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VIA ELECTRONIC MAIL
U.S. Environmental Protection Agency
EPA Docket Center
Office of Water Docket
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Re: Docket ID No. EPA-HQ-OW-2018-0149
Comments on the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Revised Definition of the "Waters of the United States"

The U.S. Poultry & Egg Association (USPOULTRY), the National Chicken Council (NCC), National Turkey Federation (NTF), United Egg Producers (UEP) and numerous state poultry association (collectively, the U. S. Poultry and Egg Industry) are pleased to submit these comments in support of the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) (collectively Agencies) proposal to revise the definition of "Waters of the United States" (WOTUS) under the Clean Water Act (CWA).[1]

USPOULTRY is the world's largest and most active poultry organization with membership comprised of producers and processors of broilers, turkeys, ducks, eggs, and breeding stock, and alliances that include farmers and growers ranging from large agricultural operations to mom-and-pop shops. NCC is the national, non-profit trade association whose primary purpose is to serve as the advocate and voice for the U.S. broiler chicken industry in Washington, D.C. and whose member companies include chicken producer/processors, poultry distributors, and allied industry firms. NTF serves as the national advocate for America's turkey farmers and producers, raising awareness for its members' products while strengthening their ability to profitably and safely deliver wholesome, high-quality, and nutritious food to consumers worldwide. UEP is a Capper-Volstead cooperative of U.S. farmers working collaboratively to address legislative, regulatory, and advocacy issues impacting egg production – through active farmer-member leadership, a unified voice, and partnership across the agriculture community.

The poultry and egg industry is among the fastest growing in the United States, providing approximately 1,814,200 American jobs that pay $100.2 billion in wages to families throughout the country while generating over $469.6 billion in annual economic impact and about $32.9 billion in taxes.[2]

[1] 84 Fed. Reg. 4154 (proposed Feb. 14, 2019).
[2] http://www.uspoultry.org/economic_data/.

U. S. Poultry and Egg Industry members and allies have had to navigate the significant confusion across the country as to which WOTUS framework is operable in a particular state—whether the 2015 WOTUS Rule[3] is active or suspended and if the 1986 version[4] is still applicable in those states where the 2015 Rule has been stayed. This checkerboard of different WOTUS standards is burdensome to family farmers and unworkable for organizations that operate in multiple states and must be cognizant of the differing requirements. Moreover, WOTUS uncertainty can be a barrier to production as CWA violations carry significant penalties (including criminal penalties) that can be a serious hardship to industry participants, especially our smaller agricultural affiliates.

The U. S. Poultry and Egg Industry applauds EPA and Corps for taking a common-sense approach to defining WOTUS, utilizing categories of waters that bear a continuous surface connection to traditionally navigable waters. The case-by-case test searching for a significant hydrological nexus employed by the 2015 Rule often inappropriately ensnared inland and isolated poultry and egg operations that coincide with the farming and livestock activities that utilize stormwater and ponds. By adopting Justice Scalia's plurality opinion in *Rapanos v. United States*,[5] the Agencies' proposed method would simplify and demystify the inquiry regarding which waters are jurisdictional and greatly alleviate the anxiety for farmers and growers that their operations would inadvertently trigger penalties or necessitate extensive, expensive, and uncertain WOTUS delineations. The U. S. Poultry and Egg Industry believes the Agencies have appropriately interpreted their charge under the CWA and relevant Supreme Court precedent in a manner that is both protective of our nation's waters while simplifying its application for industry. Given the impact of the WOTUS definition on our members and allies, The U. S. Poultry and Egg Industry provides the Agencies the following insights into how these issues impact our sector and requests clarification regarding several components of the proposed rule.

Wetlands

The U. S. Poultry and Egg Industry commends the Agencies' effort to draw a bright line in the proposed rule between jurisdictional and state regulated wetlands. In particular, the U. S. Poultry and Egg Industry applauds the removal of vague concepts from the 2015 Rule, including the approach categorizing wetlands as riparian/floodplain wetlands and non-floodplain wetlands based upon a connectivity gradient. The 2015 Rule's wetland method was both confusing, complex and unworkable in that it assumed the capability of small business industry participants to be able to measure and track hydrology.

In contrast, the 2019 proposal captures the tenor of the Supreme Court's various holdings, including *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*(*SWANCC*), which only saw the jurisdiction of WOTUS to reach those wetlands "inseparably bound up" with WOTUS.[6] The Agencies' use of the term "Abut" to touch WOTUS at a point or side demonstrates the inextricable link articulated by the *SWANCC* Court.

[3] 80 Fed. Reg. 37,054 (June 29, 2015).
[4] 51 Fed. Reg. 41,206 (Nov. 13, 1986).
[5] 547 U.S. 715, 739 (2006).
[6] 531 U.S. 159 (2001).

Tributaries

The U. S. Poultry and Egg Industry applauds the Agencies' decision to remove ephemeral streams from the "tributary" category and return them to unregulated status. Jurisdiction over ephemeral streams creates large, unpredictable risk for poultry operations, particularly producers. Regulation of so-called ephemeral streams—streams that are not there to the average person's eyes—is the heart of the "Land is Waters" approach that the *Rapanos* plurality so thoroughly rejected as beyond the plain language of the CWA.[7]

The Agencies are correct to end the 2015 Rule's approach to ephemeral streams. While the 2015 Rule claimed to reject "any hydrologic connection" (i.e., rainfall) as enough to show a regulated ephemeral stream,[8] in practice its "significant nexus" test did just that. The authors of the 2015 Rule failed to grasp that some federal courts interpreted a significant nexus, and thus a tributary, to exist based solely on "the potential" for pollutants to migrate "downstream" to regulated waters.[9] At least one of those cases remains binding precedent over huge swathes of the United States, even after *Rapanos* and the 2015 Rule.[10] The result was potential federal penalties for work anywhere where rainfall might flow. But this would mean regulation of the entire watershed. The Agencies are right to reject this approach and should expressly disclaim such cases in the preamble to the final rule.

The 2015 Rule's reliance on an "ordinary highwater mark" (OHWM) to show ephemeral tributaries did not fix this problem, either.[11] The OHWM concept is anything but "ordinary" to the average person or landowner, which makes its potential for surprise federal penalties unacceptably high. As the Agencies fully understand, identifying an OHWM requires an on-site expert to walk an entire property and document a range of technical information. That itself is costly. Worse still, an owner cannot even be sure that his hired expert will assess and weigh the many OHWM criteria in the same way as Army Corps staff (or a potential plaintiff attorney's expert). That makes even precautionary investments in compliance of little benefit. This unpredictability is compounded by the interpolation of OHWM from a few cross-sections. Even a landowner that identified an ephemeral stream's OHWM at one point could not be sure how far the stream extended. Abandoning OHWM as sufficient evidence of the existence of a tributary will save the public, including the poultry sector, large costs from compliance, litigation, and foregone investment. Given the severe consequences of surprise CWA claims, the Agencies could not rationally include ephemeral streams within the statute's reach, even if the Act left open the choice to do so.

There is also no rational connection between ephemeral streams and interstate commerce, which sets the outer limit that Congress could extend federal jurisdiction. This is the central misunderstanding behind the 2014 Science Advisory Board report urging regulation of any area

[7] *See Rapanos*, 547 U.S. at 726-27, 733-34.
[8] 80 Fed. Reg. at 37,064.
[9] *E.g., United States v. Hubenka*, 438 F.3d 1026, 1034 (10th Cir. 2006).
[10] *Id.*
[11] *See* 80 Fed. Reg. at 37,066 ("The agencies conclude that covered tributaries with a bed and banks and ordinary high water mark are similarly situated for purposes of the agencies' significant nexus analysis.").

that so much as "influence[s]" downstream waters (which even the 2015 Rule could not fully stomach).[12] While theoretical experts or hydrologists might be interested in the entirety of the watershed for their own purposes, that does not mean Congress meant to regulate it in the face of serious constitutional doubts.[13] The Agencies are right to ensure no such constitutional concerns arise.

The U. S. Poultry and Egg Industry certainly supports the proposed rule's return to a reasonable definition of "tributary." That said, the U. S. Poultry and Egg Industry believes the proposed rule can be usefully clarified in the following ways:

1. Magnitude of flows

The Agencies should require a certain magnitude of flow through a tributary before it will fall under federal jurisdiction. The proposed rule addresses duration of flows by distinguishing perennial, intermittent, and ephemeral streams, but duration alone does not give rise to a connection with interstate commerce. Even Justice Kennedy recognized that "[t]he merest trickle, if continuous," should not invite federal oversight,[14] and no reasonable person would contend that a garden hose's worth of flow meaningfully affects interstate commerce. The Agencies should therefore add magnitude as an additional necessary condition alongside duration.

The Agencies might have laid the foundation for this requirement in their definition of "tributary." As the preamble notes, "[p]erennial or intermittent flow would require some form of discrete and confined flow. . . *forming geographic features* such as rivers, streams, or similar naturally occurring surface water channels."[15] Presumably, flows must be of sufficient magnitude that they have formed or are forming readily discernible features across the landscape. This requirement has the benefit of both improved predictability (since such features should be visually identifiable) and consistent with the plurality opinion in *Rapanos*.[16] And it makes sense from a policy perspective. If even continuous flows have no meaningful impact on the surrounding landscape, it is hard to understand how they could ever rise to the level of influencing interstate commerce.

Even geographic features might not have a clear end or beginning points, so the Agencies might wish to further define a magnitude requirement. Here, many states have already developed guidance on how well-defined a water feature might be. North Carolina, for instance, grades the continuity of channel beds and banks along a four-point scale; the Agencies might fashion

[12] *See* 80 Fed. Reg. at 37,057.

[13] *See Rapanos*, 547 U.S. at 738 ("Even if the term 'the waters of the United States' were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.").

[14] *See Rapanos*, 547 U.S. at 769.

[15] 84 Fed. Reg. at 4173 (emphasis added).

[16] *See Rapanos*, 547 U.S. at 739 (Waters of the United States include "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] ... oceans, rivers, [and] lakes.'") (alterations in original).

magnitude requirements from the state's definitions for "strong" or "moderate" channel features.[17]

2. "Effluent-dependent" flows

The Agencies have requested comments on whether effluent-dependent streams should qualify as "tributaries." They should not. Congress clearly saw effluent or other "discharges" as separate from the "waters of the United States" in which it prohibited such discharges. Blurring those categories would invite strange results. If effluent-dependent streams can be regulated waters, so, too, can outfall ditches or other conveyances used to discharge effluent. Congress never intended such an outcome. Unfortunately, our sector has frustrating experience with confusion by third-party activists who believed erroneously that a wet weather ditch comprised only of storm water runoff, but below a permitted storm water outfall, was jurisdictional so as to invoke claims of an illicit discharge. Also, we have witnessed the required relocation of a permitted, long-standing direct discharge outfall because a state agency believed that the wet weather ditch below the outfall was jurisdictional and constituted a receiving stream for purposes of waste load allocation.

Regulation of effluent-dependent streams also has the negative and detrimental impact of regulating ephemeral streams indirectly. For instance, in *Quivira Mining Co. v. EPA*, a federal court found that jurisdiction over dry gullies and arroyos based on flows "short distances from the discharge points" and "flow for a period *after the time of discharge*[.]"[18] In effect, the discharge itself turned a dry canyon into some sort of ephemeral stream. But the Supreme Court expressly rejected *Quivira* in *Rapanos* for its overreach,[19] and the Agencies should, too.

3. Implementation methods

The U. S. Poultry and Egg Industry also offers some thoughts on the methods suggested by the agencies to implement the "tributaries" definition. The Agencies have noted that United States Geological Service (USGS) or National Hydrography Dataset (NHD) maps can be useful aids in identifying jurisdictional waters. These maps can in fact be helpful because they are generally available and intelligible to the public.

The U. S. Poultry and Egg Industry has concerns, however, about the Agencies' invitation to use "blue line streams" as *prima facie* proof of a tributary. These maps are not always well ground-truthed (in some cases not at all), and the U. S. Poultry and Egg Industry understands that they sometimes conflate unregulated geographic features like roads with streams, perhaps out of an overreliance on aerial photography. In other instances, these maps might misconstrue man-made ditches, even those that did not channel an existing tributary, as "blue-line" streams.

NHD maps also appear to include "predicted" tributaries based solely on topographical measurements, but it is not at all clear that those predictions are made with any sort of real-world

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[17] *See* N.C. Div'n of Water Quality, *Methodology for Identification of Intermittent and Perennial Streams and Their Origins v.4.11*, at 12 (rev. Sept. 1, 2010) (defining a "strong" channel as having "a well developed channel with continuous bed and bank present throughout the length of the reach" and a "moderate" channel as "a continuous bed and bank" with "obvious interruptions").

[18] 765 F.2d 126, 129-30 (10th Cir. 1985) (emphasis added).

[19] *See Rapanos*, 547 U.S. at 725-26.

flow data. Neither these predictions nor a potentially mistaken map description should trigger, or create a presumption for, CWA regulation. Similarly, the U.S. Poultry and Egg Industry is aware of instances in which state wetlands inventory maps misidentified wastewater treatment or fire water storage ponds as natural wetlands. The overall lesson should be clear: While maps can be a starting point, they should not be relied on at the expense of on-the-ground observation.

Lakes and Ponds

The U. S. Poultry and Egg Industry supports the Agencies' recognition that WOTUS does not include "[a]rtificial lakes and ponds constructed in upland (including water storage reservoirs, farm and stock watering ponds, and log cleaning ponds) which are not identified [as jurisdictional lakes or impoundments]." In the various stages of with egg and poultry product production, members and allies may utilize working or storage ponds in conjunction with wastewater treatment and egg washing facilities. Moreover, shared site location with other agricultural operations that utilize working ponds and lagoons may serve to further confuse farmers and growers regarding the WOTUS status of that location. The U. S. Poultry and Egg Industry seeks to clarify that this exclusion from WOTUS also includes stormwater runoff control ponds.

The U. S. Poultry and Egg Industry recognizes that the Agencies are seeking comment on whether there should be a stand-alone category for Lakes and Ponds or if these waterbodies should be included in a different section of the rule such as tributaries. The U. S. Poultry and Egg Industry recommends that lakes and ponds remain a distinct category for the waterbodies that are navigable or part of a jurisdictional tributary network. The Agencies describe that the features of lakes and ponds have never been defined under the CWA, and the U. S. Poultry and Egg Industry believes that the descriptive features that the Agencies provided were helpful markers regarding what types of waters should be considered jurisdictional. As noted above, the use of USGS and NHD Waterbody can be helpful, accessible tools in distinguishing jurisdictional lakes and ponds from not only the exclusion discussed above, but areas that are naturally inundated that do not take on the features of a jurisdictional water. Again, however, the Agencies should be careful to ensure that these maps match facts on the ground before relying too heavily on them. As an example, the U. S. Poultry and Egg Industry understands that, in one instance, a federal map developed with aerial photography misidentified a coal pile as a pond.

Similarly, the U. S. Poultry and Egg Industry agrees with the Agencies' proposal that the non-jurisdictional artificial lakes and ponds discussed above would not become jurisdictional due to ground water seepage or storage overflow that causes a hydrological connection with a WOTUS water body.

Intermittent Waters

Next, the Agencies have made an admirable effort to define "intermittent" flow, an important concept for distinguishing jurisdictional waters from ephemeral streams.[20] The U. S. Poultry and Egg Industry notes, however, that intermittent flow is often equated to, or illustrated as, "seasonal" throughout the proposal.[21] "Seasonal" does not have its own definition, despite its

[20] 84 Fed. Reg. at 4204.

[21] The same is true of the phrase "certain times of a typical year" in the definition of "intermittent." Whichever phrase is used to clarify "intermittent," there is still room for further clarity to improve regulatory predictability. *See*

importance to the meaning of "intermittent." While the Agencies state that seasonal flow must be "continuous," this term is still ambiguous in what constitutes the requisite flow that would trigger federal jurisdiction.

The Agencies should further clarify what constitutes "seasonal" flow. The U. S. Poultry and Egg Industry recommends that the Agencies reconsider use of a minimum duration. The most basic point behind *Rapanos*, and the proposal, is that the Agencies should interpret the Clean Water Act in a way that matches ordinary, everyday language.[22] That approach is necessary if farmers, landowners, and many other stakeholders are to be able to understand and apply the law without an army of lawyers and consultants.

In this case, "seasonal" has a widely understood meaning in everyday language: "occurring at or lasting for a certain season of the year."[23] There are four seasons of the year, each lasting three months. Thus, seasonal flow "lasting for a certain season" would last at least three months. Not all months are equally long, of course, but three months is roughly equivalent to 90 days. The Agencies should therefore clarify that "seasonal" flow is continuous, sustained flow lasting at least 90 consecutive days. This approach would be intuitive to stakeholders and therefore more predictable.

Continuous flow for 90 *consecutive* days is critical to that outcome; without that bright-line test, stakeholders will be left in the dark as to how many days flow must occur within the 90-day period. There is no intuitive, widely understood, and easily predictable subset of 90 days that suggests "seasonal" flow. The concept of "seasons" is simply too tied to a three-month duration in ordinary language.

In addition, the U. S. Poultry and Egg Industry recommends that the Agencies clarify that their intermittent definition is not simply a proxy for inundation as part of a floodplain. The Agencies should clarify that the requirement of flows for a "typical year" prevent jurisdictional over neighboring dryland areas situated a flood plain. The 2015 Rule included a definition for neighboring to determine agency "neighboring" definition of the 2015 Rule, which included "flood plain waters." This method created a litany of issues for the U. S. Poultry and Egg Industry members and allies that suddenly found their operations jurisdictional as part of a neighboring flood plain.

Flooding and Floodplains

The Agencies' proposal seems to suggest that that permanent or seasonal flooding of a jurisdictional waterway, including a jurisdictional tributary or lake or pond, may have WOTUS implications for its bank line, abutting dry land (assuming this area is not a wetland), and a connected artificial lake or pond that would be typically excluded. The U. S. Poultry and Egg Industry seeks the clarification regarding the WOTUS regulatory impacts of the flooding of jurisdictional water that inundates usually excluded waterbodies under the proposed rule.

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84 Fed. Reg. at 4173 (noting that "certain times of a typical year is intended to include "predictable, continuous, seasonal surface flow").

[22] *Rapanos*, 547 U.S. at 739 (urging the use of "ordinary parlance"); *see also* 84 Fed. Reg. at 4155.

[23] *Seasonal*, Oxford English Dictionary (2d ed. 1989).

Regarding flooding and inundation, the Agencies explained following Scalia's plurality that:

> "A mere hydrologic connection between a non-navigable, isolated, intrastate lake or pond and a jurisdictional water, however, may be insufficient to establish jurisdiction under the proposed rule. For instance, a lake or pond that may be connected to a "water of the United States" by flooding, on average, once every 100 years would not be jurisdictional under today's proposal. To be jurisdictional, a lake or pond that is otherwise physically separated from a "water of the United States" would need to be flooded by a jurisdictional water during a typical year."[24]

The Agencies seek to capture this passage in its proposal utilizing the concept that flows must be continuous and employ the terms "perennial," "intermittent," and "typical year" to describe the requisite connection. To have the practical effect sought, the U. S. Poultry and Egg Industry believes that it is important that the Agencies' precisely delineate the usual footprint of all jurisdictional water bodies, including a lake or pond.

Groundwater

The U. S. Poultry and Egg Industry fully affirms the Agencies' choice to continue excluding groundwater from CWA jurisdiction. The U. S. Poultry and Egg Industry is concerned, however, that the preamble to the proposed rule appears to incorporate "surface expressions of groundwater" or "baseflow" from the groundwater table into the definition of "tributary." The Agencies should not assume that all "surface expressions" or in-stream seeps from groundwater are naturally occurring. Instead, groundwater might be expressed, or expressed in increased quantities, because of activity upgradient. Groundwater seeps downgradient might not occur, for instance, without a facility's wastewater land application system quite some distance away. Land application systems have a well-recognized hydrological feature of interflow that should not be confused with WOTUS. Or, groundwater might not be expressed but for a facility's detention or equalization pond sitting entirely in uplands.

Ignoring these artificially induced expressions can significantly extend the reach of federal jurisdiction. A groundwater seep might create a small wetland next to a traditionally navigable water, or a seep might lend enough "baseflow" to make a stream jurisdictional. Importantly, the activities and groundwater movements giving rise to these artificial expressions are often regulated already by state groundwater discharge or other permits, such as Land Application System permits regulated by states.

Federal regulation at the expression point risks a conflict with the states' prerogative to regulate that groundwater, a conflict Congress sought to avoid.[25]If the expression point becomes waters of the United States, some voice will inevitably contend that work in, or discharges to, those areas will require federal permits. Federally imposed permit requirements would have the same

[24] 84 Fed. Reg. at 4183.

[25] *See Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965-66 (7th Cir. 1994) (recounting Congress' rejection of proposals to amend the Clean Water Act to regulate groundwater out of a belief that it should be left to the States).

impact on states' regulatory authority as that created by cases like *County of Maui*, which the Supreme Court might overrule.[26]

The public would be better served by clear expressions from the Agencies that groundwater expressions can give rise to CWA jurisdiction only if they are naturally occurring, not dependent on human activity.

Ditches

The U. S. Poultry and Egg Industry supports the Agencies' proposal to exclude ditches that are not used in interstate commerce, do not relocate a tributary, and are not constructed in an adjacent wetland. Ditches are important and widely used features of poultry and other agricultural operations. The Agencies' proposal to exclude most of them is an imminently sensible return to the original views towards ditches.

Justice Scalia's *Rapanos* opinion criticized past attempts to presumptively regulate ditches as "tributaries" simply because they channel water,[27] and it makes no policy sense to regulate ditches as waters of the United States when the CWA itself implies that ditches are "point sources" distinct from those same waters.[28] Separating these concepts is important to the public; The U. S. Poultry and Egg Industry understands that CWA plaintiffs have tried to use flow measurements for outfall ditches submitted in Discharge Monitoring Reports as evidence that the ditches are *themselves* tributaries. That would be an absurd result: Permit compliance should not be evidence for the lack of a permit. Shifting the presumption against regulation of ditches helps combat that absurdity.

The Agencies have asked about the separation between point sources and waters of the United States based on the statutory exemption for construction and maintenance of irrigation ditches and the maintenance of drainage ditches. The Agencies should not infer from the irrigation-ditch exemption any intent to blur the line between regulated waters and point sources; the unmistakable purpose of that exemption is to guarantee, beyond any doubt, that federal agencies did not attempt to control irrigation mechanisms vital to American agriculture. This exemption is driven by the same basic policy behind exemptions for agricultural stormwater run-off and return flows, which are equally vital to the agricultural sector.[29] Congress' efforts to make the exemption of irrigation perfectly clear does not need to be overanalyzed.

Nor should the exemption for maintenance of drainage ditches dissuade the agencies from finalizing the proposed rule. At most, the exemption allows a shaky inference that *some*

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[26] *See generally Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737 (9th Cir. 2018) (finding that the Clean Water Act indirectly regulates discharges to surface water made through groundwater), *cert. granted sub nom.*, *Cty. of Maui v. Hawai'i Wildlife Fund*, No. 18-260 (Feb. 19, 2019).

[27] *See Rapanos*, 547 U.S. at 725, 727, 733-34 ("In applying the definition" of waters of the United States to "man-made drainage ditches, . . . the Corps has stretched the term . . . beyond parody. The plain language of the statute simply does not authorize this "Land is Waters" approach to federal jurisdiction.").

[28] *See id.* at 735-36 (citing 33 U.S.C. § 1362(14)).

[29] Although the exemption for agricultural stormwater is not directly at issue in this rulemaking, the U.S. Poultry and Egg Industry urges the Agencies to reaffirm the importance of its exclusion at every turn. In particular, the Agencies should make an effort, now or later, to clarify that run-off from land application systems falls within the agricultural stormwater exemption at 33 U.S.C. § 1362

drainage ditches might be waters of the United States. The Agencies have already addressed this concern by including three such categories of ditches within CWA jurisdiction; in each of those three categories, the regulated ditch is *already within* existing waters of the United States (or virtually so if used as a navigable canal). No overlap between point sources and waters of the United States occurs. Nothing in the text of the CWA compels regulation of *all* ditches.

The proposed rule also greatly improves predictability around the jurisdictional status of ditches, with the corresponding benefits for business investment and avoidance of litigation. Even under the Agencies' 2008 *Rapanos* guidance, ditches were regulated unless "excavated wholly in and draining only uplands[.]"[30] As an evidentiary matter, it can be difficult to know in what conditions a ditch was first constructed (or even *when* it was constructed), and the very channeling function of a ditch can create wet spots that might appear to be seeps or proto-wetlands draining into the ditch, as opposed to "uplands." Additionally, the Agencies also seemed to look for OHWM in ditches as a matter of practice.[31] But an OHWM test is a poor fit for a feature artificially excavated to resemble a natural channel.

Finally, the U. S. Poultry and Egg Industry reiterates its concern that the Agencies may overly rely on USGS or NHD maps as proof that a "tributary" flows through a ditch, thus bringing it within federal oversight.[32] As explained above, these maps sometimes depict streams or "tributaries" where no such feature exists or has existed.

Prior Converted Cropland

The U. S. Poultry and Egg Industry looks forward to continuing working with the Agencies on the application of the "prior converted cropland" exclusion in conjunction with the United States Department of Agriculture ("USDA"). The U.S. Poultry and Egg Industry seeks that the Agencies clarify that their interpretation of this WOTUS exception includes all related agricultural activities, specifically the use of the land for livestock, pasturing, ranges, animal rearing, and production activities (such as broiler operations). The U. S. Poultry and Egg Industry asks the Agencies to confirm the interpretation that prior converted cropland will be considered abandoned not only "if it is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years" but also that wetlands conditions have returned in the opinion of the Corps.

In particular, the Agencies should confirm that the requisite feature of "abandonment" is the return of wetlands conditions, and that other natural features, such as forestation, would not convert excluded areas into abandoned areas for WOTUS purposes. While many land areas qualifying for prior converted cropland have been so manipulated that it is unlikely for wetland features to return, it would be helpful to industry for the Agencies to describe the degree of wetlands conditions that would provide for the assertion of WOTUS jurisdiction. In addition to satisfying the condition of abutting a WOTUS water body, it may be helpful to clarify that

[30] *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States & Carabell v. United States, at 8 (2008).

[31] *See, e.g., Deerfield Plantation Phase II-B Property Owners Ass'n, Inc. v. U.S. Army Corps of Eng'rs*, 801 F. Supp. 2d 446, 456-57 (D.S.C. 2011) (noting that Corps personnel examined a ditch for presence of OHWM during a jurisdictional determination).

[32] *See* 84 Fed. Reg. at 4181 ("For example, when a USGS topographic map displays a tributary located upstream and downstream of a ditch, this may indicate that the ditch was constructed in a tributary.").

abandoned areas must exhibit substantial wetlands features or that the area need not be drained before reengaging in agricultural activities.

Waste Treatment Systems

The U. S. Poultry and Egg Industry supports the Agencies' proposal to exclude waste treatment systems from federal jurisdiction. U. S. Poultry and Egg Industry members routinely employ lagoons, ponds, ditches, land application sites, and other facility features to protect the quality of off-site waters, and it would be absurd to impose what would amount to pretreatment before sending waste or other water to treatment systems. The proposed rule, moreover, continues the Agencies' long-standing practice of excluding these systems.[33]

The U. S. Poultry and Egg Industry also supports the proposal to define the term "waste treatment system" for the first time. This definition provides much-needed clarity to U. S. Poultry and Egg Industry members and the public about the appropriate scope of the exclusion; that clarity promotes both compliance and environmentally beneficial investment that would otherwise be deterred by the inability to predict legal outcomes. The U. S. Poultry and Egg Industry particularly applauds the agencies' efforts to explain what constitutes "treatment" by illustrating treatment functions in the text of the definition itself (e.g., settling), including the elimination of discharge. Discharge elimination is, from a policy perspective, no different than reduction of constituents within a discharge; it is likely preferable.

While the proposed definition goes a long way to aid legal predictability, the U. S. Poultry and Egg Industry suggests several refinements that could further advance that goal:

1. "Designed to convey or retain"

The Agencies should reconsider use of the word "designed" in the definition. The term "designed" has the virtue of avoiding a need to determine, at some arbitrary moment in time, the actual treatment effect of a particular site or facility feature; that test would impose excessive costs and make the exclusion unpredictable to apply. The public should not require experts to determine if a feature long-considered part of its waste treatment system in fact meets the exclusion.[34]

But "designed" creates unnecessary problems. For one, some might read it to mean that waste treatment systems cannot be created in naturally occurring water features; that inference would break with the Agencies' practice of issuing Section 404 permits to construct such systems in streams or other waters.[35] The Agencies appropriately abandoned that reading of CWA jurisdiction long ago and should not now revive it at the cost of widespread reliance interests.[36]

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[33] *See, e.g.*, 45 Fed. Reg. 48,620, 48,620 (July 21, 1980).

[34] *See, e.g., Cal. Sportfishing Prot. All. v. Cal. Ammonia Co.*, No. CIV S-05-0952-WBS-JMF, 2007 WL 273847, at *8 (E.D. Cal. Jan. 29, 2007) (explaining competing expert evidence on the actual treatment effects of a detention pond as critical to deciding the exclusion's applicability).

[35] *See, e.g., Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 211-16 (4th Cir. 2009) (discussing 404-permitted waste treatment systems in stream segments).

[36] *See* 45 Fed. Reg. 48,620, 48,620 (July 21, 1980) (rescinding regulatory language that limited the waste treatment system exclusion to "manmade bodies of water which neither were originally created in waters of the United States . . . nor resulted from the impoundment of waters of the United States").

"Designed" might also be read to require evidence of design *intent* to show that a feature is excluded. An intent requirement creates several problems. Individual components (like a swale or ditch) might be designed for one purpose and then later re-used for a "treatment" purpose once other components (like a lagoon) are completed. There is no sound policy reason to preclude coverage of components whose use has changed to treatment. More generally, a design intent requirement creates significant evidentiary problems when the original intent or purpose is lost to the passage of time. Many waste treatment systems were built decades ago, sometimes even prior to the modern CWA, and it can be exceedingly difficult to reconstruct their intended purpose. That uncertainty alone appears to have driven at least one lawsuit over the exclusion of a manmade pond, even though the pond likely helped settle out pollutants prior to discharge.[37]

The Agencies should replace "designed" with "used or that may be used,"[38] a concept the agencies have already employed in their definition of "ditch." A focus on the feature's actual or potential use avoids the need for costly technical determination to determine a feature's precise treatment effect. But, unlike a design focus, a use focus also allows the public to determine a feature's excluded status based on present-day information, not a search for fifty-year-old records and continues to allow agencies to permit waste treatment systems in naturally occurring features. These are improvements without any offsetting cost.

As part of this change, the Agencies should clarify that a feature's use in waste treatment can be proven by, but does not necessarily require, its inclusion or reference in an NPDES permit.[39]At least one U.S. Court of Appeals has held that a waste treatment system must be explicitly "incorporated in an NPDES permit" to be excluded.[40]That approach fails to recognize that, in every day practice, permit applicants and writers cannot specify every individual aspect of their facilities and describe all treatment functions of each. It also fails to recognize that many systems are used to treat waste under non-NPDES permits (e.g., a state groundwater discharge permit). A more practical approach is to presume that features used or potentially used for treatment are components of waste treatment systems if they are within the facility or site described under an NPDES or state-law discharge permit.

At the very least, the Agencies should clearly explain in the text or preamble that design intent is not a necessary aspect of identifying a site feature as part of a waste treatment system.

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[37] *See Cal. Sportfishing Prot. All*., 2007 WL 273847, at *7-8 (rejecting application of the exclusion on the grounds that a "detention pond must be a BMP reflecting BAT/BCT" to serve a treatment function).

[38] The definition would thus read, "The term *waste treatment system* includes all components . . . used or that may be used to convey . . . ." It is important to include both actual *and* potential use because, on any given day, a treatment system might receive little-to-no influent or flow. In that case, it becomes unclear if the system has sufficient actual use. A system might also sit idle for a certain period of time despite frequent past use. Including potential use solves these problems and thus improves predictability.

[39] In some parts of the proposed rule's preamble, the agencies have made commendable efforts to explain how evidence should be analyzed and weighed under the rule, in some cases by specifying presumptions. *See, e.g.*, 84 Fed. Reg. at 4181 ("[I]f the evidence does not demonstrate whether a ditch was constructed in a tributary as defined in the proposed rule, that ditch would be considered to be non-jurisdictional by the agencies under this proposal."). The agencies can make similar efforts to explain the evidentiary requirements for other aspects of the rule, including waste treatment systems.

[40] *See N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 995, 1001-02 (9th Cir. 2007) (holding that a pond made from an abandoned rock quarry was not a waste treatment system).

2. "Components, including lagoons and treatment ponds"
The Agencies can be more explicit in describing the "components" typically known to comprise waste treatment systems. It is certainly helpful that the Agencies have specified "lagoons" and "treatment ponds," but the Agencies should also specify other common components. Ditches or trenches lined with concrete or other materials, for instance, are often engineered to "convey" treated wastewater to discharge points, or are used as secondary containment for piping used to convey wastewater.

More importantly, the Agencies could greatly improve the clarity of the rule by specifying, in the text or preamble, that land application systems are one type of waste treatment system used to "eliminat[e] any such discharge." In many states, land application systems must be designed to permit requirements to minimize discharge.[41] And even if they do not prevent all discharge, land application systems are inherently designed to convey, retain, settle, reduce, and/or remove pollutants that would otherwise be discharged as effluents. Indeed, EPA itself has long recognized land application as a "treatment alternative."[42] Land application systems should therefore be explicitly and categorically included as waste treatment systems, including their pivot irrigation spray heads and related equipment and any ditches or berms running through the application area.[43]

3. "Wastewater"
The proposed definition references treatment of "wastewater." The agencies should clarify that a waste treatment system may also be used to treat stormwater. There is no sound policy reason to exclude facilities that treat one but not those that treat the other. The Agencies have proposed a separate exclusion for stormwater management, but that exclusion applies only if the features are "constructed in upland[.]" Additionally, the Agencies have previously recognized that a particular feature is often both a stormwater management feature and part of a waste treatment system.[44]

4. Authorization to construct a waste treatment system
The U. S. Poultry and Egg Industry acknowledges the Agencies' existing policy to require authorization under Section 404 to construct a waste treatment system in pre-existing waters of the United States.[45] While the U. S. Poultry and Egg Industry accepts the continuation of this policy, it requests that the Agencies clarify their discussion of this requirement in the preamble. In particular, the Agencies state they "intend for this exclusion to apply only to waste treatment

[41] Land application systems are designed and permitted to certain criteria developed by state agencies (e.g., anticipated rainfall), and wastewater is applied at these sites in line with permit conditions. Good-faith efforts to comply with design and permit criteria should be sufficient to satisfy the basic criterion of a waste treatment system, namely, the reduction in pollutants discharged.
[42] *See generally* William J. Jewell and Belford L. Seabrook, U.S. EPA, *A History of Land Application as a Treatment Alternative* (1979), https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=00000JJP.TXT.
[43] Other variations or components of land application systems can include treatment plants, subsurface drip or subsurface injection systems, traveling gun systems, drag hose systems, tankers, linear pivots, and center pivots.
[44] *See* 77 Fed. Reg. 10,184, 10,225-27 (Feb. 21 2012) (describing the overlap of the waste treatment system exclusion and Nationwide Permit 43 for stormwater management facilities).
[45] *See* 84 Fed. Reg. at 4193 ("Continuing current practice, any entity with a waste treatment system would need to comply with the CWA by obtaining a section 404 permit if constructed in waters of the United States, and a section 402 permit for discharges from the waste treatment system into waters of the United States.").

systems *constructed in accordance with the requirements of the CWA* and to all waste treatment systems *constructed prior to the 1972 CWA amendments*."[46]

This statement does not explain when a system must have been "constructed." For example, if a facility owner began construction on a treatment pond in 1971 but did not finish construction of that pond until 1973, it is not clear if the pond was "constructed prior to the 1972 CWA Amendments." The U. S. Poultry and Egg Industry recommends the agencies resolve this ambiguity by defining construction to mean the commencement of construction. This is the same policy used to apply the CWA's New Source Performance Standards,[47] and it would therefore be more easily understood and applied by the public. A start-of-construction test has the additional benefit of avoiding retroactivity. It would be essentially unfair to impose Section 404 requirements on construction that pre-dated Section 404 itself.

The phrase "constructed in accordance with the requirements of the CWA" also creates unhelpful ambiguity. Systems that pre-date the CWA, as in the example above, could not have been constructed "in accordance with" a future statute. This phrase makes it difficult to apply the rule to systems used to treat stormwater. An entity that built a treatment system before the advent of stormwater-specific NPDES permits would have difficulty proving, or even determining, if its features satisfied the agencies. If "in accordance with" is meant to provide a gloss on the word "designed" in the regulatory text, it should be disclaimed along with "designed" for the reasons above.

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The U. S. Poultry and Egg Industry appreciates the opportunity to submit these comments and welcomes additional discussions with the Agencies. Should you have any questions about these comments or would like additional information, please contact Paul Bredwell at pbredwell@uspoultry.org.

Respectfully submitted,

U. S. Poultry & Egg Association
National Chicken Council
National Turkey Federation
United Egg Producers
California Poultry Federation
Georgia Poultry Federation
Mississippi Poultry Association
Northwest Chicken Council
South Carolina Poultry Federation
Texas Poultry Federation
Texas Poultry Improvement Association
Pilgrim's

[46] *Id.* (emphasis added).
[47] *See, e.g.*, 40 C.F.R. § 401.11(e) (defining "new source" to mean any facility "the construction of which is commenced after the publication of proposed regulations").

Plainville Farms
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