Federal Environmental Law and Regulation Update

Texas City Attorneys Association Summer Conference

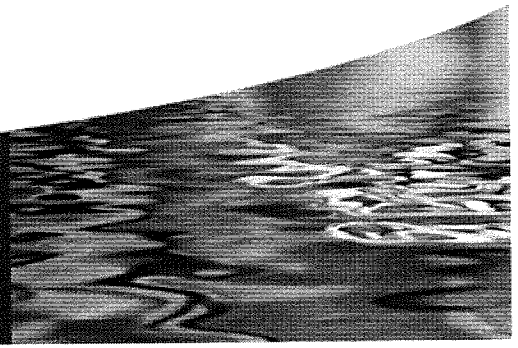
Austin Lost Pines Resort

June 17, 2015

PRESENTED BY

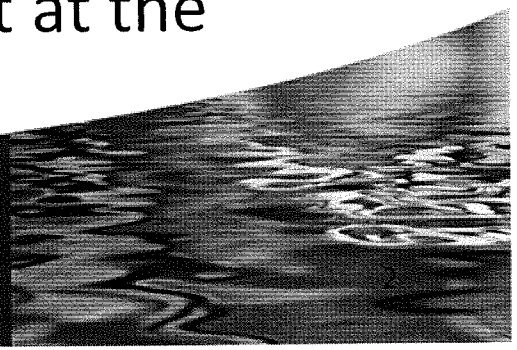
Shawn Hagerty

Best Best & Krieger LLP



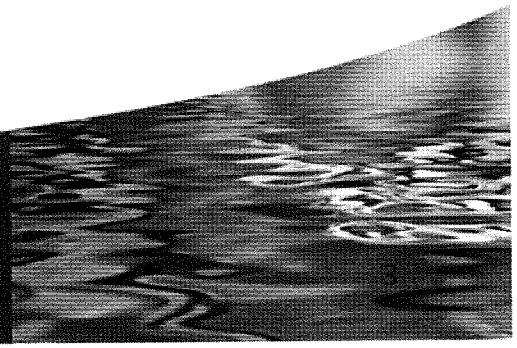
The Current Federal Legal and Regulatory Context

- Congress
- The Executive Branch
  - EPA's Strategic Plan
- The Judiciary
- Implications for Cities
  - Erosion of Local Control
  - Increased Local Costs and Liability
  - Need for Continued Local Involvement at the Federal Level



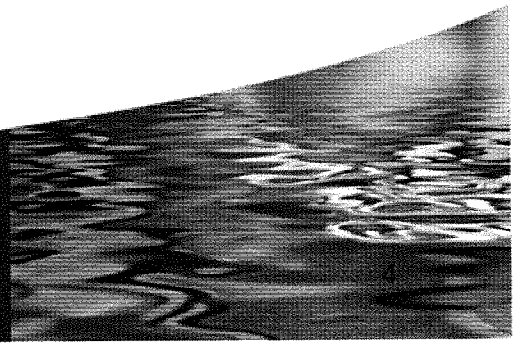
Key Environmental Law and Regulatory Areas for Discussion

- EPA's Administrative Policy, Priorities and Trends
- Water and Wastewater
- Air Quality
- Land and Species



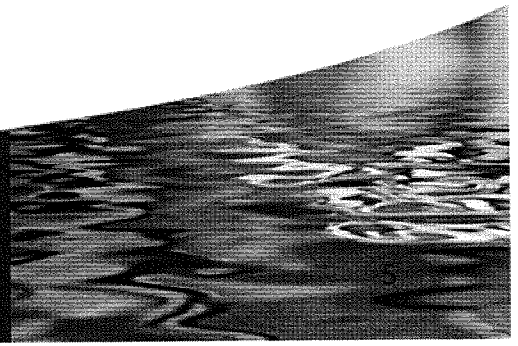
EPA's Administrative Policy, Priorities and Trends

- EPA's 2014-2018 Strategic Plan
  - "Promote Sustainable and Livable Communities"
  - "Climate Change Adaptation"
- Environmental Justice 2020 Plan
- NPDES Electronic Reporting Rule
- Funding and Tax Policy
  - EPA's Center for Environmental Finance
  - Public – Private Partnerships
  - Tax-Exempt Municipal Bonds
  - Tax on Green Infrastructure



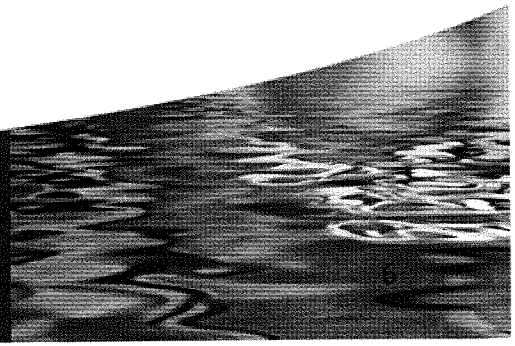
Water and Wastewater

- Clean Water Rule
- Other Water Quality and Stormwater Issues
- Wastewater
- Water Systems, Groundwater and Drinking Water



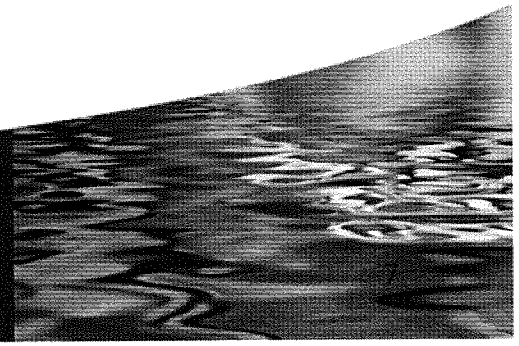
Clean Water Rule

- Final Clean Water Rule Issued by EPA and ACOE on May 26, 2015
- Final Rule Effective 60 Day After Publication in the Federal Register
- Likely Legal Challenges
- Congressional Attempts to Block Implementation
  - HR 1732, HR 2028, S 1140



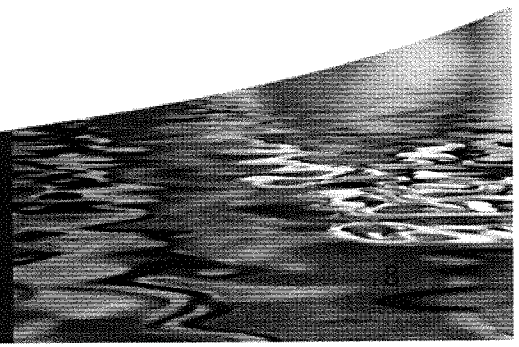
Clean Water Rule 101

- Background and Perceived Need for Rule
  - Supreme Court Cases
    - *U.S. v. Riverside Bayview Homes*
    - *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineering (SWANCC)*
    - *Rapanos v. U.S*
  - Regulatory Uncertainty and Cost
  - Demands for Clarity
  - Evolving Science on Connectivity



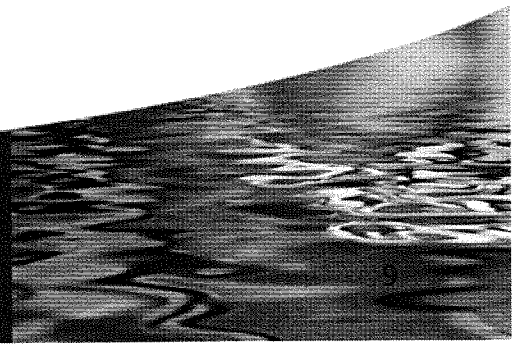
Clean Water Rule 101

- Framework for Final Rule
  - Per Se Jurisdictional Waters
  - Per Se Non-Jurisdictional Waters
  - Water that are Jurisdictional based on a Case-by-Case, Significant Nexus Analysis (Newly Defined)
- Final Rule Attempts to Address Areas of Concern to Cities
  - Stormwater Control Features
  - Wastewater Recycling Structures



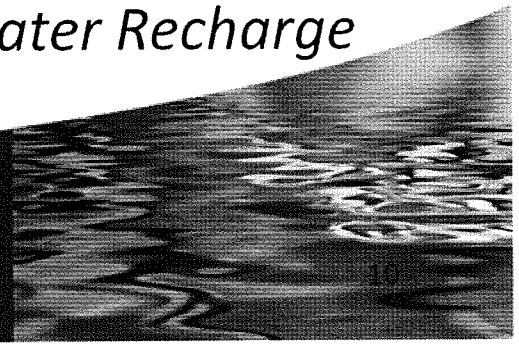
Clean Water Rule 101

- Per Se Jurisdictional Waters
  - Traditional Navigable Waters and Impoundments
  - Tributaries (Newly Defined)
  - Adjacent Waters (Newly Defined)



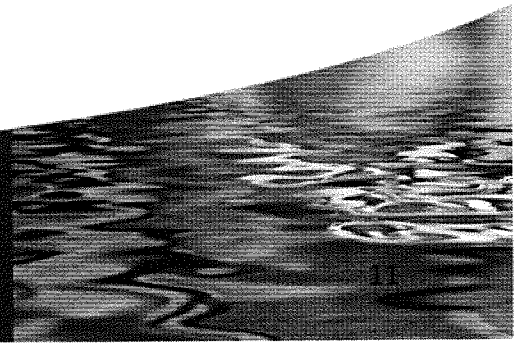
Clean Water Rule 101

- Per Se Non-Jurisdictional Waters
  - Waste Treatment Systems
  - Prior Converted Cropland
  - Ditches
    - Ephemeral Flow and not Relocated Tributary
    - Intermediate Flow and not Relocated Tributary
    - Ditches that are Tributary to TNW
  - Specific Features
  - Groundwater
  - *Stormwater Control Features Constructed to Convey, Treat, or Store Stormwater that are Created in Dry Land*
  - *Certain Wastewater Recycling and Groundwater Recharge Facilities*



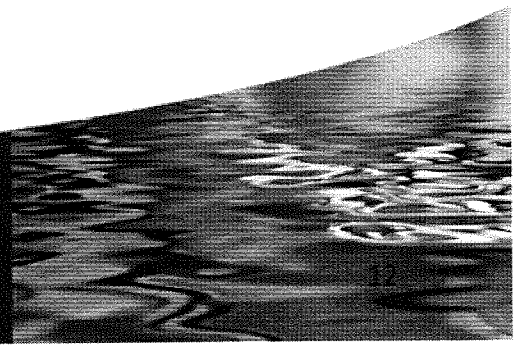
Clean Water Rule 101

- Case-By-Case Waters
  - Specific Waters With A Significant Nexus to TNW
    - Example: Texas Coastal Prairie Wetlands
    - Definition of Significant Nexus
  - Waters Within the 100-year Floodplain (Newly Defined) of TNW or Located Within 4,000 feet of the High Tide Line or Ordinary High Water Mark of TNW if Water Has A Significant Nexus



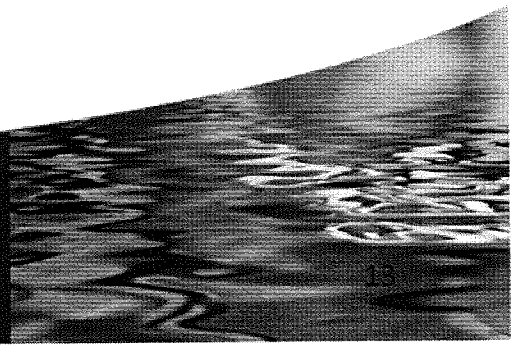
Clean Water Rule Implications

- Expansion of Federal Power or Simply Greater Clarity of Existing Power?
- Implications for Municipal Infrastructure
- Implications for Local Control and Local Land Use
- Increased Cost for Municipalities and Development



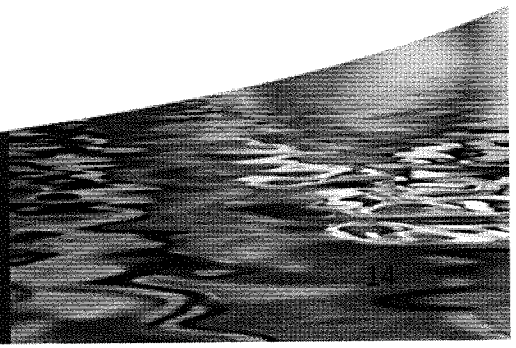
Federal Water Quality Standards

- EPA's Water Quality Standards Regulatory Clarifications
- EPA's Human Health Ambient Water Quality Criteria
- Other Water Quality Standards Issues:
  - Selenium
  - Emerging Contaminants
  - Bacteria
  - Nutrients
- TMDL Program



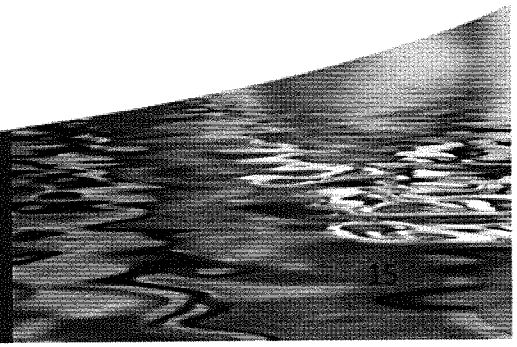
Stormwater

- What Happens After the Failed Stormwater Rule?
  - No Baseline Post-Construction Requirements
  - Case-by-Case, Permit Based Approach Rather than National Rulemaking
- Maximum Extent Practicable
- Integrated Planning



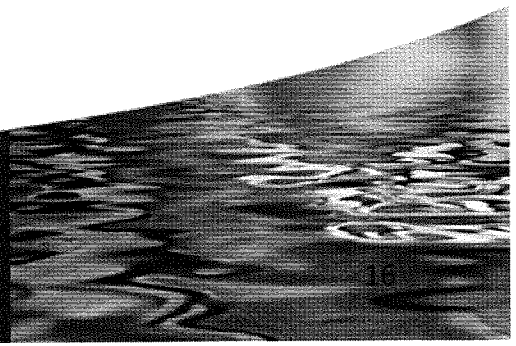
Other Important Clean Water Act Issues

- Permit Shield Cases
- EPA Veto Cases



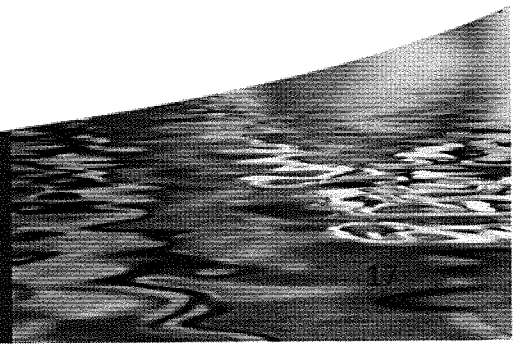
Wastewater

- Dental Amalgam Separator Rule
- Ebola Virus and other Health Issues
- Federal Implementation Plan for the Sewage Sludge Incineration Rule
- Consent Decrees and Integrated Planning



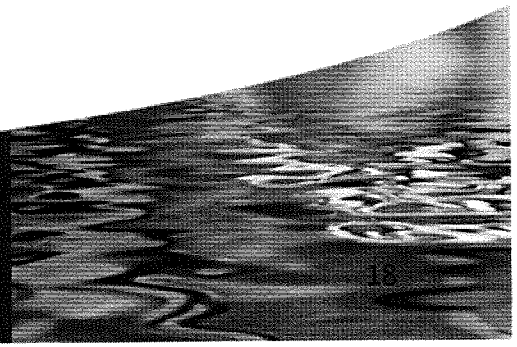
Water Systems, Groundwater and Drinking Water

- Water Transfers Rule
  - 2008 Rule
  - *Trout Unlimited* Case
- Fracking
  - BLM Rule
  - H.B. 40
- Safe Drinking Water Act
  - Arsenic
  - Chromium 6
- Desalination
- Drought Legislation



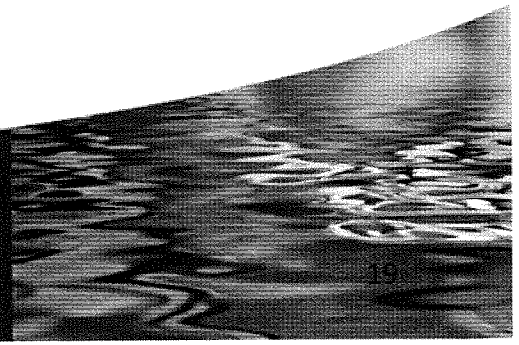
Air Quality

- Utility GHG Rules
- National Ambient Air Quality Standards for Ozone
- National Ambient Air Quality Standards for Lead
- State Implementation Plans
  - EPA Order to 36 States to Remove Start-up, Shutdown and Malfunction Exemption
  - Texas Regional Haze Plan
- New Source Performance Standards



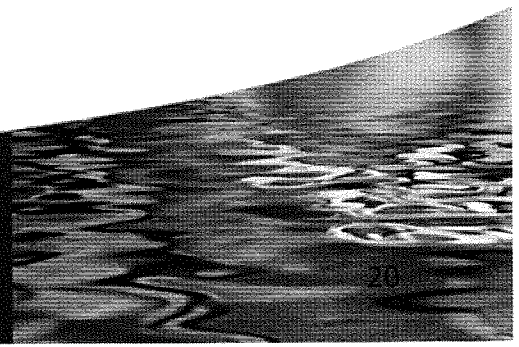
Land and Species

- Biosolids Litigation
  - Right to Farm
  - Application Bans
- ESA
  - Critical Habitat and Species
    - Yellow-Billed Cuckoo
    - Georgetown Salamander
    - Prairie Chicken and Sage Grouse
  - Implementation Agreements
- CERCLA

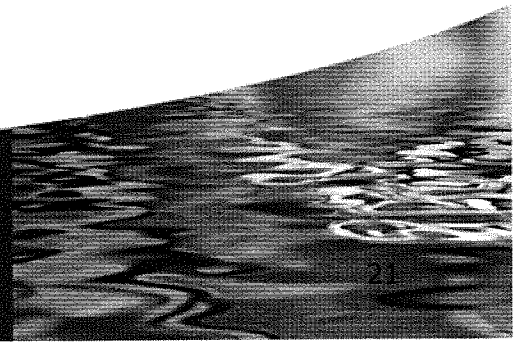


Conclusion

- Continued Increase in Federal Environmental Law and Regulation
- Continued Increase in Local Compliance Costs
- Continued Erosion of Local Control
- Need to Follow These Issues Closely to Avoid or Minimize Loss of Local Control



Questions



Thank you for attending.

Shawn Hagerty

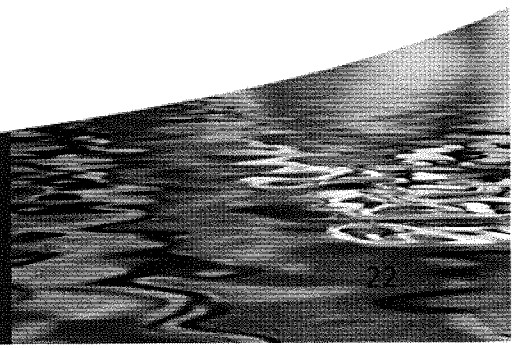
Partner

Best Best & Krieger LLP

Phone: (619) 525-1327

Email: shawn.hagerty@bbklaw.com

www.bbklaw.com



BB&K WRITTEN TESTIMONY REGARDING DRAFT CLEAN WATER RULE

SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE

"LEGISLATIVE HEARING ON S. 1140, THE FEDERAL WATER QUALITY PROTECTION ACT"

TUESDAY, MAY 19, 2015

10:00 A.M.

DIRKSEN 406

Written Testimony

of

J.G. Andre Monette

BEST BEST & KRIEGER LLP
2000 Pennsylvania Avenue N.W.
Suite 5300
Washington, DC 20006

INTRODUCTION

The United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("ACOE") have issued a proposed rule redefining the term "waters of the United States" ("Proposed Rule"). The Proposed Rule will increase the number of waters classified as "waters of the United States" As drafted, the Proposed Rule will hinder the progress made to date under the Clean Water Act by blocking projects that benefit the environment, interrupting or interfering with existing water supply, waste treatment, transportation and flood control operations, and by increasing liability for public agencies.

It is with these concerns in mind that the following public agencies have requested that we submit testimony in support of S.1140:

- The Western Municipal Water District
- The Santa Margarita Water District
- The City of Arcadia, California
- The City of Lake Forest, California
- The City of Santa Ana, California
- The City of Laredo, Texas
- The City of Roseville, California
- The City of Santa Maria, California
- The City of Ontario, California
- The City of Corona, California
- The City of Woodland, California
- The Riverside County Transportation Commission
- The San Bernardino County Association of Governments
- The Elsinore Valley Municipal Water District
- The Santa Fe Irrigation District
- The Sweetwater Authority

The primary area of concern for coalition members is the extent to which manmade ditches, channels, treatment facilities, impoundments and terminal reservoirs would be considered waters of the United States under the Proposed Rule. This is an issue of the utmost importance to government agencies because the Proposed Rule could capture much of the critical infrastructure local governments use to provide drinking water, keep streets free of flood waters, treat wastewater, and develop new uses for recycled water. S.1140 would require EPA to go back and revisit whether these impacts are appropriately avoided in the Proposed Rule. The following aspects of the Proposed Rule are of particular concern:

- Definition of "Tributary" – The Proposed Rule will reclassify manmade channels that discharge to traditional navigable waters as "waters of the United States." This change will capture aqueducts, storm drain systems, and other manmade channels. Under the Clean Water Act, these conveyances are point sources that discharge into waters of the United States rather than waters of the United States themselves. Designation as waters of the United States will interfere with or prevent manmade channels from being used to convey water whether it is in a water supply, flood control, or waste treatment capacity.

- Definition of "Adjacent" – The Proposed Rule will classify waters that exist far beyond the ordinary high water mark ("OHWM") of a navigable water as waters of the United

States, thereby capturing treatment wetlands, percolation ponds and other manmade features and expanding the footprint of existing waters of the United States. As with the definition of tributary, this proposed change will also interfere with existing and future water supply, flood control, waste treatment and transportation projects. Moreover, the Proposed Rule's basis for expansion of the definition of "adjacent" is based on an inappropriate reading of the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006) and needs to be revised.

- Definition of "Significant Nexus" – The Proposed Rule will classify water bodies that have only a biological connection to traditional navigable waters as waters of the United States. The proposed change will reclassify waters that exist far beyond the OHWM as waters of the United States and capture treatment wetlands, percolation ponds and other manmade features.

- Application to terminal water supply reservoirs – The Proposed Rule will potentially classify many water supply reservoirs as waters of the United States. Throughout the west, many reservoirs are constructed on canyons or gullies that at one time may have been bisected by an ephemeral stream. Many such reservoirs simply act as forebays to surface water treatment plants, storing imported water that is not native to the underlying stream. They are isolated and/or lack any significant nexus to waters of the United States in the watershed where the reservoir is located. Classifying these reservoirs as waters of the United States will interfere with water operations as permitting and other water quality requirements could severely limit the utility of the reservoirs.

We believe that EPA and the ACOE have an interest in crafting a rule that fully protects the waters of the United States but at the same time avoids regulatory inconsistencies where compliance with inappropriately designated requirements is not attainable. We further believe that EPA and the ACOE are committed to developing a rule that avoids such pitfalls. To that end, we support S.1140 and submit the following comments as to why adherence to the requirements of the bill and its companions in the House of Representatives are necessary:

I. PUBLIC AGENCY CONCERNS

The Proposed Rule will unquestionably expand number of waters that are classified as waters of the United States. While many would applaud this action on the part of EPA, it will hinder the progress made to date under the Clean Water Act by blocking projects that benefit the environment, interrupting or interfering with existing water supply, waste treatment, transportation and flood control operations, and by increasing liability for public agencies.

A. HINDERING PROJECTS THAT BENEFIT THE ENVIRONMENT

Federal regulations prohibit states from adopting "waste transport or waste assimilation as a designated use" for waters of the United States. (40 C.F.R. § 131.10(a).) As a result, States, including California, will not allow water bodies classified as waters of the United States to be used as treatment systems if the basic fishable swimmable standard is not attained in all parts of the water body. Because the Proposed Rule will convert off-stream treatment, water supply and

flood control projects into waters of the United States this aspect of federal law will prevent or hinder their use.

For example, if the Proposed Rule converts existing portions of municipal separate storm sewer system ("MS4") or other manmade drains into waters of the United States, those portions of the MS4 will no longer be available for implementation of best management practices ("BMPs") or treatment controls that will benefit downstream traditional navigable waters. The Proposed Rule will thereby force dischargers who operate MS4s or other non-jurisdictional conveyances to attain Water Quality Standards within their operating systems. Such compliance is in many cases infeasible and will force dischargers into non-compliance. Moreover, dischargers will not be able use treatment controls within the system, and will have far fewer tools to implement clean water goals. That was not the intent of the Clean Water Act.

1. *Treatment wetlands*

Treatment wetlands provide a substantial benefit to the environment. They improve water quality and provide habitat for a range of wildlife. Indeed, (as cited throughout the preamble to the Proposed Rule) the Supreme Court has noted the beneficial role that wetlands can play by treating water before it enters traditional navigable waters or preventing it from getting there in the first place. (*Rapanos* at 786) Public agencies look to treatment wetlands to attain compliance with their own Clean Water Act National Pollutant Discharge Elimination System ("NPDES") requirements and to benefit the environment as a whole.

Public agencies build treatment wetlands in several instances. The first is when a project will impact or take existing wetlands and new ones are constructed as mitigation. The second instance is when an existing storm drain or other stormwater point source discharges into a traditional navigable water. The agency may consider constructing a wetland at the point of discharge (but outside of the waters of the United States) or upstream in the storm drain to provide treatment to dry weather and other flows before they discharge into the traditional navigable waters.

The third instance involves wetlands created as green infrastructure upstream of a traditional navigable water to reduce pollutant discharges from areas of new construction. These swales and other wetlands serve a treatment purpose in precisely the same manner as a constructed wetland at the point of discharge. They trap sediment, hydrocarbons, metals and other pollutants before they reach the storm drain system and long before they enter a traditional navigable water. EPA and most state water quality agencies have been encouraging this type of infrastructure for over a decade.

Lastly, water purveyor and waste treatment operators have played crucial roles creating wetlands to provide additional treatment for their POTW discharges. This includes constructing wetlands and other ponds as part of the treatment system. While there is currently an exemption for wetlands that are deemed part of the treatment system, that exemption needs to be clarified and reiterated to ensure that constructed wetlands that are part of a treatment system are not captured by the Proposed Rule.

2. *Groundwater Recharge*

California and much of the West are experiencing an historic drought. The Proposed Rule could halt or make more expensive water supply projects including projects that will increase the amount of recycled water put to beneficial use in the State.

For example, Western Municipal Water District is currently planning a project to construct recharge ponds over the Arlington Groundwater Basin in Western Riverside County, California. This project would capture storm water and urban runoff and redirect it to percolation basins that would facilitate groundwater recharge. The percolation basins could also be filled with non-potable and recycled water depending on availability and need. Developing this local water resource would help California to sustainably support its water supply needs during drought conditions.

Under the Proposed Rule, Western's percolation ponds could be considered waters of the United States because they are very similar to wetlands and they will have a hydrologic connection to the Santa Ana River. As such, a Clean Water Act section 404 or other NPDES permit could be required for maintaining the ponds once they are constructed. Moreover, the percolation basins will be located adjacent to (and will be connected to) natural drainage ditches and/or manmade channels that convey storm water and urban runoff. These ditches and channels could be considered waters of the United States under the Proposed Rule, and could make Western's proposed percolation ponds waters of the United States by virtue of their connection and proximity to both the ditches and the Santa Ana River.

The cost to construct recharge basins is significant and must be factored into the cost to produce and deliver the water. In the case of the Arlington Recharge Project the budget is $10 million. The project was made economically feasible by the contribution of local and State grants amounting to $2 million. If the project is reclassified as waters of the United States it will be subject to a range of permitting requirements. Limitations could also be imposed on the quality of the source water used for the project. The additional burden of obtaining federally required permits, and potential limitations imposed based on the quality of source water could make the project infeasible.

3. *Recycled water*

The Proposed Rule will hinder recycled water projects. Water supply agencies rely on percolation ponds like those described above to add recycled water to the potable and non-potable supply. If man-made percolation ponds are classified as waters of the United States, then the percolation ponds will be required to attain designated Water Quality Standards. Though highly clean, recycled water can have TDS and nutrient levels that are higher than what regulatory agencies including EPA have determined is necessary for waters of the United States to attain their designated Water Quality Standards. If percolation ponds are considered waters of the United States, discharges of recycled water into the percolation ponds could require an NPDES permit, and the discharge itself could be prohibited because of high TDS and other constituent levels in the source water.

These restrictions will hinder the use of recycled water and put limits on the ability of water purveyors to develop new, responsible supplies. In Southern California, every gallon of recycled water that can be used is a gallon that does not have to be brought south through the Sacramento San Joaquin Delta or taken from the Colorado River. Likewise, in south Texas, every gallon of recycled water used allows more water to stay in the Rio Grande. There are very real ecological benefits to increasing the use of recycled water across the country, and the Proposed Rule could hinder those efforts.

4. *Other projects*

Other projects in the flood plain of a traditional navigable water or a tributary to a traditional navigable water will also be hindered if isolated waters that are not currently subject to the Clean Water Act are in the project path. The Proposed Rule will extend jurisdiction to those waters that though hydrologically isolated simply exist in the floodplain of a traditional navigable water or a tributary to a traditional navigable water.

Specifically, the proposed changes to the definitions of "adjacent waters" and "neighboring" will reach numerous waters that were previously outside the jurisdiction of the Clean Water Act. We request that ACOE's jurisdiction be limited to the ordinary high water mark ("OHWM") of traditional navigable waters and natural streams tributary thereto. A broad definition that covers multiple types of features that may or may not have an OHWM will only create confusion. The rule notes that uplands within floodplains are never waters of the U.S., but without requiring the physical presence of a defined OHWM, jurisdictional areas could easily be expanded.

Without question, vernal pools, prairie potholes, and other isolated waters that are not currently waters of the United States will exist in the path of public infrastructure projects. Making these features waters of the United States will trigger extensive permitting requirements that could limit or altogether prevent construction of new roads, pipelines and aqueducts.

B. INTERFERENCE WITH EXISTING OPERATIONS

If the Proposed Rule is adopted without appropriate exclusions, the Proposed Rule will have a profound negative impact on the existing operations of the Nation's water supply, flood control, transportation and waste treatment infrastructure. For one, throughout the arid west, water is moved vast distances from one traditional water of the United States to another to provide drinking water for cities and irrigation water for farmers. A strict reading of the Proposed Rule could make aqueducts and irrigation canals waters of the United States. Along with that designation comes the requirement to attain Water Quality Standards, and to obtain Clean Water Act section 404 permits.

Of even greater concern is the possibility that the EPA or a state regulatory agency would adopt a total maximum daily load ("TMDL") for an aqueduct, percolation pond or other water supply conduit on the premise that the conveyance is a water of the United States that is failing to meet applicable Water Quality Standards. A TMDL could in turn result in limitations on discharges into (and therefore use of) the aqueduct. 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.

If the aqueducts that DWR and other water purveyors rely on get reclassified as waters of the United States, it will only be a matter of time before similar actions are taken to control water quality within the aqueducts. Any limitations imposed would further constrain water availability in Southern California and limit the ability of local water districts and cities to provide supplies to their residents.

Similarly, if terminal reservoirs are considered waters of the United States, water supply operators will have significant difficulty operating and maintaining their systems. Removing vegetation and sediment built up in the system will require a 404 permit as well as consultations with 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 reservoir could be at risk. Changes tin 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. If TMDLs are adopted for a terminal reservoir they could eventually limit how and when a water supplier takes water from the system. This is an unacceptable limitation on the use of a man-made water supply facility that would be driven by the overbroad definition of "waters of the United States" included in the Proposed Rule.

Lastly, green infrastructure including but not limited to constructed wetlands, swales and other low impact development BMPs could be classified as waters of the United States under a strict reading of the Proposed Rule. These BMPs are often intentionally built to mimic natural wetlands and either hold water on a perennial basis or provide typical wetland habitat and drain to downstream traditional navigable waters. If green infrastructure BMPs are classified as waters of the United States, cities (and private property owners) who construct and operate them will be required to obtain federal permits to maintain them. Discharges into the BMPs may also require an NPDES permit. This is an outcome that EPA has stated that it does not intend, but under a strict reading of the Proposed Rule, could occur. For that reason, the Proposed Rule needs to be revised.

C. APPLICATION OF CWA 303(d) TO INTERNAL OPERATIONS OF NATION'S WATER SUPPLY, WASTE TREATMENT AND FLOOD CONTROL INFRASTRUCTURE

The Proposed Rule raises the very important distinction between Clean Water Act permitting requirements and whether a water body is a water of the United States. 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. (33 U.S.C. § 1313(c)(2)(A).) 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 process that such uses are not possible. (*See* 33 U.S.C. §§ 1251(a), 1313(c).)

Critically, states are prohibited from adopting "waste transport or waste assimilation as a designated use for any waters of the United States." (40 C.F.R. § 131.10(a).) 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. However it prevents treatment systems that could improve water quality from being constructed within waters of the United States. 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.

What is more, 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 zero sum game between the Waste Load Allocation (limits on NPDES discharges); the 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. So again, even if an NPDES or other permit is not required for a given activity, through the TMDL process, designation of a water body as waters of the United States can result in significant limitations.

The Ninth Circuit Court of Appeals' decision in *Pronsolino v. Nastri*, 291 F.3d 1123 (2002) illustrates the issue. In that case, the EPA imposed TMDLs on a river that was polluted only by non-NPDES sources of pollution. Some 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 the 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. The both the trial court and the Ninth Circuit Court of Appeals sided with the EPA, holding that the CWA's 303(d) listing and TMDLs requirements apply to all waters of the United States regardless of the source of impairment.

Thus the idea that it doesn't 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 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, aqueducts, treatment wetlands, Low Impact Development BMPs, terminal reservoirs, and flood control systems, the designation can be extremely problematic and will have a negative impact on public agency operations across the United States.

D. INCREASED RISK OF THIRD PARTY LIABILITY

Throughout the rulemaking process EPA has continually stated that it does not intend the Proposed Rule to interfere with existing water supply, flood control, waste treatment or transportation infrastructure. Even if EPA's assurances are to be taken at face value, EPA cannot control third parties who have the ability to enforce the Clean Water Act.

We do not dispute or otherwise assail the citizen suit provisions of the Clean Water Act. Citizen enforcement has always played an important role in ensuring that the Act is enforced appropriately and in the interests of the people of the United States. However, when EPA

intends one thing, it cannot control third parties who may desire another. For that reason it is imperative that the EPA draft the Proposed Rule as if it is to be applied verbatim. Overbroad requirements can and do get misconstrued.

The various iterations of *NRDC v. County of LA* are instructive. In that case, the Natural Resources Defense Council ("NRDC") sued the County of Los Angeles Flood Control District alleging that the County's NPDES permit required strict compliance with Water Quality Standards. The Los Angeles Regional Water Quality Control Board, the agency issued the permit, had previously issued the County a letter stating that a violation of Water Quality Standards would not be considered a violation of the County's NPDES permit. The District Court and the Ninth Circuit Court of Appeals disregarded the Regional Board's assurance to the County and held that the permit's language should be read as if it were a contract. As a result, the County was held liable for the fact that the Los Angeles River routinely violates the designated Water Quality Standards.

The case demonstrates that although EPA may have the best intentions in the application of its Proposed Rule, unless the language is appropriately tailored to EPA's stated goals it can be misconstrued. The current language is simply too broad and as described in greater detail below, must be revised.

II. FLAWED DEFINITION OF TRIBUTARY

The Proposed Rule will define any ditch, channel, or other open conveyance with perennial flow as waters of the United States. The Proposed Rule states:

> (5) Tributary. The term tributary means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. In addition, wetlands, lakes, and ponds are tributaries (even if they lack a bed and banks or ordinary high water mark) if they contribute flow, either directly or through another water to a water identified in paragraphs (a)(1) through (3) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more man-made breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands at the head of or along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A tributary, including wetlands, can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, lakes,

ponds, impoundments, canals, and ditches not excluded in paragraph (b)(3) or (4) of this section.[1]

The proposed definition will have negative impacts for the operation and function of the nation's water supply and flood control systems. These systems are already "point sources" under the Act and subject to separate regulation. Changing them into waters of the United States will confuse the compliance standard that is required within the system and expose public agencies to liability.

A. IMPACTS TO WATER SUPPLY, WASTE TREATMENT, TRANSPORTATION AND FLOOD CONTROL INFRASTRUCTURE

MS4s could be reclassified as tributaries. While portions of many storm drain systems are constructed out of natural drainage, there are a host of manmade drains that were constructed in uplands that would be considered tributaries under the Proposed Rule. This is because they are open ditches with perennial flow that ultimately drain to a traditional navigable water. Perennial flow can come from rain water, urban runoff, or rising groundwater entering road cut drains and other portions of the system. Changing the legal character of these channels will conflict with the plain text of the Clean Water Act which classifies them as point sources. The change will significantly hinder the ability of MS4 operators to develop projects that would normally be constructed within the MS4.

Aqueducts and other water supply canals could be reclassified as tributaries. The Proposed Rule's definition of Tributary would potentially capture water supply infrastructure throughout the West, including canals bringing water from the Colorado River to on-stream water supply reservoirs. The definition could also capture canals and aqueducts that bring water from reservoirs north of Sacramento, through the Sacramento-San Joaquin Delta and into southern California.

Discharges from water supply facilities into traditional navigable waters are generally exempt from the Clean Water Act's NPDES requirements under the Act itself, and EPA's water transfer rule. Nonetheless, if the actual conveyances are classified as waters of the United States, activities within the canals and aqueducts could require a separate permit from the ACOE. Moreover, the Proposed Rule's broad and expansive definition of a "tributary" would potentially trigger the consultation requirements of section 7 of the Endangered Species Act ("ESA"), which provide that federal agencies that propose to take a federal actions that may affect endangered species must consult with the U.S. Fish and Wildlife Service ("FWS"), which is authorized to impose alternatives to avoid such effects. (16 U.S.C. § 1536.)

Percolation ponds and off stream reservoirs could be reclassified as tributaries. Many percolation ponds and off stream reservoirs are constructed in locations where they are near a traditional navigable water (or a tributary) or drain to a traditional navigable water (or tributary). As these ponds will stay wet on a perennial basis, they are susceptible to being classified as tributaries under the Proposed Rule. If the percolation and storage ponds become waters of the United States, water providers will have limited ability to use them for their intended purpose.

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[1] 79 F.R. 22263

Constructed swales, and other green infrastructure could be reclassified as tributaries. EPA has been encouraging cities to require low impact development and hydromodification controls in new development for more than a decade. Green infrastructure BMPs reduce the amount of impervious surfaces and as a result reduce the volume of stormwater and pollutants discharged from developed areas into the waters of the United States. The designs require swales and retention basins, features that can remain wet on a perennial basis and are often intentionally planted with wetland habitat. Such features could be included in the definition of tributary if they have a surface water connection to downstream traditional navigable waters, which most will.

B. AS A MATTER OF LAW, MANMADE WATER SUPPLY, WASTE TREATMENT AND FLOOD CONTROL CHANNELS ARE NOT WATERS OF THE UNITED STATES

Aqueducts, water supply canals, storm drains, agricultural drains, and other manmade conveyances were never intended to be waters of the United States. The Clean Water Act was based on the Rivers and Harbors Act. The Rivers and Harbors Act was designed to prevent the filling of commercial waterways without approval from the ACOE. Congress viewed the Clean Water Act as an extension of the Rivers and Harbors Act to reach more than just those waters that are navigable in fact. This broader applicability has been cited by the Supreme Court.

> Congress' choice of words creates difficulties, for the Act contemplates regulation of certain "navigable waters" that are not in fact navigable. Nevertheless, the word "navigable" in the Act must be given some effect.[2]

The Supreme Court has also recognized that Congress did not intend to reach water and flood control infrastructure if such infrastructure was not navigable in fact:

> In applying the definition to "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody.[3]

There are several reasons why the structure of the Act mandates this outcome. First, the Clean Water Act includes a definition of point source that includes open conveyances that would be classified as tributaries under the Proposed Rule; second the Clean Water Act includes a discharge standard for MS4s that would be nullified if the storm drain system is considered waters of the United States; and third, the Clean Water Act specifically reserves to the states the right to regulate water supplies. Because the Proposed Rule violates these basic, plain text requirements of the Clean Water Act it must be revised.

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[2] *Rapanos*, 779 [internal citations omitted].
[3] *Rapanos*, 734

1. *The plain text of the Clean Water Act precludes treating water supply, waste treatment, and flood control channels as waters of the United States.*

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

The Clean Water Act defines the term "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 § 122.3).[4]

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 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.

[4] 33 U.S.C. § 1631 (14); 40 C.F.R. 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.[5]

Aqueducts, water supply canals, 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 prevents it.

The Supreme Court has addressed this issue on several occasion. In *Rapanos*, Justice Scalia discussed the difference between traditional navigable waters and manmade 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.[6]

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 (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 (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. On either view, however, the lower courts have seen no need to classify the intervening conduits as "waters of the United States."[7]

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[5] 40 C.F.R. 122.26(b)(8)-(9).

[6] *Rapanos* at 736 [internal citations omitted]).

[7] *Rapanos* 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*

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.[8]

Similarly, in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), the Supreme Court held that movements of water within "the waters of the United States" were not discharges from a point source. 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.

The Supreme Court subsequently reached the same conclusion in *Los Angeles County Flood Control District v. NRDC*, __U.S. __, 133 S.Ct. 710 (2013). 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 *Miccosukee*, 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 *Miccosukee* 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.

2. *Defining the MS4 as waters of the United States violates Clean Water Act section 402(p)*

For the same reason that point sources cannot be waters of the United States, an MS4 cannot be considered waters of the United States. When Congress passed the Clean Water Act in 1972, it did not specifically regulate discharges from MS4s. EPA found that MS4 discharges, despite the fact that they met the definition of point sources in the Act were too diffuse and treated them as non-point sources.

In 1977, the NRDC challenged EPA's position in *NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). Eventually the case made its way to the Supreme Court which held that because MS4s met the definition of point source under the Clean Water Act, discharges from the MS4

Paso Gold Mines, Inc., 421 F.3d 1133, 1137, 1141 (2.5 miles of tunnel separated the "point source" and "navigable waters")].

[8] Rapanos at 778-79.

must be regulated under the Act's NPDES program. In response, Congress amended the Clean Water Act in 1987 to explicitly regulate discharges from the MS4.

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 as the Administrator or the State determines appropriate for the control of such pollutants.[9]

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." (42 U.S.C. § 1342(p).) The Act applies this 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. (*Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999).) 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.

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 a flood control system first and since 1987 have also become a treatment system. Attaining Water Quality Standards within the treatment system is not the purpose of the Clean Water Act and a definition of waters of the United States that requires this outcome violates the plain text of the Act.

3. *Congress reserved regulation of water supply infrastructure to the States*

The Clean Water Act (Act), 33 U.S.C. § 1251 *et seq.*, establishes two paramount, overarching goals: (1) prevention of water pollution, and (2) preservation of the states' traditional authority to regulate water and land use. This second goal – preservation of the states' traditional authority to regulate water and land use – is spelled out in Congress' declaration of goals and policy, which states that the Act recognizes the states' "primary

[9] 33 U.S.C. § 1342(p)(3)(B) [emphasis added].

responsibilities and rights . . . to prevent, reduce, and eliminate pollution," and "to plan the development and use . . . of land and water resources." (33 U.S.C. § 1251(b).)

Congress adopted this limitation because the states have traditionally regulated all waters within their jurisdiction, subject only to the federal government's power to regulate navigable waters under its commerce powers. (*United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 (1940) (describing federal power to regulate navigable waters); *The Daniel Ball*, 77 U.S. 557, 563 (1870) (same); *California v. United States*, 438 U.S. 645, 662 (1978) (describing states' traditional authority to regulate water); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 163-164 (1935) (same).)

Many states, particularly in the arid west, are dependent on aquaducts, irrigation canals and other conduits to provide water to a thirsty populace:

- The federal Central Valley Project (CVP) in California, the nation's largest federal reclamation project, consists of dams, canals and other facilities that transfer water from the rivers of northern California to the central and southern parts of the State, in order to serve agricultural, municipal, industrial and other uses. *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 280-283 (1958); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728-736 (1950).

- California's State Water Project (SWP), the analogue of the federal CVP, similarly transfers water from northern California rivers for agricultural, municipal and other uses in other parts of the State. *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82, 98-100 (1982).

- The Metropolitan Water District of southern California, which provides water supplies for the people of southern California, operates a dam on the Colorado River that transfers water through the district's aqueduct to the district's service area, where it is distributed to cities, towns and water districts for urban and other uses. *Metropolitan Water District v. Marquardt*, 59 Cal.2d 159, 171-173 (1963).

- The Newlands Reclamation Project in Nevada—the first federal reclamation project built pursuant to authority of the Reclamation Act of 1902—transfers water from the Truckee River for irrigation uses in the project area located in central Nevada. *Nevada v. United States*, 463 U.S. 110, 115-116 (1983).

- The Central Arizona Project, which was built by the State of Arizona in order to provide Colorado River water for the benefit of the people of Arizona, transfers water from the Colorado River to the cities of Phoenix and Tucson, among others, to meet their domestic and other needs. *Maricopa-Stanfield Irrig. & Drainage Dist. v. United States*, 158 F.3d 428, 430-431 (9th Cir. 1998); *United States v. 0.59 Acres of Land*, 109 F.3d 1493, 1495 (9th Cir. 1997).

- The Colorado-Big Thompson Project, a federal reclamation project in Colorado, transfers water from the western slope of the Continental Divide through a tunnel to the eastern slope of the Rocky Mountains, in order to provide water supplies

> for people in Denver and other areas on the eastern slope. *City of Colorado Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1074 (10th Cir. 2009).

These federal and state water projects have obtained their right to appropriate water pursuant to the water laws of the states where they are located. If the manmade conduits that they rely on to transport water are reclassified as waters of the United States, the projects may be forced to reduce or in some cases cease operations. This is because they may be required to meet Water Quality Standards and TMDLs internally, and because normal maintenance operations could require permits under section 404 of the Clean Water Act which would in turn trigger a review under the Endangered Species Act.

There is no question that certain portions of the above listed projects are already waters of the United States. However, extending that designation to all conduits and canals in the system would substantially increase the regulatory burden on these projects and upset the careful balance struck by Congress on this issue. In other settings, EPA agrees:

> A holistic approach to the text of the CWA is needed here in particular because the heart of this matter is the balance Congress created between federal and State oversight of activities affecting the nation's waters. The purpose of the CWA is to protect water quality. Congress nonetheless recognized that programs already existed at the State and local levels for managing water quantity, and it recognized the delicate relationship between the CWA and State and local programs. Looking at the statute as a whole is necessary to ensure that the analysis herein is consonant with Congress's overall policies and objectives in the management and regulation of the nation's water resources.[10]

To avoid direct conflict with the Congressional limitations in the Clean Water Act, and the Constitutional limitations that reserve regulation of water rights and water supply to the states, EPA must revise the Proposed Rule.

The Clean Water Act limits its intrusion into the states' traditional authority to regulate water by providing that the NPDES program applies only to discharges from a "point source." (*Id.* at §§ 1362(12) [defining "discharge of a pollutant"].) The states are responsible for regulating discharges from nonpoint sources, such as return flows from agricultural runoff. (*Id.* at §1362(14); *Pronsolino v. Nastri*, 291 F.3d 1123, 1126-1127 (9th Cir. 2002); *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1096-1097 (9th Cir. 1998).)

The main provisions of the Act that preserve the states' traditional authority to regulate water, however, are sections 101(g) and 510. Section 101(g) states that Congress' policy is 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," and 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).)

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[10] 73 F.R. 33701)

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 very clear that it shall not be construed as interfering with the states' authority to "allocate quantities of water" or as otherwise as "impairing" or "affecting" their rights to regulate water.

Senator Malcolm Wallop of Wyoming, the principal sponsor of section 101(g), explained during the congressional debates that the provision was intended to ensure that the Act would not impair or supersede the states' traditional authority to regulate water. He stated that the provision "will reassure the State that it is the policy of Congress that the Clean Water Act will not be used for the purpose of interfering with State water rights systems," and that the provision "does seek to clarify the policy of Congress concerning the proper role of Federal water quality legislation in relation to state water law." 123 Cong. Rec. 39211, 39212 (1977). He also stated, however, that the provision does not preclude application of the Act's requirements that have only "incidental" effects on state water laws, stating:

> Legitimate water quality measures authorized by this act may at times have some effect on the method of water usage. ... The requirements of section 402 and 404 permits may incidentally affect individual water rights. Management practices developed through State or local 208 planning units may also incidentally affect the use of water under an individual water right. It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations.[11]

Otherwise, he stated, "the States historic rights to allocate quantity, and establish priority of usage remains inviolate because of this amendment." (*Id.*)

The states' traditional authority to regulate water is rooted in both constitutional and statutory principles. Under the equal footing doctrine—which is based on principles of federalism written into the Constitution, each state upon its admission to statehood, acquires sovereign rights and interests in navigable waters and underlying lands within its borders, subject to the federal government's paramount authority to regulate and control navigation. (*PPL Montana, LCC v. Montana*, 132 S.Ct. 1215, 1226-1228 (2012); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372-374 (1977); *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1894); *Pollard's Lessee v. Hagan*, 44 U.S. 212, 224-229 (1845); *Martin v. Waddell*, 41 U.S. 367, 410 (1842).)

"[E]xcept where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters." *California v. United States*, 438 U.S. 645, 662 (1978), citing *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 709

[11] 123 Cong. Rec. 39211, 39212 (1977)

(1899). Thus, the states retained "total authority" over their internal waters upon its admission to statehood, subject only to federal reserved rights and the federal navigation servitude.

Thus, both the Constitution and the Clean Water Act make clear that the states have primary authority to regulate water in our federal system. This basic principle of federalism informs the meaning of sections 101(g) and 510, and indicates that the Act cannot be construed to limit or hinder water rights and the movement of water for purposes of supply within the states. This basic premise is supported by both the Clean Water Act and the doctrine of constitutional avoidance. This doctrine holds that congressional statutes should be construed to avoid constitutional difficulties, unless such construction is plainly contrary to the congressional intent. (*Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Const. Trades Council*, 485 U.S. 568, 575 (1988); *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).)

In *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers* (SWANCC), 531 U.S. 159, 172 (2001), the Supreme Court applied the constitutional avoidance doctrine in holding that the Corps does not have authority under the Act to regulate "isolated" waters, *i.e.*, waters not connected to navigable waters, because such waters are traditionally regulated by the states. SWANCC, 531 U.S. at 172-173. The Court stated:

> Where an administrative interpretation of a statue 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.[12]

The Court stated that the Corps' interpretation of its authority "would result in a significant impingement of the States' traditional and primary power over land and water use." (*SWANCC* at 174.)

The Proposed Rule presents the same problem. Many water supply conduits are susceptible to being reclassified as waters of the United States under the Proposed Rule. Application of the Proposed Rule to these structures will infringe on the states' ability to manage water supplies within their jurisdictions, and will thereby violate the Clean Water Act.

4. *The Proposed Rule's treatment of tributaries violates the Clean Water Act and is not entitled to deference.*

The Proposed Rule would reclassify many aqueducts, water supply canals, storm drains, agricultural drains, and other manmade conveyances with perennial flow as waters of the United States. Regulation of manmade conveyances as waters of the United States is improper under

[12] *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers* (SWANCC), 531 U.S. 159, 172-73 (2001) [internal citations omitted].

any reading of the Clean Water Act and the Proposed Rule is therefore not entitled to deference from the courts.

Under the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), an agency's interpretation of a statute that it is responsible for administering is entitled to deference, if the statute is "silent or ambiguous" and the agency's interpretation is "permissible." (*Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-844 (1984); see *Mayo Foundation v. United States*, 131 S.Ct. 704, 711 (2011); *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 703 (1995); *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992).) An agency gets no deference if its rule, regulation or policy violates the plain language of the statute it is implementing. "EPA may not regulate something over which it has no statutorily granted power" (*Virginia Department of Transportation v. EPA* (2013) U.S. Dist. Lexis 981, *9, (E.D. Va.).)

The Clean Water Act precludes regulation of these conveyances as waters of the United States because they are defined point sources and because the Clean Water Act specifically reserves to the states the right to regulate water supplies. The Proposed Rule violates the plain language of the statute it is implementing and is entitled to no deference.

III. FLAWED DEFINITION OF ADJACENT

The Proposed Rule provides that all waters, including wetlands, "adjacent to" waters of the United States will be considered waters of the United States. The Proposed Rule defines "adjacent" as follows:

> (1) Adjacent. The term adjacent means bordering, contiguous or *neighboring*. . .
>
> (2) Neighboring. The term neighboring, for purposes of the term ''adjacent'' in this section, includes waters located within the *riparian* area or *floodplain* of a water identified in paragraphs (a)(1) through (5) of this section, or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water.
>
> (3) Riparian area. The term riparian area means an area bordering a water where surface or subsurface hydrology directly influence the ecological processes and plant and animal community structure in that area. Riparian areas are transitional areas between aquatic and terrestrial ecosystems that influence the exchange of energy and materials between those ecosystems.
>
> (4) Floodplain. The term floodplain means an area bordering inland or coastal waters that was formed by sediment deposition

> from such water under present climatic conditions and is inundated during periods of moderate to high water flows.[13]

The Proposed Rule will thus define any water bodies that are either directly adjacent to, or within the riparian area, or flood plain of a traditional navigable water or a tributary to a traditional navigable water as waters of the United States. This expansive definition will have negative impacts on the function of public agency operated water supply, waste treatment, and flood control systems.

A. IMPACTS TO FLOOD CONTROL, WASTE TREATMENT AND WATER SUPPLY INFRASTRUCTURE

The Proposed Rule's definition of "adjacent" would potentially capture water supply, waste treatment and flood control infrastructure including percolation basins, treatment wetlands, retention ponds, and green infrastructure BMPs.

Manmade treatment wetlands could be classified as adjacent. Treatment wetlands, as their name implies are designed to treat wastewater or stormwater before it is discharged into waters of the United States. These facilities are often constructed in close proximity to traditional navigable waters and with direct outlets to such waters. Because of this relationship they will be considered "adjacent" under the Proposed Rule. Regulating constructed wetlands as waters of the United States will be a significant burden for both the wetland owner and applicable regulatory agencies. Every time significant maintenance is required or there is a discharge into the wetlands, a federal permit will be required.

Groundwater recharge ponds and off-stream reservoirs could be classified as adjacent. Recharge and percolation ponds that have a surface connection to traditional navigable waters will be "adjacent" and therefore waters of the United States under the Proposed Rule. Percolation ponds are used to add facilitate groundwater recharge and to hold water before it is put to use or discharged to waters of the United States. These ponds are critical to the use of recycled water in California and across the west.

Green infrastructure including but not limited swales and other Low Impact Development BMPs could be classified as adjacent. EPA and state water quality control agencies have been requiring public agencies to include low impact development and hydromodification BMPs on new development. LID development techniques reduce the amount of impervious surfaces and provide storage for the timed release of stormwater following a rain event. LID and hydromodification designs require swales and retention basins. Swales in particular can remain wet on a perennial basis and are often intentionally planted with wetland habitat.

Treatment works with ponds in close proximity to a tributary or traditional navigable water could be classified as "adjacent." Waste treatment systems frequently rely on percolation ponds and basins as a critical part of the sewage treatment process. Many waste treatment systems are developing wetland type treatment systems to reduce nutrient and other pollutant levels in the final effluent discharged from the system. These ponds and wetlands are almost

[13] 79 F.R. 22263

always connected to traditional navigable waters or their tributaries because the effluent needs somewhere to go. In many cases the effluent must be returned to a surface stream so that it can contribute to overall stream flow and be used by downstream water rights holders.

By nature of their location and function these ponds could be classified as waters of the United States under the Proposed Rule. The Proposed Rule needs to very clearly exempt all aspects of the waste treatment system, including "back end" ponds and treatment wetlands to ensure that the existing exemption is carried forward and to avoid infringing on operation of this critical infrastructure.

B. THE PROPOSED DEFINITION OF "ADJACENT" IS FUNDAMENTALLY FLAWED

The Proposed Rule's definition of the term "adjacent" is fundamentally flawed because it is rooted in an overbroad interpretation of Justice Kennedy's concurring opinion in *Rapanos*; because it proposes to regulate isolated waters with only a groundwater or biological connection to waters of the United States; and because the EPA lacks substantial evidence to demonstrate that all waters within a floodplain or riparian area have a significant nexus to waters of the United States.

1. Definition is overboard and based on a flawed interpretation of Rapanos

The Proposed Rule's definition of adjacent would improperly classify isolated waters as waters of the United States based on a flawed reading of Justice Kennedy's decision in the *Rapanos* case. In *Rapanos*, Justice Kennedy's concurring opinion held that based on the Court's prior decision in *SWANCC*, a water will be considered waters of the United States if it has a significant nexus to traditional navigable waters. Justice Kennedy defined a significant nexus stating:

> wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the ***chemical, physical, and biological integrity*** of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."[14]

The Proposed Rule seeks to define "adjacent" for purposes of the Clean Water Act in terms of Justice Kennedy's decision. Indeed, the preamble relies heavily on Justice Kennedy's opinion when discussing the rationale for the definition of the term "adjacent." (79 F.R. 22260.) The proposed definition is flawed because it far exceeds the scope of what Justice Kennedy provided for in his opinion.

The preamble to the Proposed Rule states:

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[14] *Rapanos* at 780.

> The agencies have concluded that all waters that meet the proposed definition of ''adjacent'' are similarly situated for purposes of analyzing whether they, in the majority of cases, have a significant nexus to an (a)(1) through (a)(3) water. Based on the agencies' review of the scientific literature, we have concluded that these waters, when bordering, contiguous or located in the floodplain or riparian area, or when otherwise meeting the definition of ''adjacent,'' provide many similar functions that significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas.[15]

Based on the proposed definition of adjacent, the Proposed Rule will reach any isolated waters within the floodplain or riparian area of a traditional navigable water, or a tributary to a traditional navigable water. These terms are not defined in the Clean Water Act but are instead borne of the Supreme Court's decisions and the EPA and ACOE's efforts to draft a rule based on those decisions. In this case, the agencies have gone too far.

The Proposed Rule goes further than Justice Kennedy's decision would allow by extending jurisdiction to waters that have only a biological, chemical, or physical connection to a traditional navigable water, rather than a combination of the three. This exceeds EPA's authority and will result in the capture of a multitude of isolated waters that were formerly outside the jurisdiction of the Clean Water Act.

2. *Groundwater is not navigable, and jurisdiction based on a groundwater connection alone violates SWANCC*

The sections of the Proposed Rule that would make a groundwater connection to waters of the United States sufficient to make wetlands and other isolated waters themselves waters of the United States violate the Supreme Court's decision in *SWANCC*.

The wetlands at issue in *SWANCC* were manmade and connected to groundwater underlying the proposed project site. (Brief for the Petitioner at 10, *SWANCC v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001).) In fact the groundwater connectivity of the project site was a major issue for the surrounding community. (*Id.*) Groundwater in the same geologic formation has a documented connection to the nearby Fox River.[16] Additionally, EPA investigation into the nearby Elgin Landfill site showed a connection between shallow groundwater and surface streams. (EPA, Record of Decision, Tri-County/Elgin Landfill, 9-10 (1992).) Shallow and deep groundwater connections to the Fox River are well documented in the vicinity of the *SWANCC* project site.[17]

The Proposed Rule is apparently based on a very narrow reading the *SWANCC* case. (79 FR 22252 ["SWANCC did not invalidate 33 C.F.R. §328.3(a)(3) or other parts of the regulatory

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[15] 79 F.R. 22260.

[16] Dey, William S. et al, *Kane County Water Resources Investigations: Final Report on Geologic Investigations* (2007) available at http://library.isgs.uiuc.edu/Pubs/pdfs/ofs/2007/ofs2007-07.pdf [describing the connection between the St. Charles Aquifer and the Fox River].

[17] *See id.*, and Dey, *supra.*

definition of 'waters of the United States'"].) Under this reading, only the application of the Migratory Bird Rule to the *SWANCC* site was reversed by the Supreme Court and the case did not change the definition of Waters of the United States.

In drafting the Proposed Rule, it appears that EPA and the ACOE have taken their preferred readings of the Supreme Court's decisions in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 172 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006), and is attempting to codify them as law. While this will give the Clean Water Act maximum reach, it will have many negative implications for water quality across the United States. Moreover, it will leave the Proposed Rule open to challenge as an overextension of EPA's authority under the Clean Water Act and the United States Constitution.

Because federal regulations prohibit "waste treatment" to be a designated use for the purposes of water quality standards, reclassification of a water body under the Proposed Rule will hinder many projects that would benefit the environment. This is because many states including California will not allow waters of the United States to be converted into treatment systems even if it would be beneficial to the water body as a whole. Similarly, reclassification of existing facilities will prevent them from being used for their intended purpose.

3. The EPA lacks substantial evidence to demonstrate that all waters within a floodplain or riparian area have a significant nexus to waters of the United States

The Proposed Rule's definition of "adjacent" is based on EPA's survey of scientific studies. As noted in the Proposed Rule, that survey is not yet complete. When it is complete, EPA intends to issue a final rule based on a determination that the waters defined as "adjacent" *per se* have a significant impact on the physical, chemical or biological integrity of traditional navigable waters or tributaries to traditional navigable waters. We question EPA and ACOE's ability to make such a finding. No amount of study will say with certainty whether every adjacent water in the United States has a significant impact on the physical, chemical or biological integrity of traditional navigable waters or tributaries thereto unless and until every such water is studied. Until EPA and the Army Corps conduct a study that is that broad, they will lack the substantial evidence necessary to adopt the Proposed Rule.

IV. FLAWED DEFINITION OF SIGNIFICANT NEXUS

The Proposed Rule's definition of "significant nexus" would improperly classify isolated waters as waters of the United States based on a flawed reading of Justice Kennedy's decision in the *Rapanos* case. In *Rapanos*, Justice Kennedy's concurring opinion held that based on the Court's prior decision in *SWANCC*, a water will be considered waters of the United States if it has a significant nexus to traditional navigable waters. Justice Kennedy defined a significant nexus stating:

> wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region,

> significantly affect the ***chemical, physical, and biological integrity*** of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."[18]

The Proposed Rule is based in large part on Justice Kennedy's concurring opinion in *Rapanos*, yet the Proposed Rule's definition of "significant nexus" proposes to expand the definition of waters of the United States:

> "(7) Significant nexus. The term significant nexus means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region (i.e., the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section), significantly affects the ***chemical, physical, or biological integrity*** of a water identified in paragraphs (a)(1) through (3) of this section. For an effect to be significant, it must be more than speculative or insubstantial. Other waters, including wetlands, are similarly situated when they perform similar functions and are located sufficiently close together or sufficiently close to a ''water of the United States'' so that they can be evaluated as a single landscape unit with regard to their effect on the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section."[19]

The Proposed Rule has substituted an or for an and in key language from the Supreme Court's decisions in *SWANCC* and *Rapanos*. The preamble states that this was intentional:

> "The proposed rule includes a definition of significant nexus that is consistent with Justice Kennedy's significant nexus standard. In characterizing the significant nexus standard, Justice Kennedy stated: ''The required nexus must be assessed in terms of the statute's goals and purposes. Congress enacted the [CWA] to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters' . . .'' 547 U.S. at 779. It's clear that Congress intended the CWA to ''restore and maintain'' all three forms of ''integrity,'' 33 U.S.C. 1251(a), so if any one form is compromised then that is contrary to the statute's stated objective. It would subvert the intent if the CWA only protected waters upon a showing that they had effects on every attribute of a traditional navigable water, interstate water, or territorial sea. Therefore, a showing of a significant chemical, physical, or biological affect should satisfy the significant nexus standard."[20]

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[18] *Rapanos* at 780.
[19] 79 FR 22263 [emphasis added]
[20] 79 FR 22261.

The EPA and ACOE's rationale has no support in the law. The Clean Water Act is designed to restore and maintain the chemical, physical, and biological integrity of the Waters of the United States. This statement of intent from Congress unquestionably applies to waters of the United States. Neither the Act, its legislative history, or the Supreme Court's decisions defining the scope of the Act support this definition of the term:

> SWANCC rejected the notion that the ecological considerations upon which the Corps relied in Riverside Bayview--and upon which the dissent repeatedly relies today, see post, at 796, 797-798, 798-799, 800, 803, 806, 807, 809-810, 165 L. Ed. 2d, at 213, 214, 215, 216, 218, 220, 222--provided an independent basis for including entities like "wetlands" (or "ephemeral streams") within the phrase "the waters of the United States." SWANCC found such ecological considerations irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction.[21]

The Proposed Rule would therefore expand the universe of waters encompassed by Justice Kennedy's significant nexus test in a manner that far exceeds the plain language of his opinion. For that reason, the definition is flawed must be revised.

CONCLUSION

For the foregoing reasons we respectfully request that the Committee adopt S.1140 and require EPA to revisit the key aspects of the Proposed Rule discussed above. Without these revisions, the Proposed Rule will without question interfere with the operation and maintenance of the Nation's critical infrastructure; subvert the intent of the Clean Water Act; and cost public agencies millions of dollars in public funds.

Respectfully submitted,

J. G. Andre Monette
BEST BEST & KRIEGER LLP
2000 Pennsylvania Avenue N.W., Suite 4300
Washington, DC 20006

May 22, 2015

[21] *Rapanos* at 741-742.

FINAL CLEAN WATER RULE

Dated:

Jo Ellen Darcy,

Assistant Secretary of the Army

(Civil Works)

Department of the Army.

Title 33—Navigation and Navigable Waters

For the reasons set out in the preamble, title 33, chapter I of the Code of Federal Regulations is amended as follows:

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

1. The authority citation for part 328 is revised to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et.seq.*

2. Section 328.3 is amended by revising paragraphs (a) through (c), deleting paragraphs (d) and (e), and redesignating paragraph (f) as paragraph (d) to read as follows:

§328.3 Definitions.

(a) For purposes of the Clean Water Act, 33 U.S.C. 1251 *et. seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term ''waters of the United States'' means:

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

(2) All interstate waters, including interstate wetlands;

(3) The territorial seas;

(4) All impoundments of waters otherwise identified as waters of the United States under this section;

(5) All tributaries, as defined in paragraph (c)(3) of this section, of waters identified in paragraphs (a)(1) through (3) of this section;

(6) All waters adjacent to a water identified in paragraphs (a)(1) through (5) of this section, including wetlands, ponds, lakes, oxbows, impoundments, and similar waters;

(7) All waters in paragraphs (i) through (v) of this paragraph where they are determined, on a case-specific basis, to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. The waters identified in each of paragraphs (i) through (v) of this paragraph are similarly situated and shall be combined, for purposes of a significant nexus analysis, in the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. Waters identified in this paragraph shall not be combined with waters identified in paragraph (a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(i) *Prairie potholes.* Prairie potholes are a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest.

(ii) *Carolina bays and Delmarva bays.* Carolina bays and Delmarva bays are ponded, depressional wetlands that occur along the Atlantic coastal plain.

(iii) *Pocosins.* Pocosins are evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain.

(iv) *Western vernal pools.* Western vernal pools are seasonal wetlands located in parts of California and associated with topographic depression, soils with poor drainage, mild, wet winters and hot, dry summers.

(v) *Texas coastal prairie wetlands.* Texas coastal prairie wetlands are freshwater wetlands that occur as a mosaic of depressions, ridges, intermound flats, and mima mound wetlands located along the Texas Gulf Coast.

(8) All waters located within the 100-year floodplain of a water identified in (a)(1) through (3) of this section and all waters located within 4,000 feet of the high tide line or ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section where they are determined on a case-specific basis to have a significant nexus to a water identified in paragraphs (a)(1) through (3) of this section. For waters determined to have a significant nexus, the entire water is a water of the United States if a portion is located within the 100-year floodplain of a water identified in (a)(1) through (3) of this section or within 4,000 feet of the high tide line or ordinary high water mark. Waters identified in this paragraph shall not be combined with waters identified in paragraph

(a)(6) of this section when performing a significant nexus analysis. If waters identified in this paragraph are also an adjacent water under paragraph (a)(6), they are an adjacent water and no case-specific significant nexus analysis is required.

(b) The following are not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(4) through (8) of this section.

(1) Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Clean Water Act.

(2) Prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(3) The following ditches:

(i) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary.

(ii) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands.

(iii) Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (a)(1) through (3) of this section.

(4) The following features:

(i) Artificially irrigated areas that would revert to dry land should application of water to that area cease;

(ii) Artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds;

(iii) Artificial reflecting pools or swimming pools created in dry land;

(iv) Small ornamental waters created in dry land;

(v) Water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water;

(vi) Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary, non-wetland swales, and lawfully constructed grassed waterways; and

(vii) Puddles.

(5) Groundwater, including groundwater drained through subsurface drainage systems.

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

(7) 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.

(c) Definitions—In this section, the following definitions apply:

(1) *Adjacent.* The term *adjacent* means bordering, contiguous, or neighboring a water identified in paragraphs (a)(1) through (5) of this section, including waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like. For purposes of

adjacency, an open water such as a pond or lake includes any wetlands within or abutting its ordinary high water mark. Adjacency is not limited to waters located laterally to a water identified in paragraphs (a)(1) through (5) of this section. Adjacent waters also include all waters that connect segments of a water identified in paragraphs (a)(1) through (5) or are located at the head of a water identified in paragraphs (a)(1) through (5) of this section and are bordering, contiguous, or neighboring such water. Waters being used for established normal farming, ranching, and silviculture activities (33 U.S.C. 1344(f)) are not adjacent.

(2) *Neighboring.* The term *neighboring* means:

(i) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (a)(1) through (5) of this section. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;

(ii) All waters located within the 100-year floodplain of a water identified in paragraphs (a)(1) through (5) of this section and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;

(iii) All waters located within 1,500 feet of the high tide line of a water identified in paragraphs (a)(1) or (a)(3) of this section, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

(3) *Tributary* and *tributaries.* The terms *tributary* and *tributaries* each mean a water that contributes flow, either directly or through another water (including an impoundment identified in paragraph (a)(4) of this section), to a water identified in paragraphs (a)(1)

through (3) of this section that is characterized by the presence of the physical indicators of a bed and banks and an ordinary high water mark. These physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary. A tributary can be a natural, man-altered, or man-made water and includes waters such as rivers, streams, canals, and ditches not excluded under paragraph (b) of this section. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if, for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break. A water that otherwise qualifies as a tributary under this definition does not lose its status as a tributary if it contributes flow through a water of the United States that does not meet the definition of tributary or through a non-jurisdictional water to a water identified in paragraphs (a)(1) through (3) of this section.

(4) *Wetlands.* The term *wetlands* means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(5) *Significant nexus.* The term *significant nexus* means that a water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity of a water identified in paragraphs (a)(1) through (3) of this section. The term "in the region" means the watershed that drains to the nearest water identified in paragraphs (a)(1) through (3) of this section. For an effect to

be significant, it must be more than speculative or insubstantial. Waters are similarly situated when they function alike and are sufficiently close to function together in affecting downstream waters. For purposes of determining whether or not a water has a significant nexus, the water's effect on downstream (a)(1) through (3) waters shall be assessed by evaluating the aquatic functions identified in paragraphs (i) through (ix) of this paragraph. A water has a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributes significantly to the chemical, physical, or biological integrity of the nearest water identified in paragraphs (a)(1) through (3) of this section. Functions relevant to the significant nexus evaluation are the following:

(i) Sediment trapping,

(ii) Nutrient recycling,

(iii) Pollutant trapping, transformation, filtering, and transport,

(iv) Retention and attenuation of flood waters,

(v) Runoff storage,

(vi) Contribution of flow,

(vii) Export of organic matter,

(viii) Export of food resources, and

(ix) Provision of life cycle dependent aquatic habitat (such as foraging, feeding, nesting, breeding, spawning, or use as a nursery area) for species located in a water identified in paragraphs (a)(1) through (3) of this section.

(6) O*rdinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(7) High tide line. The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

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Title 40—Protection of the Environment

For reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 110—DISCHARGE OF OIL

3. The authority citation for part 110 is revised to read as follows: