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The American Public Power Association respectfully submits these comments on the Environmental Protection Agency and the U.S. Army Corps of Engineers' (together, the Agencies) Proposed Rule to Revise the Definition of "Waters of the United States" (Fed. Reg. 4154, February 14, 2019).

As detailed in the attached comments, the Association supports the Agencies' proposal to revise and refine the regulatory definition of WOTUS. The Proposal would draw clearer lines of jurisdiction, provide needed predictability for the regulated community and is consistent with Clean Water Act and Supreme Court precedent. In the Association's comments, we recommend some clarifications and changes to further improve the proposed regulatory definition and its implementation.

Sincerely,

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Comments of the American Public Power Association on the Environmental Protection Agency and U.S. Army Corps of Engineers' Proposed Rule: Revised Definition of "Waters of the United States"

84 Fed. Reg. 4154 (February 14, 2019)
Docket Id. No. EPA-HQ-OW-2018-0149

Date Submitted: April 15, 2019

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I. Introduction

The American Public Power Association (APPA or Association) appreciates the opportunity to provide comments on the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) (together, the Agencies) proposed rule to revise the definition of waters of the United States (WOTUS) under the Clean Water Act (CWA).[1] The scope of the CWA's jurisdiction is important to the APPA members.

The Association appreciates the Agencies' efforts to increase predictability and consistency by clarifying the scope of WOTUS. A clear definition of WOTUS is critical to efficiently and effectively regulating the activities of our members. Their customers have a vested interest in clean water and the reliable generation of power from low and non-emitting sources while ensuring a resilient grid.

The American Public Power Association is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 93,000 people they employ. Our association advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power. The Association and its members have a history of participating in regulatory matters concerning the scope of federal jurisdiction under the CWA.

The Association is a member of the Utility Water Act Group and the Water Advocacy Coalition. We are supportive of UWAG and WAC's detailed comments on the Proposed Rule. The Association also encourages the Agencies to consider any individual comments filed by APPA member organizations, which may raise additional points or further expand on issues highlighted in these comments.

[1] 84 Fed. Reg. 4154 (Feb. 14, 2019) (Proposed Rule).

A. Summary of APPA Comments

The Association supports the Proposal Rule because it properly emphasizes clarity, regulatory certainty, and simplicity, and respects the limited powers of the executive branch under the Constitution and the CWA to regulate navigable waters. The Proposed Rule aligns the scope of the Agencies jurisdiction with the CWA by giving proper meaning to the term "navigable", preserving the states' and tribes primary authority over land and water, and returning to fundamental principles established by Congress and recognized by the courts.

The Association agrees that protecting the nation's waters, including streams and wetlands, is important. APPA members have sought to provide cost-effective power while reducing environmental impacts to both federal and state waters. The Agencies focus on a common-sense WOTUS definition and clear lines of jurisdiction provides predictability for the regulated community, while protecting the vital resource of our nation's waters.

The Association supports the Agencies' rescission of the 2015 Clean Water Rule and replacement with a new definition of WOTUS.[2,3] The Association also urges the Agencies to expeditiously finalize this Proposal Rule to replace the patchwork of CWA jurisdiction that has resulted from litigation challenging the 2015 Clean Water Rule, and provide much needed national consistency, clarity, and certainty.[4]

1. APPA Recommendations

The Proposed Rule offers key protections for aquatic resources and is consistent with the statute and judicial precedent. To improve the clarity and implementation of the rule, our comments focus on the issues of greatest importance to public power, with suggestions to clarify certain aspects of the Proposal. As discussed below:

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[2] Clean Water Rule: Definition of Waters of the United States"; (80 Fed. Reg. 37053; June 29, 2015); (EPA-HQ-OW-2001-0880); (2015 Rule).

[3] Comments of the American Public Power Association in Response to the Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Rule to Recodify Pre-Existing "Waters of the United States" Rules; EPA-HQ-OW-2017-0203-15401 (July 27, 2017) (APPA Repeal Comments).

[4] APPA Repeal Comments at 3.

- The Association recommends revisions to clarify that the definition of traditional navigable waters (TNW) only applies to those waters which are navigable-in-fact and confirm that waters are not deemed TNWs based on recreational use.

- The Association supports the exclusion of ephemeral features from the tributary definition.

- The Association recommends the Agencies clarify the circumstances in which features qualify as "intermittent." The Agencies could provide examples or step-by-step instructions, on how the Agencies will evaluate a feature to determined where it is intermittent/perennial.

- The Association recommends the elimination of a separate category for impoundments. This category should not be included in the final rule because these features are more appropriately regulated under the (a)(1) through (4) and (6) categories.

- The Association recommends the Agencies clearly exclude most ditches including road-side, agricultural, irrigation, industry-site and other stormwater, process water and wastewater ditches from the final rule.

- The Association supports the Agencies approach to adjacent wetlands.

- Association supports the Agencies' definition and approach clarifying the waste treatment system (WTS) exclusion. We agree that WTS need not to perform active treatment to quality for the exclusion and the exclusion applies to the whole system. For further clarity the Association recommends the Agencies replace "designed" with "used" in the WTS exclusion regulatory text definition, clarify that a CWA or state permit is not required to qualify for the WTS exclusion, and that the exclusion applies when features are closed in place.

II. A Clear Definition of WOTUS Is Critically Importance to Public Power

The Association's members own and operate many types of generating facilities, including steam electric power plants, combustion turbines, hydroelectric facilities, electric transmission and distribution lines, and an increasing amount of renewable generation. A diverse electric generation portfolio is not only important to the electric energy industry and to customers, a diverse system is also critical to the nation's energy security.

Nearly every program administered under the CWA relies on determining the location and geographical boundaries of WOTUS. The electric utility industry relies on a clear WOTUS definition for various CWA program. A few examples include: The use of Nationwide Permit (NWP) 12 for utility lines, which provide streamlined authorization for minor discharges of dredge or fill material into WOTUS. Utilities construct projects to conform to the ½ acre limit in the NWP 12, to avoid wetlands and streams and to avoid the need for an individual permit under CWA§ 404; which would require more mitigation and otherwise increase permitting costs and delays. The National Pollutant Discharge Elimination Standards (NPDES) program under CWA § 402 has implications for a clear WOTUS definition. NPDES permits are required for *any* pollutant from any point source *to a* WOTUs. Utilities use a variety of water features to manage, store, and treat water, such as storm water runoff; contain spills; and manage and recycle wastewater. Any change in converting these industrial water features from non-jurisdictional to jurisdictional will alter the point of compliance at which any technology or water quality-based limit must be met. Such a change would create regulatory compliance issues and impose unwarranted new costs to public power utilities, other in the regulatory community, and to state and federal permit writers who will have to deal with the permitting implications. These industrial water features are essential to the production of efficient, reliable electricity, therefore understanding the implications of federal CWA jurisdiction is important as the Agencies revise the WOTUS definition.

A clear WOTUS definition is also critically important as the electric utility industry transitions its generation fleet to low and non-emitting resources. Public power utilities are constructing renewables, retrofitting existing generation facilities, and retiring and decommissioning facilities. The development of renewable generation resources requires

investment in critical transmission and distribution power lines, transformers, and substations to connect the new intermittent resources to the grid. Whether it is a new, existing, or a retired generating unit, maintenance and construction is regularly performed on: stormwater conveyances, other water management systems, waste management/treatment, building equipment pads and oil Spill Prevention, Control, and Countermeasures (SPCC) containment areas. Facilities that are decommissioned may be required to fill intakes and discharge channels and related features, grade the site, lay down materials, and fence the area. These types of internal water features located at an electric facility have repeatedly been determined non-jurisdictional through a formal jurisdictional determination and permits. Regulators often point to these features, but do not regulate them.

III. Proposed Jurisdictional Categories of Waters

The Association provides the following comments on each of the six proposed categories of jurisdictional WOTUS.

A. Traditional Navigable Waters (TNWs) and Territorial Seas

The proposed TNW category remains the same: "all waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide," and incorporates the territorial seas.[5] The Association supports the Agencies' clarification that TNWs are limited to these waters covered by the traditional understanding of the term "navigable", from the *Daniel Ball v. United States*, 77 U.S. 557 (1870) and subsequent Rivers and Harbor Act (RHA) case law.[6] Those cases define "navigable" waters for RHA purposes as those that: (1) are navigable-in-fact (or capable of being render so) and (2) together with other waters, form waterborne highways used to transport commercial goods in interstate or foreign commerce.[7] The Agencies should amend the proposed regulatory text for the TNW category to read (new language in bold):

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[5] 84 Fed. Reg. 4170.

[6] *Id*.

[7] *Daniel Ball v. United States*, 77 U.S. 562 (1870).

"waters which are currently used, or were used in the past, or may be susceptible to ~~use in~~ **transport** interstate or foreign comments, including the territorial seas and waters which are subject to the ebb and flow of tide."

B. Interstate Waters

The Agencies propose to remove the separate category for interstate waters, recognizing that interstate waters that would qualify as jurisdictional under other provisions of the rule (such as TNWs) would be jurisdictional under the current TNW definition. APPA supports this clarification, which more appropriately allows interstate waters without any connection to TNWs to be regulated by the states and tribes. Elimination of a separate category for interstate waters more closely aligns the definition to the constitutional and statutory authorities reflected in the CWA and jurisdictional interpretations of the term "navigable waters."[8] Moreover, interstate waters can also qualify as jurisdictional if they qualify for one of the other jurisdictional categories, such as tributaries or lakes and ponds.

C. Impoundments

The Agencies do not propose to make any changes to the impoundment category. Impoundments have historically been determined by the Agencies to be jurisdictional because enclosing a portion of a waterbody generally does not change the overall character of the waterbody (e.g., a river with a reservoir remains a river).

The term impoundment is undefined, which has led to practical problems with understanding what an impoundment is under the regulations. The Agencies are seeking comment on whether impoundments are needed as a separate category of WOTUS, or whether the other categories of waters effectively incorporate the impoundment of those waters, e.g., where water from a TNW floods a feature in the new lakes and ponds category.

The Association recommends the Agencies eliminate impoundments as a separate category of WOTUS. The term "impoundment" is broad and should not *per se* be regulated. Impoundments are features required for water and waste management associated with industrial

[8] 84 Fed. Reg. 4171.

facilities, including electric utilities that are typically subject to regulation under other regulatory programs and statutes. Removing the separate impoundment category from the WOTUS definition does not create a jurisdictional gap because many of the other categories in the Proposed Rule, such as the lakes and ponds category, effectively incorporate the impoundment of other jurisdictional waters.

Alternatively, if the Agencies elect to maintain a separate impoundment category in the final rule, the Association recommends the Agency provide a definition to clarify what constitutes an impoundment to avoid expansion of WOTUS jurisdiction into isolated or upland areas. A jurisdictional impoundment must be an enclosure of a geographic area that is otherwise a WOTUS (not an upland or isolated feature filled with water drawn from a WOTUS).

D. Tributaries

The Association is generally supportive of the proposed tributary definition. Electric utilities are often located near tributaries and withdraw water for cooling and other purposes as well as discharge to tributaries in compliance with their NPDES permits. In addition, utilities construct transmission and distribution lines that cross tributaries requiring a CWA § 404 permit. Thus, a clear and appropriate framework for the tributary category is important to APPA members.

The proposed definition of tributaries includes "a river, stream, or similar *naturally occurring* surface water channel that contributes perennial or intermittent flow to a [TNW] in a typical year either directly or indirectly through other jurisdictional waters… so long as those water features convey perennial or intermittent flow from a tributary to" TNWs or the territorial seas.[9] Tributaries as defined *do not* include surface features that flow only in direct response to precipitation, such as ephemeral flow, dry washed, arroyos, and similar feature because these lack the required perennial or intermittent flow regimes to satisfy the tributary definition under this Proposal and therefore would not be jurisdictional.[10] The Association believes the Proposal appropriately recognizes the limited scope of the tributary category to those streams that

[9] 84 Fed. Reg. 4173, 4204.

[10] 84 Fed. Reg. 4203.

contribute perennial or intermittently flow to a TNW or territorial sea. This limitation reflects the appropriate balance between states and federal rules under the CWA, preserving states' land use authority over features that are wet only periodically.

From a practical perspective, the proposed definition of tributary now focuses on well understood concepts of ephemeral, intermittent, and perennial flow. The Agencies shift away from the presence of physical indicators like bed, bank, and ordinary high-water mark to determine if jurisdiction is appropriate; given that these physical indicators can sometimes be seen in ephemeral drainage without ordinary flow. The Proposed Rule allows for more clarity and predictability in identifying tributaries subject to CWA jurisdiction.

APPA supports the exclusion of features, such as WTSs, from the tributary definition, even where tributaries are connected to jurisdictional waters through such excluded features. The Agencies note, if a "tributary flows into an excluded ditch or a waste treatment system and theses excluded features convey perennial or intermittent flow to a tributary downstream, the tributary remains a jurisdictional tributary upstream and downstream of the excluded feature."[11]

1. APPA's Response to Two Tributary-Related Issues

The Agencies solicit comment on how effluent-dependent streams (streams that flow year-round based on wastewater treatment plant discharge) should be treated under the tributary definition. As proposed, effluent-dependent streams would be included in the definition of tributary if they contribute perennial or intermittent flow to a TNW or territorial sea in a typical year. APPA recommends that the Agencies adopt a more traditional scientific definition of "intermittent" that is tied to the groundwater table (rather than simply continuous flow over a certain amount of time). Under such an approach, the tributary category would cover fewer effluent-dependent streams.

The Agencies are also seeking input on the proposed definition's treatment of natural and man-made breaks regarding the jurisdictional status of upstream waters, including whether these features can convey perennial or intermittent flow to downstream jurisdictional waters. Operators

[11] 84 Fed. Reg. 4173.

may face difficulty in determining whether there is a jurisdictional break downstream of their property or facility, and the jurisdictional status of the breaks themselves. The Agencies should, at a minimum, clarify that, just as excluded features that connect tributaries to jurisdictional waters are not themselves jurisdictional, the breaks are not jurisdictional.

E. Ditches

The Agencies propose to define *ditch* as an "artificial channel used to convey water" and delineate three categories of ditches that will be jurisdictional WOTUS: (1) commerce-based ditches (e.g., Erie Canal) and tidal ditches; (2) ditches that *meet the tributary definition* (i.e., contribute perennial or intermittent flow to a TNW in a typical year) and are either: (a) constructed in or relocate a tributary; or (b) built in adjacent wetlands. [12] All other ditches would be excluded from the WOTUS definition.[13]

The Agencies' approach seeks to provide regulatory clarity with respect to the regulation of ditches. The Association appreciates these efforts; however, we are concerned that including ditches as a category of jurisdiction will result in more confusion. The Association recommends the Agencies clearly exclude most ditches including road-side, agricultural, irrigation, industry-site and other stormwater, process water and wastewater ditches from the final rule.

The Association previously commented on the importance of ditches to the electric utility industry.[14] Ditches are constructed and used as part of the construction, operation, and maintenance of electric generation facilities, transmission and distribution lines, transportation-related infrastructure, flood control, rural drains and roads, and railroad corridors located across the country. Drainage ditches play a major role in all these activities, ensuring that storm water is properly channeled away from facilities and land where it would otherwise converge to create ponds, thereby interfering with the intended use of the land and facilities. Drainage ditches are frequently crossed or created for construction, maintenance, and repair of transmission facilities and distribution facilities, including poles, transformers, wires, towers and switchgear. These

[12] 84 Fed. Reg. 4179

[13] 84 Fed. Reg. 4204

[14] EPA-HQ-OW-2011-0880-1505

lines require a dedicated right-of-way to conduct these activities. If the ditches and associated features were jurisdictional, a utility could be required to obtain a permit every time it constructed, repaired, or even maintained a right-of-way. This would be extremely burdensome and costly. The Proposed Rule would appropriately exclude most of these types of ditches from jurisdiction.

1. Most Ditches Are Properly Deemed Non-Jurisdictional

Congress clearly did not contemplate that many ditches would be jurisdictional under WOTUS. Instead, Congress included "ditch" in the definition of a "point source" subject to permitting under CWA § 402. "[P]oint source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well . . . [or] container . . . from which pollutants are or may be discharged."[15] If a ditch or any of the other features identified in the definition of "point source" were WOTUS, then the "discharge of a pollutant" definition in CWA § 402, which contemplates discharges from ditches into WOTUS, would make no sense. "[D]ischarge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source . . . ."[16] In Congress' view, "point source" and "navigable waters" (i.e., WOTUS, as defined at CWA § 502(7), 33 U.S.C. § 1362(7)) are separate and distinct types of features. Instead of being regulated as WOTUS, many ditches are already, and appropriately, regulated under the CWA § 402 program as point sources or otherwise subject to federal, state, and/or local management and permitting.

In many public power communities, the state and local government is charged with controlling stormwater volume and reducing urban pollution runoff through the NPDES permit program. Local authorities such as water management districts and flood control entities regulate most ditches to ensure protection of natural resources and to prevent water pollution. State and local government have the most immediate knowledge of waterbodies in their jurisdiction and should be provided the discretion to manage their local land and water resources. In addition,

[15] CWA § 502(14), 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2.

[16] CWA § 502(12), 33 U.S.C. § 1362(12).

regulation of ditches as WOTUS would impose duplicative and burdensome regulations on ditches already regulated by other federal, state, and local permitting requirements.

2. The Agencies Should Bear the Burden of Proof in Determining Whether a Ditch is Jurisdictional

The Proposal Rule places the burden of determining whether a ditch was constructed in a tributary or an adjacent wetland on the Agencies. The Association agrees the burden of proof should be placed on the Agencies to show that a ditch is WOTUS.[17] The proposed ditch concept requires a determination as to whether the ditch was "constructed in" or "relocated or alter" a tributary or "constructed in an adjacent wetland."[18] Many ditches were constructed before the CWA was enacted, and before tools were readily available to help determine historic conditions of a ditch. Therefore, the Agencies should clarify what evidentiary information would be helpful to assist in meeting their burden of proof.

3. Ditches Should Be Narrowly Defined and Clearly Delineated

The CWA is a strict liability statute that includes a prohibition on unauthorized discharges to WOTUS. Thus, a new WOTUS definition must be clear and simple to administer in the field and provide regulated entities with certainty over whether their activities are lawful considering the civil and criminal penalties that can be imposed under the CWA.

The Association recommends that any final rule exclude most ditches based on use including, roadside, industrial, agricultural, irrigation, and other stormwater, process water and wastewater ditches, except to the extent those ditches are category (a)(1) waters constructed in jurisdictional adjacent wetlands and meet the definition of upland are not WOTUS. To the extent the Agencies establish a category for certain man-made diches, the Agencies should clearly define the specific ditches that are WOTUS to avoid regulating ditches that were previously excluded from jurisdiction.

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[17] 84 Fed. Reg. 4181.

[18] *Id*.

F. Lakes and Ponds

APPA Members often use ponds or other collection basins to store water for cooling, to control stormwater, and for treating process water. Additionally, electric utilities may be required to obtain CWA §404 permits to cross lakes and ponds to maintain and construct transmission and distribution lines. These activities highlight the importance of a clear WOTUS definition. The Agencies propose to add a new category of WOTUS to include that certain lakes and ponds that are: (a) TNWs, (b) contribute perennial or intermittent flow to a TNW in a typical year, either directly or indirectly, through another jurisdictional water or through non-jurisdictional water features that are excluded from the proposed rule so long as those water features convey perennial or intermittent flow downstream, or (c) flooded in a typical year by a jurisdictional TNW, tributary, ditch, lake or pond, or impoundment, and thus are effectively part of the TNW.[19]

The Association recommends the Agencies provide more clarity in the final rule with respect to what it means for a lake or pond to "contribute perennial or intermittent flow" to another water feature "in a typical year" to be regulated under the second category of lakes and ponds.

The Agencies also solicited comment on whether more specific parameters should be included for the type of flooding that should be included for lakes and ponds when flooded by an (a)(1)-(5) water in a typical year.[20] The Agencies state that such lakes and ponds would receive flood waters from (a)(1)-(5) waters via overtopping in a typical year, but a lake or pond connected to a WOTUS by flooding once every 100 years would not be jurisdictional.[21] The Association agrees that more clarification is helpful to understand what type of flooding would qualify and what data will be relied upon to make a jurisdictional determination.

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[19] 84 Fed. Reg. 4182

[20] 84 Fed. Reg. 4184.

[21] 84 Fed. Reg. 4183.

G. Adjacent Wetlands

All wetlands adjacent to jurisdictional TNWs, tributaries, ditches, lakes and ponds; and impoundments would be considered WOTUS.[22] Adjacent wetlands are defined as wetlands that physically touch (e.g., abut) or have a direct hydrologic surface connection to another WOTUS in a typical year. Wetlands that are "physically separated from [jurisdictional water] by upland and by dikes, barriers, or similar structures and also lacking a direct hydrologic connection to jurisdictional waters are not adjacent."[23] The Association supports the Agencies' proposed changes to the definition of "adjacent wetlands," to include only these wetlands that abut or have a direct hydologic surface connection to other WOTUS in a typical year. The proposed changes to the "adjacent definition" provide clear guide posts and have brought the category more in line with the fundamental tenets articulated in *Riverside Bayview*, *SWANCC* and *Rapanos*, as well as the CWA and Constitution.[24] As proposed, the category would exclude isolated wetlands with only physically remote hydrologic connection to jurisdictional waters, as required under *Rapanos* and *SWANNC*. The proposed definition would end the current practice of conducting case-specific significant nexus evaluations, which should provide greater clarity for members and regulators. However, it will still be necessary to verify jurisdiction, including confirmation of wetland characteristics, and whether the wetlands abut another jurisdictional water.

The Association supports the Agencies' proposal to keep the long-standing regulatory wetland definition. *Wetlands* are "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." The Association recommends the Agencies specify in the regulatory text that areas must satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances to qualify as wetlands, doing so would align the Corps' wetland delineation criteria. The Association also supports the Agencies' proposed definition of

[22] 84 Fed. Reg. 4204.

[23] 84 Fed. Reg. 4205.

[24] *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (*Riverside*), *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos).*

"upland" as areas that do not meet the Corps delineation criteria. This definition will further clarify the distinction between wetland and upland areas.

The Agencies seek comment on their interpretation and approach to determining a "direct hydrologic surface connection" and whether other types of hydrologic surface connections exist, or if, and under what circumstances, subsurface water connections between wetlands and jurisdictional waters could be used to determine adjacency. The Association would encourage the Agencies to adopt a narrow interpretation and avoid determining adjacency based on subsurface water connections.

IV. Proposed Rule Exclusions

The Association supports the exclusion of several critical features from the WOTUS definition. The Agencies propose the exclude any feature that does not fall within one of the six categories proposed as jurisdiction WOTUS. The Association recommends the Agencies amend the regulatory text to make it explicit in the final rule. That even if a feature otherwise meets on the six categories of WOTUS, so long as it meets one exclusion in the rule, it is non-jurisdictional.

A. Groundwater

The Proposed Rule retains the long-standing exclusion that "groundwater, including groundwater draining through subsurface drainage systems" is not jurisdictional. [25] The Association supports the continued exclusion of groundwater from the WOTUS definition, as it is consistent with the text of the CWA, agency practices and case law. Further, excluding groundwater from the definition of WOTUS preserves states authority and confirms that even if ground water is channelized in subsurface systems, it remains subject to the exclusion.

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[25] 84 Fed. Reg. 4204.

B. Ephemeral Features and Diffuse Stormwater Run-off

The Agencies propose to exclude "[e]phemeral features and diffuse stormwater run-off, including directional sheet flow over upland."[26] These ephemeral features such as swales and erosional feature including gullies and rill flow infrequently and in quantities that could affect other more significant waterbodies, therefore excluding them from jurisdiction is reasonable. The Association agrees these features are non-jurisdictional and are properly excluded from the definition of WOTUS. The Association also supports the exclusion of diffuse stormwater run-off from WOTUS. Diffuse stormwater run-off are the precise features identified by Justice Scalia, the Agencies "stretched the term 'waters of the United States' beyond parody" in extending its definition to cover "ephemeral streams" and "directional sheet slow during storm events." in the *Rapanos* plurality opinion.[27]

C. Water Management Systems Created in Upland

The Association supports the continues exclusion of "artificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, settling basins and log cleaning ponds)."[28] The exclusion would apply to features not identified as WOTUS under the (a)(4) (lakes and ponds) or (a)(5) impoundments categories.[29]
The Proposed Rule removed the language "use" of ponds which was included in the preambles to 1986 and 1988 WOTUS rule. The Association supports the exclusion, of the term "use" as it is consistent with Agencies recognition that these features "are often used for more than one purpose can have a variety of beneficial purposes, including water retention or recreation."[30]

D. Stormwater Control Features and Wastewater Recycling Structures

The Association supports the exclusion for stormwater control features, specifying that this exclusion would apply to "[s]tormwater control features excavated or constructed in upland

[26] 84 Fed. Reg. 4190.

[27] *Rapanos*, 547 U.S. at 734 (plurality).

[28] 84 Fed. Reg. 4191.

[29] 84 Fed. Reg. 4204.

[30] 84 Fed. Reg. 4192.

to convey, treat, infiltrate, or store stormwater run-off" and "wastewater recycling structures, constructed in upland, such as detention, retention and infiltration basins and ponds, and groundwater recharge basins." [31] The stormwater exclusion covers several important functions and appropriately recognizes some of beneficial trends in stormwater management. Water features use for reuse and recycling would not be jurisdictional in recognition of the importance of water reuse and recycling in certain parts of the county, such as California and the Southwest where water supply can be limited. Preserving this exclusion avoids barriers to water conservation and reuse.

V. The Waste Treatment System (WTS) Exclusion Is Important to Public Power Utilities

The Association supports the continued exclusion of WTS and the proposed definition of "waste treatment system". The proposed definition is responsive to the Association's comments on the Proposed 2014 Clean Water Rule and will codify existing practices and ensure consistency.[32] The Proposed Rule retains the long-standing WTS exclusion and clarifies the exclusion by providing a definition of "waste treatment system" and making two ministerial changes to the exclusion – removal of suspended language on impounding WOTUS, and removal of the cooling pond parenthetical. The WTS exclusion is consistent with both the structure and goals of the Act. It allows for systems to serve an important function of managing and treating waste prior to discharge via an NPDES permit. Treating these features as WOTUS would be redundant and make the features essentially useless for their intended purpose and impose additional burdens and costs on the facilities and permitting agencies without a corresponding environmental benefit.

A. The Proposed Waste Treatment System Exclusion Provides Need Clarity

The Agencies propose to define "waste treatment system" as:

> **all components**, including lagoons and treatment ponds (such as settling or cooling ponds), **designed to convey or retain,**

[31] 84 Fed. Reg. 4204.

[32] EPA-HQ-OW-0880-15800

> **concentrate, settle, reduce, or remove pollutants**, **either actively or passively**, from wastewater prior to discharge (or eliminating any such discharge) (emphasis added).[33]

The Association supports the proposed WTS exclusion regulatory language. The ministerial changes eliminate the suspended language regarding the creation of WTS in or by impounding WOTUS, and removes the cooling pond parenthetical, which cited to an obsolete provision in the Code of Federal Regulations. These changes will clean up the discrepancies throughout EPA and the Corps regulations.

1. Waste Treatment Systems Need Not Perform Active Treatment

APPA supports the proposed regulatory language, which confirms that features need not perform active treatment to qualify for the WTS exclusion. WTSs excluded from CWA jurisdiction involve components that perform multiple functions at different phases over the life of the treatment system, including various forms of treatment, storage and management of the wastewater to and from the places where treatment occurs.

2. Waste Treatment System Exclusion Applies to the Whole System, Including Related Conveyances

The WTS exclusion should apply to the entire system, because most WTSs do not consist of a single impoundment, structure, or feature where all treatment functions occur. Rather, management of the wastewater to and from the places where treatment occurs is an intrinsic and important part of the WTS. The WTS exclusion has been properly interpreted and applied to include all the drains and ditches that flow to sumps, lagoons, and other ponds or whose contents are eventually pumped or discharged to a pond exempted under the waste treatment systems (e.g. ash ponds) and from there discharged to jurisdictional waters.

[33] 84 Fed. Reg. 4206.

B. The Association Recommends Additional Clarifications

The Association recommends the Agencies provide further clarification to the regulatory definition of "waste treatment systems" and revise the final rule's preamble language to ensure clear and consistent implementation of the definition.

The Association recommends the Agencies replace the term "designed" to "used" in the regulatory definition.

> **"**all components, including lagoons and treatment ponds (such as settling or cooling ponds), **designed** to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge)"[34]

In many cases, utilities' waste management and treatment systems have changed over time to meet the needs of the utility. As such, the definition should address how the feature is used and not based on some historical practice, no longer implemented. In addition to the small but important regulatory text change, the preamble language also warrants clarifications.

The Agencies should clarify that a CWA or state permit is not a requirement to quality for the WTS exclusion and the exclusion applies to WTS features that are closed in place. The Agencies "intend for this exclusion to apply only to waste treatment systems constructed in accordance with the requirements of the CWA and to all waste treatment systems constructed prior to the 1972 CWA amendments." [35] This is a very helpful clarification, as many WTS features were created well before the CWA was enacted. However, we are concerned with statements in the Proposed Rule's preamble language that suggests that *all* WTS features constructed in waters that are now understood to be WOTUS would have been created either according to a CWA § 404 permit, or, if constructed prior the 1972 CWA amendments, pursuant

[34] 84 Fed. Reg. 4206.

[35] 84 Fed. Reg. 4193.

to a state permit. [36] The Agencies note that the waste treatment system exclusion has existed since 1979.[37] The exclusion has evolved over the years and is now broader. There are WTS features that were created after 1972 in what is now understood to be WOTUS that would not have required a CWA §404 permit. As a result, it may be difficult to prove where a CWA §404 permit was not required even though the WTS feature was "lawfully constructed." The Agencies should acknowledge in the preamble language that some facilities are unable to provide documentation to prove lawful construction as these features were created before our current CWA §404 permitting requirements. Another preamble clarification that would be helpful pertains to ensuring the WTS exclusion continues to apply when a feature is closed in place.

The preamble notes that "if a waste treatment system is abandoned or otherwise ceases to serve the treatment function for which it was designed, it would not continue to quality for the exclusion."[38] We are concerned this statement could be misinterpreted to mean the exclusion no longer applies during a facility's closing or decommissioning. Decommissioning often requires cleaning and filling ditches, treatment ponds, cannels, and fixating the waste from the WTS. The Association recommends the Agencies clarify in the final rule, that the exclusion of WTS features continues to apply when the features are closed in place and continue to retain waste.

C. The WTS Exclusion is Consistent with Both the Language and Structure of the CWA.

The CWA reflects Congressional intent that WTSs would be viewed as components of point sources or facilities that function to remove pollutants before the carrying waters are discharged via a point source into WOTUS – not as WOTUS themselves. Waste treatment systems are upstream of the point of discharge and are part of the system "from which" – not into which – pollutants are discharged within the meaning of the CWA.[39] These treatment facilities function as NPDES "end-of-pipe" treatment technologies and form an integral part of the total plant production and

[36] 84 Fed. Reg. 4193.

[37] *Id*.

[38] 84 Fed. Reg. 4194.

[39] CWA 502 (14), 33 U.S.C. 1362(14) (emphasis added).

treatment process. WTS are man-made and are unique from natural waterbodies. These features were created purposefully to serve an industrial facility, to effectively treat waste. Each stage of the treatment process is designed to meet the requirements of the CWA. It would make little sense for a power plant to have a discharge permit for pollutants entering into the treatment system, in addition to having a permit for discharges following treatment. Further, the plurality opinion and Justice Kennedy's opinion in *Rapanos* identify and accept this important distinction and recognize that the CWA definitions conceive of "point sources" and "navigable waters" as separate and distinct categories.[40] Excluding waste treatment systems from jurisdiction is essential to maintaining this distinction.

Other programs and components of the Act illustrate why it doesn't make sense to regulate WTS as WOTUS. The WTS exclusion is consistent with the CWA's goal of eliminating pollution from discharges, because any discharge to WOTUS would still be regulated and must be consistent with water quality standards. If all or parts of a waste treatment system were classified as WOTUS, states under CWA § 303 would be required to adopt, and submit to EPA for approval, water quality standards "consist[ing] of a designated use or uses for the waters of the United States . . . ." [41] However, the regulations provide that "in no case shall a state adopt waste transport… as a designated use for any waters of the United States." [42] Instead, under EPA's Water Quality Standards Rules, states would be required to assign "fishable, swimmable" use to all waters, unless the state performs a Use Attainability Analysis (UAA) demonstrating that attaining the highest use is infeasible for one of six narrow reasons. Thus, regulatory agencies would be faced with two options: attempt to impose arbitrary "fishable, swimmable"

[40] *Rapanos*, 547 U.S. at 735 (plurality), 771 (Kennedy. J) Justice Kennedy takes issue with the plurality for its "negative inference" that, because point source discharges and WOTUS are mutually exclusive, and the plurality assumes that point source discharges are always intermittent, waters that flow intermittently are more like point sources than WOTUS. Id. at 771-72. But Justice Kennedy's quarrel is with the assumption that all point source discharges are intermittent, not with the legal significance of the distinction between point source discharges and WOTUS.

[41] 40 C.F.R. § 131.3(i); CWA § 303, 33 U.S.C. § 1313.

[42] 40 C.F.R. § 131.10(a).

uses for waste treatment systems, or undertake time consuming scientific analysis required to justify less restrictive uses and criteria for the system.

The WTS exclusion provides a useful tool to prevent conflict with other CWA programs such the SPCC program. A SPCC plan is required for facilities with the potential to discharge to WOTUS.[43] Electric utilities use on-site ditches, basins, and other water features to contain oil and capture spills. The SPCC plans conceived the use of these water features to contain spills in addition to using fixed and portable equipment. In the absence of a the robust WTS exclusion, the cost of providing alternative spill containment and countermeasures would be high. In the case of NPDES permit program, if the WTS were no longer excluded from the definition of WOTUS, facilities could face increased costs to maintain these ponds. If a utility were to replace man-made or man-altered ponds to treat low-volume waste with an alternative technology, that would cost millions of dollars. Additional economic impacts could include added permitting costs for placement of treatment equipment within the ponds as well as increased costs to maintain the ponds. These additional costs would likely be incurred by the utility customer.

VI. Conclusion

The Association appreciates the opportunity to comment on the Proposed Rule and inform the Agencies final rule defining the scope of federal jurisdiction under the Act. Many public power utilities and other political subdivisions provide essential water, wastewater, and, at times, storm water control services to their customers. They have historically been, and will continue to be, supporters of the goals of the CWA. A clear definition is critical in achieving the CWA's goals and ensures our members can provide safe, reliable, sustainable, and affordable electricity to their customers. Should you have question regarding these comments please contact Ms. Carolyn Slaughter, (202) 467-2900.

[43] CWA § 311(j)(1)(C) and 40 C.F.R. 112.1.