Helix WATER DISTRICT

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Via Electronic Mail

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

Dear Ms. Downing and Mr. Hanson:

The Helix Water District ("District") is a retail municipal water supply agency located in San Diego County, California. The District was formed in 1912 and became an operating entity in 1926 under the Irrigation District Law of California, Water Code sections 20500 et seq. The District owns and operates the Lake Jennings Reservoir in eastern San Diego County and is actively engaged in water storage, recycled and indirect potable reuse projects.

The District submits this letter to EPA pursuant to Executive Order 13132. As you are aware, EO 13132 requires EPA to consult with local government agencies (or their representative national organizations) prior to issuing any regulation that may impose substantial direct compliance costs on state and local governments or preempt state or local law. EPA has proposed rescinding and revising the definition of the term "Waters of the United States" ("WOTUS") for the purposes of the federal Clean Water Act (33 U.S.C. 1251 et seq.). EPA's proposed action may impose substantial direct compliance costs to the District, and may also preempt state or local regulations applicable to the District. The District appreciates the opportunity to provide comments on EPA's proposal, and looks forward to working with EPA on revisions to the 2015 promulgated definition of WOTUS.

Background

In July, 2015, the EPA issued a final rule revising the definition of the term "WOTUS". The 2015 rule stretched the definition of WOTUS to its maximum supportable extent. The apparent intent was to reach the most headwaters and tributaries possible and thereby give the Clean Water Act the maximum supportable reach. The flaw in this approach is that the 2015 rule classified man-made infrastructure as waters of the United States including many water supply facilities. These include aqueducts, reservoirs, irrigation channels, infiltration basins, and pipelines connecting such facilities.

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

Application of the Clean Water Act to water supply infrastructure substantially interferes with its operation and usefulness. Water quality standards and TMDLs are applied in system and dredge and fill permits are required for maintenance. Federal permitting in turn triggers consultation under the federal endangered species act. In some cases, the regulatory burden created by application of the Clean water Act completely obfuscates the purpose of the facility. In others, it prevents environmentally beneficial projects from being constructed in the first place.

Without question, some water supply facilities are WOTUS. Large reservoirs constructed on major river systems that have a history of use in interstate commerce likely qualify as WOTUS. However, the 2015 Rule went much further and captured existing infrastructure that was never intended to be held to the Clean Water Act's fishable, swimmable standards, including canals, aqueducts and reservoirs that were built on or across ephemeral streams and dry canyons.

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

It is essential that any revisions to the definition of WOTUS be consistent with the text of the CWA and its implementing regulations. When interpreting statutes, the place to begin is with the statutory text and "'[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.'" *Sebelius v. Cloer*, 133 S. Ct. 1886, 1889 (2013) (quoting *BP Am. Prod. Co. v. Burton*, 84, 91 (2006)); *see also Rapanos*, 547 U.S. at 754-55 (J. Scalia) (stating the principal problem with Justice Kennedy's opinion was his reading of the Supreme Court's prior decisions "in utter isolation from the text of the [Clean Water] Act").

We are writing to request that when EPA begins revising the 2015 Rule, that the agency reconsider how water supply infrastructure is classified. We believe that an explicit exclusion for water supply infrastructure will protect water supply agencies from interference by regulatory agencies or citizens groups who may seek to control water supply operations. This approach is consistent with Justice

Scalia's opinion in the Rapanos case and is fully supported by existing case law defining the reach of the Clean Water Act.

Defining the District's Water Conveyance Systems as "Waters of the United States" substantially interferes with their operation

California depends on aqueducts, irrigation canals and other conduits to move water across vast distances and supply water to a thirsty populace. The 2015 Rule inappropriately implemented definitions of the terms "tributary" and "adjacent" that explicitly applied to man-made and man-altered facilities. These definitions were so expansive that they capture California's water conveyance and delivery system.

Recognizing the need to exempt water supply infrastructure from the expansive definition promulgated in 2015, the EPA included a limited exemption for certain facilities that were constructed "in dry land." While helpful, the exemption did not go far enough. Numerous types of facilities still fell within the broad definition of "Waters of the United States."

The District is a member agency of the Metropolitan Water District of Southern California. As a member agency, the District is reliant on water imported into southern California from across the State via aqueducts, pipelines and storage reservoirs. A definition of WOTUS that captures this infrastructure puts the entire system at risk.

Along with a WOTUS designation comes the requirement to attain Water Quality Standards, and to obtain Clean Water Act section 402 and 404 permits. If a total maximum daily load ("TMDL") is adopted for an aqueduct, percolation pond or other water supply conduit on the premise that the conveyance is failing to meet applicable Water Quality Standards, it could result in limitations on discharges into (and therefore use of) the facility. 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 water supply facilities that the Metropolitan Water District and other water purveyors rely on get reclassified as WOTUS, it will only be a matter of time before similar actions are taken to control water quality within those facilities. Limitations would further constrain water availability in Southern California and limit the ability of local water districts and cities to provide supplies to their residents.

Similarly, water supply operators will have significant difficulty operating and maintaining their systems. Removing vegetation and sediment built up in the facility will require a 404 permit as well as consultations with federal wildlife agencies. Even if no endangered species are found, the added cost and time constraints will unnecessarily hinder existing municipal operations. More importantly, the actual operation of the facility could be at risk. Changes in water level and flow have direct impacts on TDS, turbidity, temperature, dissolved oxygen, and many other "pollutants" that are regulated under the Clean Water Act. Efforts to control these constituents could eventually limit how and when a water supplier takes water from a facility.

More importantly, the District owns and operates the Lake Jennings Reservoir in eastern San Diego County. Lake Jennings was constructed by the District in 1962 to provide water storage capacity for its service area and population. Lake Jennings was formed by constructing an earthen dam in a dry canyon and filling it with imported water from the Metropolitan Water District of Southern California aqueduct system. Lake Jennings is connected to the imported aqueduct system through a series of pipelines connected directly to the reservoir. Lake Jennings source of water comes only from the connection to the imported aqueduct system and is considered a terminus reservoir. Lake Jennings is utilized as a forebay to store imported water for treatment into drinking water at the R. M. Levy Water Treatment Plant.

In an ongoing effort to increase local water supply and provide increased reliability, the District is actively engaged in recycled water and indirect potable reuse project evaluation. Currently, Helix is working with Padre Dam Municipal Water District, the County of San Diego and the City of El Cajon on the East County Advanced Water Purification Program (ECAWPP). This program is evaluating the ability to treat recycled water at an advanced water treatment facility and convey this water to Lake Jennings to be treated into drinking water at the R.M. Levy Water Treatment Plant. This process is termed indirect potable reuse or surface water augmentation.

The draft surface water augmentation regulations issued by the California State Water Resources Control Board, Division of Drinking Water, require that surface water augmentation projects must contain an environmental buffer that provides detention time and dilution to the advanced treated recycled water. The environmental buffer provides a safety factor to prevent "off spec" water that does not meet treatment requirements from reaching the drinking water treatment plant. In the evaluation of the ECAWPP, Lake Jennings serves as the required environmental buffer and as a storage vessel for the highly purified water recycled water. The ECAWPP has the potential to utilize Lake Jennings to produce up to 17,500 acre feet of "new" local water from recycled water.

In addition to producing a new water source for the region, the program would reduce treated wastewater outflow to the ocean and reduce carbon emissions by reducing the amount of imported water required to supply the region. Lake Jennings is the crucial component in the District's water supply portfolio. The District could not supply water without Lake Jennings as the storage reservoir for imported supplies or implement surface water augmentation without Lake Jennings acting as the environmental buffer for the highly purified recycled water.

The State of California, with the approval of EPA, has classified Lake Jennings as WOTUS. Moreover, the State, acting under the authority of the Clean Water Act, has issued multiple NPDES permits that impact operation of Lake Jennings. These NPDES permits limit the use of algaecides and other control mechanisms to keep the Lake fit for use as a drinking water supply reservoir. The WOTUS designation is inappropriate and should be removed. When promulgating a new regulation, EPA should be cognizant of this kind of overreach, and include specific exemptions that ensure water supply operations are not impacted by an overbroad definition of WOTUS.

In addition to the District's operations, many arid western states use surface infiltration as a management tool to prevent flooding, store excess water for future use, replenish groundwater supplies, mitigate salt water intrusion, or abate land subsidence. The most economical manner of groundwater recharge is to construct a basin in alluvial material immediately adjacent to a perennial or ephemeral stream. This allows water to rapidly infiltrate through the basin to the unsaturated zone

where it is added to the aquifer below. In addition to the basins, flood control dikes, swales and ditches are used to capture and convey stormwater to protect public safety. Examples of these facilities were detailed in the letter submitted by the Association of California Water Agencies (ACWA). The District fully supports ACWA's comments and requests.

When revising the regulatory definition of the term WOTUS, EPA needs to include express exclusions for the above described water supply facilities to ensure that implementation of the Clean Water Act does not interfere with water supply operations in violation of the Act.

Legal Basis for Exclusion

As noted above, it is essential that any revisions to the definition of WOTUS are consistent with the text of the CWA and its implementing regulations. When interpreting statutes, the place to begin is with the statutory text and "'[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning.'" *Sebelius v. Cloer*, 133 S. Ct. 1886, 1889 (2013) (quoting *BP Am. Prod. Co. v. Burton*, 84, 91 (2006)). After the Agencies have determined that the revised definition of WOTUS is consistent with the CWA and its implementing regulations, they can then consider whether it is also consistent with U.S. Supreme Court decisions interpreting the CWA, including Justice Scalia's opinion in *Rapanos*.

The Clean Water Act explicitly reserves state authority over water supply. Section 101(g) of the Act states that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter." It further states that "nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." (33 U.S.C. § 1251(g). Similarly, section 510 states that the Act shall not be "construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." (33 U.S.C. § 1370.) The Clean Water Act is thus very clear that it is not be construed in a manner that interferes with any states' authority to "allocate quantities of water" or otherwise impairs or obstructs their rights to regulate water.[1]

The Supreme Court has been clear that administrative actions that expand federal regulation into areas of traditional state control are only on allowed when there has been a clear statement of intent from Congress:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems,

[1] S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 107 (2004) ["the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by the Act"] (internal citations omitted); Great Basin Mine Watch v. Hankins, 456 F.3d 955, 963(9th Cir. 2006) [same].

> the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."
>
> (SWANCC at 172-173 [citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Const. Trades Council*, 485 U.S. 568, 575 (1988); *United States v. Bass*, 404 U.S. 336, 349 (1971). *See also NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *Machinists v. Street*, 367 U.S. 740, 749-750 (1961); *Crowell v. Benson*, 285 U.S. 22, 62 (1932).])

With regard to water supply facilities, the plain text of the Clean Water Act directs the federal government to take a "hands off" approach. Water supply facilities that are integral to the collection, transport and storage of water are not WOTUS. Any revised regulation should include a specific exclusion for this type of infrastructure.

We request that EPA reconsider the concept of navigability as used in the Clean Water Act. The Supreme Court first articulated the test for navigability in *The Montello*, 87 U.S. (20 Wall.) 430,441-42 (1874), holding: "[i]f it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it [the waterway] is navigable in fact, and becomes in law a public river or highway." [2]

Susceptibility to use as a highway of commerce is central to finding jurisdiction over what are traditionally areas of state control. In *U.S. v. Appalachian Elec. Power Co*, 311 U.S. 377 (1940), the Supreme Court held that so long as a water is susceptible to use as a highway of commerce, it is navigable-in-fact, even if the water has never been used for any commercial purpose, and even if limited improvements are necessary to make the water passable for commerce. The qualifying criteria again being whether the water is used as "a highway of commerce." (*Id.* at 407.)

Differentiating between man-made or man altered facilities and navigable waters can be difficult. Nonetheless, when the Supreme Court has considered the issue, it has always concluded that facilities are navigable waters if they are used or are capable of being used as avenues of interstate commerce. In *Ex Parte Boyer*, 109 U.S. 629 (1883), the first case in which the Supreme Court extended federal jurisdiction to man-made waters, the Court did so on the grounds that the canal at issue was designed for navigation:

> Navigable water situated as this canal is, <u>used for the purposes for which it is used, a highway for commerce between ports and places in different States,</u> carried on by vessels such as those in question here, is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States.
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> (*Ex Parte Boyer*, 109 U.S. 629, 632 (1883) [emphasis added].)

More recently, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Supreme Court found that a modified fish pond on the Hawaiian island of Oahu became navigable and subject to the Rivers and

[2] In *The Daniel Ball*, 77 U.S. 557, 563-64 (1870), the Court found the requisite commerce if the goods being carried were moving interstate, even if the steamer was not. *Id.* at 565.

Harbors Act only after it was converted from a shallow, landlocked pond, into a marina with a surface connection to the Pacific Ocean.

In *Finneseth v. Carter*, 712 F.2d 1041 (1983), the Sixth Circuit Court of Appeals considered whether Dale Hollow Lake which straddles the border between Tennessee and Kentucky was navigable in fact. The Lake was man-made and had no navigational connection to downstream waters. The Court of Appeals held "an artificial water body, such as a man-made reservoir, is navigable in fact . . . if it is used or capable or susceptible of being used as an interstate highway for commerce over which trade or travel is or may be conducted in the customary modes of travel on water" in contrast to "reservoirs created by lockless dams were wholly within the confines of one state." (Id.)

The common denominator in any analysis – whether it is man-made or natural water body at issue, is whether the water is "susceptible to use as a highway of commerce" or constructed with the intent to be used as the same. Water supply facilities built on traditional navigable waters remain jurisdictional, those that are constructed on what may have qualified as tributaries or adjacent wetlands if they were analyzed under the 2015 Rule would not.[3]

This approach is consistent with Justice Scalia's opinion in the Rapanos case. In that case, the Court considered whether various wetlands connected to geographically distant navigable-in-fact waters qualified as WOTUS. Justice Scalia found that they did not and focuses his rationale on the distinction between waters that are streams, lakes and rivers in the "ordinary parlance" and other man-made features. (Rapanos at 739) Justice Scalia specifically discussed the difference between traditional navigable waters and manmade conveyances:

> It is also true that highly artificial, manufactured, enclosed conveyance systems--such as "sewage treatment plants," and the "mains, pipes, hydrants, machinery, buildings, and other appurtenances and incidents" of the city of Knoxville's "system of waterworks," likely do not qualify as "waters of the United States," despite the fact that they may contain continuous flows of water.

Justice Scalia specifically cited a number of lower court decisions differentiating between waters of the United States and point sources as defined by the Clean Water Act:

> Cases holding the intervening channel to be a point source include *United States v. Ortiz*, 427 F.3d 1278, 1281 (CA10 2005) (a storm drain that carried flushed chemicals from a toilet to the Colorado River was a "point source"), and *Dague v. Burlington*, 935 F.2d 1343, 1354-1355 (CA2 1991) (a culvert connecting two bodies of navigable water was a "point source"), rev'd on other grounds, 505 U.S. 557, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992). Some courts have even adopted both the "indirect discharge" rationale and the "point source" rationale in the alternative, applied to the same facts. See, e.g., *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114, 118-119 (CA2 1994). On either view, however, the lower courts have seen no need to classify the intervening conduits as "waters of the United States.

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[3] We do not advocate that canals that move water as an item of commerce would create jurisdiction. The Clean Water Act does not regulate water as an item of commerce. As discussed at length herein, such regulation is expressly reserved to the states by the plain text of the Act.

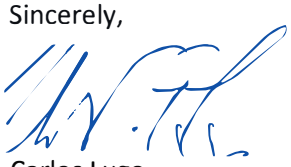
An exemption for water supply facilities is therefore consistent with both Justice Scalia's decision in the Rapanos case, and the underlying structure of the Clean Water Act.

Conclusion

The District appreciates the opportunity to provide comments on "the opportunities and challenges that exists when taking Justice Scalia's approach to implementing the Clean Water Act (CWA)". During the prior rule development process, the District also requested the exemptions discussed in this letter. Addressing the specific concerns presented in this letter is consistent with the ruling by Justice Scalia in Rapanos and will ensure water quality is protected without imposing unnecessary new burdens on the public water agencies.

If you have any questions about the District's comments, please do not hesitate to contact Brian Olney at 619-596-1362.

Sincerely,



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