



San Diego County Water Authority

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Via Electronic Mail

Donna Downing

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RE: COMMENTS ON FEDERALISM CONSULTATION REGARDING THE DEFINITION OF “WATERS OF UNITED STATES”

Dear Ms. Downing and Mr. Hanson:

The San Diego County Water Authority (“Water Authority”) is a wholesale water supply agency operating in San Diego County, California. The Water Authority sustains a \$222 billion regional economy and the quality of life for 3.3 million residents through a multi-decade water supply diversification plan, major infrastructure investments and forward-thinking policies that promote fiscal and environmental responsibility. A public agency created in 1944, the Water Authority delivers a safe and reliable wholesale water supply at an affordable cost to 24 retail water agencies, including cities, special districts and a military base in San Diego County, California. The Water Authority is governed by a 36-member Board of Directors.

The Water Authority submits this letter to EPA pursuant to Executive Order 13132. As you are aware, 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 States” (“WOTUS”) for the purposes of the federal Clean Water Act (33 U.S.C. 1251 et seq.). EPA’s proposed action may impose substantial direct

A public agency providing a safe and reliable water supply to the San Diego region

MEMBER AGENCIES

Carlsbad
Municipal Water District

City of Del Mar

City of Escondido

City of National City

City of Oceanside

City of Poway

City of San Diego

Fallbrook
Public Utility District

Helix Water District

Lakeside Water District

Olivenhain
Municipal Water District

Otay Water District

Padre Dam
Municipal Water District

Camp Pendleton
Marine Corps Base

Rainbow
Municipal Water District

Romana
Municipal Water District

Rincon del Diablo
Municipal Water District

San Dieguito Water District

Santa Fe Irrigation District

South Bay Irrigation District

Vallecitos Water District

Valley Center
Municipal Water District

Vista Irrigation District

Yuima
Municipal Water District

OTHER
REPRESENTATIVE

County of San Diego

compliance costs to the Water Authority and its member agencies, and may also preempt state or local regulations applicable to the Water Authority. The Water Authority 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.

Background

In July, 2015, the EPA issued a final rule revising the definition of the term "WOTUS. The 2015 rule sought to stretch the definition to its maximum extent. The apparent intent was to reach the most headwaters and tributaries possible and thereby give the Clean Water Act the maximum supportable reach. 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. These include aqueducts, reservoirs, irrigation channels, infiltration basins, and pipelines connecting such facilities.

Application of the Clean Water Act to water supply infrastructure substantially interferes with 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.

For example, the 2015 Rule went beyond large reservoirs constructed on major river systems, that have a history of use in interstate commerce, 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.

During the rulemaking process, the Water Authority actively engaged EPA on application of the definition to water supply facilities. EPA staff included specific exclusions from the definition of the term with the intent of preventing over-application of the Clean Water Act to the Water Authority's facilities. Unfortunately, the exemptions did not go far enough, and the final definition remains capable of being construed as applying to many water supply facilities. Additionally, EPA included comments in the preamble to the final rule claiming the authority to regulate a range of water supply infrastructure as WOTUS.

Pursuant to President Trump's February 28, 2017 Executive Order, EPA is rescinding the 2015 Rule and considering reissuing a revised definition of the term WOTUS that is consistent with Justice Scalia's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006).

It is essential that any revisions to the definition of WOTUS be 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)); *see also Rapanos*, 547 U.S. at 754-55 (J. Scalia) (stating the principal problem with Justice Kennedy’s opinion was his reading of the Supreme Court’s prior decisions “in utter isolation from the text of the [Clean Water] Act”).

We are writing to request that when EPA begins revising the 2015 Rule, that the agency reconsider how water supply infrastructure is classified. We believe that an explicit exclusion for water supply infrastructure will protect water supply agencies from interference by regulatory agencies or citizens groups who may seek to control water supply operations through application of the 2015 rule. This approach is consistent with Justice Scalia’s opinion in the *Rapanos* case and is fully supported by existing case law defining the reach of the Clean Water Act.

Defining the Water Authority and its member agencies’ 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 Water Authority 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 a facility will require a 404 permit as well as consultations with federal wildlife agencies. Even if no endangered species are 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.

If the water supply facilities that the Water Authority and other water purveyors rely on get reclassified as WOTUS, it will only be a matter of time before similar actions are

taken to control water quality within those facilities. Limitations would further constrain water availability in Southern California and limit the ability of local water districts and cities to provide supplies to their residents.

As noted above, the Water Authority provides wholesale service to 24 retail agencies in San Diego. Regionally, there are a number of local terminal reservoirs constructed in dry canyon areas where the water body was constructed to support water supply purposes including storage of imported water. In the future, several of these reservoirs will be used as a component of potable reuse projects. The Water Authority works in conjunction with its retail agencies to promote water supply innovation, such as potable reuse and is concerned about the impact that the 2015 Rule has on water supply infrastructure.

One example of such innovation in the Water Authority's service area is the use of Lake Jennings, as part of a joint potable reuse project by member agencies: Helix Water District and Padre Dam Municipal Water District. Lake Jennings, located in San Diego County, was constructed by Helix WD in 1962, using an earthen dam constructed in a dry canyon, to provide water storage capacity for its service area and population, to receive delivery of imported water supplies, and to act as a forebay to the R.M Levy Water Treatment Plant. Lake Jennings is connected to the imported water aqueduct system through a series of pipelines and is considered a terminus reservoir.

In an ongoing effort to increase local water supply and provide increased reliability, Helix WD and Padre Dam MWD are actively engaged in a recycled water and indirect potable reuse project evaluation, partnering with the County of San Diego and the City of El Cajon on the East County Advanced Water Purification Program (ECAWPP). This program is evaluating the ability to treat recycled water at an advanced water treatment facility and convey this water to Lake Jennings and blends it with imported prior to final treatment into drinking water at the R.M. Levy Water Treatment Plant. This process is termed indirect potable reuse or surface water augmentation. The project has the potential to utilize Lake Jennings to produce up to 17,500 acre feet of "new" local drought resilient water supply from recycled water.

The State of California, with the approval of EPA, has classified Lake Jennings as WOTUS. Moreover, the State, acting under the authority of the Clean Water Act, has issued multiple NPDES permits that impact operation of Lake Jennings. These NPDES permits limit the use of algacides and other control mechanisms to keep the Lake fit for use as a drinking water supply reservoir. Additionally, the State of California is requiring Padre Dam MWD to obtain an NPDES permit for "discharges" of advanced treated recycled water that will be used to augment water supply in Lake Jennings, despite the fact that the advanced treated water is of higher quality than existing water supplies. The various NPDES permits that are being required may substantially interfere with use of Lake Jennings as a drinking water supply and for this important regional project. This

same “discharge” permitting approach is being used for other local terminal reservoirs in San Diego County, because all such reservoirs are being regulated as WOTUS.

Treating these terminal off-stream reservoirs as WOTUS creates unnecessary prescriptive regulatory hurdles under the Clean Water Act for ongoing reservoir operations and implementation of new water supply projects. Therefore, we would like to clarify in the new rule that terminal off-stream reservoirs such as Lake Jennings are not WOTUS.

In addition to the Water Authority’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 Water Authority fully supports ACWA’s comments and requests. The Water Authority has member agencies that infiltrate storm water and recycled water into alluvial basins and would like the new rule to clarify that these infiltration basins are not WOTUS.

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.

Legal Basis for Exclusion

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.¹

The Supreme Court has been clear that administrative actions that expand federal regulation into areas of traditional state control are only 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).])

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.

¹ 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].

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.”²

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.

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

² 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.

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 under the 2015 Rule, would not remain jurisdictional.³

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 source" rationale in the alternative, applied to the same facts. See, e.g., *Concerned Area Residents for*

³ 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.

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.

Conclusion

The Water Authority 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)". During the prior rule development process, the Water Authority also requested the exemptions discussed in this letter. Addressing the specific concerns presented in this letter is consistent with the ruling by Justice Scalia in Rapanos and will ensure water quality is protected without imposing unnecessary new burdens on the public water agencies.

If you have any questions about the Water Authority's comments, please do not hesitate to contact Toby Roy at (858) 522-6743.

Sincerely,

A handwritten signature in blue ink, appearing to read "Robert Yamada", with a large, stylized initial "R" and "Y".

Robert Yamada
Director of Water Resources