

# Federal Update & National Stormwater Trends

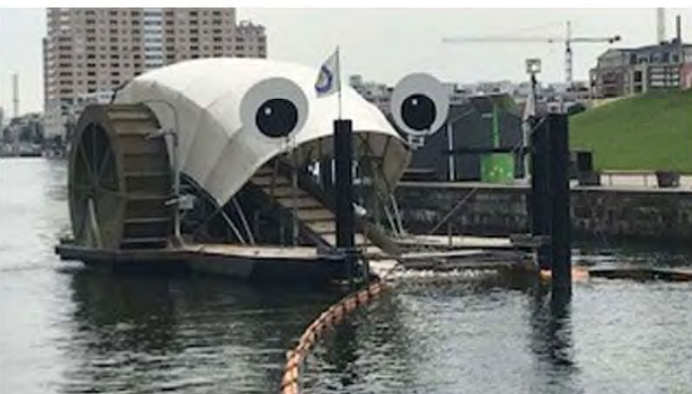
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National Association of Clean Water Agencies

Southeast Stormwater Association  
October 11, 2019  
Chatanooga, TN



# WHO ARE WE?

- National trade association for public wastewater and stormwater utilities
- NACWA represents over 320 public utility members of all sizes nationwide
- Recognized leader in legislative, regulatory, and legal advocacy on full spectrum of clean water issues



# 2019 NATIONAL POLICY DEVELOPMENTS

A VERY BUSY YEAR FOR THE CLEAN WATER SECTOR

## LEGISLATIVE

FEDERAL BUDGET/FUNDING  
WATER RESOURCES DEVELOPMENT ACT  
EMERGING CONTAMINANTS - PFAS  
AFFORDABILITY  
INCREASED PERMIT TERMS

## REGULATORY

EMERGING CONTAMINANTS - PFAS  
CSO POST LTCP COMPLIANCE  
WATER REUSE ACTION PLAN  
INTEGRATED PLANNING  
NUTRIENTS  
WOTUS

## LEGAL

DIRECT HYDROLOGIC CONNECTION LITIGATION  
MS4 PHASE II LITIGATION  
GENERAL NUTRIENT VARIANCES



# LEGISLATIVE UPDATE



## **SHORT-TERM CONTINUING RESOLUTION**

- House & Senate bipartisan support of a temporary spending package
- President signed - September 27, 2019
- Keeps current spending levels through November 21, 2019

# **LEGISLATIVE UPDATE**

# FEDERAL APPROPRIATIONS - FY2020

House passed FY2020 Interior and Environment Appropriations Bill in May 2019

- \$9.5 billion in overall funding for the EPA, (\$700 million more than current levels)
- \$1.784 billion for the Clean Water State Revolving Fund (CWSRF)
- \$50 million for the Water Infrastructure Finance and Innovation Act (WIFIA) (a \$18 million cut from FY19)
- Funding for several key programs for Water Resources Development Act (WRDA)
  - \$90 million in Sewer Overflow and Stormwater Control Grants
  - \$1 million for the Water Workforce Utility Grants Program

## LEGISLATIVE UPDATE

# FEDERAL APPROPRIATIONS - FY2020

## Senate passed FY2020 Interior and Environment Appropriations Bill in September 2019

- \$9.01 billion in overall funding for the EPA, (\$161 million more than current levels and \$2.79 billion more than the President's budget request)
- \$1.6 billion for the Clean Water State Revolving Fund (CWSRF)
- \$73 million for the Water Infrastructure Finance and Innovation Act (WIFIA) (a \$5 million increase over the current level)
- Funding for several key programs for Water Resources Development Act (WRDA)
  - \$20.5 million in Sewer Overflow and Stormwater Control Grants
  - \$1 million for the Water Workforce Utility Grants Program

# LEGISLATIVE UPDATE



## WATER RESOURCES DEVELOPMENT ACT (WRDA)

### WRDA is coming... 2020

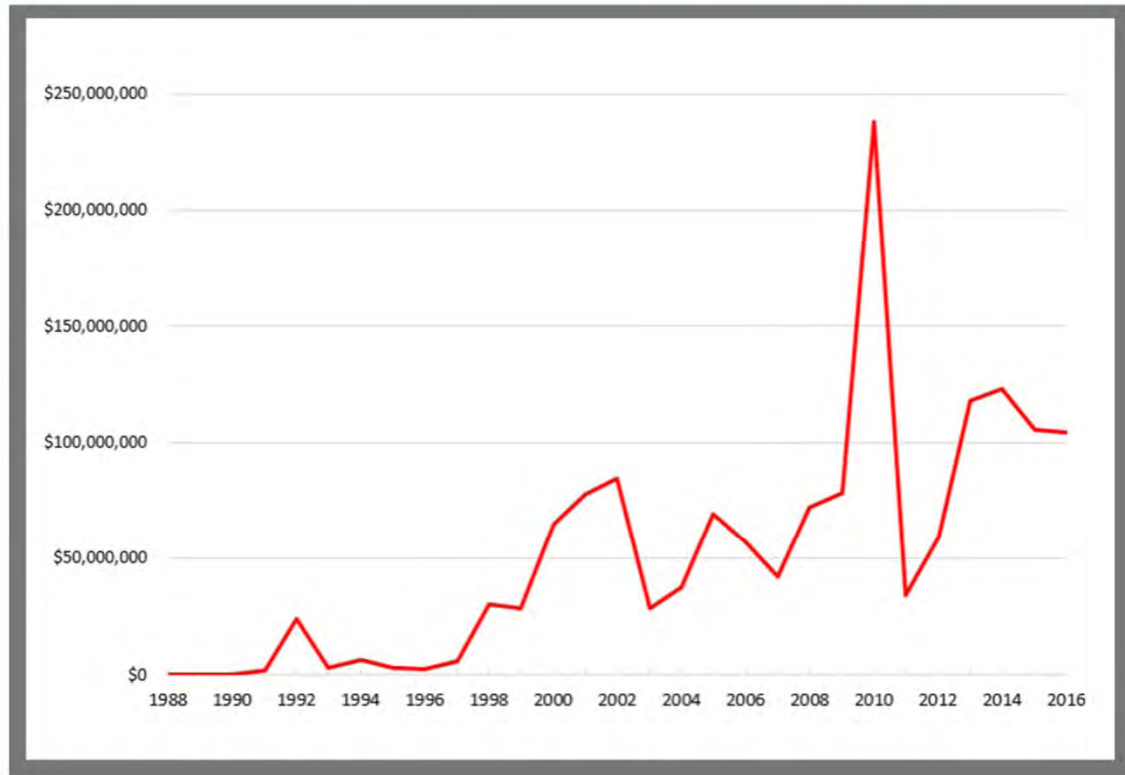
- Preliminary process beginning in the Senate this Fall
- House will likely start their formal process in early 2020
- WRDA will likely carry the CWSRF
- Note: PFAS legislation could rear its head here

# LEGISLATIVE UPDATE



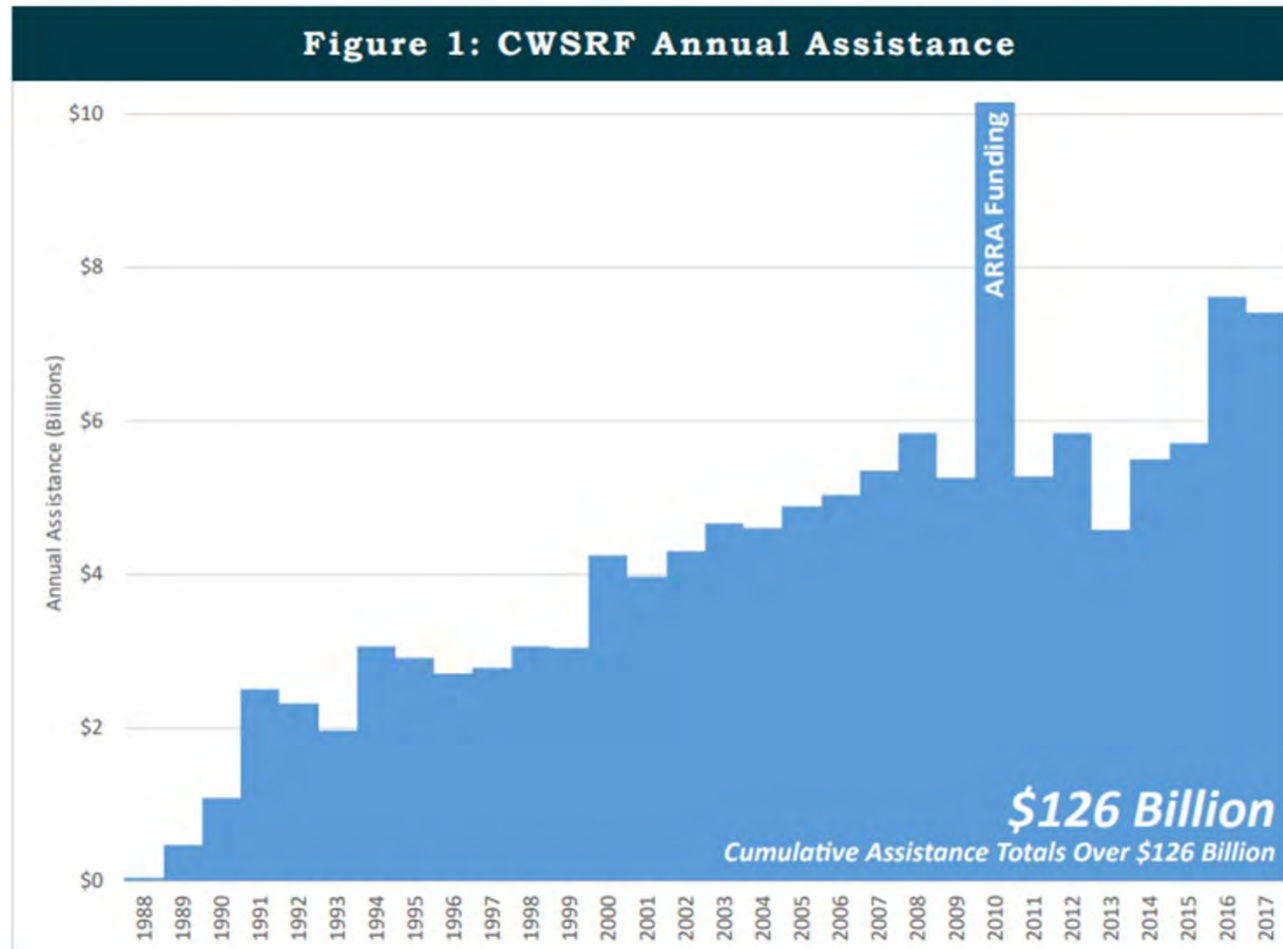
# TOTAL NATIONAL CWSRF FOR STORMWATER - 1988 TO 2016

Average 1.10% CWSRF goes to Stormwater Management



DATA FROM EPA, SEPTEMBER 2018

# CWSRF ANNUAL ASSISTANCE 1988 - 2017



# NATIONAL DEFENSE AUTHORIZATION ACT - PFAS

PROVISION	SENATE VERSION	HOUSE VERSION
Prohibition on use of PFAS for land-based applications of firefighting foam	✓	✓
Transfer authority for funding of study and assessment on health implications of PFAS contamination in drinking water by ATSDR	✓	✓
Ban the use of PFAS in packaging for ready-to-eat foods	✗	✓
Restricts PFAS disposal methods by DOD	✗	✓
Directs EPA to list PFAS as toxic and hazardous under CERCLA	✗	✓
Requires EPA to promulgate effluent limitations and pretreatment standards for PFAS	✗	✓
Requires EPA to list PFAS under Toxic Release Inventory and to promulgate drinking water reuglations	✓	✗
Authorizes \$100 million per year for PFAS mitigation through DWSRF	✓	✗
Directs USGS to establish a performance standard for detection of PFAS	✓	✓
Directs DOD to share monitoring data with utilities and municipalities adjacent to military bases	✓	✗

**\*LIST DOES NOT INCLUDE ALL PROVISIONS**

# LEGISLATIVE UPDATE

# STORMWATER LEGISLATION

## Save Our Seas 2.0

- Senate Bill 2260 - Sullivan (R-AK)
- Improve domestic infrastructure to prevent marine debris
- Reducing post-consumer materials (i.e. trash)
- EPA to develop strategy on improving management and residential recycling
- "Complementary Activities": Guidance on developing post-consumer materials management provisions for NPDES permits issued to MS4s under CWA and stormwater management plans.

## Study on Best Management Practices

- Department of Transportation focus with an agreement with U.S. EPA
- Estimate pollutant loads from stormwater runoff from highways and pedestrian facilities to inform TMDL requirements
- Recommendations on stormwater management
- Trickle down to state DOTs
- Report due to Senate EPW and House T&I Committees within 18 months

# LEGISLATIVE UPDATE

# REGULATORY DEVELOPMENTS

## EPA Remains Active on the Regulatory Front

NUTRIENT SURVEY - COMING SOON

LEAD AND COPPER RULE - COMING END OF OCTOBER

BLENDING RULE - THIS YEAR (MAYBE?)

PFAS ACTION PLAN - ONGOING

CSO POST CONTROL PLAN COMPLIANCE - ONGOING

AFFORDABILITY - ONGOING

STORMWATER FUNDING AND FINANCING - ONGOING; REPORT TO CONGRESS 2020

WATER REUSE ACTION PLAN (DRAFT) - RELEASED SEPTEMBER

ALWQC - ALUMINUM - CLOSED SEPTEMBER

PFAS SW846 ANALYTICAL METHODS - CLOSED AUGUST

EPA OIG BIOSOLIDS REPORT - FINALIZED SEPTEMBER

ALWQC + SWIMMING ADIVOSIRIES - CYANOTOXINS - FINALIZED MAY 2019

HEADQUARTERS  
Environmental  
Protection  
Agency



# REGULATORY UPDATE

# WATERS OF THE UNITED STATES (WOTUS)

## 2015 CLEAN WATER RULE

## 2019 PROPOSED DEFINITION

### NAVIGABLE WATERS

All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

Included interstate waters and wetlands, territorial seas, impoundments, tributaries, adjacent waters, and case-specific determinations if significant nexus found.

All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including **the territorial seas** and waters which are subject to the ebb and flow of the tide.

Includes tributaries, ditches, lakes and ponds, impoundments, and adjacent wetlands. **Omits significant nexus.**

### TRIBUTARIES

All tributaries that contribute flow either directly or through another water to a navigable water, interstate water or wetland, or territorial sea that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. A tributary does not lose its status if, for any length, there are one or more constructed breaks or if it contributes flow to a jurisdictional water through a non-jurisdictional water.

Tributaries are naturally occurring surface water channels that **contribute perennial or intermittent flow** to jurisdictional waters **in a typical year** either directly or indirectly through other tributaries, jurisdictional ditches, jurisdictional lakes/ponds, jurisdictional impoundments, and adjacent waters so long as those water features convey perennial or intermittent flow downstream.

### IMPOUNDMENTS

All impoundments of WOTUS are otherwise defined as jurisdictional.

No changes.\*\*

\*\*Seeking comment on whether certain categories of impoundments should not be jurisdictional, such as certain types of impoundments that release water downstream only very infrequently or impede flow downstream such that the flow is less than intermittent.

### ADJACENT WETLANDS

Wetlands that are bordering, contiguous, or neighboring a jurisdictional water, including water separated by constructed dikes or barriers, natural river berms, beach dunes and the like. Does not include waters that are subject to established normal farming, silviculture, and ranching activities.

Wetlands that **abut** or have a direct hydrologic surface connection to a jurisdictional surface water **in a typical year**. Wetlands physically separated from a jurisdictional water by upland or by dikes, barriers, or similar structures and also lacking a direct hydrologic surface connection to such waters are not adjacent.

### SIGNIFICANT NEXUS

A water or wetland, either alone or in combination with other similarly situated waters significantly affects the chemical, physical, or biological integrity of a jurisdictional water. A water has a significant nexus when any significant function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest jurisdictional water.

Omitted.

# WATERS OF THE UNITED STATES (WOTUS)

## 2015 CLEAN WATER RULE

## 2019 PROPOSED DEFINITION

<b>DITCHES</b>	Ditches constructed in tributaries or are relocated tributaries, or in certain circumstances drain wetlands, or that science clearly demonstrates are functioning as a tributary. Excludes ditches that flow only after precipitation (ephemeral ditches).	Ditches constructed in a tributary or that relocate or alter a tributary as long as those ditches also satisfy the conditions of the tributary definition and ditches constructed in an adjacent wetland as long as those ditches also satisfy the conditions of the tributary definition.
<b>LAKES/PONDS</b>	Lakes and ponds likely covered under adjacent waters or wetlands. Does not include artificial, constructed lakes and pond created in dry land (e.g., farm and stock watering ponds, irrigation ponds, settling basins, fields flood for rice growing, log cleaning ponds, or cooling ponds).	Lakes and ponds that contribute <b>perennial or intermittent flow</b> to a jurisdictional water <b>in a typical year</b> either directly or indirectly through a water or through water features that convey perennial or intermittent flow downstream and lakes or ponds that are flooded by a jurisdictional water in a typical year.
<b>TYPICAL YEAR</b>	Not included.	Typical year means within the normal range of precipitation over a rolling 30-year period for a particular geographic area.
<b>UPLAND</b>	Not included.	Any land area that under normal circumstances does not satisfy all three wetland delineation criteria (i.e., hydrology, hydrophytic vegetation, hydric soils and does not lie below the ordinary high water mark or high tide line of a jurisdictional water.
<b>EXCLUSIONS: WASTE TREATMENT SYSTEMS</b>	Waste treatment systems, including treatment ponds or lagoons, designed to meet requirements of the Clean Water Act.	Wastewater recycling structures <b>constructed in upland</b> , such as detention, retention and infiltration basins and ponds, and groundwater recharge basins.  A waste treatment system would include all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).
<b>STORMWATER CONTROL FEATURES</b>	Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.	Stormwater control features <b>excavated or constructed in upland</b> to convey, treat, infiltrate, or store stormwater run-off.** <b>**Seeking comment on whether these features should be expanded or clarified to included permitted municipal separate storm sewer systems (MS4s) either entirely or in limited portions thereof.</b>



# ENVIRONMENTAL FINANCE ADVISORY BOARD (EFAB)

## EPA Stormwater Funding and Financing Workgroup

- EFAB operates within EPA's Water Infrastructure and Resiliency Finance Center
  - Provides ideas and advice to EPA Administrator and program offices
- 2018 Water Resources Development Act directive that EPA establish stormwater task force
  - 20 stormwater experts on workgroup
- EPA soliciting input on:
  - Funding sources and challenges
  - Affordability
  - Long-term O&M and capital expenditures
- Several workshops throughout the country, in addition to workgroup meetings
- Report to EFAB (approval), report recommendations to EPA, EPA submit report to Congress April 2020

# REGULATORY UPDATE

# LEGAL UPDATE



# LEGAL UPDATE

## HAWAII WILDLIFE FUND V. COUNTY OF MAUI

### Whether a discharge to groundwater can trigger Clean Water Act liability?

- Direct Hydrologic Connection Theory
- U.S. Supreme Court oral arguments - November 6, 2019
- Maui County Council voted 5-4 to a settlement agreement (late September 2019)

9th Circuit Decision: upheld District Court decision and created the "indirect discharge theory" where the County of Maui is liable because:

- 1) a point source discharge
- 2) "fairly traceable" connection from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into navigable water, and
- 3) there is "more than a de minimus amount" of pollution reaching navigable waters

# LEGAL UPDATE

## MA/NH MS4 PHASE II LITIGATION

Does EPA have the ability to impose MS4 permit requirements that are beyond the maximum extent practicable?

- Litigation & settlement negotiations since 2017
- Update?

### 1) General prohibition:

"Permittee shall reduce the discharge of pollutants such that the discharges from the MS4 do not cause and contribute to an exceedance of water quality standards."

- 2) Waterbody with approved TMDL
- 3) Water quality limited waterbody/No TMDL yet
- 4) MS4 violators must meet tWQS within 60 days

# LEGAL UPDATE

## MARYLAND STORMWATER CASE



**Did the Maryland Department of Environment exceed its statutory authority and act arbitrary and capricious by issuing MS4 Phase I permits to "medium" jurisdictions and by failing to consider "practicability" when it included impervious surface restoration requirements?**

- Consolidated appeal to Maryland's highest court - Court of Appeals
- Decided September 2019 in a 4-3 decision (\*\*two of the majority Judges are now retired\*\*)
- Two counties involved: Frederick and Carroll Counties

State can include water quality parameters WITHOUT reference to MEP standard (relying on "and such other provisions")

State has authority to treat counties as Phase I jurisdictions

Dissent: MEP is not ambiguous and represents a "ceiling"; State cannot misclassify counties as Phase I's.

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## MS4 STORMWATER PERMITTING GUIDE

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presented by:  
The National Association of Clean Water Agencies



To download the Guide, visit:  
[www.nacwa.org/stormwaterguide](http://www.nacwa.org/stormwaterguide)

# COMING SOON...

## NACWA MS4 Phase II General Permit - Screening Tool



- Will build upon Stormwater Permitting Guide
- Help municipalities better understand and navigate permit language and regulatory obligations
- **Provide high-level individualized feedback** as draft permits are issued
- Will use a pre-determined checklist of priority issues:
  - Water quality standards - "cause and contribute" & exceedances
  - TMDLs - compliance & development of implementation plans
  - Impaired Waters
  - Numeric limits? Water Quality Trading?
  - Minimum Control Measures
  - MEP Standard and practicality

# UPCOMING EVENTS

- **NACWA Clean Water Law Seminar**
  - Austin, TX - November 20-22, 2019
- **NACWA Winter Conference**
  - Atlanta, GA - February 4-7, 2020
- **National Water Policy Fly-In**
  - Washington, DC - April 27-28, 2020
- **NACWA Utility Leadership Conference and 50th Anniversary**
  - Seattle, WA - July 13-16, 2020



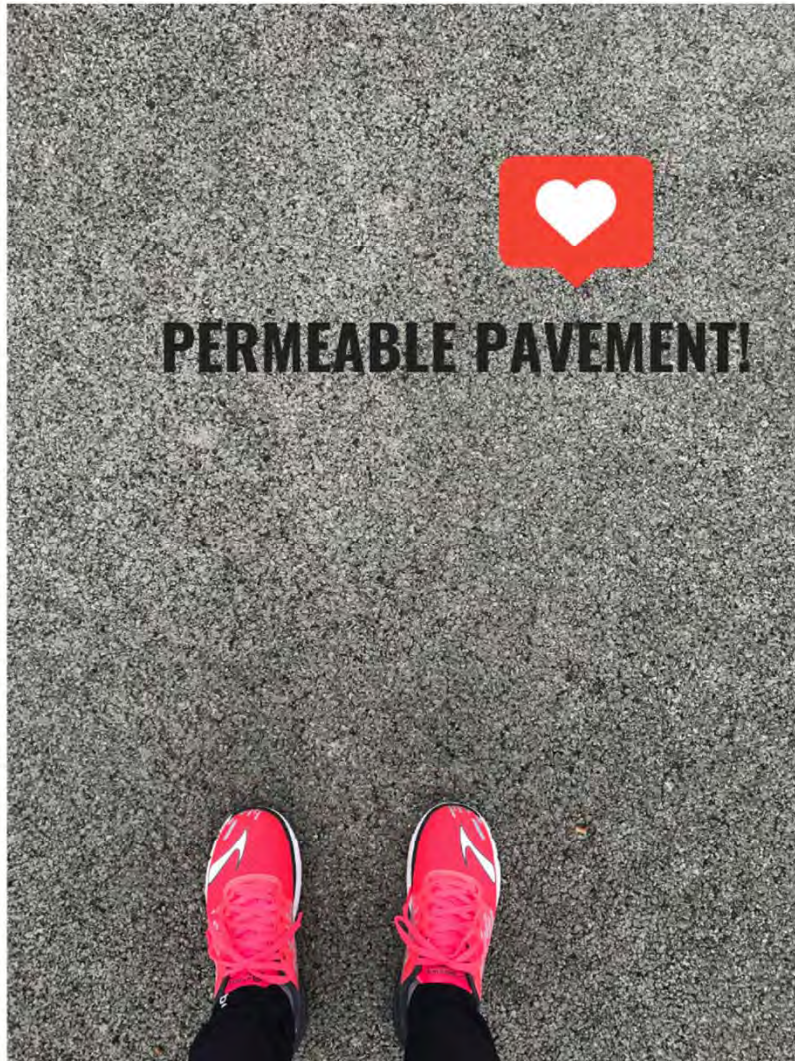


# Join the NACWA family. Join the discussion.

Small and medium sized wastewater  
and stormwater utilities serving  
populations less than 75,000

\$750 to \$1,000/year





**THANK  
YOU  
SESWA!**

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