



City of Corona
Department of Water and Power
"Protecting Public Health"

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Via Electronic Mail
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**Subject: COMMENTS ON FEDERALISM CONSULTATION REGARDING THE
DEFINITION OF "WATERS OF UNITED STATES"**

Dear Ms. Downing and Mr. Hanson:

The City of Corona ("City") is a municipal corporation located approximately 45 miles southeast of Los Angeles in western Riverside County. The City limits encompass 39.2 square miles and the population is approximately 159,132. The City was founded at the height of the Southern California citrus boom in 1886, and is situated at the upper end of the Santa Ana River Canyon, adjacent to the Prado Reservoir and the Santa Ana River. The City provides municipal water service to its residents and in addition to operating the municipal separate storm sewer system ("MS4").

The City submits this letter to EPA pursuant to Executive Order (EO) 13132. EO 13132 requires EPA to consult with local government agencies (or their representative national organizations) prior to issuing any regulation that may impose substantial direct compliance costs on state and local governments or preempt state or local law. EPA has proposed rescinding and revising the definition of the term "Waters of the United

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States” (“WOTUS”) for the purposes of the federal Clean Water Act.¹ EPA’s proposed action may impose substantial direct compliance costs on the City, and may also preempt state or local regulations applicable to and implemented by the City. The City appreciates the opportunity to provide comments on EPA’s proposal, and looks forward to working with EPA on revisions to the 2015 promulgated definition of WOTUS.

These comments request that two actions be taken: 1) that when revising the regulatory definition of WOTUS, the EPA and Army Corps of Engineers provide an explicit exclusion for water supply facilities; and 2) that EPA and the Army Corps of Engineers clarify that municipal separate storm sewer systems (“MS4s”) cannot legally be classified as WOTUS consistent with the Clean Water Act and Supreme Court precedent.

I. Background

In July, 2015, the EPA issued a final rule revising the definition of the term “WOTUS.” The 2015 rule stretched the definition to its maximum supportable extent. The apparent intent was to reach the most headwaters and tributaries possible. The flaw in this approach is that the 2015 rule classified man-made infrastructure as waters of the United States, including many water supply facilities, and extended the jurisdictional reach of EPA and the Army Corps of Engineers beyond what is allowed by federal law. Under the 2015 rule, WOTUS includes aqueducts, reservoirs, irrigation channels, storm drains, flood control channels, infiltration basins, and pipelines connecting such facilities.

During the rulemaking process, municipalities nationwide actively engaged EPA on application of the definition to cities – from both a stormwater and water supply perspective. EPA included specific exclusions from the definition of “WOTUS.” The exclusions were intended to prevent over-application of the Clean Water Act (“CWA”) to portions of the City’s MS4 system as well as the water supply infrastructure the City relies on. Unfortunately, the exemptions did not go far enough and the final promulgated definition can be construed to apply to portions of the City’s water supply infrastructure and MS4. Additionally, EPA included comments in the preamble to the final rule claiming the authority to regulate a range of water supply and flood control infrastructure as WOTUS.

Application of the Clean Water Act to water supply infrastructure substantially interferes its operation and usefulness. Water quality standards and TMDLs are applied in system and dredge and fill permits are required for maintenance. Federal permitting in turn triggers consultation under the federal endangered species act. In some cases, the regulatory burden created by application of the Clean water Act completely obfuscates the purpose of the facility. In others, it prevents environmentally beneficial projects from being constructed in the first place.

¹ 33 U.S.C. § 1251 *et seq.*

Without question, some water supply facilities are WOTUS. Large reservoirs constructed on major river systems that have a history of use in interstate commerce likely qualify as WOTUS. However, the 2015 Rule went much further and captured existing infrastructure that was never intended to be held to the Clean Water Act's fishable, swimmable standards, including canals, aqueducts and reservoirs that were built on or across ephemeral streams and dry canyons.

Similarly, defining portions of the City's MS4 as WOTUS prevent the City from using those portions of the MS4 for stormwater treatment projects including man-made wetlands and limits the usefulness of stormwater capture and use projects. It also misconstrues the point of compliance for the City such that compliance with the requirements of Clean Water Act section 402(p) becomes physically impossible.

Pursuant to the Executive Order, EPA is rescinding the 2015 Rule and considering a revised definition of the term WOTUS that is consistent with Justice Scalia's opinion in *Rapanos v. United States*.² The City is aware that the National Water Resources Association and the Association of California Water Agencies, and numerous individual water supply agencies are submitting detailed comments to EPA on proposed revisions to the WOTUS definition. The City fully supports those comments. As both a municipality and water supply agency, the City has an acute interest in the treatment of water supply and conveyance facilities under the Clean Water Act.

II. Defining the City's Water Conveyance Systems as "Waters of the United States" substantially interferes with their operation

California depends on aqueducts, irrigation canals and other conduits to move water across vast distances and supply water to a thirsty populace. The 2015 Rule implemented expansive definitions of the terms "tributary" and "adjacent" that explicitly applied to man-made and man-altered facilities. Recognizing the need to exempt water supply infrastructure from the expansive definition promulgated in 2015, the EPA included a limited exemption for certain facilities that were constructed "in dry land." While helpful, the exemption did not go far enough. Numerous types of facilities still fell within the broad definition of "Waters of the United States."

The City is a member agency of the Western Municipal Water District which is a member agency of the Metropolitan Water District of Southern California. As such, the City is reliant on water imported into southern California from across the State via aqueducts, pipelines and storage reservoirs. A definition of WOTUS that captures this infrastructure puts the entire system at risk. Along with a WOTUS designation comes the requirement to attain Water Quality Standards, and to obtain Clean Water Act section 402 and 404 permits.

Removing vegetation and sediment built up in facility will require a 404 permit as well as consultations with federal wildlife agencies. Even if no endangered species are

² 547 U.S. 715 (2006).

found, the added cost and time constraints will unnecessarily hinder existing municipal operations. More importantly, the actual operation of the facility could be at risk. Changes in water level and flow have direct impacts on TDS, turbidity, temperature, dissolved oxygen, and many other “pollutants” that are regulated under the Clean Water Act. Efforts to control these constituents could eventually limit how and when a water supplier takes water from a facility.

This is not an unlikely scenario. In 2010 the California Regional Water Quality Control Board for the Central Valley Basin adopted a methylmercury TMDL that imposed requirements on the California Department of Water Resources (“DWR”). The basis for regulation was the Regional Board’s position that the DWR and affiliated agencies discharged methylmercury through the Sacramento-San Joaquin River Delta Estuary as part of their ongoing operations moving water into Southern California.

The City operates its own infrastructure that is put at risk by a WOTUS designation. The City owns multiple infiltration basins that sit adjacent to the Prado Reservoir and are used to infiltrate recycled water and capture stormwater into the Temescal Valley Groundwater basin for future potable use. The infiltration basins were constructed in “dry land” but they are adjacent to jurisdiction wetlands. If the infiltration basins were construed as WOTUS it would prevent their use for water supply.

In addition to the City’s operations, many arid western states use surface infiltration as a management tool to prevent flooding, store excess water for future use, replenish groundwater supplies, mitigate salt water intrusion, or abate land subsidence. The most economical manner of groundwater recharge is to construct a basin in alluvial material immediately adjacent to a perennial or ephemeral stream. This allows water to rapidly infiltrate through the basin to the unsaturated zone where it is added to the aquifer below. In addition to the basins, flood control dikes, swales and ditches are used to capture and convey stormwater to protect public safety. Examples of these facilities were detailed in the letter submitted by ACWA. The City fully supports ACWA’s comments and requests.

When revising the regulatory definition of the term WOTUS, EPA needs to include express exclusions for the above described water supply facilities to ensure that implementation of the Clean Water Act does not interfere with water supply operations in violation of the Act.

III. Legal Basis for Exclusion of Water Supply Infrastructure

As noted above, it is essential that any revisions to the definition of WOTUS are consistent with the text of the CWA and its implementing regulations. When interpreting statutes, the place to begin is with the statutory text and “[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.” *Sebelius v. Cloer*, 133 S. Ct. 1886, 1889 (2013) (quoting *BP Am. Prod. Co. v. Burton*, 84, 91 (2006)). After the Agencies have determined that the revised definition of WOTUS is consistent with the CWA and its implementing regulations, they can then

consider whether it is also consistent with U.S. Supreme Court decisions interpreting the CWA, including Justice Scalia's opinion in *Rapanos*.

The Clean Water Act explicitly reserves state authority over water supply. Section 101(g) of the Act states that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter." It further states that "nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." (33 U.S.C. § 1251(g). Similarly, section 510 states that the Act shall not be "construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." (33 U.S.C. § 1370.) The Clean Water Act is thus very clear that it is not be construed in a manner that interferes with any states' authority to "allocate quantities of water" or otherwise impairs or obstructs their rights to regulate water.³

The Supreme Court has been clear that administrative actions that expand federal regulation into areas of traditional state control are only on allowed when there has been a clear statement of intent from Congress:

Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."

(SWANCC at 172-173 [citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Const. Trades Council*, 485 U.S. 568, 575 (1988); *United States v. Bass*, 404 U.S. 336, 349 (1971). See also *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *Machinists v. Street*, 367 U.S. 740, 749-750 (1961); *Crowell v. Benson*, 285 U.S. 22, 62 (1932).])

³ S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 107 (2004) ["the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by the Act"] (internal citations omitted); Great Basin Mine Watch v. Hankins, 456 F.3d 955, 963(9th Cir. 2006) [same].

With regard to water supply facilities, the plain text of the Clean Water Act directs the federal government to take a “hands off” approach. Water supply facilities that are integral to the collection, transport and storage of water are not WOTUS. Any revised regulation should include a specific exclusion for this type of infrastructure.

We request that EPA reconsider the concept of navigability as used in the Clean Water Act. The Supreme Court first articulated the test for navigability in *The Montello*, 87 U.S. (20 Wall.) 430,441-42 (1874), holding: “[i]f it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it [the waterway] is navigable in fact, and becomes in law a public river or highway.”⁴

Susceptibility to use as a highway of commerce is central to finding jurisdiction over what are traditionally areas of state control. In *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940), the Supreme Court held that so long as a water is susceptible to use as a highway of commerce, it is navigable-in-fact, even if the water has never been used for any commercial purpose, and even if limited improvements are necessary to make the water passable for commerce. The qualifying criteria again being whether the water is used as “a highway of commerce.” (*Id.* at 407.)

Differentiating between man-made or man altered facilities and navigable waters can be difficult. Nonetheless, when the Supreme Court has considered the issue, it has always concluded that facilities are navigable waters if they are used or are capable of being used as avenues of interstate commerce. In *Ex Parte Boyer*, 109 U.S. 629 (1883), the first case in which the Supreme Court extended federal jurisdiction to man-made waters, the Court did so on the grounds that the canal at issue was designed for navigation:

Navigable water situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different States, carried on by vessels such as those in question here, is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States.

(*Ex Parte Boyer*, 109 U.S. 629, 632 (1883) [emphasis added].)

More recently, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Supreme Court found that a modified fish pond on the Hawaiian island of Oahu became navigable and subject to the Rivers and Harbors Act only after it was converted from a shallow, landlocked pond, into a marina with a surface connection to the Pacific Ocean.

⁴ In *The Daniel Ball*, 77 U.S. 557, 563-64 (1870), the Court found the requisite commerce if the goods being carried were moving interstate, even if the steamer was not. *Id.* at 565.

In *Finneseth v. Carter*, 712 F.2d 1041 (1983), the Sixth Circuit Court of Appeals considered whether Dale Hollow Lake which straddles the border between Tennessee and Kentucky was navigable in fact. The Lake was man-made and had no navigational connection to downstream waters. The Court of Appeals held “an artificial water body, such as a man-made reservoir, is navigable in fact . . . if it is used or capable or susceptible of being used as an interstate highway for commerce over which trade or travel is or may be conducted in the customary modes of travel on water” in contrast to “reservoirs created by lockless dams were wholly within the confines of one state.” (Id.)

The common denominator in any analysis – whether it is man-made or natural water body at issue, is whether the water is “susceptible to use as a highway of commerce” or constructed with the intent to be used as the same. Water supply facilities built on traditional navigable waters remain jurisdictional, those that are constructed on what may have qualified as tributaries or adjacent wetlands if they were analyzed under the 2015 Rule would not.⁵

This approach is consistent with Justice Scalia’s opinion in the *Rapanos* case. In that case, the Court considered whether various wetlands connected to geographically distant navigable-in-fact waters qualified as WOTUS. Justice Scalia found that they did not and focuses his rationale on the distinction between waters that are streams, lakes and rivers in the “ordinary parlance” and other man-made features. (*Rapanos* at 739) Justice Scalia specifically discussed the difference between traditional navigable waters and manmade conveyances:

It is also true that highly artificial, manufactured, enclosed conveyance systems—such as “sewage treatment plants,” and the “mains, pipes, hydrants, machinery, buildings, and other appurtenances and incidents” of the city of Knoxville’s “system of waterworks,” likely do not qualify as “waters of the United States,” despite the fact that they may contain continuous flows of water.

Justice Scalia specifically cited a number of lower court decisions differentiating between waters of the United States and point sources as defined by the Clean Water Act:

Cases holding the intervening channel to be a point source include *United States v. Ortiz*, 427 F.3d 1278, 1281 (CA10 2005) (a storm drain that carried flushed chemicals from a toilet to the Colorado River was a “point source”), and *Dague v. Burlington*, 935 F.2d 1343, 1354-1355 (CA2 1991) (a culvert connecting two bodies of navigable water was a “point source”), rev’d on other grounds, 505 U.S. 557, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992). Some courts have even adopted both the “indirect discharge” rationale and the “point

⁵ We do not advocate that canals that move water as an item of commerce would create jurisdiction. The Clean Water Act does not regulate water as an item of commerce. As discussed at length herein, such regulation is expressly reserved to the states by the plain text of the Act.

source" rationale in the alternative, applied to the same facts. See, e.g., *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114, 118-119 (CA2 1994). On either view, however, the lower courts have seen no need to classify the intervening conduits as "waters of the United States.

An exemption for water supply facilities is therefore consistent with both Justice Scalia's decision in the *Rapanos* case, and the underlying structure of the Clean Water Act.

IV. The Plain Text of the Clean Water Act Precludes Treating Any Portion of the MS4 as WOTUS

The Clean Water Act is based on a definition of "point source" that includes ditches, channels and other conveyances that are part of the nation's water supply, waste treatment, transportation and flood control systems. The 2015 rule, as adopted without revision, conflicts with the plain text of the Clean Water Act, which regulates these sources at the point of discharge into waters of the United States.

The Clean Water Act defines "point source" as the following:

any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff. (See 40 C.F.R. § 122.3).⁶

EPA has adopted similar definitions for the terms "MS4" and "outfall" to allow for regulation of the system before discharges to waters of the United States occur:

(8) Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains):

(i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or

⁶ 33 U.S.C. § 1631 (14); 40 C.F.R. 122.2.

similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;

(ii) Designed or used for collecting or conveying storm water;

(iii) Which is not a combined sewer; and

(iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

(9) Outfall means a point source as defined by 40 CFR 122.2 at the point where a municipal separate storm sewer 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.⁷

Storm drains, agricultural drains, and other manmade conveyances that were never traditional navigable waters fit squarely within the above listed definitions. They cannot be both waters of the United States and a point source. The structure of the Clean Water Act dictates that they must be one or the other.

Section 402(p) of the Clean Water Act similarly differentiates between discharges from the MS4, and receiving waters. Section 402(p)(3)(b) of the Clean Water Act provides:

Permits for discharges from municipal storm sewers –

(i) may be issued on a system– or jurisdictional– wide basis;

(ii) shall include a requirement to **effectively prohibit non-stormwater discharges into the storm sewers**; and

(iii) **shall require controls to reduce the discharge of pollutants to the maximum extent practicable**, including management practices, control techniques and system, design and engineering methods, and such other provisions

⁷ 40 C.F.R. 122.26(b)(8)-(9).

as the Administrator or the State determines appropriate for the control of such pollutants.⁸

The plain language of the Clean Water Act requires MS4 Permits to “require controls to reduce the discharge of pollutants to the maximum extent practicable” (“MEP”).⁹ The Act applies the MEP standard to the “discharge of pollutants” from the MS4. Discharges into the MS4 are subject to a different standard.

In adopting Section 402(p), Congress defined the MS4 as a point source, established a specific standard for discharges from the MS4, and exempted MS4s from compliance with the Water Quality Standards and TMDL requirements applicable to Waters of the United States through Clean Water Act section 303.¹⁰ This Congressional determination *per se* defines MS4s as a point source and not Waters of the United States. Any other reading would write the MEP standard out of the Act.

The Supreme Court addressed differentiating between point sources and WOTUS in *Rapanos*. In his concurring opinion, Justice Scalia discussed the difference between traditional navigable waters and manmade conveyances at length:

Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from “navigable waters,” by including them in the definition of “point source.” The Act defines “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). It also defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.” § 1362(12)(A) (emphasis added). The definitions thus conceive of “point sources” and “navigable waters” as separate and distinct categories. The definition of “discharge” would make little sense if the two categories were significantly overlapping. The separate classification of “ditch[es], channel[s], and conduit[s]”—which are terms ordinarily used to describe the watercourses through which intermittent waters typically flow—shows that these are, by and large, not “waters of the United States.”¹¹

⁸ 33 U.S.C. § 1342(p)(3)(B) [emphasis added].

⁹ 42 U.S.C. § 1342(p).

¹⁰ *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999).

¹¹ *Rapanos* at 735-36. “It is also true that highly artificial, manufactured, enclosed conveyance systems—such as “sewage treatment plants,” and the “mains, pipes, hydrants, machinery,

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Justice Kennedy’s concurring opinion in *Rapanos* also addressed the issue of manmade conveyances and found that they should not be waters of the United States:

the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps’ interpretation of the statute does not extend so far.¹³

Similarly, in *South Florida Water Management District v. Miccosukee Tribe of Indians*, the Supreme Court held that movements of water within “the waters of the United States” were not discharges from a point source.¹⁴ The Court declined, however, on the basis of the record to determine whether the waters at issue were a single water body or separate waters of the United States, although there was some evidence indicating that the drainage canal and wetland at issue were in essence the same body of water. The Court remanded the case for further review of whether the two waters were distinct water bodies.

buildings, and other appurtenances and incidents” of the city of Knoxville’s “system of waterworks,” likely do not qualify as “waters of the United States,” despite the fact that they may contain continuous flows of water.” *Id.* at 736, fn. 7.

¹² *Id.* at 744; see also *Rapanos* at 743 [citing *United States v. Velsicol Chemical Corp.*, 438 F. Supp. 945, 946-947 (a municipal sewer system separated the “point source” and covered navigable waters) and *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137, 1141 (2.5 miles of tunnel separated the “point source” and “navigable waters”)].

¹³ *Rapanos* at 778-79.

¹⁴ 541 U.S. 95 (2004).

The Supreme Court subsequently reached the same conclusion in *Los Angeles County Flood Control District v. NRDC*.¹⁵ There, the Court considered whether water movement within the channelized portions of the Los Angeles River could be considered a discharge from a point source. Citing *Miccossukee*, the Court unanimously held that water movement within the Los Angeles River would not constitute a discharge from a point source under the Clean Water Act. Specifically, the Court held that the channelized portions of the river were not point sources discharging into the non-channelized portions of the river.

The Court's decisions in both *Miccossukee* and *Los Angeles County Flood Control District* recognized the fundamental difference between waters of the United States and a point source that discharges into Waters of the United States. A feature cannot be both. If a manmade conveyance meets the definition of point source under the Act, the EPA and the Army Corps lack the discretion to classify it as Waters of the United States based on an expansive definition of the term not found in the text of the Act itself. Thus, classifying a MS4 as a Water of the United States is a legal impossibility as the same water would be discharging into itself, which is contrary to U.S. Supreme Court precedent.

V. Defining the MS4 as WOTUS Makes Compliance with Clean Water Act Mandates Physically Impossible

There are very good reasons that the Clean Water Act differentiates between point sources and WOTUS. As noted in *Los Angeles County Flood Control v. NRDC*, the MS4 is a complex system of open drains, swales and channels that convey floodwaters off of public streets and into the Waters of the United States. These systems are often fenced and not designed to be used for fishable, swimmable purposes. MS4s are first and foremost a flood control system designed to protect life and property from the risk of flooding. MS4s can also function as treatment systems or can be used as a conveyance for treatment systems to sanitary sewer systems. Attaining Water Quality Standards within the flood control or treatment system is not possible. A definition of Waters of the United States that requires this outcome violates the plain text of the Act.

The Clean Water Act requires all states to adopt Water Quality Standards for each body of water within their borders. Water Quality Standards must consist of the designated uses of the navigable waters involved and the water quality criteria necessary for such waters to be put to the designated use.¹⁶ In all cases, the States must adopt standards that include full body contact recreation and fishing as designated uses, or demonstrate through the use attainability analysis ("UAA") process that such uses are not possible.¹⁷

¹⁵ 133 S.Ct. 710 (2013).

¹⁶ 33 U.S.C. § 1313(c)(2)(A).

¹⁷ See 33 U.S.C. §§ 1251(a) and 1313(c).

States are prohibited from adopting “waste transport or waste assimilation as a designated use for any waters of the United States.”¹⁸ The prohibition is designed to ensure that waters of the United States are not used for waste treatment and that the basic fishable, swimmable standard can be attained. Many jurisdictions in California, however, utilize their MS4s for diversion pipelines and other treatment-related BMPs in order to comply with TMDL requirements. Classification of MS4s as WOTUS would prevent these types of systems from being constructed within waters of the United States and improving water quality. As a result, inappropriately designating water infrastructure, and specifically flood control infrastructure, as waters of the United States will severely hinder the ability of downstream waters to ever attain the applicable Water Quality Standards.

In addition, classification of MS4s as waters of the United States become problematic in the context of total maximum daily loads (TMDLs). When waters of the United States do not attain their designated Water Quality Standards, the States or EPA are required by Clean Water Act section 303(d) to adopt a TMDL for the pollutant causing nonattainment. TMDLs are a combination of a Wasteload Allocation (limits on NPDES discharges), a Load Allocation (non-NPDES discharges) and a margin of safety. States are required to impose limits on activities that do not require Clean Water Act permits to ensure that the Load Allocation of any applicable TMDL is attained. A portion of a WLA is assigned to a MS4 discharging into a WOTUS establishing water quality based effluent limits for the point source. Upon establishment of a WLA, States are required to impose limits on discharge activities to ensure that the applicable TMDL is met. So, if a MS4 is designated as WOTUS, then that same MS4 cannot be assigned a WLA for purposes of meeting the TMDL since there is discharge (*i.e.*, point source) to a water of the U.S. It would result in regulatory uncertainty for the MS4 operator as to where its compliance points are for purposes of a TMDL.

Even if an NPDES or other permit is not required for a given activity, through the TMDL process, designation of a water body as WOTUS can result in significant limitations. The Ninth Circuit Court of Appeals’ decision in *Pronsolino v. Nastri* illustrates the issue.¹⁹ In that case, the EPA imposed TMDLs on a river that was polluted only by non-NPDES sources of pollution. Property owners who owned land in the river’s watershed applied for an agricultural permit, which was granted along with certain restrictions to comply with EPA’s TMDL. The property owners sued the EPA, contending that EPA did not have the authority to impose TMDLs on rivers that were polluted only by non-NPDES sources of pollution. Both the trial court and the Ninth Circuit Court of Appeals sided with EPA, holding that the CWA’s 303(d) listing and TMDL requirements apply to all waters of the United States regardless of the source of impairment.

Thus, the idea that it does not matter whether a water is designated Waters of the United States if an activity does not require a Clean Water Act permit is incorrect. Other

¹⁸ 40 C.F.R. § 131.10(a).

¹⁹ 291 F.3d 1123 (2002).

requirements apply and impose restrictions that are outside the scope of the Clean Water Act's permitting process. For some water bodies, that is entirely appropriate. For man-made ditches, treatment wetlands, low impact development BMPs and flood control systems, the designation can be extremely problematic and will have a negative impact on local government operations across the United States.

VI. Specific Impacts on City Operations

The City owns and operates a robust MS4 that conveys stormwater from the adjacent Santa Ana Mountains into the Prado Reservoir. The City is concerned about recent efforts to incorporate Water Quality Standards into MS4 permits in southern California. If the MS4 is classified as WOTUS then Water Quality Standards must be attained within the MS4 and there is no physical location for treatment. Additionally, classification as WOTUS inhibits the ability of the City to install capture and use projects to utilize stormflows to augment the City's potable supply. The City therefore requests that the EPA clarify that MS4s cannot be legally classified as WOTUS consistent with the Clean Water Act and Supreme Court precedent. This delineation is consistent with Supreme Court precedent, including Justice Scalia's opinion in the *Rapanos* case.

We request that when it comes to defining man-made and man-altered infrastructure, EPA look to the definition of "navigable" provided by the Supreme Court. The Supreme Court articulated the test for navigability in *The Montello* 87 U.S. (20 Wall.) 430 (1874), holding: "[i]f it 'if it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it [the waterway] is navigable in fact, and becomes in law a public river or highway.'"²⁰ (*Id.* at 441-42.)

Susceptibility to use as a highway of commerce is central to finding jurisdiction over what are traditionally areas of state control. In *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940), the Supreme Court held that so long as a water is susceptible to use as a highway of commerce, it is navigable-in-fact, even if the water has never been used for any commercial purpose, and even if limited improvements are necessary to make the water passable for commerce. The qualifying criteria again being whether the water is used as "a highway of commerce." (*Id.* at 407.)

Differentiating between man-made or man altered facilities and navigable waters can be difficult. When the Supreme Court has considered the issue, it has always concluded that facilities are navigable waters if they are used or are capable of being used as avenues of interstate commerce. In *Ex Parte Boyer*, 109 U.S. 629 (1883), the first case in which the Supreme Court extended federal jurisdiction to man-made waters, the Court did so on the grounds that the canal at issue was designed for navigation:

²⁰ In *The Daniel Ball*, 77 U.S. 557, 563-64 (1870), the Court found the requisite commerce if the goods being carried were moving interstate, even if the steamer was not. *Id.* at 565.

Navigable water situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different States, carried on by vessels such as those in question here, is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States.²¹

More recently, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Supreme Court found that a modified fish pond on the Hawaiian island of Oahu became navigable and subject to the Rivers and Harbors Act only after it was converted from a shallow, landlocked pond, into a marina with a surface connection to the Pacific Ocean.

In *Finneseth v. Carter*, 712 F.2d 1041 (1983), the Sixth Circuit Court of Appeals considered whether Dale Hollow Lake which straddles the border between Tennessee and Kentucky was navigable in fact. The Lake was man-made and had no navigational connection to downstream waters. The Court of Appeals held “an artificial water body, such as a man-made reservoir, is navigable in fact . . . if it is used or capable or susceptible of being used as an interstate highway for commerce over which trade or travel is or may be conducted in the customary modes of travel on water” in contrast to “reservoirs created by lockless dams were wholly within the confines of one state.”

The common denominator in any analysis, whether it is man-made or natural water body at issue, is whether the water is “susceptible to use as a highway of commerce” or constructed with the intent to be used as the same. Flood control and stormwater management facilities built on traditional navigable waters remain jurisdictional. Those that are constructed on what may have qualified as tributaries or adjacent wetlands if they were analyzed under the 2015 Rule (or that act as either) as a matter of law do not qualify.

This approach is consistent with Justice Scalia’s opinion in the *Rapanos* case. In that case, the Court considered whether various wetlands connected to geographically distant navigable-in-fact waters qualified as WOTUS. Justice Scalia found that they did not and focuses his rationale on the distinction between waters that are streams, lakes and rivers in the “ordinary parlance” and other man-made features.²²

V. Conclusion

The City appreciates the opportunity to provide comments on “the opportunities and challenges that exists when taking Justice Scalia’s approach to implementing the Clean Water Act (CWA).” Addressing the City’s concerns presented in this letter is consistent with the ruling by Justice Scalia in the *Rapanos* case, and will ensure water quality is protected without imposing unnecessary new burdens on local governments operating MS4s and public water agencies.

²¹ *Ex Parte Boyer*, 109 U.S. 629, 632 (1883) [emphasis added].

²² *Rapanos* at 739.

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If you have any questions about the City's comments, please do not hesitate to contact me at Tom.Moody@CoronaCA.gov or by phone at (951) 736-2477.

Sincerely,



Tom Moody

Assistant General Manager