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Seth P. Brown, Ph.D., P.E.

National Municipal Stormwater Alliance
Executive Director

February 7, 2022

Ms. Stacey Jensen
Office of the Assistant Secretary of the Army for Civil Works
Department of the Army
108 Army Pentagon
Washington, D.C. 20310-0104

Ms. Damaris Christensen
Oceans, Wetlands and Communities Division, Office of Water
(4504-T)
Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

RE: 33 CFR Part 328
40 CFR Part 120
Docket ID No. EPA-HQ-OW-2021-0602
FRL-6027.4-03-OW
Revised Definition of "Waters of the United States"

Dear Ms. Jensen and Ms. Christensen:

The National Municipal Stormwater Alliance (NMSA) appreciates this opportunity to offer recommendations on the proposed rule 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) regulations. The member organizations of NMSA are mainly state or regional-level coalitions of MS4 permittees. These member organizations are in 24 states and represent more than 4,000 MS4 permittees nationwide. Additional information about NMSA can be found at: <http://nationalstormwateralliance.org/>

The draft rule has a significant impact on our member organizations because it defines receiving waters where federal water quality standards apply. NMSA's comments for your consideration follow.

NMSA is responding to this request for comment published in the draft rule preamble: *"Moreover, as discussed in section V.D.1.b of this preamble, the agencies would expect to implement the proposed rule consistent with longstanding practice, pursuant to which they have generally not asserted*



jurisdiction over certain other features. The agencies solicit comment on this approach to codifying and implementing exclusions.” Specifically, we are commenting on the need for the explicit, categorical exclusion for stormwater control features included in the 2015 CWR and the 2020 NWPR.

Terminology & Acronyms – For clarity of communication, a listing of terms and associated acronyms is provided below:

Waters of the United States = WOTUS

Municipal Separate Storm Sewer Systems = MS4s

National Municipal Stormwater Alliance = NMSA

Stormwater Control Features (SCFs) = Stormwater Control Measures (SCMs) = Best Management Practices (BMPs)

In this comment document, the term SCF will be used because it is the term that appeared in the 2015 CWR and the 2020 NWPR

2015 Clean Water Rule = 2015 CWR

2020 Navigable Waters Protection Rule = 2020 NWPR

WQS = Water Quality Standards

Total Maximum Daily Load = TMDL

Operations and Maintenance = O&M

Exclusion for Stormwater Control Features

The 2015 CWR included a provision excluding stormwater control features (SCFs) 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 NWPR included very similar text:

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

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

It was surprising to find that this categorical exclusion language for SCFs was omitted from the proposed rule language published on December 7, 2021. The language in the rules promulgated by the previous two administrations was clear and noncontroversial.

This comment letter is focused on the explicit, categorical exclusion for SCFs. We strongly urge EPA and the Army to include this exclusion in the final WOTUS definition rule.



NMSA’s sole comment and simple request is that the exclusion for SCFs, in a form similar to either earlier rule, be included in this new rule. All the numbered comments in the rest of this letter are provided to support this comment and request.

Stated in relatively simple terms, the most important points are:

- There are a large number of entities, public and private, that own and operate SCFs and are responsible for the O&M of these SCFs. Proper O&M is essential for the continued water quality functions of SCFs.
- There is an extremely large number of SCFs in the United States, and this number is growing constantly.
- Writing the exclusion into the WOTUS definition rule enshrines it in rule language, moving a long-standing, but unstated, practice into formal rule.
- This formal exclusion reduces confusion and provides clarity, certainty, and predictability for regulators, the owners/operators of the SCFs, and the public. This explicit exclusion makes rule implementation clearer and more practical.
- Without the exclusion, there will be more jurisdictional confusion and a greater need for jurisdictional determinations, many of which could be avoided. A small percentage of a very large number (total SCFs) is still a large number. These determinations will strain and unnecessarily consume the staff resources of local jurisdictions and your agencies. Unnecessary determinations will complicate, slow down, and make more expensive the otherwise routine O&M work of the owners/operators of the SCFs.

NMSA urges EPA to preserve this exclusion in the new Rule defining Waters of the United States. For the reasons listed in this letter, this explicit exclusion is justified and needed.

It is our understanding that this is the first of two WOTUS rules that EPA and the Army intend to promulgate in the foreseeable future. In the pre-recorded video introduction for the January 2022 WOTUS public hearings, Stacey Jensen, Assistant for Regulatory and Tribal Affairs, Office of the Assistant Secretary of the Army (Civil Works), stated that the agencies “expect each rule to stand on its own, legally and as a policy matter”. Based on this statement, we believe these comments are appropriate at this time and for this draft rule.

In the preamble published on 12/7/21, there is no explicit explanation for why this exclusion language was omitted. There is also no explanation provided in the Rule Technical Support Document, Appendices to the Technical Support Document, or the Supplementary Materials to the Technical Support Document.



Specific Comments

For the purpose of clarity and reference, these specific comments are numbered separately. Several of them, though, are associated with and/or support other comments. Please consider them as a unified set of comments, all addressing this rule and the suggested SCF exclusion.

1. **Exclusion Included in Previous Rules:** Some of the most persuasive and eloquent arguments favoring the inclusion of the SCF exclusion language come from the earlier WOTUS definition rule preambles. This illustrates a consistency in the use of this exclusion in past regulations. For reference, please see the information below regarding language used in previous rules.

2015 CWR - Federal Register / Vol. 80, No. 124 / Monday, June 29, 2015

“All existing exclusions from the definition of “waters of the United States” are retained, and several exclusions reflecting longstanding agency practice are added to the regulation for the first time.”

“The agencies add exclusions for groundwater and erosional features, as well as exclusions for some waters that were identified in public comments as possibly being found jurisdictional under proposed rule language where this was never the agencies’ intent, such as stormwater control features constructed to convey, treat, or store stormwater, and cooling ponds that are created in dry land. These exclusions reflect the agencies’ current practice, and their inclusion in the rule as specifically excluded furthers the agencies’ goal of providing greater clarity over what waters are and are not protected under the CWA.”

“The rule excludes for the first time certain waters and features over which the agencies have generally not asserted CWA jurisdiction, as well as groundwater, which the agencies have never interpreted to be a “water of the United States” under the CWA. Codifying these longstanding practices supports the agencies’ goals of providing greater clarity, certainty, and predictability for the regulated public and regulators, and makes rule implementation clear and practical. This final rule provides clear exclusions for certain types of ditches. The final rule also expressly excludes stormwater control features created in dry land and certain wastewater recycling structures created in dry land.”

2020 NWPR - Federal Register /Vol. 85, No. 77 /Tuesday, April 21, 2020

“Stormwater Control Features In paragraph (b)(10) of the final rule, the agencies exclude stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff. Although stormwater control features are not specifically included in the list of waters that the agencies consider to be generally nonjurisdictional per the 1986 and 1988 preamble language, 51 FR 41206



(November 13, 1986) and 53 FR 20764 (June 6, 1988), the agencies' longstanding practice is to view stormwater control features that are not built in waters of the United States as non-jurisdictional."

"Nothing in this final rule changes the agencies' longstanding practice. Rather, this exclusion clarifies the appropriate limits of jurisdiction relating to these systems. A key element of the exclusion is whether the feature or control system was built wholly in upland or in a nonjurisdictional water. As discussed above and as further clarified below, the agencies recognize that upland features may be connected to jurisdictional waters and that such a connection does not preclude application of the exclusion. Another key element is that the feature must convey, treat, infiltrate, or store stormwater. Stormwater control features have evolved considerably over time, and their nomenclature is not consistent, so in order to avoid unintentionally limiting the exclusion, the agencies have not included a list of excluded features in the final rule. The rule excludes the diverse range of stormwater control features that are currently in place and may be developed in the future."

2. **Problems Associated with Lack of Exclusion:** It is useful to understand potential situations that could arise without the explicit, categorical exclusion for SCFs. Examples of potential problematic situations are listed below.
 - 2.a. Based on anecdotal experience, many municipal stormwater managers have experience with residents that believe that constructed SCFs, especially older stormwater ponds, are natural water bodies that should meet fishable, swimmable, and water quality standards. State and federal agency staff and environmental groups can initiate or be drawn into such assertions and disputes. These can lead to questions about jurisdictional status.
 - 2.b. Questions about jurisdictional status can significantly complicate and delay SCF O&M work that municipalities and other owner/operators of SCFs must perform. For example, a relatively simple pond dredging project can come to a complete halt if the jurisdictional status of the pond is questioned. Work can be completely stalled until a determination can be made by Federal agency staff. Flood risk reduction is a function of many SCFs. If maintenance cannot be completed in a timely manner on a schedule, flood risks increase, putting life and property at risk.
 - 2.c. Similarly, a constructed SCF may be drawn into the processes of assessment relative to water quality standards, impaired waters listing, and the development of a TMDL. Once an SCF is preliminarily included in these processes, it can be very time-consuming and difficult to have it removed.

These are significant potential problems for municipal, state, and/or federal staff. They can be avoided, in many cases, with an explicit, categorical exclusion for SCFs in this WOTUS rule.



3. **Protection from Undue Regulation:** Many of the publicly-owned and privately-owned SCFs were built and installed because of stormwater regulations, specifically NPDES stormwater permits. EPA has recognized and promoted the need for maintenance to provide continued function and water quality improvements from SCFs. The categorical exclusion in the WOTUS definition rule is a vital component of the WOTUS definition to allow local stormwater programs to efficiently maintain their SCFs.
4. **Limitations Arising from 1986 Regulation:** The published rule preamble includes this text: *"In this proposed rule the agencies are exercising their discretionary authority to interpret "waters of the United States" to mean the waters defined by the longstanding 1986 regulations, with amendments to certain parts of those rules to reflect the agencies' interpretation of the statutory limits on the scope of the "waters of the United States" and informed by Supreme Court case law."*

There are a number of problems and deficiencies in applying the "longstanding 1986 regulations" relative to stormwater.

- 4.a. The NPDES stormwater regulatory framework only came into existence after 1986. It is almost entirely rooted in Federal rules published in 1990 and 1999. Therefore, the "longstanding 1986 regulations" included nothing about regulated stormwater. A WOTUS definition based on the interpretation listed above omits this major EPA stormwater regulatory programs and framework.
- 4.b. The explicit SCF exclusion is entirely consistent with the agencies' policy and practice prior to 1986. EPA and USACE have a longstanding informal policy regarding the jurisdictional status of SCFs constructed or excavated in dry land, upland, or in non-jurisdictional waters. This policy, though, has not been explicitly written into this draft rule. The document "Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of the "Waters of the United States" " (EPA & Dept. of the Army, Jan. 23, 2020), includes this text: *"The agencies' longstanding practice is to view stormwater control measures that are not built in a "water of the United States" as non-jurisdictional."* Please note the use of the word "longstanding" in this text. This practice, the equivalent of a categorical exclusion for SCFs, was the agencies' practice on or before 1986, but was not reflected in the regulations at that time. For reasons listed in the subsequent comments, such an informal practice and exclusion policy is not sufficient today.
- 4.c. The passage of time and changes in the design and construction of SCFs since 1986 is relevant. Many stormwater ponds that were built in the 1980s have come to be viewed as part of the natural landscape. Vegetation has grown up around them, so they no longer appear as engineered and constructed features. In some cases,



they have come to be viewed as amenities, often with premium prices for homes built around them. For these reasons, residents now believe that many of these ponds should meet fishable and swimmable standards. Similarly, we have recently seen the construction of SCFs designed based on green infrastructure principles. Many of these SCFs appear to be natural features, with some people believing that they should meet fishable and swimmable standards.

5. **General Support for Exclusion from Local Governments:** The recommendation to include this exclusion for stormwater control features was strongly supported by the EPA Local Government Advisory Committee (LGAC). We have attached excerpts from the LGAC “Waters of the United States 2017 Report” dated July 14, 2017, to this comment letter, with highlighting added. 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.

6. **Large Number of Stormwater Control Features and Owner/Operators Creates Challenges for Rule without Exclusion:** 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 7,500 regulated MS4 permittees throughout the United States (EPA) and more non-regulated MS4s. The list of MS4 permittees includes cities, counties, departments of transportation, and other non-traditional MS4s. SCFs are also owned and operated by private parties: builders, developers, homeowners’ associations, residential/commercial/industrial/institutional property owners, and others.



There are a very large number of stormwater control features in the United States. This is an important fact in the context of the WOTUS Rule. It is reasonable to conclude that we currently have more than **a million** constructed SCFs in the United States, with more being built every day.

These large numbers of owner/operators and features mean that determining the jurisdictional status of stormwater control features cannot practicably be done on a case-by-case basis, as part of an informal agency practice. It is essential that clarity, certainty, and predictability for regulators, the owners/operators of the SCFs, and the public be provided by having a specific, explicit, and categorical exclusion for SCFs written in the WOTUS definition rule.

7. **Lack of Exclusion Would Stifle Needed Maintenance:** The owner/operators of SCFs need to be able to perform O&M functions without having to worry about the WOTUS jurisdictional status. EPA has recognized that maintenance of SCFs is essential for their proper function over time. Without this exclusion, staff resources and time will be diverted to the status issue. Local stormwater programs need to be confident of the status of the SCFs in their systems, minimizing the need to consult with or seek jurisdictional determinations from EPA or USACE. As stated in the 2015 CWR preamble, the SCF owner/operators need “clarity, certainty, and predictability”.
8. **Exclusion Would Reduce or Eliminate Confusion on Jurisdictional Status:** Without the exclusion, the jurisdictional status of some SCFs may be questioned, as the result of residents’ requests, 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. Simply the possibility of such jurisdictional questions will complicate and slow down the work of local stormwater programs in maintaining the SCFs in their systems.
9. **Appropriate Codification of Long-standing Practice:** This exclusion explicitly and appropriately codifies EPA’s and USACE’s publicly-stated intent and longstanding policy that SCFs not be considered WOTUS.
10. **LGAC Support for Items #6 - #9:** Supporting items 6 - 9 above, the LGAC 2017 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."

11. **Historic Codification:** The LGAC 2017 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' ". The categorical and explicit exclusion for SCFs is historic and significant.*

12. **LGAC Views on Water Quality Standards and TMDLs:** It is essential that SCFs not be subject to Water Quality Standards 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, constructed stormwater ponds have come to be viewed by the public as natural lakes.

The NPDES Program provides for the development and implementation of water quality standards, impaired waters lists, and TMDLs. It is essential that:

- water quality standards are not applied to SCFs,
- SCFs are not listed as impaired waters, and
- TMDLs are not required for SCFs.

In support of this concept, the LGAC 2017 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."



13. **WOTUS SCF exclusion is a model for states:** There is good reason to believe that the WOTUS exclusion language for SCFs will serve as a model for revisions to Waters of the State definitions in states throughout the United States. If this exclusion is omitted from the final rule, some states will not consider adding a similar exclusion to their definitions of Waters of the State.
14. **Additional Guidance Needed:** In general, NMSA supported the exclusion language for SCFs in the 2015 CWR or the 2020 NWPR. NMSA is concerned, though, that there are some portions of the U.S. where the application of the “created in dry land” or “in 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”. We request that this language be reviewed considering these facts. Perhaps additional guidance could be sufficient to address these problems. These issues are too complex to address in this comment letter. We request that EPA work with NMSA and other stormwater associations in crafting the final exclusion language and guidance, as recommended by the LGAC.

We appreciate this opportunity to comment. Please feel free to contact Seth Brown, NMSA Executive Director, at seth.brown@nationalstormwateralliance.org or at 202.774.8097, if you would like to discuss any of these items further.

Sincerely,

A handwritten signature in blue ink that reads "Scott Taylor".

Scott Taylor

Chair

National Municipal Stormwater Alliance

A handwritten signature in blue ink that reads "Randy Neprash".

Randy Neprash

Vice Chair

National Municipal Stormwater Alliance



**EPA's Local Government Advisory Committee
Waters of the United States 2017 Report – Excerpts Related to Stormwater
July 14, 2017
(highlighting added)**

Page 3: *"The EPA Administrator issued a compelling charge to the Local Government Advisory Committee that provided an opportunity for local, tribal and state governments to advise the EPA regarding 'Waters of the United States.' The LGAC Waters of the United States Report 2017 provides both policy perspective and specific responses to the charge that can help guide the EPA in moving forward with rulemaking."*

Page 16: *"Exemptions for stormwater and green infrastructure are important for local government. Local governments would be supportive of a revised rule that would retain codification of the waste treatment exemption. It should also extend to municipal separate storm sewer systems (MS4s), stormwater ponds, settling basins and recycled water facilities which depend upon artificially created wetlands and storage ponds to treat millions of gallons of water a day. There has also been a major concern of county governments that roadside ditches are also exempt."*

Page 23: *"Ditches and canals that only carry intermittent flows of water and that are not a relocated tributary or excavated in a tributary, as well as stormwater control features that periodically flow in response to significant precipitation events, should also be exempted."*

Page 26: *"Manmade conveyances, stormwater treatment systems, ditches, farm and irrigation ditches and green infrastructure amenities should be exempt from jurisdiction."*

Page 27: *"The new WOTUS rule should also confirm certain exemptions from federal jurisdiction, offering federal clarification where there has previously been uncertainty. These exemptions include stormwater detention ponds, wastewater treatment facilities, irrigation ditches and "puddles." "*

Page 28: *"The NPDES permits and discharges could hold significant economic issues for local governments in regard to WOTUS for wastewater treatment, stormwater management, CSOs, and application of pesticides (used for vector control). There has been a concern about expanded federal jurisdiction to previously unregulated streams, ditches, and wetlands. However, a revised rule will include exclusions beneficial for those that operate MS4s. The rule includes key exclusions that may be useful for localities. The rule retains a long-standing exclusion for "waste treatment systems," such as treatment ponds and lagoons. It also adds new exclusions for artificially created ponds, settling basins, construction and mining excavation pits, and wastewater recycling structures. Lastly, the revised rule could finally codify the well-understood principle that the CWA does not apply to groundwater. For MS4s, the primary concern about the 2015 CWR was it could potentially be used as parts of an MS4 – including stormwater drainage ditches, BMPs, and green infrastructure projects – are "waters of the US."*



For example, that could mean that NPDES permit coverage would be required to discharge into an MS4 or that a CWA 404 permit would be required to do maintenance on a BMP. 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.” However, the exclusion does not apply to ditches that were created in previously existing streams or wetlands. The rule’s exclusions are important because they take precedence over the rule’s jurisdictional tests. For example, a stormwater conveyance ditch that qualifies for the stormwater exclusion would be excluded from CWA jurisdiction even if the ditch would be considered a jurisdictional water under the tributary test.”

Page 33: “In 2014, the LGAC heard a broad level of concerns raised by municipal associations and county governments concerning MS4s. The LGAC is uncertain of what the regulatory impact will be on MS4s as a revised rule is currently not written. MS4s and green infrastructure are foundational to the continuum of care that is being implemented at the local level to improve water quality. (LGAC 2014 Report)

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.”

Page 35: “The LGAC recommends that manmade conveyance components of MS4s be exempt from ‘Waters of the United States.’ This includes manmade green infrastructure, roads, pipes, manmade gutters, manmade ditches, manmade drains, and manmade ponds. (LGAC 2014 Report)

The LGAC recommends that natural conveyance components of MS4s are included in ‘Waters of the United States.’ This includes natural wetlands and associated modifications to natural wetlands. (LGAC 2014 Report)

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 LGAC recommends that EPA look to stormwater experts and the practical advice that stormwater professionals can lend to a proposed WOTUS rule that the EPA is considering for 'Waters of the U.S.' (LGAC 2014 Report)"

Page 41: *"The LGAC recommends that EPA should consider the impacts of a revised rule on NPDES and Wastewater systems."*

Page 43: *"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 storm-water 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."*

Page 44: *"The EPA should plainly state how WOTUS rulemaking will impact storm-water collection systems and clearly exempt those parts of the systems that EPA does not wish to include."*

The EPA should exempt green infrastructure from jurisdiction and outline the Agency's definition of what is included within green infrastructure similarly as for agricultural practices for 'normal farming practices'."