CASQA
California Stormwater Quality Association®
Dedicated to the Advancement of Stormwater Quality Management, Science and Regulation

June 19, 2017

U.S. Environmental Protection Agency (EPA)
Attn: Andrew Hanson
Intergovernmental Liaison
USEPA Headquarters

Subject: Executive Order 13132, Review of the Waters of the U. S. Rule (February 28, 2017)

Mr. Hanson:

On behalf of the California Stormwater Quality Association (CASQA), thank you for the opportunity to provide comments on Executive Order 13132, which suggests potential changes to the "Clean Water Rule: Definition of "Waters of the United States"; Final Rule (WOTUS Rule).

CASQA[1] is the country's largest professional, non-profit association dedicated to stormwater quality issues. CASQA's municipal members are subject to regulation of their municipal separate storm sewer systems (MS4s) under National Pollutant Discharge Elimination System (NPDES) stormwater permits issued by the California Regional Water Quality Control Boards, the State Water Resources Control Board, and approved by EPA Region 9. CASQA has considerable interest in the WOTUS Rule since it has the potential to have a significant impact in defining when and where water quality standards apply.

Our specific comments, which are provided below, support those submitted by the National Municipal Stormwater Alliance (NMSA) and are consistent with the comments that CASQA submitted on the original Rule dated November 14, 2014 (see attached).

Exclusion for Stormwater Control Features

The original WOTUS Rule included a provision excluding stormwater control features from consideration as Waters of the United States:

> *(2) The* following *are not "waters of the United States" even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this section.*
> *(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.* [2]

[1] CASQA is a professional member association dedicated to the advancement of stormwater quality management through collaboration, education, implementation guidance, regulatory review, and scientific assessment. CASQA is comprised of stormwater quality management organizations and individuals, including cities, counties, special districts, industries, and consulting firms throughout California. Our hundreds of municipal members provide stormwater quality management services to more than 23 million people in California through the construction, operation, and maintenance of municipal separate storm sewer systems (MS4s).
[2] 40 CFR 110.1 – Definitions.

The types of stormwater control features and other related infrastructure projects that municipalities are concerned could be subject to jurisdiction, include, but are not limited to:

- MS4 conveyance facilities
- Detention and settling basins
- Stormwater treatment systems
- Infiltration facilities
- Bioswales
- Groundwater recharge facilities
- Green infrastructure projects

The NPDES regulations define an MS4 as "a conveyance or system of conveyances (including roads with drainage systems, municipal streets…ditches, man-made channels or storm drains) designed or used for collecting or conveying storm water." 40 C.F.R. 122.26(b)(8). As such, these conveyances cannot be both an MS4 and a jurisdictional receiving water. In fact, the pretense that an MS4 and a receiving water body can be one and the same is contrary to the NPDES regulations. In the EPA's Preamble to the initial MS4 regulations, the agency expressly determined that "streams, wetlands and other water bodies that are waters of the United States are not storm sewers for the purposes of this rule" and that "stream channelization, and stream bed stabilization, which occur in waters of the United States," were not subject to NPDES permits under Section 402 of the CWA[3]. The "conveyances" identified in the regulation – "roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains" – all refer to anthropogenic structures, not natural streams.[4] Under 40 C.F.R. § 122.26(b)(9), an MS4 outfall is defined as the point at which an MS4 discharges *to* waters of the United States. 40 C.F.R. 122.26(b)(9) (emphasis added).

Thus, there is clear distinction between the MS4 used to collect, convey and discharge stormwater, and waters of the United States, into which point source discharges from MS4s are regulated. An MS4 cannot be a receiving water because a receiving water cannot discharge into itself. *See Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc., et al.*, --- U.S. --, 133 S.Ct. 710, 712-13 (2013) (holding that the flow of polluted water from one portion of a river, through a concrete channel or other engineered improvement in the river, to a lower portion of the same river, does not constitute a discharge of pollutants); *see also So. Fla. Water Mngmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004) (holding that where a canal and an adjacent wetland are not meaningfully distinct water bodies (rather, two parts of the same water body), then the transfer of polluted water from the former into the latter would not need an NPDES permit, as it would not constitute a discharge of pollutants into waters of the United States).

For similar reasons as to why man-made flood control channels cannot be WOTUS, man-made flood control channels cannot be deemed a "tributary" to WOTUS, for purposes of CWA jurisdiction. In some cases, man-made concrete channels have been identified as tributaries to receiving waters based on the "tributary rule." Historically, the tributary rule has been used to invoke federal jurisdiction over non-navigable *natural waters* when such water has a significant effect on a WOTUS. However, EPA recently clarified in the waters of the U.S. rulemaking that

[3] 53 Fed. Reg. 49416, 49442 (Dec. 7, 1988).
[4] 40 CFR § 122.26(b)(8).

concrete channels constructed in dry lands or uplands are not waters of the U.S.; *see* 80 Fed. Reg. 124 (June 29, 2015), Clean Water Rule: Definition of "Waters of the United States"; *see also* 40 C.F.R. §§ 230.3(o)(2)(vi) and §230(o)(3)(iii) (specifically excluding from the definition of "tributary," and, therefore, WOTUS, "stormwater control features constructed to convey, treat or store stormwater that are created in dry land"). EPA's explicit exclusion of dry land "stormwater control features" from the definition of WOTUS clearly demonstrates the regulatory intent that jurisdiction over man-made flood control channel should not be exercised under the tributary rule. Tributaries can and should only be Waters of the U.S. under 40 C.F.R. § 230.3(s)(5) if they are natural water bodies. Therefore, pursuant to federal regulations, man-made flood channels are not tributaries to Waters of the U.S.

This interpretation is consistent with Justice Scalia's concurring opinion in *Rapanos v. United States* where he indicated that man-made, concrete channels are not Waters of the United States:

> Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from "navigable waters," by including them in the definition of "'point source.'" The Act defines "'point source'" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). It also defines "'discharge of a pollutant'" as "any addition of any pollutant to navigable waters from any point source." § 1362(12)(A) (emphasis added). The definitions thus conceive of "point sources" and "navigable waters" as separate and distinct categories. The definition of "discharge" would make little sense if the two categories were significantly overlapping. The separate classification of "ditch[es], channel[s], and conduit[s]"-- which are terms ordinarily used to describe the watercourses through which intermittent waters typically flow--shows that these are, by and large, not "waters of the United States."[5]
>
> ***CASQA Recommendation**: A new WOTUS Rule should clarify that municipal separate storm sewer systems (MS4s), e.g., flood control channels, are not WOTUS.*

Additional Comments

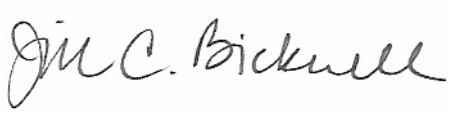
1. The WOTUS Rule definitions should take into account regional geographic differences, as "perennial" systems are currently too narrowly defined. The 3-month flow duration has worked well in states such as California and is already discussed in the Corps' instructional guidebook. The new Rule should also avoid a requirement for flow metering.

2. Since state regulations would be influenced by changes to the WOTUS Rule, the EPA should provide guidance to the states to clarify the scope of regulation that may be considered and to aid in implementation of the Rule.

[5] *Rapanos* at 735-36. "It is also true that highly artificial, manufactured, enclosed conveyance systems--such as "sewage treatment plants," and the "mains, pipes, hydrants, machinery, buildings, and other appurtenances and incidents" of the city of Knoxville's "system of waterworks," likely do not qualify as "waters of the United States," despite the fact that they may contain continuous flows of water." *Id.* at 736, fn. 7.

If you have any questions or need additional information, please contact Geoff Brosseau, our Executive Director, at (650) 365-8620.

Sincerely,



Jill Bicknell, Chair
California Stormwater Quality Association

cc: CASQA Board of Directors
CASQA Executive Program Committee
CASQA Policy and Permitting Subcommittee
Ms. Donna Downing, U.S. Environmental Protection Agency
Mr. Gib Owen, Office of the Assistant Secretary of the Army for Civil Works, Department of the Army
Scott Taylor, National Municipal Stormwater Alliance
Randy Neprash, National Municipal Stormwater Alliance

Attachment: Comments on the EPA and U.S. Army Corps of Engineers' Proposed Definition of "Waters of the United States" Under the Clean Water Act (Docket ID No. EPA-HQ-OW-2011-0880), CASQA, November 14, 2014

CASQA
California Stormwater Quality Association®
Dedicated to the Advancement of Stormwater Quality Management, Science and Regulation

November 14, 2014

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

Attn: Ms. Donna Downing (EPA) and Ms. Stacey Jensen (U.S. Army Corps of Engineers)

Subject: Comments on the EPA and U.S. Army Corps of Engineers' Proposed Definition of "Waters of the United States" Under the Clean Water Act (Docket ID No. EPA-HQ-OW-2011-0880)

Dear Ms. Downing and Ms. Jensen:

The California Stormwater Quality Association (CASQA) appreciates the opportunity to comment on the United States Environmental Protection Agency (EPA) and Army Corps of Engineers' (the Corps) (collectively the "Agencies") Proposed Definition of "Waters of the United States" Under the Clean Water Act (Proposed Rule).

CASQA is California's largest professional, non-profit association[1] dedicated to stormwater quality issues. CASQA's primary purpose is to assist regulators, municipalities, and others in implementing national pollutant discharge elimination system (NPDES) stormwater requirements. CASQA recommends objectives and procedures for stormwater quality control programs that are technically and economically feasible; promotes the need for significant environmental benefits and protection of water resources; promotes technological advancements; and promotes compliance with state and federal laws, regulations, and policies. CASQA believes that balancing human and environmental quality of life with costs is a necessary component of improving water quality through NPDES permitting and other regulatory strategies.

CASQA's municipal members are subject to detailed regulation of their municipal separate storm sewer systems (MS4s) by virtue of NPDES stormwater permits issued by the California Regional Water Quality Control Boards, the State Water Resources Control Board, and approved by EPA Region 9. These permits are expansive, include detailed programmatic requirements to control sources of pollutants, and in some cases include rigorous requirements for watershed management protection. Implementation of these requirements is costly, and has a profound effect on municipal agency resources dedicated to the control of stormwater. Additional regulatory burdens on the implementation of these requirements will not further the goal of protecting water quality but

[1] CASQA is comprised of stormwater quality management organizations and individuals, including cities, counties, special districts, industries, and consulting firms throughout California. Our membership provides stormwater quality management services to more than 22 million people in California.

will only increase costs unnecessarily. The Proposed Rule's suggestion that some types of stormwater facilities, infrastructure projects, and associated facilities could be regulated within the scope of a definitional "waters of the United States" (WOTUS) poses uncertainty and potential confusion among both the regulating entities and the regulated entities, and may increase the regulatory burden associated with implementation of MS4 permit requirements. CASQA recommends the Agencies revise the Proposed Rule to clarify that **MS4s are *not* WOTUS**, and that **certain types of stormwater related facilities** discussed herein **are also *not* considered to be WOTUS**. Specifically, CASQA recommends that certain exclusions within the Proposed Rule be expanded to include MS4 conveyance facilities and other related facilities. Exclusions needing expansion include: waste treatment system, artificial lakes, ditches, and swales. Revisions to the Proposed Rule are provided in section II of these comments.

CASQA provides its specific comments on these issues and its recommendations for changes to the Proposed Rule.

I. MS4s are *not WOTUS*

CASQA appreciates the Agencies' intent to bring greater certainty to decisions on whether particular waters will be jurisdictional in light of the Supreme Court's decisions in *Rapanos v. United States,* 547 U.S. 715 (2006), *Solid Waste Agency of Northern Cook County* (*SWANCC*) *v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001), and *United States v. Riverside Bayview Homes (Bayview),* 474 U.S. 121 (1985). However, by including new, expansive definitions for key terms such as "tributary" and "adjacent" in the Proposed Rule while leaving stated exclusions open to interpretation invites significant uncertainty with respect to how the Proposed Rule would be applied to MS4s and related facilities. To avoid such a result, it is imperative that the Proposed Rule clearly distinguishes MS4s and related facilities from WOTUS.

Federal regulations define MS4 to mean "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): . . . Designed or used for collecting or conveying stormwater . . . " (40 C.F.R. § 122.26(b)(8).) MS4s are highly regulated, and NPDES permits provide legal authority for discharges *from* MS4s to WOTUS. (See, generally, Clean Water Act (CWA), § 402(p)(3)(B); see also 40 C.F.R. §§ 122.26, 122.30-122.37.) MS4s are not themselves WOTUS, and are required, at a minimum, to implement controls to reduce the discharge of pollutants *to* WOTUS to the maximum extent practicable. (CWA, § 402(p)(3)(B)(iii).) Such controls include source control best management practices (BMPs), treatment control best management practices, and other related infrastructure facilities. Examples of treatment control BMPs can include: "(1) storage practices such as wet ponds and extended-detention outlet structures; (2) filtration practices such as grassed swales, sand filters and filter strips; and (3) infiltration practices such as infiltration basins and infiltration trenches." (See 64 Fed. Reg. 68722, 68760 (Dec. 8, 1999).) Examples of related infrastructure facilities can include groundwater recharge basins and green infrastructure projects. Green infrastructure may include the creation of new habitat and recreational facilities and areas where runoff is infiltrated or dispersed.

Unfortunately, the Proposed Rule fails to specifically exclude MS4s (and related infrastructure and associated facilities) from the definition of WOTUS. Thus, many of the newly proposed

definitions create significant uncertainty, and could be interpreted in a manner that would find an MS4 and/or its related facilities to be a WOTUS. These new definitions identify waters by category, and include tributaries, jurisdictional ditches, adjacent waters, and "other waters" with significant nexus to an existing WOTUS. The type of stormwater facilities and other related infrastructure projects that are potentially vulnerable to jurisdiction under these new categories, include, but are not limited to:

- MS4 conveyance facilities
- Detention and settling basins
- Stormwater treatment systems
- Infiltration facilities
- Bioswales
- Groundwater recharge facilities
- Green infrastructure projects

Our concerns with these newly proposed definitions as well as their potential impact to stormwater and other related facilities are explained here.

A. New definition of Tributary could improperly include MS4 Facilities

In the Proposed Rule, all "tributaries" are considered jurisdictional if it is a water physically characterized by the presence of a bed and banks and ordinary high water mark, which contributes flow (including on an ephemeral or intermittent basis), either directly or indirectly through another water, to a more "traditional" WOTUS.[2] Further, wetlands, lakes, and ponds may be a tributary even if they lack beds and bank and an ordinary high water mark. A tributary can be natural, man-altered, or man-made water and includes rivers, streams, lakes, ponds, wetlands, impoundments, canals, and ditches that are not otherwise excluded. Man-made or natural breaks (e.g., pipes, culverts, boulder fields) do not disqualify upstream reaches as tributaries.

Considering the expansive nature of this proposed definition, and unless otherwise excluded by rule, stormwater conveyance facilities, treatment wetlands, and/or infiltration projects could be considered tributaries. Although the Proposed Rule attempts to clarify that tributaries are waters that have a bed, bank, and high water mark, more than likely disagreement will result with respect to the occurrence of such characteristics in a natural or man-made channel, canal, ditch, or swale. For example, some MS4 conveyance facilities have open channels that ultimately enter a WOTUS through an outfall.[3] Under the federal regulations, an outfall is defined to mean "a

[2] Notably, the map prepared by EPA and included in the National Hydrography Database identifies even the washes in much of the Mohave Desert in southeastern California as "intermittent" and, under the Proposed Rule, would be a WOTUS. (See http://science.house.gov/epa-maps-state-2013#overly-context.)

[3] CASQA recognizes that in some cases waters that are considered to be traditional navigable waters, or waters previously identified as jurisdictional, have been modified for flood control and other purposes. CASQA's comments are not intended to imply that these waters are no longer WOTUS due to their use for flood control purposes and to the extent that these waters convey stormwater. Rather, CASQA is stating that stormwater facilities connected to these traditional navigable waters or waters previously identified as jurisdictional, and that are regulated under the MS4 permit program, are *not* WOTUS, and should not be converted to being WOTUS due to their connectivity.

point source . . . at the point where a municipal separate storm sewer system discharges to waters of the United States."[4] (40 C.F.R. § 122.26(b)(9).) However, under the Proposed Rule, these open channels could be considered a WOTUS even though they have been viewed and regulated as being part of the MS4, and are considered to be part of the point source itself. If these facilities were found to be a tributary to a WOTUS, they would become subject to CWA section 404 requirements, and current maintenance activities could require a section 404 permit as well as section 401 certification from the state. Further, water quality standards would apply in the open channels rather than after the discharge into a "traditional" navigable water. Such a result is nonsensical considering that discharges from these types of open channels to traditional navigable waters are currently regulated under the MS4 permit program pursuant to section 402(p) of the CWA.

In addition to capturing open conveyance channels under the definition of tributary, other types of stormwater facilities may also be captured by this definition. For example, stormwater treatment or capture basins that have an "open water" feature could be jurisdictional under the tributary definition, if there is some form of connectivity to a traditional navigable water, or connectivity to a tributary to a traditional navigable water. The Proposed Rule has no geographical limit with respect to such connectivity. Thus, e.g., a constructed stormwater treatment system located miles from a traditional navigable water could be a WOTUS.

The Proposed Rule claims that it is appropriate to include tributaries "by rule" because it summarily concludes that tributaries have a significant nexus to a traditional navigable water, and that they affect the physical, chemical, and biological integrity of a traditional navigable water. With respect to MS4 facilities, the significant nexus test is inapplicable because MS4 facilities are already regulated under CWA section 402. Specifically, to the extent that MS4 facilities may significantly affect traditional navigable waters, they are regulated like other point source discharges to a WOTUS, and are subject to extensive NPDES permit requirements. Since they are so regulated, it is not necessary to capture such facilities under the definition of tributary because their physical, chemical, and biological impacts to traditional navigable waters are addressed through the terms of the applicable NPDES permit.

In light of these concerns, CASQA recommends that the Proposed Rule be revised to clearly indicate the definition of tributary does not, and is not intended to, include MS4 facilities. The Agencies can accomplish this by ensuring the exclusions (discussed below in section II) are clear, concise, and specifically address stormwater management facilities. The Agencies also need to include text within the descriptive portion of the final rule that clearly and definitively states that MS4 facilities are *not* a WOTUS. Such a clarification is consistent with previous EPA findings. (See 53 Fed. Reg. 49416, 49442 (Dec. 7, 1988) ["[W]aters of the United States are not storm sewers for purposes of this rule."].)

[4] An outfall does not include open conveyances connecting two MS4s, or pipes, tunnels, or other conveyances, which connect segments of the same stream or other waters of the United States. (40 C.F.R. § 122.26(b)(9).)

B. New definition of adjacent could improperly include MS4 and other important water resource facilities

In the Proposed Rule, all types of water bodies (not just wetlands, as was the case previously) that are "adjacent" to WOTUS would be jurisdictional by rule. In addition to previous definitions of "adjacent" (separated by man-made dikes, berms, dunes, etc.), the category would now include, by rule, all water bodies located within the riparian area or floodplain of a "traditional" WOTUS. Further, where water bodies are adjacent to impoundments or tributaries of traditional navigable waters, interstate waters or territorial seas, under the Proposed Rule these waters would also be jurisdictional by rule. "Neighboring" waters would include "waters located within the riparian area or floodplain" of WOTUS, or "waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection" to WOTUS. The new definition does not require any nexus analysis and thus arguably expands the reach of the CWA to include entire floodplains or riparian areas that may not have been previously regulated under the CWA.

With respect to stormwater related facilities, this expanded definition of "adjacent" could result in treatment control BMPs, green infrastructure projects, and other multi-purpose benefit projects being classified as a WOTUS if such projects are installed in a floodplain or riparian zone, or are otherwise determined to be "adjacent" to a traditional navigable water. As indicated previously, such facilities are installed so that stormwater agencies can reduce pollutants to the maximum extent practicable, and many such facilities provide for multiple benefits to the environment. For example, green infrastructure projects improve water quality, enhance recreational uses, and help to infiltrate water to groundwater basins for future municipal and domestic uses. However, under the Proposed Rule, such projects could become jurisdictional. Thus, facilities designed and implemented to comply with NPDES MS4 permit requirements would be subject to further regulation as a WOTUS. Such a result undermines the intent and purpose of such facilities, and the stormwater program in general.

In California infiltration basins or "spreading grounds" are operated to infiltrate recycled water, imported water, stormwater, and other water across basins to recharge underground drinking water aquifers. These facilities are essential to California's efforts to manage its water supplies. If included within the "adjacent" category, these spreading grounds could become a WOTUS and become subject to extensive regulation under the CWA.

Accordingly, it is necessary to specifically exclude stormwater treatment control BMPs, spreading grounds, and other beneficial projects such as green infrastructure from the definition of "adjacent." CASQA provides suggested amendments to the exclusions in section II below to achieve this purpose.

C. "Other Waters" approach goes beyond the case-by-case significant nexus test

Although CASQA appreciates that the "Other Waters" category in the Proposed Rule is designed to capture Justice Kennedy's "significant nexus" standard that was stated in his concurring opinion in *Rapanos*, the Proposed Rule goes well beyond the individual case-by-case evaluation and proposes to allow such an analysis to occur for "groups" of waters that are similarly situated.

According to the Proposed Rule, the Agencies propose to create jurisdiction by rule over "other waters" in certain areas in the nation, including California. This would allow the Agencies to determine, at an aggregate, "ecoregion" level, whether waters within a region are "similarly situated" enough to have a significant nexus to a navigable water. If the Agencies adopt this ecoregion approach at the proposed Level III ecoregion baseline, then all "other waters" in the Central California Foothills and Coastal Mountains, Central California Valley, Southern California Mountains, Southern California/Northern Baja Coast, and Klamath Mountains/California High North Coast Range may be designated as "similarly situated" and come within CWA jurisdiction by rule. (See 79 Fed. Reg. 22188, 22215 (April 21, 2014).)

Under the expansive ecoregion approach, many "other waters" throughout California will be included under CWA jurisdiction, unless specifically excluded. Arguably, any surface water body not categorically exempted may be treated as a WOTUS if either Agency determines that the surface water body in question, or in combination with other similarly situated waters, affects the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or territorial sea. Hydrologic connection (surface or subsurface) would be unnecessary to create significant nexus. Under such an approach, stormwater agencies will face significant uncertainty with respect to CWA jurisdiction for MS4 conveyance facilities as well as other stormwater related facilities. Further, the vagueness in the exclusions will only add to this uncertainty, which will not further the overall clarity goals of the Proposed Rule.

Moreover, the Proposed Rule states that functions of waters that might demonstrate a significant nexus include sediment trapping, nutrient recycling, pollutant trapping and filtering, retention or attenuation of flood waters, runoff storage, export of organic matter, export of food resources, and provision of aquatic habitat. (79 Fed. Reg. 22,188, 22,213 (April 21, 2014).) Many of these functions are identical to functions provided by stormwater treatment control BMPs. Thus, based on the Proposed Rule, many stormwater facilities could be found jurisdictional under the "other waters" category. Yet again, however, such facilities were specifically created to serve these functions, and are implemented to ensure compliance with CWA NPDES MS4 permit requirements. Considering the broad and expansive nature of the "other waters" category, it is imperative that the exclusions, discussed below in section II, specifically identify and include stormwater facilities.

II. The exclusions for waters that are *not* WOTUS must be revised to incorporate MS4 conveyance and other related facilities

The Proposed Rule intends to maintain current exclusions contained within the definition of WOTUS, and to also incorporate others that have not been considered WOTUS through longstanding practice of the Agencies. However, the current exclusions and the proposed new exclusions do not specifically include or incorporate MS4 conveyance facilities and other stormwater related facilities. The exclusions need to be revised to provide certainty to stormwater managers, state regulators, and the Agencies themselves.

A. Waste Treatment System Exclusion

With respect to the waste treatment system exclusion, it does not adequately address the range of facilities constructed in California to convey, capture, treat, or infiltrate stormwater. At most, one would have to show that the stormwater facility was "designed to meet the requirements of the Clean Water Act." However, considering the iterative nature of stormwater BMPs and MS4 permits in general, considerable discretion will be given to the Agencies, and ultimately the courts, in determining if a specific stormwater BMP was designed to meet the requirements of the CWA. Further, based on information presented in public workshops since the Proposed Rule was published, the Agencies have been unable to provide clear direction with respect to stormwater facilities, and how they are covered by the waste treatment system exclusion. Accordingly, there is significant uncertainty with maintaining the waste treatment system exclusion, as it currently exists. To ensure stormwater facilities are properly included in the waste treatment system exclusion, CASQA recommends that it be revised as follows:

> *Waste treatment systems, including treatment ponds, ~~or~~ lagoons, or stormwater capture and treatment systems designed to meet the requirements of the CWA (including permits issued pursuant to CWA section 402(p)) are not waters of the United States. This exclusion applies only to manmade bodies of water that neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States . . .*

B. Artificial Lakes Exclusion

The Proposed Rule would also exclude waters that have the features of being "[a]rtificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing . . . ." Many stormwater related facilities have similar features to those that are included within this exclusion. Examples of such facilities could include infiltration basins, bioswales, spreading grounds, detention basins, green infrastructure projects, and others. Further, many of these facilities were created in dry land and thus clearly meet the intent of the exclusion provided here. However, as currently proposed, this exclusion does not specifically include stormwater related facilities and thereby creates uncertainty as to where such facilities would fall under the Proposed Rule. To ensure that stormwater related facilities that meet the intent and purpose of this exclusion are properly included, CASQA recommends that this exclusion be revised as follows:

> *Artificial lakes, ~~or~~ ponds, or basins created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, stormwater infiltration, groundwater recharge, or rice growing . . . .*

C. Ditch Exclusions

In the Proposed Rule, the Agencies attempt to clearly exclude from the definition of WOTUS two types of ditches that might otherwise be considered to be tributaries, and thus jurisdictional by rule. The two types of excluded ditches are as follows:

1. Ditches that are excavated wholly in upland, drain only uplands, and have less than perennial flow; and,

2. Ditches that do not contribute flow (either directly or through another water) to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water.

Ditches that have perennial flow, or that contribute flow to a traditional navigable water, interstate water, the territorial seas, or an impoundment of a jurisdictional water are not excluded. First, with respect to the issue of perennial flow, the Proposed Rule does not determine how much flow is necessary in a ditch to be considered perennial flow. Rather, the Proposed Rule states that perennial flow would mean that flow in the ditch occurs year-round under normal circumstances. (79 Fed. Reg. 22188, 22219 (April 21, 2014).) Further, the Proposed Rule is specifically requesting comment on the flow regime that should be identified for the ditch to be excluded from being a WOTUS, and suggests that perhaps the flow regime should be less than intermittent. Regardless of the flow regime distinction, stormwater conveyance channels and ditches that convey persistent dry weather urban runoff, or that convey comingled flow from urban areas and other land uses during dry weather (e.g., tile drain discharge, naturally occurring groundwater, or agricultural runoff) could be considered WOTUS under the Proposed Rule.

Second, with respect to the issue of connectivity, to fall within the ditch exclusions, a ditch could *not* contribute flow directly or indirectly to the tributary system of a traditional navigable water. This would mean that a stormwater conveyance channel that meets the definition of ditch in all other aspects would not be excluded if somewhere within the conveyance system it connects, even arguably through an "outfall," to a tributary of a traditional navigable water. As discussed above, such an approach is nonsensical because stormwater conveyance channels are considered "point sources" under the CWA, and their discharges to WOTUS are permitted and regulated under CWA section 402.

To ensure that MS4 conveyance facilities that otherwise qualify as ditches are properly excluded, CASQA recommends that a third category of "ditches" be added to the exclusions. Accordingly, we recommend the following category be added:

> *Ditches that are created or maintained as part of a municipal separate storm sewer conveyance system and that are managed as part of a municipal separate storm sewer conveyance system subject to requirements under section 402(p) of the CWA.*

D. Swales Exclusion

The Proposed Rule includes an exclusion for "gullies and rills, and non-wetland swales." Within the narrative, the Proposed Rule states further that, "[n]on-wetland natural and man-made swales would not be 'waters of the United States . . . .' " (79 Fed. Reg. 22188, 22219 (April 21, 2014).) The Proposed Rule then appears to limit the stated exclusion by indicating that wetland swales could be jurisdictional under the adjacent or other waters categories. (*Ibid*.) To avoid

uncertainty, and to ensure clarity with respect to the status of man-made swales, CASQA recommends that the exclusion be revised as follows:

Gullies and rills, and non-wetland and man-made swales.

III. Conclusion

The Proposed Rule creates new and significant uncertainty with respect to how it would be applied to stormwater related facilities. Under the newly proposed definitions, groundwater recharge facilities, stormwater conveyance channels, and other stormwater related facilities could now be found to be a WOTUS. The exclusions in the Proposed Rule do not adequately incorporate these types of facilities. Unless the Proposed Rule is further revised to address this uncertainty by clearly excluding the types of facilities discussed herein, significant confusion will result with respect to what constitutes a WOTUS. Moreover, if such facilities are found to be WOTUS, the regulatory burden associated with establishing, maintaining, and operating these facilities will increase, and result in significant costs to municipal ratepayers. However, considering these facilities are highly regulated for the protection of water quality, these increased burdens and costs will not result in better environmental protection. Stormwater agencies will also be left guessing as to their legal responsibilities and could be open to legal liability from third parties. CASQA recommends that the Proposed Rule be revised to avoid these results.

Thank you for your consideration of our comments. If you have any questions, please contact CASQA Executive Director Geoff Brosseau at (650) 365-8620.

Sincerely,

Gerhardt Hubner, Chair
California Stormwater Quality Association

cc: CASQA Board of Directors, Executive Program Committee, and Policy & Permitting Subcommittee