



October 27, 2014

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

**RE: Docket ID No. EPA-HQ-OW-2011-0880
Proposed Definition of “Waters of the United States” (“WOTUS”) Under the
Clean Water Act (“CWA”) rule contained in 40 CFR Parts 110, 112, 116, et.
al.**

To Whom It May Concern:

Please accept this letter on behalf of the Southeast Florida Utility Council (“SEFLUC”), with respect to the United States Environmental Protection Agency’s (“EPA”) proposed Definition of “Waters of the United States” (“WOTUS”) Under the Clean Water Act (“CWA”) rule contained in 40 CFR Parts 110, 112, 116, et. al. (“hereinafter referred to as the “Proposed Rule”). SEFLUC is an unincorporated, not for profit, association of 35 water and wastewater utilities located primarily in the Lower East Coast of Florida within Miami-Dade, Broward, Palm Beach, Martin and Monroe Counties. Its purpose is to advocate for water and wastewater utilities with respect to proposed government regulations affecting their interests. SEFLUC’s member utilities supply approximately 850 million gallons per day (“mgd”) of safe and reliable potable water to nearly five million residents of southeast Florida. It is projected that by 2025, its member utilities will supply approximately 1,086 mgd to over six million persons. As part of their normal operations, SEFLUC’s member utilities discharge from stormwater systems, wastewater treatment facilities, reclamation ponds, and the like into waters of the State. Therefore, the Utility Council members are expected to be significantly affected by the Proposed Rule.

SEFLUC has concerns regarding potential unintended consequences of the Proposed Rule for south Florida utilities. In 2000, the EPA authorized the Florida Department of Environmental Protection (“DEP”) to implement the National Pollution Discharge Elimination System (“NPDES”) permitting program in the state of Florida. As part of this program, the DEP regulates point source discharges from municipal, industrial and construction activities into surface waters of the State of Florida. As the NPDES permitting authority, DEP is responsible for promulgating rules and issuing permits, managing and reviewing permit applications, and performing compliance and enforcement activities. Taking into consideration the complexities of Florida’s landscape and utility operations, the DEP adopted by rule a number of exemptions from the definition of waters of the state and NPDES permitting requirements. However, the

definitions contained in the Proposed Rule raise questions as to whether waters currently excluded or exempt from the NPDES permitting process will now be considered “waters of the United States,” and thus overruling and subsequently eliminating the DEP exemptions.

Ditches

The proposed definition of tributary includes any natural, man-altered, or man-made and waters including rivers, streams, lakes, impoundments, canals and ditches (unless excluded). Much of south Florida is comprised of ditches, including roadside ditches, irrigation ditches, agricultural ditches, and stormwater ditches, which have intermittent flow and no significant nexus to waters identified in categories 1-3 of the navigable waters definition. While the Proposed Rule attempts to address these issues by excluding some ditches from the definition of tributary, this exclusion only applies to waters excavated “wholly in uplands” or waters that do not contribute *any* flow either directly or through other water bodies to a waterbody in categories 1-3.

Determining whether a ditch is located wholly in uplands will be based on historical evidence. Historically, almost all of south Florida was wetlands. Large ditches and canals were constructed and used to drain these wetlands and create dry land upon which to build. In fact, the federal government implemented one of the largest flood control and drainage projects in the world, the Central and Southern Florida Flood Control Project, to accomplish this goal. Therefore, regardless of the size, flow or nexus to other navigable waters, it will be near impossible to have any ditches in south Florida excluded from the WOTUS definition because historically, virtually none of south Florida was “uplands”.

The practical consequences of this massive inclusion of all ditches in south Florida as WOTUS will create a significant increase in the amount of new NPDES permit applications and unduly burden an already over tasked DEP. Thus shifting the focus of DEP from, focusing on enforcement and regulation environmental issues to issuing permits for discharges that would otherwise have no adverse impact on the environment. Furthermore, utilities will be forced to increase rates charged to customers because of the unwarranted need to identify and permit all point sources discharging into these roadside, stormwater, and irrigation ditches.

SEFLUC recommends the EPA revise the Proposed Rule to provide more specific guidance on how to determine if a ditch is jurisdictional. In providing that guidance, the EPA should clarify and provide a specific exemption for ditches that are used to manage stormwater or are part of the Central and Southern Florida Flood Control Project. Furthermore, the EPA should establish a baseline period for the determination of historical uplands.

Impact on Storage Ponds

The Proposed Rule’s sixth category of “navigable waters” includes all waters, including wetlands adjacent to other waters identified in categories 1-5 of the definition. Adjacent is defined as bordering, contiguous or neighboring waters separated from other WOTUS by dikes or barriers. Neighboring is further defined as waters located within a riparian area or floodplain or waters with a shallow subsurface connection or confined surface hydrologic connection. The term floodplain is defined as an area bordering inland or coastal waters....and is inundated

during periods of moderate to high water flows. However, the flood frequency is not defined, but rather left to agencies' "best professional judgment."

The Proposed Rule adds a new seventh category of "other waters" that if either alone, or in combination with other *similarly situated* waters located in the same *region* and *significantly* affects the chemical, physical or biological integrity of a water identified in categories 1-3. Interestingly, rather than relate to the degree of impact, a significant effect occurs when the effect is more than *speculative* or insubstantial. Thus, if there is a similarly situated water (i.e. other waters or wetlands that perform similar functions *located sufficiently close together or sufficiently close to a WOTUS*), which could have an impact on a category 1-3 navigable water, it will be considered a navigable water. This extremely broad definition seems to run beyond the intent of the U.S. Supreme Court in its recent rulings. Under this definition, waters not otherwise located sufficiently close to a traditional WOTUS, but close to each other could be considered navigable waters subject to CWA regulation. Clearly, the Supreme Court did not intend clusters of otherwise non-navigable waters to be considered navigable waters merely because the waters are located in close proximity to each other.

Under these definition categories, constructed storage ponds which are part of a stormwater/wastewater system (i.e. stormwater or wastewater treatment ponds, storage ponds) in Florida could be considered navigable waters because of Florida's flat landscape and broad floodplains or under the significant nexus theory. SEFLUC is concerned that storage ponds located within the traditional navigable water's floodplain would be included as navigable waters and require a NPDES permit for discharges that may occur under flood conditions. Similarly, SEFLUC is concerned that reclaimed water reuse with a direct discharge to stormwater ponds which already requires an NPDES permit; may be required to meet water quality standards at the point of discharge, thus making the practice cost prohibitive.

SEFLUC is aware of the existing exemption for "waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act.", however, the limiting language that the system be "designed to meet the requirements of the Clean Water Act" raises significant concerns as to whether these storage ponds will actually be exempt from the navigable waters definition. The written guidance on the scope of this exemption inadequately addresses the issue. Therefore, we recommend the exemption should be revised to specifically include, at a minimum, the following: water storage facilities; aquifer storage and recovery facilities; stormwater management systems that are permitted under federal or authorized state programs; reclaimed water storage and conveyance systems; and man-made wetlands that are permitted as part of waste water treatment system. Without these revisions, navigable waters may be interpreted to include a number of water systems that are clearly outside the scope of the intended definition and utility operations will suffer significant adverse impacts.

Additionally, the DEP currently exempts storage ponds from requiring a NPDES permit so long as the pond itself is not a water of the state. *See* Rule 62-610.830, Florida Administrative Code. However, if these storage ponds are now considered WOTUS, the Florida exemption by rule will be superseded by the Proposed Rule and any future attempts to exempt these storage ponds would require EPA involvement. SEFLUC recommends EPA adopt existing exemptions under state delegated NPDES programs.

Shallow Aquifers

A large area of the groundwater system in South Florida experiences limited confinement between shallow aquifers and surface waters. As written, the Proposed Rule's definition of other waters could also include groundwater in the surficial aquifer, which may have a connection to category 1-3 navigable waters. As a result, SEFLUC is concerned the NPDES permitting requirements would apply to direct or indirect discharges to shallow aquifers and require water to be treated to such levels so as to no longer make underground injection a feasible alternative for water disposal.

SEFLUC understands there is an exemption for groundwater, including groundwater drained through subsurface drainage system. However, it is concerned shallow subsurface connections referenced in the definition of adjacent waters may be used to establish jurisdiction despite this exemption. Arguably, if the groundwater exemption was intended to exclude all groundwater, including shallow aquifers, then the adjacent water definition would not specifically reference shallow subsurface hydrology connections as being included within the definition. Therefore, there must be some reconciliation of the exclusion of all ground waters in one section of the Proposed Rule and the inclusion of shallow subsurface waters in another. Given the uncertainty with future interpretations of this exemption, SEFLUC requests the Proposed Rule specifically exempt shallow aquifers from the WOTUS definition.

Conclusion

SEFLUC believes a number of these unintended consequences can be avoided through more specific exemptions and incorporation of existing exemptions under state-delegated NPDES programs.

Thank you for your consideration of our comments. We look forward to your response.

Sincerely,

A handwritten signature in blue ink, appearing to read 'G. Batista', with a stylized flourish at the end.

Giovanni Batista, Chair
Southeast Florida Utility Council