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719 East Park Avenue / Tallahassee, FL 32301 – www.seswa.org – 866-367-7379

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;

Steve Leo  
*President*  
Gwinnett County, GA

Jeff Corley, PE  
*Vice-President*  
City of Concord, NC

Buddy Smith  
*Secretary-Treasurer*  
Hamilton County, TN

Kurt Spitzer  
*Executive Director*

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 written in a cursive style with a large, sweeping flourish at the end of the name.

Kurt Spitzer

attachment

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

**Southeast Stormwater Association**

P.O. Box 10530  
Tallahassee, FL 32302

[www.seswa.org](http://www.seswa.org)

866-367-7379

# 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

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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.

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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