The Association of American Railroads and American Short Line and Regional Railroad Association, on behalf of themselves and their member railroads, submit these comments to the Environmental Protection Agency and United States Army Corps of Engineers’ February 14, 2019 notice of proposed rulemaking “Revised Definition of ‘Waters of the United States’” addressing the scope of waters federally regulated under the Clean Water Act, 33 U.S.C. § 1251 et. seq.¹

AAR and ASLRRA support the agencies’ proposed definition of waters of the United States, which reflects a clear, common-sense approach regarding the features regulated under the CWA. The proposal follows the CWA statutory language, is consistent with relevant Supreme Court precedent, and codifies much of the agencies’ existing practice so as to provide national uniformity, predictability, and regulatory certainty. In particular, AAR and ASLRRA support the exemption of railroad ditches from the definition of WOTUS.

Both law and public policy considerations support exempting railroad ditches from WOTUS. The railroads maintain a network of nearly 137,000 miles of right-of-way in the United States. Railroad ditches, which extend alongside railroad tracks and railyards, facilitate the drainage of stormwater from the tracks. The ditches are absolutely necessary for the safe operation of railroads—providing drainage and thereby preventing flooding and damage to rail beds and tracks. In order for ditches to function effectively, they must be maintained. In fact,

¹ AAR is a non-profit trade association representing large freight and passenger railroads operating in North America. ASLRRA is a non-profit trade association representing the interests of approximately 450 short line and regional railroad members and railroad supply company members in legislative and regulatory matters.
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 WOTUS, the ability of the railroad to deepen a ditch to accommodate an increased amount of water would be impaired by the conflicting regulatory requirements of FRA’s safety regulations and the regulations under Section 404 of the CWA. 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 WOTUS would have dramatic safety and transportation impacts, delaying essential safety projects.

EPA and the Corps clearly aim to exclude railroad ditches from WOTUS, and the agencies have crafted an exemption for ditches that should have the practical effect of excluding railroad ditches from CWA jurisdiction. See 84 Fed. Reg. 4193. Specifically, the proposed rule exempts all ditches from WOTUS designation, except those that have been or could be used in interstate or foreign commerce, territorial seas, and tidal waters, and their tributaries, and those constructed in jurisdictional wetlands that also meet the definition of tributary. In these comments, AAR and ASLRRA make modest suggestions to more clearly carve out railroad ditches from consideration as WOTUS.

I. Ditches: AAR and ASLRRA support the agencies’ proposal, which excludes most ditches from federal jurisdiction, but the agencies should add an express carve-out for transportation ditches.

The agencies’ WOTUS proposal includes a new category for regulated ditches and a new exemption for all other ditches. The agencies’ demarcation of the regulated ditches treats 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 tributary definition. The rule proposes to exclude all other ditches from federal jurisdiction. See 84 Fed. Reg. 4179.

By delineating the few instances in which ditches are properly regulated as WOTUS and expressly carving out the remainder, the agencies avoid the potential for the 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 desirable with respect to whether human-made channels designed to drain stormwaters from rail tracks and beds could ever meet the definition of “tributary.” As discussed below, adding an express carve-out for transportation right-of-way ditches provides that clarity.

Indeed, the agencies affirmatively seek input “on whether the exclusion for ditches should instead focus on particular ditch use, such as roadside, railway, agriculture, irrigation, water supply, or other similar uses, and if so, why.” 84 Fed. Reg. 4195. AAR and ASLRRA urge the agencies to include examples of ditches that are non-jurisdictional within the regulatory text. Within that list, the agencies should codify a blanket exemption for transportation right-of-way drainage ditches, which would exclude ditches along railroad tracks and rail yards. This
exemption will forestall future inappropriate attempts at regulation by Corps Districts or other permitting authorities—for example, a recent Corps claim that by allowing tall grasses to grow in ditches as part of an environment sustainability program, a railroad created a new jurisdictional wetland. Further, it will provide private landowners, states, and municipalities absolute certainty on whether their railroad ditches or roadside ditches are federally regulated.

A use-based exclusion to cover all transportation right-of-way drainage ditches is logical, as railroad and roadside ditches have identical purposes: they are safety features that move rain and other stormwater away from the roads and rails. Without proper drainage, water and ice would collect in the ballast and sub-ballast, distorting the grading of the rail and track and potentially causing derailments and other safety events. 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. Likewise, roadside ditches are ubiquitous safety features across our nation’s roadways—along with proper grading, ditches prevent stormwater from collecting in roadways and causing automobile accidents.²

In situations where railroads, state highway officials, or other local governments need to move or maintain their transportation ditches, designation as WOTUS could compromise the ability to maintain ditches for safe operation and to adjust ditch capacity or flow to manage storm water encroachments. This is because designation as WOTUS would trigger Section 404 permitting requirements for transportation right-of-way drainage ditches. 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.

Additionally, ditches are regulated under a different section of the Clean Water Act. The National Pollutant Discharge Elimination System covers ditches that flow into WOTUS regardless—by statute, ditches are a point source from which unpermitted pollutant discharge is forbidden.

AAR and ASLRA believe that a transportation ditch exemption is a logical outgrowth of the NPRM, and that the agencies have indicated with their questions and extensive preamble discussions that use-based ditch provisions are under consideration. Therefore, AAR and ASLRA propose the following text be added (new text in bold underline):

The following are not “waters of the United States”:

...  
(iv) Ditches that are not identified in paragraph (l)(1)(iii) of this section (including, but not limited to, transportation right-of-way drainage ditches)

Additionally, the agencies should clarify that the federal presumption during the permitting process is that railroad ditches are NOT jurisdictional. In the NPRM, the agencies discuss the hypothetical process by which the Corps would evaluate the available evidence

regarding time of construction and whether the area was a natural waterway before construction. See 84 Fed. Reg. 4181. The agencies should clarify in the regulation’s text that the presumption is that a ditch is not jurisdictional, and the permitting agencies bear the burden of proving that a ditch is jurisdictional. This presumption issue keenly impacts railroad ditches, many of which have been in use for decades or even longer, which may limit the availability of sophisticated mapping information from before the ditch was constructed. The agencies’ proposal acknowledges that ditches are already included in the CWA statutory text as point sources (where they discharge to navigable waters), and requests input as to how to delineate the two. AAR and ASLRRA agree that logic dictates that any one ditch cannot be both WOTUS and 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).

II. Clarifying the definition of tributary would likewise avoid unnecessary disputes.

While AAR and ASLRRA focused these comments on railroad ditches, AAR and ASLRRA support the agencies’ treatment of the other categories of waters, particularly tributaries and wetlands. The agencies sought comment on whether to add to the tributary definition the following sentence: “the lateral extent of a tributary is established by its ordinary high water mark.” AAR and ASLRRA support this additional language, which reinforces that railroads can continue to conduct projects (for example, bridge maintenance) above the high water mark in jurisdictional tributaries.

III. The Agencies should apply the exclusions for detention, retention, and infiltration basins to all stormwater management systems.

Stormwater management increasingly relies upon detention, retention, and infiltration methods and structures, including ditches and other human-made channels, conveyances, and conduits. These features are artificial in nature and courts have historically treated them as non-WOTUS under the waste treatment exception in current regulations.

AAR and ASLRRA support the proposal’s explicit exclusions for detention, retention, and infiltration basins but note that the proposed text would limit the exclusion to wastewater recycling structures. See 84 Fed. Reg. 4190; 84 Fed. Reg. 4204 (proposed 33 C.F.R. § 328.3(b)(10)). The new exclusion for “[s]tormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off” (proposed 33 C.F.R. § 328.3(b)(9)) is helpful but is not clearly applicable to pre-CWA stormwater control features. AAR and ASLRRA recommend deleting the limitation in § 328.3(b)(10) that detention, retention and infiltration are only excluded from WOTUS if used for wastewater recycling. This will facilitate stormwater management and is consistent with the CWA and current law.

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In addition to the comments herein, AAR joins and supports the comments of the Water Advocacy Coalition.

Thank you for your consideration.

Respectfully submitted,

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