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Louisiana Urban Stormwater Coalition

Maine Water Environment Association

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October 4, 2021

Vance F. Stewart III

Acting Principal Deputy, Office of the Assistant Secretary of the
Army for Civil Works

Department of the Army

108 Army Pentagon

Washington, DC 20310-0104

John Goodin

Director, Office of Wetlands, Oceans and Watersheds

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1200 Pennsylvania Avenue NW

Washington, DC 20460

RE: EPA-HQ-OW-2021-0328; FRL-6027.4-02-OW *Notice of
Public Meetings Regarding "Waters of the United States";
Establishment of a Public Docket; Request for Recommendations*

Dear Mr. Stewart and Mr. Goodin:

The National Municipal Stormwater Alliance (NMSA) appreciates this opportunity to offer recommendations on the pending potential changes under consideration for the definition of "Waters of the U.S." NMSA is a 501(c)(3) organization dedicated to the improvement of water quality through implementation of CWA 402(p) regulation. The member organizations of NMSA are state or regional-level coalitions of MS4 permittees in 24 states. Through its member organizations, NMSA represents more than 3,000 MS4 permittees throughout the United States. These permittees are local governments. Additional information about NMSA can be found at: <http://nationalstormwateralliance.org/>

The rule potentially has a significant impact on NMSA's member organizations because it defines receiving waters where federal water quality standards apply. Please see the comments NMSA submitted on the Navigable Waters Protection Rule. Please consider those comments incorporated by reference into this comment letter. This comment letter can be found at: <https://www.regulations.gov/comment/EPA-HQ-OW-2017-0480-0439>



NMSA's comments and recommendations for your consideration follow.

1. A theme throughout this comment letter is that NMSA requests expanded stakeholder engagement between EPA and NMSA on issues related to this rulemaking. Local stormwater programs are essential partners in much of the work to protect and improve water quality under the Clean Water Act. Many of these local programs are MS4 permittees and NMSA members.

One of NMSA's most important functions is to facilitate effective and efficient dialogue between EPA and local stormwater programs. On multiple occasions and at the request of EPA staff, NMSA helped facilitate such discussions. NMSA stands ready to continue this for the WOTUS rulemaking.

NMSA requests that EPA work with NMSA to expand stakeholder engagement with local stormwater programs, in some form deemed appropriate. We urge your agencies to provide early, continuous, and meaningful opportunities for dialogue with and input from the MS4 permittees as this new WOTUS definition rule is developed.

2. During the upcoming rulemaking process, please respect and follow the science.
3. Please recognize the geographic, geologic, climatic, hydrologic, and leadership diversity among states and local stormwater permittees and craft a definition that provides clarity but also flexibility for state and local co-regulators and implementers.
4. Please prepare to provide the states and local stormwater programs, well in advance, with technical assistance, tools, and trainings to assist with implementation of any revised definition
5. Please include a delayed effective date to give state partners ample time to revise state and local regulations and/or to develop new state and local policies to cover any changes in coverage as a result of the revised jurisdictional definition.
6. Please provide an early draft of regulatory text, or options with sufficient detail, for the NMSA members to give EPA useful and specific feedback on the proposal. Providing this information to local stormwater program managers and coalitions of MS4 permittees would be tremendously beneficial for EPA, as our members are uniquely qualified to evaluate the regulatory text in terms of technical details, implementation challenges and barriers, and unintended consequences. Undertaking such a partnership need not be a drawn-out process. NMSA will work diligently to have thorough discussions in a short period of time to meet your schedule.



Exclusions for Stormwater Features

7. The 2015 Clean Water Rule (CWR) 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.

The 2020 Navigable Waters Protection Rule (NWPR) included this text:

(b) Non-jurisdictional waters. The following are not “waters of the United States”:

(4) Diffuse stormwater run-off and directional sheet flow over upland;

(10) Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff;

NMSA urges EPA to preserve these or similar exclusions in the new Rule defining Waters of the United States. For the reasons listed below, this explicit exclusion is needed even if the new WOTUS inclusion definition appears to not include stormwater control features. It is essential that clarity be provided by having these specific, explicit, and categorical exclusions, or something quite similar, written in the WOTUS definition. The MS4 permittees need certainty.

Please consider this comment and the following sub-comments to be feedback requested in the agencies’ Notice published in the Federal Register on April 4, 2021 under the section titled “Stakeholder Engagement: Exclusions from the definition”.

- 7.a. The recommendation to include this exclusion for stormwater control features was strongly supported by the EPA Local Government Advisory Committee (LGAC): “Waters of the United States 2017 Report” dated July 14, 2017. This report reiterates recommendations from an earlier LGAC report: “Initial Findings and Recommendations Pertaining to EPA’s Clean Water Act Waters of the U. S. Proposed Rule”, November 5, 2014.

Some of the most important LGAC comments include:

“Exemptions for stormwater and green infrastructure are important for local government.”



“Much of the uncertainty of MS4s (in 2014), was that stormwater and green infrastructure is centered on whether these collection systems or portions of the systems would be required to meet State Water Quality Standards (WQS) under Section 303(d) or potentially a total maximum daily load (TMDL) because they will now be considered a “Water of the United States.” ”

“The LGAC recommends that EPA work directly with stormwater associations to provide guidance to best address MS4s, stormwater controls, and their jurisdictional determinations. (LGAC 2014 Report)”

“The EPA should plainly state how WOTUS rulemaking will impact stormwater collection systems and clearly exempt those parts of the systems that EPA does not wish to include.”

NMSA offers this comment letter as a “stormwater association” referenced by the LGAC.

- 7.b. Stormwater control features (SCFs) are owned and operated by a large number of entities. Many of these entities are publicly-owned Municipal Separate Storm Sewer Systems (MS4s). There are more than 7,555 regulated MS4 permittees throughout the United States (EPA) and far more non-regulated MS4s. The MS4 permittees includes cities, counties, departments of transportation, and other non-traditional MS4s. SCFs are also owned and operated by private parties: builders, developers, home owners’ associations, and other private property owners.
- 7.c. There are many stormwater control features in the United States. For example, in Minnesota, approximately 160 regulated cities own and operate more than 14,000 constructed stormwater ponds. One city alone is home to more than 800 rain gardens (a type of green infrastructure stormwater control feature). Based on these facts, it is reasonable to conclude that there are currently more than a million constructed stormwater control features in the United States, with more being built every day.
- 7.d. These large numbers of owners and features mean that determining the jurisdictional status of stormwater control features cannot be done on a case-by-case basis. It is essential that clarity be provided by having this specific, explicit, and categorical exclusion written in the WOTUS definition.
- 7.e. The owner/operators of SCFs need to be able to perform maintenance and operation functions without having to worry about the WOTUS jurisdictional status. Without this exclusion, significant staff resources and time will be diverted to the jurisdictional status issue.



- 7.f. Without the exclusion, some SCFs may be determined to be WOTUS, as the result of agency judgment or the outcome of third party lawsuits. This would further complicate the work of the SCF owners to properly maintain and operate these SCFs.
- 7.g. This exclusion explicitly and appropriately codifies EPA's publicly-stated intent that SCFs not be considered WOTUS.
- 7.h. Supporting items 5, 6, and 7 above, the LGAC Report includes this text:
"Rule language should not have broad inclusions and cities are concerned that jurisdictional calls will be dependent upon agency judgments and discretion for exclusions. The criteria need to be clear enough that cities do not have to either guess at application of a rule or wait for the agency to interpret a rule which creates uncertainty. It is unworkable for cities to rely on agency judgments and discretion for exemptions. There is a concern about the magnitude of the requests the agencies will be forced to address and the timeliness of the agencies' responses given any uncertainty of a new rule. For example, cities cannot be faced with significant delays to address critical stormwater infrastructure while waiting for agency action. Cities should be provided clarity by the agencies so that they can effectively plan and budget for the operation and maintenance of the storm-water collection systems without the uncertainty of the discretion of the agencies and when it will receive that agency judgment. In addition, without a specific exemption for MS4 systems including drains, roads, pipes, curbs, gutters, ditches and other components that channel runoff, as well as non-MS4 storm-water systems and features/components, EPA and Army Corps open the door for litigation and citizen suits that could determine that they are "Waters of the U.S." and thereby subject to Section 404 permitting and state Water Quality Standards."
- 7.i. The LGAC Report includes this text: *"The 2015 CWR includes, for the first time, a regulatory exclusion for 'Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land' "*. This exclusion for SCFs is historic and significant.
- 7.j. It is essential and appropriate that SCFs not be subject to Water Quality Standards (WQS) or TMDLs. The SCFs are designed to store and treat stormwater. As such, there will be times when the water quality in these SCFs will not meet WQS. It is counter-productive to expect SCFs to meet WQS or be subject to TMDLs. This is especially relevant in cases where large, old, constructed stormwater ponds have come to be viewed by the public as natural lakes.

In support of this concept, the LGAC Report includes the following text:

"Much of the uncertainty of MS4s (in 2014), was that stormwater and green infrastructure is centered on whether these collection systems or portions of the



systems would be required to meet State Water Quality Standards (WQS) under Section 303(d) or potentially a total maximum daily load (TMDL) because they will now be considered a "Water of the United States." WQS and TMDL were not designed for this application so application within a collection system seems not warranted. WQS define goals for a water body by designating its uses and setting criteria to protect those uses, but there is no established designated use for MS4s. Without a designated use, the default is "fishable/swimmable," unless the state demonstrates that it is not attainable for one of six particular reasons, none of which is because the waters serve as stormwater conveyances. A pending EPA proposed rule on water quality standards could make use designation analyses more stringent (i.e., by requiring a "highest attainable use" presumption). Also, if it is not deemed jurisdictional under Section 404 it will likely need a Section 402 permit and subject to WQS."

- 7.k. There is good reason to believe that the WOTUS stormwater exclusion language for SCFs will serve as a model for revisions to Waters of the State definitions in states throughout the United States.
8. In general, NMSA is comfortable with the exclusion language for SCFs in the 2015 CWR and the 2020 NWPR. The clause, "Stormwater control features constructed or excavated...to convey, treat, infiltrate, or store stormwater runoff", appears to be sufficiently and appropriately broad. The second clauses, "that are created in dry land" or "upland", appear to be concise and elegant language that provides sufficient protection for natural lakes, ponds, wetlands, and streams. NMSA is concerned, though, that there are some portions of the U.S. where the application of the "created in dry land" or "upland" language may be problematic. In some coastal areas and areas of very high ground water, it is impossible to construct or maintain a SCF without having the feature flood or fill with water. Some SCFs must be built in areas that may be considered not "dry land" or "upland". NMSA requests that this language be reviewed considering these facts. Perhaps additional guidance could be sufficient to address these problems. NMSA requests that EPA work with NMSA and other stormwater associations in crafting the final exclusion language and guidance, as recommended by the LGAC.
9. The agencies requested specific feedback in the Notice published in the Federal Register on April 4, 2021 under the section titled "Stakeholder Engagement: The scope of jurisdictional ditches". NMSA notes that many MS4 permittees' stormwater conveyance systems include ditches, often roadside ditches. As per regulatory requirements and principles of responsible ownership, MS4 permittees need to maintain and operate these ditches properly and effectively. This needs to be done with a minimum of concern and/or time expended to address CWA jurisdictional concerns. NMSA requests that EPA work with



NMSA and other stormwater associations in crafting the final rule language and guidance regarding ditches that are part of local conveyance systems.

NMSA appreciates this opportunity to comment. Please feel free to contact NMSA Executive Director, Seth Brown, at seth.brown@nationalstormwateralliance.org, if you would like to discuss any of these items further.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Taylor", is positioned above the printed name.

Scott Taylor, PE, DWRE, F.ASCE
Chair
National Municipal Stormwater Alliance

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Seth P. Brown, PE, PhD
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A handwritten signature in blue ink, appearing to read "Randy Neprash", is positioned above the printed name.

Randy Neprash, PE
Vice Chair
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