

BEFORE THE  
ENVIRONMENTAL PROTECTION AGENCY AND  
THE UNITED STATES CORPS OF ENGINEERS

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EPA-HQ-OW-2021-0328; FRL-6027.4-02-OW  
NOTICE OF PUBLIC MEETINGS REGARDING “WATERS OF THE  
UNITED STATES”; ESTABLISHMENT OF A PUBLIC DOCKET;  
REQUEST FOR RECOMMENDATIONS

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COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS AND  
THE AMERICAN SHORT LINE AND REGIONAL RAILROAD  
ASSOCIATION

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The Association of American Railroads (“AAR”) and the American Short Line and Regional Railroad Association (“ASLRRA”) (jointly, “the Associations”), on behalf of themselves and their member railroads, respectfully submits the following comments on EPA’s and the Corps of Engineers’ (collectively “the Agencies”) August 4, 2021 “Notice of Public Meetings Regarding ‘Waters of the United States’; Establishment of a Public Docket; Request for Recommendations.” 86 Fed. Reg. 41191 (Aug. 4, 2021) (“the Notice”).

AAR is a non-profit industry association whose membership includes freight railroads that operate 83 percent of the line-haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States. AAR also represents passenger railroads that operate intercity passenger trains and provide commuter rail service. ASLRRA is a non-profit trade association representing the interests of approximately 500 short line and regional railroad members and railroad supply company

members in legislative and regulatory matters. Short lines operate 50,000 miles of track in 49 states, or approximately 30% of the national freight network.

The Associations' member railroads have a significant interest in this rulemaking. Of particular interest to the rail industry is the treatment of ditches by any new rule promulgated. The nation's railroads operate over 137,000 miles of right-of-way. Ditches are necessary for drainage of those 137,000 miles of railroad right-of-way and are essential for railroad operations. Thus, the rulemaking anticipated by the Notice can dramatically affect the number of permits railroads must obtain to operate.

With respect to the Agencies' proposal to create two rulemaking processes, the Associations urge the Agencies to retain the Navigable Waters Protection Rule ("NWPR") while its impact and potential revisions are considered. To repeal the NWPR and revert to the pre-2015 regime would lessen the regulatory certainty and clarity achieved under the NWPR, which moved away from the overly complex significant nexus test of the pre-2015 era. That a prior administration took the same approach (to repeal and revert to the pre-2015 rule) should not be used as basis to do so now. This approach departs from sound regulatory rulemaking and exacerbates the regulatory uncertainty experienced with prior iterations, repeals, and revisions of the definition of waters of the United States ("WOTUS"). While the Associations also support the Agencies' vision of a "durable" rule, to continue fluctuating between various definitions of WOTUS—a foundational element to the CWA and its programs—is the antithesis of that vision. The railroads seek regulatory certainty to manage their expansive network and properties, and to implement much needed expansion and infrastructure projects.

To that end, the Associations support a clear, common-sense approach to regulating features such as WOTUS, and support continuing the general exclusion for ditches as drafted in the NWPR. As the Agencies consider new approaches, the Associations request consideration for express exclusion of railroad ditches in any revised rule or implementing guidance, as discussed below.

**I. Railroad Ditches Should be Categorically Excluded as Non-Jurisdictional.**

Both law and public policy considerations support excluding railroad ditches from the definition of “waters of the United States.” Railroad ditches, which extend alongside railroad tracks and railyards, are man-made features specifically designed and constructed to facilitate the drainage of stormwater from tracks. These ditches are necessary for the safe operation of railroads—providing drainage and thereby preventing flooding and damage to rail beds and tracks. For ditches to function effectively, they must be maintained. In fact, the Federal Railroad Administration requires drainage features, including ditches, to be maintained, kept free of obstruction, and able to accommodate the amount of water expected for the area concerned. *See* 49 C.F.R. § 213.319. If railroad ditches are classified as jurisdictional waters by the Agencies, the ability of a railroad to deepen, maintain, or otherwise modify a ditch to accommodate an increased amount of stormwater or runoff would be impaired by the conflicting regulatory requirements of FRA’s safety regulations and the regulations under Section 404 of the Clean Water Act. Also, from time to time, railroads need to add, relocate, or remove railroad ditches for safety or other operational reasons. In these circumstances, the classification of railroad ditches as jurisdictional would have dramatic safety and transportation impacts, delaying essential safety projects and rail service.

The NWPR treated only a very narrow subset of ditches as WOTUS: ditches that closely resemble traditionally navigable waters, such as canals; ditches constructed in 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 “adjacent wetlands” definition. 33 CFR 328.3(a)(5) and 40 CFR 120.2(2)(v). The NWPR excluded all other ditches from federal jurisdiction. See 85 Fed. Reg. 22287 (April 21, 2020).

By delineating the few instances in which ditches are regulated as WOTUS and expressly carving out the remainder, the Agencies avoided the potential for Corps Districts and state permitting authorities to inappropriately designate other ditches as WOTUS on the theory that they meet some other aspect of the WOTUS definition. Nonetheless, further clarity is needed with respect to whether human-made channels designed to drain stormwaters from rail tracks and beds could ever meet the definition of “tributary” or “adjacent wetland.” As discussed below, adding an express carve-out for railroad right-of-way ditches would provide that clarity.

The Associations urge the Agencies to include examples of ditches that are non-jurisdictional within the regulatory text or, in the alternative, within regulatory guidance. Within that list, the Agencies should provide a blanket exclusion for railroad right-of-way drainage ditches, which would exclude ditches along railroad tracks and rail yards. This exclusion will avoid future inappropriate attempts at regulation by Corps Districts or other permitting authorities—for example, a Corps claim that by allowing tall grasses to grow in ditches as part of an environmental sustainability program a railroad created a new jurisdictional wetland. Further, it would provide private landowners, states, and municipalities absolute certainty on whether their railroad ditches are federally regulated.

It is important to note that an exclusion for railroad right-of-way drainage ditches is logical because they are safety features that assure stormwater drainage from the track structure and ballast. Proper drainage is essential to prevent distortion of the track gauge or washout of the sub-structure, which can cause train derailments. This is why, under FRA track safety standards, railroads are required to maintain ditches and other drainage structures in a manner that will accommodate expected flows. See 49 C.F.R. § 213.33. Roadside ditches are a parallel example in that they are ubiquitous safety features across our nation's roadways—along with proper grading, ditches prevent stormwater from collecting in roadways and causing automobile accidents.<sup>1</sup>

In situations where railroads, state highway officials, or other local governments need to move or maintain transportation ditches, designation as WOTUS could compromise their ability to maintain ditches for safe operation and to adjust ditch capacity or flow to manage stormwater. This is because designation as WOTUS would trigger Section 404 permitting requirements for transportation right-of-way drainage ditches, if not otherwise exempted under other regulatory provisions or guidance. In turn, this could trigger the National Environmental Policy Act review process, Endangered Species Act reviews, and other federal requirements—all adding costs and timing delays to projects for railroads and cash-strapped governments.

Furthermore, the Agencies should continue the federal presumption during the permitting process that railroad ditches are not jurisdictional and that the Agencies bear the

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<sup>1</sup> See, e.g., Maintenance of Drainage Features for Safety, A Guide for Local Street and Highway Maintenance Personnel, Federal Highway Administration Report, July 2009 (available at: [https://safety.fhwa.dot.gov/local\\_rural/training/](https://safety.fhwa.dot.gov/local_rural/training/)).

burden of proving that a ditch is jurisdictional. 85 Fed. Reg. 22299. This presumption issue keenly impacts railroad ditches, many of which may have been constructed in the early 1800's and 1900's or in use for decades, which may limit the availability of sophisticated mapping information from a time before the ditch was constructed.

## **II. Railroad Ditches are Regulated as a Point Source.**

The Agencies should acknowledge that ditches are already included in the CWA statutory text as point sources (where they discharge to navigable waters). Logic dictates that any one ditch cannot be both a WOTUS and a point source. Under the CWA, a "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch...from which pollutants are or may be discharged [into navigable waters]." 33 U.S.C. § 1362(14). EPA regulations have an identical definition. See 40 C.F.R. § 122.2. As the Supreme Court has noted, point source and navigable waters are two "separate and distinct categories." *Rapanos v. United States*, 547 U.S. 715, 735-36 (2006). For these reasons, a railroad ditch exclusion is both logical and practical.

## **III. Absent an Express Exclusion for Railroad Ditches, Railroad Ditches Should Continue to be Generally Excluded from Any WOTUS Definition.**

If the Agencies decline to include an express exclusion for railroad ditches, the Associations offer the following comments regarding the jurisdiction of ditches generally.

Ditches should be generally excluded from jurisdiction unless they fall squarely within another jurisdictional category, such as a traditional navigable water, tributary, wetland, or adjacent wetland as such terms are defined under the NWPR. To prescribe jurisdiction-based other characteristics as suggested in the Notice, (*e.g.*, flow, physical features, or biological indicators) would needlessly complicate a straightforward analysis for a land feature that has

no significant connection to waterways beyond regulation as a point source. Moreover, to approach ditch jurisdiction in a way that would require an assessment of observable or calculated characteristics would be overly burdensome and untenable and would require case-by-case analysis of hundreds of thousands of miles of railroad ditches.

The Associations also recognize that any changes to the definitions of a traditional navigable water, tributary, wetland, or adjacent wetland may likely, in turn, impact whether and which ditches are jurisdictional. As such, key, overarching concepts the Agencies should incorporate into any new rule include (i) exclusions for ephemeral and surface features that flow only in direct response to precipitation, (ii) refraining from asserting jurisdiction over physically remote wetlands, and (iii) retaining that only adjacent wetlands with direct hydrologic surface connection are jurisdictional. These concepts mitigate regulatory overreach, particularly for man-made ditches, like railroad ditches, that serve the primary purpose of drainage for surface water runoff and stormwater. To the extent any such ditch activities or features cause water quality concerns, such could be handled under other CWA programs.

Similarly, man-made railroad ditches that are not jurisdictional but later develop wetlands characteristics, such as vegetation, should not become jurisdictional for lack of maintenance or other reasons. To conclude otherwise presumes there is a change in use of a feature whose primary purpose and function remains drainage, and potentially forecloses or delays the very maintenance needed to ensure proper drainage.

Finally, in those cases where railroad ditches are ultimately deemed jurisdictional, it is also important that the Agencies continue to recognize and not conflict with 33 USC 1344(f),

which provides exemptions from section 301, 402, and 404 permitting for maintenance of drainage ditches.

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The Associations appreciate this opportunity to provide pre-proposal comments on the Agencies' new rulemaking effort related to revising the definition of WOTUS. Please feel free to contact us with any questions.

Respectfully submitted,



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