No. 21-454

IN THE

Supreme Court of the United States

MICHAEL SACKETT; CHANTELL SACKETT,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY;
MICHAEL S. REGAN, ADMINISTRATOR,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICUS CURIAE*[1]

The National Association of Clean Water Agencies ("NACWA") is a nonprofit trade association representing more than 350 municipal clean water agencies that own, operate, and manage publicly owned treatment works, wastewater and stormwater sewer systems, water reclamation districts, and infrastructure relating to all aspects of wastewater collection, treatment, and disposal.

NACWA submits this brief to help ensure that the Court preserves two central aspects of current U.S. water quality regulation: (1) the existence of a federal water quality regime that displaces what would otherwise be an ad hoc, activist-driven legal landscape that could cripple the ability of public agencies to provide affordable and sustainable clean water services to communities throughout the country; and (2) the ability of federal agencies to exclude waters from that regime where doing so would serve environmental, regulatory, or efficiency aims.

Some *amici* urge this Court to curtail the authority of the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("the Corps") (collectively, "the Agencies") to administer the operative provisions of the Clean Water Act ("CWA" or "the Act") based on their own interpretation of constitutional limits on legislative delegations of authority. However, such a ruling could undermine or even dismantle the Agencies'

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, nor has such counsel or any party made a monetary contribution intended to fund the preparation and submission of this brief. No person other than amicus curiae and its members have made a monetary contribution to the preparation and submission of this brief.

50-year-old regulatory program and dramatically increase legal uncertainty and risk for NACWA members, threatening not only their provision of affordable clean water services, but also their substantial investments in critical public infrastructure. The CWA's federal regulatory scheme, though not perfect, has for years displaced what could otherwise be a chaotic judicial patchwork of water quality requirements driven by plaintiffs' lawsuits, that is potentially untethered from key technical, affordability, and feasibility considerations. The existence of a federal scheme which requires such issues to be taken into account is vital to NACWA's members, who rely on a consistent and predictable regulatory approach to facilitate their critical work and safeguard their long-term investments.

Separately, litigants in suits challenging previous CWA rulemakings have continuously sought to limit the ability of the Agencies to exclude waters from the stringent requirements of the Act, even where doing so would foster improved water management practices, downstream water quality, and regulatory certainty. Such limits also threaten the ability of NACWA's members to protect public health and the environment and minimize costs for local communities. It is therefore of equal importance to NACWA members that this Court preserve the flexibility of the Agencies to exclude specific categories of waters from the CWA, and clarify that the text and structure of the Act actually require that the Agencies exclude one of these categories of waters – groundwater.

SUMMARY OF ARGUMENT

The legal certainty provided by the Clean Water Act's displacement of federal common law tort actions against clean water utilities, as well as long-standing exclusions of certain waters from the regulatory definition of "waters of the United States" ("WOTUS"), are essential to the work NACWA's members carry out to protect human health and the environment and steward public funds. NACWA submits this brief to provide insight as to how the structure and jurisdictional reach of the CWA impact the provision of clean water services and development of critical infrastructure and to ask this Court to consider these impacts in resolving the question presented.

This Court should reject the requests of several *amici* for it to find that the CWA unlawfully delegates legislative authority to the Agencies. Such a finding would be in direct contravention to this Court's precedent as to the permissible scope of congressional delegation, which requires that Congress provide an intelligible principle to agencies to guide their exercise of discretion in administering a regulatory system. The CWA clearly provides such a limiting principle by confining the Act's jurisdictional reach to "navigable waters." Further, a finding of unlawful delegation of legislative authority would upend the federal regulatory structure that has for five decades shielded regulated entities from an inconsistent, unpredictable, and unworkable patchwork of activist-driven and judicially created water quality requirements. The continued operations of clean water agencies throughout the country depend on this Court's clear rejection of these nondelegation arguments. The Agencies' half-century history of substantially successful administration of the CWA, bolstered by guidance from

the courts, evidences the fact that there is no constitutional delegation problem with the CWA.

The Agencies' long-term administration of the Act has also fostered the development of significant technical expertise, which the Agencies have in part applied by consistently recognizing certain exclusions from the definition of "waters of the United States." These exclusions have facilitated better water management practices, improved downstream water quality, and promoted regulatory certainty. They should be recognized by the Court as it provides guidance on the appropriate scope of federal CWA jurisdiction.

Of particular import to NACWA's members are exclusions for groundwater, waste treatment systems, and stormwater control infrastructure. NACWA's members have long relied on these exclusions to perform essential wastewater treatment, flood, and stormwater management and water conservation activities, including the implementation of green infrastructure and other innovative practices that provide important public health and environmental benefits consistent with the goals of the CWA.

These exclusions have been embedded as core limits on the jurisdictional reach of the CWA for decades and provide vital stability in an ever-shifting regulatory landscape. In doing so, they help prevent unnecessary expenditures of limited municipal resources and support continued efficient and effective water management operations. NACWA has consistently worked with the Agencies to improve the clarity of these exclusions, most recently by submitting comments on the Agencies' proposed rule to revise their definition of WOTUS. See *Revised Definition of "Waters of the United States,"* 86

Fed. Reg. 69,372 (Dec. 7, 2021), Docket No. EPA-HQ-OW-2021-0602.

In considering the bounds of the CWA's reach, NACWA asks that this Court recognize that one of these key excluded categories—groundwater—is not a "navigable water" subject to federal CWA jurisdiction and reject any formulation of a WOTUS definition that would prevent the Agencies from implementing other sensible regulatory exclusions. Such a ruling would provide critical support to NACWA members' ability to adopt novel and advanced technologies that benefit the millions of American water ratepayers they serve.

ARGUMENT

I. THE CWA IS NOT AN UNLAWFUL DELEGATION OF LEGISLATIVE POWER TO THE AGENCIES

Congress enacted the CWA in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), creating a broad pollution control program that relies on cooperative federalism for implementation. The Act's programs to protect water quality are limited to "navigable waters," defined in the Act as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Several *amici* have suggested that, in delegating power to the Agencies to administer programs for all "waters of the United States," Congress has unlawfully granted the Agencies legislative authority in violation of the nondelegation doctrine. *See* Amicus Brief of Liberty Justice Center (filed Apr. 14, 2022); Amicus Brief of Americans for Prosperity Foundation (filed Apr. 14, 2022). These legal arguments are inherently flawed and should not be accepted by this Court.

At its core, the nondelegation doctrine seeks to preserve the constitutional balance of separation of powers. See *Mistretta* v. *United States*, 488 U.S. 361, 371 (1989). However, this doctrine is intended to be used as a last resort in instances of clear legislative abdication, as it is a chainsaw rather than a scalpel. This is apparent from the doctrine's 85-year history, throughout which this Court has repeatedly refused to find congressional delegation to be unconstitutional unless "Congress had failed to articulate *any* policy or standard" to confine the Executive's discretion. *Id.* at 373, n.7 (emphasis added).

There is no basis for this Court to take up *amici*'s invitation to find an unlawful delegation in the CWA. The

Act clearly provides an intelligible principle to shape the Agencies' interpretation of their authority by limiting the Agencies' jurisdiction to "navigable waters."[2] This fact is underscored by the Agencies' 50 years of implementation of the Act with direction from the courts.

A holding that the CWA amounts to an unlawful delegation of congressional authority would be detrimental to the reliable and affordable provision of clean water throughout the country. Displacement of a comprehensive federal regime would resuscitate the threat of federal common law causes of action against NACWA's members, thereby exposing them to an ad hoc patchwork of judicial water quality requirements that flies in the face of both clear congressional intent and common sense. The Court should avoid these consequences by rejecting *amici's* nondelegation arguments.

A. The Act Provides an Intelligible Principle to Guide its Interpretation

All that is required to withstand a nondelegation challenge is a demonstration that Congress included "an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928). Specifically, this Court has found

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[2] Congress has used the term "navigable waters" in other contexts as well, including in determining the extent of the authority of the Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899, see 33 U.S.C. § 403 (regulating activities in "navigable . . . waters of the United States"), and in establishing the limits of the jurisdiction of federal courts conferred by Art. III § 2 of the United States Constitution over admiralty and maritime cases. While the term has different meaning depending on its context, it nevertheless has been consistently held to provide an intelligible principle from which congressional intent can be gleaned.

it "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946). Applying this standard, this Court has upheld challenged delegations made pursuant to the Clean Air Act, see *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 473 (2001), the Public Utility Holding Company Act of 1935, see *Am. Power & Light Co.*, 329 U.S. at 104–105, and the Sex Offender Registration and Notification Act, see *Gundy* v. *United States*, 139 S. Ct. 2116, 2129–2130 (2019).

As this Court emphasized in *Gundy*, "a nondelegation inquiry always begins (and often almost ends) with statutory interpretation." 139 S. Ct. at 2123. The CWA confines federal authority to "navigable waters," defined in section 502(7) of the statute as "waters of the United States, including the territorial seas." Previous decisions of this Court have made clear that both "navigable" and "waters" impose boundaries on the jurisdictional scope of the CWA, thereby providing an intelligible principle upon which the Agencies must base their WOTUS definition. Consistent with this Court's observation in *Gundy,* then, the nondelegation inquiry for the CWA begins and ends with the text of the statute.

In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers* (*"SWANCC")*, this Court held that Congress' use of the term "navigable" in the Act imposed clear limits on the Act's jurisdictional reach, having "at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so

made." 531 U.S. 159, 172 (2001).[3] These limits are tied to the Commerce Clause, which serves as the source of Congress' power to regulate waters and which thereby imposes bounds on the Agencies' authority under the CWA. Even Justice Kennedy in his *Rapanos* concurring opinion reiterated that "the word 'navigable' in the Act must be given some effect," and that the term "navigable" constrains the Agencies' discretion over their jurisdictional reach by requiring "the existence of a *significant nexus* between the wetlands in question and navigable waters in the traditional sense." *Rapanos* v. *United States*, 547 U.S. 715, 779 (2006) (Kennedy, J., concurring) (emphasis added).

Congress' use of the term "waters" as a jurisdictional touchstone also imposes significant limits on the Agencies' discretion to determine the jurisdictional reach of the CWA. Under the Act, the Agencies have authority to regulate "waters" but not lands, and while "the transition from water to solid ground is not necessarily or even typically an abrupt one," the Agencies "must necessarily choose some point at which water ends and land begins." *United States* v. *Riverside Bayview*, 474 U.S. 121, 132 (1985). While ultimately this choice is informed by the Agencies' expertise, see *id.* at 134, it is also guided by "legislative history and underlying policies of [the Agencies'] statutory grants of authority," *id.* at 132.

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[3] The Court also specifically found that the *text of the statute* was the source of these jurisdictional limits: "In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this." *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 168 (2001).

In limiting the reach of the CWA to "navigable waters," then, Congress clearly provided an intelligible principle upon which to base a WOTUS definition, and this Court should reject the nondelegation arguments proffered by *amici* in this case.

B. Finding a Nondelegation Issue Would Undo the Act's Preclusive Effect, Subjecting Regulated Entities to Significant Burdens

In *City of Milwaukee* v. *Illinois*, this Court held that the CWA displaced federal common law:

> Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has *occupied the field* through the establishment of a comprehensive regulatory program supervised by an expert administrative agency. . . . The establishment of such a self-consciously comprehensive program by Congress . . . strongly suggests that there *is no room for courts to attempt to improve on that program with federal common law.*

451 U.S. 304, 317–319 (1981) (emphases added). In considering the preclusive effect of the CWA, the Court emphasized the key role of agency expertise in addressing water pollution control, finding both that "the general area is particularly unsuited to the approach inevitable under a regime of federal common law," and that Congress had "criticized past approaches" that relied on piecemeal litigation. *Id.* at 325.

Building on this reasoning in the context of the Clean Air Act, in *American Electric Power Co.* v. *Connecticut*, this Court reiterated that "[Congress'] *delegation* is what displaces federal common law," and emphasized that displacing federal common law does not circumvent judicial review, but rather channels this review to an assessment of whether an expert agency abused its discretion under its delegated authority. 564 U.S. 410, 426 (2011) (emphasis added).

Finding a nondelegation issue in this case would undermine the basis for the CWA's preclusive effect by calling into question Congress' grant of authority to the Agencies. And relegating federal pollution control to federal common law would reintroduce the kinds of "sporadic" and "ad hoc" decision-making that Congress roundly rejected in enacting the CWA.[4] For example, Congress carefully constrained the availability of CWA citizen suits to avoid exposing dischargers to disparate "court-developed definition[s] of water quality." See S. REP. NO. 92-414, at 79-80 (1971). Subjecting NACWA's members to such a water quality scheme now would significantly reduce their ability to plan for the long-term investments in critical infrastructure necessary for the continued provision of sustainable, affordable clean water nationwide.

Reliance on the development of federal common law would likewise subject regulated entities to the unpredictability of local courts without the availability of the administrative protections and opportunities for engagement offered by federal agency regulation. Nor would it entail the mandatory consideration of factors such

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[4] See *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 325 (1981) (citing S. REP. NO. 92-414 at 95 (1971)).

as costs, feasibility, and societal impacts which are ensconced in the CWA's regime and are so critical to the work of clean water agencies.

The programs Congress set up in the CWA serve as a crucial bulwark against piecemeal, time- and resource-consuming litigation that would untenably interfere with the public services performed by clean water agencies. In the face of these significant practical consequences, it is imperative that this Court not take up *amici*'s invitation to find an unlawful delegation of legislative authority.

II. THIS COURT SHOULD PROVIDE CLARITY ON CERTAIN WOTUS EXCLUSIONS

In defining WOTUS, the Agencies have long recognized waters which fall outside the scope of the CWA's programs. These exclusions are based on a variety of considerations, from practical concerns related to administrability to more fundamental limits on the scope of federal regulatory authority grounded in the language of the CWA. The Court should take this opportunity to provide clarity on a number of these exclusions vital to clean water utilities, specifically, those for groundwater, waste treatment systems, and stormwater control features.

A. THE COURT SHOULD CLARIFY THAT GROUNDWATER IS NOT A WOTUS

The Agencies' longstanding position that groundwater is not a WOTUS stems from both the text and structure of the Act. As the Agencies' recent proposed rule reiterates, "they have never interpreted groundwater [to] be a 'water of the United States' under the Clean Water Act." 86 Fed. Reg. at 69,424 n. 47 (2021). Nevertheless, the

appropriateness of the Agencies' position has been repeatedly called into question.[5]

In enacting the CWA, Congress crafted careful limits on federal authority, preserving significant authority for the states to control pollution. In its declaration of goals and policy, Congress explicitly affirmed "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and to preserve "land and water resources." 33 U.S.C. § 1251(b). This policy is reiterated throughout the substantive provisions of the CWA.[6] The regulation of groundwater as a WOTUS would inappropriately shift the authority of the states in this regard to EPA and the Corps.

Moreover, it defies logic to include groundwater under any concept of navigability. Groundwater is "water that exists underground in saturated zones beneath the land surface," moving at "rates of 7-60 centimeters (3-25

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[5] See, *e.g.*, Comments of Sierra Club, Puget Soundkeeper Alliance, Idaho Conservation League, & Mi Familia Vota, *Proposed Rule, Revised Definition of "Waters of the United States,"* EPA-HQ-OW-2021-0602-0328, at 25 (Feb. 7, 2022); Comments of WWALS Watershed Coalition, Inc., *Proposed Rule, Revised Definition of "Waters of the United States,"* EPA-HQ-OW-2021-0602-0551 (Feb. 12, 2022), Docket ID No. EPA-HQ-OW-2021-0602.

[6] See, *e.g.*, 33 U.S.C. §§ 1342(b), 1344(g)–(h) (creating a mechanism for states to receive delegation of permitting authority and implement permitting programs); 33 U.S.C. §§ 1252(a), 1254(a)(5) (directing EPA to address groundwater pollution through information gathering and coordination with the States); 33 U.S.C. § 1341(a)(1) (imposing a certification requirement that allows states to prevent the Agencies from issuing permits that would violate state water quality standards). See also *Rapanos* v. *United States*, 547 U.S. 715, 803 (2006) (Stevens, J., dissenting) (assigning states "nearly exclusive responsibility for containing pollution from nonpoint sources").

inches) per day in an aquifer."[7] This water "fills the pores and fractures in underground materials such as sand, gravel, and other rock."[8] It is not, nor can it ever be, navigable.

This fact is underscored by Congress' disparate treatment of "ground waters" and "navigable waters" throughout the Act,[9] as well as the Act's legislative history, which confirms that Congress expressly decided *not* to regulate groundwater through the CWA's federal pollution control programs.[10] In addition, as the Fifth Circuit emphasized in *Exxon Corp.* v. *Train*, the Act's "simple requirement" in 33 U.S.C. § 1342(b)(1)(D) that EPA find adequate authority "under State law" to "control the disposal of pollutants into wells" before approving a state National Pollutant Discharge Elimination System ("NPDES") program demonstrates an intent on the part of Congress to "stop short of establishing federal controls over groundwater pollution." 554 F.2d 1310, 1324-1325, 1328 (5th Cir. 1977).[11]

This Court, too, has recognized the bifurcated system Congress established under the CWA for protecting groundwater and surface water. *Cnty. of Maui* v. *Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020). *County of Maui* found federal authority to regulate discharges *conveyed*

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[7] U.S. Geological Survey, *What is groundwater?*, https://www.usgs.gov/faqs/what-groundwater.

[8] Id.

[9] See, *e.g.*, 33 U.S.C. §§ 1252(a), 1254(a)(5), 1256(e)(1).

[10] See S. REP. NO. 92-414 at 73 (1971) (rejecting adoption of "[s]everal bills pending before the Committee provided authority to establish Federally approved standards for groundwaters").

[11] See also *Rice* v. *Harken Expl. Co.*, 250 F.3d 264, 269 (5th Cir. 2001) (reaffirming that "ground waters are not protected waters under the CWA").

via groundwater to "navigable waters" under certain circumstances. See *id.* at 1468. However, treating groundwater as a method of conveyance is wholly different from regulating groundwater as a WOTUS itself, and this Court was careful to draw such a distinction, finding that "Congress left general groundwater regulatory authority to the States; its failure to include groundwater in the general EPA permitting provision was deliberate." *Id.* at 1472.

As this Court considers the appropriate scope of federal CWA jurisdiction, it should take the opportunity to provide stakeholders with long-sought clarity and hold that the text and structure of the CWA precludes groundwater from being included by the Agencies in any WOTUS definition.

B. The Court Must Preserve the Agencies' Ability to Exclude Waste Treatment Systems from CWA Jurisdiction

Since the early days of CWA implementation, the Agencies have recognized that, at times, waters that could otherwise be considered "WOTUS" must be excluded from such a designation where they are part of waste treatment systems designed to improve downstream water quality. See 45 Fed. Reg. at 33,424 (specifying in regulations promulgated in 1980 that "[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA . . . are not waters of the United States"). This exclusion was preserved throughout the Agencies' 1986 Rule, see 51 Fed. Reg. at 41,250 (citing 42 C.F.R. § 328.3(a)), 2015 rule, see 80 Fed. Reg. at 37,059 (emphasizing that "waste treatment systems have been excluded . . . since 1992 and 1979 respectively"), and 2020 Rule, see 85 Fed. Reg. at 22,317 (noting that "exclusions

[for] waste treatment systems . . . have been expressly included in regulatory text for decades"). And the Agencies' current proposed rule retains an explicit regulatory exclusion for waste treatment systems. See 86 Fed. Reg. at 69,385 ("[T]he agencies are proposing to retain the waste treatment system exclusion . . . from the 1986 regulations."). Yet, as with groundwater, plaintiff's groups have frequently attacked the legality of the waste treatment system exclusion. See, *e.g., Ohio Valley Envtl. Coal.* v. *Aracoma Coal Co.*, 556 F.3d 177, 188 (4th Cir. 2009).

The Agencies' existing exclusion for waste treatment systems covers a wide array of water features relied on by clean water agencies that are designed to enhance surface water quality, reduce environmental impacts, and promote water sustainability. These features vary by facility, but can include constructed wetlands and other green infrastructure, wastewater collection bins, basins and channels, cooling ponds, stormwater sedimentation ponds, low volume waste ponds, and wastewater and treated water conveyances, such as pipes and channels. EPA has long recognized the importance of such features to the efficient and effective treatment and management of water resources.[12]

Notably, waste treatment systems address pollutants *before* they are discharged into navigable waters. However, regulating waste treatment systems as WOTUS, either in whole or in part, would mandate application of technological and water quality-based limits

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[12] See, *e.g.*, EPA, *Managing Wet Weather with Green Infrastructure: Municipal Handbook – Incentive Mechanisms*, EPA-833-F-09-001 (Jun. 2009), https://www.epa.gov/sites/default/files/2015-10/documents/gi_munichandbook_incentives.pdf.

on discharges *into* the features themselves, thereby completely precluding their use for treatment. Such a requirement to treat discharges *before* they reach a treatment system would be nonsensical and would have significant ramifications for clean water agencies that utilize such systems to meet CWA obligations.

Congress made clear that, while standards of performance apply to end-of-pipe discharges, facilities should be left with "the responsibility to achieve the level of performance by the application of *whatever technique determined available and desirable*."[13] Retaining a WOTUS exclusion for these systems is essential to enable clean water utilities to create and implement important pollution control strategies, consistent with the purpose of the CWA.

C. The Exclusion Of Stormwater Control Features from the Scope of CWA Jurisdiction Is Necessary For the Work of Clean Water Agencies

Similar to waste treatment systems, stormwater control infrastructure includes a wide variety of features critical to public clean water agencies, including stormwater retention basins, curbs, gutters, and sewers. The Agencies have historically not regulated these features as WOTUS, and in their more recent rulemakings have recognized the appropriateness of such exclusion. See, *e.g.*, 80 Fed. Reg. at 37,059 (2015) (reiterating the Agencies' intent to retain exclusion of "stormwater control features constructed to convey, treat, or store stormwater," and arguing that "[finding these features jurisdictional] was never the agencies' intent"); see also 85

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[13] S. Rep. No. 92-1236, at 128 (1972) (Conf. Rep.) (emphasis added).

Fed. Reg. at 22,323 (2020) (excluding stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff).

As with waste treatment systems, regulating stormwater management features as WOTUS makes no practical sense and would impose additional regulatory burdens that would interfere with the ability of these features to perform their intended function. Such a definition would impose limits on stormwater discharges *into* the very features intended to treat and manage them. See 33 U.S.C. § 1342. Additionally, absent a clear regulatory exclusion, these features could be subjected to lengthy and costly jurisdictional determinations, further increasing the costs for public utilities needing to utilize them. The Court should therefore uphold the authority of the Agencies to exclude these features from CWA jurisdiction.

D. CONGRESS, THE AGENCIES, AND THE STATES HAVE RECOGNIZED THE IMPORTANCE OF THE INNOVATIVE WATER MANAGEMENT STRATEGIES FOSTERED BY WOTUS EXCLUSIONS

Many of the features covered by the WOTUS exclusions for groundwater, waste treatment systems, and stormwater control are green infrastructure and other innovative water management processes employed by clean water agencies for their human health, environmental, and societal benefits. Exclusions for such features from the WOTUS definition support critical public policy aims acknowledged by Congress and both state and federal agencies.

Green infrastructure mimics the natural hydrologic cycle by using natural vegetation to capture and store

runoff and allow it to gradually infiltrate into the ground so as to avoid unnatural flow regimes and erosive flows that can destroy stream habitat and disrupt aquatic systems.[14]

EPA has explicitly recognized the value of these practices in managing stormwater and wastewater, dedicating an entire section of its website to green infrastructure and its benefits[15] and developing a green infrastructure modeling toolkit to "incorporate green… infrastructure practices to help communities manage their water resources in a more sustainable way."[16]

Congress has likewise demonstrated its clear support for maintaining and expanding innovative treatment works, creating a funding program authorizing EPA to issue grants for construction. See 33 U.S.C. § 1281. This program includes a wide array of important treatment strategies, such as "aerated lagoons, trickling filters,

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[14] EPA's *Progress Report on Promoting Innovation for a Sustainable Water Future* highlights 10 areas with "the most promising opportunities to employ technology and institutional innovation to help solve current water resource issues and promote economic growth," which include conserving and reusing water, as well as improving and greening water infrastructure. See EPA, *Promoting Innovation for a Sustainable Water Future: Progress Report*, EPA-820-F-15-002 (Jul. 2015), https://www.epa.gov/sites/default/files/2015-07/documents/promoting-innovation-report-2015.pdf.

[15] See EPA, *Green Infrastructure*, https://www.epa.gov/green-infrastructure. EPA notes the specific benefits provided by green infrastructure to water quality and quantity, air quality, climate resiliency, habitat and wildlife, and communities. See EPA, *Benefits of Green Infrastructure*, https://www.epa.gov/green-infrastructure/benefits-green-infrastructure.

[16] See EPA, *Green Infrastructure Modeling Toolkit*, https://www.epa.gov/water-research/green-infrastructure-modeling-toolkit.

stabilization ponds, land application systems, [and] sand filters." *Id.* at 1283(f)(2).[17] Further, Congress explicitly recognized the value of green infrastructure in the CWA in 2019, amending the Act to direct EPA to "promote the use of green infrastructure in, and coordinate the integration of green infrastructure into, permitting and enforcement under this chapter, planning efforts, research, technical assistance, and funding guidance." *Id.* at 1377a.

States, too, recognize, encourage, and at times require the use of green infrastructure. Multiple EPA guidance documents describe how these practices can be used at the local level to protect surface waters by treating runoff through methods including infiltration, storage, filtration, and evaporation,[18] and many states encourage or require the use of green infrastructure to meet groundwater

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[17] Strong congressional support for innovative technologies is also apparent in the Senate Committee Report for the 1977 Amendments—specifically, the Committee Report emphasized that "[t]he committee intends that all of those involved in implementing the program—the Environmental Protection Agency, States, communities, and consulting engineers—redirect the program away from the conventional collection and secondary treatment approach and toward the use of alternative technologies, especially those which rely on natural systems, such as land or lagoons or marshes, in order to make use of waste waters." S. REP. NO. 95-370, COMMITTEE ON ENV. & PUB. WORKS, at *5 (Jul. 19, 1977).

[18] See, *e.g.*, EPA's *Green Infrastructure Municipal Handbook* (2008), https://www.epa.gov/green-infrastructure/green-infrastructure-municipal-handbook; see also EPA's *National Management Measures Guidance to Control Nonpoint Source Pollution from Urban Areas*, at Chapter 5 (2005), https://www.epa.gov/sites/production/files/2015-09/documents/urban_guidance_0.pdf.

recharge, stormwater runoff quantity, and stormwater runoff quality standards.[19]

In addition to green infrastructure, clean water agencies also rely on WOTUS exclusions when utilizing water reuse and recycling practices for aquifer recharge. During that process, treated water is conveyed underground to replenish groundwater stored in aquifers for beneficial purposes, especially to supplement drinking water supplies. Such recycling projects are engineered, designed, and operated to treat and attenuate pollutants and abate their discharge into surface waters.

EPA's Water Reuse Action Plan ("WRAP") acknowledges the important role water reuse and recycling can play in supplementing drinking water supplies.[20] Likewise, recycled water can also be reused for other applications such as irrigation. As EPA's WRAP

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[19] See, *e.g.*, New Jersey Administrative Code, NJDEP-N.J.A.C. § 7.8.1.2 (defining green infrastructure to mean stormwater management measures "that manage stormwater close to its source either by . . . infiltration into subsoil, treat[ment] . . . by vegetation or soil, or stor[age] . . . for reuse"); see also, Boston Zoning Code Art. 32 § 32-6 (requiring certain development projects in the Groundwater Conservation Overlay District to "promote infiltration of rainwater into the ground by capturing within a suitably-designed system a volume of rainfall on the lot equivalent to no less than 1.0 inches across . . . that portion of the surface area of the lot to be occupied by the Proposed Project").

[20] EPA, *National Water Reuse Action Plan: Collaborative Implementation* ("WRAP"), EPA 820-R-20-001 (Feb. 2020), https://www.epa.gov/sites/default/files/2020-02/documents/national-water-reuse-action-plan-collaborative-implementation-version-1.pdf. In addition, a recent WRAP progress update indicates the specific accomplishments of the WRAP program, highlighting advance reuse projects. EPA, *National Water Reuse Action Plan: Update on Collaborative Progress—Year 2* (Mar. 2022), https://www.epa.gov/system/files/documents/2022-03/wrap-annual-update_2022.pdf.

explains, such reuse can help reinforce water sustainability, resilience, and security in communities.[21]

E. Agency Discretion to Exclude Features From the WOTUS Definition Promotes Innovative Water Management Strategies And Affordability

Preserving Agency flexibility to promulgate and broadly implement exclusions from the WOTUS definition is key to fostering innovative water management strategies. As EPA noted in a recent rulemaking, various control features "have evolved considerably over the past several years, and their nomenclature is not consistent," so a flexible regulatory approach is essential for appropriately addressing the "diverse range of [innovative] features that are currently in place and may be developed in the future."[22]

Arbitrarily limiting exclusions risks omitting critical components, creating uncertainty based on inconsistent terminology, and hampering the development and implementation of new components. By contrast, clear exclusion of innovative practices from the WOTUS definition allows for investment in them.

Investments in critical infrastructure, technologies, and practices by clean water utilities transform the social,

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[21] See WRAP at 7. EPA's WRAP also emphasizes that "[a] central tenet of water reuse is that the source of water for potential reuse must be *appropriately treated and verified* to meet applicable fit-for-purpose specifications to protect public health, the environment, and any other particular end user needs or quality endpoint." *Ibid.* (emphasis added). Facilitating innovative treatment technologies is critical to this effort.

[22] Proposed Rule, *Revised Definition of "Waters of the United States,"* 84 Fed. Reg. 4154, 4192 (Feb. 14, 2019).

economic, and environmental health of the communities they serve, but they also require a multi-year planning horizon dependent on regulatory consistency and predictability. Appropriate but flexible application of WOTUS exclusions allow clean water utilities to efficiently assess federal permitting obligations and develop infrastructure projects that can meet them in a manner that minimizes costs and helps keep rates affordable.

CONCLUSION

For the foregoing reasons, this Court should preserve the CWA's federal regulatory scheme and its critical preclusive effect, clarify that groundwater is not a "navigable water," and preserve the ability of the Agencies to foster effective, efficient, and innovative water management practices through the adoption of regulatory WOTUS exclusions, consistent with the purposes of the CWA.

Respectfully submitted,

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