

**From:** [mwinter@jeffparish.net](mailto:mwinter@jeffparish.net)  
**To:** [CWAwotus](#)  
**Subject:** Comments on Potential "Waters of the U.S." Rewrite  
**Date:** Tuesday, June 20, 2017 4:48:49 PM  
**Attachments:** [Jefferson Parish Comments on Proposed Waters of U.S. Rule.pdf](#)  
[John Young FW Rep. Scalise Jefferson Parish Comments RE Proposed Waters of U.S. Rule.pdf](#)

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Attached please find comments submitted by Jefferson Parish in November 2014.

Thank you, in advance, for consideration of our comments.

***Marnie Winter, Assistant Director  
Jefferson Parish Department of Environmental Affairs  
4901 Jefferson Hwy., Suite E  
Jefferson, LA 70121  
Phone: (504) 736-6443***

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PARISH OF JEFFERSON  
OFFICE OF THE PRESIDENT

JOHN F. YOUNG, JR.  
PARISH PRESIDENT

November 17, 2014

Honorable Steve Scalise  
Representative, District 1  
2338 Rayburn HOB  
Washington, DC 20515

**RE: Proposed Rule on Waters of the U.S.**

Dear Representative Scalise:

On April 21, 2014, the United States Army Corps of Engineers and the Environmental Protection Agency proposed rules which substantially increase the scope of waters that would be subject to federal regulation under the Clean Water Act ("Act"), (See, 79 Fed. Reg. No. 76).

Jefferson Parish submitted the attached comments in opposition to the proposed rule during the comment period which ended November 14, 2014. Additionally, the Jefferson Parish Council adopted a resolution in opposition to the proposed rules, also attached.

As proposed, removal of the word "navigational" from references defining waters of the Act would substantially and significantly expand the scope of federal regulatory authority to include low-lying areas and ditches/canals as tributaries. Rather than providing increased clarity, the proposed rules result in capricious and arbitrary applications that unfairly impede local authority and jurisdiction for traditionally municipal functions of development, drainage and flood protection. Additionally, such over-regulation potentially breeds additional permitting requests, associated delays, and added expenses for infrastructure expansion, mitigation and court suits.

Since the proposed rules were developed without sufficient input from state and local governments that will ultimately bear the consequences of implementation, Jefferson Parish has requested that the rule be re-formulated in consensus with state and local government input.

Regards,

John F. Young, Jr.  
Jefferson Parish President

Attachment



## PARISH OF JEFFERSON

OFFICE OF THE PRESIDENT

November 7, 2014

JOHN F. YOUNG, JR.  
PARISH PRESIDENT

**FILED VIA EMAIL AND FEDERAL eRULEMAKING PORTAL**

Water Docket  
U.S. Environmental Protection Agency  
Mail Code 2822T  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

**Attention:** Docket ID No. EPA-HQ-OW-2011-0880

**RE: Proposed Rule on Waters of the U.S.**

To the Comment File of Docket ID No. EPA-HQ-OW-2011-0880

The Corps of Engineers and the U.S. EPA on April 21, 2014 (79 Fed. Reg. No. 76) have proposed rules on the scope of waters subject to federal regulation under the Clean Water Act ("Act"). Jefferson Parish appreciates the opportunity to provide comments and suggestions on that proposal.

The proposed rules promulgated by 79 Fed. Reg. 22262-22274 (April 21, 2014) are essentially identical to a number of the Act's water programs, and albeit short in length, result in a land and water grab.

True to its sovereign capacity, the federal government wields as much power and authority as is available to it. Federal courts and Congress have deferred too often to the EPA and the Army Corps of Engineers regarding the control of navigable and non-navigable waterways. Such deference to administrative agencies that are not well-suited to create legislation or regulation has resulted in a collection of capricious and arbitrary rules which are derived with little input from state and local governments, and which violate those provisions of the Clean Water Act at 33 U.S.C. §1251(b) which mandate that federal agencies "recognize...the primary responsibilities and rights of State...to plan the development and use...of land and water resources...." The resulting rules fail to provide clarity, and instead expand and confuse those requirements with absurd results.

Proposing Clean Water Act jurisdiction over Louisiana's coastal geography interferes with the traditional state functions of land development, mosquito control, and storm water management. The proposal as written potentially impacts 393 miles of storm water drainage canals throughout Jefferson Parish, and violates the Commerce Clause limits for the Act by expanding jurisdiction to include ditches and wetlands.

## I. Ditches

The rules in Paragraph 1(iii) and (iv) exclude certain ditches, including: ditches that are excavated wholly in uplands, drain only uplands and have less than perennial flow; and ditches that do not contribute flow, either directly or through another water, to a water identified in Paragraph (a)(1) and (4) therein, [basically, navigable-in-fact waters, including historically navigable waters, interstate water, territorial waters, impoundments to those specified waters, and tributaries to any of those waters or impoundments] (emphasis added).

Ditches in Jefferson Parish act as tributaries to nearly all waterways regulated under the Act, and as such "tributary" as defined would include all ditches if they have a bed, banks, ordinary high water marks, and if they directly or indirectly flow through any "water", to those waterways noted above in brackets. Further, the rule specifies that a tributary does not lose its regulated status, notwithstanding manmade breaks, such as bridges, culverts, pipes, dams, or notwithstanding natural breaks such as wetlands, debris piles, boulder fields, or underground. Applied, the definition of tributaries effectively recaptures regulation of drainage and roadside ditches, and virtually every ditch and adjacent wetland in Jefferson Parish would be regulated under the Act.

Likewise, the categorical regulatory coverage of all interstate waters, navigable or not, unwisely broadens the reach of the proposal.

Drainage is the mainstay of coastal civilization. The ambiguity in the proposed rule between excluded drainage ditches and ditches regulated as tributaries cannot stand in the way of local needs. Once a ditch is federally regulated, local parishes and counties are at the mercy of cumbersome, time-consuming and expensive federal programs, and vulnerable to federal enforcement and federal citizen suits, typically without additional funding. Federal regulation of ditches unduly interferes with local flood and vector (e.g., mosquito) control, ditch and levee maintenance, and stormwater management in order to protect the health and welfare of local citizens.

Regulation of additional ditches, storm water conveyance canals and vague "interstate waters" will also require state and local governments to meet water quality standards over an expanded area. Florida, for instance, has estimated these costs in the billions of dollars to meet water quality criteria for expansion into storm water conveyances and drainage ditches. See Estimated Fiscal Impacts on Selected Municipal Separate Storm Sewer System Permittees (Florida H<sub>2</sub>O Coalition, prepared by ATM, August 29, 2014). While we do not have such cost data analyzed yet for Jefferson Parish, attached are color-coded graphics that demonstrate the potential expansion in coverage of local waters engendered by the regulatory proposal over new "waters of the United States [U.S.]". We fear that the cost impact to any coastal parish from the proposed rule will be as extreme as Florida's estimates.

The federal-state balance of power is under attack here. The federal government is only supreme within a limited band of enumerated powers, including the Commerce Clause. What is not expressed in the United States Constitution for the federal government is reserved to the states and people under the Tenth Amendment. Certain integral state operations of traditional

governance must remain immune from federal regulation. Local flood control, vector control, land development, and public safety are such areas.

The limits of federal regulation that burden states must first take place in the political process. Garcia v. San Antonio Metropolitan Transit Auth., 468 U.S. 521 (1985). That is the purpose of these comments, to persuade EPA and the Corps to place reasonable limits and constraints, including clarity and obtaining more input from state and local governments, in its proposed rules.

Regulation of "waters of the U.S." too broadly and unfairly impedes local police powers, as over-regulation breeds more permits, delay, expense for infrastructure expansion and mitigation (such as the Modified Charleston Method on wetlands) and involvement of courts.

Besides the expense of new water quality dictates and potential delays in providing and maintaining local flood control in coastal areas impacted by hurricanes (e.g., Katrina), the delay and potential reduction in vector control due to federal regulations cannot be overlooked. Waters and wetlands in coastal Louisiana are often breeding grounds for nuisance mosquitoes. Mosquitoes have historically carried diabolical diseases (e.g., malaria, and now West Nile Disease and encephalitis). EPA and states already have a pesticide general permit, and any further regulation of vector control in an expansion of waters under the Clean Water Act is not warranted in light of public health and safety concerns.

Here are our initial suggestions:

- A. Except from regulation those roadside ditches "substantially" excavated in "non-wetlands", "fastlands" (leveed areas) or farmland, that have only rainwater, irrigation flow or state permitted discharges.
- B. Except from regulation those drainage ditches that contribute only stormwater flow to other waters.
- C. Exclude from regulation other manmade ditches unless they have substantial year-round flow of water and are directly connected to navigable waters of the United States.
- D. Exclude non-navigable interstate waters from categorical coverage.

See also, comments on the proposal by State Attorney Generals on October 8, 2014.

## II. Wetlands

The proposed rule also expands coverage over jurisdictional wetlands in an unwarranted manner.

Paragraph (a)(6) categorically regulates wetlands "adjacent" to five waters listed, including navigable waterways and tidal waters; interstate waters; territorial seas; impoundments of these waters; and tributaries to these waters.

“Adjacent” in Paragraph (c)(1) means bordering, contiguous or neighboring, including wetlands separated from manmade dikes or barriers, natural berms, and beach dunes. “Neighboring” in Paragraph (c)(2) includes riparian areas, floodplains and waters with a shallow subsurface connection or confined surface hydrologic connection with the five waters listed above.

The sum of these definitions is overreaching, especially in light of the concept of “significant nexus” in Paragraph (c)(7) calling for additional case-by-case determinations. Therein the basis of regulation of other “non-adjacent” waters is if they either alone or in combination with other “similarly situated waters” in the watershed, have a chemical, physical, or biological connection with listed waters, such as navigable-in-fact waters, tidal waters and territorial seas.

Thus, categorically, it is difficult for us to determine which wetlands would be non-adjacent to listed waters. And, on a case-by-case basis, it is difficult for us to determine which wetlands could lack a “nexus” to other unknown “similarly situated waters” (including other wetlands) in a broad watershed region. Wetlands could then virtually never be considered “isolated” under the proposed regulation, which conclusion would then run contrary to Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (SWANCC), which held isolated waters are not regulated under the Clean Water Act. We are again left to the whim of individual regulators to determine which lands will come under federal control. This is not the clarity and certainty the new rules are supposed to bring.

SWANCC decided there are “isolated waters” (e.g., certain ponds) that are not regulated by the Commerce Clause, the sole source of the federal agencies’ authority over non-federal territory under the Clean Water Act. It is only the water quality connection of wetlands to open bodies of navigable water that could justify federal wetland regulation of wetlands. However, not every wetland connection to any type of water, however remote (subsurface), strained (in combination with other wetlands) or expansive (any flood plain location) can justify federal regulation. Protection of wetlands bordering truly navigable waters is the key.

In this vein, EPA references the draft report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (2013) (“Report”). Although the Report exploits a general truism, that virtually everything is “connected”, that alone is not a legal test for federal regulation under the Commerce Clause. Even EPA’s own Science Advisory Board’s Review of the EPA Water Body Connectivity Report (2014), criticized the draft Report’s terminology and its theory of connectivity as “binary” (go versus no go), and recommended a gradient in connectivity (low to high). The Science Advisory Board also emphasized “strong” biological connections beyond hydrological connections (pages 58-59). However, the Science Advisory Board criteria also conflicts with a test of Commerce Clause jurisdiction over local activity which substantially impacts interstate commerce. Such connection is clearest only for wetlands bordering truly navigable waters. Other scientific “connections” are too attenuated to meet the substantial impact test. Further, these other scientific connections are speculative for permit writers to meet and too expensive for permit applicants to address in terms of physics, hydrology, chemical and biological flow paths. Gradations, other than substantial or high, will wreak havoc on Clean Water Act programs.

SWANCC, supra, at 169, indicated that congressional acquiescence in expansive wetland regulation is to be considered. However, there is no congressional acquiescence in the proposed rule.

The proposed rule has merely expanded some dicta in Rapanos v. U.S., 547 U.S. 715 (2006), e.g., "significant nexus" to reach new regulatory heights. Nothing in Rapanos redefined terms like adjacent, neighboring, or significant nexus to reach subsurface connections or aggregation of wetlands to justify federal regulation. Only the judiciary, not agencies, can interpret case law. This is a federal land grab usurping local land use control as well as private property rights.

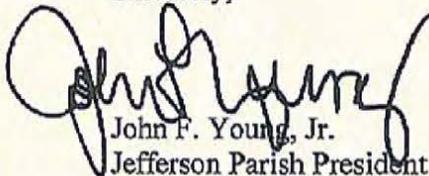
SWANCC, supra, at 173-174, cautioned against pushing an administrative interpretation of law that alters the federal-state framework by permitting federal encroachment upon a traditional state power, e.g., land development and water use. Rather, the rule should eliminate floodplain, riparian areas, or subsurface connection from the definition of "neighboring". It should also clarify "significant nexus" and eliminate other wetlands from the "similarly situated waters" concept by adding "(except other wetlands)" thereto.

### III. Conclusion

The rule should be narrowed as proposed herein and re-formulated with more initial state and local government input.

We appreciate the opportunity to provide our comments on the proposed rule change of the EPA and the Corps. If adopted as proposed, the effects of the Waters of the U.S. rulemaking will be particularly severe on coastal communities, such as Jefferson Parish, with significant low-lying areas. Attached please find, and include with the comments herein, Jefferson Parish Resolution No. 123814, adopted by the Jefferson Parish Council on November 5, 2014, opposing the proposed rule on Waters of the U.S.

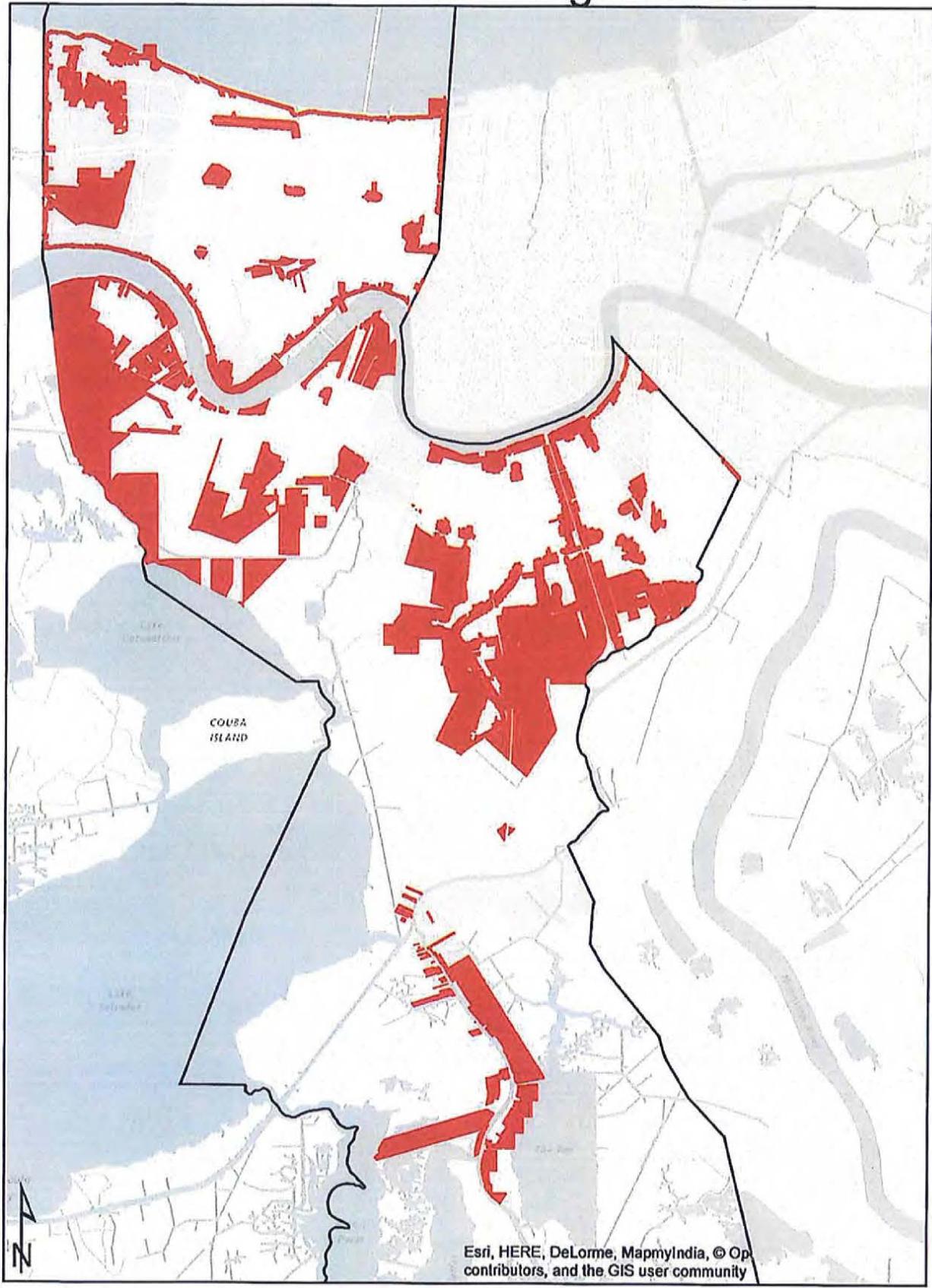
Sincerely,



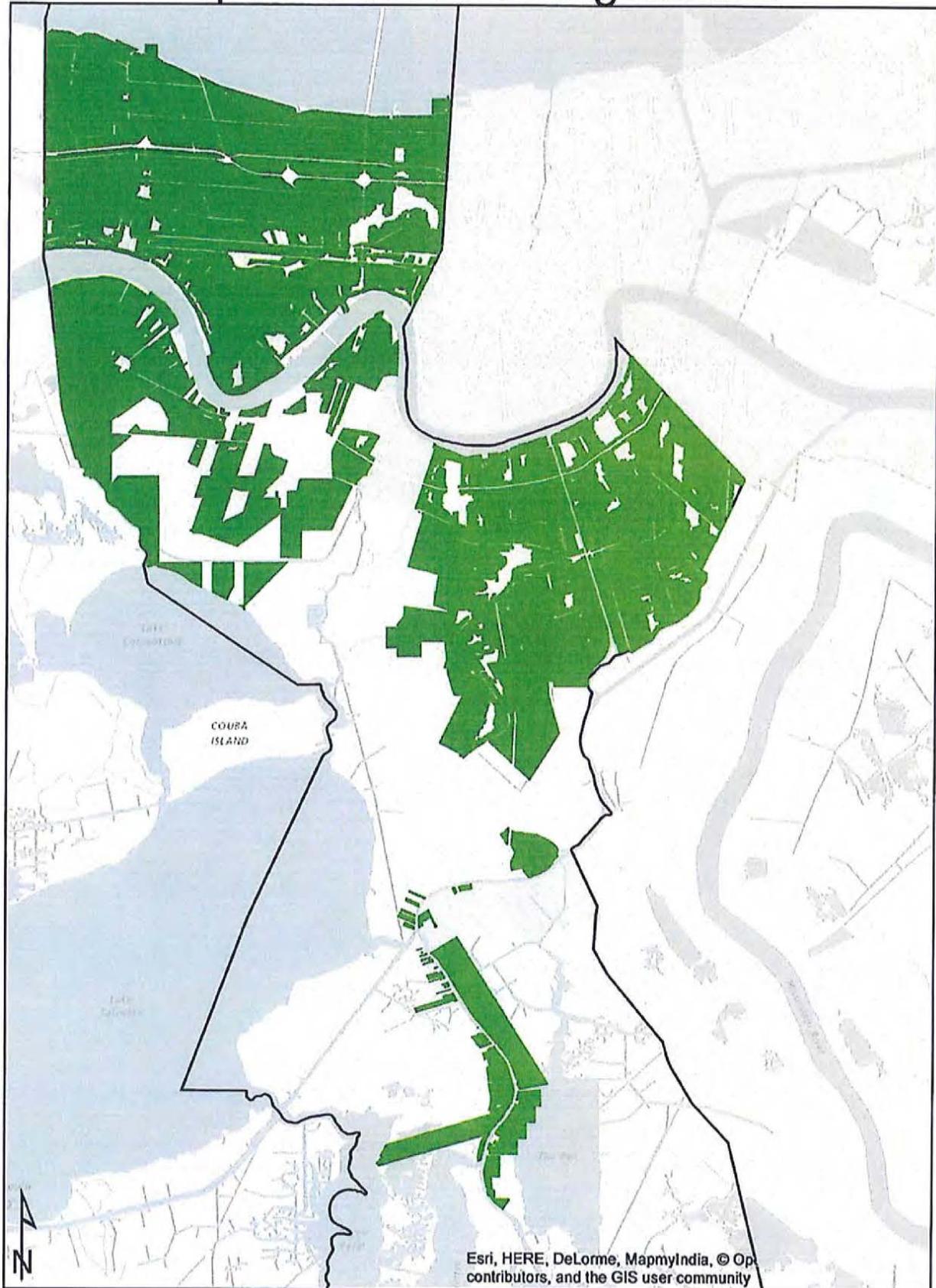
John F. Young, Jr.  
Jefferson Parish President

Attachments

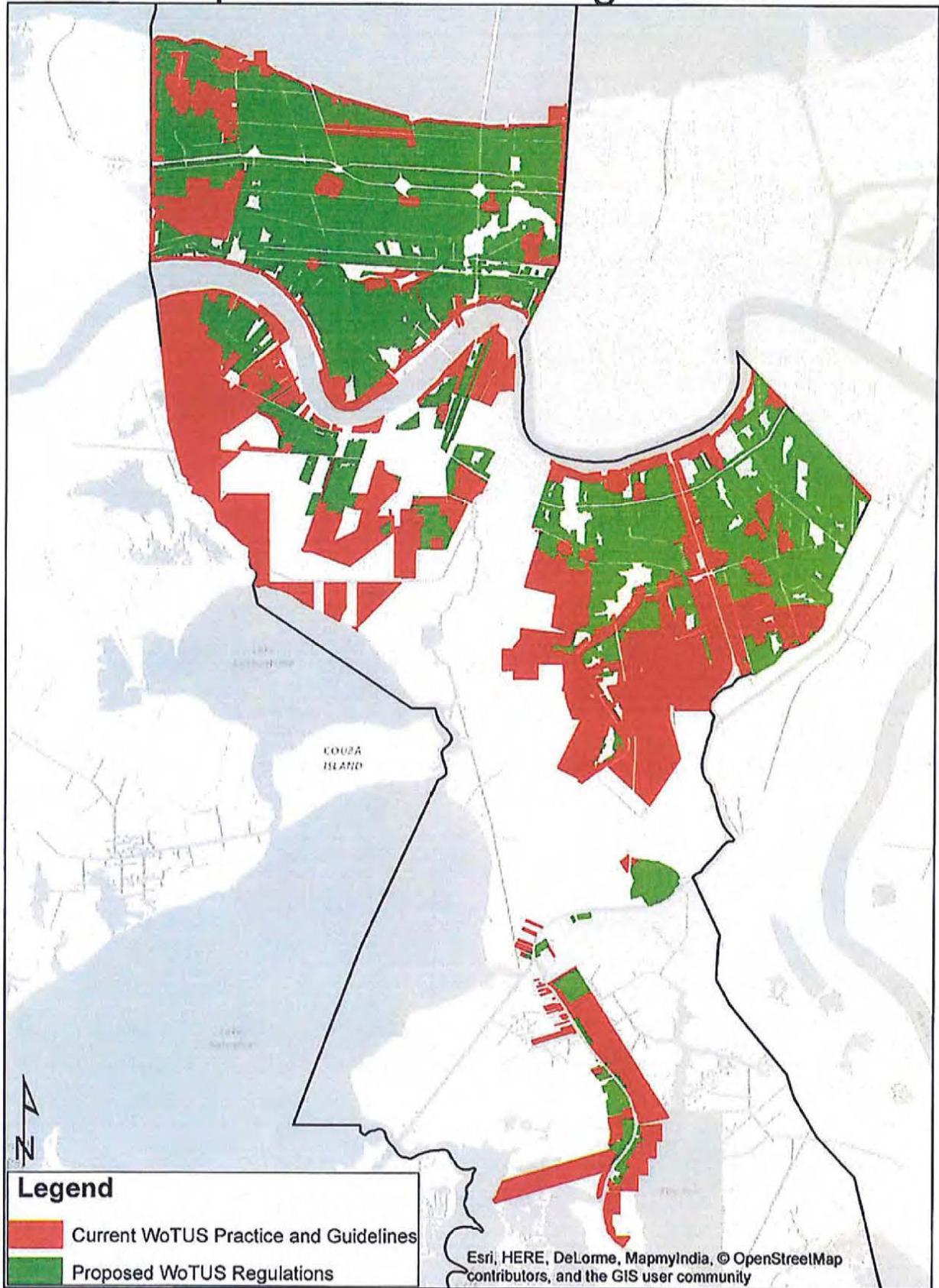
# Jefferson Parish Areas Affected by the Current WoTUS Regulations



# Jefferson Parish Areas Affected by the Proposed WoTUS Regulations



# Jefferson Parish Areas Affected by the Proposed WoTUS Regulations



On motion of **Mr. Templet**, seconded by **Mr. Spears**, the following resolution was offered:

**RESOLUTION NO. 123814**

A resolution opposing the Environmental Protection Agency's proposed rule redefining Waters of the U.S. Under the Clean Water Act. (Parishwide)

**WHEREAS**, a new proposed rule – Definition of Waters of the U.S. Under the Clean Water Act –would amend the definition of "Waters of the U.S." and expand the range of waters that fall under federal jurisdiction; and

**WHEREAS**, the proposed rule has gone too far in proposing Clean Water Act jurisdiction over areas that would interfere with traditional state functions, such as use of drainage ditches; and

**WHEREAS**, the proposed rule exceeds the Commerce Clause limits for the Act by expanding jurisdictional wetlands in an unwarranted manner; and

**WHEREAS**, particularly troubling for coastal areas like Jefferson Parish is the inclusion of ditches and wetlands; and

**WHEREAS**, under the proposed rule, virtually all ditches could be called a regulated tributary by any federal regulator for many purposes, including wetlands, municipal stormwater, pesticide application, water quality rules, and permitting; and

**WHEREAS**, the Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* cautioned against pushing an administrative interpretation of law that alters the federal-state framework by permitting federal encroachment upon a traditional state power, e.g., land development and water use; and

**WHEREAS**, the Parish President and the Parish Council opposes the implementation of the proposed rule redefining Waters of the U.S. Under the Clean Water Act.

**NOW, THEREFORE, BE IT RESOLVED** jointly by the Parish Council of Jefferson Parish, Louisiana, acting as governing authority of said Parish and the Jefferson Parish President acting as the Chief Administrative Officer:

**SECTION 1.** That Jefferson Parish opposes the Environmental Protection Agency's proposed rule redefining Waters of the U.S. Under the Clean Water Act as the expansion would negatively impact the Parish as stated above.

**SECTION 2.** That an original and three copies of this Resolution be forwarded to the Environmental Protection Agency at Water Docket, Environmental Protection Agency, Mail Code 2822T, 1200 Pennsylvania Avenue NW., Washington, DC 20460, Attention: Docket ID No. EPA-HQ-OW-2011-0880.

The foregoing resolution having been submitted to a vote, the vote thereon was as follows:

**YEAS: 5            NAYS: None            ABSENT: (2) Roberts & Lagasse**

This resolution was declared to be adopted on this the **5<sup>th</sup> day of November, 2014.**

THE FOREGOING IS CERTIFIED  
TO BE A TRUE & CORRECT COPY



**EULA A. LOPEZ  
PARISH CLERK  
JEFFERSON PARISH COUNCIL**