

definitions in the NWPR that build upon that foundation are contrary to law and science, including, but not limited to:

- The blanket exemption of “Waters or water features that are not identified in paragraph (1)(i), (ii), (iii), or (iv);”
- Ephemeral streams;
- “Ditches that are not waters identified in paragraph (1)(i) or (ii) of this definition, and those portions of ditches constructed in waters identified in paragraph (1)(iv) of this definition that do not satisfy the conditions of paragraph (3)(i) of this definition;”
- “Artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated **in upland or in non-jurisdictional waters**, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of paragraph (3)(vi) of this definition;”
- “Water-filled depressions constructed or excavated in **upland or in non-jurisdictional waters** incidental to mining or construction activity, and pits excavated in **upland or in non-jurisdictional waters** for the purpose of obtaining fill, sand, or gravel;”
- “Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, **constructed or excavated in upland or in non-jurisdictional waters**;”
- Waste treatment systems; and
- all of the definitions in the NWPR.¹⁸³

These exemptions and definitions encompass waters that have long been protected as jurisdictional “waters of the United States” under the CWA, and their removal from protections under the CWA is unlawful.¹⁸⁴ Additionally, as discussed extensively in the Waterkeeper CWR Comments and the

¹⁸³ Amended Complaint, *supra* fn. 21 at ¶¶ 185-269; Waterkeeper NWPR Comments, *supra* fn. 21 at 54-98.

¹⁸⁴ For example, because the agencies narrowly defined jurisdictional waters in the NWPR, and also defined “upland” in a manner that could include waters that have historically been protected as “waters of the United States,” the exclusions allow for mining and construction activity to take place in, discharge pollutants to, or destroy streams, rivers, lakes, wetlands and other waters contrary to the CWA. *Id.* at 79, 87-90, *see also* Corps Approved Jurisdictional Determination SAJ-2010-01702 (Dec. 7, 2020) (exempting multiple ditches by deeming them prior converted cropland whether the ditches are “connected to the now interconnected system of ditches that have successfully dewatered **much of the site** for agriculture. All ditches on site were excavated to drain wetlands that do not satisfy the conditions of (c)(1).”) (emphasis added) (Attachment 14).