

# 2015 POLICY BRIEF



## FINAL "WATERS OF THE U.S." RULE

**ACTION NEEDED:** Urge your Senators to support the Federal Water Quality Protection Act (S. 1140) and other legislative vehicles to restart the "waters of the U.S." rule-making process.

**BACKGROUND:** On June 29, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) published their Definition of Waters of the U.S. Under the Clean Water Act (renamed the Clean Water Rule) in the *Federal Register*. It will become effective 60 days after publication on August 28.

Since its proposal last year, NACo has expressed multiple concerns on the rule's impact on county-owned and maintained roadside ditches, bridges, flood control channels, drainage conveyances and wastewater and stormwater systems.

As co-regulators under provisions of the Clean Water Act, counties are not just another stakeholder in this discussion. Despite having provided detailed feedback and congressional testimony on multiple occasions on the potential impact of the proposed rule on counties, and despite repeated attempts to have a meaningful consultation process with the federal agencies, many issues remain unresolved.

### DESPITE ASSURANCES FROM THE AGENCIES THAT DITCHES ARE EXEMPT, ACTUAL LANGUAGE REMAINS UNCLEAR

While the final rule attempts to exempt certain ditches, many county owned ditches may still fall under federal authority.

#### According to the final rule, several types of ditches are now exempt:

- Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary
- Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands
- Ditches that do not flow, either directly or through another water, into traditional navigable and interstate waters, and territorial seas.

While this may seem to address county concerns about roadside and other types of ditches, a closer reading reveals greater ambiguity than clarification.

#### Under the final rule, the following types of ditches are jurisdictional:

- Roadside and other ditches that have flow year-round (perennial flow)
- Roadside and other ditches with intermittent flow (not continuous, irregular) that are a relocated tributary, or are excavated in a tributary, or drain wetlands
- Ditches, regardless of flow, that are excavated in or relocate a tributary

The final rule also newly defines the term "tributary," and in doing so states that "a tributary can be a natural, man-altered or man-made water and includes waters such as rivers, streams, canals, and ditches."

### QUICK FACTS

- Even non-federal waters are protected by state and local regulations — sometimes even more strictly than federal rules. As co-regulators under provisions of the Clean Water Act, counties are not just another stakeholder in this discussion.
- While the final rule attempts to exempt certain ditches, many county owned ditches may still fall under federal authority.
- The final rule newly defines the term "tributary," and in doing so states that "a tributary can be a natural, man-altered or man-made water and includes waters such as rivers, streams, canals, and ditches."

Since ditches can now be classified as tributaries, and the new definition of tributaries includes ditches, it remains unclear what ditches will actually be exempt under the new rule.

**CONGRESSIONAL ACTION:** On May 12, the U.S. House of Representatives passed the Regulatory Integrity Protection Act of 2015 (H.R. 1732) by a vote of 261-155. H.R. 1732 would withdraw the final rule and require the agencies to restart the rule-making process, inclusive of state and local governments.

However, it is unlikely the Senate will take up H.R. 1732 since they have their own bill. On June 10, the U.S. Senate Committee on Environment and Public Works passed the Federal Water Quality Protection Act (S. 1140). S. 1140 would also require the agencies to redo the “waters of the U.S.” rule-making process. Additionally, the bill includes a set of principles the agencies should consider when rewriting the rule, including the types of ditches that should be exempt. S. 1140 passed out of committee and is currently waiting for floor consideration.

Both the U.S. House of Representatives and the U.S. Senate FY 2016 Interior, Environment, and Related Agencies Appropriations bills contains language to stop the final “waters of the U.S.” rule from being implemented.

NACo supports legislative efforts to stop and restart the “waters of the U.S.” rule-making process. For more information on the final rule, please refer to the attached analysis chart.

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

## Summary of Final Regulation Published by EPA and Corps

(As of June 29, 2015)



Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
<b>“Waters of the U.S.” (WOTUS) Definition</b>	40 CFR 230.3(s) The term “waters of the United States” means:	Define “waters of the United States” for all sections (including sections 301, 311, 401, 402, 404) of the CWA to mean:	For purposes of the Clean Water Act, 33 U.S.C. 1251 <i>et. seq.</i> and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term “waters of the United States” means:	<b>NOTE: This rule will be implemented on August 28—60 days after publication in the Federal Register</b>
<b>Traditional Navigable Waters</b>	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;	(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;	(i) 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;	<b>NO CHANGE</b>  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: <ul style="list-style-type: none"> <li>• They are subject to section 9 /10 of the 1899 Rivers and Harbors Appropriations Act</li> <li>• A federal court has determined the water body is navigable-in-fact under law</li> <li>• Waters currently used (or historically used) for commercial navigation, including commercial waterborne recreation (boat rentals, guided fishing trips, etc.)</li> </ul>

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<b>Interstate Waters</b>	All interstate waters, including interstate “wetlands”;	(2) All interstate waters, including interstate wetlands;	(i) All interstate waters <sup>1</sup> , including interstate wetlands;	<b>NO CHANGE</b>
<b>Territorial Seas</b>	The territorial seas <sup>2</sup> ; and	(6) The territorial seas;	(iii) The territorial seas;	<b>NO CHANGE</b>
<b>Impoundments</b>	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;	(iv) All impoundments of waters otherwise identified as “waters of the U.S.” under this section;	<b>NO SIGNIFICANT CHANGE</b> Impoundments such as berms, dikes, levees and dams may be considered jurisdictional because they are subject to “seepage”
<b>Tributaries</b>	Tributaries of waters for navigable and interstate, territorial seas and impoundments of waters	(5) All tributaries of a traditional navigable water, interstate water, the territorial seas or impoundment;	(v) All tributaries, as defined, of navigable waters, interstate waters or territorial seas	<b>NEW LANGUAGE</b> The final rule provides, for the first time, the definition of a tributary: <ul style="list-style-type: none"> <li>• A tributary has the physical indicators of a bed, bank and ordinary high water mark</li> <li>• A tributary contributes flow, directly or indirectly, to a WOTUS</li> </ul> <p>The rule states that “a tributary can be a natural, man-altered or man-made water and includes waters such as rivers, streams, canals, and ditches” and <b>can flow perennially, intermittently or ephemerally</b> Refer to tributary definition on pages 18-19 of the chart</p>

<sup>1</sup> Waters, such as lakes, ponds, streams, tributaries, etc.) are considered “interstate waters” if they flow across state boundaries, even if they are not considered “navigable” and do not connect to a WOTUS

<sup>2</sup> 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 extending seaward a distance of three miles”

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<b>Adjacent</b>	Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.	7) All waters, including wetlands, adjacent to a traditional navigable water, interstate water, the territorial seas, impoundment or tributary;	(vi) <b>All waters adjacent to navigable and interstate waters, territorial seas, impoundments and tributaries</b> , including wetlands, ponds, lakes, oxbows, impoundments and similar waters;	<p><b>NEW LANGUAGE</b></p> <p>This is a significant change—current Corps regulations refer to “<i>wetlands adjacent to</i>” WOTUS. The final rule encompasses “<i>all waters adjacent</i>” to navigable and interstate waters, territorial seas and impoundments</p> <p>The entire water is adjacent if any part of the water is bordering, continuous or neighboring. <b>These terms, including significant nexus, are further defined on pages 15-22 of this chart</b></p> <p>Adjacency is not limited to waters located laterally to navigable waters, interstate waters, impoundments, territorial seas and tributaries</p>
<b>Regional Consideration Criteria</b>	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:	3) 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, located in the same region, have a significant nexus to a traditional navigable water, interstate water or the territorial sea	<p>(vii) All waters, where they are determined, on a case-specific basis, to have a significant nexus to navigable waters, interstate waters and the territorial seas. These waters are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest navigable or interstate waters or territorial seas</p> <p>Waters identified in this paragraph shall not be combined with adjacent waters</p>	<p><b>NEW LANGUAGE</b></p> <p>Regional water features that have a connection to a WOTUS may be jurisdictional</p> <p>These water features will be aggregated together—it may be difficult to exempt one water feature if others are regulated</p> <p>More waters in a broader area will be analyzed together</p>

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<b>Regional Consideration Criteria</b> <i>(continued)</i>			when performing a significant nexus analysis  If waters identified in this section are also an adjacent water, they are considered an adjacent water and no case-specific significant nexus analysis is required  (A) Prairie potholes <sup>3</sup> (B) Carolina bays and Delmarva bays <sup>4</sup> (C) Pocosins <sup>5</sup> (D) Western vernal pools <sup>6</sup> (E) Texas coastal prairie wetlands <sup>7</sup>	<b>This definition is relevant for counties that own facilities and/or infrastructure near these regional water features</b>  <b>It will be difficult to do any construction projects around these waters without getting a federal permit</b>
<b>Commerce Clause Language</b>	(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 (iii) Which are used or could be used for industrial purposes by industries in interstate commerce	(i) through (iii) eliminated	(i) through (iii) eliminated	<b>DELETED</b> The agencies considered this section duplicative language

<sup>3</sup> Prairie potholes are primarily freshwater marshes found in the Upper Midwest (especially North Dakota, South Dakota, Wisconsin and Minnesota)

<sup>4</sup> The Carolina bays (also called Delmarva bays) are ponded, depressions and wetlands found along the Atlantic seaboard

<sup>5</sup> Pocosins are bog areas, with a shallow water table, that contain evergreen shrubs and trees. They can be found from Virginia to northern Florida

<sup>6</sup> Western vernal pools are seasonal depression wetlands found on the West Coast and in the northeastern and Midwestern states

<sup>7</sup> Texas coastal prairie wetlands are freshwater wetlands located along the Texas Gulf Coast

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<b>Floodplain/ High Tide Line/ Ordinary High Water</b>		<p>The proposed rule used the term “floodplain” to identify waters that would be near (adjacent) to a WOTUS to claim federal jurisdiction</p> <p>Floodplain, under the proposed rule, meant 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>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>(viii) <b>All waters<sup>8</sup> located within a 100-year floodplain</b> of navigable and interstate waters and territorial seas and <b>all waters located within 4,000 feet of the high tide line or ordinary high water mark (OHWM)</b> of navigable waters, interstate waters, territorial seas and impoundments where they are determined on a case-specific basis to have a significant nexus to navigable waters, interstate waters and/or territorial seas</p> <p>For waters determined to have a significant nexus, the entire water is a “water of the U.S.” if a portion is located within the 100-year floodplain of navigable or interstate waters or territorial seas or within 4,000 feet of the high tide line or ordinary high water mark</p> <p>Waters in this section shall not be combined with adjacent waters when performing a significant nexus analysis</p> <p>If waters identified in this paragraph are also an adjacent water, no case-specific significant nexus analysis is required</p>	<p><b>NEW LANGUAGE</b></p> <p>This language is broad and may have significant impact on county facilities and infrastructure in a 100-year floodplain or near a river, ocean, dam or interstate waters</p> <p>It may be problematic using the term “100-year floodplain” for jurisdictional purposes:</p> <ul style="list-style-type: none"> <li>• Not all areas of the country have 100-year floodplain maps</li> <li>• In some parts of the country, the 100-year floodplain maps have not been updated—nor are they available</li> <li>• The 100-year flood maps are constantly changing, and the process to revise can be challenging</li> </ul> <p>The agencies’ Economic Analysis states “that a vast majority of the nation’s water features are located within 4,000 feet...” of a jurisdictional water. The agencies go on to state, “We believe, therefore, that very few waters will be located outside 4,000 feet and within a 100-year floodplain.”</p>

<sup>8</sup> The agencies use the term “water,” “waters” and “waterbodies” in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, oxbows and other types of natural or man-made aquatic systems, identifiable by the water containing in these aquatic systems OR by their chemical, physical and biological indicators (i.e. proof that water had flowed in the conveyance, at some point)

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<b>Floodplain/ High Tide Line/ Ordinary High Water</b> <i>(continued)</i>				<p><b>QUESTION: Will this definition impact jurisdictional stormwater and wastewater recycling features built in wet areas, such as constructed wetlands and grassy and vegetated swales?</b></p> <p><b>QUESTION: If the “vast majority” of waters are located within 4,000 feet of a jurisdictional water, what types of waters features would not be regulated?</b></p> <p><b>QUESTION: Where did the term “4,000 feet” originate?</b></p>
<b>WOTUS Exemptions</b>	8) Waters of the United States do not include:	Waters excluded from the definition of “waters of the U.S.” include:	(2) The following are not “waters of the United States” even where they otherwise meet the definition of “waters of the U.S.”	N/A
<b>Waste Treatment Exemption</b>	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.	(1) Waste treatment systems, including treatment ponds or lagoons, <b>designed to meet CWA requirements</b>	(i) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act	<p><b>REVISED LANGUAGE</b> The final rule codifies 1986 and 1988 guidance preamble language</p> <p>Under the final rule, only those waste treatment systems designed to meet CWA requirements would be exempt but for waste treatment systems that were built to address non-CWA compliance issues, it is uncertain whether these systems would also be exempt</p>



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<b>Prior Converted Cropland Exemption</b>	<i>(Refer above)</i>	(2) Prior converted cropland	(ii) 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 CWA, the final authority regarding CWA jurisdiction remains with EPA	EPA is the final decision-maker on what constitutes a prior converted cropland
<b>Ditch Exemptions</b>		<ul style="list-style-type: none"> <li>Ditches that are excavated wholly in uplands, drain only in uplands, and have less than perennial flow</li> <li>Ditches that do not contribute to flow, either directly or indirectly to a “water of the U.S.”</li> </ul>	<p>(iii) The following ditches <i>(are exempt)</i>:</p> <p>(A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary</p> <p>(B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands</p> <p>(C) Ditches that do not flow, either directly or through another water, into a navigable and interstate waters and territorial seas</p>	<p><b>NEW LANGUAGE</b></p> <p>The final rule proposes to exempt certain types of ditches. <b>However, the language is likely to cause implementation issues</b></p> <p>The final rule specifically states that ditches are tributaries if they have:</p> <ul style="list-style-type: none"> <li>A bed, banks and ordinary high water mark</li> <li>And connects, directly or indirectly, to a “waters of the U.S.”</li> </ul> <p>The final rule and preamble states that tributaries can be natural, man-altered or man-made and includes rivers, streams, canals and <b>ditches</b> that flow perennially, intermittently and ephemerally</p> <p>Under the final rule, these types of ditches are clearly jurisdictional:</p> <ul style="list-style-type: none"> <li>Roadside and other ditches that have flow year-round</li> <li>Roadside and other ditches with irregular flow (intermittent) that</li> </ul>

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<p><b>Ditch Exemptions</b> <i>(continued)</i></p>				<ul style="list-style-type: none"> <li>○ are a relocated tributary, or are excavated in a tributary, or drain wetlands</li> <li>○ Ditches, regardless of flow, that are excavated in or relocate a tributary</li> </ul> <p>Counties can own hundreds, if not thousands, of miles of ditches. Also, roadside ditches, by necessity are constructed parallel to the road and sometimes cross wetlands and streams and could be located in a 100-year floodplain</p> <p><b>QUESTION: If part of a ditch lies within a 100-year floodplain, is the entire ditch considered a “water of the U.S.?”</b></p> <p><b>QUESTION: If a ditch can be a tributary and ditches are generally formed through excavation activities, what type of ditches would be exempt? How would the exemption be proven if the ditches were hand dug decades ago and no documentation exists?</b></p> <p><b>QUESTION: If data does not currently exist, who will have to pay for the data to be developed—the federal government or the permit applicant?</b></p>

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<p><b>Ditch Exemptions</b> <i>(continued)</i></p>				<p><b>QUESTION: If a portion of the ditch is in a relocated tributary, would only that portion be considered jurisdictional or would the whole length of the ditch be regulated?</b></p> <p><b>QUESTION: Even if a ditch is exempt under this exclusion, will CWA’s recapture clause<sup>9</sup> negate the exemption? Under what circumstances would normally exempt ditches be recaptured?</b></p> <p><b>QUESTION: For local governments applying for Section 404 permits, who would be responsible for proving the ditch is exempt—the federal or local government?</b></p> <p><b>QUESTION: If a ditch is considered jurisdictional, is it then subject to the same requirements as “navigable waters? These requirements include monitoring, inventorying all point source discharges, permitting, establishing use attainability and water quality standards and the development of Total Maximum Daily Loads (TMDLs).</b></p>

<sup>9</sup> The “recapture clause” brings a normally exempt ditch back under federal jurisdiction if it constitutes a new use of the wetland and if the activity in the ditch would result in a “reduction in reach/impairment of flow or circulation” of “waters of the U.S.”

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<b>Other Exemptions</b>		<p>Additionally, the following features are exempted (from the “waters of the U.S.” definition):</p> <ol style="list-style-type: none"> <li>(1) Would exclude artificial areas that revert to uplands if application of irrigation water ceases;</li> <li>(2) Artificial lakes and ponds used solely for stock watering, irrigation, settling basins, rice growing;</li> <li>(3) Artificial reflecting pools or swimming pools created by excavating and/or diking in dry land</li> <li>(4) Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;</li> <li>(5) Water-filled depressions created incidental to construction activity;</li> </ol>	<p>(iv) The following features (are not “waters of the U.S.”):</p> <ol style="list-style-type: none"> <li>(A) Artificially irrigated areas that would revert to dry land should application of water to that area cease;</li> <li>(B) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;</li> <li>(C) Artificial reflecting pools or swimming pools created in dry land;</li> <li>(D) Small ornamental waters created in dry land;</li> <li>(E) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;</li> </ol>	<p><b>MODIFIED LANGUAGE</b></p> <p>Adds the term “dry land” which is undefined in the final regulation—the final rule is even narrower than the proposal</p> <p>The agencies note that artificially created ponds can be used for multiple purposes, including farming, animal habitat, water retention, fire control ponds and recreation; many of these ponds are relevant to county governments. The agencies have stated that these types of ponds should <u>generally</u> be exempt</p> <p>However, even if these ponds are excluded as a WOTUS, the discharges from the pond to a WOTUS may be regulated under the CWA’s current National Pollution Discharge Elimination System (NPDES) Section 402 permit program</p> <p>It is important to note that while certain ditches and waters may seem to be exempt, they can also serve as a hydrological connection that the agencies may consider jurisdictional under a significant nexus analysis. In addition, these features may be regulated as a point source and regulated under</p>

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Other Exemptions (continued)		<p>(6) Groundwater, including groundwater drained through subsurface drainage systems; and,</p> <p>(7) Gullies and rills and non-wetland swales</p>	<p><i>(groundwater section moved to section (v))</i></p> <p>(F) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and</p> <p>(G) Puddles</p>	<p>other CWA programs, such as Section 402</p> <p>The agencies tried to make it clear that ALL erosional features that are not considered a “tributary” would be excluded from federal permitting authority</p>
Groundwater Exemption		<i>(refer above to (F) Groundwater section)</i>	(v) Groundwater, including groundwater drained through subsurface drainage systems	<p><b>No change from current rules</b>— Agencies have never interpreted WOTUS to include groundwater</p> <p>However, per the preamble<sup>10</sup>, the exclusion does not apply to surface expressions of groundwater—i.e. where groundwater emerges and becomes a base flow in streams or spring fed ponds</p>

<sup>10</sup> Final rules include a preamble, which includes a summary of the rule, effective date and supplemental information. Preambles are legally non-binding.

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Stormwater and Wastewater Exemptions	N/A	N/A	<p>(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in <u>dry land</u>.</p> <p>(vii) Wastewater recycling structures constructed in <u>dry land</u>; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling</p>	<p><b>NEW LANGUAGE</b> Stormwater features and wastewater structures built on <u>dry land</u> are exempt from WOTUS but some features, such as channelized or piped streams, would be jurisdictional</p> <p><b>But, the term “dry land” is undefined in the final regulation. This is relevant because counties may own stormwater features or wastewater structures that are located in wet areas</b></p> <p>A key element of the stormwater exclusion is whether the feature conveys, treats, or stores stormwater. Certain features, such as curbs and gutters, may be features of stormwater collection systems “but have never been considered ‘waters of the U.S.’”</p> <p>The final rule states that if water is removed from one part of a tributary network and moved to another, such as in an aqueduct or canal, it would be regulated</p> <p>But, even if stormwater and wastewater infrastructure is granted an exemption, they may be regulated as a point source under CWA Section 402 permit program</p>

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<b>Stormwater and Wastewater Exemptions</b> <i>(continued)</i>				<p><b>QUESTION:</b> What kind of documentation must an applicant produce to demonstrate that the feature was constructed on dry land?</p> <p><b>QUESTION:</b> If a portion of the stormwater system is within a 100-year floodplain—and is comprised of both dry and wet portions—is the whole system jurisdictional?</p> <p><b>QUESTIONS:</b> For systems that have a combination of exempt and non-exempt features, how will the agencies handle competing permit requirements?</p> <p><b>QUESTION:</b> Will the agencies institute an appeals process to challenge wet/dry land determinations?</p> <p><b>QUESTION:</b> Will this exemption apply to infrastructure in coastal or low-lying areas?</p> <p><b>QUESTION:</b> What if a facility uses an artificial swamp to improve water quality — i.e. treatment swamps — are these jurisdictional?</p> <p><b>QUESTION:</b> Are grassy and vegetative swales jurisdictional?</p>

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<b>Stormwater and Wastewater Exemptions</b> <i>(continued)</i>				<p><b>QUESTION:</b> The EPA has recently stated that the onus will be on the federal agencies to prove that a ditch or other exclusions under the rule do not qualify for the exemption. However, the CWA Section 402 permit program, is delegated to the states. Which agency is responsible for making the <u>final</u> determination whether the features or facilities are built on dry land—the EPA, Corps or the states?</p> <p><b>QUESTION:</b> Older facilities may have segments of their structures build on wet and dry areas. Even if the infrastructure is connected, will the portions built strictly on dry land be exempt, while the portions built on wet land are jurisdiction?</p> <p><b>QUESTION:</b> The rule explains that some water features within a system, such as a storm sewer system or a water recycling system, might be defined as “waters of the U.S.” because they were constructed or excavated in waters. Yet the CWA prohibits this type of treatment within “waters of the U.S.” How would these systems be affected by such a partial WOTUS designation, and how would local governments have to change their systems to comply with the rule?</p>



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<p><b>Stormwater and Wastewater Exemptions</b> (continued)</p>				<p><b>QUESTION: For facilities that are constructed in coastal or low-lying areas, in 100-year flood plains or “adjacent” to a WOTUS, qualify for this exemption?</b></p> <p><b>QUESTION: Under the final rule, if stormwater features or wastewater structures are on wet land, they are jurisdictional. However, if only part of the feature is in a 100-year floodplain, will the whole system then fall under federal regulation?</b></p> <p><b>QUESTION: Drinking water and other water delivery systems are not granted an exemption under the rule. Why were these systems not given an exemption?</b></p>
			<p><b>In this section, the following definitions apply to terms used in the final rule:</b></p>	
<p><b>Adjacent Definition</b></p>	<p>Under existing regulation for “adjacent wetlands,” only wetlands adjacent to a “water of the U.S.” are considered jurisdictional</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>(i) The term <i>adjacent</i> means bordering, contiguous, or neighboring waters next to navigable and interstate waters, territorial seas and impoundments, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like</p>	<p><b>NEW DEFINITION</b> The new definition of adjacency is broad—this may lead to confusion and inconsistency in the field</p>

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<p><b>Adjacent Definition</b> <i>(continued)</i></p>	<p>Adjacent means bordering, ordering, contiguous or neighboring</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>For purposes of adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark</p> <p>Adjacency is not limited to waters located laterally in navigable and interstate waters, territorial seas, impoundments and tributaries</p> <p>Adjacent waters also include all waters that connect segments of navigable and interstate waters, territorial seas, impoundments and tributaries or are located at the head of a water identified as navigable and interstate waters, territorial seas, impoundments and tributaries of this section and are bordering, contiguous, or neighboring such water</p> <p>Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent</p>	<p>Adjacent waters include waters separated from other “waters of the U.S.” by constructed dikes or barriers</p> <p><b>Adjacency is not just limited to traditionally navigable and interstate waters, territorial seas, impoundments and tributaries</b></p> <p>The term “adjacent waters” is broad in scope. Ponds, wetlands, ditches, lakes and other types of nature or man-made aquatic systems may be jurisdictional if they are near to a WOTUS. This may have implications for counties that own infrastructure near these waters</p>

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<b>Neighboring Definition</b>		<p>Neighboring is defined as:</p> <ul style="list-style-type: none"> <li>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<sup>12</sup> to a jurisdictional water;</li> <li>Water must be geographically proximate to the adjacent water;</li> </ul> <p>Waters outside the floodplain or riparian zone are jurisdictional if they are reasonably proximate</p>	<p>(ii) The term <i>neighboring</i> means:</p> <p>(A) All waters located within 100 feet of the ordinary high water mark of a water identified as navigable and interstate waters, territorial seas, impoundments and tributaries are jurisdiction. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;</p> <p>(B) All waters located within the 100-year floodplain of a navigable and interstate waters, territorial seas, impoundments and tributaries and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;</p> <p>(C) All waters located within 1,500 feet of the high tide line of navigable waters, interstate waters and territorial seas, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes</p>	<p><b>NEW DEFINITION</b>  <b>Under the final rule, neighboring is defined for the first time</b></p> <p>Final rule eliminated the proposed rule’s language on shallow subsurface hydrological connection, which is helpful</p> <p>However, the final rule lays out specific parameters for jurisdiction within the 100-year floodplain and ordinary high water mark—and the implications to counties are broad</p> <p><b>First, if a county owns a non-exempt ditch that runs for miles and only a small portion of the ditch is in the 100-year floodplain, the whole length of the ditch—inside and outside the floodplain—may now be jurisdictional</b></p> <p>Second, the neighboring definition is broad and may have a significant impact on county facilities and infrastructure in a 100-year floodplain or near rivers, oceans, dams or other tributaries</p> <p>This definition may also impact jurisdictional stormwater and wastewater recycling features built in wet areas, such as constructed wetlands and grassy and vegetated swales</p>

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Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
<b>Tributary Definition</b>	<p>Tributaries are considered a “water of the U.S.” under existing regulation.</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"> <li>• Have a bed, bank, and ordinary high water mark (OHWM)<sup>6</sup></li> </ul> <p>Contribute to flow, either directly or indirectly, to a “water of the U.S.” Would exclude ditches that are excavated wholly in uplands, drain only in uplands, and have less than perennial flow<sup>8</sup></p>	<p>The terms <i>tributary</i> and <i>tributaries</i> each mean a water that contributes flow, either directly or through another water (including an impoundment) identified as navigable waters, interstate waters and/or territorial seas, that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark</p> <p>These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary</p> <p>A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, <b>and ditches</b> not excluded under paragraph (2) of this section</p> <p>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 constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles,</p>	<p><b>NEW DEFINITION</b></p> <p>The final rule includes <i>for the first time</i> a regulatory definition of a tributary, which specifically defines ditches as jurisdictional tributaries unless specifically exempt</p> <p>Physical characteristics of a tributary include a bed, banks and ordinary high water mark<sup>11</sup>. Additionally, a tributary contributes flow, directly or indirectly, to “waters of the U.S.”</p> <p>A tributary can be perennial, intermittent or ephemeral</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. <b>This is problematic for arid and semi-arid areas where banks of the tributary may disappear at times</b></p>

<sup>11</sup> NOTE: The term ordinary high water mark is problematic and inconsistently applied in the field. For more information, refer to page 19 of this chart

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<b>Tributary Definition</b> <i>(continued)</i>			<p>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</p> <p><b>A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the U.S. that does not meet the definition of tributary or through a non-jurisdictional water to a WOTUS</b></p>	<p><b>There is no limit on the length of the break as long as there are an upstream bed, banks and an ordinary high water mark</b></p> <p>Many county-owned ditches have a bed, bank and ordinary high water mark and flow, directly or indirectly to a WOTUS and may be classified as a tributary which may negate the ditch exemption</p>
<b>Ordinary High Water Mark Definition</b>	<p>Existing Corps regulations define ordinary high water mark as the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the banks, 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. 33 CFR 328.3(e)</p>		<p>(vi) 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 a 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><b>Note: Under current regulation, the term ordinary high water mark is ambiguous and applied inconsistently in the field</b></p> <p>Many of the ordinary high water mark physical indicators can occur whenever land may have water flowing across it, regardless of flow or duration</p> <p>The final rule bases many decisions on identifying the ordinary high water mark (OHWM). While this term has been in use for decades, guidance manuals on defining OHWM have been developed for only two parts of the country. The Corps recently stated that this term will be developed further as the rule is implemented</p>

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<b>Ordinary High Water Mark Definition</b> <i>(continued)</i>				<p><b>QUESTION: Counties and other permit applicants need much more certainty in understanding what the OHWM is and how it will be determined. How will counties and other agencies responsible for complying with and administering the CWA be engaged to better define this commonly used but inexact term?</b></p> <p><b>QUESTION: While guidance is being developed for most of the country, how will determinations of OHWM be made in the interim?</b></p> <p><b>QUESTION: Since the agencies relied on the science validated by the Science Advisory Board (SAB) in writing the rule, how was OHWM considered in that process—or was it weighed at all?</b></p>
<b>Significant Nexus Definition</b>		<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, must be more than speculative or insubstantial</p>	<p>(v) The term <i>significant nexus</i> means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, <u>or</u> biological integrity of a water identified as navigable waters, interstate waters or territorial seas</p> <p>The term “in the region” means the watershed that drains to the nearest</p>	<p><b>NEW DEFINITION</b></p> <p>The final rule’s significant nexus definition is based on Supreme Court Justice Kennedy’s “similarly situated waters” test</p> <p>The significant nexus standard is used to determine connection to “waters of the U.S.”</p> <p>The significant nexus definition used in the final rule diverges from</p>

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<p><b>Significant Nexus Definition</b> <i>(continued)</i></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.”</p>	<p>navigable waters, interstate waters or territorial sea</p> <p>For an effect to be significant, it must be more than speculative or insubstantial</p> <p>Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water’s effect on downstream navigable waters, interstate waters and territorial seas shall be assessed by evaluating the aquatic functions identified in paragraphs (A) through (I) of this paragraph</p> <p><b>A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest navigable water, interstate water or territorial seas</b></p> <p>Functions relevant to the significant nexus evaluation are the following:                      (A) Sediment trapping,                      (B) Nutrient recycling,                      (C) Pollutant trapping, transformation, filtering, and</p>	<p>Justice Kennedy’s decision. Justice Kennedy’s opinion included “chemical, physical <u>and</u> biological” to determine jurisdiction</p> <p>However, the final rule uses the “chemical, physical <u>or</u> biological” to determine jurisdiction</p> <p><b>This will allow the agencies to claim jurisdiction based on just one factor, rather than all three factors—chemical, physical and biological—and will broaden the types of waters that fall under federal jurisdiction</b></p> <p><b>QUESTION: Are all of these factors equally important or are some factors more important than others?</b></p>

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Key Terms	Current EPA/Corps Regulations	Proposed Rule	Final Rule	Preliminary Analysis
<b>Significant Nexus Definition</b> <i>(continued)</i>			transport, (D) Retention and attenuation of flood waters, (E) Runoff storage, (F) Contribution of flow, (G) Export of organic matter, (H) Export of food resources, and (I) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species	
<b>“Dry Land” Definition</b>			<b>The term is used but undefined in the final rule</b>	<p>Several exclusions and exemptions use the phrase “dry land.” The agencies state that “dry land” refers to areas of the geographic landscape that are not water features such as streams, rivers, wetlands, lakes, ponds, and the like</p> <p>However, the final rule notes that a WOTUS is not considered “dry land” just because it lacks water at a given time. Similarly, an area remains “dry land” even if the land is wet</p> <p>The agencies note there is no agreed upon definition, given geographic and regional differences</p> <p><b>The agencies concluded that further clarity on this issue can be provided during implementation</b></p>