CITY OF LAKE FOREST

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June 19, 2017

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 City of Lake Forest ("City") is a municipal corporation located in Orange County, California. The City is home to approximately 84,000 people and is 17.96 square miles. The City contains a number of natural and manmade waterbodies, and it also operates a municipal separate storm sewer system ("MS4").

The City submits this letter to EPA pursuant to Executive Order (EO) 13132. 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.[1] EPA's proposed action may impose substantial direct compliance costs on the City, and may also preempt state or local regulations applicable to and implemented by the City. The City appreciates the

[1] 33 U.S.C. § 1251 *et seq.*

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opportunity to provide comments on EPA's proposal, and looks forward to working with EPA on revisions to the 2015 promulgated definition of WOTUS.

These comments request that two actions be taken: 1) that EPA and the Army Corps of Engineers clarify that MS4s cannot legally be classified as Waters of the United States consistent with the Clean Water Act and Supreme Court precedent, and 2) that EPA rescind its 2014 Stormwater Memorandum recommending that States express TMDL wasteload allocations as enforceable, numeric effluent limitations in NPDES permits.[2]

I. Background

In July, 2015, the EPA issued a final rule revising the definition of WOTUS. The 2015 rule stretched the definition to its maximum supportable extent. The apparent intent was to include as many headwaters and tributaries as possible. 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, and extended the jurisdictional reach of EPA and the Army Corps of Engineers beyond what is allowed by federal law. Under the 2015 rule, WOTUS includes aqueducts, reservoirs, irrigation channels, storm drains, flood control channels, infiltration basins, and pipelines connecting such facilities.

During the rulemaking process, municipalities nationwide actively engaged EPA on application of the definition to cities – from both a stormwater and water supply perspective. EPA staff included specific exclusions from the definition of WOTUS. The exclusions were intended to prevent over-application of the Clean Water Act ("CWA") to portions of the City's MS4 system as well as the water supply infrastructure the City relies on. Unfortunately, the exemptions did not go far enough and the final promulgated definition can be construed to apply to portions of the City's MS4.

The City is most concerned about the characterization of its waterbodies and storm drains within its jurisdiction. The City is regulated by two regional water boards which issue NPDES permits for the City's storm water discharges to WOTUS. Both NPDES permits contain a finding that a river, stream or creek in a developed area of the City can be "both an MS4 and receiving water."[3] For the reasons discussed herein, designation of a natural water as both MS4 and WOTUS is a legal impossibility that has the potential effect of imposing inapplicable requirements on MS4s and could substantially interfere with the City's ability to manage stormwater in its jurisdiction. Dual designation can also subject the City to unnecessary litigation under the Clean Water Act from third party citizen groups that seek penalties for pollutants carried in stormwater channels.

Pursuant to the Executive Order, EPA is rescinding the 2015 Rule and considering a revised definition of WOTUS that is consistent with Justice Scalia's opinion in *Rapanos v. United States.*[4] . The City is aware

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[2] These comments were prepared with the assistance of legal counsel.

[3] National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds Within the San Diego Region, Order No. R9-2013-0001, as amended by Order No. R9-2015-0001 and Order No. R9-2015-0100, Finding 11, pg. 4; National Pollutant Discharge Elimination System (NPDES) Permit and Waste Discharge Requirements for Discharges from the Municipal Separate Storm Sewer Systems (MS4s) Draining the Watersheds Within the Santa Ana Region, Order No. R8-20009-0030, as amended by Order No. R8-2010-0062, Finding F-18,, pg. 7.

that the National Water Resources Association and the Association of California Water Agencies, and numerous other municipalitiesare submitting detailed comments to EPA on proposed revisions to the WOTUS definition. The City fully supports those comments. As a municipality the focus of the City's comments is the treatment of flood control and stormwater infrastructure under the 2015 Rule and potential revisions to the definition of WOTUS.

Specifically, we are writing to request that EPA reconsider how flood control infrastructure is classified. We believe that the definition of WOTUS does not include MS4s or point sources as a matter of law and practicality, and that any promulgated definition of WOTUS should explicitly state that MS4s are not WOTUS. This exclusion will protect cities, counties and other local governments that own and operate MS4s from inappropriate application of the Clean Water Act by regulatory agencies and from claims by third party citizen groups that the MS4 does not comply with federal law. This approach is consistent with Justice Scalia's opinion in the *Rapanos* case and is fully supported by the plain text of the Clean Water Act.

II. The Plain Text of the Clean Water Act Precludes Treating Any Portion of the MS4 as WOTUS

The Clean Water Act is based on a definition of "point source" that includes ditches, channels and other conveyances that are part of the nation's water supply, waste treatment, transportation and flood control systems. The 2015 rule, as adopted without revision, conflicts with the plain text of the Clean Water Act, which regulates these sources at the point of discharge into waters of the United States.

The Clean Water Act defines "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 40 C.F.R. § 122.3).[5]

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):
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> (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

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[4] 547 U.S. 715 (2006).

[5] 33 U.S.C. § 1631 (14); 40 C.F.R. 122.2.

> 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;
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> (ii) Designed or used for collecting or conveying storm water;
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> (iii) Which is not a combined sewer; and
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> (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.
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> (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.[6]

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 dictates that they must be one or the other.

Section 402(p) of the Clean Water Act similarly differentiates between discharges from the MS4, and receiving waters. Section 402(p)(3)(b) of the Clean Water Act provides:

> Permits for discharges from municipal storm sewers –
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> (i) may be issued on a system– or jurisdictional– wide basis;
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> (ii) shall include a requirement to ***effectively prohibit non-stormwater discharges into the storm sewers***; and
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> (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.[7]

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[6] 40 C.F.R. 122.26(b)(8)-(9).

[7] 33 U.S.C. § 1342(p)(3)(B) [emphasis added].

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" ("MEP").[8] The Act applies the 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.[9] 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.

The Supreme Court differentiated between point sources and WOTUS in *Rapanos*. In his concurring opinion, Justice Scalia discussed the difference between traditional navigable waters and manmade conveyances at length:

> Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from "navigable waters," by including them in the definition of "'point source.'" The Act defines "'point source'" as "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, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). It also defines "'discharge of a pollutant'" as "any addition of any pollutant to navigable waters from any point source." § 1362(12)(A) (emphasis added). The definitions thus conceive of "point sources" and "navigable waters" as separate and distinct categories. The definition of "discharge" would make little sense if the two categories were significantly overlapping. The separate classification of "ditch[es], channel[s], and conduit[s]"-- which are terms ordinarily used to describe the watercourses through which intermittent waters typically flow--shows that these are, by and large, not "waters of the United States."[10]

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

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[8] 42 U.S.C. § 1342(p).

[9] *Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999.

[10] *Rapanos* at 735-36. "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." *Id.* at 736, fn. 7.

> 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."[11]

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.[12]

Similarly, in *South Florida Water Management District v. Miccosukee Tribe of Indians* , the Supreme Court held that movements of water within "the waters of the United States" were not discharges from a point source.[13] 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*.[14] 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

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

[12] *Rapanos* at 778-79.

[13] 541 U.S. 95 (2004).

[14] 133 S.Ct. 710 (2013).

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 WOTUS based on an expansive definition of the term not found in the text of the Act itself. Thus, classifying a MS4 as a Water of the United States is a legal impossibility as the same water would be discharging into itself, which is contrary to U.S. Supreme Court precedent.

III. Defining the MS4 as WOTUS Makes Compliance with Clean Water Act Mandates Physically Impossible

There are very good reasons that the Clean Water Act differentiates between point sources and WOTUS. 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 first and foremost a flood control system designed to protect life and property from the risk of flooding. MS4s can also function as treatment systems or can be used as a conveyance for treatment systems to sanitary sewer systems. Attaining Water Quality Standards within the flood control or treatment system is not possible. A definition of Waters of the United States that requires this outcome violates the plain text of the Act.

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.[15] 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 ("UAA") process that such uses are not possible.[16]

States are prohibited from adopting "waste transport or waste assimilation as a designated use for any waters of the United States."[17] 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. Many jurisdictions in California, however, utilize their MS4s for diversion pipelines and other treatment-related BMPs in order to comply with TMDL requirements. Classification of MS4s as WOTUS would prevent these types of systems from being constructed within waters of the United States and improving water quality. 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.

In addition, classification of MS4s as Waters of the United States become problematic in the context of total maximum daily loads ("TMDLs"). 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 combination of a wasteload allocation (limits on NPDES discharges) ("WLA"), a load Allocation (non-NPDES discharges) and a margin

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[15] 33 U.S.C. § 1313(c)(2)(A).
[16] *See* 33 U.S.C. §§ 12S1(a) and 1313(c).
[17] 40 C.F.R. § 131.10(a).

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. A portion of a WLA is assigned to a MS4 discharging into WOTUS establishing water quality based effluent limits for the point source. Upon establishment of a WLA, States are required to impose limits on discharge activities to ensure that the applicable TMDL is met. So, if a MS4 is designated as WOTUS, then that same MS4 cannot be assigned a WLA for purposes of meeting the TMDL since there is discharge (*i.e.*, point source) to a water of the U.S. It would result in regulatory uncertainty for the MS4 operator as to where its compliance points are for purposes of a TMDL.

Even if an NPDES or other permit is not required for a given activity, through the TMDL process, designation of a water body as WOTUS can result in significant limitations. The Ninth Circuit Court of Appeals' decision in *Pronsolino v. Nastri* illustrates the issue.[18] In that case, the EPA imposed TMDLs on a river that was polluted only by non-NPDES sources of pollution. 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 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. Both the trial court and the Ninth Circuit Court of Appeals sided with EPA, holding that the CWA's 303(d) listing and TMDL requirements apply to all waters of the United States regardless of the source of impairment.

Thus, it matters whether a water is designated WOTUS even if an activity does not require a Clean Water Act permit. 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, treatment wetlands, low impact development BMPs and flood control systems, the designation can be extremely problematic and will have a negative impact on local government operations across the United States.

IV. Specific Impacts on City Operations

As noted above, various natural and manmade waterbodies lie within the City's jurisdiction. Although the State has not attempted to characterize the waterbodies in the City's jurisdiction in any adverse way, the City is concerned that the State and EPA have attempted to do so in other parts of Orange County where man-made, concrete channels that were constructed in dry land for irrigation or flood control purposes have been designated as WOTUS. The effect of these designations will cause those flood control channels to be listed on the CWA 303(d) list for impaired waterbodies and subject to applicable TMDLs.

The Supreme Court articulated the test for navigability in *The Montello*[19] 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."[20] Susceptibility to use as a highway of commerce is central to finding jurisdiction over what are

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[18] 291 F.3d 1123 (2002).

[19] 87 U.S. (20 Wall.) 430,441-42 (1874).

[20] 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.

traditionally areas of state control. In *U.S. v. Appalachian Elec. Power Co*,[21] 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."[22]

Differentiating between man-made or man altered facilities and navigable waters can be difficult. 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*,[23] the first case in which the Supreme Court extended federal jurisdiction to man-made waters, the Court did so on the grounds that the canal at issue was designed for navigation:

> Navigable water situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different States, carried on by vessels such as those in question here, is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States.[24]

More recently, in *Kaiser Aetna v. United States*, the Supreme Court found that a modified fish pond on the Hawaiian island of Oahu became navigable and subject to the Rivers and Harbors Act only after it was converted from a shallow, landlocked pond, into a marina with a surface connection to the Pacific Ocean.[25]

In *Finneseth v. Carter*, the Sixth Circuit Court of Appeals considered whether Dale Hollow Lake which straddles the border between Tennessee and Kentucky was navigable in fact.[26] 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."[27]

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. Flood control and stormwater management 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 (or that act as either) as a matter of law do not qualify.

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[21] 311 U.S. 377 (1940).
[22] *Id.* at 407.
[23] 109 U.S. 629 (1883)
[24] *Ex Parte Boyer*, 109 U.S. 629, 632 (1883) [emphasis added].
[25] 444 U.S. 164 (1979).
[26] 712 F.2d 1041 (1983).
[27] *Id.*

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.[28]

V. EPA Should Rescind the Office of Water's 2014 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs"

In addition to the MS4/WOTUS conflation that has occurred by federal and state regulators, there have been issues in California as to whether MS4s are required by federal law to strictly meet water quality standards and other numeric effluent limitations. Historically, federal courts and EPA have opined that federal law does not require MS4s to meet numeric limits in their NPDES permits, but that compliance is based on best management practices that are implemented to the maximum extent practicable.[29]

On November 22, 2002, EPA's Office of Water reaffirmed this position, issuing a memorandum on the subject of "*Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs*" ("2002 Memorandum"). The 2002 Memorandum was issued as guidance to clarify existing EPA regulatory requirements for establishing WLAs and water quality based effluent limits ("WQBELs") and conditions in NPDES permits. WLAs are often expressed as numeric WQBELs in NPDES permits. At that time, there was confusion as to whether MS4s have to strictly meet the numeric WQBELs that were derived from their TMDL WLAs and inserted into NPDES permits or whether compliance could continue to be based on best management practices that were implemented to the maximum extent practicable. In 2002, EPA recommended "that for NPDES-regulated municipal and small construction storm water discharges effluent limits should be expressed as best management practices ("BMPs") or other similar requirements, rather than as numeric effluent limits."[30] EPA recognized that storm water discharges are due to storm events that "are highly variable in frequency and duration are not easily characterized", and that this variability made it difficult to determine project loadings for MS4 dischargers. Thus, in 2002, EPA did not recommend that MS4s strictly meet water quality standards in receiving waters, but that BMP practices constituted compliance with certain Clean Water Act requirements. The 2002 Memorandum was relied upon by subsequent courts upholding the ruling in *Defenders* that MS4s do not have to comply with numeric water quality standards and other effluent limitations.[31]

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[28] *Rapanos* at 739.

[29] *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166 (9th. Cir 1999) ("In conclusion, the text of 33 U.S.C. § 1342(p)(3)(B), the structure of the Water Quality Act as a whole, and this court's precedent all demonstrate that Congress did not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C).") ("*Defenders*").

[30] 2002 Memorandum, pg. 4

[31] *Md. Dep't of the Env't v. Anacastia Riverkeeper*, 447 Md. 88, 100 (2016); *see also Divers' Environmental Conservation Organization v. State Water Resources Control Bd.*, 145 Cal. App. 246 (2006) ("*Divers*").

In 2014, however, EPA replaced its prior guidance and issued a memorandum superseding the 2002 Memorandum (and a 2010 memorandum on the same subject), recommending that States issue NDPES permits with clear, specific and measurable requirements for MS4s.[32] Despite federal law to the contrary and without formal rulemaking, EPA recommended states include numeric effluent limits for stormwater discharges in NPDES permits. This "guidance" effectively recommends that compliance no longer be based on a BMP approach but that cities strictly comply with WQBELs, and thereby with Water Quality Standards. This guidance is in conflict with the Clean Water Act and applicable case law, such as the *Defenders* and *Divers* cases.

The issue of numeric limits in permits has been the subject of extensive administrative proceedings and litigation in California since there is a significant financial and regulatory burden on local governments operating MS4s.[33] In 2015, the California State Water Resources Control Board upheld the Los Angeles County MS4 permit that required the county, flood control district and 84 cities to comply with numeric receiving water limits and other numeric effluent limitations based on the incorporation of 33 new TMDLs and their associated WQBELs.[34] In its order, the State Water Board cited the 2014 Memorandum that it was feasible to include numeric limits in the permit, thus making them enforceable. Several other California regional water boards have followed suit, incorporating numeric limits in permits and requiring compliance therewith – much of which has been based on EPA's 2014 Memorandum and its recommendation that numeric limits be used as measurable and enforceable goals for flood control channels that discharge to waters of the United States. In an effort to comply, many cities face significantly high compliance costs that threaten city general funds and the funding of municipal services. Others have been threatened with third party lawsuits by private citizen organizations over the failure to comply with certain numeric limits, leading to extensive penalties and attorney's fees.

The 2014 Memorandum is a guidance document that is in conflict with federal law and prior EPA policies, and has led to the justification by states that federal law requires MS4operators to comply with numeric limits, and thus face astronomical compliance costs that jeopardize local government revenues. Compliance with numeric limits also makes the operation of MS4s as facilities to protect life and property infeasible, and it creates disorder and ambiguity for critical infrastructure operations and

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[32] Revisions to the November 22, 2002 Memorandum "Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs" (Nov. 26, 2014).

[33] *See e.g., National Resources Defense Council v. State Water Resources Control Boord*, Case No. BS156962 (Sup. Ct. Jan. 23, 2017 (holding by Superior Court that watershed management plans not unlawful; Petitioners have filed a Notice of Appeal); *City of Gardena v. Regional Water Quality Control Board et al*, Case No. 00833732 (challenging adoption of Los Angeles County NPDES permit; case pending); *City of Duarte v. State Water Resources Control Board et al*; Case No. 00833614 (challenging numeric limits in Los County NPDES permit; case pending).

[34] State Water Resources Control Board, Order No. 2015-0075, *In the Matter of Review of Order No. R4-2012-0175, NPDES Permit No. CAS004001 Waste Discharge Requirement for Municipal Separate Storm Sewer System (MS4) Discharges within the Coastal Watersheds of Los Angeles County, Except Those Discharges Originating from the City of Long Beach MS4*, Issued by the California Regional Water Quality Control Board, Los Angeles Region SWRCB/OCC FILES A-2236 (a)-(kk), pp. 57-58 (July 2015).

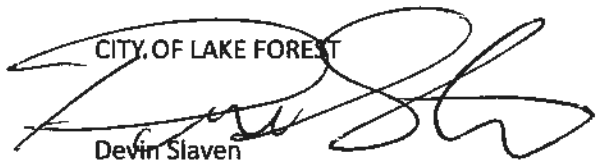
maintenance. EPA should rescind the 2014 Memorandum and replace it with guidance based on the 2002 Memorandum that effluent limits in permits be expressed as BMPs.

V. Conclusion

The City 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)." Addressing the City's concerns presented in this letter is consistent with the ruling by Justice Scalia in the *Rapanos* case, and will ensure water quality is protected without imposing unnecessary new burdens on local governments operating MS4s while preserving flood control facility functions to protect life and property.

If you have any questions about the City's comments, please do not hesitate to contact Devin Slaven at (949) 461-3436 or dslaven@lakeforest.ca.gov.

Sincerely,



CITY OF LAKE FOREST

Devin Slaven
Environmental Manager