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Attention: Definition of "Waters of the United States under the Clean Water Act"

Palm Beach County, Florida (County) welcomes the opportunity to submit comments on the final Clean Water Act (CWA) Rule, published June 29, 2015 (FR 80:124), as provided in Executive Order 13132, February 28, 2017. The County appreciates the efforts by the United States Environmental Protection Agency (EPA) to initiate rulemaking to further streamline the definition of "waters of the United States" (WOTUS) in a manner consistent with previous guidance and decisions of the Supreme Court of the United States. The County also appreciates the efforts of EPA staff to engage state and local government representatives on issues pertaining to the applicability of rule development to geographically specific local conditions.

Prior to the publication of the previous Clean Water Rule in 2015, the County provided extensive comments to the docket (EPA-HQ-OW-2011-0880) and hosted EPA staff at a meeting that included stakeholders and Congressional staff from throughout Southeast Florida. Despite multiple constructive conversations regarding the applicability and implementation of the proposed rule in South Florida, the County was concerned by the language of the final rule, definitions proposed therein, and the lack of clarity and direction from the federal agencies regarding its impacts to the County and other local governments within South Florida. The County felt that the final rule arbitrarily expanded the definition of "waters of the United States" to water bodies outside of current practices and permitting regimes and created significant regulatory uncertainties regarding previously approved and highly effective state regulatory programs, thereby violating the framework of cooperative federalism envisioned by the Clean Water Act. Additionally, the rule failed to anticipate or address the unique local circumstances and challenges faced by local governments in South Florida, instead imposing a "one size fits all" federal rule without resolving the unintended consequences of the implementation of the rule.

While the definition of "waters of the United States" is important in defining the "rules of the game" as they exist under the various provisions of the Clean Water Act (CWA), equally as vital are the various exemptions from the definition, which

provide flexibility in applying the provisions in circumstances dictated by unique factors in a given geographic context. This is especially vital in a geographic region such as South Florida, where 6 million people and large scale agricultural enterprises exist in an area that is wholly dependent on man-made and highly managed canals and associated control structures for flood control, water supply and environmental benefits. As noted below, recognition that retention and treatment of water to meet standards must occur within specifically defined areas currently permitted and recognized as outside the definitions of "waters of the state" in Florida law is vital in achieving the protections necessary for those water resources that we are seeking to protect.

Palm Beach County

Palm Beach County is the second largest county in Florida in terms of geographic area and has the third largest population in the State. The County is extremely diverse; with a large and thriving urban area in the eastern part of the County, as well a highly productive agricultural industry in the rural western part of the County. The current population of the County is approximately 1.5 million people and represents an extremely diverse socio-economic demographic. Palm Beach County leads the nation in the production of sugar and sweet corn. Eighteen percent of all sugar in the United States is produced here. Sugar cane covers some 400,000 acres or about one-third of the county's overall land mass. The county is also the state's leading producer of rice, bell peppers, lettuce, radishes, Chinese vegetables, specialty leaf and celery.

Palm Beach County, like most of South Florida, is a relatively flat and highly developed, with distinct urban and rural areas. The County experiences distinct wet and dry seasons, as well as marked periods of intense rainstorms and tropical storm events. Additionally, there is an intricate interface between the groundwater table and surface water features due to South Florida's unique topography and surficial aquifer system. As a result, the County is susceptible to flooding and extreme water flows.

Water management and flood control in Palm Beach County is dependent on a complex, integrated system of primary canals, waterways and flood control devices operated by the South Florida Water Management District, secondary canals and accompanying infrastructure owned and operated by approximately 20 local drainage districts, and thousands of privately owned canals, retention/detention lakes and ponds that have previously been permitted under existing federally approved state surface and stormwater management permitting programs. The county's drainage system is generally designed to handle excess surface water in three stages. The "neighborhood or tertiary drainage systems" (made up of community lakes, ponds, street and yard drainage grates or culverts, ditches and canals) flow into the "local or secondary drainage system"(made up canals, structures, pumping stations and storage areas) and then into the "primary flood control system" (consisting of South Florida Water Management District canals and natural waterways and rivers), ultimately reaching the Atlantic Ocean. As a result,

there are very few "natural" water bodies in Palm Beach County. Urban populations and agricultural interests are wholly dependent on the greater water management systems for their public safety, water supply, and economic success.

Clean water is vital to Palm Beach County and the well-being of the region. However, the County felt that the final WOTUS rule expanded CWA jurisdiction to systems and waters not previously considered "waters of the United States" under the Act, without providing the appropriate exemptions to recognize pragmatic realities on the ground. The imposition of additional regulatory control by federal agencies would result in decreased governmental efficiency, conflate and confuse existing regulatory practices and programs that have already been granted EPA approval, create extensive regulatory uncertainty and impeding the ability of stakeholders to further develop the economy of the region.

For example, the final rule would have severely limited the ability of the County to achieve its goals and obligations regarding stormwater retention, conveyance and treatment under existing MS4 programs and could have severely curtailed the County's reclaimed water programs that have been recognized by EPA as exemplary templates for other utilities throughout the nation. The rule expanded CWA jurisdiction to any small stream, ditch or other water body that could eventually flow into a traditionally "navigable water," rendering the majority of Palm Beach County and the South Florida region "waters of the United States," and arbitrarily eliminating previously approved jurisdictional boundaries for previously permitted surface and stormwater management systems. To address these and other concerns, the County submits the following comments and suggestions regarding potential language to be incorporated into the re-issuance of an updated rule:

I. Maintain the Principles of Cooperative Federalism Framework Required by the CWA

As noted above, the final rule resulted in the significant expansion of federal jurisdiction beyond that contemplated by Congress in passing the Clean Water Act and by the Supreme Court of the United States (SCOTUS) in interpreting its provisions in several cases involving jurisdictional claims by the federal agencies. Palm Beach County supports the stated objective of the Clean Water Act to "restore and maintain the chemical, physical and biological integrity of the Nations' waters." However, the County also understands that the stated policy of the Act is also to "recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use...of water and land resources."[1]

The SCOTUS, in the *SWANCC* case, noted that concern is heightened when an interpretation of a statute by a federal agency "alters the federal-state framework by permitting federal encroachment on a traditional state power."[2] The final rule

[1] 33 U.S.C. §1251 s. 101(a)-(b)

[2] *Solid Waste Agency of Northern Cook County (SWANCC) v. United States,* 531 U.S. 159 (2001) at 172-173 (citing *United States v. Bass,* 404 U.S. 336, 349 (1971)).

adopted by the Obama Administration created in Florida a situation where currently approved permitting and regulatory programs were called into question due to uncertainties created by the expansion of jurisdiction contained in the rule. The definition of "waters" of the State,[3] which was traditionally considered more expansive than "waters of the US," is interpreted by state regulators to exclude those surface water management systems that were permitted under delegated permitting programs as measures to treat and retain water prior to discharge. Without a designated exemption for previously permitted stormwater and surface water management systems in the federal rule, the definition of "waters of the US" may necessitate the development of water quality standards for water bodies that were never contemplated for jurisdictional status by state regulators. Such an expansion is analagous to the "immense expansion of federal regulation" found in the *Rapanos* case that led to the following summary by the plurality opinion:

> *The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit, whether man-made or natural, broad or narrow, permanent or ephemeral – through which rainwater or drainage may occasionally or intermittently flow. On this view, the federally regulated "waters of the United States" include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years. Because they include land containing storm sewers and desert washes, the statutory "waters of the United States" engulf entire cities and immense arid wastelands."*
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> *In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever rain falls. Any plot of land containing such a channel may potentially be regulated as a "water of the United States."*[4]

The final rule developed by the Obama administration arguably rendered the entirety of South Florida "waters of the United States," thereby resulting in an "expansive theory" that, rather than "preserving the primary rights and responsibilities of the States" would bring "virtually all planning of the development and use...of land and water resources" under federal control.[5] The cooperative federalism framework of the Clean Water Act demands that the federal agencies refrain from infringing on the ability of the State to implement existing and effective water quality standards and permitting programs, particularly when those programs and standards have already been approved by the federal agencies as meeting the requirements of the Clean Water Act. In developing an updated rule, the County recommends that EPA recognize those regulatory programs that have been developed and implemented by the Florida Department of Environmental

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[3] Section 373.019 (22), Florida Statutes

[4] *Rapano v. United States*, 547 U.S. 715, 722 (2006)

[5] *Id.* at 737.

Protection and ensure that the language developed by the rewrite of the WOTUS regulations not infringe upon the authority of the State to continue to implement those programs.

II. Excluded Waters and Exempted Activities:

In areas, such as South Florida, where there is a marked surface water/ground water interface and all waters can be argued to be interconnected even under the Scalia plurality opinion in *Rapanos*, there is a need to recognize the pragmatic reality that the citizens and businesses inhabiting the area require flood control and water management to enable society to function. To that end, there is a need to recognize and exempt from direct regulation those systems that are utilized to provide retention and treatment prior to discharge to those waters that we are seeking to protect.

Ditches

The US Army Corps of Engineers (Corps) has not consistently asserted authority over manmade tributaries, including ditches. The 1977 Corps definition of "waters of the US" expressly excluded "manmade nontidal drainage and irrigation ditches excavated on dry land" from the definition of tributaries[6]. This appears to be the genesis from which the federal agencies generated the exclusion for ditches articulated in the 2015 final rule. However, instead of being generally excluded, ditches would have been considered tributaries and therefore "waters of the US" *unless* they met the terms of an exemption. The 2015 rule therefore represented the first time that manmade conveyances were expressly included in the definition of "waters of the US."

The 2015 rule listed several categories of waters that were explicitly excluded from the definition of "waters of the U.S.", and not jurisdictional under the CWA, including those constructed wholly in the uplands and that drain only uplands, and those that do not contribute flow, directly or through other waters, to a "water of the U.S." However, the rule failed to exclude systems like those that exist in South Florida to provide areas for treatment prior to discharge to a sensitive water resource, regardless of where they were constructed. As described above, much of South Florida had been drained, channelized and diked well before the passage of the Clean Water Act, rendering it nearly impossible to determine whether ditches drain uplands or would have been considered "tributaries" under the 2015 rule. A better approach would be to grant an additional exclusion for ditches incorporated as part of previously permitted stormwater or surface water management.

Under the 2015 rule, ditches with perennial flow would have been considered identical to any other tributary. They would not only be subject to the CWA's permitting requirements, but they would also be subject to other requirements of the law, including water quality standards, pollution cleanup plans and oil spill prevention measures. Even a ditch that collected agricultural or stormwater runoff

[6] 33 C.F.R. 323.2(a)(3)(1977)

could end up needing a pollution discharge permit for where it flows into navigable waters. This could have been potentially devastating to farming in South Florida. If stormwater and surface water management ditches and conveyances are not clearly exempted from the definition of "waters of the U.S.", many ditches will fall under federal jurisdiction and maintenance activities will require a CWA Section 404 permit. This permitting process is very expensive and time consuming, creating legal vulnerabilities for entities responsible for maintaining the ditches, in addition to significantly increasing the administrative load on staff from the Army Corps of Engineers, most likely resulting in greater permitting times and costs.

"Waste Treatment Systems and Other Exclusions"

Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act have traditionally been exempted from the requirements of the Act. The County suggests that any new rule should also exclude other constructed water management and treatment infrastructure with similar attributes to traditionally waste treatment systems, as well as constructed or managed water reuse and recycling systems that may not have been designed to meet the requirements of the Clean Water Act, but that serve a vital purpose for water recycling and provide marked water supply benefits. These facilities could include water reuse and recycling ponds, conveyance systems, treatment lagoons, and other appurtenances; artificially constructed wetlands designed to treat agricultural or stormwater runoff (e.g. green infrastructure) used and managed to improve water quality; and artificially constructed groundwater recharge basins designed to percolate surface water into groundwater basins. Simply put, as the EPA and Corps update and clarify the definition of what constitutes a "water of the US," they should also take the opportunity to update the language of the water treatment exclusion to recognize the advancements that have been made in wastewater design and treatment. EPA should also consider update the language to include the innovative measures being undertaken by wastewater utilities to embrace a "one water" framework and incorporate water reuse into local and regional goals.

III. Palm Beach County Concerns

Stormwater

Palm Beach County is one of 41 co-permittees under Phase I MS4 Permit No. FLS000018-003, issued by DEP pursuant to the stormwater element of the NPDES permitting framework that has been delegated to the State of Florida by EPA. The permit is issued pursuant to Section 403.0885, Florida Statutes and associated regulatory provisions contained in Florida Administrative Code and covers a myriad of man-made canals, ditches, ponds, wetlands and structures that make up the stormwater management systems. The permit specifically authorizes "all existing stormwater point source discharges to waters of the State,[7]" and authorizes new

[7] Authorized discharges are to the channelized primary canals of the South Florida Water Management District and secondary canals of several independent special districts, the

stormwater discharges provided they meet all applicable requirements of the environmental resource permitting program authorized pursuant to Part IV of Chapter 373, Florida Statutes. Co-permittees are required to implement Stormwater Management Programs that include pollution prevention measures, treatment and removal techniques, stormwater monitoring, use of legal authority and other appropriate measures to "control the quality" of stormwater discharged from the MS4. Importantly, stormwater point source discharges are sited at points of discharge from the man-made stormwater treatment systems into the primary and secondary canals. The man-made stormwater treatment systems are considered "waters of the state," as defined in Florida law, and are not subject to state water quality standards pursuant to Section 373.4142, Florida Statutes, as long as they are designed, constructed and operated pursuant to a valid state stormwater or environmental resource permit.

Given the unique topography and high water table in South Florida, stormwater treatment mechanisms are necessary parts of the conveyance system of an MS4 that are integrated throughout the system to ensure water quality benefits are achieved prior to discharge through a control structure into a receiving "water of the State" at the downstream end of the MS4 system. If stormwater treatment mechanisms and their accompanying MS4 systems become "Waters of the US," the points of discharge would be required to move upstream of the stormwater treatment system, resulting in the almost total elimination of the MS4 jurisdictional area. State water quality requirements would have to be met inside the systems, or DEP would be forced to adopt additional standards for those water bodies. For privately owned stormwater management systems (also referenced below), this would directly contradict established and EPA approved state law and regulatory regimes that consider the systems "waters" only for the purposes of discharge. For local government systems, this would practically eliminate the ability to provide treatment within the systems prior to discharge. As an example, the lead permittee on the Palm Beach County MS4, Northern Palm Beach County Improvement District, will see its MS4 area reduced from 36,000 acres to less than 1,000 acres (a 97% reduction) under the proposed rule. The Village of Wellington, one of the larger municipalities in the County, will see a reduction in its MS4 area from 20,000 acres to 6,000 acres (a 70% reduction).

All stormwater systems permitted under Florida law and regulatory programs are designed to provide retention, conveyance and treatment prior to discharge into "waters of the State." EPA Region IV's guidance on the treatment of wastes, including the treatment of stormwater, finds that such treatment in "Waters of the US" is inconsistent with provisions of the Clean Water Act.[8] Simply put, if stormwater management systems are considered jurisdictional "Waters of the

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overwhelming majority of which were constructed prior to the passage of the Clean Water Act. The federal agencies have consistently maintained that the primary and secondary canals are "navigable waters" under the meaning of the CWA. See, e.g., *Mildenberger v. U.S.*, 41 ELR 20225 (Fed. Cir. 6/30/11).

[8] See *Final Region 4 Guidelines for Reconciling Storm Water Management and Water Quality and Resource Protection Issues* (11/14/01).

United States" as contemplated under the proposed rule, the ability of local governments in South Florida to provide treatment will be eliminated. This will result in deleterious water quality impacts to the water resources of the region, a result not contemplated by the agencies. As previously articulated, Palm Beach County recommends that the federal agencies include language in the final rule explicitly excluding, as part of the waste treatment system exclusion, those man-made stormwater management systems that have been previously permitted under existing federal or federally approved state permitting programs.

Wastewater and Reclaimed Water

The Palm Beach County Water Utilities Department (PBCWUD) is the third largest water and wastewater utility in Florida and operates one of the largest and most mature reclaimed water networks in the State. PBCWUD treats wastewater at its Southern Region Water Reclamation Facility and supplies reuse to a number of different golf courses and residential communities for irrigation use. The facility is permitted under Florida DEP NPDES Permit FL0041424. Under the conditions of the permit, PBCWUD discharges reclaimed water into existing stormwater treatment systems that are owned, operated and maintained by the various golf courses and homeowner's associations and have previously been permitted under Florida's environmental permitting programs. The storage of reclaimed water in the stormwater systems are subject to DEP Program Guidance Memo DOM 96-01 and the associated TBEL that have previously been approved by EPA.

Under the conditions of its permit, PBCWUD is limited to discharging reclaimed water into the systems up to an agreed upon control elevation. Due to Florida's wet weather and groundwater/surface water interface, water within the ponds and lakes that make up the stormwater systems is a blend of groundwater, stormwater and reclaimed water. In wet weather periods, there may be intermittent discharges of this blended water from the systems into "waters of the State." PBCWUD is required to monitor and report these intermittent discharges to DEP as part of its permit requirements. The privately owned systems are not considered to be "waters of the state" and are only included in the definition of "waters" in state statutes for the purposes of discharge from the system onto property or into other "waters."[9]

The lack of clarity in the 2015 rule created broad interpretive possibilities and uncertainties regarding water reuse and recycling infrastructure. Were any future rule result in the stormwater management systems being designated jurisdictional "waters of the US," PBCWUD would be required to meet water quality standards prior to the discharge of reclaimed water into systems under the existing approved permitting regime. This requirement would result in skyrocketing costs to implement a vital water reuse program that has been promoted by both the Florida DEP and EPA as an effective way to address water supply concerns and could result

[9] See Section 403.301, Florida Statutes, and Guidance Memo DOM-96-01 (April 26, 1996) at p. 3 (describing golf course lakes and other lakes of ponds as "not waters of the state" and "part of the stormwater management system").

in the abandonment of the program as not cost effective. Palm Beach County believes that water reuse and recycling infrastructure should be expressly included in the waste treatment exemption, along with previously permitted stormwater management systems that are utilized for reclaimed water distribution.

IV. Suggested Improvements to the Clean Water Rule

To avoid regulatory uncertainty, legal deficiencies and problematic practical consequences, Palm Beach County proposes the following amendments to the existing rule language:

1) Exclude all ditches that are excavated in uplands from CWA jurisdiction, including the point at which a ditch discharges to a water of the US, no matter how often the ditch holds water.
2) Ditches that develop wetland characteristics (as happens in South Florida as they are often wet and intended to collect water) should be explicitly exempted from jurisdiction.
3) Ditches that are part of federal or state permitted surface water or storm water management systems or that do not have continuous flow should be exempted from jurisdiction.
4) Clarify the waste treatment exemption to clearly include man-made storm water management and treatment systems that have been previously permitted under the MS4 permitting program or a federally approved state permitting program. Exempted man-made storm water features should include ditches, canals and conveyances, wetlands, inflow basins, and other features that should be clearly articulated in the rule. Alternatively, the proposed rule should be amended to include a new exemption for stormwater management facilities and features.
5) Clarify the waste treatment exemption to further clarify that innovative features other than treatment ponds or lagoons clearly fit within the exemption, including features that are designed to facilitate the delivery or disposal of reclaimed water that may not have been explicitly designed to meet the requirements of the Clean Water Act. In the case of Palm Beach County, these systems are included in the NPDES permit for the facilities, however, there are other situations where this is not the case and facility owners may see increased liability without an explicit change in the exemption.
6) Explicitly exempt green infrastructure from jurisdiction under the rule.

Conclusion:

Palm Beach County understands the meaning and purpose of the Clean Water Act and the goal of protecting our nation's water resources while providing clarity and certainty for the regulated community. Palm Beach County has attempted to provide examples of how previously proposed rule language was problematic, provoked confusion and gave rise to regulatory uncertainty, particularly in the context of the unique topography of South Florida. Any approach to protecting water quality in America must be accomplished through the Clean Water Act's vision

of cooperative federalism, including partnerships at the local, regional and state levels. Failure to define or limit essential terms on the part of the federal agencies in the language of any proposed rule will render the rule impermissibly vague[10] and the utilization of expansive and subjective "best professional judgment" in implementation similar to that proposed as part of the 2015 rule is arbitrary, capricious, and in clear violation of existing law. Palm Beach County continues to welcome the opportunity to work with the EPA, the Corps and our local, regional and state governments in promulgating a reasonable and rational rule that will achieve the protection of our nation's water resources while recognizing the practical realities of specific regions.

Sincerely,

Kenneth S. Todd, Jr.

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[10] *See Atlas Copco, Inc. v. Environmental Protection Agency,* 642 F.2d 458 (D.C. Cir. 1979) (A rule that is so ambiguous that it allows any manner of regulatory authority is arbitrary and capricious and an abuse of agency discretion.).