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RE: Response to Proposed Revisions to the Definition of Waters of the United States, 84 *Federal Register*, 4,154 (Feb. 14, 2019); **Docket ID No. EPA-HQ-OW-2018-0149**

Dear Mr. McDavit and Ms. Moyer:

The Associated General Contractors of America (AGC) appreciates the opportunity to comment on the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers' (Corps) (jointly, the agencies) request for public comment on proposed revisions to the definition of "Waters of the United States" (WOTUS) under the Clean Water Act (CWA) (the "proposal"). The definition of WOTUS directly affects permitting programs that cover activities that AGC members perform in the course of constructing projects of all types.

AGC is the nation's leading construction trade association. It dates back to 1918, and it today represents more than 27,000 construction contractor firms, suppliers and service providers across the nation, and has members involved in all aspects of nonresidential construction. Through a nationwide network of chapters in all 50 states, D.C., and Puerto Rico, AGC contractors are engaged in the construction of the nation's public and private buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development.

The precise definition of WOTUS—which dictates the scope of the federal control and CWA permitting responsibility—is of fundamental importance to the construction industry. AGC members perform many construction activities on land and water that often require a jurisdictional determination from the Corps before proceeding. Construction work that involves the discharge of dredged material or the placement of fill material in a WOTUS cannot legally commence without authorization from the federal government, which takes the form of a CWA Section 404 permit (and may require additional permissions and reporting duties under other CWA programs). Therefore, changes to CWA regulations, case law, and resultant guidance throughout the years has invariably affected our members’ ability to secure financing and approval to construct new projects or maintain existing infrastructure and facilities across the nation.¹

I. INTRODUCTION

The CWA grants EPA and the Corps jurisdiction over “navigable waters,” defined as “Waters of the United States” (WOTUS) without further clarification. Both federal agencies and courts have long struggled to define WOTUS resulting in confusion over which waters are regulated by the federal government and leaving other waters to the purview of state and local governments for protection. The CWA, as amended in 1972, focuses on eliminating discharges of pollution to navigable waters and recognizes the importance of protecting the primary responsibilities and rights of the states in pollution prevention and in the use of land and water resources.² Subsequently the agencies have expanded that jurisdiction and case law has at times either supported or halted that expansion—sometimes with conflicting opinions. For example, in *Riverside Bayview*³ the U.S. Supreme Court affirmed that adjacent wetlands are included in the definition of jurisdictional water; however, in *SWANCC*,⁴ the Court cautioned that the term “navigable” cannot be read out of the [CWA]; and in *Rapanos*,⁵ that water must be “relatively permanent surface water” and there must be a “significant nexus” for a non-navigable water to be regulated—not a mere hydrologic connection.

In 2015, EPA and the Corps finalized a definition (Clean Water Rule: Definition of “Waters of the United States”⁶ or the “2015 WOTUS Rule”) that expanded federal jurisdiction over water and wetlands to encompass features that are dry most of the year and isolated and far removed from any traditional navigable water. Legal action has halted the rule’s implementation in 28

¹ AGC of America, Comments on the Proposed Definition of “Waters of the United States” – Recodification of Pre-existing Rules, (September 27, 2017), Docket ID No. EPA-HQ-OW-2017-0203, <http://newsmanager.commpartners.com/agcleg/downloads/AGC%20WOTUS%20Repeal%20Ltr%20FINAL%209.27.17.pdf>.

² CWA, Oct 18, 1972, Title 1, Section 101(b).

³ 474 U.S. 121 (1985).

⁴ *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC), 531 U.S. 159 (2001).

⁵ *Rapanos v. United States*, 547 U.S. 715 (2006), https://www.epa.gov/sites/production/files/2016-04/documents/rapanos_decision_2006.pdf.

⁶ 80 *Fed. Reg.* 37,054 (June 29, 2015), <https://www.federalregister.gov/documents/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states>.

states, while 22 states have implemented the rule, creating a patchwork of regulations and uncertainty for contractors. The agencies are in the process of repealing the 2015 WOTUS Rule and revising the definition of WOTUS—a process that AGC supports.

After conducting a preliminary public outreach and information gathering effort in 2017, on Feb. 14, 2019, the agencies published for public comment a proposal to revise the definition of WOTUS. This comment letter is in response to the proposed revisions.

II. PROPOSED CHANGES TO THE DEFINITION OF “WATERS OF THE UNITED STATES”

Throughout the process of reevaluating the 2015 WOTUS Rule and drafting a revision to the definition of WOTUS, the agencies have expressed their intent to bring clarity to the often-complex process of determining jurisdiction and whether federal permitting programs would apply to a proposed activity. The proposed revision includes waters that in many cases are readily identifiable as federal waters, such as traditional navigable waters, including waters used for interstate or foreign commerce, tributaries and other waters with a surface connection or that regularly flow into those waters. It excludes most ditches, stormwater control features constructed in uplands,⁷ and earthen depressions caused by construction equipment in uplands that may fill with water.

Proposed Six Categories of WOTUS

- (a)(1) Traditional Navigable Waters (TNWs) – includes waters for interstate or foreign commerce
- (a)(2) Tributaries – naturally occurring surface water channel that contributes perennial or intermittent flow to a TNW in a typical year
- (a)(3) Ditches – artificial channels used to convey water that are TNWs, constructed in/relocate a tributary and meet tributary definition, or constructed in adjacent wetlands and meet tributary definition
- (a)(4) Lakes and Ponds – that are TNWs, contribute perennial or intermittent flow to a TNW in a typical year, or are flooded by a jurisdictional water in a typical year
- (a)(5) Impoundments
- (a)(6) Adjacent Wetlands – must abut or have direct hydrological surface connection

Proposed Exclusions

- (b)(1) Features Not Identified as WOTUS in (a) Are Excluded
- (b)(2) Groundwater
- (b)(3) Ephemeral Features and Diffuse Stormwater Runoff

⁷ The proposal defines “upland” as “any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (l)(3)(xv) of this section, and does not lie below the ordinary high water mark or the high tide line of a water identified in paragraph (l)(1)(i) through (vi) of this section. Waters identified in paragraphs (l)(1)(i) through (vi) of this section are not upland.” 84 *Fed. Reg.* 4,217 (Feb. 14, 2019).

- (b)(4) Ditches Not Identified as WOTUS in (a)(3) Are Excluded
- (b)(5) Prior Converted Cropland
- (b)(6) Artificially Irrigated Areas – that would revert to upland
- (b)(7) Artificial Lakes and Ponds Constructed in Upland - that are not otherwise jurisdictional
- (b)(8) Water-filled Depressions Created in Upland - incidental to mining or construction and sand, gravel, and fill pits excavated in uplands
- (b)(9) Stormwater Features - excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off
- (b)(10) Wastewater Recycling Structures - constructed in upland
- (b)(11) Waste Treatment Systems - active or passive

The proposal removes interstate waters as a separate category and brings it into the category for “traditional navigable waters,” creates new categories for jurisdictional ditches as well as jurisdictional lakes and ponds, and expressly excludes groundwater and ephemeral features from jurisdiction under the Clean Water Act. Many of the exclusions remain largely intact from the 2015 WOTUS Rule with new definitions intended to clarify the exclusions and make it easier to determine whether a feature is jurisdictional.

III. EXECUTIVE SUMMARY OF AGC’S POSITION

AGC considers the proposed revisions a step in the right direction for ensuring clean water through clear guidelines and generally supports the proposal. AGC has long been engaged in the agencies’ efforts to define what WOTUS means under the CWA.⁸ In the following comments, AGC provides suggestions to improve the proposal and bring greater clarity to the regulated community and to field staff at the regulatory agencies.

- The proposal appropriately addresses issues of critical importance to AGC members; providing greater clarity than the prior rule in offering more practical solutions for ditches, identifying jurisdictional tributaries and wetlands, and applying the stormwater exclusion—issues which AGC has raised in prior comment letters to the agencies.

⁸ Including formal AGC comments on the agencies’ advanced notice of proposed rulemaking in 2003, draft agency guidance following a series of court cases in the early 2000s, as well as several related efforts in this decade to redefine jurisdiction.

Particularly, AGC’s comments on the 2014 proposal (joint⁹ and individual¹⁰ comments) and comments¹¹ in support of the recently proposed recodification of pre-existing rules provide insight specific to the construction industry members’ concerns with agency efforts to determine jurisdiction.

- For example, AGC members are pleased to see the proposal’s “specific tributary and adjacent wetlands definitions would eliminate the need for the case-specific significant nexus test that [is] required for many features ... according the agencies’ *Rapanos* Guidance.”¹² The construction industry stands to face significant delay and cost as field staff implement the 2015 WOTUS Rule’s requirement to perform a significant nexus determination for waters within the 100-year floodplain of a TNW or within 4,000 feet of a high-tide line or ordinary high water mark (OHWM) and for specific features such as prairie potholes.
 - Whereas the 2015 WOTUS Rule generally includes ditches in the definition of WOTUS unless expressly excluded, the proposal generally excludes ditches unless it conveys a TNW or the “tributary” criteria are met and the ditch alters or relocates a tributary or is constructed on an adjacent (jurisdictional) wetland; AGC members appreciate this new approach and offer suggestion in this letter for further clarity.¹³
 - The proposal’s definitions of “perennial,” “intermittent,” and “ephemeral” resolve much of the confusion that the 2015 WOTUS Rule created relative to the jurisdictional status of ephemeral streams that have no continuous surface connection to navigable water.
- The proposal appropriately addresses relevant case law and balances relevant majority and concurring legal opinions—issues which AGC has raised in prior comment letters to the agencies. Particularly, AGC’s comment letters on the draft guidance in 2011 (joint

⁹ Waters Advocacy Coalition, Comments on the Proposed Rule to Define “Waters of the United States” Under the Clean Water Act, (November 13, 2014, corrected November 14, 2014), Docket ID No. EPA-HQ-OW-2011-0880, https://www.uschamber.com/sites/default/files/11.14.14- waters_ advocacy_ coalition_ comments_ on_ proposed_ rule_ waters_ of_ the_ united_ states.pdf; Federal Stormwater Association, Comments on the Proposed Rule to Define “Waters of the United States” Under the Clean Water Act, November 14, 2014), Docket ID No. EPA-HQ-OW-2011-0880, <https://www.agc.org/sites/default/files/FSWA%20WOTUS%20Comments%20-%20FINAL.pdf>; and the Coalition of Real Estate Associations, Comments on the Proposed Rule to Define “Waters of the United States” Under the Clean Water Act, (August 8, 2014), Docket ID No. EPA-HQ-OW-2011-0880, <http://newsmanager.commpartners.com/agcenv/downloads/Coalition%20of%20Real%20Estate%20CORE%20Associations%20Comments%20on%20MS4s%20WOTUS%20--%20.pdf>.

¹⁰ AGC of America, Comments on the Proposed Rule to Define “Waters of the United States” Under the Clean Water Act, (November 13, 2014), Docket ID No. EPA-HQ-OW-2011-0880, <https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-14602>.

¹¹ AGC of America, Comments on the Proposed Definition of “Waters of the United States” – Recodification of Pre-existing Rules, (September 27, 2017), Docket ID No. EPA-HQ-OW-2017-0203, <https://www.regulations.gov/document?D=EPA-HQ-OW-2017-0203-10460>.

¹² 84 *Fed. Reg.* at 4,197. See “I. Summary of Proposed Rule as Compared to the 1986 and 2015 Regulations” at 4195-98.

¹³ 84 *Fed. Reg.* at 4,179-82 (comparing the 2015 WOTUS Rule’s and the proposal’s treatment of ditches).

comments¹⁴) and on the 2014 proposal (see links above) discussed in depth the interpretation of case law and importance in meeting judicial constraints.

- For example, AGC members are pleased to see the proposal limits the 2015 WOTUS Rule’s “adjacent waters” to “adjacent wetlands,” because the former category is “at odds with the Supreme Court’s ruling in *Rapanos*.”¹⁵ AGC strongly supports the agencies’ plan to further limit “adjacent wetlands” to those that abut a jurisdictional water or have a direct hydrological surface connection, in accordance with *Rapanos*.
- The proposal also appropriately recognizes state’s primary responsibilities in water pollution prevention and land use decisions.
 - For example, AGC members are pleased to see the proposal excludes from the “tributaries” category “ephemeral streams” and “ephemeral features” – giving state and tribes the ability to manage these waters within their borders.

In the sections that follow, AGC provides comments on key proposed changes that are of particular importance to the construction industry. Based on significant outreach and feedback from its construction-industry membership, AGC is offering specific feedback to help improve the proposed definitions and to clarify when/where specific categories and exclusions would apply, as well as to respond directly to questions raised by the agencies in the preamble text such as the appropriate treatment of Municipal Separate Storm Sewer Systems (MS4s).

AGC is a member of the Waters Advocacy Coalition (WAC) and the Federal StormWater Association (FSWA) and incorporates by reference those coalitions’ comments submitted to this docket. The WAC coalition comment letter walks step-by-step through the proposal and makes specific recommendations based on the broad consensus of many industry groups. The FSWA comment letter focuses on key stormwater related provisions in the WOTUS proposal—namely stormwater ditches and stormwater control features.

IV. CONSTRUCTION INDUSTRY CONSIDERATIONS WITH KEY PROPOSED CHANGES

A. Tributaries of Traditional Navigable Waters and New Key Definitions

Proposed definition of jurisdictional tributaries: “*River, stream, or similarly naturally occurring surface water channel that contributes **perennial or intermittent** flow to a ...[TNW] in a **typical year** either directly or indirectly through a ...[jurisdictional water] or through water features identified ...[as non-jurisdictional] so long as those water features convey perennial or intermittent flow downstream. [Emphasis added.]*” The

¹⁴ Waters Advocacy Coalition, Comments on the Draft Guidance on Identifying Waters Protected by the Clean Water Act, (July 29, 2011), Docket ID No. EPA-HQ-OW-2011-0409, <https://www.agc.org/sites/default/files/072911WACcommentsFinal.pdf>.

¹⁵ 84 *Fed. Reg.* at 4,197 (Feb. 14, 2019).

proposal notes that a tributary maintains status even if it flows through a natural or artificial break, so long as the break conveys **perennial or intermittent** (terms are defined in the proposal) flow to a tributary or other jurisdictional WOTUS. The proposal introduces the concept of the “**typical year**” to consider the local, normal range of precipitation over a rolling 30-year period, which is intended to address regional and geographic variations for determining intermittent flow. The proposal further **excludes ephemeral features** and diffuse stormwater run-off (including sheet flow). It defines ephemeral features, to further distinguish between ephemeral and intermittent features, as follows: “*surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).*”

The proposal appropriately finds that ordinarily dry channels where water flows occasionally do not constitute a jurisdictional tributary. AGC supports the exclusion of ephemeral features from federal jurisdiction, a position supported by the Supreme Court in the *Rapanos* case,¹⁶ finding that the CWA covers “relatively permanent bodies of water.” In *Rapanos*, Justice Kennedy established important limitations on the Corps’ and EPA’s authority to regulate work in water and wetlands and rejected the Corps’ practice of asserting jurisdiction over any non-navigable water that has any hydrological connection to any navigable water. Justice Kennedy holds that to be jurisdictional, a non-navigable waterbody’s relationship with traditional navigable waters must be “substantial” and not a mere “hydrologic connection.” AGC also supports the elimination of the bed and bank and OHWM concepts from the process for determining jurisdictional waters, as the terms have caused confusion in the field, especially in arid regions.¹⁷ The agencies’ prior reliance on the OHWM “test” for determining tributaries received criticism from Justices Kennedy and Scalia in the *Rapanos* case—concluding that the practice would lead to the agencies straying too far from traditional navigable waters and would inappropriately lead to claims of federal jurisdiction over many ditches, dry desert drainages, swales, and gullies.¹⁸

The proposal provides welcome clarification for distinguishing between ephemeral and intermittent streams—flows only in response to precipitation events versus flows continuously during certain times of a typical year due to seasonally elevated groundwater tables or melting of snowpack, respectively. However, the fact remains that some intermittent streams will remain hard to distinguish from ephemeral features without the use of expert consultants.

As such, the agencies should work to provide tools, such as an online map of jurisdictional waters. AGC recognizes and reminds the agencies that such a tool would need a high level of accuracy to have confidence in the identification of ephemeral and intermittent features, unlike the current National Wetlands Inventory, which is not accurate enough to determine jurisdiction.

¹⁶ See *supra* note 5.

¹⁷ See WAC September 29, 2014 Letter to EPA and Corps preliminary comments (EPA-HQ-OW-2011-0880); FSWA comments 2014 Proposed WOTUS Rulemaking (EPA-HQ-OW-2011-0880) related to OHWM and MS4 ditches; and AGC’s EPW testimony following the *Rapanos* and *Carabell* decisions (August 1, 2006) (Also included as AGC comments following the Oct. 12, 2011, EPA Small Entities Outreach Meeting on the Definition of WOTUS)

¹⁸ See *supra* note 5.

The agencies should standardize the concept of “typical year” to ensure consistency and predictability, as it would be crucial to determining between tributaries and non-jurisdictional features. “Under the proposed rule a tributary must contribute perennial or intermittent flow to a traditional navigable water or territorial sea in [a] typical year.”¹⁹ Precipitation may vary due to flooding or drought, which would affect one’s ability to determine whether a feature is intermittent (for example, lower water tables or less snowpack during times of drought). The typical year sets a normal amount of precipitation over a rolling 30-year period and should provide clarity on whether a given year’s precipitation falls within a normal range—and whether a project proponent can rely on flow observations made that year. However, the agencies also should provide a definition of and methodology(ies) for determining the “typical year” (such as a simple average of the 30-70 percentile range of the data) and state which datasets to use. This will ensure that the districts are using the same methods and types of data. Those datasets should be standardized and publicly available. Recognizing that topographical features may result in varying precipitation amounts by weather station(s) located in close proximity, the agencies should provide a means for resolving discrepancies between data sources. At the same time, the agencies should clarify how long the “typical year” would remain valid once established.²⁰

Regarding the proposal’s definition of “intermittent,” the agencies *should not* rely on descriptive features alone, OHWM or otherwise, for identifying intermittent tributaries. Ephemeral and intermittent streams can share similar characteristics as illustrated by the confusion in the field when applying the OHWM test. AGC members have indicated that there may be greater scouring of the stream bed with intermittent features but caution against relying on that indicator, or other indicators such as particular vegetation, as it would only increase inconsistency in the field.

AGC recommends that the agencies provide stakeholders with an example step-by-step analysis as to how field staff will determine if features are jurisdictional tributaries, particularly in hard to determine cases. For example, the agencies should develop specific criteria that applicants can demonstrate, which may include flow characteristics and physical indicators, to show that a feature contributes ephemeral rather than intermittent flow. However, AGC members caution that observing, sampling, and recording conditions over a large period of time to determine flow duration and magnitude for intermittent tributaries would be overly burdensome and further delay the permitting of projects. AGC recommends the agencies establish a streamlined process for any determinations that require additional monitoring steps.

Some AGC members are frustrated with the ongoing regulatory “tug of war” between federal and state governments over features that are dry most of the year. These AGC members question whether any ephemeral or intermittent feature should be considered significant enough to be jurisdictional at the federal level or whether the states should address those features as needed.

¹⁹ 84 *Fed. Reg.* 4,173 (Feb. 14, 2019).

²⁰ Jurisdictional determinations are typically good for five years; however, preliminary JDs do not have a “good through” date and presumably the typical year would have to be calculated annually until a JD is secured.

AGC members are also concerned that features dispersing the melting of normal snowfall (ephemeral and thereby not jurisdictional per the proposal) may be confused with intermittent streams that flow seasonally due to the melting of “snow pack” (jurisdictional per the proposal). Further clarification for the regulated community and field staff would be helpful.

Furthermore, the agencies should provide more clarification on “natural or artificial breaks.” A landowner may find it difficult to determine whether there is a jurisdictional break upstream or downstream of a feature of their property. If that break occurs outside the boundaries of their property, how would the landowner discover it? For example, an intermittent stream on their property that disperses into ephemeral features would not be jurisdictional even if a subsequent segment later develops into a jurisdictional intermittent tributary connecting to a TNW.

B. Ditches

The proposal includes a jurisdictional ditch category for the first time. It also expressly excludes all ditches that do not fall into the category of jurisdictional ditches.

Jurisdictional ditches: *“Ditches that satisfy any of the conditions identified in paragraph (a)(1) of this section [traditional navigable waters], ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition, and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definitions.”* Excluded ditches: *“Ditches that are not identified [above].”* Proposed definition of ditch: *“an artificial channel used to convey water.”* Furthermore, if the agency(ies) is not sure whether ditch was constructed in a tributary, it would need to look at historical data, but the burden of proof would be on agencies.

AGC appreciates the agencies’ effort to clarify which ditches are jurisdictional and those excluded. This distinction is much improved compared to the 2015 WOTUS Rule. The proposal makes it clear that unless the ditch functions as a TNW or was constructed in a tributary or a jurisdictional wetland (and also satisfies the conditions of the proposed “tributary” definition), it is excluded.

As the agencies are now distinguishing between artificial ditches and naturally-occurring tributaries, they should provide greater clarity on how they will distinguish between the two. To this end, AGC recommends that the agencies address the following outstanding issues not clearly addressed in the proposal:

- Provide example scenarios, as ditches are linear features that may move through varying terrain, intersect with other features, or channel tributaries for only a short period of time.
- Provide clarification on whether jurisdiction of a ditch may be segmented.
- Provide greater clarity on the reach of jurisdiction for a ditch that may abut or channel a tributary for only a short stretch (e.g., a roadside ditch intersecting with a tributary and conveying it a short distance to a culvert or stream crossing).

- Provide confirmation that a ditch that is not constructed in a jurisdictional water or jurisdictional wetland is not jurisdictional would not later become jurisdictional.

AGC is encouraged that the burden of proof would shift to the agencies where there is uncertainty whether ditch was constructed in tributary. AGC maintains that the new rule should establish a defined timeframe and criteria that an applicant can use to assist the agencies in meeting their evidentiary burden to show that ditch was constructed in upland, and such criteria **should not require a burdensome historical inquiry.**

- Set parameters and a deadline for obtaining and assessing historical data; otherwise the process could drag on indefinitely with successive and onerous documentation requests made of the property owner. AGC members have suggested a timeframe of 45 days for assessing historical data, as this is the pre-construction notification review timeframe for the nationwide permits that require review (notwithstanding those that also require extensive species or historic properties reviews). If the project proponent does not receive a reply from the Corps within that timeframe, then they should assume that the ditch in question is not a historical tributary, which also is consistent with the approach for many nationwide permits.²¹
- Establish clear evidentiary requirements for a specific time-range. Even though the burden of proof for determining whether a ditch is jurisdictional would be on the agencies, the project proponent will still need to respond to requests for data that could include historical records, maps, and photographs that are not readily available. The agencies also do not address a time-range for historic data. AGC suggests the agencies make clear that they will accept available visual observations, maps, and aerial photos to support the determination, as appropriate. AGC members report that it is increasingly more difficult to provide data for time periods where none was collected. Furthermore, the historic nature of a ditch or tributary may not address an area as it currently exists or even as it existed when the Act was enacted. The landscape may have changed so dramatically as to preclude consideration of its status before the Act. The agencies have addressed similar situations in the early days of the Act and have decided not to claim jurisdiction over “fast land” comprising potential WOTUS that had been previously filled.²² The CWA’s antidegradation policy also suggests a recognition that the Act addresses “existing” (in this case, post-1975) conditions. To further limit onerous

²¹ Some “NWP activities cannot proceed until the project proponent has submitted a pre-construction notification to the Corps, and for most NWPs that require pre-construction notifications the Corps has 45 days to notify the project proponent whether the activity is authorized by NWP.” ... “Except for NWPs 21, 49, and 50, and activities conducted by non-Federal permittees that require PCNs under paragraph (c) of general conditions 18 and 20, if the Corps district does not respond to the PCN within 45 days of a receipt of a complete PCN the activity is authorized by NWP (see [33 CFR 330.1\(e\)\(1\)](https://www.federalregister.gov/documents/2017/01/06/2016-31355/issuance-and-reissuance-of-nationwide-permits)).” ... “There is no required timeframe for responding to requests for approved jurisdictional determinations, although the Corps strives to respond to those requests within 60 days.” See <https://www.federalregister.gov/documents/2017/01/06/2016-31355/issuance-and-reissuance-of-nationwide-permits>.

²² The WAC comments that AGC has incorporated herein by reference provide further discussion and support for this approach. See WAC letter for discussion on Exclusions subheading on Features Constructed in “Upland” in this docket.

historical inquiry, AGC strongly maintains that the rule should exempt ditches constructed prior to 1972.

- Provide regulatory certainty for features previously altered. AGC members have expressed concerns regarding how the historic look back at ditches would work if a contractor is, for example, seeking approval to expand a drainage area that has previously undergone construction pursuant to a duly-issued Section 404 permit. In other words, a portion of the artificial channel used to convey water may have historically presented as a wetland, but then been lawfully dredged and filled pursuant to the project plans and specifications. At a future date, there may be a need to perform additional construction at the same location. Would the agencies revert back to the original conditions in making the jurisdictional determination or would they recognize the subsequent altered state, as authorized via the 404 permit? The following language in the proposal (in the section on impoundments) provides useful guidance and direction: “Where discharge of dredged or fill material into a ‘water of the United States’ transforms a water body into upland through a section 404 permitting action, the water would no longer be jurisdictional, consistent with longstanding agency practice.”²³ AGC asks the Corps to include this language in the text of the regulation and apply it more broadly (beyond impoundments) to cover the scenario described above.

AGC remains concerned that there are millions of miles of man-made stormwater management and drainage ditches in the United States that were constructed in “adjacent wetlands” prior to the CWA and many stormwater control features have become wetlands under the Corps 1987 Manual and guidance since their construction. These features would invariably become WOTUS under the proposed rule. See the Stormwater Management, Collection and Drainage Ditches section below for specific comment about ditches within the MS4 and the complications associated with treating a point source as a WOTUS.

C. Stormwater Controls, Waste Treatment, and Artificial Lakes and Ponds

The proposal includes three exclusions related to stormwater, waste treatment systems, and man-made lakes and ponds: (1) stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off; (2) waste treatment systems, which include: 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); and (3) artificial lakes and ponds constructed in upland ... which are not identified [as jurisdictional lakes and ponds or impoundments of WOTUS]. It is important to note that the stormwater exclusion is tied to the concept of “upland” (area that is not a WOTUS or does not meet wetland criteria), so that stormwater control features that are not constructed in a WOTUS or wetland are viewed as non-jurisdictional. It would also include stormwater features (e.g., green infrastructure) that develop/exhibit wetland characteristics. The artificial lakes and pond

²³ 84 *Fed. Reg.* 4,172 (Feb. 14, 2019).

exclusion also applies to those constructed in upland. Furthermore, the exclusion for waste treatment systems applies to all components of WTS system and that treatment can be passive or active.

AGC generally supports these three exclusions, which would exclude many features intended to control stormwater runoff (constructed in upland) and relevant to the construction industry. Contractors build/install these types of controls to comply with permit requirements associated with the National Pollutant Discharge Elimination System (NPDES) (section 402 of the CWA) or local stormwater runoff requirements. Or, in the case of green infrastructure, local governments use the features as part of a strategy in combination with grey infrastructure to manage stormwater runoff from developed areas.

AGC recommends that the new rule exclude stormwater control features regardless of whether they were constructed in upland. The CWA already regulates discharges from stormwater control features through its point source permitting programs, regardless of whether the feature was constructed in upland. Regulating a conveyance itself provides no additional water quality protection beyond the regulation of the discharge, for which the CWA already provides through the NPDES program. Additionally, the showing required to establish that a stormwater control feature was constructed in upland creates an unnecessary regulatory burden given the fact that any discharge from the stormwater control feature would already be subject to CWA regulation. Similarly, the new rule should not change the non-jurisdictional status of existing artificial ponds and lakes that were permitted or lawfully constructed, under the laws at the time of construction, regardless of whether the feature was constructed in upland.

What is more, AGC is concerned that the term “constructed in upland” lacks specificity. First, as written, it can be construed to mean historic instead of current conditions, setting up a similar “burden of proof” scenario as with historic ditches. For all exclusions where the agencies retain the reference “constructed in upland,” the agencies should clarify that this reflects current rather than historic conditions. Second, the agencies should clarify that “upland” areas can include non-jurisdictional water features, such as ephemeral features or intermittent streams that are not jurisdictional tributaries. See the definition below. Therefore, stormwater controls that impound or collect non-jurisdictional waters or ephemeral features would still be excluded under the proposal.

AGC also is concerned that tying the stormwater exclusion to upland conditions increases uncertainty over stormwater features that interact with non-jurisdictional wetlands. (The proposal would regulate adjacent wetlands.) This would be a concern for *any* of the exclusions that are tied to the “constructed in upland” concept when one of the excluded features—such as an artificial lake or stormwater control feature—comes into contact with *non-jurisdictional* wetlands. Those wetlands are not jurisdictional, yet also could not be considered “upland” because they have wetland characteristics. Are non-jurisdictional wetlands indirectly treated as jurisdictional in the proposal? Is a stormwater control feature that interacts with a non-jurisdictional wetland then considered a WOTUS even though neither the feature nor the wetland meets the criteria for jurisdictional waters? Currently, the agencies do not propose to carry this

same condition through to the ditch exclusion; however, they are requesting comment on doing so. Furthermore, the agencies introduce confusion by referring to “ditches in upland” in the fact sheets and other materials related to the proposal. Should the agencies make the ditch exclusion conditional to “constructed in upland”, then ditches that interact with non-jurisdictional wetlands will face the same uncertainties.

The term upland means any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils) ... and does not lie below the ordinary high water mark or the high tide line of a [jurisdictional water]. [Jurisdictional waters] are not upland.

Lastly, the agencies must expand the exclusion for stormwater control features to include the entire permitted MS4, as argued in the section immediately below.

D. Stormwater Management, Collection and Drainage Ditches

AGC recommends that the new rule expressly exclude Municipal Separate Storm Sewer Systems (MS4s) in their entirety and clarify that point sources and WOTUS are mutually exclusive.

a. MS4s and their component conveyances should be expressly excluded from WOTUS jurisdiction

MS4s—which include roadside drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains designed to funnel or to treat stormwater runoff before it discharges to WOTUS—play an important role in collecting and treating stormwater discharges from industrial/construction and commercial operations.²⁴ MS4s also serve as a flood control system designed to protect life and property from the risk of flooding. Most cities/counties hire contractors to build these public infrastructure systems to funnel water away from low-lying roads, properties, and businesses to prevent accidents and flooding incidences. Construction repair and expansion projects commonly take place in and around these areas.

As with the last round of revisions to the WOTUS definition, AGC remains concerned about how the agencies will characterize the jurisdictional status of the millions of miles of stormwater management collection and drainage ditches that span across the country. The extent of control that the federal government asserts over these water conveyance systems, or components thereof, will impact the construction industry’s ability to effectively construct and maintain drainage infrastructure for purposes of public safety, local water supply augmentation and water quality protection. A WOTUS designation triggers numerous federal CWA provisions covering the discharge of oil and hazardous substances, the administration of the NPDES permit program and permitting for the discharges of dredge and fill material.²⁵

²⁴ Regulations define MS4s as “a conveyance or system of conveyances . . . designed or used for collecting or conveying storm water.” 40 CFR Part 122.26(b)(8).

²⁵ See 33 CFR Part 328; 40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401.

Per the proposal and preamble text, parts of a MS4 would be under federal jurisdictional and permitting control. Specifically, the preamble to the proposal states: “The agencies currently view some waters, such as channelized streams with intermittent or perennial flow, as jurisdictional even where used as part of a stormwater management system.”²⁶ Similarly, under the proposal, some “artificial channels”²⁷ with intermittent or perennial flow could be jurisdictional ditches, even where used as part of a stormwater management system.

AGC strongly urges the agencies to explicitly exclude MS4s that are managed via federal, state and local clean water permits from the WOTUS definition to avoid duplicative regulation by multiple agencies at multiple levels of government. MS4s and the component parts of these systems that channel runoff are already regulated as “point sources” under other CWA programs. If components of an MS4 are deemed federal WOTUS, the operator of the system, and all regulated “facilities” (including construction sites) within the MS4’s jurisdiction, would confront conflicting CWA requirements, as further explained below.

The agencies have requested comment on whether the proposed exclusion in paragraph (b)(9) for stormwater control features should be expanded or clarified to accomplish this. That is one option, and in section IV subsection C above AGC has recommended that the agencies make additional changes to further clarify and ensure the utility of this exclusion; particularly, excluding stormwater control features regardless of whether they were constructed in upland, as well as MS4s in their entirety. The agencies have also asked for comment on whether the exclusion for ditches should instead focus on particular ditch uses, such as roadside or other similar uses, and if so, why. This may be another approach for the agencies to pursue, and AGC offers additional insights on below on roadside ditches used for drainage. Above all else, AGC request that the agencies pay special attention to avoid the following illogical results that are overburdensome and legally untenable.

- **Active construction sites and related industrial support operations that discharge stormwater into MS4s (which themselves are already regulated under different parts of the Clean Water Act) would face double regulation of both what goes in to an MS4 as well as what comes out of one.** Stormwater discharges from an MS4 into a WOTUS are heavily regulated under EPA’s CWA Section 402 NPDES permit program.²⁸ Those permits require MS4 operators to control runoff from active and completed construction sites, among other sources, located within the urbanized area. If the MS4 system itself becomes WOTUS, then the point of compliance would shift from the nearby surface water to, for example, the ditch on the side of the roadway. Contractors would be subject to city/county stormwater runoff ordinances – and they would also need to get a Section 404 permit from the Army Corps to perform work anywhere in, or around, the system of public infrastructure ditches. In addition, federal hazardous waste reporting and Spill Prevention Control and

²⁶ 84 *Fed. Reg.* 4,192 (Feb. 14, 2019).

²⁷ The agencies propose to define “ditches” for purposed of this rule as simply artificial channels used to convey water. 84 *Fed. Reg.* 4,215 (Feb. 14, 2019).

²⁸ Through CWA § 402(p), Congress required all MS4s to obtain NPDES permits for stormwater discharges. 33 U.S.C. § 1342(p)(1).

Countermeasure (SPCC) requirements would apply to any construction work in—*and around*—these WOTUS areas.

- **If an MS4 were deemed a WOTUS, then states and EPA would be compelled to establish water quality standards (WQSs), criteria, and total maximum daily loads (TMDLs) for municipally-owned storm sewers, which would yield unintended and unreasonable results.** The CWA requires WQSs and TMDLs (which are essentially pollutant budgets) for jurisdictional waters. It would be impractical, if not impossible, to require MS4s to meet WQSs within their entire systems (this would be contrary to the Maximum Extent Practicable or MEP standard applicable to MS4 dischargers); the MS4 operator has limited ability to control what pollutants flow into its system and limited ability to “treat” those pollutants before they discharge from the system. What is more, if MS4s were WOTUS, then state-developed and EPA-approved WQSs would need to designate “uses” for storm sewer systems. Per EPA regulations, “waste transport” is not a legal option, which would create a conflict. Indeed, one of the very purposes of an MS4 and the ditches, drains and gutters within these systems is, in fact, to transport waste. Parts of the MS4 system would likely be placed on the CWA 303(d) list of impaired water bodies, which has regulatory consequences and would certainly impact the routine operation and maintenance of such stormwater conveyance facilities. (Specifically, the MS4’s NPDES permit already regulates pollutants that the operator may discharge from the storm sewer into receiving waters; concurrently, any WQS and TMDL would set federal standards/limits on the pollutants entering the MS4 from third party releases, and pollutant loads within the system itself.)
- **Moreover, MS4s could be forced to break up their MS4 permit programs into smaller pieces so that each permit is limited to each discharge into a WOTUS, further confusing and adding complexity when the agencies’ intent was the opposite.** If an MS4 were deemed a WOTUS, then the MS4’s NPDES permit becomes an approval to discharge pollutants from one jurisdictional water into another jurisdictional water. Congress required permits for discharges from point sources into WOTUS – not for discharges from a WOTUS to a WOTUS. This creates an untenable result within the Act’s structure.

At a minimum, AGC urges the agencies to clarify the status of the new rule’s application to MS4 systems. The proposal does not mention MS4s, except to take comment on whether or not it should be part of an exception. By way of background, while some progress was made under the 2015 WOTUS Rule to clarify the jurisdictional status of an MS4 system, AGC maintains that the agencies fell short of the level of predictability and certainty needed.²⁹ In the preamble to the 2015 WOTUS Rule calls into question which exclusion should apply to stormwater drainage ditches and the order of hierarchy: “the agencies do not expect the scope of ditches excluded to

²⁹ Comments submitted by AGC on the 2014 proposed rule, as part of the Coalition of Real Estate (CORE) Associations, urged the agencies to exclude MS4s from WOTUS coverage to avoid “double regulation” under the CWA’s complicated structure. Local urban, suburban, and other government bodies already need federal permits to operate MS4s and to discharge storm runoff, so they should not also be considered federal WOTUS, as the comments explain. See EPA-HQ-OW-2011-0880-5175, at 11-17, incorporated herein by reference.

be different under paragraphs (b)(3) [ditches] and (b)(6) [stormwater treatment], so there should be little practical need to distinguish between the two.” In the preamble to the proposal, the agencies attempt to distinguish between the stormwater treatment and the ditches exclusions, stating: “This proposed [paragraph (b)(9) stormwater control features] exclusion does not cover ditches, as ditches would be addressed under paragraph (b)(4) of the proposed rule.” However, the agencies need to go further to provide more clarity for the construction industry.

b. Maintenance of Roadside Drainage Ditches, Including Components of MS4s

AGC remains concerned about its members ability to maintain drainage ditches, including roadside ditches and ditches that may be part of a MS4 system. All roadside ditches should be non-jurisdictional in light of their importance to highway safety and the need to not discourage maintenance of roadside ditches by requiring federal approval to conduct maintenance and other activities in these ditches. The agencies must take care to not impose any obstacles (or delays) to the critically important and routine maintenance activities in jurisdictional ditches, which would not only affect flood control and public safety, but it would also impact the ability of an MS4 to meet its NPDES permit requirements.

In the past, the agencies have referenced AGC and its members to the statutory exemptions under CWA Section 404(f)(1)(C) for maintenance, which allow for the maintenance (but not construction) of non-excluded irrigation and drainage ditches without a Section 404 permit from the Department of the Army.³⁰ (AGC is also aware that other types of maintenance activities in WOTUS may also be authorized by a non-reporting Nationwide Permit 3.) However, past EPA and USACE interpretations of Section 404(f)(2)—the so-called exemption to the exemption or “recapture provision” (recapturing the exempted activity back under CWA regulations)—has limited the application and utility of the maintenance exemptions, according to AGC members.

AGC requests that the agencies take this opportunity to make it clearer that the ditch maintenance exemption applies (and has historically applied) to all drainage ditches, including drainage ditches adjacent to roads. In guidance (Regulatory Guidance Letter 07-02), “drainage ditch” is broadly defined as “a ditch that conveys water (other than irrigation related flows) from one place to another.” AGC believes this definition is applicable to most, if not all, roadside ditches and asks that the agencies make that point in the final WOTUS rule preamble. AGC is concerned that the CWA exemption is too narrowly applied, and often inconsistently applied, by Corps Districts throughout the country. Indeed, the Corps has required contractors to obtain 404 permits for activities that AGC believes should have been covered by an exemption (or exclusion).

³⁰ See also 33 CFR Part 323.4(a)(3) and 40 CFR Part 232.3(c)(3). More information about this exemption can be found in the U.S. Army Corps of Engineers Regulatory Guidance Letter (RGL) 07-02: “Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches under Section 404 of Clean Water Act.” In addition, CWA Section 404(f)(1)(B) that exempts additional dredge and fill activities “for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures.”

c. Point Sources and WOTUS are Mutually Exclusive

The proposal also for the first time seeks to clarify when a WOTUS and point source under the CWA now can be one and the same. (“However, an ephemeral feature may constitute a point source that discharges pollutants to a “water of the United States.”) AGC provides the following additional rationale and justification for excluding stormwater treatment and collection/drainage features (including related ditches) subject to permitting under the NPDES’s MS4, industrial, and construction stormwater permit programs from the WOTUS definition. By definition, such features cannot be both a “point source” and a WOTUS.³¹ In passing the 1987 CWA Amendments, Congress recognized that all MS4 discharges ultimately enter a WOTUS through point sources and whether part of the historic drainage system might at one point have qualified today as a WOTUS was inconsequential in reducing pollutant discharges “from” the MS4 point sources into the WOTUS. In these comments, AGC provide support from EPA’s 1990 stormwater regulations explaining why all NPDES permitted stormwater drainage systems, including all related ditches, must be excluded from the definition of WOTUS.

AGC acknowledges that there can be jurisdictional waters in or near an MS4, but the drainage system identified by the NPDES permitting authority and the MS4 as its regulated drainage system (i.e., through its maps or other permitting documents) should meet the exemption from being a WOTUS. Making ditches WOTUS only when they meet traditional navigability or when they are constructed in/relocate a tributary or constructed in adjacent wetlands (and meet the tributary definition in both cases) does not resolve the legal inconsistency of calling ditches both a point source and a WOTUS. While it may be impossible to distinguish every possible site-specific situation to distinguish between MS4 and WOTUS within a national rulemaking, the act of defining what constitutes an individual municipality’s MS4 drainage system is uniquely a process that is inherently part of the MS4 NPDES permitting process between the permitting authority and the MS4. In sum, if those parties define a feature as part of an NPDES permitted drainage system, then that feature is exempt from the WOTUS definition. On a much smaller and site-specific basis, the same would apply under the industrial or construction NPDES stormwater permitting programs for drainage and treatment features established for compliance with those permits.

V. OTHER CONSIDERATIONS

A. Jurisdictional - Adjacent Wetlands

AGC supports the proposed delineation for wetlands under federal jurisdiction. Jurisdictional wetlands would be those adjacent to TNWs and other jurisdictional waters (e.g., tributaries or jurisdictional ditches, lakes/ponds, and impoundments). The *Rapanos* decision and Kennedy’s concurrence supports this interpretation. It is also supported by the *Riverside Bayview* case,

³¹ “The “term ‘point source’ means any discernible, defined 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.” 33 U.S.C. § 1362(14); 40 CFR Part 122.2. AGC notes that the definition of a “point source” under the CWA **explicitly includes ditches.**

which limited CWA jurisdiction to wetlands that abut a navigable water. AGC supports the proposal to maintain the current definition requiring all three wetland criteria to be present (hydrology, hydrophytic vegetation, and hydric soils) and the proposal to remove “bordering, contiguous, and neighboring” concepts from consideration of jurisdiction. Wetlands that are physically separated from jurisdictional features by upland, dikes, barriers, or similar structure *and lack a direct hydrologic surface connection* would not be considered adjacent wetlands.

B. Exclusion - Water-Filled Depressions

AGC supports the agencies’ continued exclusion of water-filled depressions created in upland incidental to mining or construction and sand, gravel, and fill pits excavated in uplands. This exclusion is largely consistent with the 2015 WOTUS Rule. Note that this exclusion is also tied to the concept of “upland” (an area that does not meet wetland criteria and is not a jurisdictional water). The agencies need to provide clarification of whether depressions “created in upland” would exclude depressions created in upland that later develop wetland characteristics. For example, this might include utility corridors where compaction from construction equipment creates a localized hardpan that holds water and aquatic vegetation. In some parts of the country, these are called right-of-way (ROW) wetlands and they are prevalent along utility corridors.

C. Impoundments / Flood Controls

AGC members have expressed concern with how the proposal relates to impoundments or flood control structures and on the proposed treatment of natural and man-made breaks regarding the jurisdictional status of upstream waters. In one scenario, flood control features impound stormwater sheet flow and/or ephemeral, perennial or intermittent streams and release to potential tributaries. Are flood control features covered? Are releases covered? Is maintenance of the structures covered? In another scenario, if an impoundment is constructed in a perennial stream but does not discharge intermittent or perennial flows due to the impoundment, is the downstream segment of the stream a WOTUS or is just the impounded feature (e.g., lake) a WOTUS? Or neither because they do not contribute intermittent or perennial flows to a TNW? The agencies need to provide more clarification on how to interpret the impoundment category and the stormwater exclusion, especially as it relates to dams, breaks/barriers, and stormwater and flood controls.

The term “impoundments” is not defined in the proposal. Should the agencies decide to retain this category in the final rule, they should provide a clear definition of the term that focuses on the water feature, rather than the impoundment itself, so that stakeholders receive proper notice as to the categories of WOTUS and the jurisdictional status of related features. In the alternative, the agencies should remove this category, given that impoundments that would be covered are essentially part of other jurisdictional waters.

In the preamble, the agencies welcomed comment on “whether certain categories of impoundments should not be jurisdictional, such as certain types of impoundments that release water downstream only very infrequently or impede flow downstream such that the flow is less than intermittent.” AGC members have provided an example of flood controls in a Western state

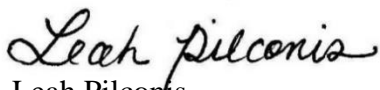
that include embankment dams stretching across broad swaths of dry land to contain flood waters.³² In this case, the agencies' statement is incorrect that: "Most impoundments do not cut off a connection between upstream tributaries and a downstream TNW. As a result, the upstream tributaries would remain jurisdictional under the proposal." AGC argues that impoundments such as embankment dams or other barriers that cut off that connection should be exempt either as its own exclusion or expressly under the stormwater control exclusion. Furthermore, the waters leading into these types of impoundments should be included in the exclusion as they are part of the system of controls. The agencies should clarify this in the final rule.

VI. CONCLUSION

In conclusion, AGC and its members are supportive of the proposed rule and look forward to receiving clarification on the areas raised in this letter. AGC has requested a rule wherein the federal government does not assert control over waters that have historically been protected by the states, one that aligns with the majority and concurring opinions of relevant case law, as well as "draws bright lines" for the regulated community and the agencies' field staff. The proposal is a step in the right direction. The agencies should commit to provide field staff with clear guidelines so that they make objective, consistent, and predictable decisions upon which the regulatory community can rely.

AGC appreciates this opportunity to provide recommendations on behalf of its construction industry member companies. If you have any questions, please contact Melinda Tomaino directly at tomainom@agc.org or (703) 837-5415.

Respectfully,



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³² See comment letter submitted by Arizona Chapter Associated General Contractors in this docket.