79 Fed. Reg. at 22,236. As noted in the preamble, the likelihood of flood in a 500-year floodplain is once in 500 years, or 0.2 percent. The proposed rule leaves determination of the extent of floodplain to the Agencies “best professional judgment” rather than creating predictable scientific standards. *Id.* at 22,209. Without a clear definition of floodplain, the designation of waters in a floodplain as Waters of the United States is arbitrary and capricious.

4. Subsurface Waters Have Never Been Waters of the United States and are Insufficient to Establish Jurisdiction

The proposed rule’s assertion of jurisdiction over all waters with “shallow subsurface hydrologic connections” to jurisdictional waters is a radical departure from current methods of jurisdictional determination. Every other type of jurisdictional determination starts with and can be performed primarily with visual observation (e.g., OHWM, wetlands vegetation, etc.). There is simply no way to determine the flow direction, depth and other characteristics of subsurface water without costly, time-consuming, and invasive subsurface investigation. Additionally, there is no scientific standard to separate what is “shallow subsurface” versus “groundwater.” According to the USGS, the definition of groundwater includes shallow subsurface flow, and this flow can be complex. The Agencies should clarify that groundwater connections cannot be used to establish jurisdiction and should clearly define what is meant by “shallow subsurface” flow that will be
used to establish jurisdiction. Finally, determining the extent of subsurface connections will be
difficult and will likely lead to improper assumptions that there is always a connection.
Determination of connection involving subsurface flow would be particularly problematic in
floodplain areas, where subsurface flow, direction and other characteristics can vary greatly
based on season, rainfall, and other factors.

For all these reasons, the Agencies must reconsider the proposed rule’s assertion of jurisdiction
over all waters with “shallow subsurface hydrologic connections” to jurisdictional waters and
clearly distinguish between shallow subsurface flow and groundwater.

5. Riparian Areas are Inappropriate for establishing CWA jurisdiction

The proposed rule’s definition of “riparian area” is vague and provides no meaningful guidance
for the regulated community. The limits of the riparian zone, as well as how the zone will be
determined or mapped, are unclear under the definition. Additionally, which types of animal,
plant, and aquatic life may trigger this definition is unclear, because terms used in the
definition—area, ecological processes, plant and animal community structure, exchange of
energy—are themselves vague and undefined. As with floodplains, the proposed rule leaves it to
the Agencies’ “best professional judgment” to apply the term “riparian area.” 79 Fed. Reg. at
22,208. This will lead to confusion and inconsistency among the Agencies and their District and
Regional offices.

A quick search of Agencies’ guidance shows numerous inconsistent references to riparian. The
EPA Connectivity Report defines riparian in the context of “uplands,” which are also undefined,
implying riparian is separate from upland. EPA Connectivity Report, A-14, line 10-16. EPA
guidance, however, references riparian as including uplands. Of course, as discussed in Section
III.b.3, “upland” is not defined in the proposed rule, despite being used as a central feature for
the ditch exclusion, and therefore referencing upland provides no guidance regarding what is
considered riparian under the proposed rule. Further, other Federal agencies have vastly different
definitions.

Without a definition of riparian area in the proposed regulation that provides meaningful
guidance, the regulated community has no idea which water features are potentially Waters of
the United States. This will create immense and unjustified expense, delay, consultation, and
regulatory burden on the regulated community.

6. New “fill and spill” terminology establishes overly expansive CWA jurisdiction

The proposed rule uses a new “fill and spill” concept to establish jurisdiction over “wetlands and
open waters” that “fill” during heavy rain events and “spill” downgrade into a jurisdictional
water. 79 Fed. Reg. 22,188, 22,208. This establishes almost limitless jurisdiction over any waters
which may spill into jurisdictional waters during a flood event, including rail ditches and other
currently non-jurisdictional, isolated water bodies, depressions in rail yards or upland areas. The
Agencies do not provide any limiting principle for “fill and spill” jurisdiction, leaving open the
possibility that a one-time flood event could create permanent CWA jurisdiction over an isolated

http://cals.arizona.edu/extension/riparian/chapt1/table.html.
water body that would, on its own, never be considered a Water of the United States. The "fill and spill" concept could even impact systems that would be covered under the waste treatment exception, such as designed biodetention systems or surface impoundments, because they could "fill" and "spill" into a jurisdictional water.

C. Waste Treatment Exception

Since 1979, EPA and Corps regulations have exempted "waste treatment systems" from the definition of Waters of the United States. The proposed rule would retain the following waste treatment exemption:

The following are not 'waters of the United States' notwithstanding whether they meet the terms of paragraph (a)(1) through (7) of this section –

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.

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

1. Conduits, Channels, and Ditches Fall Within the Waste Treatment Exception and Must be Identified in the Proposed Rule

Despite the reference to only treatment ponds or lagoons, the Agencies have made clear that the waste treatment exception includes swales and conduits managing water and storm water. The Supreme Court also noted that “the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from ‘navigable waters’ by including them in the definition of ‘point source.’”

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17 33 C.F.R. Part 328; 40 C.F.R. Parts 110, 112, 117, 122, 230, 232. The history of the exemption indicates a conscious decision by EPA to exclude treatment systems from Waters of the United States regardless of whether they were man-made or constructed in natural water bodies, despite some legislative history to the contrary.

18 Ohio Valley Environmental Coalition v. Aracoma Coal Corp., Mem. Op., Civ. Action No. 3:05-0784 (S.D.W.Va. June 13, 2007), rev’d, vacated and remanded sub nom. at Ohio Valley Environmental Coalition v. Aracoma Coal, 556 F.3d 177 (4th Cir. 2009). In Aracoma, the Agencies filed briefs with the Court supporting application of the waste treatment exception to intervening conduits and conveyances. This included former intermittent streams that connected waste treatment ponds.

19 Rapanos, 547 U.S. at 735.
An important part of the waste treatment exception is to ensure that storm water management, flood control, as well as environmental enhancement and restoration features and activities, is not erroneously considered jurisdictional. Since adjustments are being made to address cooling water ponds, the Agencies should also include language clarifying that the waste treatment exception applies to channels, conveyances, and conduits, including storm water management systems.

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

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

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

Because thousands of waste treatment systems, including storm water management, are not subject to CWA requirements, the Railroads recommend the Agencies remove the phrase “designed to meet the requirements of the Clean Water Act.”

3. The Proposed Rule Relies on the Water Transfer Rule, Which Has Questionable Validity

The proposed rule relies on the regulatory status of water transfers that existed before the release of the pre-proposal draft on March 25, 2014. On March 28, the United States District Court for the Southern District of New York issued an order purporting to vacate EPA’s water transfer rule, 73 Fed. Reg. 33,697 (June 13, 2008). Catskill Mountains Chapter of Trout Unlimited Inc., et al. v. EPA consolidated case Nos. 08-cv-0560 and 08-cv-9430 (S.D.N.Y., March 28, 2014). The reliance on the vacated water transfer rule is a procedural flaw that makes the proposed rules invalid.


See, e.g., Hughey v. JMS, 78 F.3d 1523(11th Cir. 1996)(permit unavailable for construction stormwater discharges; “practically speaking, rain water will run downhill, and not even a law passed by the Congress of the United States can stop that.”).
4. The Proposed Rule Cannot Apply Retroactively

Absent express Congressional language permitting the Agencies to apply the definition of Waters of the United States retroactively, the Agencies are constitutionally prohibited from retroactively applying the proposed rule's definition. The Agencies must make clear that the applicability of the proposed rule is limited to post-rule activities and any prior activities or features would not be subject to the proposed rule.

D. The Proposed Rule Incorrectly Applies Only Justice Kennedy's Rapanos Opinion and Ignores the Plurality Decision

The proposed rule (and preamble) misinterprets Rapanos in several key respects and sets forth a "Waters of the United States" definition that does not comport with a true reading of the case law. As EPA notes in its preamble, most Circuit Courts of Appeals considering Rapanos have held that CWA jurisdiction is governed by both Justice Kennedy's standard and the plurality's standard. *Id.* at 22,252. However, the plurality decision is only referenced, not applied. EPA has clearly based the proposed rule entirely on Justice Kennedy's opinion. To comply with Supreme Court and common law precedent, the proposed rule should only find jurisdiction where both the plurality's and Justice Kennedy's standards are satisfied.

E. EPA Has Violated Fundamental Administrative Procedure Act Requirements

A basic and fundamental requirement of the Administrative Procedure Act and rulemaking under the CWA is the requirement to follow APA and CWA procedures. Where not followed, a reviewing court may set aside agency action that has failed to observe those "procedure[s] required by law." § 706(2)(D).

The Agencies have issued various interpretations of the proposed rule through blogs, press releases, phone conferences, and other means. It is impossible to determine the precise record upon which the proposed rule was issued, and impossible to determine which of the varying interpretations propounded by the Agencies in these various forums are the official and proper interpretation upon which to submit comment. Accordingly, the Agencies have violated the basic and fundamental requirements of notice and comment rulemaking. Since those procedures have not been followed, the proposed rule must be withdrawn.

F. Section 311 Does not Include Waters of the United States

The Agencies have proposed to revise the definition of Waters of the United States for the purpose of Section 311 of the CWA. See 40 C.F.R. Part 117. Section 311 addresses "discharge

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22 See *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). See also 33 C.F.R. § 322.4 (Activities not requiring permits).

of oil or hazardous substances (i) into or upon the *navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone.*” 33 U.S.C. § 1321(b)(3). In using the term “navigable waters” and “adjoining shorelines,” Congress has expressed the clear intent that Section 311 not be applied to the scope of “Waters of the United States” which are subject to regulatory provisions. Legislative history regarding Section 311 supports the interpretation that Section 311 applies to releases from vessels and facilities to traditional navigable waters.

**G. Incorporation by Reference**

AAR endorses the comments of the Waters Advocacy Coalition and the comments by the U.S. Chamber of Commerce. Each reference and citation identified in those comments is incorporated by reference as if fully set forth in these comments. Such references are readily available, but can be requested by contacting:

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**III. CONCLUSION**

As described above, the proposed rule exceeds the Agencies’ authority, is ultra vires and must be withdrawn. The proposed rule is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and fails to observe procedures required by law.

This 14th day of November, 2014.

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