



WASHINGTON COUNTY, ARKANSAS
County Courthouse

August 1, 2014

MEETING OF THE
WASHINGTON COUNTY QUORUM COURT
COUNTY SERVICES COMMITTEE

Monday, August 4, 2014
5:30 p.m.
Washington County Quorum Court Room

AGENDA

1. Call to Order.
2. Adoption of Agenda.
3. An Ordinance Amending Ordinance 2014-38 To Make The Effective Date Of Such January 31, 2016. This ordinance has been drafted by the County Attorney. (3.1-3.2)
4. Report from the Washington County Planning Office. In addition to the routine monthly report, Planning Director Juliet Richey will provide information concerning the FEMA Risk MAP program. (4.1-4.2)
5. Update from the Lester C. Howick Animal Shelter. (5.1-5.4)
6. Report from the Environmental Affairs Office. (6.1)
7. A Resolution Opposing A Proposed Rule Amending The Definition Of "Waters Of The U.S." Under The Clean Water Act. This resolution is being brought to the Committee by JP Rex Bailey. (7.1-7.5)
8. Next Month's Meeting Date. The next regular Committee meeting date falls on the Labor Day holiday. It has tentatively been scheduled for the following day, Tuesday, September 2.
9. Other Business.
10. Public Comment.
11. Adjournment.

ORDINANCE NO. 2014-_____

**BE IT ORDAINED BY THE QUORUM COURT
OF THE COUNTY OF WASHINGTON,
STATE OF ARKANSAS, AN ORDINANCE
TO BE ENTITLED:**

**AN ORDINANCE AMENDING ORDINANCE
2014-38 TO MAKE THE EFFECTIVE DATE
OF SUCH JANUARY 31, 2016.**

WHEREAS, Ordinance 2014-38 enacted on June 19, 2014,
amended Washington County Code 9-12 regarding the Washington County Library
Board; and,

WHEREAS, such needs to be amended so that it is
effective on January 31, 2016, so that the existing at large member can serve out her
term which ends on January 31, 2016, and so that the new Farmington representative
can be appointed on January 31, 2016, to a five-year term that will end on January 31,
as all other board members.

**NOW, THEREFORE, BE IT ORDAINED BY THE QUORUM
COURT OF WASHINGTON COUNTY, ARKANSAS:**

ARTICLE 1. Ordinance 2014-38, a copy of which is
attached hereto and incorporated herein, as if set out word for word shall be effective
January 31, 2016.

MARILYN EDWARDS, County Judge

DATE

BECKY LEWALLEN, County Clerk

Sponsor: _____

Date of Passage: _____

Votes For: _____ Votes Against: _____

Abstention: _____ Absent: _____

ORDINANCE NO. 2014-38

FILED
2014 JUN 23 AM 11:29
BECKY LEWALLEN
CLERK
CO. & PROBATE CLERK
WASHINGTON CO. ARK.

BE IT ORDAINED BY THE QUORUM COURT
OF THE COUNTY OF WASHINGTON,
STATE OF ARKANSAS, AN ORDINANCE
TO BE ENTITLED:

AN ORDINANCE AMENDING WASHINGTON
COUNTY CODE 9-12 PERTAINING TO THE
WASHINGTON COUNTY LIBRARY BOARD.

WHEREAS, in 2003 the Washington County Library Board was reorganized; and,

WHEREAS, in 2003 Washington County Code 9-12 did not provide for a specific seat for the City of Farmington; and,

WHEREAS, with the passage of time, the Farmington Library has expanded such that it should have a permanent seat on the Board.

NOW, THEREFORE, BE IT ORDAINED BY THE QUORUM COURT OF WASHINGTON COUNTY, ARKANSAS:

ARTICLE 1. Washington County Code Sec. 9-12 is hereby amended to read as follows:

Sec 9-12. Membership

(a) The new Washington County Library Board shall be composed of seven (7) qualified electors of the County to be appointed and confirmed in accordance with Ark. Code Ann., §14-14-705. The term of each member shall begin on January 1 of each year; provided further one (1) member shall represent the City of Springdale; one (1) member shall represent the City of Prairie Grove; one (1) member shall represent the City of Lincoln; one (1) member shall represent the City of West Fork; one (1) member shall represent the City of Elkins; and one (1) member shall represent the City of Farmington. The Mayors of the aforesated cities shall, in consultation with their respective library boards, certify nominees to the County Judge. One (1) members shall represent the remainder of the unincorporated areas of the County and cities not set out above. ~~These two (2) members~~ This one (1) member shall be submitted by the County Judge. All nominees are to be confirmed by the Quorum Court.

(b) The terms of each board member shall be five (5) years; however, the initial terms shall be staggered in accordance with Ark. Code Ann., §14-14-705.


MARILYN EDWARDS, County Judge

6-23-14
DATE


BECKY LEWALLEN, County Clerk

Sponsor: Tom Lundstrum
Date of Passage: June 19, 2014
Votes For: 13 Votes Against: 0
Abstention: 0 Absent: 2



water resources / environmental consultants

124 W. Sunbridge Drive, Suite 3 • Fayetteville, AR 72703 • (479) 571-3334 • FAX (479) 571-3336

July 25, 2014

jrichey@co.washington.ar.us

Ms. Juliet Richey
 Director of Planning, Washington County
 2615 Brinker Drive
 Fayetteville, AR 72701

Re: Illinois Watershed Discovery
 FTN No. P03015-0005-012

Dear Ms. Richey:

The Federal Emergency Management Agency (FEMA) is leading the Risk Mapping, Assessment, and Planning (MAP) program. The Risk MAP program provides communities with flood information and tools that can be used to enhance mitigation plans and better define flood risk in their communities to inform and protect citizens. Through more accurate flood maps, including digital Flood Insurance Rate Maps (FIRMs), risk assessment tools, and outreach support, Risk MAP strengthens local ability to make informed decisions about reducing risk. A Risk MAP Fact Sheet is enclosed for your review.

In 2011, FEMA Region 6 and the Arkansas Natural Resources Commission (ANRC) entered into a Cooperating Technical Partnership (CTP) for implementation of Risk MAP in the State of Arkansas. ANRC then selected a contractor, FTN Associates, Ltd. (FTN) to work with them in executing this program. As a part of the CTP Program, ANRC has identified the Illinois Watershed for the initial step in the Risk MAP process, which is known as Discovery. A watershed is selected for Discovery based on evaluations of risk, need, availability of elevation data, regional knowledge of issues, and input from the communities.

During this initial Discovery phase, ANRC and local entities work together to collect data regarding local flood risks. ANRC will work with FEMA to collect data on national and regional levels, but ANRC relies heavily on information and data provided by communities because local officials are able to provide a holistic view of their communities and their known risks. Discovery will allow communities within a watershed to come together to develop partnerships, share flood risk information with ANRC and identify opportunities for mitigation action within the community. The Illinois Watershed is known to have updated elevation/topographic data, as compared to some of the effective FIRMs, which can be used later during Risk MAP to produce products that would better reflect the flood risk in the communities of the Illinois Watershed.

The Discovery process is funded through a FEMA grant to ANRC that provides 75% of the cost. The additional 25% is being requested by ANRC from the communities in the Illinois Watershed. ANRC and FTN are contacting Illinois Watershed communities to identify cost sharing partners. This cost sharing approach provides leverage that allows the ANRC to acquire future federal funding to improve data gathering and flood hazard mapping in the Illinois Watershed. As part of this effort, we would appreciate

Corporate Office: 3 Innwood Circle, Suite 220 • Little Rock, AR 72211 • (501) 225-7779 • Fax (501) 225-6738
 Regional Offices: Fayetteville, AR; Baton Rouge, LA; Jackson, MS • www.ftn-assoc.com • ftn@ftn-assoc.com

Illinois Watershed Stakeholder
July 25, 2014
Page 2

the contribution of \$1,000 from your community to aid in performing the Discovery process for the Illinois Watershed. Any contribution committed will not be required until the spring of 2015, which is when the primary community coordination activities will be occurring. However, in order to secure this grant, ANRC must identify and confirm our partners and their contributions before August 8, 2014. ANRC or FTN will be contacting you within this next week to discuss your ability to participate in the important opportunity.

The partnership and exchange of data between FEMA, the ANRC and your community is vital to the success in identifying flood risks and needs that may impact local citizens. We note that funding on the local level is limited. However, a small amount of funding now could lead to large returns in the future. If you have any questions, please contact me or Mike Borengasser at the information shown below.

FTN Associates, Ltd.
Attn: MaryBeth Breed
124 West Sunbridge Drive, Suite 3
Fayetteville, AR 72703
(479) 571-3334
mbb@ftn-assoc.com

Arkansas Natural Resources Commission
Attn: Michael Borengasser
101 East Capitol, Suite 350
Little Rock, AR 72201
(501) 682-3969
michael.borengasser@arkansas.gov

We look forward to working with you to reduce the risks associated with flooding and increase your community's resiliency, long term.

Sincerely,
FTN ASSOCIATES, LTD.



MaryBeth Breed, CFM
Project Manager

MBB/FJM

Enclosure

cc: Michael Borengasser, ANRC

S:\PROPOSALS\03015-0005-012\DRAFT\ILLINOISWATERSHED\L-RICHEY 2014-07-25 ILLINOIS DISCOVERY.DOCX





FEMA



What is Risk MAP?

Risk Mapping, Assessment, and Planning (Risk MAP) is the Federal Emergency Management Agency (FEMA) Program that provides communities with flood information and tools they can use to enhance their mitigation plans and take action to better protect their citizens. Through more precise flood mapping products, risk assessment tools, and planning and outreach support, Risk MAP strengthens local ability to make informed decisions about reducing risk.

The Risk MAP Vision

Through collaboration with State, Tribal, and local entities, Risk MAP delivers quality data that increases public awareness and leads to action that reduces risk to life and property. Risk MAP focuses on products and services beyond the traditional Flood Insurance Rate Map (FIRM) and works with officials to help put flood risk data and assessment tools to use, effectively communicating risk to citizens and enabling communities to enhance their mitigation plans and actions.



Risk MAP Solution

Building on the Risk MAP Multi-Year Plan, FEMA has developed a Risk MAP Solution to achieve the Program’s vision. The Solution identifies new strategies and products designed to achieve the goals and objectives laid out in the vision. These strategies and products address project prioritization, elevation data acquisition, a watershed study approach, engineering and mapping, risk assessment, mitigation planning support, and risk communications. The following sections provide the overall objective of each of these strategies.

The Risk MAP Team

FEMA’s ten Regional Offices implement Risk MAP at the local level through close collaboration with community officials.

FEMA Headquarters provides direction, policy, and guidance to enable consistent implementation nationwide.

State, regional, Tribal, and local communities can use enhanced hazard data to make more informed decisions regarding risk.

FEMA’s Risk MAP Multi-Year Plan and FY12 Report to Congress

On March 16, 2009, Congress approved the Risk MAP Multi-Year Plan for fiscal years 2010 to 2014. The document outlines the goals, objectives, and strategies for Risk MAP and summarizes FEMA’s strategic planning approach and stakeholder roles and responsibilities. For more information please visit http://www.fema.gov/plan/prevent/fhm/rm_main.shtm#8.

FEMA’s Risk Mapping, Assessment, and Planning (Risk MAP) Fiscal Year 2012 Report to Congress, dated February 23, 2012, provides an update on FEMA’s strategic approach, program budget and measures, and implementation for Risk MAP. For more information about the report please visit <http://www.fema.gov/library/viewRecord.do?id=5924>.

Vision

Risk MAP will deliver quality data that increases public awareness and leads to action that reduces risk to life and property

Multi-Year Plan

Risk MAP Program Measures

Goal 1: Data Gaps Address gaps in flood hazard data	Goal 2: Awareness & Understanding Measurably increase public’s awareness & understanding	Goal 3: Mitigation Planning Lead effective engagement in Mitigation Planning	Goal 4: Digital Platform Provide an enhanced digital platform	Goal 5: Synergize Programs Align Risk Analysis programs and develop synergies
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RiskMAP
Increasing Resilience Together

Project Prioritization

Guides FEMA's investments in engineering, mapping, assessment, and planning support in order to achieve Risk MAP objectives

- Applies a quantitative approach to determine which communities FEMA will study

Elevation Data Acquisition

Improves engineering data and supports risk assessment data development

- Elevation data is essential to the accuracy and reliability of flood hazard data
- Updated digital elevation data enables better risk assessments
- Detailed, digital elevation data supports innovative risk communication products

Watershed Study Approach

Improves engineering credibility and opens the door to understanding risks in a more holistic, comprehensive way

- Encourages work across community boundaries and a more comprehensive understanding of flooding
- Allows for a better understanding of flood hazards as a result of more comprehensive assessments of stream and tributary relationships
- Provides a framework to evaluate flood risk, engineering need, elevation data acquisition availability and gaps, and availability of community contribution by watershed

Engineering and Mapping

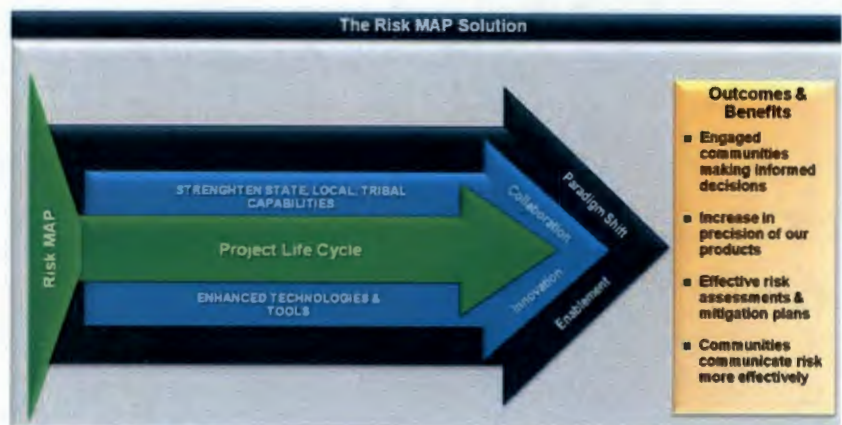
Identifies flood hazards, provides local floodplain management data, supports the National Flood Insurance Program (NFIP), and provides data for risk assessments and mitigation plans for flood hazards

- Includes the scientific collection, processing, and analysis of flood hazard data to provide communities with accurate flood maps and risk assessment products
- Engineering and mapping data provide the foundation for more effective risk communications through assessments and also enable effective mitigation at the local level
- Includes significant investments in the flood mapping of areas impacted by levees and coastal flood hazard

Risk Assessment

Allows communities to make informed mitigation decisions by providing products and technologies that communicate and visualize risks

- Equips communities with the information and tools they need to develop effective mitigation plans



- Provides communities with flood risk information through a Flood Risk Report, Flood Risk Map, and Flood RiskDatabase

Mitigation Planning Support

Provides technical assistance, incentivizes risk reduction activities at the local level, and develops the programmatic infrastructure to monitor community efforts

- Enables communities to assess risks and identify actions to reduce vulnerability to those risks
- Enhances collaboration with and among local stakeholders
- Provides tools to improve communities' understanding of risk and facilitate mitigation planning and local risk reduction efforts
- Incentivizes local effective mitigation planning and risk reduction activities

Risk Communications

Motivates citizens to make informed decisions regarding their risks and encourages communities to take the lead in protecting their constituents

- Enhances local capabilities to communicate effectively with constituents about risk
- Allows for an exchange of information about risk between FEMA and other stakeholders
- Provides customizable communications plans, key messages, and materials to communities
- Facilitates national and local collaboration through key partnerships

RiskMAP
Increasing Resilience Together

INTAKE REPORT
July 2014

	Cats	Dogs
Washington County		
Animal Control: Strays/Impound	37	89
Adoption Returns	1	2
Returned from Fostering	29	13
Return from Other	0	0
Owner Surrender	43	24
Contracted Cities		
Elkins	0	3
Elm Springs	0	2
Farmington	14	4
Goshen	0	0
Greenland	2	0
Johnson	0	0
Prairie Grove	0	0
Tontitown	0	1
West Fork	1	1
Winslow	0	0
July 2014 Intake	127	139
Jan-Jun 2014 Intake	393	579
Ending Census 2012	45	111
Intakes 2013	804	1223
TOTAL INTAKES	1369	2052

266

972

1238

DISPOSITION REPORT
July 2014

	Cats	Dogs
Adopted	29	40
Euthanized sick/injured/aggression	57	19
Euthanized for space	0	0
Fostered	25	17
Reclaimed	0	9
Transferred to rescue	16	7
Rescue Waggin' Program	0	35
Died on Shelter	0	0
Escaped		
July dispositions	127	127
Jan-Jun Dispositions	249	354
TOTAL DISPOSITIONS	376	481

254

CENSUS REPORT
July 2014

	Cats	Dogs
# Adoptable Animals	48	70
# Animals Being Evaluated	20	15
# Animals Temporarily Fostered	49	14
CENSUS July 31, 2014	117	99

216

SHELTER INCOME FROM CITY CONTRACTS

2012 INCOME	2013 INCOME		2014 INCOME											
			Jan	Feb	Mar	Apr	May	June	Jul	Aug	Sep	Oct	Nov	Dec
\$ 170.00	\$ 510.00	Elkins	\$ 170.00	\$ -	\$ -	\$ -	\$ -	\$ 170.00	\$ 85.00					
\$ -	\$ -	Elm Springs	\$ -	\$ -	\$ 425.00	\$ -	\$ -	\$ -	\$ -					
\$ 2,210.00	\$ 11,815.00	Farmington	\$ 1,870.00	\$ 595.00	\$ 595.00	\$ 765.00	\$ 1,105.00	\$ -	\$ 1,615.00					
\$ 170.00	\$ 1,530.00	Goshen	\$ 85.00	\$ -	\$ 255.00	\$ -	\$ -	\$ -	\$ 85.00					
\$ 170.00	\$ 850.00	Greenland	\$ 425.00	\$ -	\$ -	\$ -	\$ 510.00	\$ -	\$ -					
\$ 340.00	\$ 1,445.00	Johnson	\$ -	\$ 85.00	\$ 85.00	\$ 85.00	\$ -	\$ 170.00	\$ 255.00					
\$ 255.00	\$ 4,335.00	Prairie Grove	\$ 255.00	\$ -	\$ -	\$ 425.00	\$ 340.00	\$ -	\$ -					
\$ -	\$ 595.00	Tontitown	\$ -	\$ -	\$ -	\$ 170.00	\$ 85.00	\$ 340.00	\$ -					
\$ 855.00	\$ 5,950.00	West Fork	\$ 170.00	\$ 170.00	\$ -		\$ 595.00	\$ -	\$ 1,105.00					
\$ -	\$ 340.00	Winslow	\$ -	\$ 85.00	\$ -		\$ 85.00	\$ -	\$ -					
\$ 4,170.00	\$ 27,370.00	Total Deposits	\$ 2,975.00	\$ 935.00	\$ 1,360.00	\$ 1,445.00	\$ 2,720.00	\$ 680.00	\$ 3,145.00	\$ -	\$ -	\$ -	\$ -	\$ 13,260.00

2012 Contract Income	\$ 4,170.00
2013 Contract Income	\$ 27,370.00
2014 YTD	\$ 13,260.00
TOTAL CONTRACT INCOME	\$ 44,800.00

ADOPTION/RECLAIM FEES

2012		2013	2014
	JAN	\$ 3,900.00	\$ 4,705.00
	FEB	\$ 3,170.00	\$ 1,146.00
	MAR	\$ 6,270.00	\$ 906.00
	APR	\$ 2,152.00	\$ 1,733.00
	MAY	\$ 2,890.00	\$ 2,590.00
	JUN	\$ 2,387.00	\$ 757.00
	JUL	\$ 2,370.00	\$ 1,035.00
	AUG	\$ 2,070.00	
	SEP	\$ 2,680.00	
	OCT	\$ 2,075.00	
	NOV	\$ 3,600.00	
	DEC	\$ 1,779.50	
\$ 9,560.00	TOTAL	\$ 35,343.50	\$ 12,872.00

2014 FEE SCHEDULE
Adoption
Canine \$65.00 per animal
Feline \$45.00 per animal
Reclaim \$15.00 per day/per animal
City Contracts \$85.00 per animal

SPAY/NEUTER DEPOSITS

	2014
JAN	\$ 710.00
FEB	\$ 930.00
MAR	\$ 910.00
APR	\$ 810.00
MAY	\$ 340.00
JUNE	\$ 310.00
JULY	\$ 630.00
AUG	
SEPT	
OCT	
NOV	
DEC	
TOTAL	\$ 4,640.00

PETSMART CHARITIES REIMBURSEMENT

	2014
MAY	\$ 2,189.85
JUNE	\$ 595.65
JULY	\$ 1,429.56
AUG	
SEPT	
OCT	
NOV	
DEC	
TOTAL	\$ 4,215.06

SHELTER DONATIONS

2012 DONATIONS	MONETARY	PRODUCT	EST. VALUE
SEPT-DEC		Litter, food, clothes, cat beds, dog beds, food dishes, treats, canned food, poop bags, sponges, surgical gowns, surgical drapes, betadine, syringes	\$ 800.00
2012 DONATIONS			\$ 800.00

2013 DONATIONS	MONETARY	PRODUCT	EST. VALUE
JAN	\$ -	Toys, food, litter, scoops, etc	\$ 200.00
FEB	\$ -	Food	\$ 25.00
MAR	\$ 35.00	Food, toys, treats	\$ 130.00
APR	\$ 215.00	Food, treats, supplies	\$ 40.00
MAY	\$ 963.55	Treats, supplies, litter	\$ 138.00
JUN	\$ 348.20	Pools, towels, food, treats, bowls, shampoo	\$ 304.00
JUL	\$ 417.50	Pools, towels, food, treats, bowls, shampoo, Small Refrigerator (ALWC-\$125)	\$ 604.00
AUG	\$ 527.76	Food, supplies, toys, pools, office supplies & refreshments for the staff	\$ 573.00
SEP	\$ 635.00	Blankets, litter pans, scoops, bowls, toys, microchips, towels, pet taxi's	\$ 380.00
OCT	\$ 301.02	Treats, supplies, dog food, bedding, towels	\$ 205.00
NOV	\$ 791.00	Clinic equipment(ALWC \$16966.92)-K &K Vet Supply (\$4808.00)	\$ 22,069.92
DEC	\$ 190.00	Canned & dry food, toys, treats, bedding	\$ 214.00
2013 DONATIONS	\$ 4,424.03		\$ 24,882.92

2014 DONATIONS	MONETARY	PRODUCT	EST. VALUE
JAN	\$ 475.00	Leashes, dog food, toys, bowls, treats	\$ 100.00
FEB	\$ 270.00	Leashes, dog food, toys, bowls, treats	\$ 143.00
MAR	\$ 266.00	Clinic equipment, dog food, litter, toys	\$ 602.00
APR	\$ 258.00	Blankets, towels, food, shampoo	\$ 35.00
MAY	\$ 527.00	Scratching post, toys, food, towels (Atwood's \$1250.00 dog food) (Harp's \$497.00 food)	\$ 1,832.00
JUN	\$ 160.00	food, cotton balls, q-tips, rawhides, tarps, toys, baby wipes	\$ 310.00
JUL	\$ 277.00	Food	\$ 417.95
AUG			
SEP			
OCT			
NOV			
DEC			
2014 DONATIONS	\$ 2,233.00		\$ 3,439.95

NON-PAID VOLUNTEER/STAFF HOURS
July 2014

	P/T Volunteer	F/T Volunteer	Director	Office Mgr	Vet Tech	Vet Tech	Vet	Admin Asst	Kennel 1	Kennel 2	Kennel 3	PT		
Office Help	6.75													
Clinic Help	-													
Adoption Counseling	14.50													
Socialization	3.00													
Photography														
Cleaning/Bathing/Walking	3.00													
Miscellaneous														
Petfinder														
Outside Events	4.00													
Male Inmate 309	135.00													
Male Work Release	558.50													
Female Inmate	379.50													
8 hrs x 22 days=176 reg. hrs			176.00	176.00	176.00	-	176.00	176.00	184.00	192.00	120.00	96.00	1,472.00	Total - Employee Regular
Overtime Hours Worked			65.00	65.00	80.00	-	40.00	1.00	8.00	9.25		6.50	274.75	Total - Employee Overtime
Total Actual Hours Worked			241.00	241.00	256.00	-	216.00	177.00	192.00	201.25	120.00	102.50	1,746.75	Total - Employee Hours Worked
Volunteer Hours Worked	1,104.25												1,104.25	Total - Volunteer
													2,851.00	Total - All

WASHINGTON COUNTY ENVIRONMENTAL AFFAIRS AND RECYCLING

Services and Programs April - June 2014

SPECIAL EVENTS

- Spring Cleanup: collected **288 tons** at a cost of \$12,466
- Fall Cleanup: tentative dates October 29—November 1
- Assisted with cleanups at the following locations: East Fork of the White River, West Fork of the White River, and Lake Fayetteville

ENFORCEMENT CASES

- Burned Structure – 2
- Burning Trash – 2
- Illegal Dumps – 15
- Junkyard and Auto Graveyard- 1
- Roadside Dumps and Litter – 21
- Trashy House – 2
- No Violation – 2
- **Total Cases— 45**

SERVICES

Rural Recycling

Elkins: 6.4 tons
Lincoln: 5.1 tons

County Facilities Recycling: 4 tons

Household Hazardous Waste (HHW) Facility

- Electronics: 32 tons
- Scrap metal: 6.5 tons
- Motor oil: 1,200 gallons
- Medical sharps: 1,020 pounds
- HHW: 18,700 pounds
- Averaged 14 new customers/week
- Averaged 175 visits/week

EDUCATION

1,979 education contacts through classroom presentations, community events, public outreach, and conducting teacher professional development.



Lincoln third grade students participating in a recycling relay as a hands-on method of teaching about recycling.



ENFORCEMENT CASES BEFORE AND AFTER PICTURES



RESOLUTION NO. 2014-_____

**BE IT RESOLVED BY THE QUORUM COURT
OF THE COUNTY OF WASHINGTON,
STATE OF ARKANSAS, A RESOLUTION
TO BE ENTITLED:**

**A RESOLUTION OPPOSING A PROPOSED RULE
AMENDING THE DEFINITION OF “WATERS OF
THE U.S.” UNDER THE CLEAN WATER ACT.**

WHEREAS, on April 21, 2014, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jointly released a new proposed rule, *Definition of Waters of the U.S. Under the Clean Water Act*, that would amend the definition of “waters of the U.S.”; and,

WHEREAS, the proposed rule change could have significant impact on Washington County by expanding the range of waters falling under federal jurisdiction; and,

WHEREAS, the proposed rule would modify existing regulations, which have been in place for over 25 years, regarding which waters fall under federal jurisdiction through the Clean Water Act (CWA); and,

WHEREAS, the proposed rule would define some ditches as “waters of the U.S.” if they meet certain conditions; and,

WHEREAS, the proposed rule would broaden the geographic scope of CWA jurisdiction; and,

WHEREAS, the proposed rule could broaden the number of county maintained ditches—roadside, flood channels and potentially others—that would require CWA Section 404 federal permits; and,

WHEREAS, the proposed rule change could significantly impact Washington County by requiring additional permitting and extending the time period needed for infrastructure improvements; thereby, putting an additional burden on already tight budgets and possibly causing safety concerns to go unaddressed while awaiting federal approval.

**NOW, THEREFORE, BE IT RESOLVED BY THE QUORUM
COURT OF THE COUNTY OF WASHINGTON, STATE OF ARKANSAS:**

ARTICLE 1. That the Quorum Court hereby opposes the proposed rule change in its current form and asks the EPA and Corps to revisit this proposed rule change and more narrowly define waters of the U.S.

MARILYN EDWARDS, County Judge

DATE

BECKY LEWALLEN, County Clerk

Sponsor: _____ Rex Bailey

Date of Passage: _____

Votes For: _____ Votes Against: _____

Abstention: _____ Absent: _____

Proposed “Definition of ‘Waters of the United States’ Under the Clean Water Act”
40 CFR 230.3

(s) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (t) of this section, the term “waters of the United States” means:

- (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters, including interstate wetlands;
- (3) The territorial seas;
- (4) All impoundments of waters identified in paragraphs (s)(1) through (3) and (5) of this section;
- (5) All tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
- (6) All waters, including wetlands, adjacent to a water identified in paragraphs (s)(1) through (5) of this section; and
- (7) On a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands, located in the same region, have a significant nexus to a water identified in paragraphs (s)(1) through (3) of this section.

(t) The following are not “waters of the United States” notwithstanding whether they meet the terms of paragraphs (s)(1) through (7) of this section—

- (1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.
- (2) Prior converted cropland. Notwithstanding the determination of an area’s status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act the final authority regarding Clean Water Act jurisdiction remains with EPA.
- (3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.
- (4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section.
- (5) The following features:
 - (i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;
 - (ii) Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
 - (iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
 - (iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;
 - (v) Water-filled depressions created incidental to construction activity;
 - (vi) Groundwater, including groundwater drained through subsurface drainage systems; and
 - (vii) Gullies and rills and non-wetland swales.

(u) Definitions—

- (1) *Adjacent*. The term *adjacent* means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent waters.”
- (2) *Neighboring*. The term *neighboring*, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (s)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.

(3) *Riparian area*. The term *riparian area* means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.

(4) *Floodplain*. The term *floodplain* means an area bordering inland or coastal waters that was formed by sediment deposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows.

(5) *Tributary*. The term *tributary* means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (s)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (s)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches not excluded in paragraph (t)(3) or (4) of this section.

(6) *Wetlands*. The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(7) *Significant nexus*. The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (s)(1) through (3) of this section), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (s)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a “water of the United States” so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (s)(1) through (3) of this section.

The U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency propose to make identical changes as described in the preamble to the definition of “waters of the United States” at 33 CFR 328.3 and 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 232.2, 300.5, part 300 App. E, 302.3 and 401.11. Read the full proposed rule at <http://www.gpo.gov/fdsys/pkg/FR-2014-04-21/pdf/2014-07142.pdf>.

Renee Biby

From: George Butler
Sent: Tuesday, July 01, 2014 12:13 PM
To: Renee Biby
Subject: back up for resolution

Clean Water Act Definition of "Waters of the U.S."

The U.S. Environmental Protection Agency and U.S. Army Corps of Engineers jointly released a proposed rule to clarify protection under the Clean Water Act for streams and wetlands that form the foundation of the nation's water resources. Determining Clean Water Act protection for streams and wetlands became confusing and complex following Supreme Court decisions in 2001 and 2006. The proposed rule was published in the *Federal Register* on Monday, April 21, 2014. The public comment period will be open for 182 days and will close on Monday, October 20, 2014.

<http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>

Proposed EPA, Corps Rule Clarifies Federal Jurisdiction Over Waters, Wetlands

Wednesday, March 26, 2014

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By *Amena H. Saiyid*

March 25 --All natural and artificial tributaries and wetlands that are adjacent to or near larger downstream waters would be subject to federal Clean Water Act protections under a joint proposed rule announced by the Environmental Protection Agency and the U.S. Army Corps of Engineers March 25.

The proposal also would allow the EPA and corps to seek comment on a case-by-case basis on whether the aggregate effect of geographically isolated wetlands and other waters that "significantly" affect the physical, biological and chemical integrity of federally protected downstream waters are jurisdictional.

The agencies also included an interpretive rule, immediately effective, that clarifies that the 53 specific conservation practices identified by the Agriculture Department's Natural Resources Conservation Service to protect or improve water quality won't be subject to dredge-and-fill permits under Section 404 of the Clean Water Act.

The rulemaking is significant because it would seek to clarify the definition of which waters or wetlands are considered "waters of the U.S." under the Clean Water Act, and therefore within U.S. regulatory jurisdiction, triggering federal requirements, such as permitting, state water quality certification and oil spill response.

EPA Administrator Gina McCarthy signed off on the proposed rule March 25, and Jo-Ellen Darcy, assistant secretary of the Army for civil works, signed off on it March 24. Comments will be accepted on the proposed rule for 90 days following publication in the Federal Register.

According to McCarthy, the proposed rule will reduce the confusion and complexity about where the Clean Water Act applies following U.S. Supreme Court decisions in *Solid Waste Agency of N. Cook Cnty. (SWANCC) v. U.S. Army Corps of Eng'rs.*, 531 U.S. 159, 51 ERC 1833 (2001), and *Rapanos v. United States*, 547 U.S. 715, 62 ERC 1481 (2006).

“We are clarifying protection for the upstream waters that are absolutely vital to downstream communities,” McCarthy in a statement accompanying the proposed rule's release.

Darcy said, “Today's rulemaking will better protect our aquatic resources, by strengthening the consistency, predictability, and transparency of our jurisdictional determinations.”

The agencies said the proposed rule would not subject “any entities of any size to any specific regulatory burden.” Rather, it is designed to clarify the statutory scope of “the waters of the United States, including the territorial seas,” consistent with Supreme Court precedent.

Proposed Rule Would Address Loopholes

During a March 25 teleconference call, McCarthy pointed out that an Environmental Law Institute study showed that 36 states have legal limitations that prevent the agency from covering waters not covered by the Clean Water Act. She said this proposed rule would cover those regulatory loopholes.

Emphasizing the need to protect 60 percent of streams that flow “seasonally” and provide drinking water to 117 million people, McCarthy said, “From farming to manufacturing to recreation to energy production, you name it--these streams and wetlands protect the economy,” she said.

McCarthy said the proposed rule wouldn't cover groundwater, tile drainage, maintenance and construction of irrigation ditches, agricultural stormwater discharges, silvicultural activities that involve logging and construction of temporary roads.

The EPA and the U.S. Army Corps of Engineers jointly sent a draft rule to the White House Office of Management and Budget in September 2013 for interagency review. The rule proposed by the agencies doesn't differ drastically from the draft rule, which was leaked in November 2013.

New Definitions Proposed

More significantly, the proposed rule would revise the existing definition of “waters of the United States” that now include a new regulatory definition for tributaries. The EPA and the corps proposed that only those waters meeting the regulatory definitions would be subject to Clean Water Act protections.

The proposed rule, as in the draft rule, also would define the terms “significant nexus,” “neighboring” waters, floodplains, riparian areas and wetlands.

The proposed rule would expand the definition of a tributary of an interstate river, territorial seas and navigable waters. Right now, it is defined as having a bed, a channel and an ordinary high water mark.

Under the proposed rule, the definition would include tributaries that run through wetlands and bridges, culverts and dams without losing their characteristics. Tributaries would include lakes, streams, canals and ditches, excluding those ditches that don't contribute flow or have an ephemeral flow or are found in uplands.

In a change from the draft rule, the rule would define tributaries to impoundments of interstate waters, territorial seas or navigable waters to be jurisdictional.

Test Set by Supreme Court

The so-called significant nexus test was articulated by Supreme Court Justice Anthony Kennedy in *Rapanos v. United States*. The purpose of Kennedy's test was to identify which waters fell under the Clean Water Act jurisdiction based on a significant nexus between the water in question and downstream navigable waters and wetlands.

The agencies have asked the public to comment on how it should go about evaluating, on a case-by-case basis, "other waters" that include prairie potholes, playa lakes, mudflats and sandflats that "alone or in combination with similarly situated waters, including wetlands" have a significant nexus to traditional navigable waters, interstate waters or the territorial seas.

Environmental groups, including Earthjustice and the National Wildlife Federation, were mostly effusive in their praise for the proposed rule.

"By protecting the streams that feed into mighty rivers like the Mississippi and the wetlands that filter pollution from the Puget Sound and other iconic waters, this rule is a safety net for all the waterways Americans care about," Margie Alt, executive director of Environment America, said.

Peter Lehner, executive director for the Natural Resources Defense Council, cautioned against the rule's naysayers, urging the public to support the rule.

Chandler Goule, vice president for the National Farmers Union, was pleased that the rule clarified Clean Water Act jurisdiction, maintained existing agricultural exemptions and added new exemptions.

Farm Bureau Federation Displeased

Unlike Goule, Don Parrish, federal regulatory relations director for the American Farm Bureau Federation, maintained the group's opposition to the proposed rule, saying it would expand federal regulatory overreach over the nation's waters.

Parrish questioned the exemptions that the rule immediately grants for conservation practices, saying they already were exempt from permitting requirements under the Clean Water Act.

Patrick Parenteau, a Vermont Law School professor specializing in environmental issues, asked whether the EPA "couldn't have done more" in asserting jurisdiction over geographically isolated wetlands, such as prairie potholes in the Upper Midwest and Carolina Bays in the southeastern U.S. that play important roles in filtering pollutants and providing habitat for wildlife.

Overall, Parenteau said the proposed rule was an improvement over what existed before.

"The fact it is a rule, not simply a guidance, gives it additional formality," Parenteau said. "It has more the status of law now. I think it may undergo further changes during notice and comment. I would say EPA is moving in the right direction to clarify that something that is extraordinarily complicated, but it's an improvement."

Positive Economic Impacts Expected

In a teleconference call, both Chris Wood, president of Trout Unlimited, and Whit Fosburg, president and chief executive officer of the Theodore Roosevelt Conservation Partnership, highlighted the positive economic

impact of protecting headwaters that serve as habitat for fish and wildlife. Representing anglers, Wood said the direct economic benefit to the nation from protecting headwaters is estimated at \$87 billion each year.

Benjamin Grumbles, the president of the nonprofit U.S. Water Alliance, was more circumspect in his reading of the proposed rule, saying, "It's a respectable jump shot, but hardly a slam dunk."

Democratic lawmakers say the cost of inaction would be higher. Republican lawmakers remained opposed to the rulemaking (see related story).

Sen. David Vitter (R-La.), the ranking member on the Environment and Public Works Committee, led five Republican senators in circulating a letter March 5 urging a "no" vote on President Obama's nominee to serve as assistant administrator for water at the EPA, a bid to stop the agency from moving forward with the Clean Water Act jurisdiction rulemaking .

Comments identified by Docket ID No. EPA-HQ-OW-2011-0880 should be submitted to <http://www.regulations.gov>.

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Renee Biby

From: George Butler
Sent: Tuesday, July 01, 2014 1:07 PM
To: Renee Biby
Subject: epa rule -- more back up info

May 05, 2014 at 2:57 PM, updated May 05, 2014 at 2:58 PM

PASCAGOULA, Mississippi -- Jackson County supervisors decided today to speak out against a draft regulation that could affect the county's ability to maintain its waterways.

Supervisor John McKay first expressed concern about the document -- released by the Environmental Protection Agency and the Army Corps of Engineers last month -- that attempts to define the scope of waters protected under the Clean Water Act.

"Determining Clean Water Act protection for streams and wetlands became confusing and complex following Supreme Court decisions in 2001 and 2006," the EPA said in a news release. "For nearly a decade, members of Congress, state and local officials, industry, agriculture, environmental groups, and the public asked for a rulemaking to provide clarity."

In the draft regulation, "waters of the U.S." will include most seasonal and rain-dependent streams, wetlands near rivers and streams, and some roadside ditches.

Other types of waters that have more uncertain connections with downstream water will be evaluated through case-specific analyses, according to the EPA.

The proposed rules were published in the Federal Register on April 21, and the draft will be open for public comment until July 21.

Jackson County will draft a letter outlining its concerns to submit during that period, supervisors decided.

The county will also share that with the National Association of Counties and the state and federal delegation.

[Click here to read the full Federal Register publication.](#)

"Pretty soon, you'll have to have a permit to clean every ditch in the county," McKay said.

Road manager Joe O'Neal agreed.

"That's where it's headed," he said, noting the county has about 2,000 miles of road ditches.

NACO argues that local streets, gutters and human-made ditches should not be considered waters of the U.S.

The rule would broaden the number of county maintained ditches that would require CWA Section 404 federal permits, NACO says, and counties would be liable for maintaining the integrity of those ditches, even if federal permits are not approved by the federal agencies in a timely manner.

"Every time regulation comes down, it's more stressful on cities and counties," McKay said, calling the draft rule a "far-reaching overreach of the government."

The rule would "affect everyone," McKay said, and could jeopardize the county's ability to properly maintain its ditches, which could lead to more flooding issues.

"It's going to slow everything down," he said. "This is ridiculous."

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County Action Needed

New “Waters of the United States” Definition Released

Counties are strongly encouraged to submit written comments on potential impacts of the proposed regulation to the Federal Register

On April 21, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jointly released a new proposed rule – [Definition of Waters of the U.S. Under the Clean Water Act](#) – that would amend the definition of “waters of the U.S.” and expand the range of waters that fall under federal jurisdiction. The proposed rule, published in the Federal Register, is open for public comment for 181 days, until October 20, 2014.

The proposed rule uses U.S. Environmental Protection Agency’s (EPA) draft report on [Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence](#), which is currently undergoing review by EPA’s Science Advisory Board, as a scientific basis for the new definition. The report focuses on over 1,000 scientific reports that demonstrate the interconnectedness of tributaries, wetlands, and other waters to downstream waters and the impact these connections have on the biological, chemical and physical relationship to downstream waters.

Why “Waters of the U.S.” Regulation Matters to Counties

The proposed “waters of the U.S.” regulation from EPA and the Corps could have a significant impact on counties across the country, in the following ways:

- Seeks to define waters under federal jurisdiction:** The proposed rule would modify existing regulations, which have been in place for over 25 years, regarding which waters fall under federal jurisdiction through the Clean Water Act (CWA). The proposed modification aims to clarify issues raised in recent Supreme Court decisions that have created uncertainty over the scope of CWA jurisdiction and focuses on the interconnectivity of waters when determining which waters fall under federal jurisdiction. **Because the proposed rule could expand the scope of CWA jurisdiction, counties could feel a major impact as more waters become federally protected and subject to new rules or standards.**
- Potentially increases the number of county-owned ditches under federal jurisdiction:** The proposed rule would define some ditches as “waters of the U.S.” if they meet certain conditions. This means that more county-owned ditches would likely fall under federal oversight. In recent years, Section 404 permits have been required for ditch maintenance activities such as cleaning out vegetation and debris. **Once a ditch is under federal jurisdiction, the Section 404 permit process can be extremely cumbersome, time-consuming and expensive, leaving counties vulnerable to citizen suits if the federal permit process is not streamlined.**

- **Applies to all Clean Water Act programs, not just Section 404 program:** The proposed rule would apply not just to Section 404 permits, but also to other Clean Water Act programs. Among these programs—which would become subject to increasingly complex and costly federal regulatory requirements under the proposed rule—are the following:
 - **Section 402 National Pollution Discharge Elimination System (NPDES) program**, which includes municipal separate storm sewer systems (MS4s) and pesticide applications permits (EPA Program)
 - **Section 303 Water Quality Standards (WQS) program**, which is overseen by states and based on EPA’s “waters of the U.S.” designations
 - Other programs including **stormwater, green infrastructure, pesticide permits and total maximum daily load (TMDL) standards**

Background Information

The Clean Water Act (CWA) was enacted in 1972 to restore and maintain the chemical, physical and biological integrity of our nation’s waters and is used to oversee federal water quality programs for areas that have a “water of the U.S.” The term navigable “waters of the U.S.” was derived from the Rivers and Harbors Act of 1899 to identify waters that were involved in interstate commerce and were designated as federally protected waters. Since then, a number of court cases have further defined navigable “waters of the U.S.” to include waters that are not traditionally navigable.

More recently, in 2001 and 2006, Supreme Court cases have raised questions about which waters fall under federal jurisdiction, creating uncertainty both within the regulating agencies and the regulated community over the definition of “waters of the U.S.” In 2001, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (531 U.S.159, 2001), the Corps had used the “Migratory Bird Rule”—wherever a migratory bird could land—to claim federal jurisdiction over an isolated wetland. The Court ruled that the Corps exceeded their authority and infringed on states’ water and land rights.

In 2006, in *Rapanos v. United States*, (547 U.S. 715, 2006), the Corps were challenged over their intent to regulate isolated wetlands under the CWA Section 404 permit program. In a 4-1-4 split decision, the Court ruled that the Corps exceeded their authority to regulate these isolated wetlands. The plurality opinion states that only waters with a relatively permanent flow should be federally regulated. The concurrent opinion stated that waters should be jurisdictional if the water has a “significant nexus” with a navigable water, either alone or with other similarly situated sites. Since neither opinion was a majority opinion, it is unclear which opinion should be used in the field to assert jurisdiction, leading to further confusion over what waters are federally regulated under CWA.

The newly proposed rule attempts to resolve this confusion by broadening the geographic scope of CWA jurisdiction. The proposal states that “waters of the U.S” under federal jurisdiction include navigable waters, interstate waters, territorial waters, tributaries (ditches), wetlands, and “other waters.” It also redefines or includes new definitions for key terms—adjacency, riparian area, and flood plain—that could be used by EPA and the Corps to claim additional waters as jurisdictional.

States and local governments play an important role in CWA implementation. As the range of waters that are considered “waters of the U.S.” increase, states are required to expand their current water quality designations to protect those waters. This increases reporting and attainment standards at the state level. Counties, in the role of regulator, have their own watershed/stormwater management plans that would have to be modified based on the federal and state changes. Changes at the state level would impact comprehensive land use plans, floodplain regulations, building and/or special codes, watershed and stormwater plans.

Examples of Potential Impact on Counties

County-Owned Public Infrastructure Ditches

The proposed rule would broaden the number of county maintained ditches—roadside, flood channels and potentially others—that would require CWA Section 404 federal permits. Counties use public infrastructure ditches to funnel water away from low-lying roads, properties and businesses to prevent accidents and flooding incidences.

- The proposed rule states that man-made conveyances, including ditches, are considered jurisdictional tributaries if they have a bed, bank and ordinary high water mark (OHWM) and flow directly or indirectly into a “water of the U.S.,” regardless of perennial, intermittent or ephemeral flow.
- The proposed rule excludes certain types of upland ditches with less than perennial flow or those ditches that do not contribute flow to a “water of the U.S.” However, under the proposed rule, key terms like ‘uplands’ and ‘contribute flow’ are undefined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a “water of the U.S.”

Ultimately, a county is liable for maintaining the integrity of their ditches, even if federal permits are not approved by the federal agencies in a timely manner. For example, in 2002, in *Arreola v Monterey* (99 Cal. App. 4th 722), the Fourth District Court of Appeals held the County of Monterey (Calif.) liable for not maintaining a levee that failed due to overgrowth of vegetation, even though the County argued that the Corps permit process did not allow for timely approvals.

The National Association of Counties’ policy calls on the federal government to clarify that local streets, gutters, and human-made ditches are excluded from the definition of “waters of the U.S.”

Stormwater and Green Infrastructure

Since stormwater activities are not explicitly exempt under the proposed rule, concerns have been raised that Municipal Separate Storm Sewer System (MS4) ditches could now be classified as a “water of the U.S.” Some counties and cities own MS4 infrastructure including ditches, channels, pipes and gutters that flow into a “water of the U.S.” and are therefore regulated under the CWA Section 402 stormwater permit program.

This is a significant potential threat for counties that own MS4 infrastructure because they would be subject to additional water quality standards (including total maximum daily loads) if their stormwater ditches are considered a “water of the U.S.” Not only would the discharge leaving the system be regulated, but all flows entering the MS4 would be regulated as well. Even if the agencies do not initially plan to regulate an MS4 as a

“water of the U.S.,” they may be forced to do so through CWA citizen suits, unless MS4s are explicitly exempted from the requirements.

In addition, green infrastructure is not explicitly exempt under the proposed rule. A number of local governments are using green infrastructure as a stormwater management tool to lessen flooding and protect water quality by using vegetation, soils and natural processes. The proposed rule could inadvertently impact a number of these county maintained sites by requiring Section 404 permits for non-MS4 and MS4 green infrastructure construction projects. Additionally, it is unclear under the proposed rule whether a Section 404 permit will be required for maintenance activities on green infrastructure areas once the area is established. In stakeholder meetings, EPA has suggested local governments need to include in their comments whether an exemption is needed, and if so, under what circumstances, along with the reasoning behind the request.

Potential Impact on Other CWA Programs

It is unclear how the proposed definitional changes may impact the pesticide general permit program, which is used to control weeds and vegetation around ditches, water transfer, reuse and reclamation efforts and drinking and other water delivery systems. According to a joint document released by EPA and the Corps, [Economic Analysis of Proposed Revised Definition of Waters of the United States](#) (March 2014), the agencies have performed cost-benefit analysis across CWA programs, but acknowledge that “readers should be cautious in examining these results in light of the many data and methodological limitations, as well as the inherent assumptions in each component of the analysis.”

Submitting Written Comments

NACo has prepared draft comments for counties. Go to NACo’s “Waters of the U.S.” hub for more information, www.naco.org/wous.

Written comments to EPA and Corps are due no later than October 20, 2014. *If you submit comments, please share a copy with NACo’s Julie Ufner at jufner@naco.org or 202.942.4269.*

Submit your comments, identified by **Docket ID No. EPA-HQ-OW-2011-0880** by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments
- E-mail: ow-docket@epa.gov. Include EPA-HQ-OW-2011-0880 in the subject line of the message
- Mail: Send the original and three copies of your comments to: Water Docket, Environmental Protection Agency, Mail Code 2822T, 1200 Pennsylvania Avenue, NW, Washington, DC 20460, Attention: Docket ID No. EPA-HQ-OW-2011-0880.

For further information, contact: Julie Ufner at 202.942.4269 or jufner@naco.org

Definition of “Waters of the United States” Under the Clean Water Act Summary of Draft Regulation As Proposed by EPA and Corps

(Working draft subject to change, updated April 23)



Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
<p>“Waters of the U.S.”¹ Definition</p>	<p>40 CFR 230.3(s) The term “Waters of the United States” means:</p> <p>(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, all waters which are subject to the ebb and flow of the tide;</p>	<p>Define “Waters of the United States” for all sections (including sections 301, 311, 401, 402, 404) of the CWA to mean:</p> <p>(1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;</p>	<p>No change from current rules</p> <p>These waters are referred to as traditionally navigable waters of the U.S. For the purposes of CWA jurisdiction, waters are considered traditional navigable waters if:</p> <ul style="list-style-type: none"> • They are subject to section 9 or 10 of the 1899 Rivers and Harbors Appropriations Act • A federal court has determined the water body is navigable-in-fact under law • Waters currently used (or historically used) for commercial navigation, including commercial waterborne recreation (boat rentals, guided fishing trips, etc.)
	<p>(2) All interstate waters², including interstate “wetlands”;</p>	<p>(2) All interstate waters, including interstate wetlands;</p>	<p>No change from current rules</p> <p>Under the proposed rule, waters (lakes, streams, tributaries, etc.) would be considered “interstate waters” if they flow across state boundaries, even if they</p>

¹ There is only one Clean Water Act definition of “waters of the U.S.” This definition is used for all CWA programs (including sections 301, 311, 401, 402, and 404)

² All interstate waters are “waters of the U.S.”, even if they are non-navigable (under the current “waters of the U.S.” definition)

Definition of “Waters of the United States” Under the Clean Water Act Summary of Draft Regulation As Proposed by EPA and Corps

(Working draft subject to change, updated April 23)



Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
<p>“Waters of the U.S.” Definition (continued)</p>	<p>(3) All other waters such as interstate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:</p> <p>(i) Which are or could be used by interstate or foreign travelers for recreation or other purposes;</p> <p>(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or</p>	<p>(7) And on a case-specific basis, other waters, including wetlands, provided that those waters alone, or in combination with other similarly situated waters, including wetlands³, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial sea</p> <p>(i) through (iii) eliminated</p>	<p>are not considered “navigable” and do not connect to a “water of the U.S.”</p> <p>Under the proposed rule, “other waters” would not automatically be considered jurisdictional, instead, they would be assessed on a case-by-case basis, either alone or with other waters in the region to assess the biological, physical, chemical impacts to the closest jurisdictional waters</p> <p>Under the proposed rule, “other waters,” such as isolated wetlands, must meet the significant nexus test to be considered jurisdictional. <i>This is a major change over current practice.</i></p> <p>The agencies consider (i) through (iii) duplicative language</p>

³ The term wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of vegetation typical of wet soil conditions. The term generally includes swamps, marshes, bogs and other similar areas.

**Definition of “Waters of the United States” Under the Clean Water Act
Summary of Draft Regulation As Proposed by EPA and Corps**

(Working draft subject to change, updated April 23)



Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
<p>“Waters of the U.S.” Definition (continued)</p>	<p>(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;</p> <p>(4) All impoundments of waters otherwise defined as waters of the U.S. under this definition;</p> <p>(5) Tributaries of waters identified in paragraphs (a) through (d) of this definition;</p> <p>(6) The territorial seas; and</p>	<p>(4) All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;</p> <p>(5) All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;</p> <p>(3) The territorial seas;</p>	<p>No change from current rules – County owned dams and reservoirs are under federal jurisdiction</p> <p>Proposed rule more broadly defines the definition of tributary to include manmade and natural ditches</p> <p>Proposed rule would potentially increase the number of county-owned ditches under federal jurisdiction</p> <p>All manmade and natural ditches that meet the definition of a tributary would be considered a “water of the U.S.” regardless of perennial, intermittent or ephemeral flow – Refer to “Tributary” definition for further explanation</p> <p>No change from current rules</p> <p>Territorial seas are defined as <i>“the belt of the seas measured from the line of the ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and</i></p>

Definition of “Waters of the United States” Under the Clean Water Act

Summary of Draft Regulation As Proposed by EPA and Corps

(Working draft subject to change, updated April 23)



Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
<p>“Waters of the U.S.” Definition (continued)</p>	<p>(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.</p> <p>(8): Waters of the United States do not include prior converted cropland or waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling points as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the U.S.</p>	<p>(6) All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary;</p> <p>Waters excluded from the definition of “waters of the U.S.” include:</p>	<p><i>extending seaward a distance of three miles”</i></p> <p>Proposed rule would broaden what types of waters next to a “waters of the U.S.” are considered jurisdictional</p> <p>Under the proposed regulation, wetlands, lakes, ponds, etc. that are adjacent to “waters of the U.S.” would be jurisdictional if they can meet the significant nexus test – meaning the adjacent waters must show a significant connect to a “water of the U.S.”</p> <p>The proposed rule change would be relevant for non-jurisdictional county-owned ditches near a “water of the U.S.” that have a significant connection (hydrologic water connection is not necessary) to a “water of the U.S.”</p> <p>The proposed rule excludes certain type; of waters from being classified as a “water of the U.S.”</p> <p>The proposed rule codifies 1986 and 1981 guidance preamble language – meaning the proposed rule makes official a number of exemptions that have been in place since the 1980’s</p>

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<p>“Waters of the U.S.” Definition (continued)</p>		<ul style="list-style-type: none"> Waste treatment systems, including treatment points or lagoons, designed to meet CWA requirements Prior converted cropland Ditches that are excavated wholly in uplands, drain only in uplands, and have less than perennial flow Ditches that do not contribute to flow, either directly or indirectly to a “water of the U.S.” 	<p>Over the years, some exemptions, such as for waste treatment systems, have been challenged in the courts. The exemptions may be interpreted very narrowly</p> <p>Under the proposed rule, only those waste treatment systems, designed to meet CWA requirements, would be exempt. For waste treatment systems that were built to address non-CWA compliance issues, it is uncertain whether the system would also be exempt</p> <p>The proposed rule exempts a certain type of uplands ditch – there is little consensus on how this language would (or would not) impact roadside ditches. EPA and Corps need to answer whether ditches will be considered in parts or in whole</p> <p>Under the new rule, other ditches, not strictly in uplands, would be regulated or potentially those ditches adjacent to a “water of the U.S.”</p> <p>The proposed rule would exempt ditches that show they do not contribute to the flow of a “water of the U.S.”</p>

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<p>“Waters of the U.S.” Definition (continued)</p>		<p>Additionally, the following features are exempted (from the “waters of the U.S.” definition):</p> <ol style="list-style-type: none"> 1. Would exclude artificial areas that revert to uplands if application of irrigation water ceases; 2. Artificial lakes and ponds used solely for stock watering, irrigation, settling basins, rice growing; 3. Artificial reflecting pools or swimming pools created by excavating and/or diking in dry land 4. Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons; 5. Water-filled depressions created incidental to construction activity; 6. Groundwater, including groundwater drained through subsurface drainage systems; and 7. Gullies and rills and non-wetland swales⁴ 	<p>Question: Are there county maintained ditches that do not contribute to flow of a “water of the U.S.”?</p> <p>However, ditches can be a point source and regulated under the CWA Section 402 permit program</p> <p>Under the proposed rule, ditches that do contribute to the flow of a “water of the U.S.” regardless of perennial, intermittent or ephemeral flows, would be jurisdictional</p>

⁴ While non-jurisdictional geographic features such as non-wetland swales, ephemeral upland ditches may not be jurisdictional under the CWA section 404 permit program, the “point source” water discharges from these features may be regulated through other CWA programs, such as section 402

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<p>“Waters of the U.S.” Definition (continued)</p>			<p>Under the proposed rule, stormwater and green infrastructure are not explicitly exempt. Clarification is needed to ensure this type of infrastructure is not classified as a “water of the U.S.” through regional staff determinations or CWA citizen lawsuits</p> <p>If more waters are designated “waters of the U.S.,” those waters would then have to meet water quality standards (WQS), which are set by the state based on federally designated “waters of the U.S.” State standards for these waters must include a highest beneficial use based on scientific analysis—fishable, swimmable, water supply—these standards are often challenged in the courts. Under CWA statute, states must treat all “waters of the U.S.” equally, regardless of size or flow, when determining WQS</p> <p>In parts of California, stormwater channels are considered “waters of the U.S.” However, the designation is not currently enforced</p>

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Ditches (aka “Tributaries”)	<p>Tributaries are considered a “waters of the U.S.” under existing regulation.⁵</p> <p>Agencies have stated they <i>generally</i> would not assert jurisdiction over ditches (including roadside ditches) excavated wholly in and draining only in uplands and do not carry a relatively permanent flow of water.</p>	<p>Tributaries include, natural and manmade waters, including wetlands, rivers, streams, lakes, ponds, impoundments, canals and ditches if they:</p> <ul style="list-style-type: none"> • Have a bed, bank, and ordinary high water mark (OHWM)⁶ • Contribute to flow, either directly or indirectly, to a “water of the U.S.”⁷ <p>Would exclude ditches that are excavated wholly in uplands, drain only in uplands, and have less than perennial flow⁸</p>	<p>Proposed rule includes <i>for the first time</i> a regulatory definition of a tributary, which specifically defines ditches as jurisdictional tributaries unless exempted</p> <p>The proposed rule states that manmade and natural ditches are considered jurisdiction if they have a bed, bank and evidence of, and contribute to, flow, directly or indirectly, to a “water of the U.S.”</p> <p>Proposed rule would potentially increase the number of county-owned ditches under federal jurisdiction</p> <p>All manmade and natural ditches that meet the definition of a tributary would be considered a “water of the U.S.” regardless of perennial, intermittent or ephemeral flow</p> <p>Under the proposed rule, ditches are “exempt” if they are strictly uplands ditches with a less than a relatively permanent flow. There is uncertainty</p>

⁵ The term “tributary” is not defined under current regulations

⁶ Bed, bank and OHWM are features generally associated with flow. OHWM usually defines the lateral limits of the ditch by showing evidence of flow. The bed is the part of the ditch, below the OHWM, and the banks may be above the OHWM

⁷ The flow in the tributary may be ephemeral, intermittent or perennial, and the tributary must drain, or be a part of a network of tributaries that drain, into a “water of the U.S.”

⁸ Perennial flow means that water is present in a tributary year round when rainfall is normal or above normal

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<p>Ditches (aka “Tributaries”) (continued)</p>		<p>Would exclude ditches that do not contribute flow, either directly or through another water, to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water</p> <p>Jurisdictional ditches include, but are not limited to, natural streams that have been altered (i.e. channelized, straightened, relocated); ditches that have been excavated in “waters of the U.S.” including jurisdictional wetlands; ditches that have perennial flow; and ditches that connect two or more “waters of the U.S.”</p> <p>Tributaries that have been channelized in concrete or otherwise human altered, may also be jurisdictional if they meet the definitional conditions</p> <p>All tributaries in a watershed will be considered in combination to assess whether they have a significant nexus to a “water of the U.S.”</p>	<p>whether this designation would protect all roadside ditches in uplands since many ditches run through both uplands and wetlands through the length of the ditch</p> <p>Under the proposed rule, ditches that do not contribute to flow of a “waters of the U.S.” would be exempt. Since the majority of public infrastructure ditches are ultimately connected to a “water of the U.S.” it is uncertain how this would be documented</p> <p>EPA officials indicate the intent of the rule to regulate ditches that remain “wet” most of the year and have a mostly permanent flow –pooled or standing water is not jurisdictional.</p> <p>Question: if all perennial, intermittent and ephemeral ditches are jurisdictional, how can they be differentiated from exempt ditches?</p>

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<p>Ditches (aka “Tributaries”) (continued)</p>		<p>A water, that is considered a jurisdictional tributary, does not lose its status if there are manmade breaks – bridges, culverts, pipes, or dams – or natural breaks – wetlands, debris piles, boulder fields, streams underground –as long as there is a bed, bank, and OHWM identified upstream of the break. This is relevant for arid and semi-arid areas where banks of the tributary may disappear at times.</p>	<p>The proposed rule notes that manmade and natural breaks in ditches – pipes, bridges, culverts, wetlands, streams underground, dams, etc. – are not jurisdictional. However, the ditch considered a “water of the U.S.” above the break is also a jurisdictional water after the break</p> <p>The term uplands is not defined under the current or the proposed regulation.</p> <p>Question: how can the term uplands be defined to lessen impact on county operations?</p> <p>The proposed rule states that tributary connection may be traced by using direct observation or U.S. Geological Survey maps, aerial photography or other reliable remote sensing information, and other appropriated information in order to claim federal jurisdiction over the ditch</p> <p>Question: how can the agencies delineate how seasonal ditches will be regulated under the proposal?</p>

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<p>“Other Waters”</p>	<p>All other waters such as interstate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds that would impact interstate or foreign commerce</p>	<p>“Other waters” are jurisdictional if, “either alone or in combination with similarly situated “other waters” in the region⁹, they have a “significant nexus” to a traditional navigable water, interstate water, or the territorial seas.”</p> <p>“Other waters” would be evaluated either individually, or as a group of waters, where they are determined to be similarly situations in the region</p> <p>Waters would be considered “similarly situated” when they perform similar functions and are located sufficiently close together or when they are sufficiently close to a jurisdictional water</p>	<p>Under the proposed rule, “other waters” are not automatically considered jurisdictional, instead, they must be assessed on a case-by-case basis, either alone or with other waters in the region to assess the biological, physical, chemical impacts to the closest jurisdictional waters</p> <p>Under the proposed rule, “other waters” will be under federal jurisdiction if they have a significant connection to “waters of the U.S.”</p> <p>Question: In the proposed rule, how can agencies clearly distinguish between landscape features that are not waters or wetlands and those that are jurisdictional</p> <p>Question: The agencies request, in the proposed rule, comments on alternative methods to determine “other waters.” For example, should determinations be made on ecological or hydrologic landscape regions? If so, why and how? How would the various definitions impact counties?</p>

⁹ “In the region,” means the watershed that drains to the nearest traditional navigable water, interstate water, or the territorial seas through a single point of entry

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“Adjacent Waters”	<p>Under existing regulation for “adjacent wetlands,” only wetlands adjacent to a “water of the U.S.” are considered jurisdictional</p> <p>Adjacent means bordering, ordering, contiguous or neighboring</p>	<p>Adjacent waters are defined as wetlands, ponds, lakes and similar water bodies that provide similar functions which have a significant nexus to “waters of the U.S.”</p> <p>Waters, including wetlands, separated from other waters of the U.S. by man-made dikes or barriers, natural river berms, beach dunes, etc. are “adjacent waters” are jurisdictional</p>	<p>The proposed rule replaces the term “adjacent wetlands” with “adjacent waters” – this definition would include adjacent wetlands and ponds</p> <p>Under the proposed rule, adjacent waters to a “water of the U.S.” are those waters (and tributaries) that are highly dependent on each other, which must be shown through the significant nexus test</p> <p>The proposed rule uses other key terms in definition—riparian area and flood plains—to claim jurisdiction over adjacent water.</p>
“Significant Nexus”	n/a	<p>The term “significant nexus” means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e. the watershed that drains to the nearest “water of the U.S.”) and significant affect the chemical, physical or biological integrity of the water to which they drain</p> <p>For an effect to be significant, it must be more than speculative or insubstantial</p> <p>Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a “water of the U.S.” so they can be evaluated as a single landscape unit regarding their chemical, physical, or biological impact on a “water of the U.S.”¹⁰</p>	<p>Newly defined term – The proposed rule definition is based on Supreme Court Justice Kennedy’s “similarly situated waters” test. A significant nexus test can be based on a specific water or on a combination of nearby waters</p> <p>The proposed rule states waters would be considered jurisdictional, the waters either alone or in conjunction, with another water must perform similar functions such as sediment trapping, storing and cleansing of water, movement of organisms, or hydrologic connections.</p>

¹⁰ Note: The term “single landscape unit is not defined in the proposed regulation.

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<p>“Riparian Area”</p>	<p>n/a</p>	<p>The term riparian area means an area bordering a water where the surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area.</p> <p>Riparian areas are transition areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems¹¹</p> <p>No uplands located in “riparian areas” can ever be “waters of the United States.”</p>	<p>Newly defined term</p> <p>The proposed rule broadly defines “riparian area” to include aquatic, plant or animal life that depend on above or below ground waters to exist</p> <p>Under the proposed rule, a riparian area would not be jurisdiction in itself, however, it could be used as a mechanism to claim federal jurisdiction</p> <p>Under the proposed rule, there is no limiting scope to the size of a riparian area or a definition of the types of animal, plant and aquatic life that may trigger this definition</p> <p>The proposed rule states that no uplands in a riparian area can ever be “waters of the U.S.”</p>

¹¹ Note: Under the new term “riparian area,” terms used in the definition – area, ecological processes, plant and animal community structure, exchange of energy and materials are not defined.

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<p>“Flood Plain”</p>	<p>n/a</p>	<p>Flood plain, under this definition, means an area bordering inland or coastal waters that was formed by sediment preposition from such water under present climatic conditions and is inundated during periods of moderate to high water flows</p> <p>Absolutely no uplands located in riparian areas and flood plains can ever be “waters of the U.S.”</p> <p>There may be circumstances where a water located outside a flood plain or riparian area is considered adjacent if there is a confined surface or shallow subsurface hydrology connection</p> <p>Determination of jurisdiction using the terms “riparian area,” “flood plain,” and “hydrologic connection” will be based on best profession judgment and experience applied to the definitions proposed in this rule</p>	<p>Newly defined term</p> <p>The proposed rule uses the term “flood plain” to identify waters and wetlands that would be near (adjacent) to a “waters of the U.S.” in order to establish federal jurisdiction</p> <p>The proposed rule definition relies heavily on “moderate to high water flows” rather than the Federal Emergency Management Agency’s (FEMA) flood plain definitional terms such as 100 year or 500 year floodplains</p> <p>The proposed rule states waters near to a “water of the U.S.” could be jurisdiction without a significant nexus if they are in a flood plain or riparian area</p>

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<p>“Neighboring”</p>	<p>n/a</p>	<p>Neighboring is defined as:</p> <ul style="list-style-type: none"> • Including waters located within the riparian area or floodplain of a “water of the U.S.” or waters with a confined surface or shallow subsurface hydrological connection ¹² to a jurisdictional water; • Water must be geographically proximate to the adjacent water; • Waters outside the floodplain or riparian zone are jurisdictional if they are reasonably proximate 	<p>Under the proposed rule, neighboring is defined for the first time</p>

¹² While shallow subsurface flows are not considered a “water of the U.S.” under the proposal, they may provide the connection establishing jurisdiction