



Bringing
Water
Together

VIA EMAIL: CWAwotus@epa.gov, Hanson.Andrew@epa.gov

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RE: FEDERAL CONSULTATION ON THE DEFINITION OF “WATERS OF UNITED STATES”

Dear Ms. Downing and Mr. Hanson:

The Association of California Water Agencies (ACWA) appreciates the opportunity to comment on the questions the U.S. Environmental Protection Agency (EPA) raised in its April 19, 2017 E.O. 13132 Federalism Consultation Meeting. ACWA’s 430 public water agency members range in size from small irrigation districts to the largest water wholesaler in the country, and collectively supply over 90 percent of the water delivered in California for residential, agricultural, and municipal uses. Accordingly, ACWA’s members have a strong interest in the definition of “waters of the United States” (WOTUS) and the potential effects associated with any change to this definition.

As you are aware, E.O. 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” for the purposes of the federal Clean Water Act (33 U.S.C. § 1251, et seq.). ACWA member agencies are units of local government and EPA’s proposed action may impose substantial direct compliance costs on them. As a result, pursuant to E.O. 13132, ACWA is entitled to participate in this consultation process.

A. INTRODUCTION

ACWA recognizes the important water quality improvements brought about by the passage and implementation of the federal Clean Water Act (CWA) and has a history of encouraging EPA and the U.S. Army Corps of Engineers (collectively, the Agencies) to use their existing authorities to prevent pollutants from entering California’s drinking water supply. In order to achieve their water quality and reliability goals, ACWA members need predictability and certainty in determining if a waterbody is subject to jurisdiction of the CWA. To this end, the Agencies need to be specific about which waters are considered to be “waters of the United States” and the degree of regulation that accompanies that designation. If not carefully considered, the regulatory burden created by application of the CWA could completely obfuscate the purpose of the facility. In others, it could prevent environmentally beneficial projects from being constructed in the first place.

The Agencies issued the final rule regarding the *Definition of Waters of the United States Under the Clean Water Act* (Clean Water Rule) on June 29, 2015. This rule introduced uncertainty as to the potential designation of certain western water delivery systems as “waters of the United States”. The economic, agricultural, and human development that has occurred in the United States would not be possible without the ability to divert, transport, store, treat, and deliver water for human consumption and use. Designating water delivery systems as WOTUS would trigger numerous additional legal requirements for maintenance and operation that do not result in improved water quality or otherwise further the goals of the CWA.

As written, the Clean Water Rule could be interpreted to mean that water conveyance systems, recycled water facilities, groundwater recharge basins, and other facilities are subject to CWA jurisdiction as “waters of the United States”. The limited exemptions included in the Clean Water Rule for certain facilities constructed “in dry land” were helpful, but not sufficient. ACWA believes that a proper interpretation of the text of the CWA and both Justice Kennedy’s and Justice Scalia’s opinions in *Rapanos v. United States*, 547 U.S. 715 (2006), will result in a determination that water supply facilities and delivery systems are not WOTUS and that any revised or new rule defining WOTUS should expressly state that determination.

One of EPA’s questions is “How would you like to see the agencies interpret ‘consistent with’ Scalia?” First and foremost, it is essential that any revisions to the definition of “waters of the United States” 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)); 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”). 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*.

Set forth below are several examples of how interpreting the term “waters of the United States” in a manner “consistent with” Scalia’s opinion would provide greater clarity and certainty to the scope of the CWA’s jurisdiction. Also explained below are “particular features or implications of . . . such approaches” (especially when compared to the Clean Water Rule) “that the agencies should be mindful of in developing the step 2 proposed rule.”

B. COMMENTS

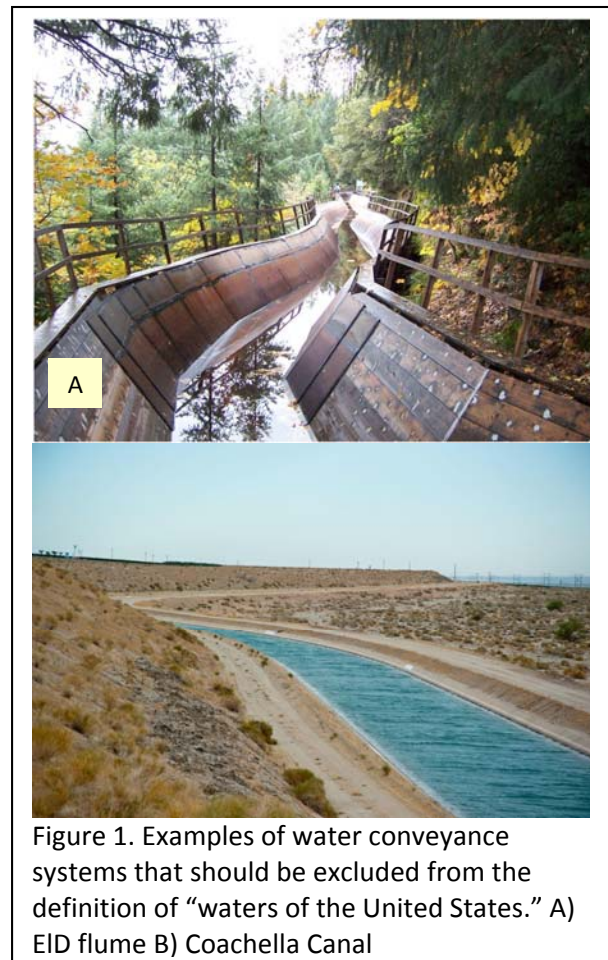
1. Consistent with the CWA and Justice Scalia’s Approach, Water Conveyance Systems are not “waters of the United States”

California depends on aqueducts, irrigation canals, and other conduits to provide water. The definition of “tributary” in the Clean Water Rule is so expansive that it could be interpreted to include California’s water conveyance and delivery systems, and if implemented, could subject numerous facilities throughout California to duplicative and unnecessary permitting requirements. As Justice Scalia recognized in *Rapanos*, such a result, especially for facilities

already licensed by a federal regulatory agency (for example, FERC), would be absurd (*Rapanos*, 547 U.S. at 734).

The narrow exceptions included in the Clean Water Rule for some types of man-made, non-stream conveyance facilities are insufficient to ensure that these facilities are not determined to be a “waters of the United States”. If water conveyance systems constitute “tributaries” simply because they contribute flow to traditional navigable waters, water agencies would need to obtain CWA, section 404 permits when, for example, they replace a generator, or a section of penstock, flume, siphon, or canal. Numerous types of facilities that would be subject to new permitting requirements exist all over California. For example (Figure 1):

- El Dorado Irrigation District’s (EID) stores water in Caples, Silver, Aloha, and Echo lakes, and releases water from these reservoirs into tributaries of the South Fork American River, a navigable stream. Near the town of Kybrz, California, the District diverts water from the South Fork American River, through a state-of-the-art fish screen, into its El Dorado Canal. Once in the El Dorado Canal, water flows through 22 miles of canal, flumes, tunnels, and siphons before it reaches the artificial, off-stream Forebay regulating reservoir. From Forebay, EID sends the water either into its water treatment facility for treatment and distribution as potable drinking water, or into its FERC-licensed hydropower generating plant. After generating electricity, water leaves the generating plant, and re-enters the South Fork American River.
- The Coachella Canal is a concrete conveyance that carries Colorado River water 123 miles west to Lake Cahuilla, a terminal reservoir in La Quinta, California. The Coachella Canal and Lake Cahuilla supply water to the Coachella Valley Water District’s agricultural irrigation system. The irrigation return water subsequently enters drainage facilities that flow to the Salton Sea.
- The Irvine Ranch Water District (IRWD), in coordination with local partners, conveys stormwater flows in the Central Valley during wet years for storage in groundwater banking facilities. When needed in dry years or emergencies, the water is extracted and conveyed back to IRWD and its local partners for use.



- The Nevada Irrigation District collects, stores and conveys water from the upper Yuba and Bear River watersheds (over 8,000 feet elevation) through 700 miles of canals and pipelines for hydropower generation and consumptive uses at elevations as low as 150 feet as part of its FERC–licensed Yuba-Bear Project.
- Placer County Water Agency owns and operates the FERC-licensed, Middle Fork Project that diverts, stores, and transports water through a series of stream diversions, reservoirs, water conveyance systems, and powerhouses in the Middle Fork American River watershed at elevations from 5,300 to 1,100 feet before being released back into the Middle Fork American River. The Interbay Powerhouse, one of the hydroelectricity facilities licensed by the Middle Fork Project, is fed by a 17-mile tunnel from Hell Hole Reservoir. PCWA’s canal system (not the hydro system) consists of 157 miles of canals, including randoms—short sections of natural channels that are used as part of the canal system, normally connecting two man-made ditches or canals.
- Modesto Irrigation District and Turlock Irrigation District jointly own and operate the FERC-licensed Don Pedro Hydroelectric Project, which is operated for hydroelectric generation and other consumptive beneficial uses. It includes hundreds of miles of pipelines, canals and ditches, as well as penstocks and similar man-made infrastructure that divert, store and discharge water to and from the Tuolumne River.
- Water purveyors across the Sierra Nevada continue to operate hundreds of miles of Gold Rush-era earthen ditches that transport water from upper watersheds to municipal and agricultural customers downstream, for example, the Georgetown Divide Public Utilities District (70 miles of earthen ditches) and Tuolumne Utilities District (57 miles of earthen ditches).

A revised “waters of the United States” definition consistent with the CWA and Justice Scalia’s opinion in *Rapanos* should eliminate any ambiguity and make clear that water conveyance systems like the ones described above are not subject to CWA jurisdiction and prevent these additional permitting requirements. Justice Scalia discussed the difference between traditional navigable waters and man-made conveyances at length:

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. . . . Just as ordinary usage does not treat typically dry beds as “waters,” so also it does not treat such elaborate, man-made, enclosed systems as “waters” on a par with “streams,” “rivers,” and “oceans.” *Rapanos*, 547 U.S. at 736 n.7.

Again, as Justice Scalia’s opinion demonstrates, it is important to interpret statutory terms in accordance with their “ordinary meaning.” See *Sebelius*, 133 S. Ct. at 1889. The ordinary meaning of “waters of the United States” in the CWA simply does not encompass man-made water conveyance systems.

Justice Scalia specifically cited a number of lower court decisions differentiating between “waters of the United States” and point sources as defined by the CWA:

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 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". *Rapanos*, 547 U.S. at 743-44.

ACWA requests that any new definition of “waters of the United States” take into account Justice Scalia’s opinion that man-made water conveyance systems, including aqueducts, canals, and ditches, should be excluded from the definition of WOTUS.

2. Consistent with the CWA and Justice Scalia’s Approach, Adjacent Water Facilities are not “waters of the United States”

The broad terminology used to define “adjacent” in the Clean Water Rule allows for sweeping jurisdiction over every wet feature in a floodplain, or riparian area, or an area that has a shallow, but unquantified, subsurface hydrologic connection to jurisdictional (a)(1) through (a)(5) waters. This expansive definition is not supported by language in the CWA or established by Supreme Court precedent. The Clean Water Rule’s exemption for certain man-made facilities created or constructed in “dry land” is insufficient to protect groundwater recharge projects, stormwater retention facilities, and recycled water facilities from additional extensive permitting requirements. As a result, keeping this definition would place a substantial regulatory burden on building and operating these facilities.

For example, Eastern Municipal Water District (EMWD), a water and wastewater agency in Southern California, utilizes nearly 100 percent of the recycled water it generates, and recycled water comprises 30 percent of its entire water supply portfolio – over 35,000 acre feet annually. With the assistance of the U.S. Bureau of Reclamation’s Title XVI program, EMWD has

developed 7000 acre-feet of seasonal storage, 19.5 million gallons of elevated storage (to pressurize the system), 200 miles of recycled distribution water pipeline, and 19 pumping facilities. EMWD currently has greater demand than supply for recycled water and in response has prepared unique allocations for customers. Under the Clean Water Rule, 10 EMWD recycled water storage sites could become jurisdictional unless they qualify for the “dry land” exemption (Figure 2). After becoming jurisdictional, regular maintenance and vegetation removal of these 550 acres of ponds would require Section 404 permits. This added regulatory burden would not only increase the cost of recycled water, and potentially delay further development of recycled water storage ponds, but also hamper the development of this drought-proof water supply.



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. In addition to being adjacent to a “waters of the United States,” all of these features may contain hydric soil, wetland vegetation, and have an ordinary high water mark. Under the Clean Water Rule, these facilities could meet the definition of “waters of United States” unless they “were built for wastewater recycling” or “created in dry land.”

Examples of these facilities can be found all over California, and a few of these projects are described below (Figure 3).

- Santa Ana River spreading basins. A \$35 million project is underway to expand and enhance stormwater recharge at an existing recharge site near the headwaters of the Santa Ana River. It is a joint project between Riverside Public Utilities, San Bernardino Valley Municipal Water District, San Bernardino Valley Water Conservation District and Western Municipal Water District. Once completed, up to 80,000 acre feet of stormwater water per year will be diverted and recharged into the groundwater basin to improve water supply reliability, protect water quality,

and help restore and improve ecosystems.

- Coachella Valley flood protection. The Coachella Valley is an arid desert region averaging less than three inches of rain per year. However, the surrounding mountains are subject to much higher rainfall rates which can produce unpredictable, damaging, and even deadly flash flooding events throughout the Coachella Valley. To protect the region from flooding, the Coachella Valley Water District maintains nine stormwater retention basins (approximately 330 acres), 73 miles of flood control dikes, and over 100 miles of swales and ditches designed to capture and convey stormwater.

- Coachella Valley Water District’s earthen percolation pond groundwater replenishment facilities. Two of these facilities are located adjacent to jurisdictional waters, and all four are located in a flood plain and percolate Colorado River water. Due to their location in the flood plain and adjacency to jurisdictional waters, these facilities are often altered by storm flows and require earth moving work to maintain functionality and efficiency. Additionally, these facilities are instrumental to life in this desert climate because they replenish the primary water supply.

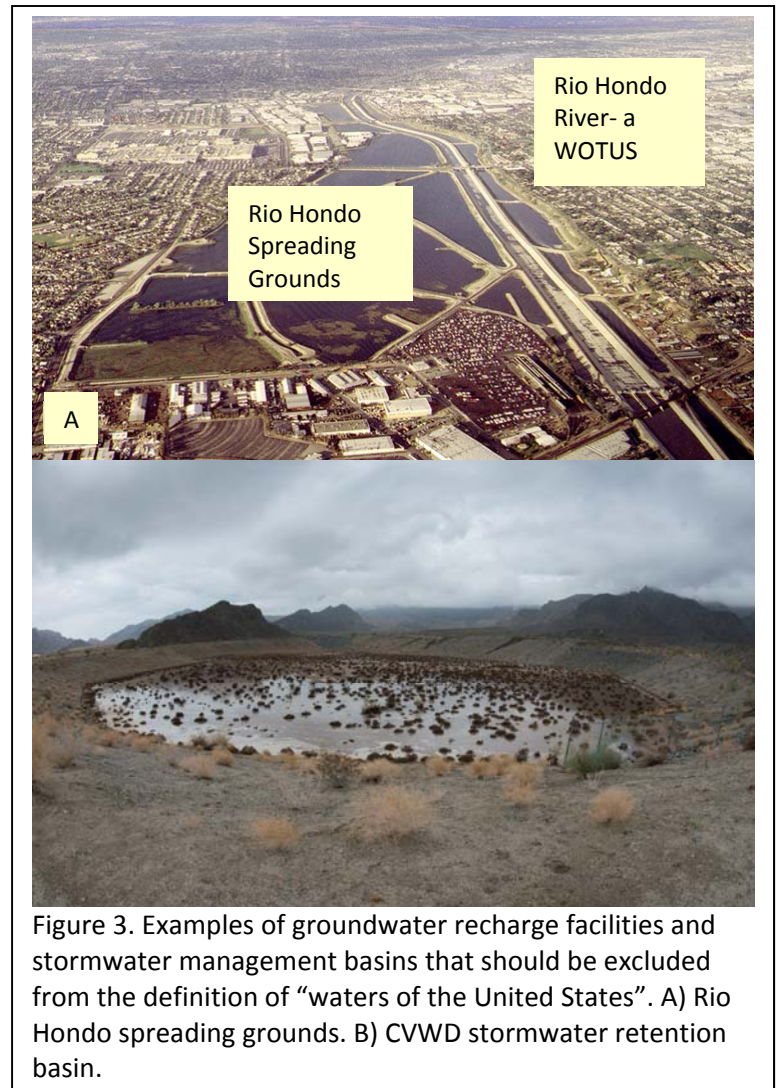


Figure 3. Examples of groundwater recharge facilities and stormwater management basins that should be excluded from the definition of “waters of the United States”. A) Rio Hondo spreading grounds. B) CVWD stormwater retention basin.

- The Rio Hondo Spreading Grounds next to the Rio Hondo River in the Central Basin of Los Angeles County. The Rio Hondo River is a concrete drainage channel classified as a WOTUS. The spreading grounds are filled by flowing stormwater, recycled water and/or imported water down the river channel and moving it into the spreading grounds. Both the river and spreading grounds have water in them only during storm events or when a deliberate decision is made to move water down to or into them.

- Recharge in Cactus Basins. San Bernardino Valley Municipal Water District is working in partnership with the San Bernardino County Flood Control District and

West Valley Water District to facilitate recharge of State Water Project (SWP) water in the Cactus Basins for replenishment of the Rialto – Colton Groundwater Basin. The project consists of modifications to the existing Lytle Creek Turnout, a hydroelectric generation unit, and dual-purpose pipelines to provide flood control and recharge benefits at an estimated cost of \$6 million. Initially, the goal for SWP recharge in the Cactus Basins is 7,000 AFY.

- The Riverside North Aquifer Storage & Recovery Project is designed to capture and recharge stormwater and facilitate State Water Project recharge to the Rialto-Colton and Riverside groundwater basins for subsequent extraction and use. The project would have the capacity to divert up to 200 cubic feet of water per second between the in-channel, off-channel, and diversion facilities. The centerpiece of the project is an inflatable dam measuring approximately 810 feet long across the Santa Ana River by 6 feet high. Project proponents include San Bernardino Valley Municipal Water District, the Riverside Public Utilities, and Western Municipal Water District.
- The Cañada Gobernadora Multipurpose Basin project (“Gobernadora Basin”) is located within an unincorporated portion of southeastern Orange County, just south of the community of Coto de Caza in Santa Margarita Water District. The proposed basin will capture and naturally treat urban runoff and storm flows, and use that water to help meet irrigation demands in the nearby community. The Gobernadora Basin project will consist of a storm detention basin and a natural treatment system, a system to capture and divert flows to the wetlands, a pump station, and a pipeline to deliver flows to the Portola Reservoir, a recycled water reservoir located in Coto de Caza.
- Yucaipa Basin Recharge. This is a joint project between San Bernardino Valley Municipal Water District, San Bernardino County Flood Control District, South Mesa Water Company, Yucaipa Valley Water District, Western Heights Water Company and the City of Yucaipa. The project will involve the capture and recharge of local stormwater and imported water in, and adjacent to, natural streams in the Yucaipa Basin to increase water supply reliability and protect water quality.

Justice Scalia’s opinion in *Rapanos* focused on the phrase “adjacent wetlands,” and his opinion supports the facilities described above being excluded from CWA jurisdiction. In that case, wetlands were jurisdictional if:

First, that the adjacent channel contains a “wate[r] of the United States,” (*i.e.*, a relatively permanent body of water connected to traditional navigable waters); **and second**, that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.” *Rapanos*, 547 U.S. at 742 (emphasis added).

All of the examples described above fail the second test. It is easy to tell where the water ends and the constructed facilities begin. ACWA requests all water infrastructure, such as recycled water facilities, groundwater recharge basins, stormwater retention basins, and constructed wetlands, adjacent to “waters of the United States” be excluded from jurisdiction under the

revised WOTUS definition even when those areas have or have been allowed to develop the three characteristics that make a water body a wetland, including characteristic soils, and wetland vegetation and aquatic species.

3. Consistent with the CWA and Justice Scalia’s Approach, Desert Washes, Dry Arroyos, and other features are not “waters of the United States”

Ecosystems in the arid west are different from wetter ecosystems in the eastern United States. For example, desert vegetation is very slow to recover when disturbed. Vegetative recovery time in the desert can take hundreds of years given the slow growth rates of desert climax vegetation. This being the case, many desert “washes” scoured by extreme weather events in the past may not have experienced active flowing water for quite some time. For example, many washes in the Mojave Desert are little more than a slight depression, yet they are classified as “waters of the United States” (Figure 4). Given the infrequent contribution of stormwater runoff from many desert washes throughout the arid west, it would be reasonable to designate that certain washes only be regulated under a predetermined frequency of flow.



Figure 4. Typical example of a wash in the Mojave Desert. It is currently considered a “water of the United States.”

Justice Scalia railed against this expansive definition of “waters of United States,” writing:

In sum, on its only plausible interpretation, the phrase “the waters of the United States” includes only those relatively permanent, standing or continuously flowing bodies of water “forming geographic features” that are described in ordinary parlance as “streams,... oceans, rivers [and] lakes.” See Webster’s Second 2822. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. *Rapanos*, 547 U.S. at 739.

This reading of “waters of the United States” interprets the statutory term in accordance with its “ordinary meaning.” See *Sebelius*, 133 S. Ct. at 1889. For the reasons stated in Justice Scalia’s opinion, ephemeral streams do not fall within this ordinary meaning of WOTUS. The rulemaking should also be based on best available science focused specifically on answering questions about relative permanence, and standing or continuously flowing bodies of water that would inform how these terms relate to traditional navigable uses. Any new scientific studies should include a field evaluation designed to capture the variability in waters across the United States as opposed to just a literature review.

ACWA requests the Agencies' revised definition of "waters of the United States" clarify that it is a threshold requirement that any WOTUS within desert or arid regions be a relatively permanent, standing or continuously flowing body of water and asks that the Agencies reissue all guidance and field documents describing them as such. ACWA also requests that the Agencies' revised definition of WOTUS clarify that relatively permanent, standing or continuously flowing bodies of water that function as water supply infrastructure, such as drinking water reservoirs and aqueducts, are excluded from the definition of WOTUS.

C. LEGAL ANALYSIS

1. ACWA's Requests are Consistent with the CWA and Judicial Record

As noted above, it is essential that any revisions to the definition of "waters of the United States" are consistent with the text of the CWA and its implementing regulations. 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

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].

[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)].

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.) Absent specific direction from Congress to reach further, this is the highwater mark of federal jurisdiction.

In *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985), the Supreme Court found that direction in the statements of Representative John Dingell and Senator Edmund Muskie when the Clean Water Act was enacted. The lawmakers described the Clean Water Act’s intent to reach waters that “in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, [form] a continuing highway over which commerce is or may be carried” 118 Cong. Rec. 33699 (1972); 1972 Act Leg. Hist., v. 1, at 178 (Muskie statement), and “serve as a link in the chain of commerce among the States as it flows in the various channels of transportation.” 118 Cong. Rec. 33756-57 (1972); 1972 Act Leg. Hist., v. 1, at 250 (Dingell statement).

Senator Muskie described the reach of the term “waters of the United States” in terms of the waters’ use as a highway of commerce, as described in *The Daniel Ball*, *supra*, 77 U.S. at 563-65; and *Appalachian Elec. Power Co*, *supra*, 311 U.S. at 407, 118 Cong. Rec. 33699 (1972); 1972 Act Leg. Hist., v. 1, at 178. (Muskie statement); and both men clarified that any water serving as a channel of interstate commerce or susceptible to such use would be classified as “waters of the United States” under the Act.

In the absence of specific limitations in the Clean Water Act itself, the Supreme Court held that wetlands with a direct surface connection to traditional navigable waters (those used for commerce) can reasonably be classified as “waters of the United States” and that the Corps had not abused its discretion in that case. (*United States v. Riverside Bayview Homes*, 474 U.S. 121, 139 (1985).)

Bayview Homes, *SWANNC* and *Rapanos* were each decided in the context of undeveloped wetlands where there is no explicit direction in the Act on the scope of jurisdiction. In contrast, sections 101(g), 402, and 505 all direct the federal government to take a hands off approach to water supply facilities. Nonetheless, differentiating between man-made or man altered facilities and navigable waters has always been difficult. When the Supreme Court has considered the issue, it has 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 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.

The text of the CWA and case history support ACWA’s request to exclude water supply infrastructure and desert features found throughout arid regions from the definition of “waters of the United States.” ACWA’s request preserves the longstanding federal-state framework in which the federal government does not impede on states’ authority to allocate water within their jurisdictions. As discussed previously, this request is also consistent with Justice Scalia’s opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). In that case, the Court considered whether various wetlands connected to ditches or man-made drains that were geographically distant from traditional navigable waters qualified as WOTUS. Justice Scalia found they did not and focused his rationale on the distinction between waters that are streams, lakes and rivers in the “ordinary parlance” and man-made and man-altered water courses and channels. (*Id.* at 739.) The water supply facilities and desert features discussed in this comment letter do not meet the “ordinary parlance” standard and should be specifically excluded from the definition of “waters of the United States” in future rulemaking.

D. CONCLUSION

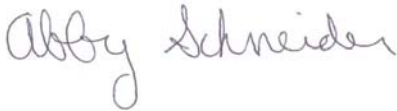
ACWA appreciates the opportunity to provide comments as the Agencies begin the process to develop a new definition of “waters of the United States”. During the prior rule development process, ACWA also requested the exemptions discussed in this letter. The Agencies considered ACWA’s concerns, and included the following exemptions in the Clean Water Rule: “Ditches with intermittent flow that are not a relocated tributary or excavated in a tributary.... Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land....[and] Wastewater recycling structures constructed in dry land; detention and retention basins built for wastewater recycling; groundwater recharge basins; percolation ponds built for wastewater recycling; and water distributary structures built for wastewater recycling.”

Unfortunately, these exemptions do not ensure that ACWA's members' water supply conveyance and storage facilities will not be subject to CWA jurisdiction. To help water agencies continue to provide safe and reliable water, ACWA recommends the following:

- Water conveyance systems, including aqueducts and ditches, be excluded from the revised definition of "waters of the United States";
- Ephemeral streams, such as desert washes and dry arroyos, be excluded from the revised definition of "waters of the United States", and the Agencies should reissue all guidance and field documents describing them as such; and
- Water infrastructure, such as recycled water facilities, groundwater recharge basins, stormwater retention basins, and constructed wetlands, **adjacent** to "waters of the United States" should be excluded from jurisdiction.

Addressing the specific concerns presented in this letter is consistent with the CWA and its implementing regulations, as well as the ruling by Justice Scalia in *Rapanos* and will help ensure water quality is protected without imposing unnecessary new burdens on the public water agencies. Should you have any questions, please do not hesitate to contact Abby Schneider, ACWA's Senior Federal Relations Representative, at 202-434-4760 or by email at aschneider@sso.org.

Sincerely,

A handwritten signature in cursive script that reads "Abby Schneider". The ink is dark and the signature is fluid and legible.

Abby Schneider
Senior Federal Relations Representative