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Subject: Executive Order 13132, Waters of the U. S.

Mr. Hanson:

On behalf of the County of Orange ("County") and the Orange County Flood Control District ("OCFCD"; County and OCFCD collectively referred to as "the County"), we appreciate for the opportunity to provide comments on Executive Order 13132 ("EO 13132"), which, in part, directs the US Environmental Protection Agency to review the final Clean Water Rule: Definition of Waters of the United States (WOTUS Rule) and publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law.

The County is responsible for operating and maintaining 350 miles of flood control channels, 4 large dams, 7 large stormwater pumping stations, and 319 miles of roads. The County is subject to the Cleanwater Act (CWA) regulation under two National Pollutant Discharge Elimination System (NPDES) permits for discharges of stormwater from its municipal separate storm sewer system, or "MS4," into WOTUS. These MS4 stormwater permits are issued by the California Regional Water Quality Control Boards and approved by EPA Region 9. In instances where flood control infrastructure, which is an integral part of the County's MS4, is deemed WOTUS, routine operation and maintenance of such storm water conveyance facilities becomes subject to Clean Water Act (CWA) regulation and for permitting purposes.

Consequently, the County has considerable interest in the WOTUS Rule, since the WOTUS Rule has significant implications on fundamental issues such as whether a permit is required for discharges into a water body or conveyance, whether Water Quality Standards adopted by the State Water Resources Control Board (and approved by US EPA) apply to a water body or conveyance, such that failure to meet the standard could result in regulatory consequences (e.g. placement of the CWA 303(d) list of impaired water bodies), the threat of administrative enforcement actions or potential citizen lawsuits under the CWA, and the ability to effectively construct, operate and maintain drainage infrastructure for purposes

of public safety, local water supply augmentation and water quality protection. These issues are underscored by the fact that MS4 are a flood control system designed to protect life and property from the risk of flooding. MS4 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 MS4 is not possible, and to force local governments to expend precious resources to attempt to do so, while being exposed to an immediate and constant state of non-compliance with their MS4 permits, is overburdensome and legally untenable. **For these and additional reasons set forth in detail below, the County urges that any proposed rule promulgated by the EPA pursuant to EO 13132 explicitly exclude MS4 from the definition of WOTUS. Such an express exclusion would provide clarity to federal and state regulatory agencies by reiterating a point of law that is inherent in the CWA, as well as reflect consistency with Supreme Court case law.**

In 2015 when the WOTUS Rule became final, the definition of WOTUS was modified to explicitly exclude “stormwater control features” from CWA jurisdiction. Specifically, the WOTUS Rule provides, in part:

(2) The following are not “waters of the United States” even where they otherwise meet the terms of paragraphs (1)(iv) through (viii) of this section.

...

(vi) Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.¹

....

Thus, notwithstanding what many have characterized as the EPA’s broad expansion of the scope of what could be regulated as WOTUS, the regulatory intent to exclude MS4 infrastructure owned and operated by the County is clear. This exclusion is in line with the express statutory language of the CWA and its regulations, as well as Supreme Court case law.

The NPDES MS4 regulations define an MS4 as “a conveyance or system of conveyances (including roads with drainage systems, municipal streets...ditches, man-made channels or storm drains) designed or used for collecting or conveying storm water.”² For these conveyances to be included in the definition of WOTUS would mean that a conveyance could constitute both an MS4 and a jurisdictional receiving water. However, an MS4 and a receiving water body cannot be one in the same, as the CWA distinguishes between discharges from MS4 storm drains, which are defined as “point sources,” and receiving waters.

In the EPA’s Preamble to the initial MS4 regulations, the agency expressly determined that “streams, wetlands and other water bodies that are waters of the United States are not storm drains for the purposes of this rule” and that “stream channelization, and stream bed stabilization, which occur in waters of the United States,” were not subject to NPDES permits under Section 402 of the CWA.³ Further, the “conveyances” identified in the regulation – “roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains” – all refer to anthropogenic structures, not natural streams; and an MS4 “outfall” is defined as the point at which an MS4 discharges to waters of the United States.⁴

¹ 40 C.F.R. §§ 230.3 (o) (2) (vi) and 230 (o) (3) (iii) (August 28, 2015).

² 40 C.F.R. 122.26(b)(8).

³ 53 Fed. Reg. 49416, 49442 (Dec. 7, 1988).

⁴ 40 CFR § 122.26(b)(8)-(9).

Section 402(p) of the CWA similarly differentiates between discharges from the MS4 and receiving waters, by requiring MS4 permits to require controls to reduce discharges of pollutants from MS4 to the maximum extent practicable.⁵ In adopting section 402(p), Congress defined 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 the CWA section 303.⁶

Thus, there is clear distinction between the MS4 used to collect, convey and discharge stormwater, and waters of the United States, into which point source discharges from MS4s are regulated. An MS4 cannot also constitute a receiving water because a receiving water cannot discharge into itself – a fundamental point illustrated by the U.S. Supreme Court in *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc., et al.*, and *South Florida Water Management District v. Miccosukee Tribe of Indians*.⁷

In declaring that certain “storm water control features” are “not waters of the United States,” the EPA plainly recognized what is already inherent in the CWA: that jurisdiction over these types of man-made waterways was legally (and practically) inappropriate and should not be exercised, notwithstanding the fact that the excluded waters could technically meet the characteristics of waters otherwise defined as WOTUS (e.g. tributaries).⁸ The County urges the EPA recognize this critical exclusion, and to promulgate a WOTUS rule that clearly excludes MS4 from WOTUS.⁹

The County notes that the above comment is consistent with comments submitted by the California Stormwater Quality Association (CASQA) and the National Municipal Stormwater Alliance (NMSA).

⁵ 33 U.S.C. §1342(p)(3)(B)

⁶ *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999).

⁷ *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc., et al.*, --- U.S. ---, 133 S.Ct. 710, 712-13 (2013) (holding that the flow of polluted water from one portion of a river, through a concrete channel or other engineered improvement in the river, to a lower portion of the same river, does not constitute a discharge of pollutants); *see also So. Fla. Water Mngmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004) (holding that where a canal and an adjacent wetland are not meaningfully distinct water bodies (rather, two parts of the same water body), then the transfer of polluted water from the former into the latter would not need an NPDES permit, as it would not constitute a discharge of pollutants into waters of the United States).

⁸ Regulatory agencies have asserted jurisdiction over certain of the County’s flood control channels under the “tributary rule,” notwithstanding the fact that these channels are not traditionally navigable waters, but were constructed to drain the uplands of stormwater runoff, and contain only intermittent flow.

⁹ While the 2015 WOTUS Rule exclusion was qualified in stating that storm water control features “created on dry land” were excluded, this qualification is rife with ambiguity and potential for misapplication. The EPA is not encouraged to retain this caveat, but to instead, adopt clear exclusions for MS4 from WOTUS.

Recommendation: *The definition of WOTUS under the CWA should explicitly exclude MS4. Such an express exclusion would provide clarity to federal and state regulatory agencies by reiterating a point of law that is inherent in the CWA, as well as reflect consistency with Supreme Court case law.*

If you have any questions or need additional information, please contact Jim Volz, Senior Civil Engineer, at (714) 647-3904.

Sincerely,



for

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