



# COUNTY OF LOS ANGELES

## DEPARTMENT OF PUBLIC WORKS

*"To Enrich Lives Through Effective and Caring Service"*

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IN REPLY PLEASE

REFER TO FILE: **WM-9**

Ms. Donna Downing  
United States Environmental Protection Agency  
Office of Water  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Dear Ms. Downing:

### **REQUEST FOR LOCAL GOVERNMENT PERSPECTIVE ON DEFINITION OF "WATERS OF THE UNITED STATES" COMMENT LETTER**

The County of Los Angeles and the Los Angeles County Flood Control District appreciates the opportunity to provide input on the upcoming proposal to revise the definition of the "Waters of the United States." Enclosed are our comments for your review and consideration.

If you have any questions, please contact me at (626) 458-4300 or [dlaff@dpw.lacounty.gov](mailto:dlaff@dpw.lacounty.gov) or your staff may contact Mr. Paul Alva at (626) 458-4325 or [palva@dpw.lacounty.gov](mailto:palva@dpw.lacounty.gov).

Very truly yours,

MARK PESTRELLA  
Director of Public Works

DANIEL J. LAFFERTY  
Assistant Deputy Director  
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GA:sw

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Enc.

cc: County Counsel (Mark Yanai)

**COMMENTS OF THE COUNTY OF LOS ANGELES AND  
THE LOS ANGELES COUNTY FLOOD CONTROL DISTRICT CONCERNING  
REQUEST FOR LOCAL GOVERNMENT PERSPECTIVES ON DEFINITION OF  
“WATERS OF THE UNITED STATES”**

**I. INTRODUCTION**

The County of Los Angeles (“County”) and the Los Angeles County Flood Control District (“LACFCD”) appreciate this opportunity to provide comments to the United States Environmental Protection Agency (“EPA”) and the United States Army Corps of Engineers (“USACE”) (collectively referred to as “the Agencies”) in response to the Agencies’ initiative to consult with state and local government officials regarding a revised definition of what constitutes a “Water of the United States” (“WOTUS”).

These comments are provided on behalf of the County’s unincorporated areas, which have a population of more than one million residents and by the LACFCD, which is the largest flood control district in the nation. Established by the California State Legislature in 1915, the mission of the LACFCD is to provide vital flood protection and water conservation services to the 10 million residents within its service area. The LACFCD operates and maintains 14 dams and reservoirs, 485 miles of open channel, 2,800 miles of underground storm drain, 26 infiltration basins, 3 seawater intrusion barriers, and numerous other facilities. Those facilities are part of a complex regional flood protection and water conservation network that also includes facilities owned and operated by the USACE. Today, the work of the LACFCD is integrated into the County’s Department of Public Works. The elected governing board of both the County and the LACFCD is the Los Angeles County Board of Supervisors.

The Agencies have invited state and local governments to comment on how upcoming new rules by the Agencies should define a WOTUS. In response, the County and LACFCD wish to provide the Agencies with information on certain elements of the flood control and water conservation services for their consideration in crafting the new rule. These comments are made in light of the County’s and LACFCD’s commitment to two overriding goals: protecting residents and property from damaging flood waters and maximizing the capture and reuse of stormwater and urban runoff to provide crucial water supply for our millions of residents.

The County and LACFCD request that the Agencies consider the following comments as they embark on developing the new rule to define the WOTUS. The County and LACFCD plan to make additional comments in the future as opportunities afford them during the upcoming rulemaking process.

## II. WOTUS DEFINITION ISSUES RELATING TO FLOOD CONTROL AND WATER CONSERVATION FACILITIES

### A. *Need for Clear Jurisdictional Boundary Between Municipal Separate Stormwater Sewer Systems and WOTUS*

Almost all waters within the urbanized areas of Los Angeles County are either man-made or man-altered channels constructed for flood control purposes. Some of the major flood control channels have been considered WOTUS, including the main stem of the Los Angeles River as well as significant tributaries to the Los Angeles River and other rivers in the County.

However, there are numerous smaller man-made channels (as well as pipes, catch basins and other structures) that form the municipal separate storm sewer system (“MS4”) operated by the LACFCD and other agencies within the County. This MS4 is regulated under Section 402(p) of the CWA, which requires that MS4s must, as a “point source” discharge, obtain a National Pollutant Discharge Elimination System permit and control the discharge of pollutants into WOTUS to the “maximum extent practicable.” 33 U.S.C. § 1342(p)(3)(B)(iii). Because “municipal separate storm sewer” is defined to include “man-made channels,” 40 CFR § 122.26(b)(8), channels within the MS4 are required to be covered under an MS4 NPDES permit as part of the MS4 point source.

Both the CWA and its implementing regulations distinguish between an MS4, which is a point source, and a WOTUS, which is the “receiving water” into which the MS4 discharges. MS4 permits contain specific requirements regarding the operation and maintenance of the MS4, as well as monitoring requirements.

In Los Angeles County, some MS4 lines have open channel segments which are fed by MS4 pipes or culverts and which discharge into MS4 pipes or culverts. In addition, there are detention basins which serve as surge protection in the event of heavy rain events by providing temporary storage of flood waters. Under high-flow circumstances, such basins can become open water features within the MS4. (The need to exclude these basins from WOTUS designation is discussed below.) These channels and basins are limited in length and number and are secured from public access for safety reasons.

As a legal matter, we believe that such isolated open water conveyances do not constitute a WOTUS, as demonstrated by the distinct treatment afforded MS4s and WOTUS in the CWA and its implementing regulations. The definition of “outfall,” the point at which the MS4 discharges into the WOTUS, for example does not include discharges from sewer pipes into MS4 channels: “*Outfall* means a *point source* as defined by 40 CFR 122.2 at the point where a [MS4] discharges to waters of the United States and **does not include open conveyances connecting two municipal separate storm sewers**, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the United States and are used to

convey waters of the United States.” 40 CFR § 122.26(b)(9) (italicized emphasis in original; bold emphasis supplied). The phrase “open conveyances connecting two municipal separate storm sewers” means that open channels or other conveyances linked on either end by storm sewer pipes cannot be a WOTUS, since there is no “outfall” to a WOTUS when the upstream storm sewer pipe discharges into the channel.

The regulatory definitions of “MS4” and “outfall” plainly distinguish between an MS4, which is not a WOTUS, and the water into which the MS4 discharges, which is. By definition, an MS4 discharges “to” a WOTUS. 40 CFR 122.26(b)(8). An “outfall” exists only where a MS4 discharges “to” a WOTUS. 40 CFR § 122.26(b)(9). There is no “outfall” and no discharge where one portion of an MS4 connects to another or where a WOTUS discharges or flows into another WOTUS. The United States Court of Appeals for the Ninth Circuit has in fact held that “[a]s a matter of fact and law, the MS4 is distinct from the two navigable rivers [the Los Angeles and San Gabriel Rivers].” *Natural Resources Defense Council, Inc. v. County of Los Angeles*, 673 F.3d 880, 899 (9<sup>th</sup> Cir. 2011), *reversed on other grounds, Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc.*, 568 U.S. \_\_\_, 133 S.Ct. 710 (2013).

The distinction between “point sources” and “navigable waters” was a key feature of Justice Scalia’s opinion in *Rapanos*. In particular, he noted that the phrase “discharge of a pollutant” under the CWA meant to add a pollutant “to navigable waters from any point source,” and thus these definitions “conceive of ‘point sources’ and ‘navigable waters’ as separate and distinct categories.” *Rapanos*, 547 U.S. at 735 (emphasis in original).

Unfortunately, the now-stayed Clean Water Rule did not clearly establish a boundary between a MS4 and a WOTUS, limiting non-WOTUS designation only to those portions of a stormwater control system constructed in “dry land.”<sup>1</sup> For those portions constructed in non-“dry land” areas, the Rule potentially could have classified them to be “tributaries” and thus WOTUS. We believe that the necessary import of Justice Scalia’s opinion in *Rapanos* is that because all elements of the MS4 be a “point source,” none of the MS4 can be a WOTUS. Also, such stretches of the MS4 are clearly not “navigable” or “traditional” waters under Justice Scalia’s opinion.

Applying WOTUS status to sections, but not the entirety, of the MS4 would create regulatory chaos without any benefits to water quality or the quality of the receiving waters into which the MS4 discharged. MS4 operators would be required to obtain CWA section 404 permits and associated section 401 certifications if permit-required work was being done in the facility. Similarly, water quality standards (and potentially TMDLs) would apply to these isolated, secure waterbodies.

For these reasons, the County and LACFCD believe that any future WOTUS definition regulations should establish a clear boundary between MS4s regulated under Section 402(p) of the CWA and jurisdictional waters.

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<sup>1</sup> E.g., 40 CFR § 230(s)(2)(vi).

In addition to this general comment, the County and LACFCD also suggest that there be specific exemptions for two types of basins, those used to infiltrate groundwater and those used for the detention of stormwater, as well as for so-called “green infrastructure,” which are elements of the flood control and water conservation system which serve not only to protect against flooding but also to clean and infiltrate stormwater and provide water supply and recreational opportunities. These are discussed below.

### ***B. Need for Express Exemption for Groundwater Infiltration Basins***

The LACFCD owns and/or operates numerous infiltration basins that are designed to recharge underground aquifers with stormwater, recycled water, and water imported from outside the region. These aquifers are critical sources of water supply for the region. The infiltration basins are generally located next to engineered flood control channels (which may be WOTUS) and are separated from those channels by a levee or other structure. These infiltration basins are either artificial basins constructed by the LACFCD or conversions of abandoned gravel pits. While located adjacent to channels, the infiltration basins have a completely different function; their purpose is to percolate water into underground aquifers while the purpose of the channels is to efficiently convey flood waters toward the ocean.

The infiltration basins operated by the LACFCD recharge an average of 290,000 acre-feet of water per year, providing water equivalent to the annual needs of 2.3 million people. These basins are thus a critical element of the drinking water supply for County residents. Many communities obtain the majority of their drinking water (in some communities as much as 80 percent) from groundwater. The need to recharge the aquifers is even more vital in time of drought for the region as has been seen in recent years.

To recharge groundwater aquifers, water conveyed through the channel is diverted into the infiltration basins through a headwaters structure. The groundwater aquifer being recharged generally is located between 100 and 200 feet below the surface. Water from the engineered channels is taken into the infiltration basins at a rate to match the percolation rate and available storage in the basins. See Attachment A for pictures of typical groundwater infiltration basins. Infiltration basins must be regularly and rigorously maintained to ensure the maximum infiltration rate, including regular mowing of vegetation, removing accumulated debris and sediment, “ripping” the bottoms to loosen soils compacted by stored water and maintenance equipment, taking vector control actions, and maintaining support structures. We understand that some or all of such activities would require a CWA section 404 permit and 401 certification if they were conducted in a jurisdictional waterbody. Any interference in such maintenance (for example, due to a delay in obtaining a permit or certification) could seriously degrade a basin’s percolation capacity to a degree that it cannot easily be restored. Also, the conditions contained in such permits/certifications would

necessarily restrict the operational parameters of the basins and impede the LACFCD's maintenance of these crucial facilities.

The now-stayed "Clean Water Rule" provided an express exemption for such groundwater recharge basins. While the County and LACFCD do not believe that such basins, since they discharge to groundwater, would be considered as WOTUS under the pre-Clean Water Rule definition, we believe that for purposes of regulatory clarity, any new WOTUS definitional regulations should expressly provide that such basins are not WOTUS. The County and the LACFCD also believe that such an exclusion would be consistent with Justice Scalia's opinion in *Rapanos*, since the basins do not discharge to any other navigable water and are filled only during part of the year, and do not otherwise constitute a traditional navigable water.

### ***C. Need for Express Exemption for Detention Basins***

As noted, the LACFCD's detention basins provide a critical flood control function in preventing potential flooding by temporarily storing high stormwater flows and then gradually releasing those flows when the flood threat has ended. Detention basins are located within the flood control system operated by the LACFCD and in effect, act as "surge protectors" during high flow events. [See Attachment B for a picture of a typical detention basin]. Detention basins are typically located along storm drain systems, are restricted from public access, and are currently not considered to be WOTUS. Nonetheless, due to some ambiguity as to their status under the now-stayed Clean Water Rule, the LACFCD believes that an express exemption of detention basins should be included in a new WOTUS rule to avoid ambiguity and potentially unnecessary disruptions to flood risk management created by the need to treat such isolated flood control features as jurisdictional waters. Detention basins, because they are part of the MS4 point source and are not in any sense traditional waters, would not qualify as a WOTUS under Justice Scalia's test in *Rapanos*.

### ***D. Need for Express Exemption for Green Infrastructure***

"Green Infrastructure" has been defined by EPA as "an adaptable term used to include an array of product, technologies, and practices that use natural systems – or engineered systems that mimic natural processes – to enhance overall environmental quality and provide utility services."<sup>2</sup> Green Infrastructure projects provide multiple benefits such as groundwater replenishment, water quality improvement, and enhancement of wildlife habitats and recreational opportunities. In July 2014, EPA launched the Green Infrastructure Collaborative, which in part aims to advance green stormwater management techniques.<sup>3</sup> The Office of Management and Budget also has acknowledged that Green Infrastructure, including wetlands, can be a cost-

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<sup>2</sup> *Green Infrastructure: Glossary of Commonly Used Terms*. EPA's Office of Water/Office of Wastewater Management, 24 August 2009.

<sup>3</sup> *FACT SHEET: Building community resilience by strengthening America's natural resources and supporting green infrastructure*. President's Council on Environmental Quality, 8 October 2014.

effective way to manage stormwater and meet Clean Water goals.<sup>4</sup> In recent years, the LACFCD has begun to incorporate Green Infrastructure elements, including constructed wetlands and engineered soft bottom, low-flow channels, as part of its flood control infrastructure. The following are two examples of Green Infrastructure projects constructed by the LACFCD.

The first example is the Dominguez Gap Wetlands, a constructed wetland built into a multipurpose facility located within the City of Long Beach and operated by the LACFCD. The wetlands project maintains the integrity of flood protection along Los Angeles River (a traditional navigable water), while introducing other benefits, including new water quality elements, groundwater recharge, restoration of native habitat, pedestrian and equestrian trails, environmental education, and river bike trail enhancements. The wetlands naturally treat from 2-3 cubic feet per second (1.3 to 3.2 million gallons a day) of stormwater and urban runoff resulting in a significant reduction in the amount of fecal coliform, nutrients, heavy metals, organic carbons, and oil and greases that could otherwise be discharged to the Los Angeles River.

The second example is the Tujunga Wash Greenway (Greenway) in the City of Los Angeles, a meandering stream constructed by the LACFCD as part of the Tujunga Wash Ecosystem Restoration Project. The Greenway is a man-made stream adjacent to the concrete-lined Tujunga Wash flood control channel, which has been considered to be a WOTUS. The Greenway has brought plant and animal habitat, water quality enhancement, groundwater replenishment, and passive recreation to a one-mile reach of the Tujunga Wash. Both sides of the Wash now feature vibrant native vegetation and pathways for walking and biking. During an average rain year, as much as 325,000 gallons a day will flow through the Wash's new naturalized streambed, resulting in improved water quality, more groundwater and enhanced recreational opportunities for the region.

The County and the LACFCD are concerned that projects such as these might be considered a WOTUS or a tributary of a WOTUS simply because they may be located adjacent to existing WOTUS. As with the groundwater infiltration basins discussed above, designating waterway-based Green Infrastructure projects such as the Dominguez Gap Wetlands and Tujunga Wash Greenway as a WOTUS would discourage the future development of such regional and collaborative multipurpose projects. Requiring CWA Section 404 and 401 permits or applying water quality standards to such projects would raise the cost of such projects beyond feasible funding sources. The County and the LACFCD believe that a specific exclusion for Green Infrastructure projects in a future WOTUS rule is needed to avoid ambiguity and to promote Green Infrastructure projects that improve water quality and habitat, enhance water supply, and provide recreational opportunities for the region. Such exclusion is especially crucial now because many Los Angeles area municipalities are currently in the planning stages of various Green Infrastructure projects, reflecting a larger trend towards using green stormwater management techniques.

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<sup>4</sup> Budget of the United States Government, Fiscal Year 2014: 154. The White House and U.S. Government Printing Office.



**COMMENTS PREPARED BY THE COUNTY OF LOS ANGELES AND  
THE LOS ANGELES COUNTY FLOOD CONTROL DISTRICT CONCERNING  
THE PROPOSED RULE TO DEFINE "WATERS OF THE UNITED STATES"**

**Attachment A - Typical Infiltration Basins**





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**Attachment B - Typical Detention Basin**

