WATERS OF THE UNITED STATES PRESENTATION

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Brief Summary of Litigation Challenging U.S. EPA's and Army Corps' Waters of the United States Rule

Courts have divided on both which courts have jurisdiction to hear the suits and the merits

- Clean Water Act (CWA) Section 509(b)(1) is not clear whether challenges to CWA rules go to federal courts of appeal or federal district courts. Courts have divided over this issue and likely the Supreme Court will have to resolve it. By contrast, the Clean Air Act Section 307(b)(1) clearly assigns challenges of nationally applicable regulations to the D.C. Circuit Court of Appeals.

- The U.S. Judicial Panel for Multidistrict Litigation consolidated various challenges in the court of appeals in the 6th Circuit. On October 9, 2015, in EPA v. State of Ohio et al. (including several states and Murray Energy), issued a preliminary order, in a two to one panel decision, blocking the rule nationwide while it considered its jurisdiction to hear the case. Judge David McKeague's order was joined by Judge Richard Allen Griffin. However, Senior Circuit Judge Damon J. Keith dissented and argued that the court should not issue an order until it determined it had jurisdiction in the case. The majority questioned the validity of the distance requirements in the final rule for both which waters constitute adjacent waters (1,500 foot maximum) and which waters have a "significant nexus" (4,000 foot maximum) as potentially inconsistent with Justice Kennedy's crucial concurring opinion setting forth a "significant nexus" test in the 2006 *Rapanos v. U.S.* decision. Because Justice Kennedy provided the fifth and deciding vote, many judges and the EPA have concluded that his opinion is more determinative of the law than Justice Scalia's plurality opinion in that case. The majority also questioned whether the distance requirements in the final rule were the "logical outgrowth" of the draft rule, which mentioned the possibility of setting distance requirements but did not specify any numerical limits. Arguably, the distance requirements in the final rule for both which waters constitute adjacent waters (1,500 foot maximum) and which waters have a "significant nexus" (4,000 foot maximum) should have been published in a draft rule and subject to public notice and comment before being issued in a final rule.

Brief Summary of Litigation Challenging U.S. EPA's and Army Corps' Waters of the United States Rule (Cont'd)

- The U.S. Judicial Panel for Multidistrict Litigation in October 2015 declined to consolidate the various district court suits in one single district court. District courts have divided on both whether they have jurisdiction and on the merits of the rule. Notably, in *North Dakota v. U.S.*, Judge Ralph R. Erickson of the District of North Dakota found that his court had jurisdiction and issued an injunction blocking the rule in the thirteen states that sued in his court. Judge Erickson questioned whether the rule's definition of a tributary as water features with bed, banks and ordinary high water mark, and flow downstream was inconsistent with Justice Kennedy's "significant nexus" test in the *Rapanos* decision because every tributary meeting that definition might not have a "significant nexus" with navigable waters of the U.S.. He also questioned the rule's "significant nexus" (4,000 foot maximum) distance requirement as inconsistent with that decision for the same reason.

The next part of my presentation compares the U.S. EPA's defense of its rule with American Farm Bureau Federation arguments criticizing the rule as invalid. I think these documents present the strongest arguments for and against the rule on the merits.

EPA's CLEAN WATER RULE CHART

www.epa.gov/cleanwaterrule (my presentation based on EPA fact sheets)

Subject	Old Rule	Proposed Rule	Final Rule
Navigable Waters	Jurisdictional	Same	Same
Interstate Waters	Jurisdictional	Same	Same
Territorial Seas	Jurisdictional	Same	Same
Impoundments	Jurisdictional	Same	Same
Tributaries to the Traditionally Navigable Waters	Did not define tributary	Defined tributary for the first time as water features with bed, banks and ordinary high water mark, and flow downstream.	Same as proposal except wetlands and open waters without beds, banks and high water marks will be evaluated for adjacency.
Adjacent Wetlands/Waters	Included wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments or tributaries.	Included all waters adjacent to jurisdictional waters, including waters in riparian area or floodplain, or with surface or shallow subsurface connection to jurisdictional waters.	Includes waters adjacent to jurisdictional waters within a minimum of 100 feet and within the 100-year floodplain to a maximum of 1,500 feet of the ordinary high water mark.
Isolated or "Other" Waters	Included all other waters the use, degradation or destruction of which could affect interstate or foreign commerce.	Included "other waters" where there was a significant nexus to traditionally navigable water, interstate water or territorial sea.	Includes specific waters that are similarly situated: Prairie potholes, Carolina & Delmarva bays, pocosins, western vernal pools in California, & Texas coastal prairie wetlands when they have a significant nexus. Includes waters with a significant nexus within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, as well as waters with a significant nexus within 4,000 feet of jurisdictional waters.
Exclusions to the definition of "Waters of the U.S."	Excluded waste treatment systems and prior converted cropland.	Categorically excluded those in old rule and added two types of ditches, groundwater, gullies, rills and non-wetland swales.	Includes proposed rule exclusions, expands exclusion for ditches, and also excludes constructed components for MS4s and water delivery/reuse

CWA Waters of U.S.

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CWA Waters of U.S.

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CWA Waters of U.S.

Subject	Old Rule	Proposed Rule	Final Rule
Adjacent Wetlands/Waters	Included wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments or tributaries.	Included all waters adjacent to jurisdictional waters, including waters in riparian area or flood-plain, or with surface or shallow subsurface connection to jurisdictional waters.	Includes waters adjacent to jurisdictional waters within a minimum of 100 feet and within the 100-year flood-plain to a maximum of 1,500 feet of the ordinary high water mark.

CWA Waters of U.S.

Subject	Old Rule	Proposed Rule	Final Rule
Isolated or "Other" Waters	Included all other waters the use, degradation or destruction of which could affect inter-state or foreign commerce.	Included "other waters" where there was a significant nexus to traditionally navigable water, interstate water or territorial sea.	Includes specific waters that are similarly situated Prairie potholes, Carolina & Delmarva bays, pocosins, western vernal pools in California & Texas coastal prairie wetlands when they have a significant nexus. Includes waters with a significant nexus within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, as well as waters with a significant nexus within 4,000 feet of jurisdictional waters.

CWA Waters of U.S.

Subject	Old Rule	Proposed Rule	Final Rule
Exclusions to the Definition of "Waters of the U.S."	Excluded waste treatment systems and prior converted cropland.	Categorically excluded those in old rule and added two types of ditches, groundwater, gullies, rills and non-wetland swales.	Includes proposed rule exclusions, expands exclusion for ditches, and also excludes constructed components for MS4s and water delivery/reuse.

CWA Waters of U.S.

The Clean Water Rule:

- **Clearly defines and protects tributaries that impact the health of downstream waters**. The Clean Water Act protects navigable waterways and their tributaries. The rule says that a tributary must show physical features of flowing water – a bed, bank, and ordinary high water mark – to warrant protection. The rule provides protection for headwaters that have these features and science shows can have a significant connection to downstream waters.
- **Provides certainty in how far safeguards extend to nearby waters.** The rule protects waters that are next to rivers and lakes and their tributaries because science shows that they impact downstream waters. The rule sets boundaries on covering nearby waters for the first time that are physical and measurable.
- **Protects the nation's regional water treasures.** Science shows that specific water features can function like a system and impact the health of downstream waters. The rule protects prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands when they impact downstream waters.

CWA Waters of U.S.

- **Focuses on streams, not ditches.** The rule limits protection to ditches that are constructed out of streams or function like streams and can carry pollution downstream. So ditches that are not constructed in streams and that flow only when it rains are not covered.
- **Maintains the status of waters within Municipal Separate Storm Sewer Systems.** The rule does not change how those waters are treated and encourages the use of green infrastructure.
- **Reduces the use of case-specific analysis of waters.** Previously, almost any water could be put through a lengthy case-specific analysis, even if it would not be subject to the Clean Water Act. The rule significantly limits the use of case-specific analysis by creating clarity and certainty on protected waters and limiting the number of similarly situated water features.

CWA Waters of U.S.

- **The rule protects clean water without getting in the way of farming, ranching, and forestry.** Farms across America depend on clean and reliable water for livestock, crops, and irrigation. Activities like planting, harvesting, and moving livestock have long been exempt from Clean Water Act regulation, and the Clean Water Rule doesn't change that. The Clean Water Rule provides greater clarity and certainty to farmers and does not add any new requirements or economic burden on agriculture.
- **The rule only protects waters that have historically been covered by the Clean Water Act.** It does not interfere with or change private property rights, or address land use. It does not regulate most ditches or regulate groundwater, shallow subsurface flows or tile drains. It does not change policy on irrigation or water transfers. It does not apply to rills, gullies, or erosional features.

CWA Waters of U.S.

- **FACT: THE CLEAN WATER RULE DOES NOT REGULATE MOST DITCHES** Rule Text § 230.3(s)(2)(iii): "The following are not 'waters of the United States… the following ditches: (A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary. (B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands. (C) Ditches that do not flow, either directly or through another water, into [a traditional navigable water, interstate water, or the territorial seas.]" Preamble page 169: "Moreover, since the agencies have focused in the final rule on the physical characteristics of excluded ditches, the exclusions will address all ditches that the agencies have concluded should not be subject to jurisdiction, including certain ditches on agricultural lands and ditches associated with modes of transportation, such as roadways, airports, and rail lines."

- **FACT: THE CLEAN WATER RULE DOES NOT CHANGE EXEMPTIONS FOR AGRICULTURE** Preamble page 8: "Congress has exempted certain discharges, and the rule does not affect any of the exemptions from CWA section 404 permitting requirements provided by CWA section 404(f), including those for normal farming, ranching, and silviculture activities. CWA section 404(f); 40 CFR 232.3; 33 CFR 323.4. This rule not only maintains current statutory exemptions, it expands regulatory exclusions from the definition of "waters of the United States" to make it clear that this rule does not add any additional permitting requirements on agriculture."

CWA Waters of U.S.

- **FACT: THE CLEAN WATER RULE DOES NOT REGULATE EROSIONAL FEATURES** Rule Text § 230.3(s)(2)(iv)(F): "The following are not 'waters of the United States' . . . erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary . . . ." Preamble page 175: "While the proposed rule specifically identified gullies and rills, the agencies intended that all erosional features would be excluded. The final rule makes this clear."

- **FACT: THE CLEAN WATER RULE DOES NOT REGULATE GROUNDWATER** Rule Text § 230.3(s)(2)(v): "The following are not 'waters of the United States… groundwater, including groundwater drained through subsurface drainage systems." Preamble page 176: "The agencies include an exclusion for groundwater, including groundwater drained through subsurface drainage systems."

CWA Waters of U.S.

- **FACT: THE CLEAN WATER RULE DOES NOT REGULATE FARM PONDS** Rule Text § 230.3(s)(2)(iv)(B): "The following are not 'waters of the United States… Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds . . . ." Preamble page 173: "In the exclusion for artificial lakes or ponds, the agencies have removed language regarding 'use' of the ponds, including the term 'exclusively.' . . . [T]he agencies recognize that artificial lakes and ponds are often used for more than one purpose and can have other beneficial purposes . . .."

- **FACT: THE CLEAN WATER RULE DOES NOT REGULATE LAND USE** Preamble page 8: **"**The rule also does not regulate … land use."

- **FACT: THE CLEAN WATER RULE DOES NOT CHANGE POLICY ON IRRIGATION** Rule text § 230.3(s)(2)(iv)(A): "The following are not 'waters of the United States… artificially irrigated areas that would revert to dry land should application of water to that area cease . . . ." Rule text § 230.3(s)(2)(iv)(B): "The following are not 'waters of the United States . . . Artificial constructed lakes and ponds created in dry land such as . . . irrigation ponds . . . ." Preamble page 8: "The rule also does not . . . affect either the existing statutory or regulatory exemptions from NPDES permitting requirements, such as for agricultural stormwater discharges and return flows from irrigated agriculture . . . ."

CWA Waters of U.S.

- **FACT: THE CLEAN WATER RULE DOES NOT REGULATE PUDDLES** Rule Text § 230.3(s)(2)(iv)(G): "The following are not 'waters of the United States… puddles." Preamble page 176: "The final rule adds an exclusion for puddles . . . . Numerous commenters asked that the agencies expressly exclude them in a rule. The final rule does so."

- **FACT: THE CLEAN WATER RULE DOES NOT CHANGE POLICY ON STORMWATER** Rule text § 230.3(s)(2)(vi): "The following are not 'waters of the United States… stormwater control features constructed to convey, treat, or store stormwater that are created in dry land." Preamble page 177: "This exclusion responds to numerous commenters who raised concerns that the proposed rule would adversely affect municipalities' ability to operate and maintain their stormwater systems . . . . The agencies' longstanding practice is to view stormwater control features that are not built in 'waters of the United States' as non-jurisdictional."

CWA Waters of U.S.

- **FACT: THE CLEAN WATER RULE DOES NOT REGULATE WATER IN TILE DRAINS** Rule Text § 230.3(s)(2)(v): "The following are not 'waters of the United States… groundwater, including groundwater drained through subsurface drainage systems."

- **FACT: THE CLEAN WATER RULE DOES NOT CHANGE POLICY ON WATER TRANSFERS** Preamble page 8: **"**The rule also does not … affect either the existing statutory or regulatory exemptions from NPDES permitting requirements, such as for… water transfers."

CWA Waters of U.S.

Impact on Agricultural Sector

- **Defining tributaries more clearly.** The rule is precise about the streams being protected so that it could not be interpreted to pick up erosion in a farmer's field. The rule says a tributary must show physical features of flowing water – a bed, bank, and ordinary high water mark – to warrant protection.
  - **Providing certainty in how far safeguards extend to nearby waters.** The rule sets limits on covering nearby waters that for the first time are physical and measurable.
  - **Focusing on streams, not ditches.** The rule limits protection to ditches that are constructed out of streams or function like streams and can carry pollution downstream. So ditches that are not constructed in streams and that flow only when it rains are not covered.

CWA Waters of U.S.

- **THE RULE DOES: Preserve agricultural exemptions** from permitting, including:
  - Normal farming, silviculture, and ranching practices. Those activities include plowing, seeding, cultivating, minor drainage, and harvesting for production of food, fiber, and forest products.
  - Soil and water conservation practices in dry land.
  - Agricultural stormwater discharges.
  - Return flows from irrigated agriculture.
  - Construction and maintenance of farm or stock ponds or irrigation ditches on dry land.
  - Maintenance of drainage ditches.
  - Construction or maintenance of farm, forest, and temporary mining roads.
  - Ensure fields flooded for rice are exempt and can be used for water storage and bird habitat.

CWA Waters of U.S.

- **THE RULE ALSO DOES: Preserve and expand common sense exclusions from jurisdiction, including:**
  - Prior converted croplands.
  - Waste treatment systems (including treatment ponds or lagoons).
  - Artificially irrigated areas that are otherwise dry land.
  - Artificial lakes or ponds constructed in dry land and used for purposes like rice growing, stock watering, aesthetics, or irrigation.
  - Water-filled depressions created as a result of construction activity.
  - Pits excavated in dry land for fill, sand, or gravel.
  - Grass swales.

CWA Waters of U.S.

- **THE RULE DOES NOT:**
  - Protect any types of waters that have not historically been covered by the Clean Water Act.
  - Add any new requirements for agriculture.
  - Interfere with or change private property rights.
  - Regulate most ditches.
  - Change policy on irrigation or water transfers.
  - Address land use.
  - Cover erosional features such as gullies, rills and non-wetland swales.
  - Include groundwater, shallow subsurface flow and tile drains.

CWA Waters of U.S.

- American Farm Bureau Critique of EPA's Waters of the U.S. Rule:

  http://www.fb.org/newsroom/news_article/311/ (see discussion at web address and the first pdf at bottom of page criticizing the Rule, **FACT or FICTION? Shedding the light on EPA's "Facts" about the new "waters of the U.S." rule**

  The American Farm Bureau Federation released documents outlining how the EPA's Waters of the U.S. rule will give the agency sweeping powers to regulate land use despite a body of law clearly prohibiting such overreach.

  The Farm Bureau analysis, now available online, makes available to the public details the EPA has refused to address in public meetings over the past year. The documents are available as PDF attachments.

  "Our analysis shows yet again how unwise, extreme and unlawful this rule is," American Farm Bureau Federation President Bob Stallman said. "Our public affairs specialists and legal team have assembled the best analysis available anywhere, and their conclusions are sobering: Despite months of comments and innumerable complaints, the Waters of the U.S. proposal is even worse than before."

  The WOTUS rule, first released in draft form in April, 2014, has garnered fierce opposition from farmers, ranchers and land owners of all kinds. Dozens of states and countless municipalities oppose the measure since it would federalize regulation already handled at the local level. Just as important is the rule's radical view of "water" which, in its view, should encompass the vast majority of land in the United States since it surrounds actual water that may or may not be protected under the Clean Water Act.

  Alarmed by the agency's actions, the House of Representatives recently voted to prohibit the EPA from enacting the rule. A similar bill is moving through the Senate and could come to a floor vote within weeks.

CWA Waters of U.S.

- **EPA "FACT": "The Clean Water Rule does not regulate land use."**

The *Real* Facts:

This statement would be funny if the issue weren't so serious. The rule is *all* about regulating land use—except EPA calls the land "water" in the rule. EPA's own press statements claim that the rule will regulate *60% of the nation's streams, and millions of acres of wetland* that otherwise "lack clear protection."(**BRAD MANK-All footnotes omitted to make slides more readable and for space reasons, see web address to view footnotes**) "Wetland" is simply *land* that is wet enough to support water-tolerant plants. And the newly regulated "streams" (unlike most of the already regulated streams) actually contain water only when it rains. They don't look at all like streams to most people—they look like *land*.

CWA Waters of U.S.

- The rule defines “waters of the U.S.” to include “tributaries”—and defines tributaries to include any landscape feature “characterized by the presence of physical indicators of a bed and banks and ordinary high water mark” (OHWM)—so long as water sometimes flows in that feature and eventually reaches a navigable water, no matter how many miles away. (Final Rule at 204) A bed, bank and OHWM can look like this farm field in Tennessee that the Corps of Engineers previously found to have a bed, bank and OHWM:

CWA Waters of U.S.

You might think you can kind of make out a “bed, bank and ordinary high water mark” in this photo. But even if those things weren’t visible, the agencies can *still* find land to be a “tributary” and therefore “waters of the U.S.” under the new rule. The agencies claim they can establish the existence of a “tributary” using only “indicators” identifiable to agency staff through “remote sensing or mapping information” or other “desktop tools.” There does not need to be any actual or visible bed, bank and OHWM.

This means that distant regulators using “desktop tools” can *conclusively* establish the presence of a “tributary” on private lands, even where the human eye can’t see water or any physical channel or evidence of water flow. That’s right—*invisible tributaries!* The agencies even claim “tributaries” exist where remote sensing and other desktop tools indicate a *prior existence* of bed, banks and OHWM, where these features are *no longer present* on the landscape today. Final Rule at 94-95. So land will be regulated based on the presence of *invisible* or *historical* tributaries. Tributaries also include ditches that carry only rainwater, if the ditch was built (maybe decades ago) to divert the rainwater flowing in a natural drainage path. Final Rule at 98-99.

CWA Waters of U.S.

Even if you think it's a great idea to treat areas like this as "waters of the U.S.," it's hard to dispute that regulating them is regulating *land*. There's also no question that having a part of your property defined as "waters of the U.S." has a devastating impact on a landowner's ability to build, grow or do most anything on that land without the risk of Clean Water Act liability. Landowners or others who conduct any activity on these areas—growing and protecting crops, harvesting trees or building roads, houses or most anything else—and who cause any amount of "pollutant" to fall into these areas will be in violation of federal law (subject to huge penalties) unless they first submit to a cumbersome, complex and often extremely costly permitting process. Most people would agree that's regulating land use.

CWA Waters of U.S.

- **EPA "FACT": "A Clean Water Act permit is only needed if a protected water is going to be polluted or destroyed."**

The *Real* Facts:

If a low spot or other "water" is regulated as a "water of the U.S." under the rule, then *any* "discharge" of any "pollutant," in any amount, into that feature—even if the feature is dry at the time—is *illegal* unless it is authorized under a Clean Water Act permit or some other provision of the Act. "Pollutant" includes soil, biological materials, and rock, in addition to waste materials. Courts have interpreted "pollutant" broadly to include most any foreign substance, and even the disturbance and immediate redeposit of soil in the same spot (regulators call that a "regulable redeposit").

That means conducting *any* activity on land that causes *any* material to be deposited onto a regulated low spot, wetland, or ditch (applying fertilizer, applying pest control products, or even just moving dirt) can trigger CWA permit requirements and "discharge" liability of tens of thousands of dollars per discharge per day.6 Notice what's missing here? There is NO requirement of any actual environmental or water quality impact from the activity. Just the "discharge" of any amount of "pollutant" into the regulated area is enough to trigger permit requirements, plus potentially devastating penalties—even imprisonment.

CWA Waters of U.S.

- **EPA "FACT": "The Clean Water Rule does not change exemptions for agriculture."**

  The *Real* Facts:

  The rule doesn't technically "change" the several Clean Water Act exemptions for agriculture. But, by broadening the definition of "waters of the U.S.," the rule works around those exemptions, making many more farmers vulnerable to enforcement lawsuits and liability under the Clean Water Act if they fail to get a permit for their farming. Here's how…

  There is no Clean Water Act exemption for the application of fertilizer or products to protect crops from pests or disease in "waters of the U.S." That means, when the rule defines features right in the middle of a farm field to be "waters of the U.S.," putting *any* amount of fertilizer or pesticide onto those features will be an illegal "discharge" unless the farmer gets a permit under Clean Water Act section 402. That's true even at times when the protected "water" (low spot) is *perfectly dry*—and regardless of whether the application would have any environmental effect!

  EPA's "FACT CHECK" specifically mentions the longstanding exemption for "normal" farming, ranching and forestry activities. But what it leaves out is the fact that this exemption only applies to moving dirt (not applying fertilizer or crop protection products), and it has been interpreted very narrowly by the agencies. For example, the agencies have historically taken the position that "normal" farming only means activities such as plowing and planting at "established" operations that have been "ongoing" at the same location since the exemption was created in *1977*. *See, e.g., U.S. v. Cumberland Farms of Connecticut, Inc.*, 647 F. Supp. 1166 (D. Mass. 1986), *affirmed* 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988).

CWA Waters of U.S.

- **EPA "FACT": "The Clean Water Rule does not change exemptions for agriculture." (Continued)**

The *Real* Facts:

EPA has refused to publicly discuss this limitation during this rulemaking process, because it exposes the fact that many farmers will face permit requirements for plowing a field if that field contains low spots that are jurisdictional under the rule. However, in private meetings during the comment period, EPA officials have admitted their position that farming that started after 1977 in a jurisdictional feature, and new farming today in a jurisdictional feature, *does require* a section 404 permit—but "only for the first year" (after that, it would be an "established" operation). These same officials as recently as June 3, in meetings with agricultural stakeholders in Washington, have taken the position that farmers who started farming after 1977 without a Clean Water Act section 404 permit, in wetlands or ephemeral stormwater paths that the rule now defines as "waters of the U.S.," were not "established" and therefore *violated the Clean Water Act by farming without a permit.*

Want the truth? Under EPA's interpretation of the agricultural exemptions, many farmers will not qualify for an exemption and *will* face permitting requirements and potentially devastating enforcement liability as a result of this rule.

CWA Waters of U.S.

- **EPA "FACT": The rule "expands regulatory exclusions from the definition of 'waters of the United States' to make it clear that this rule does not add any additional permitting requirements on agriculture."**

The *Real* Facts:

The first part of this statement is "kinda" true, but the last part is false. The agencies *did* add a provision in the final rule that says, "Waters being used for established normal farming, ranching, and silviculture activities … are not adjacent." (This appears on page 199 of the pre-publication copy of the final rule.) But that does not mean that farmed lands won't become "waters of the U.S." Remember how narrowly the "normal" farming exemption has been interpreted (see above)? Only those lands are excluded—and only from regulation as "adjacent" waters. Any farmed lands will still be automatically regulated if they contain ephemeral drainage paths or ditches that meet the broad definition of a "tributary"10 (see photo above), or if they contain wetlands or other features found to be "waters of the U.S." under the agencies' expansive "significant nexus" test. For all the reasons described above, farmers with lands like these—and farmers with "adjacent" wetlands but who fall outside the "normal" farming exemption—*will* face additional permitting requirements (not to mention the threat of lawsuits) under the rule.

CWA Waters of U.S.

- **EPA "FACT": "The Clean Water Rule does not regulate most ditches."**

The *Real* Facts:

In reality, we have no idea how many ditches, or exactly which ditches, will be regulated under the rule. Neither do the agencies. And unfortunately, neither do the people, businesses and state and local governments whose lands include ditches. That's because under this rule, you can't tell a regulated ditch by looking and you can't tell an excluded ditch either. There is no getting getting around the fact that ditches are expressly defined as tributaries (Final Rule at 204), and the agencies state that "ditches are one important example of constructed features that *in many instances* can meet the definition of tributary" (Final Rule at 97).

The rule excludes: (1) ditches with ephemeral (after rainfall) flow that "are not a relocated tributary or excavated in a tributary" and (2) ditches with intermittent (e.g., seasonal) flow that "are not a relocated tributary, excavated in a tributary, or drain wetlands." (Final Rule at 201). So whether you have an excluded ditch or a "tributary" rests entirely on the broad and unknowable definition of "tributary" described above. If a landowner *cannot know* through on-the-ground observation which land features would, according to remote sensing and other desktop tools, be found to meet the definition of a "tributary" (or to have historically met the definition of "tributary"), how can he determine whether a ditch historically relocated a "tributary" or was excavated in a tributary? He can't. It is insufficient for only agency staff—and not the farmer, rancher, or other landowner—to be able to identify a regulated ditch, particularly where the landowner will face *strict liability* for any "discharge" of any amount of "pollutant" (including biological materials, weed control products, or dirt) into that ditch.