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

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION ET AL IN SUPPORT OF NEITHER PARTY

LISA SORONEN
STATE AND LOCAL LEGAL CENTER
444 N. Capitol Street, NW
Suite 515
Washington, DC 20006
(202) 434-4845
lsoronen@sso.org

RODERICK WALSTON
J.G. ANDRE MONETTE
Counsel of Record
BEST BEST & KRIEGER, LLP
1800 K Street, NW
Suite 725
Washington, DC 20006
(202) 785-0600
Andre.Monette@bbklaw.com

Counsel for Amici Curiae

[Additional Amici On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Additional Amici Curiae

Association Amici:
The Agribusiness and Water Council of Arizona ("ABWC")
The Association of California Water Agencies ("ACWA")
The International City/County Management Association ("ICMA")
The International Municipal Lawyers Association ("IMLA")
The National Association of Counties ("NACo")
The National League of Cities ("NLC")
The National Water Resources Association ("NWRA")

Municipal Amici:
The City of Corona, CA
The City of Lake Forest, CA
The City of Santa Ana, CA
The City of Santa Maria, CA

Water Supply Amici:
The State Water Contractors
The Elsinore Valley Municipal Water District
The Helix Water District
The Santa Margarita Water District
Western Municipal Water District

QUESTION PRESENTED

Whether the Ninth Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act, 33 U.S.C. § 1362(7).

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INTERESTS OF AMICI CURIAE

Amici are local government agencies and organizations from across the United States whose members are public and private entities that provide drinking water, water supply, water conservation, flood and stormwater management, and wastewater treatment services to the public.[1]

Association Amici:

- The Agribusiness and Water Council of Arizona ("ABWC") is a nonprofit association founded in 1978, whose members are responsible for annually providing 2.5 million acre feet of water to 500,000 acres of Arizona farmland, supporting Arizona's annual $5 billion agricultural industry.
- The Association of California Water Agencies ("ACWA") is the largest coalition of public water agencies in the nation, representing 440 water agencies. ACWA's members range in size from small irrigation districts to some of the largest water wholesalers in the world.
- The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, no counsel for a party to the case authored this brief in whole or in part, and neither such counsel nor any party made a monetary contribution intended to fund the preparation or submission of the brief. All counsel of record have consented to the filing of this brief.

regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

- The International Municipal Lawyers Association ("IMLA") is a nonprofit professional organization of more than 3,000 local government entities, including cities, counties, and special districts. IMLA's mission is to advance responsible development of municipal law through education and advocacy.

- The National Association of Counties ("NACo") is the only national association that represents county governments in the United States. NACo serves as an advocate for county government and works to ensure that counties have the resources, skills and support needed to successfully lead their communities. NACo's members provide water wastewater and flood control services to the nation's 3,069 counties.

- The National League of Cities ("NLC") is the voice of America's cities, towns and villages, representing more than 200 million people. NLC works to strengthen local leadership, influence federal policy and drive innovative solutions.

- The National Water Resources Association ("NWRA") is a nonprofit, voluntary organization of state water associations, whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers,

ranchers, and others with an interest in water issues in the western states. NWRA has member associations in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Texas, Utah, and Washington.

- The U.S. Conference of Mayors ("USCM") is the official nonpartisan organization of the more than 1,400 United States cities with a population of more than 30,000 people. Each city is represented in the USCM by its chief elected official, the mayor.

Municipal Amici:

- The City of Corona is a municipal corporation located approximately 45 miles southeast of Los Angeles in western Riverside County, California. The City encompasses 39.2 square miles with a population of approximately 160,000. The City was founded at the height of the Southern California citrus boom in 1886, and has long relied on local groundwater and surface water as to supply its residents with potable water. The City also operates a separate municipal storm sewer system ("MS4") to provide flood control protection for its residents.

- The City of Lake Forest 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 operates an MS4 to provide flood control protection for its residents.

- The City of Santa Ana is a municipal corporation located in Orange County, California. The City is fully built out and is the most densely populated city in the county with a population of 300,000 or more with 12,471.5 people per square mile. The City is located on flat, low-lying plains adjacent to the Santa Ana River. Those portions of the City that do not drain to the Santa Ana River or Anaheim Bay/ Huntington Harbor drain via a man-made channel to Upper Newport Bay, a 1,000 acre estuary and designated WOTUS.

- The City of Santa Maria is a municipal corporation located on California's central coast, on the south bank of the Santa Maria River, surrounded by agricultural lands. The City provides potable water, sanitary sewer, and flood control services to its residents. The City faces a variety of water quality challenges related to urbanization and contributions from upstream sources, including agriculture.

Water Supply Amici:

- The State Water Contractors is a non-profit association of 27 public water supply agencies in California. The association represents the legal, policy and regulatory interests of the California State Water Project ("SWP") contractors, who are responsible for the capital and operations and maintenance costs of the SWP. The SWP is a collection of canals, pipelines, reservoirs, and hydroelectric power facilities that extends more than 705 miles, and delivers clean water to 27 million

Californians, 750,000 acres of farmland, and businesses throughout the state.

- The Elsinore Valley Municipal Water District is a public non-profit water agency that provides potable water service, water supply development and planning, wastewater treatment and disposal, and recycling. Located in Riverside County, California, the District has over 42,000 water, wastewater and agricultural service connections. The vast majority of the District's water is imported into southern California via aqueducts, pipelines and storage reservoirs.

- The Helix Water 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 §§ 20500-20627. 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 Santa Margarita Water District is a retail municipal water supply agency located in southern Orange County, California. The District is the second largest retail water agency in Orange County. The District is actively engaged in water recycling, stormwater capture and use, and other innovative water supply projects.

- Western Municipal Water District is a water wholesale agency located in Riverside County,

> California. The District provides water and wastewater services to retail customers and wholesale agencies throughout the Inland Empire. The District is a member agency of Metropolitan Water District of Southern California, and receives most of its water from northern California via the Sacramento-San Joaquin Bay-Delta and from the Colorado River.

Amici submit this brief because of their interest in ensuring that their (and their members') existing and planned infrastructure will be free from inappropriate application of the Clean Water Act and a mandate to attain internal compliance with a range of requirements, including, the Act's "fishable, swimmable" standard.

SUMMARY OF ARGUMENT

Amici submit this brief to highlight the risk that designation as "waters of the United States" ("WOTUS") under the federal Clean Water Act ("CWA") poses to their (and their members') operations. Specifically this brief provides examples of projects and infrastructure that are environmentally beneficial and/or necessary for protecting basic public health and safety, and that could be hindered by inappropriate designation as WOTUS under the CWA.

Amici request that this Court consider the implications its decision will have on public infrastructure and how agencies such as the United States

Environmental Protection Agency ("EPA") will use the Court's decision in future rule making. Specifically, amici request that the Court acknowledge that not all waters are WOTUS and that amici's infrastructure in particular does not properly fall within the definition of the term.

Amici and/or their members own and operate infrastructure that provides for drinking water, water supply, flood control and stormwater management throughout the United States. This infrastructure includes irrigation canals, aqueducts, reservoirs, flood control channels, infiltration basins and stormwater treatment facilities.

Much of amici's infrastructure is in close proximity to waters that would qualify as traditionally navigable, and/or includes features that could be construed as meeting the definition of WOTUS that has been promulgated by the EPA and the United States Army Corps of Engineers ("Corps," jointly, "Agencies"). *See Final Rule for Regulatory Programs of the Corps of Engineers*, 51 Fed. Reg. 41206 (Nov. 13, 1986); *Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37054 (June 29, 2015); *The Navigable Waters Protection Rule: Definition of "Waters of the United States*," 85 Fed. Reg. 22250 (Apr. 21, 2020); and *Revised Definition of "Waters of the United States,"* 86 Fed. Reg. 69372 (Dec. 7, 2021) ("*Revised Rule*").

It is this infrastructure that is at risk. Classifying it as WOTUS is unworkable and unnecessary. In many cases, it is simply not possible for it to achieve the

stringent requirements CWA applies to WOTUS. Thus, an overly broad application of WOTUS will result in irreconcilable conflicts between the ability to continue to provide public services, and the ability to satisfy the CWA's standards. At a minimum, a WOTUS designation gives legal priority to compliance with a federal regulatory scheme without regard for how those requirements can interfere with operations and the overall purpose of a facility.

A commonsense reading of the CWA, one that looks at the Act as a whole, and its implications for traditional state control of water supply and flood control, recognizes the difference between the infrastructure that amici operate and those waters that were intended to be treated as WOTUS under the Act. Failure to recognize this difference leads to absurdities and an inability of the Act to achieve its stated purpose.

EPA and the Corps are in the process of issuing yet another regulation defining the term WOTUS. *Revised Rule*, 86 Fed. Reg. 69372 (Dec. 7, 2021). Instead of excluding amici's infrastructure – as the Agencies did with wastewater treatment facilities – the Agencies are proposing a return to their longstanding "referee" approach, wherein they leave the status ambiguous and give themselves discretion to assert jurisdiction on a case-by-case basis. *Id.* at 69424.

The problem with this approach is that it leaves amici uncertain as to the status of their operations, open to the changing interpretations of agency staff, and subject to citizen suits alleging violations of the

Act. This uncertainty inhibits amici's ability to provide cost effective and reliable services that are critical to public health and safety.

The Court's decision in the case will direct the Agencies' actions in future rule making. For the reasons set forth herein, amici urge the Court to adopt a decision that clarifies that water supply and treatment, flood control and stormwater management infrastructure is not WOTUS under the Clean Water Act.

ARGUMENT

I. THIS COURT'S DECISIONS IN *SWANCC*, *RAPANOS*, AND *MAUI*, AND OTHER ACTIONS BY EPA, INDICATE A COMMONSENSE APPROACH IS APPROPRIATE TO DEFINING WOTUS; UNDER SUCH AN APPROACH DRINKING WATER, WATER SUPPLY, FLOOD CONTROL AND STORMWATER MANAGEMENT INFRASTRUCTURE ARE NOT WOTUS

Like many federal regulatory schemes, the CWA is written broadly, and with the potential to apply to many waters and activities. The Act divides the universe into waters that qualify as WOTUS, 33 U.S.C. § 1362(7), point sources that discharge into WOTUS, 33 U.S.C. § 1362(14), non-point sources that contribute water (and potentially pollutants) to WOTUS, 33 U.S.C. § 1329, and non-jurisdictional waters. A "commonsense" approach to the Act gives full effect to these

categories and allows it to fulfill its potential to restore and maintain the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

The CWA regulates discharges into "navigable waters." This term, which is itself defined as the "waters of the United States" in the CWA, is a well-understood to mean waters that are "navigable in fact" or "susceptible" of being so rendered. *E.g.*, *PPL Montana v. Montana*, 565 U.S. 576, 591-592 (2012); *The Daniel Ball*, 77 U.S. 557, 563 (1871).

WOTUS, on the other hand, is not defined in the CWA or elsewhere in federal law. Congress, rather than determining the scope of federal jurisdiction under the CWA, evidently entrusted federal agencies and the courts to determine the scope of federal jurisdiction. WOTUS plainly means something more than traditional navigable waters – because otherwise navigable waters would not have been defined as WOTUS. The term "navigable waters" is not without significance in defining WOTUS, because the CWA anchors federal jurisdiction to "navigable waters."[2]

The fact that the CWA anchors federal jurisdiction to "navigable waters" is relevant in interpreting WOTUS. *Solid Waste Agency of Northern Cook County v. The United States Army Corps of Engineers*, 531 U.S. 159, 172 (2001) ("[I]t is one thing to give a word [navigable] limited effect, and quite another to give it no

[2] Congress has applied the term "navigable waters" in many statutes. *E.g.*, Rivers and Harbors Act of 1899, 33 U.S.C. § 403.

effect whatever."). As drinking water, water supply, flood control and stormwater management infrastructure were not intended to be navigable or move people and goods, a commonsense approach to the CWA would exclude this infrastructure from the definition of WOTUS.

Amici do not address whether WOTUS includes wetlands in general, or includes the wetlands located on or near petitioner Sackett's property. Amici argue, however, that regardless of how this Court defines WOTUS, it should adopt a definition that, as the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*") stated, is based on a "commonsense understanding" of the term. A commonsense definition of WOTUS would indicate that Congress, in enacting the CWA, did not intend to capture amici's infrastructure.

In *Rapanos*, this Court considered whether WOTUS includes wetlands that "lie near ditches or man-made drains that eventually empty into traditional navigable waters. . . ." *Rapanos*, 547 U.S. at 729 (concurring op.). While Justice Scalia and Justice Kennedy adopted different definitions for when wetlands are WOTUS, they both took a commonsense approach to the built environment.

Justice Scalia's plurality opinion stated that WOTUS includes "something more than traditional navigable waters," but concluded that WOTUS includes only "relatively permanent, standing or flowing bodies of waters," such as "streams, oceans, rivers, lakes, and bodies of water forming geographical

features." *Id.* at 732-733 (quotation marks omitted). This definition, the plurality opinion stated, "accords with the commonsense understanding of the term." *Id*. at 733-734.

Most importantly, both Justice Scalia's plurality opinion, and Justice Kennedy's concurring opinion agreed that the definition of WOTUS should not be construed to include amici's drinking water, water supply, flood control and stormwater management infrastructure. Justice Scalia discussed the difference between traditional navigable waters and manmade conveyances at length, holding:

> 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.

Rapanos, 547 U.S. at 736.

Justice Scalia further noted that storm drains and other similar infrastructure are not WOTUS, even if they serve a similar function:

> Cases holding the intervening channel to be a point source include *United States v. Ortiz*, 427 F.3d 1278, 1281 (10th Cir. 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 (2d Cir. 1992) (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 (2d Cir. 1994). On either view, however, the lower courts have seen no need to classify the intervening conduits as "waters of the United States." *Id.* at 743 (citing *United States v. Velsicol Chemical Corp*., 438 F. Supp. 945, 946-947 (W.D. Tenn. 1976) (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 (10th Cir. 2005) (2.5 miles of tunnel separated the "point source" and "navigable waters.).

Rapanos, 547 U.S. at 744.

Justice Kennedy's concurring opinion in *Rapanos* also addressed the issue of human-made conveyances and found that they should not be waters of the United States.[3]

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[3] *Rapanos*, 547 U.S. at 778-779 ("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").

More recently, this Court took a similar approach in *County of Maui v. Hawaii Wildlife Fund*, 140 S.Ct. 1462 (2020) ("*Maui*"), holding "[v]irtually all water, polluted or not, eventually makes its way to navigable waters." *Id*. at 1470. The Court, however, declined to apply a "literal" approach in deciding whether the water in that case was "from" a point source and thus subject to NPDES permit requirements, recognizing that a "literal" approach would require issuance of permits in "surprising, even bizarre circumstances." *Id.* at 1471. Instead, the Court held that "context" is important, *id*. at 1473, 1476, and that context must take into account "many [other] potentially relevant factors." *Id*. at 1476-1477.

Just as context must be considered in determining whether a pollutant discharge is "from" a point source, as in *County of Maui*, context must also be considered in defining WOTUS and determining whether it applies to particular discharges. One such contextual factor that should be considered in defining WOTUS – and that cautions against its application – is whether the term applies to movements of water in the water supply, flood control and stormwater management projects that Amici and their members operate.

These projects do not occur in traditional navigable waters or act as highways of commerce. They provide important benefits to the public, and the application of the CWA's WOTUS requirements would hinder and impair their efficiencies and core functions. Although these projects may sometimes be located near wetlands, Congress did not intend to subject these

projects to NPDES permit requirements and thus cripple their functions. Thus, a commonsense definition of WOTUS would exclude these projects and infrastructure.

EPA has also recognized the need for a commonsense approach to the CWA in other circumstances. For example, EPA regulations defining WOTUS have long excluded wastewater treatment systems. *Revised Rule*, 86 Fed. Reg. 69372, 69424-69428. In the Agencies' own words, "[t]his longstanding approach to excluding waste treatment systems – including those that are not manmade bodies of water – is a reasonable and lawful exercise of the Agencies' authority to determine the scope of 'waters of the United States.'" *Id.* at 69427.

The EPA's Water Transfer Rule provides another example. The rule excludes water transfers from NPDES permit requirements if the transferred water is not subject to "intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i). In adopting the Water Transfer Rule, the EPA took into account the circumstances of water transfer projects. The circumstances cited by the EPA are that "[w]ater transfers occur routinely and in many different contexts across the United States," *National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule*, 73 Fed. Reg. 33697 (June 13, 2008); that "thousands of water transfers [are] currently in place in the United States," *id.* at 33698; that the water transfers are "administered by various federal, State, and local agencies and other entities," *id.*; that "numerous States, localities, and residents are dependent upon water

transfers, and these transfers are an integral component of U.S. infrastructure," *id*. at 33699; that deference should be granted to "congressional concerns that the statute [CWA] not unnecessarily burden water quality management activities," *id*. at 33700; that "[w]ater transfers are an essential component of the nation's infrastructure for delivering water that users are entitled to receive under State law," *id*. at 33702; and that "[t]he pollution from transferred water is more sensibly addressed through water resource planning and land use regulations," *id*.

Notably, EPA also stated that "[a] holistic approach to the text of the CWA is needed here in particular because the heart of this matter is the balance Congress created between federal and State oversight of activities affecting the nation's waters." *Id*. at 33701. EPA found that although the purpose of the CWA is to protect water quality, "[l]ooking at the statute as a whole is necessary to ensure that the analysis herein is consonant with Congress's overall policies and objectives in the management and regulation of the nation's water resources." *Id*.[4]

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[4] The Second Circuit upheld the EPA's Water Transfer Rule in *Catskill Mountains Chapter of Trout Unlimited v. EPA*, 846 F.3d 492 (2d Cir. 2017). Prior to the EPA's adoption of its Water Transfer Rule, the United States raised its "unitary water" body argument in this Court in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), which involved the question of whether a Florida flood control and conservation project was subject to NPDES permitting requirements in transferring water from one navigable waterway in the Florida Everglades to another navigable waterbody. This Court declined

In summary, there is ample precedent in this Court's opinions and in the actions of EPA for the Court to take a commonsense approach to the CWA – one that looks at the Act as a whole and avoids micromanagement in favor of interpretations that allow the Act to work. Amici request that the Court take the same approach here, and issue a decision that excludes amici's infrastructure from the definition of WOTUS.

Although the issue before this Court is whether WOTUS applies to wetlands, the EPA and the Corps will use this Court's definition of WOTUS as a basis for regulating waters other than wetlands that may potentially fit into the definition. Therefore, this Court should provide a commonsense definition of WOTUS that does not interpret the term in a way that would apply to water supply, flood control and stormwater management projects operated by the amici and their members.

II. DESIGNATING AMICI'S WATER INFRASTRUCTURE AS WOTUS DEFIES COMMONSENSE, IS UNWORKABLE AND UNNECESSARY

Amici and their members provide water supply, flood control and stormwater management services to the public. These services address the most basic

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to address the United States "unitary water body" argument because it had not been raised or addressed below, and the Court remanded the issue to the lower courts for further determination. *Id.* at 109.

human needs – drinking water, food supply and public safety. They are critical for providing the basic protections that allow society to operate.

At various times since passage of the CWA in 1972, EPA and the Corps have issued regulations and guidance that define the term WOTUS to include, among other things, any waters with bed banks and ordinary high water mark (United States Environmental Protection Agency and United States Army Corps of Engineers, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, 1, 10 (Dec. 2, 2008)); any waters that contribute flow to downstream waters that are navigable; *Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37058 (June 29, 2015); *The Navigable Waters Protection Rule: Definition of "Waters of the United States*, 85 Fed. Reg. 22250 (Apr. 21, 2020); *Revised Rule*, 86 Fed. Reg. 69372 (Dec. 7, 2021), and any waters that are in close proximity to navigable waters – regardless of their actual level of connectivity to downstream waters. *Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37054 (June 29, 2015).

The Agencies have not excluded amici's infrastructure from these definitions unless it can be shown that the infrastructure was originally constructed outside of waters that would qualify as WOTUS. EPA Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States*, 11-12 (Dec. 2, 2008); *Clean Water Rule: Definition of "Waters of the United*

States," 80 Fed. Reg. at 37078 (June 29, 2015); *The Navigable Waters Protection Rule: Definition of "Waters of the United States*, 85 Fed. Reg. at 22305 (Apr. 21, 2020).

Water infrastructure is often constructed at geographic low points to take advantage of gravity. As a result, there is often overlap between waters that would qualify as WOTUS (non-navigable tributaries and wetlands), and amici's infrastructure. The result is an expansive definition that has the potential to capture amici's facilities and inhibit their operations.

This is what it means to be WOTUS: to have complex protections imposed on the activities and uses of a water body which are given priority over the operational needs of those using the water. This may be appropriate in waters that are truly navigable and/or integral to the chemical, physical and biological integrity of the Nation's waters. It is not appropriate for the built environment, especially man made water supply, flood control and stormwater management infrastructure.

Compliance with the CWA is not a simple thing. Waters that are WOTUS must meet designated Water Quality Standards. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.10. These standards must include fishing and swimming as a designated use, and must include criteria to ensure that the water body is capable of those uses. 40 C.F.R. §§ 131.10; 131.11.

The Los Angeles River provides an example of how a WOTUS designation can operate. This Court has recognized that the River is WOTUS, *Los Angeles County*

Flood Control Dist. v. NRDC, 568 U.S. 78 (2013) and EPA and California have included recreation as a designated use in compliance with the CWA's Water Quality Standards requirements. California Regional Water Quality Control Board Los Angeles Region, *Los Angeles River Watershed Total Maximum Daily Load* (July 15, 2010), https://www.waterboards.ca.gov/losangeles/board_decisions/basin_plan_amendments/technical_documents/80_New/LARiverFinal/Staff%20Report%20LAR%20Bact%2015Jul10%20final.pdf.

Pursuant to this designation, the River must have bacteria levels that are low enough to allow for full body immersion. *Id.* at 4.[5] The estimated cost of attaining these standards is $1.5 Billion. *Id.* at 81. The cities and County of Los Angeles are required to fund this effort, despite the fact that large portions of it are fenced and no public access is allowed.

The Los Angeles River provides an example of the requirements that the CWA attaches to all WOTUS, and the costs that come along with that designation. These requirements can be especially hard on those who operate infrastructure that has been designed to

[5] Water Quality Standards apply even if the source of pollution is naturally occurring. EPA's guidance document, *A Framework for Defining and Documenting Natural Conditions for Development of Site-Specific Natural Background Aquatic Life Criteria for Temperature, Dissolved Oxygen, and pH: Interim Document* (Feb. 2015), describes the highly technical options for a state to go through to account for naturally occurring pollutants. If the cause of the elevated levels of "natural" pollutants can be attributed to human activity *at all*, then the corresponding water quality criteria cannot be set to "natural" background levels.

move, store or treat water. These are not natural systems and in many cases cannot physically attain the water quality aspects of a natural system. Requiring government agencies to expend resources, (in some cases billions of dollars) chasing an unattainable goal is absurd.

Water Quality Standards are not the only restrictions that come with a WOTUS designation. Discharges into waters that are classified as WOTUS must be regulated with permits issued under sections 402 and 404 of the CWA. 33 U.S.C. §§ 1311, 1342, 1344. Section 402 prohibits the discharge of a pollutant to WOTUS from a point source without a permit issued under the National Pollutant Discharge Elimination System ("NPDES") program.[6] Section 404 prohibits the discharge of dredged or fill material to WOTUS without a permit from the Corps and a certification from the state in which the project will take place.

The cost of obtaining these permits is significant. As this Court noted in *The United States Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590 (2016), for an

[6] EPA regulations require most NPDES permits to prohibit discharges that "cause, or contribute" to an exceedance of Water Quality Standards (40 C.F.R. § 122.44(d)), meaning that discharges into a facility that has been designated WOTUS can be prohibited if the water within the facility is not meeting applicable standards. The definition of the term "Pollutant" under the CWA is very broad, and includes heat, and biological materials such as invasive species. 33 U.S.C. § 1362(6); 40 C.F.R. § 122.2; See also Environmental Law Institute, *The Role of Aquatic Invasive Species in State Listing of Impaired Waters and the TMDL Program*, 9 (May 2008), *available at* https://www.eli.org/sites/default/files/eli-pubs/d18__14.pdf.

"individual" permit, the average applicant spends 788 days and $271,596 in completing the process, without "counting costs of mitigation or design changes. *Id.* at 594-95 (citing *Rapanos*, 547 U.S. at 721).

But there is more than money at stake. National Pollutant Discharge Elimination System ("NPDES") permits issued under Section 402 can hinder operations by imposing limits on what can be discharged into a facility. If the facility is designed to provide treatment, like the green infrastructure and low impact development discussed below, NPDES restrictions can prevent effective use – essentially requiring treatment before the water can be put into a facility that is designed to provide treatment.

Similarly, Section 404 permits can limit the scope and timeline for basic maintenance activities like cleaning debris from a storm drain or retention pond.[7] Section 404 also triggers requirements for the Corps to consult with the United States Fish and Wildlife Service ("USFWS") and the National Marine Fisheries Service ("NMFS") to ensure there are no impacts to endangered species or their habitat. If there are, the Corps must impose restrictions as a condition of the

[7] EPA and the Corps have defined the discharge of dredge and fill material to include virtually any activity taking place in a WOTUS that could disturb sediment. 33 C.F.R. § 323.2(d)(1)(iii) ("discharge of dredged material means . . . [a]ny addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation").

Section 404 permit. 16 U.S.C. § 1536. The compensatory mitigation required can be costly and illogical given that the water being regulated would not exist at all but for the water supply, flood control or water treatment purpose served.

Section 404 also triggers review by the state in which the project will take place. 33 U.S.C. § 1341. Pursuant to Section 401 of the Act, states may impose conditions on a proposed activity that requires a 404 permit, sometimes pushing the outer bounds of their authority. *Clean Water Act Section 401, Certification Rule*, 85 Fed. Reg. 42210, 42256 (July 13, 2020) ("EPA is aware of circumstances in which some States have denied certifications on grounds that are unrelated to water quality requirements and that are beyond the scope of CWA section 401"); *Louisiana v. Am. Rivers*, 142 S.Ct. 1347 (2022) (emergency order reinstating EPA regulation limiting state authority to impose conditions under Section 401 of the CWA).

In summary, these requirements can severely hinder the core functions of water supply, flood control and stormwater management infrastructure by limiting what can go into the facilities on a day to day basis, imposing restrictions on when and how maintenance can occur, and requiring the water within the facilities to meet standards that may not be achievable. None of that is necessary because the water in the facilities is

subject to other environmental laws such as the federal Safe Drinking Water Act, and and/or other facets of the CWA.[8]

III. AN OVERBROAD DEFINITION OF WOTUS HINDERS PROJECTS THAT ARE CRITICAL TO PUBLIC HEALTH AND SAFETY

A. Drinking Water and Water Supply Infrastructure should be excluded from the definition of WOTUS

The network of irrigation canals, aqueducts and reservoirs that convey water across the western United States is among humankind's greatest accomplishments.

Via this network, water is diverted from the Platte, Rio Grande and Colorado Rivers, and water use in Colorado can affect crop yields in Kansas, Oklahoma, New Mexico, Texas, Utah, Wyoming, Nevada, Arizona and California. Via similar networks, water users in Arizona and California can trade water with farmers in northern Mexico, and farmers across the

[8] Cities and water supply agencies in particular go to great lengths to ensure that the water they deliver is safe for human consumption. Moreover, the protections in the CWA do not address the safety or nature of the public drinking water supply. The fact that recycled water is such a large part of the water supply portfolio in the United States demonstrates the capability of cities and water agencies to treat water to a level that is more than safe for human consumption.

western states can bring to market the food supply that the entire world has come to rely on.

Without it, the economic engines of the west, in Los Angeles, Phoenix, Las Vegas, Boise, Salt Lake City, Tucson, San Francisco and San Diego, would not exist. Most importantly, this infrastructure forms the backbone of the nation's drinking water supply system. Its importance to the vitality of the entire United States cannot be overstated. Public water systems typically divert waters from a WOTUS into a water system that conveys, stores, treats, and delivers water to residential, agricultural, and industrial users.

This water has value, and the costs to treat water to drinkable standards are high. Generally, public water agencies are extremely protective of the quality of water in their systems and spend a large amount of money to protect water quality both in the system and in source waters. Excluding these systems from regulation as a WOTUS will not result in a degradation of water quality because they are covered by other regulatory schemes that more appropriately regulate their core function. Indeed, regulating these systems as WOTUS will result in increased costs for permitting and compliance and subject public water systems to separate and conflicting regulations.

1. Aqueducts and Irrigation Canals

Water delivery throughout the United States is reliant on complex systems of aqueducts and irrigation

canals.[9] These channels draw surface water from rivers and streams, and can connect one WOTUS to another. They have varied water levels (based on how much water is delivered through them) that can create features that look like an ordinary high water mark. However their most important feature is connectivity. They were designed and constructed to move water.[10]

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[9] Examples of this infrastructure include the federal Central Valley Project (CVP) in California, *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 280-283 (1958); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728-736 (1950); California's State Water Project (SWP), *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82, 98-100 (1986); the Newlands Reclamation Project in Nevada, *Nevada v. United States*, 463 U.S. 110, 115-116 (1983); the Central Arizona Project, *Maricopa-Stanfield Irrig. & Drainage Dist. v. United States*, 158 F.3d 428, 430-431 (9th Cir. 1998); *United States v. 0.59 Acres of Land*, 109 F.3d 1493, 1495 (9th Cir. 1997); and the Colorado-Big Thompson Project, *City of Colorado Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1074 (10th Cir. 2009).

[10] Irrigation canals deliver water to fields, and then can act as drains to take water off the fields and return it to a stream. In other cases, there is a deliberate connection to groundwater. For example, in eastern Idaho, water routinely leaves unlined irrigation canals and infiltrates into underlying groundwater where it can later emerge as a spring or underflow of the Snake River. The State of Idaho takes advantage of this system by engaging in managed recharge. In 2009, Idaho legislature enacted House Bill 264 approving the Eastern Snake Plain Comprehensive Aquifer Management Plan ("CAMP"). Idaho Code Ann. § 42-1734B (West 2017). The CAMP process established goals managing the aquifer, including managed aquifer recharge. The Idaho Legislature reiterated its commitment to recharge in 2016, through a Senate Concurrent Resolution directing the Idaho Water Resources Board ("IWRB") to develop a program to recharge an annual average of 250,000 acre-feet by 2024. The goal of this managed recharge is to stabilize and recover the Eastern Snake River Plain

An expansive definition of the term WOTUS captures these channels because they can look, and in some cases act like what the Agencies have defined as tributaries. For example, the 2015 EPA definition of WOTUS described jurisdictional tributaries to include "man-altered, or man-made water and includes waters such as rivers, streams, lakes, ponds, impoundments, canals, and ditches." *Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054, 37,100 (June 29, 2015). Under this definition, a water would qualify as a "tributary" (and therefore WOTUS) if it contributes flow, either directly or indirectly, to a water that is navigable in fact, *id.* at 37,104, or if it removes water from one part of the tributary network and moves it to another" *id.* at 37,100.

There should be little argument that Congress did not intend to capture the network of irrigation canals that brings water to farmers across the United States. However, EPA and the Corps have been drafting regulations that do just that. Without appropriate direction from the Court, it is very likely that the Agencies will issue a new definition that includes a similar definition of tributary that, like its predecessor has the potential to be broadly construed.

2. Terminal Reservoirs

Like aqueducts and irrigation canals, off stream water storage reservoirs (known as "terminal reservoirs"

Aquifer and to restore spring flows that feed the Snake River and its tributaries.

because they do not discharge downstream) are often misclassified as WOTUS. Lake Jennings in San Diego County provides an example. The reservoir serves as a storage facility for water imported into the region from the Colorado River and northern California. It was constructed on a dry canyon and does not discharge downstream. Nonetheless, California has classified it as WOTUS, designated Water Quality Standards, and imposed NPDES permitting requirements on the Lake's operator. California Regional Water Quality Control Board San Diego Region, *Water Quality Control Plan for the San Diego Basin*, 2-75 (2021), https://www.waterboards.ca.gov/sandiego/water_issues/programs/basin_plan/.

The WOTUS designation is unnecessary, and interferes with the core water supply function of the reservoir. As noted above, compliance with the NPDES program is not inexpensive or easy. The reservoir is artificial, the water in it is imported, and it does not discharge downstream. The Safe Drinking Water Act (42 U.S.C. §§ 300f, *et seq*.) requires the reservoir operator to treat the water before delivering it to the public as part of the potable water supply, and state laws dictate water quality from both a drinking water (see California Health & Safety Code §§ 116270-116300) and environmental perspective. See California Water Code §§ 13000-13998. There is no need to overlay a complex federal regulatory scheme on reservoir operations.

Moreover, this kind of determination calls into question the status of the entire delivery system upstream of the reservoir. If the reservoir is WOTUS, are

the aqueducts that deliver water to it, tributaries? That system connects reservoirs across the state via pipelines and open channels. Common sense would dictate that this kind of infrastructure is not WOTUS, but that is not how it is being treated.

3. Groundwater Recharge and Infiltration Basins

Many local governments rely on infiltration basins to store water in subsurface aquifers. These basins are often located at natural low points to take advantage of gravity to feed water into the facility. They are also often built adjacent to streams so that water can be easily diverted into the facility. In many ways, they function like a wetland by capturing water and providing basic treatment before it percolates into the ground. Indeed, without constant maintenance, they can develop plants and other features that can make them look like a wetland.

Because of these features, groundwater infiltration basins are also susceptible to being classified as WOTUS. As with terminal reservoirs aqueducts and irrigation canals, a WOTUS designation substantially interferes with the operational integrity of a basin by limiting what can go into it, and imposing restrictions on how and when it can be operated and maintained.

If these restrictions are too onerous or expensive, it becomes more economical to rely on other sources of water that provide fewer environmental benefits. The

result is that good projects will be abandoned or never pursued in the first place.

B. Flood Control, Stormwater Management and Green Infrastructure should be excluded from the definition of WOTUS

Amici's concerns are not limited to infrastructure in the arid west. Local governments across the country operate flood control, stormwater management and green infrastructure to divert floodwaters away from cities and protect property and human lives. This infrastructure is critical to public health and safety. *See New Orleans Gaslight Co. v. Drainage Comm'n*, 197 U.S. 453, 460 (1905).

It is also largely designed to protect water quality in the nation's waters. In fact, EPA regulations and guidance require cities and counties to implement Low Impact Development ("LID") and other "green" infrastructure on new development. *See*, *e.g.*, United States Environmental Protection Agency – Nancy Stoner and Cynthia Giles*, Memorandum: Achieving Water Quality Through Integrated Municipal Stormwater and Wastewater Plans* (Oct. 27, 2011), https://www.epa.gov/sites/production/files/2015-10/documents/memointegratedmunicipalplans_0.pdf.

This means that cities and counties are required to construct wetlands, swales, and other similar features as part of their stormwater management efforts. The projects are often built to mimic natural wetlands and either hold water on a perennial basis, or provide

typical wetland habitat. They provide treatment before the water is discharged to navigable waters. Many municipalities have invested heavily in these projects with the support and guidance of EPA.

Amici's concerns with the definition of WOTUS as applied to this infrastructure is two-fold. First, the system of ditches, pipes and drains that make up a municipal separate storm sewer system ("MS4") is easily misclassified as WOTUS.[11] Second, the LID and green infrastructure that many cities are investing in can look a lot like wetlands, and in fact are often constructed immediately adjacent to waters that are properly classified as WOTUS.

A commonsense approach to the Clean Water Act would dictate that this infrastructure is not WOTUS. The Court's decision in the instant case will establish a rule of law that will be applied to amici's MS4s and other projects that are aimed at controlling storm flows and urban runoff. Amici urge the Court to adopt a commonsense approach to the CWA that would exclude this infrastructure from the definition of WOTUS.

CONCLUSION

For the foregoing reasons, this Court should construe "waters of the United States" in the Clean Water

[11] EPA has asserted that an MS4 can be both a point source and WOTUS. *The Navigable Waters Protection Rule: Definition of "Waters of the United States*," 85 Fed. Reg. 22323-22324 (April 21, 2020).

Act in a way that excludes amici's water supply, flood control and stormwater drainage projects.

Respectfully submitted,

LISA SORONEN
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol Street, NW
Suite 515
Washington, DC 20006
(202) 434-4845
lsoronen@sso.org

RODERICK WALSTON
J.G. ANDRE MONETTE
Counsel of Record
BEST BEST & KRIEGER, LLP
1800 K Street, NW
Suite 725
Washington, DC 20006
(202) 785-0600
Andre.Monette@bbklaw.com