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Via Electronic Mail

April 12, 2019

Water Docket
U.S. Environmental Protection Agency
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2018-0149-0003
Proposed Regulations concerning Waters of the United States

To Whom It May Concern:

On February 14, 2019, the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) jointly proposed regulations replacing the definitions of waters subject to the jurisdiction of the federal government or “waters of the United States” (“WOTUS”) as the term is used in the application of the Clean Water Act (CWA). This letter presents the comments of the Southeast Stormwater Association, Incorporated (SESWA) concerning the Proposed Regulations as relates to the regulation’s impacts on Part 122 of the Code of the Federal Regulations (CFR), EPA Administered Permit Programs - the National Pollutant Discharge Elimination System (NPDES) program – and related impacts on water quality improvement programs administered by local governments.

The Southeast Stormwater Association

The Southeast Stormwater Association is a voluntary, non-profit corporation organized under subsection 501(c)(3) of the Internal Revenue Service Code. There are over 170 organizational members of SESWA (comprising 1,280 individuals) primarily consisting of municipal and county governments that must obtain and comply with municipal separate storm sewer system (MS4) permits. SESWA’s membership also includes many consulting and engineering firms that work with local governments, and various special districts and authorities. Its boundaries are co-terminus with the eight states in EPA Region 4. All of the members of SESWA have an interest in surface water quality improvement and the effective implementation of the MS4 permit program.

Laurie J. Hawks <i>President</i> Brown and Caldwell, GA	Scott C. Hofer <i>Vice President</i> Jefferson County, DOH, AL	J. Cory Rayburn <i>Secretary-Treasurer</i> City of Atlanta, GA	Danielle Hopkins <i>Executive Director</i>
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SESWA has been actively engaged in rulemaking related to the current WOTUS definition as that phrase is used in implementing the CWA. SESWA previously commented on rulemaking related to the current rule (see attachment A) and remains a party to judicial proceedings concerning the 2015 final regulations before the U.S. District Court for the Northern District of Florida.

Additionally, SESWA has previously submitted comments on three separate occasions (September 2017, November 2017 and July 2018) in response to requests from EPA and the Corps (the “Agencies”) concerning rulemaking efforts of the current Administration. Said comments are attached hereto (see attachment B) and are incorporated into this April 12, 2019 letter by reference.

Recommendations

SESWA supports scientifically-based regulations that further the goals of the CWA and make improvements to state and local programs implementing the Act. SESWA believes that the WOTUS regulations should contain measures that ensure a baseline level of environmental protection while improving regulatory clarity and lessening burdens on MS4 permit holders, consistent with the provisions of the Clean Water Act and case law interpreting the Act.

Importantly, we believe that any rule revising the definitions of waters of the United States must follow the clear intent of the CWA and not include those waters utilized as parts of a permitted municipal separate storm sewer system.

While SESWA strongly supports most of the provisions of the proposed regulations, we remain concerned that portions of the current draft are unclear as to their intent or application, or do not ensure a sufficient baseline level of environmental protection, and therefore make the following recommendations:

1. Adjacent Wetlands - We recommend that the term “adjacent wetlands” be revised to include wetlands that are within a 100-year floodplain of a jurisdictional water, including wetlands that are separated by a man-made or natural barrier from a jurisdictional water or lack a direct hydrologic connection thereto, and that the definition thereof be revised as follows:

(3)(i) Adjacent wetlands. The term adjacent wetlands means wetlands that abut or have a direct hydrologic surface connection to a water identified in paragraphs (1)(1)(i) through (v) of this section in a typical year. Abut means to touch at least at one point or side or are within the floodplain of a 100-year flood event of a water identified in paragraphs (1)(1)(i) through (v) of this section. A direct hydrologic surface connection occurs as a result of inundation from a paragraph (1)(1)(i) through (v) water to a wetland or via

perennial or intermittent flow between a wetland and a paragraph (l)(1)(i) through (v) water.

2. Exclusion of Stormwater Control Features – We recommend that the requirement that stormwater control features be constructed only in uplands to be excluded from being considered a jurisdictional water be revised so that condition only applies to newly constructed features and not existing features, as follows:

(2)(ix) Existing stormwater control features that are used to convey, treat, infiltrate or store stormwater run-off, or new stormwater control features that are excavated or constructed in upland to convey, treat, infiltrate or store stormwater run-off;

3. Municipal Stormwater Systems – Consistent with the intent of the CWA, we recommend that municipal stormwater systems be added to the list of waters specifically excluded from being a water of the United States and that the following definition of such systems be included within the regulations:

Municipal stormwater systems – The term municipal stormwater system means a conveyance or part of or a system of conveyances including but not limited to canals, ditches, catch basins, gutters, swales, constructed channels or storm drains, including detention, retention and infiltration basins and ponds, and groundwater recharge basins, that is designed or used for collecting, conveying, retaining or treating stormwater, that discharges to downstream waters identified in paragraphs (l)(1)(i) through (v) of this section, and is owned or operated by a state, city, town, county, special district, authority or other public entity having jurisdictional responsibility for obtaining and complying with the provisions of a municipal separate storm sewer system permit. A municipal stormwater system does not include any part of a combined sewer system or a publicly owned treatment works.

4. Waste Treatment System – We recommend that the definition of waste treatment systems be revised to add stormwater, as follows:

The term waste treatment system includes all components, including lagoons and treatment ponds (such as settling, cooling, detention and retention ponds) designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater or stormwater prior to discharge (or eliminating any such discharge) and including all components of NPDES-permitted municipal separate storm sewer systems that are upstream from the point of discharge.

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Summary

SESWA believes that the above recommendations serve to protect our surface water resources while significantly reducing the profound impacts that the 2015 regulations would have on local governments and other entities subject to or administering the NPDES and MS4 permitting programs.

As always, we stand ready to answer any questions that you may have concerning our comments and to work with both Agencies to improve water quality.

Sincerely,
SOUTHEAST STORMWATER ASSOCIATION

A handwritten signature in black ink that reads "Danielle Hopkins". The signature is written in a cursive, flowing style.

Danielle Hopkins

Attachments



Via Electronic Mail

November 14, 2014

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
Proposed Regulations concerning Waters of the United States

To Whom It May Concern:

On April 21, 2014, the US Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) jointly proposed regulations revising the definitions of waters subject to the jurisdiction of the federal government or “waters of the United States” (“WOTUS”) as the term is used in the application of the Clean Water Act (CWA) and Corps jurisdictional regulations. This letter presents the comments of the Southeast Stormwater Association, Incorporated (SESWA) concerning the Proposed Regulations as relates to the regulation’s impacts on Part 122 of the Code of the Federal Regulations (CFR), EPA Administered Permit Programs – the National Pollutant Discharge Elimination System or “NPDES” program.

Summary of Recommendations

As drafted, the Proposed Regulations would exceed Congress’s authority under the Commerce Clause of the U.S. Constitution and would misinterpret and then misapply the U.S. Supreme Court’s decision in *Rapanos v. United States*, 547 U.S. 715, 738 (2006).

SESWA thus recommends that the Proposed Regulations NOT be finalized or adopted at this time. We further recommend the following:

1. The Regulations be re-proposed to limit the expansion of federal jurisdiction as discussed in greater detail below;

2. The Regulations be re-proposed to confirm that ditches, canals and other waterways that convey wastewater or treated water to or from features where treatment occurs are covered by the wastewater treatment exclusion, including all sections of NPDES-permitted Municipal Separate Storm Sewer Systems (MS4s) that are upstream from the point of discharge;
3. The Economic Analysis of the Proposed Regulations be dismissed as it is based on fatally flawed assumptions, a new economic analysis be conducted and that a Small Entity Advisory Committee be created pursuant to the requirements of the Regulatory Reform Act based on the provision of the re-proposed rules; and
4. A new comment period opened on the provisions of the re-proposed rules, that EPA and the Corps concurrently engage recognized stakeholder groups in the discussion of the re-proposed rules, and that a series of public hearings be scheduled in each EPA Region on the re-proposed rules.

The Southeast Stormwater Association

The Southeast Stormwater Association (SESWA) is a voluntary, non-profit corporation organized under subsection 501(c)(6) of the Internal Revenue Service Code. There are over 150 organizational members of SESWA, primarily consisting of municipal and county governments that must obtain and comply with MS4 permits. SESWA's membership also includes various water control districts and authorities, academic institutions, and consulting and engineering firms.

SESWA has been actively involved in the development of water quality policy and the implementation of water quality improvement programs in the southeast for the past 10 years. All of the members of SESWA have an interest in surface water quality improvement and the effective implementation of the MS4 permit program.

Analysis of Proposed Regulations

The Proposed Regulations would categorically and very significantly expand the definition of jurisdictional waters in the following manners:

1. “Adjacent” Waters – The proposed regulations provide that *all* waters (including wetlands) that are adjacent to a waterbody that is currently jurisdictional are themselves jurisdictional and therefore subject to Clean Water Act (CWA) and EPA/Corps policies. Adjacent is defined to include “neighboring” waters. Neighboring waters include waters within the “floodplain” of jurisdictional waterbodies. Floodplain is 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*.

The proposed definition of “floodplain” is the broadest possible definition of the word. The definition is so broad that it would limit EPA’s and the Corp’s ability to use best professional judgment when determining where a floodplain (and therefore jurisdictional water) is or is not. It would create a state of confusion where many would litigate the terms “adjacent” and “floodplain” for years to come – the antithesis of the stated reasons for one of the primary reasons for proposing the regulations: To provide clarity in terms of the application of the CWA.

2. “Tributaries” – The proposed regulations provide for an expansive definition of what a tributary is, categorically including man-altered and man-made ponds, canals and ditches, with limited exceptions. The exemption from the definition of tributary includes ditches that are excavated wholly in uplands, only drain uplands, and have less than perennial flow; and, ditches that do not contribute flow, either directly or through another water, to a jurisdictional waterbody.

However, in coastal and other low-lying areas where high groundwater tables exist, it is common for ditches that are built in and drain uplands to have significant groundwater inputs. Since they have constant flows, the exemption would not apply to these types of waters.

3. “Significant Nexus” – The proposed rule broadens the “significant” nexus test from *wetlands* that are connected to a jurisdictional water physically, chemically *and* biologically, to physically or chemically *or* biologically. Thus, any water that was not determined to be jurisdictional by the expansive definitions of “adjacent” or “tributary” would likely be determined to be jurisdictional by the expansive definition of significant nexus.

Therefore, unless there is a specific exclusion pursuant to the very limited exceptions as contained in the proposed regulations, one could interpret the regulations as making all ditches, stormwater conveyances and attenuation ponds jurisdictional waters. Additionally, any and all waterbodies that are “adjacent” to jurisdictional water, and any and all waterbodies that have a physical or chemical or biological connection to jurisdictional water, could also be determined to be jurisdictional.

Impacts of the Proposed Regulations

If finalized as currently worded, the proposed regulations would have very significant and profound impacts on local governments and other entities subject to or administering the NPDES and MS4 permit programs, and to the workload of EPA and Corps Regional offices. Waterbodies that are “jurisdictional” are subject to the following:

1. Water Quality Criteria – Water quality criteria for the appropriate classification of the waterbody must be attained. In most instances
2. Total Maximum Daily Loads – Programs for implementing Total Maximum Daily Loads and water quality improvement measures – the listing process for impaired waters and TMDLs) – would be applied to newly jurisdictional waters, significantly increasing the workload of not only the MS4 permittees but also that of state and federal regulatory agencies that administer those programs.
3. MS4 Permit Program – Attainment of water quality criteria and water quality improvement programs (i.e. implementation of TMDLs) are implemented by the regulated community. In the case of city and county governments, that is through the MS4 permit program, as administered by the state regulatory agencies.
4. Fiscal Impacts - Contrary to the conclusions reached in EPA’s Economic Analysis of the Proposed Regulations, SESWA believes that there will be very significant fiscal impacts on MS4 permit holders. Please see the attached document, which is incorporated by reference herein.

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EPA Region 4, state regulatory agencies and the MS4 permit holders in the southeast have worked cooperatively for the past 25 years to develop and refine water quality improvement programs that implement the goals and provisions of the Clean Water Act and other state-based initiatives.

If finalized, the proposed regulations would throw many of those programs into a state of chaos, increasing the number of waters determined to be jurisdictional to such a degree that it will force local governments to divert scarce resources from water quality improvement projects benefiting streams, lakes and rivers, to ditches and other stormwater conveyances that serve no useful purpose other than to move floodwaters from one point to another.

The universe of waterbodies to which the MS4 permit program might apply would be so large and local fiscal resources so dispersed, and the discretion of EPA and the Corps so limited by the provisions of the proposed regulations, that it is quite possible that the regulations would have the paradoxical effect of reducing (not improving) water quality. This would be an absurd result if ever there were one.

Furthermore, to attempt to successfully implement the proposed regulations, local governments subject to the MS4 permit program would be forced to implement revisions to zoning and other land use regulations, in addition to the permit conditions. We believe that this necessity far exceeds any consideration ever made by the framers of the Clean Water Act and far exceeds the authority granted by Congress to EPA and the Corps.

Commerce Clause Concerns and *Rapanos* Concerns

Indeed, as drafted, the Proposed Regulations would exceed Congress's authority under the Commerce Clause and would contravene the U.S. Supreme Court's decision in *Rapanos*. Congress intended for Clean Water Act jurisdiction to be tied to its ability to regulate channels of interstate commerce like navigable rivers, lakes and canals. *SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001). According to the Court, the word "navigable" should have some meaning. In *Rapanos*, the Court thus rejected the "any hydrological connection" theory, reasoning that the theory "would stretch the outer limits of Congress's commerce power." *Rapanos*, 547 U.S. at 738. But by now

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extending jurisdiction to isolated wetlands and ponds, ephemeral drainage features, ditches, and other waters that have no navigable features and lack connections to truly navigable waters, the Proposed Regulations would exceed Congress's authority under the Commerce Clause.

The Proposed Regulations also incorrectly conclude that Justice Kennedy's decision in *Rapanos* is controlling. The Proposed Regulations then stretch the "significant nexus" test in Justice Kennedy's opinion to waters other than wetlands – to "tributaries," "adjacent waters," and "other waters." But by its own terms, Justice Kennedy's opinion applies only to wetlands. And, even for wetlands, because Justice Kennedy's opinion alone cannot be the narrowest, it alone cannot control. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

Recommended Revisions to the Proposed Regulations

As such, SESWA recommends that the proposed regulations not be adopted or finalized at this time. We recommend that EPA's Economic Analysis be rejected as it is based on fatally flawed assumptions. The rule should be re-proposed, a new Economic Analysis initiated and a Small Entity Advisory Committee created to study its effects.

SESWA further recommends that any re-proposed amendments to 40 CFR 230.3(u) be revised as follows:

1. Adjacent – We recommend that the definition of "adjacent" be revised to delete the word "neighboring" so that the definition includes only waters that border or are contiguous to a jurisdictional water.
2. Floodplain - As an alternative to our recommendation as contained in subparagraph 1 (above), we recommend that the definition of "floodplain" as used within the term "neighboring" be revised to specifically include only waters that are within the floodplain of a 20-year flood event. Leaving this phrase vague might encourage the inclusion of waters within, for example, the floodplain of a 100-year (or even higher) event - the inclusion of *land* that is usually dry.

3. Tributary – We recommend that the definition of “tributary” be revised to delete all language after the end of the first sentence of the proposed definition (i.e. delete all “additional” references) that add wetlands, lakes, ponds, impoundments, canals and ditches, whether they are natural, man-altered, or man-made.

Concerning ditches and whether they already should or should not be considered to be tributaries and therefor jurisdictional waters, EPA has stated during numerous conference calls, webinars and other meetings (both public and those that are less formal) that ditches and other conveyances with standing water in them already are or should be determined to be waters of the United States. This obviously begs the question: Why is it necessary to categorically include the term “ditches” within the definition of tributaries if they are already subject to existing regulations?

4. Significant nexus – We recommend that the term “significant nexus” be revised to include only waterbodies that significantly affect the physical, chemical, and biological integrity of a water as identified in the re-proposed regulations. And we recommend that that the term “significant nexus” apply only when considering whether wetlands are jurisdictional.
5. Exclusions – We recommend that subsection 40 CFR 230.3(t)(1) (concerning exclusions from the definitions of “waters of the United States”) be revised as follows:

Waste treatment and flood control systems, including treatment ponds or lagoons, stormwater retention and detention ponds, and man-made and made-altered structures, devices and conveyances that are designed to meet the requirements of the Clean Water Act, the conditions of an MS4 permit or to provide flood control services.

Such an exclusion would be consistent with existing distinctions in the Clean Water Act and EPA regulations. Specifically, such a distinction would confirm that sections of an MS4 upstream from a discharge point are not jurisdictional; that the MS4 system itself is not waters of the United States; that the features of an MS4 are clearly and unequivocally subject to the waste treatment exclusion and are distinct

from waters of the United States. *See, e.g.* 33 U.S.C. § 1342(3)(B) (requiring NPDES permits to limit pollutant “discharges *from* municipal storm sewers”)(emphasis added); 40 C.F.R. §122.26(b)(9)(defining an MS4’s “outfall” as “*the point where a municipal separate storm sewer discharges to waters of the United States...*”) (emphasis added); *Id.* at § 122.26(d) (providing requirements for MS4 permittees to manage their systems to limit pollutants to jurisdictional waters); *Id.* at § 122.1(b) (“The NPDES program requires permits for the discharge of ‘pollutants’ from any ‘point source’ into waters of the United States.”).

Conclusion

Contrary to providing clarity and furthering the laudable objective of more effective implementation of the Clean Water Act, the Proposed Regulations would leave the public, the regulated community, state regulatory agencies, and EPA and the Corps in a flummoxed state.

Despite whatever the best intentions of the drafters of the proposed regulations may have been, it would take the courts many years to sort out the validity of the proposed regulations. Worse yet, the proposed regulations would force city and county governments to divert scarce resources away from streams, rivers and lakes sorely in need of water quality improvement projects, to ditches and urban stormwater conveyances that serve no environmental or human purpose, other than flood protection or (ironically) waste treatment.

We therefore urge EPA and the Corps to not adopt or finalize the proposed regulations but to re-propose substantially revised regulations, re-open a new comment period, conduct a new economic analysis and empanel a Small Entity Advisory Committee on the re-proposed regulations.

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As always, we stand ready to answer any questions that you may have concerning our comments and to work with both agencies to improve water quality.

Sincerely,
SOUTHEAST STORMWATER ASSOCIATION

A handwritten signature in black ink that reads "Kurt Spitzer". The signature is stylized, with the first name "Kurt" written in a cursive-like font and the last name "Spitzer" written in a more blocky, cursive style. There is a horizontal line underlining the end of the signature.

Kurt Spitzer

attachment

Proposed Regulations on Waters of the United States
Analysis of Selected Subsections

Southeast Stormwater Association

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Proposed Regulations on Waters of the United States

Analysis of Selected Subsections Southeast Stormwater Association

On April 21, 2014, the US Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) jointly proposed regulations revising the definitions of waters subject to the jurisdiction of the federal government or “waters of the United States” (“WOTUS”) as the term is used in the application of the Clean Water Act (CWA) and Corps jurisdictional regulations. While the rule proposes language to a number of sections of the Code of the Federal Register (CFR), this analysis only refers to Part 122, EPA Administered Permit Programs – the National Pollutant Discharge Elimination System or “NPDES” program.

EPA has indicated that the purpose of the proposed regulations is to clarify what waters are (and are not) covered by the CWA and that the new regulations will not have substantial direct effects on the regulated community since they will not significantly change what is currently considered jurisdictional waters or WOTUS.

Expansion of WOTUS

The proposed regulations begin with the traditional definition of WOTUS, such as those waters that are susceptible for use in interstate or foreign commerce, interstate waters, certain wetlands, territorial seas and impoundments of these waters, and tributaries thereto. But the proposed regulations then expand the definition of WOTUS in the following manner:

- “Adjacent” Waters – The current regulations provide that wetlands adjacent to WOTUS are included, although “adjacent” is not defined. The proposed regulations provide that *all* waters (including wetlands) that are adjacent to

Proposed Regulations on Waters of the United States

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WOTUS are included. A definition of “adjacent” is also provided in the proposed rules that include *neighboring* waters. “Neighboring” includes waters within the *floodplain* of a WOTUS. “Floodplain” is 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. EPA has stated that it will use “best professional judgment” when determining where a floodplain exists.

- “Tributaries” – The current regulations provide that tributaries of a WOTUS are jurisdictional waters, although “tributary” is not defined. The proposed rules keep the same reference but have an expansive definition of what a tributary is, including man-altered or man-made ponds, canals, and ditches, with limited exceptions.
- Waters with “Significant Nexus” – Finally, on a case-specific basis, the proposed regulations provide that other waters and wetlands, alone or in combination with other waters, that have a significant effect on WOTUS in the region, are also considered jurisdictional waters.

Specific Exclusions

The proposed regulations also define waters that are not considered jurisdictional waters. Ditches are specifically not considered WOTUS under the following circumstances:

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- Ditches that are excavated wholly in uplands, only drain uplands, and have less than perennial flow; and, ditches that do not contribute flow, either directly or through another water, to WOTUS.
- Waste treatment systems, including treatment ponds or lagoons, constructed for water quality improvement purposes designed to meet CWA requirements.

Assessment

Unless there is a specific exclusion, the proposed revisions will require that the provisions of the NPDES program (including the conditions of Municipal Separate Storm Sewer System permits) apply to ditches, stormwater conveyances and attenuation ponds if they meet certain tests. First, is the water body “adjacent” or has a “significant nexus” to classic WOTUS or a tributary thereof? To be adjacent, the water body must be within a classic WOTUS’s floodplain or is a tributary that is directly *or indirectly* connected to the waterbody. To have a significant nexus, a water body must be within the classic WOTUS’s watershed, the flow from which significantly affects the waterbody.

Thus (unless specifically excluded) a water body that is adjacent to a jurisdictional water is WOTUS. Also, if a water body is not adjacent but has a significant nexus, then that water body is also WOTUS, unless specifically excluded.

Additionally, all tributaries (i.e. ditches and stormwater conveyances) that have a direct connection and contribution to jurisdictional water - even if not “adjacent” or are without a “significant nexus” - will be considered to be WOTUS.

Proposed Regulations on Waters of the United States

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Consequences

Given the assessment of the proposed regulations and considering all tests in total, in many areas throughout the southeast the following types of water bodies will now be considered to be jurisdictional waters of the United States:

- Man-made or man-altered ditches and conveyances, and stormwater ponds (designed to attenuate stormwater runoff) within the floodplain of a classic WOTUS; and
- Man-made or man-altered ditches and conveyances, and stormwater ponds (designed to attenuate stormwater runoff) that have a direct connection to WOTUS.

Note that the expansion of the number of jurisdictional waters may be especially pronounced in coastal areas, where ditches may exist that are built in and drain uplands but have significant groundwater inputs. If they have constant flows from groundwater, they could be considered to be WOTUS even if constructed in uplands.

Since the regulations are jointly issued by EPA and the Corps, there are at least two significant consequences of which local governments in Region 4 should be aware:

1. Municipal Separate Storm Sewer System permit requirements and water quality standards must be met in stormwater conveyances and retention structures that

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are determined to be WOTUS, including applicable water quality criteria and other permit conditions.

2. Dredge and fill permitting policies of the Corps will be applicable to stormwater attenuation ponds, drainage ditches and other conveyances that are determined to be WOTUS, even during routine maintenance activities.

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May 21, 2014



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Via Electronic Mail

July 31, 2018

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

Attention: Docket ID No. EPA-HQ-OW-2017-0203

To Whom It May Concern:

The US Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) have jointly solicited comments regarding revisions to the definitions of waters subject to the jurisdiction of the federal government or “waters of the United States” (“WOTUS”) as the term is used in the application of the Clean Water Act (CWA) and Corps jurisdictional regulations. The purpose of the most recent solicitation is to seek additional comments on earlier proposals to repeal the 2015 WOTUS definitions. This letter presents the comments of the Southeast Stormwater Association, Incorporated (SESWA) concerning the most recent request of EPA and the Corps.

The Southeast Stormwater Association

The Southeast Stormwater Association (SESWA) is a voluntary, non-profit corporation organized under subsection 501(c)(3) of the Internal Revenue Service Code. There are over 150 organizational members of SESWA, primarily consisting of municipal and county governments that must obtain and comply with MS4 permits. SESWA’s membership also includes various special districts and authorities, academic institutions, and consulting and engineering firms. Its boundaries are co-terminus with those of EPA Region 4.

SESWA has been actively involved in the development of water quality policy and the implementation of water quality improvement programs in the southeast for the past 12 years. All of the members of SESWA have an interest in surface water quality improvement and the effective implementation of the MS4 permit program.

Hillary C. Repik <i>President</i> Town of Mt. Pleasant, SC	Laurie J. Hawks <i>Vice President</i> Brown and Caldwell, GA	Scott C. Hofer <i>Secretary-Treasurer</i> Jefferson County DOH, AL	Danielle Hopkins <i>Executive Director</i>
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Additionally, SESWA has been actively involved in rulemaking concerning the definition of “waters of the United States,” as that phrase is used in the CWA. SESWA previously commented on the rulemaking on several occasions. The most recent comments that we provided to the agencies are attached and are incorporated into this comment letter by reference.

SESWA remains a party to judicial proceedings concerning the 2015 final regulations before the U.S. District Court for the Northern District of Florida and the U.S. Court of Appeals for the Sixth Circuit in Ohio.

Specific Recommendations

In general, SESWA supports scientifically-based regulations that further the goals of the CWA and make improvements to state and local programs implementing the Act. Our reasons for challenging the 2015 WOTUS regulations were based on our belief that the rules would actually have resulted in *lessening* local government’s ability to manage water quality improvement programs. Because the applicability of the 2015 rule was as broad as it was, local governments and other entities charged with implementing the provisions of their municipal separate storm sewer system permit would lose the ability to target specific waterbodies for improvement programs.

SESWA supports the repeal of the 2015 regulations. Nonetheless, we continue to urge EPA and the Corps to include provisions in the replacement rule similar to those which we have recommended in our letters of September and November of 2017. We remain steadfast that a rule replacing the 2015 definitions should not reduce the scope of the application of the CWA to the extent that the interconnected nature of many waterbodies is not recognized, thereby resulting in lowering water quality not improving it.

We appreciate the opportunity to comment and stand ready to answer any questions that you may have.

Sincerely,
Southeast Stormwater Association

A handwritten signature in black ink that reads "Danielle Hopkins". The signature is written in a cursive style with a large, sweeping initial "D".

Danielle Hopkins

attachments



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Via Electronic Mail

November 28, 2017

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

Attention: Docket ID No. EPA-HQ-OW-2017-0480
Non-regulatory docket soliciting recommendations for Step 2 rulemaking
defining “Waters of the United States”

To Whom It May Concern:

The US Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) jointly solicited comments regarding revisions to the definitions of waters subject to the jurisdiction of the federal government or “waters of the United States” (“WOTUS”) as the term is used in the application of the Clean Water Act (CWA) and Corps jurisdictional regulations. This letter presents the comments of the Southeast Stormwater Association, Incorporated (SESWA) concerning recommended definitions that we urge the Agencies to adopt in 2018. Our comments presume that the current (2015) WOTUS regulations have been repealed in their entirety.

SESWA is a voluntary, non-profit corporation organized under subsection 501(c)(3) of the Internal Revenue Service Code. There are over 150 organizational members of SESWA, primarily consisting of municipal and county governments that must obtain and comply with MS4 permits. SESWA has been actively involved in rulemaking concerning the definition of “waters of the United States” and has commented on proposed rules on several occasions. SESWA remains a party to judicial proceedings concerning the 2015 final regulations before the U.S. District Court for the Northern District of Florida, the U.S. Court of Appeals for the Sixth Circuit, and the U.S. Supreme Court.

Hillary Repik
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Kurt Spitzer
Executive Director

Summary of SESWA's Recommendations

While we had significant concerns with the 2014 draft regulations and still have similar concerns with the 2015 final regulations, we believe that the rules should recognize the scientifically-confirmed connectivity that exists between certain types of waters. We believe that the proposed rule should contain measures that ensure environmental protection while improving regulatory clarity and lessening burdens on MS4s.

We have two primary sets of recommendations concerning the proposed WOTUS regulations:

1. DEFINITIONS

- a. We recommend that a definition of “floodplain” be included in the 2018 regulations but be limited to waters located within the 100-year floodplain of waters used for interstate or foreign commerce; interstate waters, including wetlands; and territorial seas.
- b. We recommend that a definition for “adjacent” be included in the 2018 regulations but that it be limited to waters bordering or contiguous to those used for similar purposes as floodplain definitions. We specifically recommend against the inclusion of a definition of “neighboring waters” or a similar term in the 2018 rules.
- c. We recommend that a definition specifically not include references to “man-made waters” and “ditches” as a category of waters that could be included as jurisdictional.
- d. We recommend that 2018 language include definitions for significant nexus but that it not include functions such as the retention and attenuation of flood waters, and runoff storage when determining relevance during the nexus evaluation.

2. EXEMPTIONS

- a. The 2018 regulations should confirm that ditches, canals and other waterways that convey stormwater to or from features where treatment occurs are included in an exemption, and including all sections of NPDES-permitted MS4s that are upstream from the point of discharge.
- b. Any exemptions for waste treatment systems should specifically include stormwater treatment systems, including detention and retention ponds and green infrastructure, designed to meet Clean Water Act requirements or to provide flood control functions.
- c. Any exemptions for wastewater recycling structures should specifically include stormwater recycling structures, and exemptions for stormwater control features

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November 28, 2017
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constructed to convey, treat, or store stormwater should not be required to be “created in dry land.”

We believe that the above recommendations would serve to protect our surface water resources while significantly reducing the profound impacts that the 2015 regulations would have had on local governments and other entities subject to or administering the NPDES and MS4 permit programs.

As always, we stand ready to answer any questions that you may have and to work with both agencies to improve water quality.

Sincerely,
SOUTHEAST STORMWATER ASSOCIATION

A handwritten signature in black ink that reads "Kurt Spitzer". The signature is written in a cursive style with a large, sweeping flourish at the end of the name.

Kurt Spitzer



719 East Park Avenue • Tallahassee, FL 32301 • (866) FOR-SESWA [367-7379] • www.SESWA.org

Via Electronic Mail

September 27, 2017

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

Attention: Docket ID No. EPA-HQ-OW-2017-0203
Proposed Regulations concerning Waters of the United States

To Whom It May Concern:

On July 27, 2017, the US Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) jointly proposed regulations revising the definitions of waters subject to the jurisdiction of the federal government or “waters of the United States” (“WOTUS”) as the term is used in the application of the Clean Water Act (CWA) and Corps jurisdictional regulations. *See* 82 Fed. Reg. 34,899 (July 27, 2017). This letter presents the comments of the Southeast Stormwater Association, Incorporated (SESWA) concerning the Proposed Regulations as relates to the regulation’s impacts on Part 122 of the Code of the Federal Regulations (CFR), EPA Administered Permit Programs – the National Pollutant Discharge Elimination System or “NPDES” program.

Summary of SESWA’s Recommendations

As drafted, the Proposed Regulations would repeal in their entirety the regulations adopted by EPA and the Corps in 2015. While SESWA had significant concerns with the 2014 draft regulations and still has significant concerns with the 2015 final regulations, we recommend that the Proposed Regulations focus not only on repealing certain provisions but also revising and retaining other sections of the 2015 final regulations.

Concerning the proposed regulation, we recommend the following:

1. The proposed Regulations seek to roll back the expansion of federal jurisdiction as contained in the 2015 rule. Recognizing the scientific connectivity that does exist between certain types of waters, we believe that EPA and the Corps should retain some definitions for the sake of providing regulatory clarity.

Buddy Smith, EPSC II
President
Hamilton County, TN

Hillary Repik
Vice President
Town of Mt. Pleasant, SC

Laurie J. Hawks
Secretary-Treasurer
Brown and Caldwell, GA

Kurt Spitzer
Executive Director

2. The Regulations confirm that ditches, canals and other waterways that convey stormwater, wastewater or treated water to or from features where treatment occurs are included in an exemption from coverage under the WOTUS rules, including all sections of NPDES-permitted Municipal Separate Storm Sewer Systems (MS4s) that are upstream from the point of discharge.

The Southeast Stormwater Association

The Southeast Stormwater Association (SESWA) is a voluntary, non-profit corporation organized under subsection 501(c)(3) of the Internal Revenue Service Code. There are over 150 organizational members of SESWA, primarily consisting of municipal and county governments that must obtain and comply with MS4 permits. SESWA's membership also includes various special districts and authorities, academic institutions, and consulting and engineering firms. Its boundaries are co-terminus with those of EPA Region 4.

SESWA has been actively involved in the development of water quality policy and the implementation of water quality improvement programs in the southeast for the past 12 years. All of the members of SESWA have an interest in surface water quality improvement and the effective implementation of the MS4 permit program.

Additionally, SESWA has been actively involved in rulemaking concerning the definition of "waters of the United States," as that phrase is used in the CWA. SESWA previously commented on the rulemaking in 2014. See Attachment A. SESWA remains a party to judicial proceedings concerning the 2015 final regulations before the U.S. District Court for the Northern District of Florida, the U.S. Court of Appeals for the Sixth Circuit, and the U.S. Supreme Court.

Specific Recommendations

SESWA recommends the following revisions to the 2015 WOTUS regulations.

Definitions

1. Floodplains - We recommend that the term "floodplain" as used in the 2015 WOTUS regulations be significantly revised to retain the provisions including all waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (3) of the section but to delete the balance of subsection (8) in its entirety.
2. Adjacent and Neighboring - We recommend that the term "neighboring" be deleted from the definition of "adjacent" waters in its entirety.
3. Neighboring – We recommend that the definition of "neighboring" be deleted in its entirety.

4. Tributary and Tributaries – we recommend the following:
 - Delete “man-made” waters and “ditches” as a category of waters that could be included in the definition of a tributary.
 - Delete the language protecting the water’s status as a “tributary” when there are one or more constructed or natural breaks, even if a bed and banks and an ordinary high water mark can be identified upstream of the break.
 - Delete the language protecting the water’s status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through non-jurisdictional waters to waters otherwise identified as a jurisdictional.
4. Significant Nexus – Revise the definition so as to delete the following functions relevant to the significant nexus evaluation:
 - Retention and attenuation of flood waters, and
 - Runoff storage

Exemptions

So as to avoid the expenditure of scarce public resources on waters that serve little or no human, economic or environmental benefit, we recommend that the below exemptions be included if the provisions of the 2015 rule are revised but retained as described above:

1. We recommend that the exemption for waste treatment systems be clarified to include stormwater treatment systems, including detention/retention ponds and green infrastructure practices that are designed to meet the requirements of the Clean Water Act or to provide flood control functions.
2. We recommend that ditches that are owned or operated by a public entity and are part of a municipal separate storm sewer system be added as an exempt category.
3. We recommend that the existing exemption for stormwater control features constructed to convey, treat, or store stormwater be revised to delete the provision that they must be “created in dry land.”
4. We recommend that the exemption for wastewater recycling structures be revised to include stormwater recycling structures.

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Summary

SESWA is encouraged that the “agencies will more fully consider the policy in section 101(b) when exercising their discretion to delineate the scope of waters of the U.S., including the extent to which states . . . have protected or may protect waters that are subject to CWA jurisdiction.” 82 Fed. Reg. at 34,902. We believe that the above recommendations would serve to protect our surface water resources while significantly reducing the profound impacts that the 2015 regulations would have had on local governments and other entities subject to or administering the NPDES and MS4 permit programs.

As always, we stand ready to answer any questions that you may have concerning our comments and to work with both agencies to improve water quality.

Sincerely,
SOUTHEAST STORMWATER ASSOCIATION

A handwritten signature in black ink that reads "Kurt Spitzer". The signature is stylized and written in a cursive-like font.

Kurt Spitzer

Attachment