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 90 days, until July 21, 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 maxiumum 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 opposing 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 to 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 cautions is 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 is in the process of preparing suggested draft comments for counties. In the short term, because of the complexity of the proposed rule and the unexplored impacts on CWA programs, counties should ask for an extension of the 90 day comment period to 180 days.

Written comments to EPA and Corps are due no later than July 21, 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
"Waters of the U.S."[1] Definition	40 CFR 230.3(s) 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, all waters which are subject to the ebb and flow of the tide;	Define "Waters of the United States" for all sections (including sections 301, 311, 401, 402, 404) of the CWA to mean: (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;	**No change from current rules** 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: • 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.)
	(2) All interstate waters[2], including interstate "wetlands";	(2) All interstate waters, including interstate wetlands;	**No change from current rules** Under the proposed rule, waters (lakes, streams, tributaries, etc.) would be considered "interstate waters" if they flow across state boundaries, even if they

[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)

Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
			are not considered "navigable" and do not connect to a "water of the U.S."
"Waters of the U.S." Definition (continued)	(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:	(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 wetlands[3], located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial sea	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 Under the proposed rule, "other waters," such as isolated wetlands, must meet the significant nexus test to be considered jurisdictional. ***This is a major change over current practice.***
	(i) Which are or could be used by interstate or foreign travelers for recreation or other purposes; (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or	(i) through (iii) eliminated	The agencies consider (i) through (iii) duplicative language

[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

Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
"Waters of the U.S." Definition (continued)	(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;		
	(4) All impoundments of waters otherwise defined as waters of the U.S. under this definition;	(4) All impoundments of a traditional navigable water, interstate water, the territorial seas or a tributary;	**No change from current rules – County owned dams and reservoirs are under federal jurisdiction**
	(5) Tributaries of waters identified in paragraphs (a) through (d) of this definition;	(5) All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;	**Proposed rule more broadly defines the definition of tributary to include manmade and natural ditches** **Proposed rule would potentially increase the number of county-owned ditches under federal jurisdiction** 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*
	(6) The territorial seas; and	(3) The territorial seas;	**No change from current rules** Territorial seas are defined as *"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*

Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
			extending seaward a distance of three miles"
"Waters of the U.S." Definition (continued)	(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.	(6) All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary;	**Proposed rule would broaden what types of waters next to a "waters of the U.S." are considered jurisdictional** 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." **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."**
	(8): Waters of the United States do no not included 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.	Waters excluded from the definition of "waters of the U.S." include:	**The proposed rule excludes certain types of waters from being classified as a "water of the U.S."** The proposed rule codifies 1986 and 1988 guidance preamble language – meaning the proposed rule makes official a number of exemptions that have been in place since the 1980's

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
"Waters of the U.S." Definition (continued)			**Over the years, some exemptions, such as for waste treatment systems, have been challenged in the courts. The exemptions may be interpreted very narrowly**
		• Waste treatment systems, including treatment points or lagoons, **designed to meet CWA requirements**	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
		• Prior converted cropland	
		• Ditches that are excavated wholly in uplands, drain only in uplands, and have less than perennial flow	**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** 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."
		• Ditches that do not contribute to flow, either directly or indirectly to a "water of the U.S.	**The proposed rule would exempt ditches that show they do not contribute to the flow of a "water of the U.S."**

Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
"Waters of the U.S." Definition (continued)		Additionally, the following features are exempted (from the "waters of the U.S." definition): 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 swales[4]	**Question: Are there county maintained ditches that do not contribute to flow of a "water of the U.S."?** **However, ditches can be a point source and regulated under the CWA Section 402 permit program** **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**

[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

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
"Waters of the U.S." Definition (continued)			**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** 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 In parts of California, stormwater channels are considered "waters of the U.S." However, the designation is not currently enforced

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
Ditches (aka "Tributaries")	Tributaries are considered a "waters of the U.S." under existing regulation.[5] Agencies have stated they *generally* 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.	Tributaries include, natural and manmade waters, including wetlands, rivers, streams, lakes, ponds, impoundments, canals and ditches if they: • 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] Would excludes ditches that are excavated wholly in uplands, drain only in uplands, and have less than perennial flow[8]	Proposed rule includes *for the first time* a regulatory definition of a tributary, which specifically defines **ditches** as jurisdictional tributaries unless exempted 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." **Proposed rule would potentially increase the number of county-owned ditches under federal jurisdiction** 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 Under the proposed rule, ditches are "exempt" if they are strictly uplands ditches with a less than a relatively permanent flow. There is uncertainty

[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

Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
Ditches (aka "Tributaries") (continued)			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
		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	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
		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."	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. Question: if all perennial, intermittent and ephemeral ditches are jurisdictional, how can they be differentiated from exempt ditches?
		Tributaries that have been channelized in concrete or otherwise human altered, may also be jurisdictional if they meet the definitional conditions	
		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."	

Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
Ditches (aka "Tributaries") (continued)		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.	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 The term uplands is not defined under the current or the proposed regulation. Question: how can the term uplands be defined to lessen impact on county operations? 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 Question: how can the agencies delineate how seasonal ditches will be regulated under the proposal?

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
"Other Waters"	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	"Other waters" are jurisdictional if, "either alone or in combination with similarly situated "other waters" in the region[9], they have a "significant nexus" to a traditional navigable water, interstate water, or the territorial seas." "Other waters" would be evaluated either individually, or as a group of waters, where they are determined to be similarly situations in the region 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	**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** Under the proposed rule, "other waters" will be under federal jurisdiction if they have a significant connection to "waters of the U.S." Question: In the proposed rule, how can agencies clearly distinguish between landscape features that are not waters or wetlands and those that are jurisdictional 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?

[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

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
"Adjacent Waters"	Under existing regulation for "adjacent wetlands," only wetlands adjacent to a "water of the U.S." are considered jurisdictional Adjacent means bordering, ordering, contiguous or neighboring	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." 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	**The proposed rule replaces the term "adjacent wetlands" with "adjacent waters"** – this definition would include adjacent wetlands and ponds **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** The proposed rule uses other key terms in definition–riparian area and flood plains–to claim jurisdiction over adjacent waters
"Significant Nexus"	n/a	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 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 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]	**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 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.

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

Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
"Riparian Area"	n/a	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. Riparian areas are transition areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems[11] No uplands located in "riparian areas" can ever be "waters of the United States."	**Newly defined term** **The proposed rule broadly defines "riparian area" to include aquatic, plant or animal life that depend on above or below ground waters to exist** 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 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 The proposed rule states that no uplands in a riparian area can ever be "waters of the U.S."

[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.

Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
"Flood Plain"	n/a	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 **Absolutely no uplands located in riparian areas and flood plains can ever be "waters of the U.S."** 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 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	**Newly defined term** 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 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 **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**

Key Terms	Current EPA/Corps Regulations	Proposed Regulatory Language	Analysis of Potential County Impact
"Neighboring"	n/a	Neighboring is defined as: • 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	Under the proposed rule, neighboring is defined for the first time

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