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The Coalition of Real Estate ("CORE") Associations[1] appreciates the opportunity to provide these comments to the proposed rule of the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps"), entitled "Definition of 'Waters of the United States' Under the Clean Water Act," published at 79 Federal Register 22,188 (April 21, 2014) ("Proposed Rule"). The CORE Associations represent an informal group of trade associations whose members are involved in almost every aspect of real estate development, ownership, management, and contracting, covering both the residential and commercial markets.

I. SUMMARY

These comments address the impact of any revised definition of "waters of the United States" ("WOTUS") on Municipal Separate Storm Sewer Systems ("MS4s"), and the component

[1] For purposes of these comments, the CORE Associations include: Associated Builders and Contractors; Associated General Contractors of America; Building Owners and Managers Association International; International Council of Shopping Centers; Leading Builders of America; National Apartment Association; NAIOP, the Commercial Real Estate Development Association; National Association of Home Builders; National Association of Real Estate Investment Trusts; National Association of REALTORS®; National Multifamily Housing Council; and The Real Estate Roundtable.

conveyances within these systems that channel and discharge stormwater runoff.[2] Members of the CORE Associations release stormwater into MS4s and also may be regulated by operators of MS4s, underlying our interest in the possible impact of the Proposed Rule on MS4 systems.

In the comprehensive and exhaustive Proposed Rule, nowhere do EPA and the Corps (the "Agencies") mention the term "MS4" – much less the elaborate Clean Water Act ("CWA") regime that governs and regulates these systems across the United States. The CORE Associations believe that the Agencies must address the interplay between the MS4 stormwater program and WOTUS coverage. Indeed, the Proposed Rule's "strong intent to provide as much certainty to the regulated public and the regulators"[3] requires clarification on the jurisdictional status of MS4s. Moreover, while EPA's recent "Ditch the Myth" campaign[4] states that the Proposed Rule "cuts through the red tape" to offer greater certainty and consistency on WOTUS determinations – with an emphasis on ditches – nowhere does EPA specifically address ditches that are components in permitted MS4s. Respectfully, this is a glaring omission in the agencies' otherwise exhaustive proposed treatment of WOTUS matters. Consistent with EPA Administrator McCarthy's commitment to address key issues of concern in the WOTUS context,[5] the jurisdictional status of MS4s and their component conveyances is the very kind of issue that warrants the agencies' careful deliberation and clear explanation.

Accordingly, the Agencies should state in plain language whether CWA permitted MS4 systems and their component conveyances are "in" or "out" of the scope of WOTUS. The CORE Associations suggest there is little room for gray area or case-by-case field determinations on this point. We believe that:

- "Waste treatment systems" have long been excluded from WOTUS jurisdiction under EPA and Corps regulations – including the regulations implementing the permit program for the National Pollutant Discharge Elimination System ("NPDES") authorized by CWA section

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[2] Some CORE members are also members of other coalitions, or plan to submit their own individual comments, on other aspects of the many issues implicated by this Proposed Rule. These comments enhance and supplement any other comments submitted by any of the CORE Associations to the Proposed Rule.

[3] 77 Fed. Reg. at 22,189, col. 2.

[4] See http://www2.epa.gov/uswaters/ditch-myth.

[5] "I commit to you that if you raise an issue of concern, I will address it." Administrator Gina McCarthy, Remarks at the Agricultural Business Council of Kansas City on Clean Water Proposal, As Prepared (July 10, 2014) ("McCarthy Remarks"). Available at http://yosemite.epa.gov/opa/admpress.nsf/8d49f7ad4bbcf4ef852573590040b7f6/aa42d63b31d4b1fa85257d110066168b!OpenDocument.

402.[6] MS4s are "waste treatment systems" and, accordingly, should be categorically excluded from the reach of WOTUS.

- The CORE Association's proposal to exclude MS4s from WOTUS jurisdiction as waste treatment systems is not to avoid CWA regulation. Rather, our proposal is intended to avoid *double* regulation. MS4s – and the drains, roads, pipes, curbs, gutters, ditches and other component parts of these systems that channel runoff – are regulated "point sources" that discharge pollutants conveyed in stormwater. Though section 402(p), Congress required MS4s to obtain NPDES permits for stormwater discharges.[7] Thus, because MS4s and all identified components of these systems are already subject to NPDES permitting requirements, excluding them for WOTUS jurisdiction as waste treatment systems is wholly consistent with the Act's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[8]

- A contrary interpretation – that MS4s are somehow considered jurisdictional WOTUS – would upset the federal-state balance envisioned by Congress to vest in States and localities the "primary responsibilities and rights" to control water pollution, and the use of land and water resources, within their borders.[9]

- Deeming permitted MS4s and their components as WOTUS would also contravene the plain language of the CWA and implementing regulations, and lead to strained and illogical regulatory results. For example, if a ditch within an NPDES-permitted MS4 system was somehow deemed jurisdictional, then a "water of the United States" would be located within a regulated "point source." That result would upend the Act's entire regulatory structure. Similarly, if an MS4 was a WOTUS, then States and EPA would be compelled to establish water quality standards, criteria, and total maximum daily loads for municipally-owned storm sewers. Nothing in the CWA's language, structure, or legislative history supports such interpretations. These and other untenable results would be easily avoided by the Agencies' express clarification that the exclusion for waste treatment systems captures MS4s.

Ditches are a common component in MS4s to convey and channel stormwater runoff. The Proposed Rule suggests that some ditches are excluded from WOTUS coverage, while other ditches are "tributaries" and thus within CWA jurisdiction. These comments do not opine on the

[6] See 40 C.F.R. § 122.2 (exclusions from WOTUS definition at subsection (b)(1)).

[7] 33 U.S.C. § 1342(p)(1). See also *id.* § 1342(p)(3)(B) (establishing contours of "permit requirements" for "discharges from municipal storm sewers ….."

[8] *Id.* § 1251(a).

[9] *Id.* § 1251(b).

jurisdictional treatment of ditches outside of permitted MS4s. But to the extent that ditches (and other system components) are mapped and identified as part of an MS4, and subject to an NPDES permit governing the MS4 of which they are a part, then such ditches (and components) should not be WOTUS under the exclusion for waste treatment systems.[10] The CORE Associations thus recommend modest – but important – changes to the Proposed Rule, as follows:

> "(b) The following are not 'waters of the United States' notwithstanding whether they meet the terms of paragraphs (a)(1) through (7) of this definition—
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> > "(1) Waste treatment systems, including treatment ponds, lagoons, **or Clean Water Act regulated municipal separate storm sewer systems and the component conveyances within such systems."**[11] ~~[designed to meet the requirements of the Clean Water Act.]~~"[12]

II. THE CLEAN WATER ACT'S PERMIT PROGRAM FOR STORMWATER DISCHARGES FROM MS4s.

A. Statutory and Regulatory Overview.

The CWA's overriding regulatory objective is to prohibit pollutant discharges without a permit – such as a permit issued under the NPDES program.[13] Stormwater that conveys

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[10] This comment letter focuses on regulated MS4s. However, there are other stormwater systems and conveyances not covered by NPDES permits that the Agencies should also exempt from the WOTUS definition. Certain CORE members will comment on those systems separately.

[11] The last sentence of the "waste treatment systems" exclusion reads: "This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal areas in wetlands,) nor resulted from the impoundment of waters of the United States." 40 C.F.R. § 122.2(b). Since 1980, EPA has "suspended" this last sentence. See 45 Fed. Reg. 48,620 (July 21, 1980); 48 Fed. Reg. 14,153 (Apr. 1, 1983). The Proposed Rule continues this longstanding suspension, with which the CORE Associations agree. See 79 Fed. Reg. at 22,268 col. 3.

[12] The condition in the last clause that waste treatment systems be "designed to meet the requirements of the Clean Water Act" unnecessarily narrows the exclusion. Certain waste treatment systems are designed to meet state and local (as opposed to federal) requirements, but should still be excluded from the WOTUS definition. Some members of the CORE Associations will provide separate comments concerning this issue.

[13] 33 U.S.C. §§ 1311(a), 1342(a); see *Envt'l Def. Ctr. v. EPA,* 344 F. 3d 832, 841 (9th Cir. 2003) ("*EDC*") (the CWA "prohibits the discharge of pollutants from a 'point source' into the waters of the United States without a permit issued under the terms of the National Pollutant Discharge Elimination System ….").

pollutants"[14] from a "point source"[15] into WOTUS are a type of "discharge"[16] that triggers NPDES permitting requirements.

"In 1987, to better regulate pollution conveyed by stormwater runoff, Congress enacted … § 402(p), [entitled] 'Municipal and Industrial Stormwater Discharges.'"[17] By requiring stormwater discharge permits under CWA section 402, Congress made "the stormwater program … part of the (NPDES) Program …."[18] Municipal pollutant discharges from MS4s are one of three categories of

[14] While Congress exempted most discharges "composed entirely of stormwater" (*i.e.,* not mixed with wastewater or other regulated discharges) (33 U.S.C. § 402(p)(1), it specifically identified certain MS4 and industrial stormwater pollutant sources for permitting to control pollutants discharged in stormwater from those point sources. The CWA defines "pollutants" to mean wastes like "dredged spoil, solid waste, … sewage, garbage sewage sludge, … chemical wastes, biological materials, … heat, … rock, sand, cellar dirt, and industrial, municipal and agricultural waste discharged into water." 33 U.S.C. § 1362(6). See *LA Cnty. Flood Control Dist. v. NRDC,* 133 S. Ct. 710, 712 (2013) ("Because stormwater is often heavily polluted, … the CWA and its implementing regulations require the operator of an MS4 … to obtain a [NPDES] permit before discharging storm water into navigable waters"); *EDC,* 344 F.3d at 840-841 ("Storm sewer waters carry suspended metals, sediments, algae-promoting nutrients (nitrogen and phosphorous), floatable trash, used motor oil, raw sewage, pesticides, and other toxic contaminants ….") In *Virginia DOT v. EPA,* 2013 WL 53741 (E.D. Va., Jan. 3, 2013), the court held that EPA did not have the statutory authority to establish a Total Maximum Daily Load (TMDL) based on "stormwater flow rate" as a "surrogate" or "proxy" for sediment. *Id.* at *2, *3. For purposes of the CWA, the court stated "sediment is a pollutant, … but stormwater is not. " *Id.* at *3. In short, stormwater is subject to NPDES permit requirements to the extent such runoff discharges "pollutants" into WOTUS.

[15] "The term 'point source' means any discernible, defined and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well … [or] container … from which pollutants are or may be discharged." 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2.

[16] The CWA defines "discharge of a pollutant" as "any addition of any pollutant ***to*** navigable waters ***from*** any point source …." 33 U.S.C. § 1362(12) (emphasis supplied). Thus, in the "discharge" definition, Congress distinguished between "navigable waters" (defined to mean WOTUS at 33 U.S.C. § 1362(7)) on the one hand, and "point sources" on the other hand. EPA regulations likewise specify that "discharge of a pollutant" includes "additions of pollutants into [WOTUS] from … discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works …" 40 C.F.R. § 122.2. Thus, "point sources" (like MS4s) serve the function to convey and carry pollutants, and are features from which pollutants are discharged into WOTUS . But "point sources" are *not* themselves WOTUS. Congress did not give the Agencies broad authority over "point sources" as conveyances *per se* -- but only conferred limited federal permitting authority over the *activity* of a "discharge" when a "point source" *adds* a pollutant to WOTUS. See *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe,* 541 U.S. 95, 109-110 (2004) (emphasizing that CWA permits are required for "any addition" of pollutants to WOTUS, not the movement of pollutants within the same waterbody).

[17] *EDC,* 344 F. 3d at 841.

[18] 40 C.F.R. § 122.30(b).

stormwater permits authorized by section 402(p).[19] For over 20 years, EPA has implemented Congress's plan for a "phased" approach to regulate municipal runoff based on the size of the population served by an MS4.[20] NPDES permits must be obtained for all stormwater discharges from "large" and "medium" MS4s under so-called "Phase 1" rules,[21] and from regulated "small" MS4s under Phase 2 rules.[22] EPA estimates there are approximately 750 Phase 1 MS4s, and 6,700 Phase 2 MS4s, in the United States.[23]

B. MS4s and the Component Conveyances Within These Systems.

Regulations define MS4s as "a conveyance or *system of conveyances* … designed or used for collecting or conveying storm water."[24] The component "conveyances" within a larger MS4 "system" collect and channel runoff through "roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains."[25] The MS4 definition closely tracks the separate definition of "point source"[26] – thus confirming that "'[s]torm sewers are established point sources subject to NPDES permitting requirements" within section 402's regime.[27]

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[19] 42 U.S.C. § 1342(p)(2). The other categories are discharges associated with "industrial activity" (such as land development and construction activities), and certain other discharges that, as EPA determines on a case-by-case basis, contribute to a violation of a water quality standard or significantly contribute pollutants to WOTUS. See *EDC,* 344 F.3d at 841-842.

[20] See 33 U.S.C. § 1342(p)(2)-(4), (6) (two-phase approach for stormwater regulation). MS4s can be "large," "medium," or "small." Large MS4s serve a population of 250,000 or more (40 C.F.R. § 122.26(b)(4)), while medium MS4s serve a population of 100,000 or more but less than 250,000. (*Id.* § 122.26(b)(7)). Large and medium MS4s have been subject to NPDES regulation since 1990 under the so-called "Phase 1" rules, see 55 Fed. Reg. 47,990 (Nov. 16, 1990) (codified at 40 C.F.R. pts. 122-124). Small MS4s (defined *id.* § 122.26(b)(16) have been regulated since 1999 under the "Phase 2" rules, see 64 Fed. Reg. 68,722 (Dec. 8, 1999) (codified at 40 C.F.R. pts. 9, 122, 123, and 124). The phased approach for the NPDES stormwater permit program, including MS4 discharge permits, is discussed at *EDC*, 344 F. 3d at 841-842.

[21] See, *e.g.*, 40 C.F.R. §§ 122.26(a)(3), (4).

[22] See, *e.g.*, *id.* § 122.26(a)(5).

[23] See http://cfpub.epa.gov/npdes/stormwater/munic.cfm.

[24] 40 C.F.R. § 122.26(b)(8) (emphasis supplied).

[25] *Id.*

[26] See *supra* note 15.

[27] *EDC*, 344 F.3d. at 841 (citing *NRDC v. Costle,* 568 F.2d 1369, 1379 (D.C. Cir. 1977)).

Generally speaking, governmental bodies at the state and local level own or operate MS4 systems.[28] EPA guidance explains:

> What constitutes an MS4 is often misinterpreted and misunderstood. An MS4 is not always just a system of underground pipes—it can include roads with drainage systems, gutters, and ditches. Although most entities with MS4s are local municipal governments (*e.g.,* cities and counties), there are other governmental entities that manage storm drains at their facility, including state departments of transportation, universities, local sewer districts, hospitals, military installations, and prisons.[29]

C. MS4 "Outfall Points."

All of the municipally owned or operated pipes, curbs, gutters, ditches, drains and other conveyances that comprise an MS4 system collect and carry stormwater to an "outfall" – specifically designated by EPA's regulations as a "point source" because it is "the point where a municipal separate storm sewer discharges to [WOTUS]."[30] A key element of MS4 permit applications is the precise mapping and identification of the storm sewer's outfall points[31] as well as the entire "network" of conveyances that ultimately connect to the outfall:

> Phase I MS4 permittees should have developed a map of known municipal outfalls discharging to waters of the United States as part of their source identification conducted for Part I of their NPDES application. Phase II permittees are required to develop a map of outfalls and the names of locations of all waters of the United States that receive discharges from those outfalls. *To be useful, these maps should also include the storm drain pipe network and catch basin locations,* along with other

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[28] 40 C.F.R. § 122.26(b)(8)(i).

[29] U.S. EPA Office of Wastewater Management, "MS4 Program Evaluation Guidance," EPA-833-R-07-003, at p. 5 (Jan. 2007) (available at: http://www.epa.gov/npdes/pubs/ms4guide_withappendixa.pdf) ("MS4 Guidance").

[30] 40 C.F.R. § 122.26(b)(9). A "major" MS4 outfall discharges from a single pipe with an inside diameter of 36 inches or more; or an inside diameter of 12 inches in the case where an MS4 receives stormwater from lands zoned for construction and other types of industrial activity. *Id.* § 122.26(b)(7).

[31] *Id.* §§ 122.26(d)(iii)(B)(1),(5) (Part 1 of the large or medium MS4 NPDES permit application shall include a USGS topographic map that identifies "[t]he location of known [MS4] outfalls discharging to (WOTUS)," and "[t]he location of major structural controls for stormwater discharge (retention basins, detention bsins, major infiltration devices, etc."). After storm events, samples of effluent are taken at MS4 outfall points and, as required, analyzed to detect pollutants. *Id.* § 122.26 (d)(2)(iii)(A).

> relevant information such as the location of stormwater treatment facilities, watershed boundaries for each outfall, critical land uses and pollutant sources, and municipal facilities. Outfalls and drainage areas should be prioritized in order of their potential to be a source of illicit discharges. Ideally, this information would be managed in a database linked to a GIS.[32]

MS4 maintenance likewise calls for "infrastructure mapping" in a geographic information system (GIS) showing all inlets, outfalls, storm drain conduits, and receiving water bodies; EPA further advises that these "infrastructure assets or components" should be "named or numbered" for ease of identification. [33]

D. Regulation of Stormwater Discharges (1) From MS4 Outfalls to Receiving Water Bodies, and (2) Into and Through MS4s Themselves.

NPDES regulations require MS4 owners and operators to control pollutant discharges into receiving waters "to the maximum extent practical." While the CWA requires NPDES permits for discharges "from" the MS4 into WOTUS, MS4 owners and operators also need to control or limit pollutant contributions entering their storm sewer systems from third parties.

First, because "municipal … waste" carried by stormwater is a "pollutant,"[34] section 402 permits are necessary at the point that an MS4 outfall discharges runoff into WOTUS. Permits for discharges from MS4s "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and systems, design, and engineering methods."[35] To obtain NPDES permit coverage, the MS4 operator must certify that all outfalls "that should contain stormwater discharges … have been tested or evaluated for the presence of non-stormwater discharges which are not covered by a NPDES permit …."[36] In describing the system monitoring approach for MS4s, EPA states that "monitoring of outfalls close to the point of discharge to [WOTUS] is generally preferable when attempting to identify priorities for developing pollutant control programs."[37] NPDES regulations further specify effluent sampling procedures at MS4 outfall points after storm events,[38] such as the

[32] MS4 Guidance, at p. 85 (emphasis supplied).

[33] *Id.* at p. 47.

[34] 33 U.S.C. § 1362(6); 40 C.F.R. § 122.2. See *supra* note 14.

[35] 33 U.S.C. § 1342(p)(3)(B)(iii).

[36] 40 C.F.R. § 122.26(c)(i)(C).

[37] Phase 1 Rules, 55 Fed. Reg. at 48,057 (Nov. 16, 1990).

[38] See 40 C.F.R. subpt. B.

reporting of "quantitative data … for the grab sample … of the discharge of all pollutants" (such as process wastewater, oil, grease, phosphorous, total suspended solids, and nitrogen).[39]

Second, any industrial operation (like many construction sites)[40] that discharges stormwater "through" a large or medium MS4 must provide the MS4 operator with key information regarding that penultimate discharge into the municipal system before it may reach receiving waters – such as any existing NPDES permit allowing that "industrial" site to legally discharge pollutants off site in the first place.[41] Otherwise, any other release of a pollutant into an MS4 that is not itself permitted or otherwise exempt from permitting is "illicit."[42] The MS4 permit application must set forth "[a]dequate legal authority" for the municipality to prohibit illicit discharges "through ordinance, order, or similar means."[43] Applicants for MS4 permit coverage must also describe a program "including a schedule, to detect and remove (or require the discharger to the [MS4] to obtain separate NPDES permit coverage for) illicit discharges and improper disposal into the storm sewer."[44]

E. MS4s are "waste treatment systems."

Just as treatment works are publicly owned and operated systems that store, treat and recycle sanitary and industrial waste (*i.e.,* sewage)[45] – and are "point sources" subject to NPDES permit requirements[46] – MS4s are systems that separately treat, store and recycle municipal and industrial pollutants that are present in stormwater flows.

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[39] 40 C.F.R. § 122.21 (g)(7)(ii); § 122.26 (c)(1)(i)(E).

[40] According to EPA's Phase 1 stormwater rules an "industrial activity" includes construction activity (such as land clearing, grading and excavation) on sites larger than five acres, but may also include land clearing activities on smaller lots in a common plan or development (like a subdivision) that is five acres or more. 40 C.F.R. § 122.26(b)(14)(x). Under the Phase 2 rules, "small construction activity" on sites between one and five acres must also obtain NPDES permit coverage for stormwater discharges. *Id.* § 122.26(b)(15).

[41] *Id.* § 122.26(a)(4).

[42] *Id.* § 122.26(b)(2).

[43] *Id.* § 122.26(d)(2)(i)(B).

[44] *Id.* § 122.26(d)(2)(iv)(B).

[45] 33 U.S.C. § 1292(2)(A).

[46] See, *e.g.*, http://www.epa.gov/region1/npdes/potw-gp.html.

Stormwater discharged from MS4s often carries "pollutants" as the CWA defines that term.[47] Regulations specify that MS4s are owned or operated by state or local governments (or other bodies) created under State law, that specifically have "jurisdiction over disposal of sewage, industrial wastes, *storm water, or other wastes* …."[48] Thus, only government entities that have responsibilities for waste management are eligible to obtain MS4 NPDES permits.[49]

To meet the CWA's directive that municipal stormwater permits must control pollutants "to the maximum extent practicable,"[50] MS4 operators must include a "proposed management plan" in their NPDES application that, among other things, incorporates "management practices, control techniques, and system design and engineering methods" to reduce pollutant discharges.[51] MS4s treat wastes in stormwater with such features as settling structures to collect sediment, and racks to capture trash.[52] EPA's online "National Menu of Stormwater Management Best Practices" sets forth an exhaustive suite of controls[53] to help prevent and treat municipal waste such as trash, debris, sediment, animal waste, oil and grease, and pesticides before such pollutants are conveyed by stormwater discharges from an MS4 outfall into WOTUS (or at the front end, from third parties releasing pollutants into the MS4).

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[47] 33 U.S.C. § 1362(6). See *supra* note 14.

[48] 40 C.F.R. § 122.26(b)(8)(i) (emphasis supplied)

[49] That stormwater conveys "waste" is also made plain by EPA's regulations addressing non-municipal runoff associated with industrial activities. Aside from the general definition of "discharge of a pollutant," EPA has a specific definition for "storm water discharge associated with industrial activity" – that is, the discharge "from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing processing or raw materials storage areas at an industrial plant." *Id.* § 122.26(b)(14). Among the categories of industrial discharges identified in this definition are runoff from roads and rail lines "used or traveled by carriers of … waste materials," "refuse sites," "sites used for the application or disposal of process waste waters," and "material handling activities that include … conveyance of any … by-product or waste product." *Id.*

[50] 33 U.S.C. § 1342(p)(3)(B)(iii).

[51] 40 C.F.R. 122.26(d)(2)(iv). For example, "structural controls to reduce pollutants (including floatables) in discharges from [MS4s]" must be included in the plan accompanying the NPDES application. *Id.* § 122.26(d)(2)(iv)(A)(1).

[52] Ben Urbonas, *et al.*, *Stormwater, Best Management Practices and Detention for Water Quality, Drainage, and CSO Management* 42, 416-433 (1993).

[53] *E.g.,* infiltration trenches, infiltration basins, drain system cleaning, silt fences, wet and dry detention ponds, geotextiles, polymer treatment of suspended solids, etc. See http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm.

Municipalities around the country typically install stormwater infrastructure for the sole purpose of cleaning runoff and treating the wastes it conveys before entering receiving waters. For example, Madison, Wisconsin has installed numerous treatment structures that remove large particles and trash from the stormwater as it moves through the municipality's storm sewer.[54] Similarly, the Brookfield Pond Restoration Project in Fairfax, Virginia improves a pond that was not created with modern stormwater management techniques. The project includes infrastructure located where stormwater enters the pond to filter pollutants and sediment, and floating wetlands designed to remove nutrients.[55] These are just two examples of the thousands of treatment projects nationwide that municipalities operate to manage and control the wastes carried by stormwater that runs through MS4 systems.

II. MS4s AND THEIR COMPONENT CONVEYANCES SHOULD BE EXPRESSLY EXCLUDED FROM WOTUS JURISDICTION.

The Proposed Rule is intended to offer "greater clarity to regulated entities as to whether [or not] individual water bodies are jurisdictional" under the CWA.[56] The Agencies' aim of improved regulatory predictability is to "minimiz[e] the number of case specific" WOTUS determinations in the field.[57] Because of the "strong intent to provide as much certainty to the regulated public and the regulators as to which waters are and *are not* jurisdictional," EPA and the Corps have specifically requested comment on "which waters should be determined non-jurisdictional."[58]

In this regard, the CORE Associations respectfully urge the Agencies to clarify that WOTUS jurisdiction does not reach MS4s and the component conveyances that comprise these systems. Any final rule should state that MS4s fall within the "waste treatment systems" exclusion from WOTUS, at 40 C.F.R. § 122.2 of the NPDES program regulations.[59] The CORE Associations thus recommend modest – but important – changes to the Proposed Rule, as follows:

> "(b) The following are not 'waters of the United States' notwithstanding whether they meet the terms of paragraphs (a)(1) through (7) of this definition—

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[54] http://www.cityofmadison.com/engineering/stormwater/TreatmentStructures.cfm

[55] http://www.fairfaxcounty.gov/dpwes/stormwater/projects/brookfield_pond.htm

[56] Proposed Rule, 79 Fed. Reg. at 22,188, col. 3.

[57] *Id.*

[58] *Id.* at 22,189, col. 2 (emphasis supplied).

[59] Conforming changes should be made to all relevant WOTUS definitions in the "List of Subjects" in the Code of Federal Regulations set forth in the Proposed Rule at 79 Fed. Reg. 22,262, cols. 2-3.

> "(1) Waste treatment systems, including treatment ponds, lagoons, **or Clean Water Act regulated municipal separate storm sewer systems and the component pollutant conveyances within such systems.** ~~designed to meet the requirements of the Clean Water Act~~"

A categorical WOTUS exclusion of MS4s and their component conveyances is warranted for the following reasons:

A. MS4s are "waste treatment systems" – which have never been considered WOTUS. No lessened protections for aquatic resources would result by clarifying that MS4s are not WOTUS.

As explained above, MS4s are systems that treat wastes transported by stormwater. This fact is amplified by Congress's direction that MS4s must control stormwater pollutants "to the maximum extent practicable" by deploying a suite of best management practices, control techniques, and engineering methods designed to treat pollutants in runoff.[60] A 2005 memorandum from EPA's General Counsel and Assistant Administrator for Water confirms that "waste treatment systems" are "by definition" *not* WOTUS.[61]

Excluding MS4s from WOTUS jurisdiction will not lower protection of aquatic resources, because pollutant discharges from these systems are fully covered by the comprehensive and exhaustive NPDES regime. Direct or indirect discharges – from MS4 outfall points into WOTUS – must be permitted under all of the section 402 authorities and implementing regulations controlling additions of pollutants from point sources.[62] Furthermore, when an industrial activity results in a discharge into an MS4, EPA has "always addressed such discharges as discharges *through* [MS4s] as opposed to 'discharges to waters of the United States' …."[63] EPA thus provides an exhaustive online library of resources for MS4 operators to detect, eliminate, and take action against "illicit discharges" into their systems.[64] Indeed, a municipal program to fully address

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[60] 33 U.S.C. § 1342(p)(3)(B).

[61] Memorandum from Ann R. Klee, General Counsel, and Benjamin H. Grumbles, Assistant Administrator for Water, Environmental Protection Agency, to Regional Administrators, Regarding Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfer, at 18, n. 18 (Aug. 5, 2005) (available at http://www.epa.gov/ogc/documents/water_transfers.pdf).

[62] See *supra* notes 34-44.

[63] Preamble to Phase 1 Rule, 55 Fed. Reg. 47,900, 47,997 (Nov. 16, 1990) (emphasis supplied).

[64] See http://cfpub.epa.gov/npdes/stormwater/idde.cfm.

"illicit discharges" is a prerequisite to Section 402 permit coverage for any municipal storm sewer.[65] As EPA's guidance manual for MS4s explains:

> Provisions of the Clean Water Act (1987) require National Pollutant Discharge Elimination System (NPDES) permits for storm water discharges. Section 402 (p)(3)(B)(ii) requires that permits for municipal separate storm sewers shall include a requirement to effectively prohibit problematic non-storm water discharges into storm sewers. Emphasis is placed on the elimination of inappropriate connections to urban storm drains. This requires affected Agencies to identify and locate sources of non-storm water discharges into storm drains so they may institute appropriate actions for their elimination.[66]

In short: Because MS4s and their component parts are waste treatment systems that manage and control pollutants conveyed by stormwater, they should be categorically excluded from the scope of WOTUS.

B. Excluding MS4s from WOTUS jurisdiction furthers the CWA's goal to ensure that states and local governments bear the primary responsibility for water pollution prevention and management within their borders.

CWA section 101(b) places the "primary responsibilities" on States to address water pollution, and develop plans to preserve and protect land and water resources, within their borders.[67] As the Supreme Court emphasized in one of its seminal cases interpreting WOTUS jurisdiction, through section 101(b) Congress preserved the "federal-state balance" in the CWA when it "chose to 'recognize, preserve and protect the primary responsibilities and rights of States to ... plan the development and use ... of land and water resources ...."[68] Regulation of water and land use has always been a state function.[69] However, any agency interpretation or field determination that somehow deems MS4s as WOTUS would enormously disrupt State and local government programs and responsibilities to maintain, manage, and treat stormwater discharges under section 402(p).

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[65] See *supra* notes 40-44.

[66] Center for Watershed Protection, *et al.*, "Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessments," (October 2004) at p. i, available at http://www.epa.gov/npdes/pubs/idde_manualwithappendices.pdf

[67] 33 U.S.C. § 1251(b).

[68] *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs,* 531 U.S. 151, 166-67 (2001) ("*SWANCC*") (citing 33 U.S.C. § 1251(b)).

[69] See *SWANCC,* 531 U.S. at 174 (citing *Hess v. Port Authority Trans-Hudson Corp.,* 513 U.S. 30, 44 (1994)).

MS4s are owned and operated by public entities, including states, local governments, and other bodies created under state law, such as sewer districts, flood control districts, or drainage districts. "Rather than regulate individual sources of runoff, such as churches, schools and residential property (which one Congressman described as a potential 'nightmare'), … Congress put the NPDES permitting requirement at the municipal level to ease the burden of administering the program."[70] States and local government are thus charged with reducing pollution through the NPDES program. No added benefit would be gained by treating MS4 systems permitted under NPDES requirements as federal jurisdictional waters.

Under the Phase 2 stormwater rules, all municipal separate storm sewer systems in "urbanized areas" (as defined by the U.S. Census Bureau)[71] must develop and implement controls to prevent polluted runoff from entering rivers, lakes and coastal waters. Census maps (most recently released in 2010) are used to assist EPA and states to determine which new MS4s are located in urbanized areas and thus require NPDES permit coverage. Municipalities also use these maps to determine which locations within their jurisdiction are located in the urbanized area where the MS4 program would apply. As the U.S. population grows and becomes more concentrated in the nation's urban and suburban growth centers, EPA recognizes that "the universe of the regulated small MS4 program expands every ten years based on the decennial Census definition of urbanized area."[72] Any interpretation that subjects MS4s and the conveyances within them to WOTUS jurisdiction would federalize a vast network of storm sewer systems within State and local control – plainly upsetting the goal and policy of federal-state balance that Congress announced in CWA section 101(b). That result can be easily avoided, and the careful balance of authorities maintained, though a simple but important clarification that MS4s are excluded from the scope of WOTUS.

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[70] *Nat. Res. Def. Council, Inc. v. Cnty. of Los Angeles,* 636 F.3d 1235, 1247(9th Cir. 2011). The statement referenced by the Ninth Circuit was made by Senator Wallop: "[T]he regulations can be interpreted to require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to get a permit from EPA as a point source …. Requiring a permit for these kinds of stormwater runoff conveyance systems would be an administrative nightmare." *Id.* (citing 131 Cong. Rec. 15616, 15657 (Jun. 13, 1985)).

[71] In its FAQs for the NPDES program, EPA explains that Urbanized Areas (UAs) "constitute the largest and most dense areas of settlement. UA calculations delineate boundaries around these dense areas of settlement and, in doing so, identify the areas of concentrated development. UA designations are used for several purposes in both the public and private sectors. For example, the federal government has used UAs to calculate allocations for transportation funding, and planning Agencies and developers use UA boundaries to help ascertain current, and predict future, growth areas. The Bureau of the Census determines UAs by applying a detailed set of published UA criteria (see 55 FR 42592, October 22, 1990) to the latest decennial Census data." See "MS4: What is an Urbanized Area," at http://cfpub.epa.gov/npdes/faqs.cfm?program_id=6#174.

[72] See "Urbanized Area Maps," at http://cfpub.epa.gov/npdes/stormwater/urbanmaps.cfm.

Professor Tribe has explained that the "most important" rule of statutory construction "is the clear statement rule."[73] Where a statutory interpretation "invokes the outer limits of Congress's power" or "overrides ... [the] usual constitutional balance of federal and state powers," Supreme Court cases "expect a clear indication that Congress intended that result."[74] The clear statement requirement is "heightened" where an agency interprets a statute in a manner that would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power."[75] There is no statement in the CWA – "clear" or otherwise – that Congress intended WOTUS to reach MS4s (and their roads, pipes, ditches and drains) covered by NPDES permits. Respectfully, EPA and the Corps should thus make it clear in any final rule that MS4s are categorically excluded from WOTUS jurisdiction.

C. Treating MS4s (and their component conveyances) as WOTUS would undermine longstanding EPA interpretations and practice.

EPA's pronouncements in developing NPDES regulations have long distinguished between MS4s as "point sources" on the one hand, and the "waters of the United States" on the other hand. In the 1990 preamble to the Phase 1 regulations, EPA stated that stormwater runoff *into* municipal sewers (including MS4-controlled ditches, roads, storm drains, etc.) is *not* a discharge of a pollutant into a WOTUS. In the context of the Phase 1 regulations, a municipality commented to EPA "that neither the term 'point source' nor 'discharge' should be used in conjunction with industrial releases into urban storm sewer systems because that gives the impression that such systems are navigable waters."[76] EPA responded that it:

> "[A]lways addresses such discharges as 'discharges *through* municipal separate storm sewers' as opposed to 'discharges *to* waters of the United States."[77]

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[73] Laurence Tribe, Constitutional Law vol. I, § 5-9 at 853.

[74] *SWANCC,* 531 U.S. at 172-73; *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991) (citing *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 242-43 (1985)).

[75] *SWANCC,* 531 U.S. at 173.

[76] *Id.*

[77] *Id.* (emphasis supplied). Indeed, the CWA's "discharge" definition drives home the point that Congress did not intended MS4s and other permitted "point sources" to be WOTUS. See *supra* notes 15-16. For purposes of these comments, the CORE Associations maintain that permitted MS4s are categorically not WOTUS. We do not address here whether, or under what circumstances, other "point sources" can ever be considered WOTUS.

In addition, implementing regulations require MS4 permit applicants to identify and list "water bodies" that receive discharges from municipal storm systems – further making plain that EPA does not consider MS4s as jurisdictional water bodies under the CWA.[78]

A contrary interpretation – whereby an MS4 and its component conveyances could possibly be swept within the scope of WOTUS – would yield unintended and unreasonable results. The proposed rule explains that the term "navigable waters" (defined by statute to mean WOTUS)[79] "is used in a number or provisions of the CWA"[80] including "the water quality and total maximum daily load programs under section 303, and the section 401 state water quality certification process." Application of these programs to MS4s and their conveyances – a result that would follow upon deeming these storm sewer systems as WOTUS – would lead to strained agency interpretations and likely cause increased litigation.

For example, section 303 requires States to adopt and submit to EPA water quality standards ("WQSs") which "consist of a designated use or uses for the waters of the United States …."[81] If MS4s were WOTUS, then State-developed and EPA-approved WQSs would need to designate "uses" for storm sewer systems. However, "in no case shall a State adopt waste transport … as a designated use for any water of the United States."[82] Yet one of the very purposes of an MS4 and the ditches, drains and gutters within these systems is, in fact, to transport waste. It would be impossible to designate a WQS for an MS4 for any other reason *but* to convey and treat stormwater – in plain violation of EPA's regulations for water quality standards. To avoid such an untenable result within the Act's structure and the Agencies' own regulations, EPA and the Corps should thus clarify that MS4s are not WOTUS.[83]

Furthermore, WQSs contain both designated uses for a waterbody and water quality criteria ("WQC") which protect the designated use.[84] If a waterbody is not meeting its WQC then

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[78] 40 C.F.R. § 122.26(d)(1)(iv).

[79] 33 U.S.C. § 1362(7) ("The term 'navigable waters' means the waters of the United States, including the territorial seas").

[80] 79 Fed. Reg. at 22,191, col. 2.

[81] 33 U.S.C. § 1313; 40 C.F.R. § 131.3(i).

[82] 40 C.F.R. § 131.10(a).

[83] In the context of industrial discharges into MS4s, EPA has explained that the discharger's obligation to satisfy WQSs is "at the boundary of a State established mixing zone … located in the receiving waters of the United States." 55 Fed. Reg. at 48,037. That is, the industrial discharger's obligation to satisfy WQSs does not pertain to such standards for the very storm sewer system itself.

[84] 40 C.F.R. § 131.11(a).

the state must develop a pollutant-specific total maximum daily load ("TMDL") for the waterbody.[85] Interpreting the CWA in a manner that construes MS4s to be WOTUS would force states to develop WQC and TMDLs for storm systems designed to treat pollutants. Aside from the sizeable resource commitment (which the states would bear) to develop WQCs and TMDLs for every MS4 and all of the ditches, drains, and pipes that comprise these systems, such an interpretation adds unnecessary layers of regulation. The MS4's section 402 permit would already regulate pollutants that the operator may discharge from the storm sewer into receiving waters; concurrently, any WQC and TMDL would regulate pollutants entering the MS4 from third party releases, and pollutant loads within the system itself. Because any WQC and TMDL would control pollutant levels in the MS4, there would be no need for an NPDES permit because the pollutant levels within the MS4 would be at the same levels allowed for the discharge into the receiving water.

Moreover, if an MS4 were somehow deemed a WOTUS, then the MS4's NPDES permit becomes an approval to discharge pollutants from one jurisdictional water into another jurisdictional water. Of course, Congress required permits for discharges from point sources into WOTUS – not for discharges from a WOTUS to a WOTUS.[86] Such an absurd result can be avoided by excluding MS4s from the definition of CWA jurisdictional waters.

The specific, detailed statutory and regulatory provisions regarding the treatment of MS4s as NPDES "point sources" must trump the more general provisions that define "waters of the United States."[87] Under the rule of statutory construction that specific provisions supersede general ones, the Agencies should avoid any possible regulatory interpretation that MS4s and their component conveyances are somehow penumbral to the WOTUS definition. The CORE Associations thus request EPA and the Corps to state clearly that MS4s – and the conveyances within these systems – as regulated under the NPDES program are categorically excluded from WOTUS jurisdiction.

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[85] 33 U.S.C. § 1313(d).

[86] Moving pollutants within the same waterbody is not a "discharge" because no pollutants are added, and hence do not trigger CWA permitting obligations. See, *e.g., LA Cnty. Flood Control Dist. v. NRDC,* 133 S. Ct. 710, 733 (2013); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe,* 541 U.S. (2004) (both cases quoting *Catskill Mountains Chapter of Trout Unlmtd., Inc. v. New York,* 273 F.3d 481, 492 (2nd Cir. 2001)).

[87] "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Fourco Glass Co. v. Transmirra Prods. Corp.,* 353 U.S. 222, 228 (1957) (internal quotes omitted).

D. The proposed definitions of "tributary," "adjacent waters," and "significant nexus" could be improperly construed to include MS4s and their components, so the Agencies should expressly clarify that such systems are not WOTUS.

The Agencies' overly broad definition of "tributary" may improperly treat MS4s as WOTUS – providing yet a further reason to clarify that MS4s are excluded from jurisdictional coverage. EPA and the Corps propose that any waterbody that meets the definition of a tributary is "by rule" a WOTUS.[88] Pursuant to the Proposed Rule, a "tributary" is a waterbody that has a bed, bank and ordinary high water mark ("OHWM"), and contributes flow to waters that are used in interstate commerce, territorial seas, interstate waters, and their impoundments ("(1)-(4) waters"). The Agencies further explain that ponds and wetlands are "tributaries" as long as they also contribute flow. In addition, "tributaries" can be manmade; their flow may be ephemeral, intermittent, or perennial; and they may be broken by features such as pipes, culverts and dams.[89]

Under this proposed definition, MS4s and their system components could likely (and confusingly) be deemed jurisdictional WOTUS. MS4 systems often include ditches and other manmade structures that have a bed, bank and OHWM. Moreover, as they are designed to convey and treat stormwater, MS4s will contribute flow (directly or indirectly) to the categories of so-called (1)-(4) waters. Finally, MS4 systems frequently include sediment ponds and similar structures which also will contribute flow to the (1)-(4) waters. Under the government's tributary definition, these common MS4 components – owned and controlled by municipalities, and already subject to NPDES permit requirements – could be confusingly and unnecessarily layered with more federal regulation as a WOTUS. As a result, the CORE Association can predict field determinations where a ditch, pond or other conveyance is deemed jurisdictional WOTUS – even though they are part of an MS4 system subject to an NPDES discharge permit. Certainly, Congress never envisioned a circumstance where a "water of the U.S." could be located *within* a "point source." EPA and the Corps should thus clarify for its field offices, state and local governments, and the regulated community that MS4s and their component conveyances – categorically – are *not* WOTUS.

In addition to its broad tributary definition, the Agencies' proposed new definition of "adjacent waters" could improperly capture certain MS4s. Under the proposal, all waters that are located within a floodplain or riparian area are considered adjacent waters and are "by rule"

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[88] Proposed Rule, 79 Fed. Reg. at 22,201, col. 2.

[89] See, *e.g., id.* at 22,202, col. 3 ("[T]ributaries that have been channelized in concrete or otherwise have been human altered, may still meet the definition of tributaries under the agencies' proposed regulation so long as they still contribute flow to an (a)(1) through (a)(4) water. The agencies' proposed definition of tributary provides a non-exclusive list of the types of waters, natural, man-altered, and mand-made, that may be tributaries: …. [P]onds, impoundments, canals, and ditches not excluded in paragraphs (b)(3) or (4) of the proposed rule."

WOTUS.[90] Thus, to the extent that any part of an MS4 system is located in a riparian area or floodplain, that portion of the MS4 might be deemed a WOTUS. Similarly, a portion of the MS4 system may have more than an insubstantial physical (including subsurface flow), biological, or chemical connection to a traditional navigable water. In that instance, that portion of the MS4 could be found to have a "significant nexus" and therefore also be deemed a WOTUS. In the CORE Association's view, express exclusion of MS4s is thus necessary in light of the confusion that would arise by sweeping storm sewer systems into CWA jurisdiction by virtue of the "adjacent waters" and "significant nexus" definitions.

Finally, the Proposed Rule's narrow exemptions of certain ditches will not likely cover many parts of an MS4.[91] In subparagraph (b)(4) of the Proposed Rule, the Agencies exempt ditches that do not "contribute" flow to the (1)-(4) waters. Many MS4 ditches would not expressly fall within this exemption, as a major purpose of an MS4 is to convey and "contribute" stormwater to receiving waters. The other ditch exemption in the Proposed Rule requires the ditch to have less than perennial flow and only drain upland areas. This exemption is equally ineffective as many MS4 ditches will contain water throughout the year and may receive water from non-upland areas.

Thus, the government's broad proposed definition of WOTUS could often sweep in MS4s. To provide the regulatory certainty that the Agencies express as a key objective of this rulemaking, MS4s should be specifically excluded from WOTUS jurisdiction as "waste treatment systems."

III. CONCLUSION

The CORE Associations submit that MS4s should be categorically excluded from the definition of WOTUS because:

- For decades, the Agencies have interpreted the CWA to exclude "waste treatment systems" from WOTUS coverage. MS4s and the ditches, pipes, ponds and other conveyances that make up these storm sewer systems are indeed "waste treatment systems." The Agencies should accordingly clarify that their longstanding jurisdictional exclusion captures MS4s.

- The WOTUS exclusion for MS4s should apply to storm sewer systems and their components that are mapped, identified and governed by a duly issued section 402 permit for the discharge of pollutants. Aquatic resources are thus fully protected, and the CWA's objectives are furthered, by virtue of the panoply of NPDES program requirements that apply to MS4 permits.

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[90] *Id*. at 22,207, col. 2.

[91] Insofar as ditches are concerned, these comments only address exclusion of such features to the extent they that are identified and mapped within, and subject to an NPDES permit for, MS4 systems. Other comments submitted by CORE Association participants will address treatment of non-MS4 ditches.

- MS4s and their components are typically owned and controlled by municipalities and other government or tribal bodies. Thus, excluding MS4s from WOTUS jurisdiction furthers the CWA's objectives to vest States (and localities) with the primary responsibilities to control water pollution within their borders.

- Somehow deeming MS4s as jurisdictional WOTUS would disserve key definitions of, and upset the overall structure of, the CWA and the Agencies' own regulations. For example, EPA's obligations to establish water quality standards, criteria, and TMDLs would prove to be illogical and unworkable as applied to MS4s and the conveyances within these systems.

- Express exclusion of MS4s from the WOTUS rule is warranted to provide regulatory clarity and prevent improper interpretations that municipal storm sewers and their components could somehow be deemed jurisdictional "tributaries" or "adjacent waters."

Thank you for the opportunity to provide comments on this significant matter.

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