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RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT

November 13, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2011-0880

Ladies and Gentlemen:

Re: Proposed Regulatory Definition of Waters of the United States Under the Clean Water Act

The Riverside County Flood Control and Water Conservation District (District) appreciates the opportunity to comment on the United States Environmental Protection Agency's (EPA) and Army Corps of Engineers' (the Corps) (collectively the "Agencies") proposed definition of "waters of the United States" under the Clean Water Act (Proposed Rule). The District is the regional flood management authority for the western half of Riverside County, California, which contains 1.8 million of the County's nearly 2.2 million residents. Besides flood protection, the District is also charged with promoting water conservation and serves as the Principal Permittee for three NPDES Municipal Separate Storm Sewer System (MS4) Permits covering stormwater discharges from the District, County of Riverside, Coachella Valley Water District, and incorporated cities of Riverside County.

This comment letter addresses the District's primary concerns from the perspective of flood control, water conservation, and stormwater quality.

Local Climatic and Hydrologic Setting

Riverside County encompasses 7,300 square miles with a population of 2,189,641 according to the 2010 U.S. Census. Riverside County's climatic conditions vary from a low-elevation arid desert area in the east, with an average annual rainfall of two to four inches in the Coachella Valley, to a Mediterranean climate in the western inland valleys of the County, with average annual rainfall of 10-13 inches. In fact, the Coachella Valley is the most arid urbanized community in the United States. In the local mountains (the San Jacinto and San Bernardino ranges), average annual precipitation (including snowfall) is 30-40 inches. In the more developed areas of Riverside County, annual precipitation totals range from three inches in the Indio area to about 12 inches in western Riverside County. Precipitation in Riverside County is usually episodic, with only a few storms each year yielding enough rainfall to have flows in local watercourses, which may last from a few hours to a few days. Consequently, Riverside County watercourses flow intermittently, even in very wet years, and become ephemeral or experience long periods of no-flow in normal or below average rainfall seasons.

Another characteristic of Riverside County watercourses is that due to the arid nature of the region, stream flow during the dry season is predominantly effluent. That flow is generally from wastewater treatment plant discharges, urban runoff, water rights transfers, and other non-rainfall runoff sources.

The climatological and hydrological conditions of Riverside County are different enough from other parts of the country that it is important that any national waters of the United States (WOTUS) rule account for such differences. The following discussion provides further support for this important point.

I. GENERAL COMMENTS

The Proposed Rule is Inconsistent with *Rapanos* Decision

We note that the Agencies ground the Proposed Rule on Justice Kennedy's opinion in the *Rapanos* decision, and its emphasis on "significant nexus". Indeed, the Proposed Rule would make significant nexus "the touchstone for CWA jurisdiction". However, the Proposed Rule is not consistent with Justice Kennedy's opinion and would extend his analysis beyond the situations discussed in *Rapanos.* In particular, Justice Kennedy based his "significant nexus" test on a water that "significantly affects the chemical, physical, *and* biological integrity" of another water. The Proposed Rule instead would base such a nexus on any one of those factors, using "or" instead of the "and" specified in Justice Kennedy's opinion. Justice Kennedy also made clear in *Rapanos* that there was no such nexus between jurisdictional waters and isolated waters, which might be separated some distance from the jurisdictional water. The Proposed Rule, however, ignores the rigor inherent in Justice Kennedy's opinion in favor of generally finding such a nexus in the absence of true connections.

The intent of Justice Kennedy's opinion (and also that of the plurality opinion) was to place sensible limits upon, and not to expand, the scope of jurisdictional waters. However, the Proposed Rule would institute such an expansion through its new definitions and establishing connectivity through subterranean waters, which are not WOTUS.

The Connectivity Report is Not Applicable to our Desert Regions

The Proposed Rule is largely informed by EPA's Office of Research and Development's *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence.* The District believes reliance on the Connectivity Report would bring about an unwarranted expansion of Waters in the arid deserts of southeastern California.

For example, the Connectivity Report examined the Upper San Pedro River basin in Arizona as a case study of intermittent and ephemeral streams in the Southwest. Rainfall in the Upper San Pedro basin, however, ranges from 12-30 inches per year. By contrast, while flows in the southeastern California desert are also ephemeral, the average annual rainfall is *much* less--- Blythe averages 4 inches per year, Indio just 3 inches. The big difference in rainfall suggests that the connectivity case study would not be applicable to the southeastern California desert. We believe that further study of connectivity in such extremely arid desert areas in California and other parts of the Southwest should be performed and that the final rule language should reflect such study.

II. COMMENTS ON DEFINITIONS IN PROPOSED RULE

Water and waters: *"The agencies use the term "water" and "waters" in the proposed rule in categorical reference to rivers, streams, ditches, wetlands, ponds, lakes, playas, and other types of natural or man-made aquatic systems. The agencies use the terms "waters" and "water bodies" interchangeably in this preamble.* ***The terms do not refer solely to the water contained in these aquatic systems, but to the system as a whole including associated chemical, physical, and biological features."*** (Proposed Rule, footnote 3, emphasis added)

Comment: The last sentence in this footnote potentially creates an unintended expansion of jurisdictional waters. It is plain that the footnote is not referring to physical, chemical or biological integrity of *water*, but to the chemicals and biota themselves. Obviously, the chemicals and biota are *not* water. The Connectivity Report gives an explicit example of how the Agencies could end up interpreting this footnote:

> Many living organisms, however, can also actively move with or against water flow; others disperse actively or passively over land by walking, flying, drifting, or "hitchhiking". All of these organism-mediated connections form the basis of biological connectivity between headwater tributaries and downstream waters. (*Connectivity Report*, Page 4-29)

In other words, the Agencies may interpret the Proposed Rule to claim the movement of biota *outside the surface water column* is what connects waters of the United States together. The District believes using this definition of connectivity would result in jurisdictional over-reach by the Agencies. For example, such a broad interpretation of waters could be used by the Agencies to find all ditches jurisdictional. The Proposed Rule purports to exclude those ditches from waters of the United States jurisdiction:

> Ditches that do not contribute flow, either directly **or through water**, to a traditional navigable water, interstate water, the territorial seas or an impoundment of a jurisdictional water. (Emphasis added)

The District is concerned the footnote equating biota with water when taken together with the Connectivity Report's explicit embrace of biological connection to cover animals walking or flying between waters would allow the Agencies to link a tributary and a ditch together and determines the ditch to be "waters of the United States".

The Preamble to the final rule should make clear that the term "waters" is limited to actual water bodies, as intended by Congress. Chemical, physical and biological integrity may be factors, which, under appropriate circumstances, cause some waters to be jurisdictional. However, such features do not of themselves constitute a "water" for purpose of determining jurisdiction. The Supreme Court in *SWANNC v. Army Corps of Engineers* ruled that using the Migratory Bird Treaty to determine jurisdictional waters exceeded the Corps' authority granted under the CWA. Similarly, the District believes that any attempt by the Agencies to use other birds, flying insects or prowling animals to connect what are now isolated waters to waters of the United States would exceed their authority.

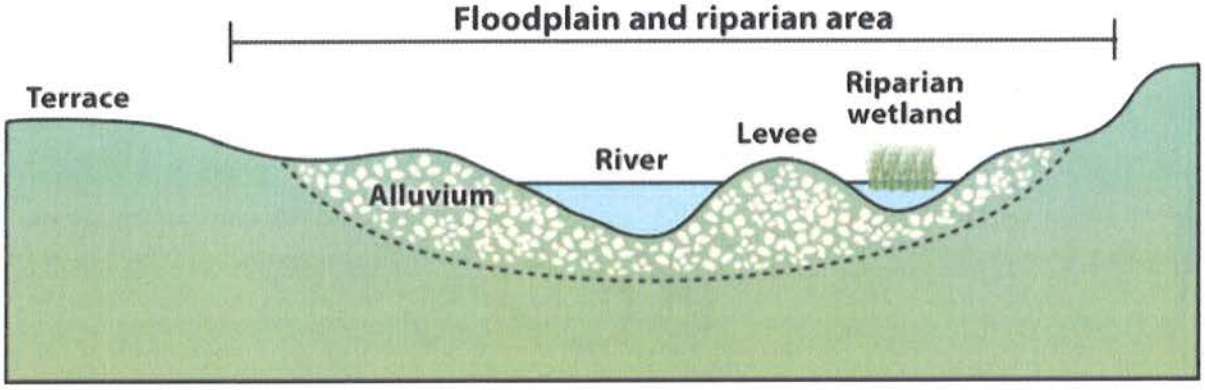
Tributary: *"The term tributary means a water physically characterized by the presence of a bed and banks and ordinary high water mark, as defined at 33 CFR § 328.3(e), which contributes flow, either directly or through another water, to a water identified in paragraphs (a)(1) through (4) of this section. 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 paragraphs (b)(3) or (4) of this section."* (Emphasis added)

Comment: The District agrees that the definition of Tributary should consider *natural* bed and bank and ordinary high-water mark.

But that is not enough. The frequency and amount of flow, and the effect of infiltration, evaporation and transpiration should be considered, too. The District believes that those variables may preclude determining by rule that a feature is a "tributary". In the southeastern Californian desert, the amount of flows and the distance they must travel affect whether there can be an integrated ecological system with downstream traditional navigable waters, interstate waters, and territorial seas.

As we have discussed, in the southeastern California desert, rainfall events are infrequent, and on average, minimal in size, which means that existing bed and banks in the valleys may have been formed during very infrequent events. During common runoff events, the desert provides plenty of infiltration and distributary flow paths, and as a result ephemeral storm runoff may never reach jurisdictional waters and form the integrated ecological system that a "tributary" should be part of. Thus, the lengthy periods of time between storms large enough to cause runoff in a desert wash to reach jurisdictional waters makes the connection insubstantial. Truly, in the arid desert, it is as Justice Scalia remarked, the CWA jurisdiction evaporates with the water.

Another concern is that the Connectivity Report concludes that all tributaries, including perennial, intermittent and ephemeral streams, are connected to downstream rivers via channels and associated alluvial deposits. Alluvial deposits, as shown in the exhibit taken from Page 3-6 of the Connectivity Report, should not establish CWA connectivity because underground water is not regulated by the CWA.



Finally, the length of natural "breaks" through ponds, lakes, and wetlands, should not matter as long as the flows stay on the surface. However, once flows go underground, or dry up, that is a real break in the jurisdictional chain, and what matters then for determining waters of the United States jurisdiction should be the frequency of the physical connection of surface waters.

Adjacent: *The term adjacent means bordering, contiguous or neighboring. Waters, including wetlands, separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent waters".*

Neighboring: *The term neighboring, for purposes of the term "adjacent", 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.*

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.*

Floodplain: *The term "floodplain" means a level area bordering a stream or river channel that was built by sediment deposition from the stream or river under present climatic conditions and is inundated during moderate to high flow events.*

Comment: The District recommends that the Proposed Rule not expand the term *neighboring* to cover the *floodplain* as currently defined because the definition of floodplain is too general. The District's experience with geomorphology indicates that the last 11,000 years can be lumped together under "present climatic conditions". Any definition that takes into account sediment that has been deposited over some geologic period, like during the last 11,000 years, can lead to jurisdictional determinations that are too expansive. It is particularly inappropriate to apply that definition to the ancient surfaces found on alluvial fans in the southeastern Californian desert. While the typical alluvial fan's surface has had sediment deposited on it over the last 11,000 years, vast areas of the fan would not have seen flows in decades. In short, "present climatic conditions" is too expansive.

Alternative engineering approaches to define the floodplain would also be inappropriate. For example, a possible approach would be to map floodplains caused by storms that exceed some arbitrarily defined recurrence probability, like the 2-year event or the 10-year event. Since urban areas and MS4 facilities that should not be regulated could fall within the calculated floodplain boundaries, the method would result in an expansion of waters.

An engineering approach would also run into trouble in the desert where alluvial fans are quite common. The accepted methodology for mapping alluvial fan floodplains assumes that floodwaters have an equal probability *in the future* to flow across any part of the fan surface. While fine for floodproofing new development this method simply is not appropriate for determining where flows have been recently and thus determining CWA jurisdiction. Users of this method may determine that large tracts of land which have not seen runoff in decades would be jurisdictional.

It is for all these reasons that we would support a definition of floodplain that would only take into account overbank flows that occur with high-frequency and leave surface markers that can be identified in the field. Moreover, the definition should exclude overbank flows that would inundate urban areas and MS4 facilities.

Finally, regarding the "riparian area" definition, we believe riparian areas dependent on sub-surface hydrology should not be regulated by the CWA.

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 traditional navigable water, interstate water, or the territorial seas.* (Emphasis added)

Comment: The District believes that the Proposed Rule should include a definition or examples of what is "speculative or insubstantial".

With respect to what could constitute a "speculative" effect, when two natural water features are not physically connected by surface flow, the one cannot have a significant effect on the other. To infer such an effect is speculative.

An example of an "insubstantial" effect would be one that does not occur within a reasonable time horizon. The Connectivity Report discusses aquifer replenishments that take place over centuries; the District maintains that processes that take decades or centuries to complete are evidence that there is *not* a substantial connection of a headwater to identified jurisdictional waters. In the desert of southeastern California, for example, flows that connect headwaters to tributaries and eventually to traditional navigable waters, interstate waters and territorial seas may occur decades apart. Such infrequent effects on the physical, biological and chemical integrity of traditional waters should be recognized as insubstantial in the Proposed Rule.

Similarly situated: *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 traditional navigable water, interstate water, or the territorial seas.*

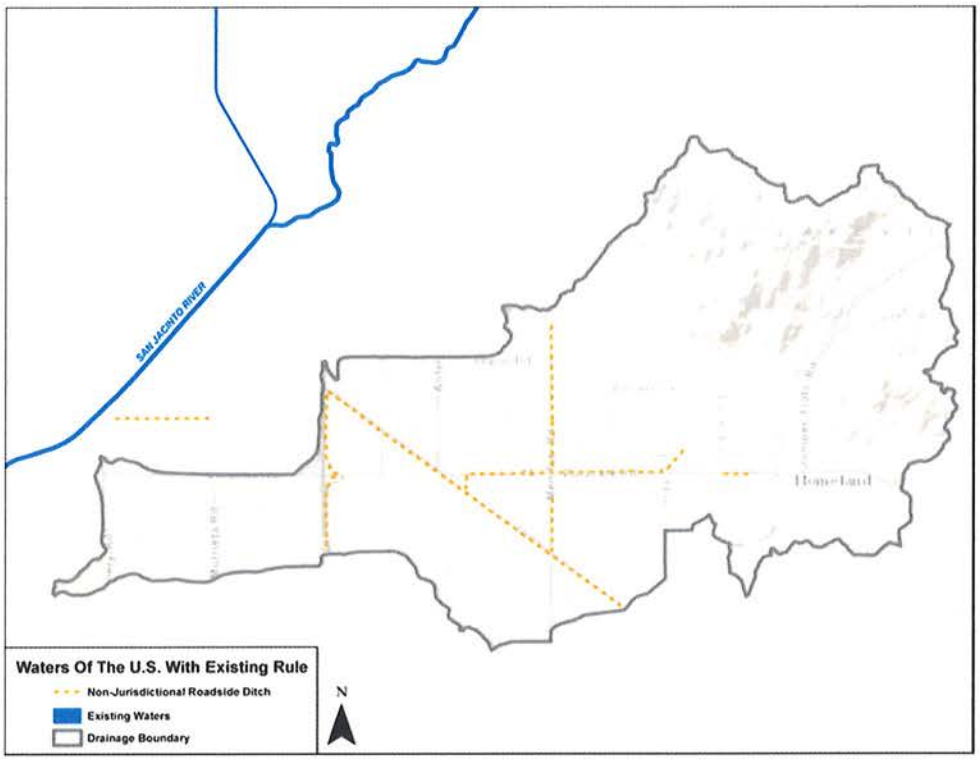
Comment: The District believes that establishing the functionality of a water feature will be subject to protracted dispute, costing excessive time and money. Given that the Agencies have stated that the Proposed Rule is intended to clarify and simplify the question of whether a water is jurisdictional, the use of amorphous and over-inclusive terms to determine that question would result in a more protracted 404 permit process simply because of the time it would take the Agencies to document the hydrologic, geomorphic and ecological characteristics and circumstances of the waters, as well as other similarly situated waters in the region. Such a process would not be advantageous for the Agencies or the Permittee.

In the region: *The Agencies have interpreted "in the region" to mean the watershed that drains to the nearest (i.e., first downstream) traditional navigable water, interstate water, or the territorial seas through a single point of entry.*

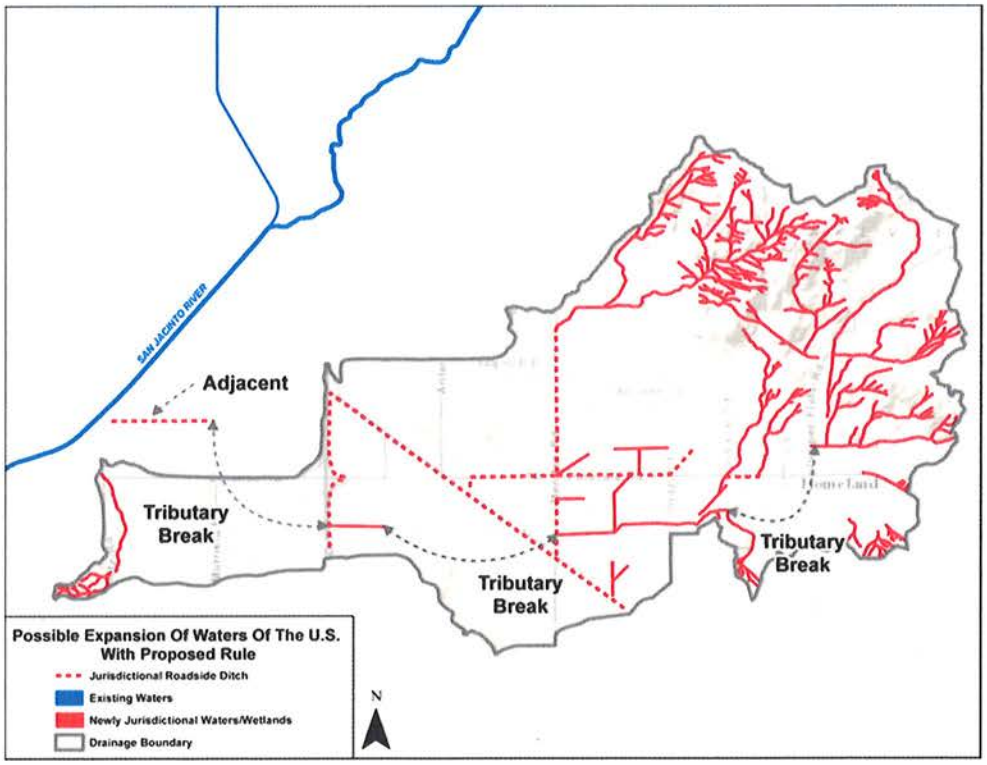
Comment: The Proposed Rule recognizes that the watersheds may be very large in arid areas of the West, like southeastern California, and it may be resource intensive to demarcate watershed boundaries and all relevant waters in the watershed. The Agencies offer an NHD mapping tool as a method to demarcate catchments surrounding the water to be evaluated that, in combination, are roughly the size of the typical nearby 10-digit hydrologic unit code (HUC-10) watershed. Marking all the relevant waters in the region would be a daunting task. The Agencies should propose a better description of the method for the public to evaluate; as it is described in the Proposed Rule, marking all the waters in a region would be very burdensome and costly.

The District's concern about the new definitions can be summed up by two exhibits that I presented during testimony to the House Water Resources and Environment Subcommittee on June 11, 2014.

The first exhibit shows an actual jurisdictional delineation made by the Corps Regulatory staff for the Romoland sub-watershed. While there were some ditches and streams and a 100-year floodplain in the watershed, there was no physical connection to traditional navigable waters, interstate waters or territorial seas, and as a result, no CWA jurisdiction.



The second exhibit shows what the District fears could be the jurisdictional delineation after the application of the definitions discussed above. In this case, the Agencies' new definitions for adjacent waters and floodplain, and the inclusion of bed and bank upstream of tributary breaks, would contribute to an astounding expansion of waters of the United States.



III. INTERRELATIONSHIP OF MS4 AND WATERS OF THE UNITED STATES

Another major issue with respect to the Proposed Rule is its failure to acknowledge the relationship between municipal separate storm sewer systems (MS4) and WOTUS. MS4 is defined to mean "a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains". 40 CFR § 122.26(a)(8).

MS4s are "point sources" required to be permitted under CWA Section 402(p). Section 402(p) requires that MS4s discharging into WOTUS must obtain a National Pollutant Discharge Elimination System (NPDES) permit (which are required of all point sources of pollutants in WOTUS) and control the discharge of pollutants from the MS4 to the "maximum extent practicable". 33 U.S.C. § 1342(p)(3)(B)(iii).

The point at which an MS4 discharges into the WOTUS is an "outfall", which is defined as:

> *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. 40 CFR § 122.26(b)(9) (emphasis in original).

Both the CWA and its implementing regulations establish a distinction between MS4 and WOTUS. MS4 permits contain specific requirements regarding the operation and maintenance of the MS4, including the control of non-stormwater discharges into the MS4 (which are required to be "effectively prohibit[ed]" pursuant to 33 U.S.C. § 1342(p)(3)(B)(ii)) as well as monitoring requirements. The regulation of MS4s is accomplished by these permits, which are extensive and complex in scope.

In public statements, EPA and Corps representatives have indicated that the Proposed Rule is not intended to expand the reach of jurisdictional waters. However, the definition of "tributary" in the Proposed Rule could arguably transform water bodies that have been considered and regulated as MS4 into jurisdictional WOTUS. Under the "tributary" definition, any water body which includes a channel with a bed, bank and OHWM "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).... so long as a bed and bank and an [OHWM] can be identified upstream of the break. Moreover, a tributary.... can be natural, man-altered, or man-made water...." 79 Fed. Reg. at 22199.

The complexity of MS4 systems in the urban environment makes these determinations difficult. Western Riverside County is dominated by major up-thrust mountain ranges that bound our watersheds, including the San Bernardino, San Jacinto and Santa Ana Mountains. These features create a substantial grade differential, and the urbanized areas are peppered with hills, plateaus and other vertical features that, in turn, contain small, ephemeral water courses with indications of bed and bank. The majority of our storm drains collect runoff from these upland areas and convey them through urbanized communities to stream segments lower in the valley. There is thus a robust mix of natural waterbodies and man-made flood control channels and storm sewers. The need for a clear boundary between what is considered an MS4 and what is considered a jurisdictional water is thus very important.

The regulatory definitions of both an "MS4" and an "outfall" plainly distinguish between an MS4, which is not a WOTUS, and the water into which the MS4 discharges, which is. By definition, an MS4 discharges "to" a WOTUS. 40 CFR 122.26(b)(8) through an "outfall". 40 C.F.R. § 122.26(b)(9). There is no "outfall" and no discharge where one portion of an MS4 connects to another or where a WOTUS discharges or flows into another WOTUS. In litigation involving Los Angeles County, the United States Court of Appeals for the Ninth Circuit has held that "[a]s a matter of fact and law, the MS4 is distinct from the two navigable rivers [the Los Angeles and San Gabriel Rivers]". *Natural Resources Defense Council, Inc. v. County of Los Angeles,* 673 F.3d 880, 899 (9th Cir. 2011), *reversed on other grounds, Los Angeles County Flood Control Dist. v. Natural Resources Defense Council, Inc.,* 568 U.S., 133 S.Ct. 710 (2013). Such a view is correct with respect to the waters already designated as WOTUS in Riverside County.

This distinction has been recognized both by the EPA and the United States Supreme Court. In the Preamble to the original version of the MS4 regulations, the EPA drew a clear distinction between waters in an MS4 and a WOTUS: "[W]aters of the United States are not storm sewers for purposes of this rule." 53 Fed. Reg. 49416, 49442 (Dec. 7, 1988). This distinction was affirmed by the United States Supreme Court in the *Los Angeles County Flood Control Dist.* case, in which the Court unanimously reversed the Ninth Circuit, which had erroneously held that the "discharge" from an MS4 had occurred when waters flowed from an engineered portion of the Los Angeles River into another portion of that same river. 133 S.Ct. at 712.

Applying WOTUS status to miscellaneous MS4 lines because they fell within the proposed definition of "tributaries" would create regulatory chaos without any benefits to water quality or the quality of the receiving waters into which the line discharges. The District and other municipalities in the county could be faced with operating an interconnected, but distinct, storm drain system, some of which was considered MS4 and some of which was considered WOTUS. The District and other MS4 operators in Riverside County might be required to obtain CWA Section 404 Permits and Section 401 Certifications if permit-required work was being done in these isolated open channels or other conveyances, even though those channels are part of the storm drain system. Similarly, water quality standards (and potentially TMDLs) would apply to these isolated jurisdictional waters.

The purpose of the MS4 permit program is to reduce pollutants collected by the MS4 from the urban watershed and discharged to WOTUS. MS4 operators are, therefore, required to address such pollutants within the framework of the MS4 permit and to evaluate their performance through monitoring of the outfalls to a WOTUS. If the Proposed Rule's "tributary" definition causes lines currently deemed to be MS4 to instead be designated WOTUS (a designation that cannot apply to MS4 catch basins, pipes and culverts since they are not "navigable" and do not fall under any WOTUS definition in the Proposed Rule), MS4 operators might have to address each storm drain pipe discharging into a channel as a separate "outfall" and point of compliance for discharges regulated by the MS4 permit. MS4 operators might be liable for multiple violations of their MS4 permit for MS4 discharges into isolated jurisdictional waters if the permit prohibited MS4 discharges that exceeded water quality standards, as is typical in many California MS4 permits. Though EPA representatives have indicated that "well-crafted" MS4 permits may reduce this risk, this assumes that permitting agencies are willing to limit liability to only certain discharges into WOTUS. Also, it is unclear whether a permitting agency could, by permit, immunize MS4 operators from the threat of citizen suits brought for discharges into a WOTUS. In any event, MS4 operators should not be forced to depend on permitting agencies to address such core jurisdictional issues.

The designation of portions of MS4s as jurisdictional waters also could harm the ability of operators to address contaminated stormwater and urban runoff in regional treatment facilities. The District has determined that such regional solutions are generally preferable to structural best management practices (BMPs) maintained at individual private properties. Such individual BMPs may not be adequately maintained over time, especially if the property is occupied by numerous tenants or resold. Regional treatment systems, which may be operated and maintained by MS4 operators, are more efficient as well. However, MS4 operators in Southern California have been informed that a WOTUS cannot be used to transport such stormwater to a regional treatment because, pursuant to 40 CFR 131.10(a), such use would violate the prohibition against a state adopting waste transport or waste assimilation as a designated use for any waters of the United States. The District does not agree with this interpretation, but the designation of WOTUS in what had been considered MS4 would exacerbate this issue.

It is thus important that the final WOTUS rule leave no confusion as to where the MS4 ends and a WOTUS begins. At minimum, the Agencies should include language making clear the distinction between the MS4 and WOTUS in the Preamble to the final WOTUS rule.

In addition, the District notes that neither the Preamble to the Proposed Rule nor the rule language mentions the rule as it may apply to various facilities, including the municipal separate storm sewer system or such municipal water facilities as spreading grounds and flood control facilities. In public meetings, the Agencies have acknowledged that such impacts were not considered. Thus, any rule adopted by the Agencies would be arbitrary and capricious as all relevant factors had not been examined. *Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983). Additionally, although the Agencies will receive comments on how MS4s and other facilities should be treated under a new rule, the Agencies cannot adopt a final rule because the Proposed Rule did not allow notice and a fair opportunity to comment due to its silence and lack of analysis on its application to those facilities. *Chocolate Manufacturers Association v. Block*, 755 F.2d 1098 (4th Cir. 1985). Without any discussion as to whether and how the Proposed Rule applies to MS4s, notice is inadequate.

IV. NEED TO EXCLUDE BASINS USED TO RECHARGE GROUNDWATER

Riverside County, like many counties in California and the Southwest, has an extensive program of groundwater recharge to support drinking water supplies. Central to this program are "spreading basins", basins located adjacent to flood control channels (which may be designated as WOTUS) which collect and percolate water into underground aquifers.

The need to recharge the aquifers with local stormwater, as well as recycled water, is becoming even more vital in time of drought. The infiltration basins must be rigorously maintained to ensure that they continue to support their infiltration purpose.

The District is very concerned about any interpretation of the rule that might include infiltration basins as WOTUS, particularly the definition of "adjacent waters". The Proposed Rule expands the scope of "adjacent" from "wetlands" to all waters. 79 Fed. Reg. 22206. "Adjacent" waters are waters which are "bordering, contiguous or neighboring", including waters "separated from other [WOTUS] by man-made dikes or barriers, natural river berms, beach dunes and the like". 79 Fed. Reg. at 22263. Additionally, waters which are "neighboring", defined to be "waters located within the riparian area or flood plain of a [WOTUS], or waters with a shallow subsurface hydrologic connection or confirmed surface hydrologic connection to such a jurisdictional water" also meet this definition and would be considered WOTUS. *Id.* As discussed, many infiltration basins are adjacent to channels that are considered WOTUS. Basins may also be located within the floodplain of the adjacent channels. Also, the exclusion for artificial lakes or ponds in Section b(5)(ii) is limited to specified uses, which currently do not include infiltration basins. 79 Fed. Reg. at 22218. Thus, under the Proposed Rule, the infiltration basins could be classified as WOTUS (though, as noted above, the District opposes the designation of "adjacent" waters based on a subsurface hydrologic connection).

However, as the Proposed Rule indicates, "adjacent waters" are distinguished by the fact that they "provide similar functions which have a significant nexus to [WOTUS]". 79 Fed. Reg. at 22207. Infiltration basins do not provide a similar function to the adjacent channels. The channels are designed to rapidly convey floodwaters so that they do not threaten lives and property. The infiltration basins, by contrast, are designed and maintained to percolate waters into groundwater, which is not a WOTUS. This characteristic distinguishes infiltration basins from other waters adjacent to a WOTUS, such as a wetland, which can influence the character of waters in the WOTUS.

The District supports language in the final rule exempting the designation of infiltration basins as WOTUS.

V. CONCLUSION

As currently drafted, the Proposed Rule threatens to broaden CWA jurisdiction, increase the threat of future litigation and create regulatory chaos. If the Agencies do not modify the Proposed Rule to address the concerns set forth above, the District is concerned that our ability to effectively construct, operate, and maintain facilities to conserve runoff, to manage runoff water quality, and to protect life and property from flood hazards in a timely manner would be impaired. We, therefore, urge the Agencies to consider our comments and those of municipalities across the county and to re-issue the Proposed Rule in light of those comments.

The District thanks the Agencies for the opportunity to comment on the Proposed Rule and for their consideration of these comments.

Very truly yours,

Steve Thomas

for WARREN D. WILLIAMS
General Manager-Chief Engineer

c: Congressman Ken Calvert
Congressman Duncan D. Hunter
Congressman Raul Ruiz
Congressman Mark Takano
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