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Via Electronic Mail

February 7, 2022

Water Docket
U.S. Environmental Protection Agency
Washington, DC

Attention: Docket ID No. EPA-HQ-OW-2021-0602
Revised Definition of “Waters of the United States”
Comments of the Southeast Stormwater Association

To Whom It May Concern:

On December 7, 2021, the US Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) published revised regulations concerning 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 and suggestions of the Southeast Stormwater Association, Incorporated (SESWA) concerning revisions to such regulations, especially as relates to the potential 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.

The Southeast Stormwater Association

SESWA is a voluntary, non-partisan, non-profit corporation organized under subsection 501(c)(4) of the Internal Revenue Service Code. Its membership area is co-terminus with the boundaries of EPA Region 4. There are over 185 organizational members of SESWA, 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 various water control districts and authorities, academic institutions, product manufacturers, and many consulting and engineering firms. There are 1,300 individuals who are actively engaged as members of SESWA.

SESWA has been actively involved in the development of water quality policy and the implementation of water quality improvement programs for the past 19 years. All of the members of SESWA have an interest in surface water quality improvement and the effective implementation of the MS4 permit program.

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Summary of Recommendations

SESWA recognizes the need for federal oversight that sets basic standards for the protection of waterbodies and water quality and that the proposed definitions for Waters of the United States (WOTUS) should contain provisions that ensure protection of waterbodies and water quality. We believe that the forthcoming rules should contain measures that ensure environmental protection while improving regulatory clarity and lessening burdens on MS4s. SESWA also recognizes the need of its members to have a clear understanding of the boundary between their stormwater systems and WOTUS. Based on this, the comments presented below reflect the Associations desire for greater clarity and specificity in the definitions so that the rules are applied consistently and allow for the management of stormwater treatment systems to help meet the goals of the Clean Water Act.

At this time, SESWA offers the following recommendations for clarifications to the proposed revisions of the WOTUS definitions and regulations:

1. Waste Treatment Systems - As part of the exclusions which would fit under Waste Treatment Systems, SESWA recommends reestablishment of the exclusion (from the 2020 rule) for stormwater control features:
 - a. *Non-jurisdictional waters. The following are not “waters of the United States”:*
(10) Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff.
2. 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:
 - a. *(3)(i) Adjacent wetlands. The term adjacent wetlands means wetlands that abut or have a direct hydrologic surface connection to a jurisdictional water in a typical year. Abut means to touch at least at one point or side or to be within the floodplain of a 100-year flood event of a jurisdictional water. A direct hydrologic surface connection occurs as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and a jurisdictional water.*

General Comments

1. SESWA believes that the rules should contain provisions that improve regulatory clarity for MS4s and assist MS4s in the implementation of their permit conditions. This should include more specificity on the specific types of stormwater treatment and conveyance infrastructure that would not be deemed WOTUS.
2. SESWA agrees with the stated goal of this rule “to Provide Certainty for the Definition of WOTUS.” Evaluation of the rule language and the supporting documentation does not seem to fully support the stated goal in that the removal of some of the clear methods for determining and quantifying jurisdictional waters that were in previous rules leaves uncertainty. Both the 2015 and 2020 WOTUS rules provide definitions of jurisdictional waters in such a way that a map could be made of the WOTUS with a fairly high level of certainty (although very different maps). This rule does not have those levels of certainty and leaves too much to the discretion of local regulators.
3. The rule specifically avoids certain levels of specificity in the definitions so as to allow the discretion of the regulators to make site specific determinations of WOTUS. The rule falls back on some of the methodologies and approaches utilized based on the 1987 rules as being familiar and established. It is important to note that the reasons for the need for the rewrite of the WOTUS rule is that too much uncertainty existed, and issues occurred relative to the discretion of the regulating agencies resulting in inconsistent application of the rule across jurisdictions. To achieve the stated goals of the rule rewrite, the new rule must provide sufficient additional specificity to avoid the historic issues.
4. The rule at present does not account for the historic development of stormwater systems throughout the US. Many stormwater systems have been built within historic drainageways and even high-level tributaries to receiving waters. This stormwater infrastructure has little resemblance to historic natural systems and would not support the biological and chemical conditions of jurisdictional waters. Some accounting of these conditions, through clearer definitions of exclusions, should be made under this rule.
5. Stormwater treatment takes many forms. It is important that these rules do not inadvertently limit innovative treatment approaches that would support achievement of the goals of the Clean Water Act. Treatment wetlands for example, provide treatment of stormwater runoff but would resemble, through their connectivity and significant nexus to receiving waters, their natural counterparts. Another aspect is the use of offline or inline regional treatment facilities which also would resemble natural waters through connectivity and would impact the chemical, physical and biological condition of downstream waters. The exclusions provided within the rule need to allow room for these and other future innovative treatment approaches that help address the difficult and costly aspects of stormwater treatment.

Docket ID No. EPA-HQ-OW-2021-0602
February 7, 2022
Page four of four

6. SESWA recommends that additional guidance and streamlined permitting be made available for projects that, by their nature, are located within jurisdictional waters whose sole purpose is to combat climate change through building resiliency. These projects may include wetlands expansion or restoration to naturally buffer our coastal communities, restoring floodplains and streambanks to reduce flooding, maintenance of historically impacted jurisdictional waters to restore their hydraulic capacity (canals, channelized streams, retention ponds, etc.), or integrating green stormwater infrastructure projects into our built environment per our MS4 permits.

Summary

We believe that the above recommendations and existing state regulatory regimes would serve to provide clarity and protect our surface water resources while avoiding the profound impacts that the regulations would have had on local governments and other entities subject to 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 "Danielle Hopkins". The signature is fluid and cursive, with "Danielle" on top and "Hopkins" below it, slightly overlapping.

Danielle Hopkins