

RESOLUTION NO. 2014- 204

**A RESOLUTION BY THE BOARD OF COUNTY COMMISSIONERS OF ST. JOHNS COUNTY, FLORIDA, AUTHORIZING THE COUNTY CHAIR TO SEND A LETTER TO THE ENVIRONMENTAL PROTECTION AGENCY AND THE U.S. ARMY CORPS OF ENGINEERS ON BEHALF OF THE COUNTY REQUESTING THAT THE RULE AMENDMENT TO THE CODE OF FEDERAL REGULATIONS, PART 328, DEFINITION OF WATERS OF THE UNITED STATES, BE POSTPONED UNTIL CONCERNS RAISED BY STATE AND LOCAL GOVERNMENT STAKEHOLDERS ARE ADDRESSED; AND PROVIDING AN EFFECTIVE DATE**

**WHEREAS**, on April 21, 2014, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jointly released a proposed rule amendment to the definition of “waters of the U.S.” under the Clean Water Act (CWA); and

**WHEREAS**, key terms used by the “waters of the U.S.” definition including, tributary, adjacent waters, riparian areas, flood plains, uplands and the exemptions listed, are inadequately explained; and

**WHEREAS**, the proposed rule could have a significant impact on counties by potentially increasing the number of county-owned ditches that fall under federal jurisdiction; and,

**WHEREAS**, the proposed rule states that man-made conveyances, including ditches, may be considered jurisdictional tributaries; and

**WHEREAS**, it is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a “water of the U.S.”; and,

**WHEREAS**, stormwater management activities are not explicitly exempt under the proposed rule, so it appears that man-made conveyances and facilities for stormwater management could now be classified as a “water of the U.S.”; and,

**WHEREAS**, the county maintains Municipal Separate Storm Sewer System (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; and

**WHEREAS**, there is a significant potential threat for counties that own MS4 infrastructure because they may be subject to additional water quality standards (including total maximum daily loads) if their stormwater ditches are considered a “water of the U.S.”; and,

**WHEREAS**, the County’s stormwater management is funded by the County’s general fund therefore if stormwater costs significantly increase due to the proposed rule, not only will it potentially impact the County’s ability to focus available resources on real, priority water quality

issues, but it may also require that funds be diverted from other government services including but not limited to education, police, fire; and

**WHEREAS**, several pieces of federal legislation have been proposed in opposition to the proposed rule, including HB 5078, HB 5034, and a Committee on Appropriations Fiscal Year 2015 Interior and Environment Appropriations Bill rider prohibiting the EPA and Corps from proceeding with the proposed rule.

**NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF ST. JOHNS COUNTY, FLORIDA, AS FOLLOWS:**

**Section 1.** The above recitals are hereby incorporated into the body of this Resolution, and are adopted as Findings of Fact.

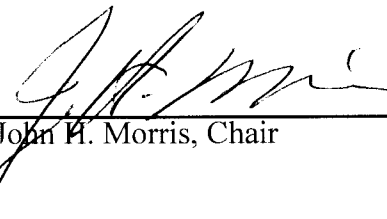
**Section 2.** The Board of County Commissioners authorizes the County Chair to send a letter to the St. Johns County Federal Congressional representatives, the Environmental Protection Agency, and the U.S. Army Corps of Engineers on behalf of the County requesting their support for the proposed federal legislation in opposition to the proposed rule and that the rule amendment to the Code of Federal Regulations, Part 328, Definition of Waters of the United States, be postponed until concerns raised by state and local government stakeholders are addressed.

**Section 3.** To the extent that there are typographical or administrative errors that do not change the tenor, or concept of this Resolution, then this Resolution may be revised without subsequent approval of the Board of County Commissioners.

**Section 4.** This Resolution shall become effective immediately upon its adoption.

PASSED AND ADOPTED by the Board of County Commissioners of St. Johns County, Florida, this 5<sup>th</sup> day of August, 2014.

BOARD OF COUNTY COMMISSIONERS  
OF ST. JOHNS COUNTY, FLORIDA

By:   
John H. Morris, Chair

ATTEST: Cheryl Strickland, Clerk of Court

By:   
Deputy Clerk

Effective Date: 8/5/17

RENDITION DATE 8/7/14



August 6, 2014

Donna Downing  
Jurisdiction Team Leader, Wetlands Division  
U.S. Environmental Protection Agency  
Water Docket, Room 2822T  
1200 Pennsylvania Avenue N.W.  
Washington, D.C. 20460

Stacey Jensen  
Regulatory Community of Practice  
U.S. Army Corps of Engineers  
441 G Street N.W.  
Washington, DC 20314

RE: Proposed Rule on "Definition of "Waters of the United States Under the Clean Water Act," Docket No. EPA-HQ-OW-2011-0880

Dear Ms. Downing and Ms. Jensen:

Please accept this letter addressing the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) proposed rule regarding *Definition of Waters of the U.S. Under the Clean Water Act*, Docket No. EPA-HQ-OW-2011-0880. We appreciate that EPA and the Corps are moving forward with a proposed rule, rather than a guidance document, as originally proposed however the currently proposed rule appears to expand existing regulations which potentially will create a financial burden on the County. St Johns County has the following concerns:

- The draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, is currently under peer review and it is our understanding that the document will be used as a scientific basis for the proposed rule. Releasing the proposed rule before the connectivity report is finalized is premature and the agencies may have missed a valuable opportunity to review comments or concerns raised in the final report that would be useful in development of the proposed rule.
- Key terms used by the "waters of the U.S." definition including, tributary, adjacent waters, riparian areas, flood plains, uplands and the exemptions listed, are inadequately explained.
- Counties own and operate a number of public infrastructure ditches such as roadside swales, flood control channels, drainage conveyances and stormwater and these ditches are used to safely funnel water away from homes, properties and roads to keep our citizens protected. The proposed rule could have a significant impact on counties by potentially increasing the number of county-owned ditches that fall under federal jurisdiction.
- The agencies state that the purpose of the rule is to provide clarity in the jurisdictional process. However, the definition is unclear. 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 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, key terms like "uplands" and "contribute flow" are not defined. It is unclear how currently exempt ditches will be distinguished from jurisdictional ditches, especially if they are near a "water of the U.S."

Ms. Downing and Ms. Jensen  
August 6, 2014  
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- Stormwater management activities are not explicitly exempt under the proposed rule, so it appears that man-made conveyances and facilities for stormwater management could now be classified as a “water of the U.S.” Some counties and cities own Municipal Separate Storm Sewer System (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. There 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 St. Johns County the stormwater management is funded by the county general fund. If stormwater costs significantly increase due to the proposed rule, not only will it potentially impact our ability to focus available resources on real, priority water quality issues, but it may also require that funds be diverted from other government services such as education, police, fire, etc.

Contrary to the agencies assertions, the proposed rule does not provide certainty for St. Johns County therefore we request that the rule be postponed until these concerns are addressed and re-release a revised rule based on the concerns raised by state and local government stakeholders. Thank you for considering these important issues.

Sincerely,

John H. Morris, Chair  
St. Johns County Commission

JM/jb

Cc: St. Johns County Board of County Commissioners  
Michael D. Wanchick, County Administrator

**Comparison of the existing text in the Code of Federal Regulations  
Part 328, Definition of Waters of the United States, to the proposed revision  
April 25, 2014**

<b>Current §328.3 Definitions.</b>	<b>Proposed § 328.3 Definitions.</b>
<p>For the purpose of this regulation these terms are defined as follows:</p> <p>(a) The term <i>waters of the United States</i> means</p>	<p>(a) For purposes of all sections of the Clean Water Act, 33 U.S.C. 1251 <i>et. seq.</i> and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term "waters of the United States" means:</p>
<p>(1) All waters which are currently used, or 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>(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>(2) All interstate waters including interstate wetlands;</p>	<p>(2) All interstate waters, including interstate wetlands;</p>
<p>(3) All other waters such as intrastate 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 could affect interstate or foreign commerce including any such waters:</p> <ul style="list-style-type: none"> <li>(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or</li> <li>(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or</li> <li>(iii) Which are used or could be used for industrial purpose by industries interstate commerce;</li> </ul> <p><i>This text has been deleted.</i></p>	<p>(3) The territorial seas;</p> <p><i>Territorial seas definition moved into this location from old #6.</i></p>
<p>(4) All impoundments of waters otherwise defined as waters of the United States under the definition;</p>	<p>(4) All impoundments of waters identified in paragraphs (a)(1) through (3) and (5) of this section;</p>
<p>(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;</p>	<p>(5) All tributaries of waters identified in paragraphs (a)(1) through (4) of this section; adjacent to a water identified in paragraphs (a)(1) through (5) of this section;</p>

<p>(6) The territorial seas; <i>Now new definition #3</i></p>	<p>(6) All waters, including wetlands, adjacent to a water identified in paragraphs (a)(1) through (5) of this section; and <i>This text has been revised from old #7</i></p>
<p>(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section. <i>This text has been revised and is now new #6</i></p>	<p>(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 (a)(1) through (3) of this section. <i>This is a new definition.</i></p>
<p>(8) Waters of the United States do not include 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.</p> <p>Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.</p> <p><i>In the new text there is no longer an item #8. The proposed text now has #8 becoming the new Section (b). The old Sections (b) through (f) will become the new section (c) as seen below.</i></p>	<p>(b) The following are not "waters of the United States" notwithstanding whether they meet the terms of paragraphs (a)(1) through (7) of this section—</p> <ol style="list-style-type: none"> <li>(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.</li> <li>(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.</li> <li>(3) Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow.</li> <li>(4) Ditches that do not contribute flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section.</li> <li>(5) The following features: <ol style="list-style-type: none"> <li>(i) Artificially irrigated areas that would revert to upland should application of irrigation water to that area cease;</li> <li>(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;</li> <li>(iii) Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;</li> <li>(iv) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;</li> <li>(v) Water-filled depressions created incidental to construction activity;</li> <li>(vi) Groundwater, including groundwater drained through subsurface drainage systems; and</li> <li>(vii) Gullies and rills and non-wetland swales.</li> </ol> </li> </ol> <p><i>This is an expanded definition of old #8.</i></p>

<p>(b) The term <i>wetlands</i> means those areas that are inundated or saturated by surface or ground water 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.</p> <p><i>Now definition (c)(6)</i></p>	<p>(c) Definitions—</p> <p>(1) <i>Adjacent</i>. The term <i>adjacent</i> 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.”</p> <p><i>This text has been revised from old (c)</i></p>
<p>(c) The term <i>adjacent</i> means bordering, contiguous, or neighboring. 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 wetlands.”</p> <p><i>Now definition (c)(1)</i></p>	<p>(c) Definitions—</p> <p>(2) <i>Neighboring</i>. The term <i>neighboring</i>, for purposes of the term “adjacent” in this section, includes waters located within the riparian area or floodplain of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.</p> <p><i>This is a new definition</i></p>
<p>(d) The term <i>high tide line</i> means the line of intersection of the land with the water’s surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.</p> <p><i>This text has been deleted.</i></p>	<p>(c) Definitions—</p> <p>(3) <i>Riparian area</i>. The term <i>riparian area</i> 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.</p> <p><i>This is a new definition</i></p>
<p>(e) The term <i>ordinary high water mark</i> means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.</p> <p><i>This text has been deleted.</i></p>	<p>(c) Definitions—</p> <p>(4) <i>Floodplain</i>. The term <i>floodplain</i> 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.</p> <p><i>This is a new definition</i></p>

<p>(f) The term <i>tidal waters</i> means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.</p> <p><i>This text has been deleted.</i></p>	<p>(c) Definitions—</p> <p>(5) <i>Tributary</i>. The term <i>tributary</i> 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 (a)(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 (a)(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 (b)(3) or (4) of this section.</p> <p><i>This is a new definition</i></p>
	<p>(c) Definitions—</p> <p>(6) <i>Wetlands</i>. The term <i>wetlands</i> 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.</p> <p><i>This text was old (b)</i></p>



## St. Johns County Board of County Commissioners

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August 8, 2014

Donna Downing  
Jurisdiction Team Leader, Wetlands Division  
U.S. Environmental Protection Agency  
Water Docket, Room 2822T  
1200 Pennsylvania Avenue N.W.  
Washington, D.C. 20460

Stacey Jensen  
Regulatory Community of Practice  
U.S. Army Corps of Engineers  
441 G Street N.W.  
Washington, D.C. 20314

Re: Proposed Rule on Definition of "Waters of the United States" Under the Clean Water Act (CWA), Docket No. EPA-HQ-OW-2011-0880

Dear Ms. Downing and Ms. Jensen:

Please accept this letter addressing the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (ACOE) proposed rule regarding *Definition of Waters of the U.S. Under the Clean Water Act* (CWA), Docket No. EPA-HQ-OW-2011-0880. We appreciate that EPA and ACOE are moving forward with a proposed rule, rather than a guidance document, as originally proposed, however the currently proposed rule appears to expand existing regulations which will potentially create a tremendous financial burden on St. Johns County.

Contrary to the agencies' assertions, the proposed rule does not provide certainty for St. Johns County, therefore we request that the rule be postponed until these concerns are addressed and re-release of a revised rule based on the concerns raised by state and local government stakeholders.

St. Johns County has the following specific concerns:

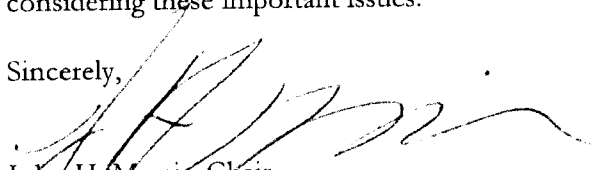
- The draft science report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, is currently under peer review, and it is our understanding that the document will be used as a scientific basis for the proposed rule. Releasing the proposed rule before the connectivity report is finalized is premature and the agencies may have missed a valuable opportunity to review comments or concerns raised in the final report that would be useful in development of the proposed rule.

Ms. Downing and Ms. Jensen  
August 8, 2014  
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- Key terms used by the “waters of the U.S.” definition including, tributary, adjacent waters, riparian areas, flood plains, uplands and the exemptions listed are inadequately explained.
- Counties own and operate a number of public infrastructure ditches such as roadside swales, flood control channels, drainage conveyances and stormwater, and these ditches are used to safely funnel water away from homes, properties and roads to keep our citizens protected. The proposed rule could have a significant impact on counties by potentially increasing the number of county owned ditches that fall under federal jurisdiction.
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Again, we request that the rule be postponed until these concerns are addressed. Thank you for considering these important issues.

Sincerely,



John H. Morris, Chair  
St. Johns County Commission

JHM/ld

cc: Chair and Honorable Board of County Commissioners