



Scott Taylor
California Stormwater
Quality Association
Chair

Randy Neprash
Minnesota Cities
Stormwater Coalition
Vice-Chair

Member Organizations

Arizona Stormwater Outreach for
Regional Municipalities

California Stormwater
Quality Association

Central Massachusetts Regional
Stormwater Coalition

Kentucky Stormwater Association

Indiana Association for Floodplain
and Stormwater Management

Iowa Stormwater
Education Partnership

Louisiana Urban
Stormwater Coalition

Maine Water Environment Association

Minnesota Cities
Stormwater Coalition

Nebraska Floodplain & Stormwater
Managers Association

Ohio Stormwater Association

Pennsylvania Water Environment
Association

Tennessee Stormwater Association

Virginia Municipal
Stormwater Association

Utah Stormwater Advisory Committee

Water Environment Federation

May 21, 2018

Scott Wilson
Office of Wastewater Management, Water Permits Division
(MC4203M)
United States Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460

RE: Comments from National Municipal Stormwater Alliance
Docket ID No. EPA-HQ- OW-2018-0063
“Clean Water Act Coverage of Discharges of Pollutants via a
Direct Hydrologic Connection to Surface Water”

Mr. Wilson:

The National Municipal Stormwater Alliance (NMSA) appreciates this opportunity to provide comments as EPA considers whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to CWA regulation. The member organizations of NMSA are state or regional-level coalitions of Municipal Separate Storm Sewer System (MS4) permittees. NMSA exists to be the voice of local MS4 programs throughout the United States. Additional information about NMSA can be found at: <http://nationalstormwateralliance.org/>

This letter is in response to EPA’s request for comments posted in the Federal Register on February 20, 2018: “Clean Water Act Coverage of Discharges of Pollutants via a Direct Hydrologic Connection to Surface Water”. Specifically, this is in response to the following statements from the Notice:

“EPA also seeks comment on whether EPA should clarify its previous statements concerning pollutant discharges to groundwater with a direct hydrologic connection to jurisdictional water in order to provide additional certainty for the public and the regulated community.”

“EPA also seeks suggestions on what issues should be considered if further clarification is undertaken, including, for example, the consequences of asserting CWA jurisdiction over certain releases to groundwater or determining that no such jurisdiction exists.”



The MS4 permittees that are associated with NMSA own and operate stormwater conveyance systems throughout the United States. These systems store, treat, and convey urban stormwater. Urban stormwater includes a wide variety of pollutants. Some of these pollutants may leave our municipal separate storm sewer systems and enter groundwater. A portion of the pollutants are attenuated as they move through treatment systems, vegetation and/or soil. Another portion of the pollutants may travel to deep groundwater aquifers. Some of the pollutants may move through shallow groundwater and shallow aquifers to waters that are jurisdictional under the Clean Water Act (CWA).

NMSA is concerned that the issues discussed in this Docket are appearing in multiple and varied court cases. NMSA concurs with the Federal Register Notice's characterization of the current status of case law as "mixed". The Notice also included the following sentence:

"As one court noted, 'the inclusion of groundwater with a hydrological connection to surface waters has troubled courts and generated a torrent of conflicting commentary.'"

NMSA is especially concerned about third-party lawsuits under the CWA.

Based on the variety of current lawsuits focused on these issues, it is apparent that these issues are complex, and the possible resolutions carry significant risk of unintended consequences. NMSA is especially concerned about unintended consequences that will result if the resolutions of these issues are primarily or solely guided by court rulings. Therefore, it is important for EPA to issue a comprehensive position statement and initiate a formal notice-and-comment rulemaking to address these issues.

NMSA requests that the following items be considered in the process of addressing these issues. NMSA also requests and strongly recommends that the relevant stakeholders be invited to participate in discussions to arrive at EPA's policies and clarifications related to these topics. From the perspective of MS4 permittees, issues related to urban stormwater and the operation of local municipal separate storm sewer systems significantly impact the local program managers, whom NMSA represents.

1. Leakage from pipe systems

Every pipe system leaks. This is especially true for underground pipe systems. Every pipe system owner and operator works to minimize leakage, but leakage cannot practicably be eliminated.

MS4 permittees throughout the United States own and operate underground storm sewer and storm drain piping systems. These pipe systems are "point sources" under the CWA. These pipe systems carry stormwater that include pollutants. It is inevitable that some of these pollutants will leak from the pipe systems into the ground. As described above, some of these pollutants may travel through shallow groundwater and shallow aquifers to waters that are jurisdictional under the CWA.



NMSA requests that any EPA policies and clarifications on these issues explicitly address (through exemption) pipes as point sources. There cannot be an expectation, under the CWA, that pollutants leaking from storm sewer/drain systems, traveling through the ground, and reaching jurisdictional waters can be eliminated. Similarly, there cannot be a regulatory regime under which numerous, relatively small leaks from storm sewer pipe systems must be permitted under the CWA. Please note that this concern extends to sanitary sewer and drinking water pipe systems.

2. Stormwater infiltration

MS4 permittees throughout the United States are constructing and promoting Stormwater Control Measures (SCMs) based on infiltrating stormwater. One of the most important recommendations from the study: “Urban Stormwater Management in the United States” (National Research Council, 2008), was:

“SCMs that harvest, infiltrate, and evapotranspire stormwater are critical to reducing the volume and pollutant loading of small storms.”

Of these methods, infiltration is the most widely and frequently used and implemented. Most types of “green infrastructure” SCMs rely on infiltration for stormwater treatment and management.

Some of these infiltration SCMs are owned and operated by MS4 permittees. As part of permitted MS4 systems, piped discharges from underdrains in these SCMs are considered point source discharges. Other infiltration SCMs are constructed by private or other parties to meet local stormwater design standards that have been promulgated to meet MS4 permit requirements.

The urban stormwater entering and leaving infiltration SCMs contain some pollutants. Some of the water leaving these SCMs does so via underdrain pipes. Much of it leaves these SCMs as infiltration to the ground. Some pollutants are attenuated by the vegetation and/or soil, and other portions of the pollutants may travel to deep groundwater aquifers. A portion of the pollutants may go to shallow groundwater or shallow aquifers and travel to waters that are jurisdictional under the CWA.

NMSA requests and recommends that EPA policies and clarifications addressing discharges of pollutants traveling through groundwater to WOTUS include an explicit exemption for stormwater infiltration SCMs. NMSA estimates the current number of infiltration SCMs in the U.S. to be in the range of hundreds of thousands to more than a million, with that number growing rapidly. There cannot be a regulatory regime under the CWA that requires or promotes the construction of infiltration SCMs and then considers the discharges of pollutants from those infiltration SCMs as possible CWA violations or discharges that must be permitted under the CWA.



3. Additional research

The fact that these issues have risen to the fore is instructive. The facts that the courts are “troubled” and we have a “torrent of conflicting commentary” is additionally instructive. This indicates a lack of understanding and knowledge about the interactions between urban stormwater and groundwater.

This is a significant source of concern related to the issues discussed above, but extends to other more important concerns. For example, in the northern U.S., we have chloride (from road salt and other sources) in urban stormwater. In response to regulatory pressure, some MS4 permittees are promoting infiltration of stormwater from roads. It is understood that vegetation and soil do not attenuate chloride in stormwater as it moves through the ground. There is concern that the infiltrated chloride will travel to and significantly contaminate groundwater drinking water sources.

NMSA requests and recommends that additional research be done to better understand the interactions and potential problems related to urban stormwater and groundwater. NMSA additionally recommends that the full range of stakeholders be involved in identifying and prioritizing the research needs related to these topics and selecting research projects to be funded. Finally, NMSA strongly recommends that a robust technology transfer program be implemented at the national level to translate the results of research projects and disseminate them to local implementers in forms that are useful for local implementation.

In order to provide clarity and certainty, NMSA urges EPA to issue a comprehensive position statement addressing these issues. EPA should also initiate a formal notice-and-comment rulemaking to clarify and memorialize EPA’s position, thereby remedying the regulatory ambiguity and constitutional uncertainty that is currently plaguing courts, permittees, regulatory agencies, and other stakeholders. As always, NMSA urges EPA to include stakeholders in the process of developing the position statement and rule.

NMSA appreciates the opportunity to submit these comments. Please contact us if you would like any additional information or have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Randy Neprash", is written over the word "Sincerely,".

Randy Neprash, PE
Vice-Chair, National Municipal Stormwater Alliance
randy.neprash@stantec.com
651-604-4703