

# SOUTHEAST FLORIDA UTILITY COUNCIL



## Impacts of EPA's “Waters of the United States” Rulemaking

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# Proposed Rule

- Published: April 21, 2014
- Purpose:
  - Developed jointly by EPA and USACOE
  - Define the scope of waters protected under the CWA in light of Supreme Court cases
  - Clarify protection under the CWA for streams and wetlands
  - replaces the definition of “navigable waters” and “waters of the United States” in the regulations for **all** CWA programs, including 40 C.F.R. § 122.2: NPDES permitting and Storm Water

# Impact on Florida

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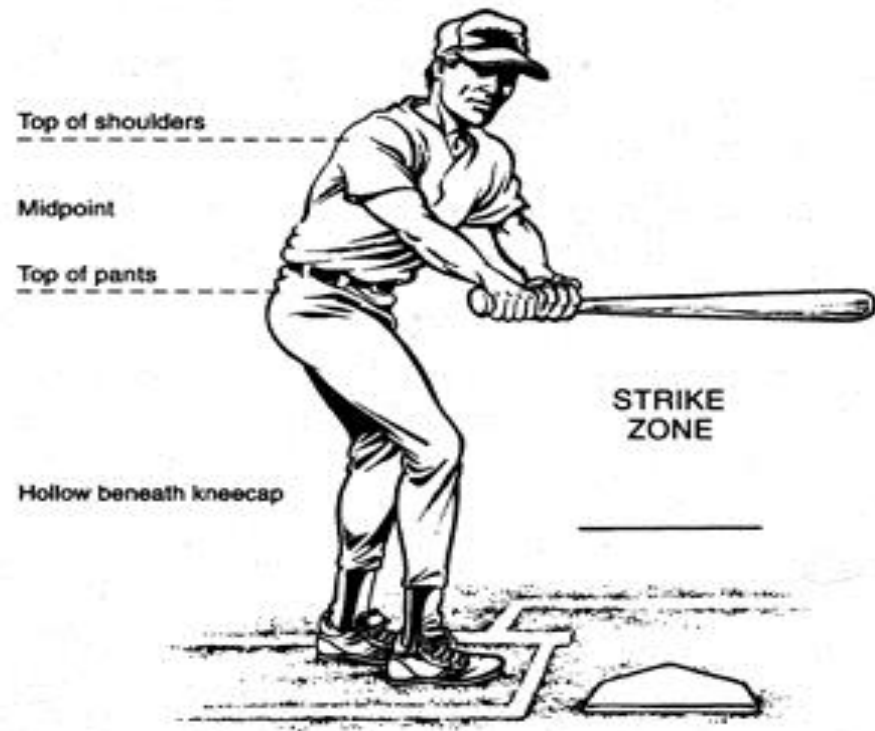
- Florida delegated NPDES permitting program and created separate ERP process
- Florida “waters of the state” broader than current “waters of the US”
  - No significant *jurisdictional* difference between existing Florida definition and proposed WOTUS definition
- Broader Florida definition resulted in existing state exemptions by rule (storm water ponds)
  - Issue whether existing state exemptions can be exempted by rule or subject to EPA review

# Purpose

## \*\*Clarity (Per EPA Statements)

### Possible Impediments:

- 1) National Rulemaking when permitting occurs on a state/local level based on local conditions
- 2) Possible conflict between proposed rule and existing state programs
- 3) Third Party Umpires interpreting EPA “intent”



# Why does it matter?

- **Enforcement/likelihood for potential illegal discharges**
  - Is an NPDES permit required? Where is the discharge point?
  - Are you complying with your permit – meeting water quality standards, discharge limits? At what point is that required?
- **Additional costs and monitoring requirements**
- **Third-party citizen suits**

# What is Included?

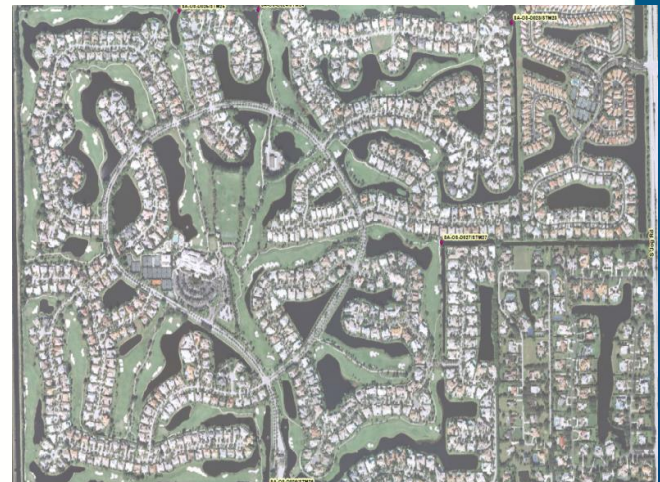
## What Waters Does the Clean Water Act Cover?

- The CWA applies to “navigable waters,” or “waters of the U.S.”
- Under the CWA, the federal government has control over waters that have a substantial impact on interstate commerce, and the states have control over all other waters within their borders.
- “Navigable waters” are waters that are navigable in a traditional sense, and the Supreme Court has held that the CWA reaches those and certain other waters.
- The Supreme Court has in several instances limited EPA and the Corps’ jurisdiction under the CWA. **CWA jurisdiction cannot be based on a mere connection to a navigable water (*Rapanos*), nor does it extend to waters far removed from navigable waters (*SWANCC*).**



# What is Included?

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# Navigable Waters

1. All waters currently, in the past, or may be susceptible to use in interstate or foreign commerce, including tidal waters;
2. All interstate waters, including interstate wetlands;
3. The territorial seas;
4. All impoundments of waters identified in 1-3 above;
5. All **tributaries** of waters identified in 1-4 above;
6. **All waters, including wetlands, adjacent to waters** identified in 1-5 of this section; and
7. On a case-specific basis, **other waters**, including wetlands, that alone or in combination with other similarly situated waters in the region have a **significant nexus** to a water identified in paragraphs 1-3

First 6 categories part of *existing rule* except:

- Tributaries is defined for the first time
- Adjacent waters was previously adjacent wetlands
- Key words defining adjacent are themselves defined for the first time



# Significant Changes

- 1) First **6** categories part of *existing rule* except:
  - Tributaries is defined for the first time
  - Adjacent waters was previously adjacent wetlands
  - Key words defining “adjacent” are themselves defined for the first time
- 2) New Category 7 – Other Waters and the “Significant Nexus”
- 3) Exemptions

# New Definition

## Tributary:

- Water body physically characterized by a bed and bank and ordinary high water mark which contributes flow directly or through other water bodies to waters in 1-4.
- A water **does not lose its tributary status if there are man-made breaks** (such as bridges, culverts, pipes, dams) so long as bed and bank can be identified upstream of the break.
- A wetland, pond, or lake can be a tributary, even if it lacks an OHWM and bed and bank, provided it contributes flow to 1-3.
- **A tributary can be natural, man-altered, or man-made and includes rivers, streams, lakes, impoundments, canals, and ditches (unless excluded).**

# Tributary

Tributary does NOT include:

- Ditches ***excavated wholly in uplands*** and that ***drain only uplands*** and ***have less than perennial flow***
  - “In uplands means ditches at no point along their length are excavated in a wetland or other water.”
  - Historical evidence will be necessary to prove that excavated wholly in uplands, etc.
  - Drain only uplands means that no wetlands drain to the ditch
- Ditches that do not contribute flow either directly or through other water bodies to a water in 1-3 above

# Tributary - Impacts

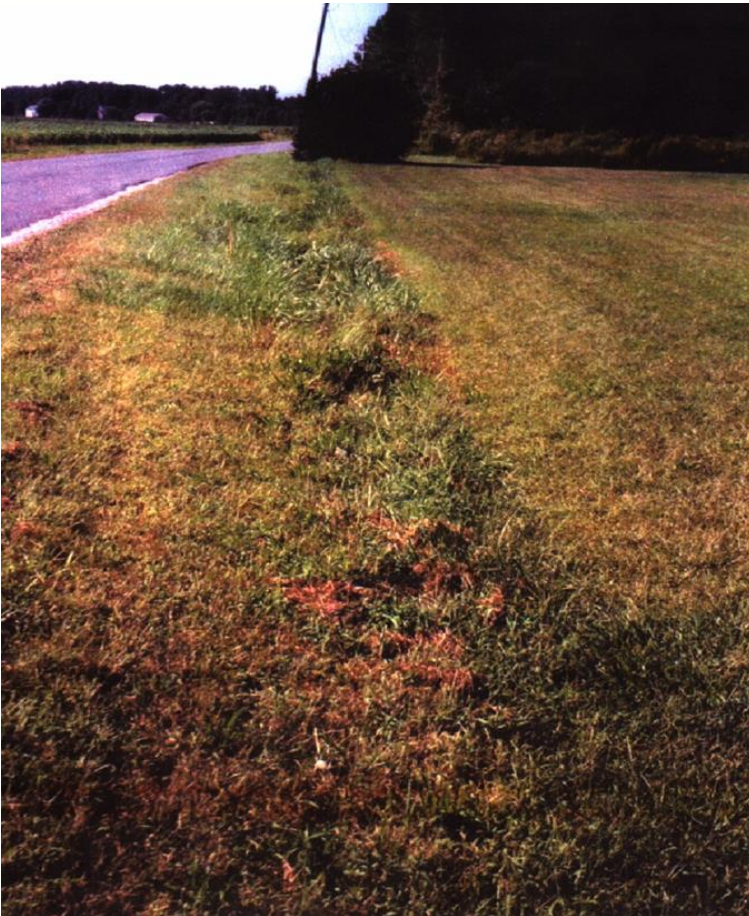
## Impact of Tributary Definition:

- The rule, for the first time ever, specifically defines ditches as jurisdictional tributaries under all CWA programs
  - Roadside ditches
  - Irrigation ditches
  - Stormwater ditches
- Other man-made conveyances that drain or connect also qualify as tributaries
- Huge practical consequences that have yet to be evaluated
- Florida – difficult to show ditch is wholly part of an “upland” to qualify for exemption



# Tributary - Impacts

Examples of Tributaries:



# Other New Definitions - Adjacent

- **Adjacent:** Bordering, contiguous, or **neighboring** waters separated from other WOTUS by dikes, or barriers are adjacent waters
- **Neighboring:** Waters located within a **riparian area** or **floodplain** or waters with a shallow subsurface connection or confined surface hydrologic connection
  - **Riparian area:** Transitional areas between water and land where surface or subsurface hydrology influences the ecological process and plant community of the area ...
  - **Floodplain:** An area bordering inland or coastal areas that ... is inundated during periods of moderate to high water flows

# Other New Definitions - Adjacent

- **Riparian Areas and Floodplains Analysis**

- Nearly every city and county in the U.S. have these areas
- Flood frequency (e.g., 5-year, 100-year, 500-year floodplain) is not defined, but is left to agencies' "best professional judgment."
- FEMA spends about \$100 million annually mapping floodplains (primarily 100-year and sometimes 500-year). If EPA decides a smaller floodplain is more appropriate, it would be much more difficult and expensive to define
- No federal agency maps riparian areas, so would fall to EPA to define riparian area for every part of the country



# Other New Definitions - Adjacent

## Riparian Areas and Floodplains Impact

- Floodplain definition could include storage ponds
  - Floodplain not defined
  - If 100 year floodplain, may discharge every 25 years = NPDES Permit
- Florida waters of the state exempt storage pond discharges
  - If WOTUS, DEP may need EPA approval to exempt





# Other New Definitions – Significant Nexus

- **Significant Nexus\*:**

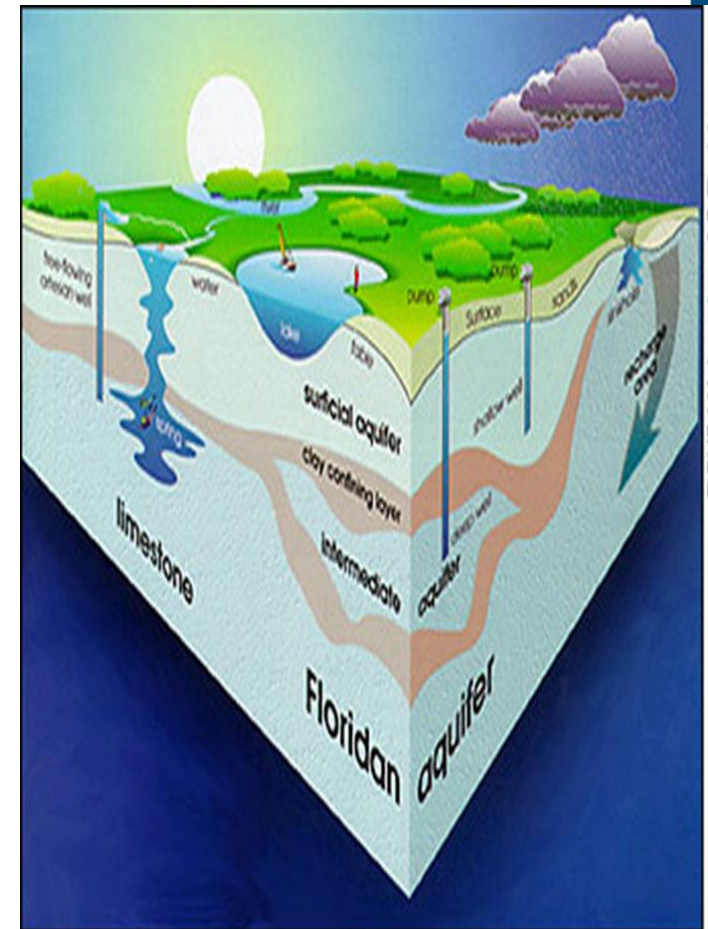
- “Significant nexus” means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (1)(i) through (iii) of this definition), significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (1)(i) through (iii) of this definition.
  - “Significant” means a more than speculative or insubstantial effect that a water or wetland has either or alone or in combination with other waters in the region on waters 1-3.
  - Other waters, including wetlands, are “similarly situated” when they perform similar functions and are located sufficiently close together so that they can be evaluated as a single landscape unit.

\*Case by Case Determination

# Other New Definitions – Significant Nexus

## Potential Impact

- Surficial aquifer could be included as having a significant nexus to a water in 1-3 of the navigable water definition
  - UIC Program Impacts – would discharges to underground injection well require NPDES permit?
    - Although groundwater is exempt under the rule, “subsurface hydrology” can provide connection to establish jurisdiction
    - Florida has complex surface/ground water interface, particularly in south Florida
- Reuse discharges
  - NPDES permit required for reuse runoff? Not specifically exempted



# Exclusions from Navigable Waters Definition

- **Waste treatment systems, including treatment ponds or lagoons, *designed to meet the requirements of the Clean Water Act*,**
  - Limited written guidance on what is included
    - Stormwater systems permitted under authorized state programs
    - Water reuse facilities constructed for water supply or other purposes
- Prior converted cropland;
- Ditches ***excavated wholly in uplands*** and that ***drain only uplands*** and ***have less than perennial flow***; and
- Ditches that do not contribute flow either directly or through other water bodies to a water in 1-3 above
- Artificially irrigated areas that would revert to uplands should irrigation cease

# Exclusions

- Artificial lakes or ponds created in ***dry land*** and used exclusively for stock watering, irrigation, settling basins, or rice growing
- Artificial reflecting pools or swimming pools created by excavating and/or diking dry land
- Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons
- Water-filled depressions from construction
- Gullies, rills, and ***non-wetland swales***
- ***Groundwater***, including groundwater drained through subsurface drainage systems \*does not reconcile the exclusion with the inclusion of waters based on subsurface connection; 9<sup>th</sup> Circuit Case



# Summary of Potential Impacts/Issues

- Ditches
  - No exemption in South Florida because not located wholly in uplands
- Stormwater Management Programs
  - No exemption in WOTUS for permitted stormwater treatment systems for NPDES and Dredge and Fill Permits
- Adjacent waters includes waters in floodplain
  - Potential for storage/retention ponds to be included UNLESS
    - Prove part of water treatment system *designed to meet requirements of CWA*
    - Exemption – which may require EPA approval rather than DEP rule

# Summary of Potential Impacts/Issues

- Significant Nexus
  - Could extend to groundwater in surficial aquifer
    - Impacts to UIC program – NPDES permit required for discharge to well?
  - Reuse runoff
    - NPDES permit for reuse wastewater discharges?

# What do we seek to avoid?

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**SOLUTION:**  
Maintain/clarify  
existing exemptions  
and reaffirm  
previously delegated  
and authorized state  
programs

# Potential Amendment Suggestions

- Incorporate state exemptions where NPDES permitting has been delegated
- Exclude from definition of WOTUS
  - Water Supply Storage Facilities
  - Aquifer Storage and Recovery Facilities
  - Stormwater management systems that are currently permitted under federal or authorized state programs
  - Reclaimed water storage and conveyance systems
  - Application of reclaimed water
  - Man-made wetlands that are permitted as part of waste treatment systems
- Clearly define “floodplain” and provide limits to “riparian area” to define adjacency



# Questions?

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THANK YOU!