No. 11-460

In The
Supreme Court of the United States

LOS ANGELES COUNTY
FLOOD CONTROL DISTRICT,

Petitioner,

v.

NATURAL RESOURCES
DEFENSE COUNCIL, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE CALIFORNIA STORMWATER QUALITY ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The California Stormwater Quality Association (CASQA) respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTERESTS OF THE *AMICUS CURIAE*

CASQA is a nonprofit corporation with approximately 2,000 members, including hundreds of local public agencies. Almost 300 CASQA members hold national pollutant discharge elimination system (NPDES) permits that regulate the municipal services function of discharge of stormwater to navigable waters, and 14 of the 300 are flood control districts that have similar circumstances as the Petitioner. CASQA members stand to suffer from the Ninth Circuit's finding that the Petitioner's improvements to waters like the Los Angeles and San Gabriel Rivers converted those waterways, or parts of them, to a point source discharge to navigable waters. Further, the Ninth Circuit's opinion has created substantial regulatory uncertainty for CASQA's members with

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. All parties have consented to the filing of this brief. Those consents are being lodged herewith. No counsel for a party authored this brief in whole or in part, and no counsel or party made monetary contributions intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

respect to what is now considered to be, or not be, a navigable water under the Clean Water Act (CWA), and whether other CWA regulatory requirements apply to waterways improved through portions of their reach.

CASQA is the largest professional association dedicated to stormwater quality issues in California. CASQA's membership includes a diverse range of governmental and non-governmental entities throughout the state that discharge under NPDES stormwater permits, one of which is the Petitioner. CASQA members also include professionals, businesses, trade associations, and others that do not themselves hold NPDES stormwater permits, but have an interest in managing stormwater quality.

CASQA's primary purpose is to assist regulators, municipalities, and others in implementing NPDES stormwater requirements. CASQA: recommends objectives and procedures for stormwater discharge control programs that are technically and economically feasible; promotes the need for significant environmental benefits and protection of water resources; promotes technological advancements; and promotes compliance with state and federal laws, regulations, and policies. CASQA also engages experts to help assess and understand the impacts of proposed changes to laws and regulations governing stormwater management. CASQA believes that balancing human and environmental quality of life with costs is a necessary component of improving water quality through NPDES permitting and other regulatory strategies.

CASQA has a statewide perspective on the importance of municipal separate sewer systems (MS4s) and their interaction with navigable waters under the CWA. CASQA also understands and is experiencing the broad regulatory confusion created by the Ninth Circuit's ruling, which conflicts with its own relevant decisions as well as decisions of this Court.

SUMMARY OF ARGUMENT

The Ninth Circuit's conclusion that concrete-improved portions of the Los Angeles and San Gabriel Rivers are point source discharges to navigable waters creates instant liability for those entities that own or operate the facilities in the improved channels. It also expands regulatory jurisdiction, creates confusion with respect to the definition and scope of navigable water under the CWA, and related, results in a patchwork approach to identifying any regulating discharges to navigable waters or segments. In reaching its conclusion that the concrete portions of these two rivers are point source discharges, the Ninth Circuit bypassed this Court's jurisprudence as well as its own.

1. The Ninth Circuit's findings contradict themselves, other Ninth Circuit decisions, and the decisions of this Court. Specifically, the Ninth Circuit found that the "Watershed Rivers," including the Los Angeles and San Gabriel Rivers, were navigable waters. *NRDC v. County of Los Angeles*, No.

10-56017, 2011 U.S. App. LEXIS 14443, at *49 (9th Cir. 2011) (*NRDC*). But the court then found that the "MS4," as a matter of law and fact, was distinct from the two navigable rivers because it was "an intra-state man-made construction – not a naturally occurring watershed river." *Id.* at **52-53. To find this distinction, the court appears to rely primarily on the fact that portions of the Los Angeles and San Gabriel Rivers are now "concrete portions of the MS4 controlled by the District," and that the discharge occurred when stormwater flowed out of the concrete channels into navigable waters. *Id.* at **53, 56. In other words, the concrete portions of the rivers are MS4s – not navigable waters. Notably, the Ninth Circuit failed to first determine if the concrete portions of the Los Angeles and San Gabriel Rivers are in fact navigable waters under the CWA regardless of the Petitioner's improvements. Instead, the Ninth Circuit made a sweeping conclusion that concrete improvements to the Los Angeles and San Gabriel Rivers changed the character of these channels from navigable waters to point source discharges. The Ninth Circuit's failure to engage in this analysis calls into question what constitutes a navigable water, and conflicts with this Court's guidance in *Rapanos v. United States*, 547 U.S. 715 (2006).

2. The Ninth Circuit's decision leaves MS4 permittees and others in the untenable position of not knowing whether a water previously considered a navigable water under the CWA (i.e., waters of the United States) is in fact not a navigable water

because of a given degree of man-made improvements. This uncertainty calls into question the application of statutory and regulatory requirements that are triggered when a water is considered to be a navigable water under the CWA. More importantly, the transformation of previously considered navigable waters to point sources (due to man-made improvements) shifts liability and responsibility for meeting the goals of the CWA from all "dischargers of pollutants" that contribute pollutants to segments in question to the entity that controls the newly defined point source in the river channel. This artificially created liability undermines the water quality standards provisions in the CWA.

The primary purpose and goal of the CWA is to restore and maintain the integrity of the nation's waters. 33 U.S.C. § 1251(a). To accomplish this goal, the CWA regulates point source discharges to navigable waters. 33 U.S.C. § 1342. Municipal stormwater dischargers are subject to the CWA's NPDES requirements. 33 U.S.C. § 1342(p). The CWA includes other mechanisms such as the adoption and implementation of water quality standards to meet the purpose and goal of the CWA. 33 U.S.C. § 1313(c). Compliance with water quality standards applies to both point sources of pollution and nonpoint sources of pollution. 33 U.S.C. § 1313; see generally *Pronsolino v. Nastri*, 291 F.3d 1123, 1132-1133 (9th Cir. 2002).[2] Further,

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[2] The term "point source" is defined in the CWA at 33 U.S.C. § 1362(14). The term "nonpoint source" is not specifically

(Continued on following page)

municipal stormwater dischargers are also subject to regulation under other CWA provisions applicable to discharges to navigable waters, including total maximum daily load (TMDL) and dredge and fill material permit requirements. 33 U.S.C. §§ 1313(d)(1), 1344.

In California, the water quality standards, TMDL, and dredge and fill material requirements have been, and are, applied to concrete-improved portions of waters because the state, U.S. Army Corps of Engineers (Corps), and the U.S. Environmental Protection Agency (EPA) have considered these waters to be navigable waters under the definitions contained in the CWA, its implementing regulations and through the tests set forth by this Court in its previous decisions. However, the Ninth Circuit's decision questions the applicability of these CWA requirements as currently being applied to concrete-improved portions of waters because the court's decision has transformed these concrete-improved waters from being navigable waters to point source discharges.

Review by this Court is needed to provide NPDES permittees, regulatory agencies, and others with certainty as to what constitutes a navigable

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defined by the CWA but is considered to mean "the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source." *Northwest Envt'l Defense Center v. Brown*, 640 F.3d 1063, 1070 (9th Cir. 2011) citing *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002).

water under the CWA if the waterbody in question has been improved or altered for flood protection, or for other purposes. Moreover, review by this Court is necessary to maintain the integrity of the CWA's water quality standards provisions, including TMDLs (which are designed to ensure that all sources of pollution to navigable waters are held proportionally responsible for attaining the nation's water quality goals). Specifically, if left unchanged, the Ninth Circuit's decision means that as long as there is some concrete improvement, those point or nonpoint sources of pollution that discharge into the "point source" would no longer be responsible for their contributions that cause or contribute to problems in the nation's waters.

ARGUMENT

I. The Ninth Circuit Failed to Make the Necessary Threshold Determination as to Whether the Concrete-Improved Portions of the Los Angeles and San Gabriel Rivers Are In Fact Navigable Waters as Defined By the CWA

CWA jurisdiction covers "navigable waters," which are defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Both the Corps and EPA have defined waters of the United States in regulations. 33 C.F.R. § 328.3 (Corps Regulations); 40 C.F.R. § 122.2 (EPA's Regulations). The definitions include, in part, "all interstate waters

. . . ; all other waters such as intrastate lakes, rivers, streams . . . the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce. . . . [t]ributaries of such waters." 40 C.F.R. § 122.2, *Waters of the U.S.* (b), (c) and (e). The meaning of waters of the United States, and the application of the regulatory definitions, has been the subject of several decisions by this Court. *Rapanos*, 547 U.S. 715; *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

The term "point source" is defined by the CWA 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). A navigable water cannot be both a point source and a navigable water. See *Rapanos*, 547 U.S. at 735 ("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.").

In the decision below, the Ninth Circuit departed from this Court's rulings with respect to the definition of a water of the United States. In the *Rapanos* case, the plurality and Justice Kennedy's concurring opinion each established a standard for determining what constituted a navigable water, or water of the United States. The plurality found that the phrase

"waters of the United States" included "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Rapanos*, 547 U.S. at 739. The plurality further declared that "waters of the United States" includes streams that "contain continuous flow during some months of the year but no flow during dry months," but not streams whose flow is "coming and going at intervals," "broken, fitful," or "existing only, or no longer than, a day." *Id.* at 732 n.5. In his concurring opinion, Justice Kennedy articulated the standard for whether a wetland is jurisdictional to be a "significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 779 (Kennedy, J., concurring in judgment). He further stated that wetlands possessed the "requisite nexus," and thus came within the meaning of navigable waters "if the wetlands either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780 (Kennedy, J., concurring in judgment).

Under either standard, the presence of man-made improvements was not considered to transform what otherwise would be considered a navigable water to a point source discharge. In fact, Justice Kennedy uses the Los Angeles River as an example of an impermanent stream that reasonably should

be included as a navigable water under the CWA. *Rapanos*, 547 U.S. at 769-770.

The Ninth Circuit also failed to follow its own jurisprudence when it found the concrete-improved portions of the Los Angeles and San Gabriel Rivers to be point sources instead of navigable waters. For example, the Ninth Circuit has found that man-made irrigation ditches can constitute a water of the United States when they were tributary to other navigable waters. *Headwaters v. Talent Irrigation District*, 243 F.3d 526, 533 (9th Cir. 2001) "As tributaries, the canals are 'waters of the United States,' and are subject to the CWA and its permit requirements."

More recently, the Ninth Circuit found that in *Rapanos* "the Supreme Court unanimously agreed that intermittent streams (at least those that are seasonal) can be waters of the United States." *United States v. Moses*, 496 F.3d 984, 991 (9th Cir. 2007). It also rejected the argument that modification to a stream that is a navigable water destroyed its legal character. Specifically, the Ninth Circuit considered whether a portion of Teton Creek was a water of the United States. *Id.* at 988-991. The portion of Teton Creek in question only maintained flows for two months during spring runoff because of an irrigation diversion structure upstream. *Id.* at 985. The Ninth Circuit noted that is unlikely that a "mere man-made diversion would have turned what was part of the waters of the United States into something else and, thus, eliminated it from national concern." *Id.* at 989. In other words, the Ninth Circuit found that

man-made changes or improvements to the waterway did not change its character as navigable under the CWA. The Ninth Circuit also answered the question, if a "seasonally intermittent stream which ultimately empties into a river that is a water of the United States can, itself, be a water of the United States[?]" *Id.* at 989. Answering in the affirmative, and relying on its previous decision in *Headwaters, Inc. v. Talent Irrigation District* that "even tributaries that flow intermittently are 'waters of the United States'" (*Moses*, 496 F.3d at 989), the Ninth Circuit specifically found as follows: " . . . Teton Creek constitutes a water of the United States and, as the Supreme Court has recognized, regardless of any other disagreements, 'no one contends that federal jurisdiction appears and evaporates along with water in such regularly dry channels.'" *Id.* at 991, internal citations omitted.

As described by Justice Kennedy in *Rapanos*, the Los Angeles River factually resembles Teton Creek. "The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river. Yet it periodically releases water volumes so powerful and destructive that is has been incased in concrete and steel over a length of some 50 miles." *Rapanos*, 547 U.S. at 769. Despite the factual similarities between the Los Angeles River and Teton Creek, the Ninth Circuit has found one to be a water of the United States and the other to be a point source discharge. The Ninth

Circuit's holdings in *Moses* and in this case cannot be reconciled.

In light of the inconsistency with applicable precedent, this Court must grant review to ensure consistency and uniformity with respect to determination of what constitutes a water of the United States. Further, because a point source and navigable waters under the CWA are necessarily distinct, the Ninth Circuit's decision raises practical application issues that cannot be reconciled with the Ninth Circuit's decision here and with other decisions.

II. If Left Uncorrected, the Ninth Circuit's Decision Creates Confusion and Regulatory Uncertainty, and Shifts Responsibility for Meeting Water Quality Standards From All Responsible Dischargers to the Owner/Operator of the Newly Described Point Source

Further review is also warranted because the Ninth Circuit's decision engenders confusion for federal and state appellate courts, the EPA, the Corps, delegated states, and both point and nonpoint source dischargers. Most notably, the CWA requires that waters of the United States be protected with water quality standards. 33 U.S.C. § 1313. In general, water quality standards consist of "designated uses of the navigable waters involved and the water quality criteria for such waters based upon the uses." 33 U.S.C. § 1313(c)(2)(A). "The states are required to set water quality standards for *all* waters within their

boundaries regardless of the sources of pollution entering the waters. If a state does not set water quality standards, or the EPA determines that the state's standards do not meet the requirements of the Act, the EPA promulgates standards for the state. 33 U.S.C. §§ 303(b), (c)(3)-(4)." *Pronsolino,* 291 F.3d at 1127, *cert. denied*, *Pronsolino v. Nastri*, 539 U.S. 926 (2003). EPA defines water quality standards to mean "[p]rovisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses." 40 C.F.R. §§ 130.2(d), 131.3(i).

The CWA further requires that when imposition of certain effluent limitations on point sources are not sufficient to implement water quality standards applicable to such waters, states must establish a priority ranking of such waters not meeting applicable standards. 33 U.S.C. § 1313(d)(1)(A); see generally *Pronsolino*, 291 F.3d at 1136. The state's ranking is often referred to as the "303(d)" list or List of Water Quality Limited Segments.[3] For those waters identified on the List of Water Quality Limited Segments, states must establish "the total maximum daily load,

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[3] The term *Water Quality Limited Segment* is from the EPA's regulations, which defines *water quality limited segment* as "[a]ny segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by sections 301(b) and 306 of the Act." 40 C.F.R. § 130.2(j).

for those pollutants which the Administrator identifies . . . as suitable for such calculation." 33 U.S.C. § 1313(d)(1)(C). TMDLs are an essential component in the CWA because they "serve as a link in an implementation chain that includes federally-regulated point source controls, state or local plans for point and nonpoint source pollution reduction, and assessment of the impact of such measures on water quality, all to the end of attaining water quality goals for the nation's waters." *Pronsolino*, 291 F.3d at 1129. Both the List of Water Quality Limited Segments and state-established TMDLs require EPA approval. 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d).

In California, EPA most recently approved the state's 2010 California 303(d) List of Water Quality Limited Segments.[4] Six reaches of the Los Angeles River and three reaches of the San Gabriel River are included on the list. California State Water Resources Control Board, Final 2010 Integrated Report (CWA Section 303(d) List/305(b) Report), *Category 5, 2010 California 303(d) List of Water Quality Limited Segments* (Aug. 4, 2010), http://www.waterboards.ca.

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[4] See generally, Letter to Tom Howard, Executive Director of the State Water Resources Control Board, from Alexis Strauss, Director, Water Division, U.S. EPA Region XI (Oct. 11, 2011), http://www.waterboards.ca.gov/water_issues/programs/tmdl/records/state_board/2011/ref3641.pdf, and Letter to Tom Howard, Executive Director of the State Water Resources Control Board, from Alexis Strauss, Director, Water Division, U.S. EPA Region XI (Nov. 12, 2010), http://www.waterboards.ca.gov/water_issues/programs/tmdl/records/state_board/2010/ref3640.pdf,

gov/water_issues/programs/tmdl/2010state_ir_reports/category5_report.shtml, **134-135, 147-148 (2010 Limited Segments Report). Combined, the six reaches of the Los Angeles River alone total over 42 miles and include various reaches where water quality standards are not attained for pollutants ranging from ammonia to zinc. *Id.* at **134-135. The listings for the Los Angeles and San Gabriel Rivers would not exist but for the fact that both are considered to be waters of the United States, have applicable water quality standards, and that such water quality standards are not being met. In other words, the Los Angeles and San Gabriel Rivers are considered to be waters of the United States for the application of water quality standards and the development of TMDLs by both the state and the EPA. However, in the decision below, the Ninth Circuit has now declared that the concrete-improved portions of these rivers are in actuality point source discharges. *NRDC*, 2011 U.S. App. LEXIS 14443 at *52.

With this finding, the Ninth Circuit would make the owner/operator of the concrete improvements in a portion of the channel responsible for any and all pollutants that enter or pass through this portion of the river – regardless of its original source. *NRDC*, 2011 U.S. App. LEXIS 14443 at **53-54. By making one entity responsible, those that contribute pollutants to the newly defined point source are no longer responsible for controlling their discharges.

Further, the Ninth Circuit's decision creates an odd patchwork of navigable waters and point sources

within the same waterway. For example, a single water may have "naturally-occurring" portions as well as portions that have been improved or altered with man-made features. Such portions may be interspersed throughout the length of the water. Under the Ninth Circuit's ruling, the portions with man-made improvements are now point source discharges while the "naturally-occurring" portions are navigable waters. Water quality standards would apply only to the naturally-occurring portions. This fragmented application of water quality standards undermines their primary purposes, which are "to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act. . . ." 33 U.S.C. § 1313(c)(2)(A). More importantly, where water quality standards are not met, states must adopt TMDLs. By definition, TMDLs allocate responsibility between point sources, nonpoint sources, and natural background. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.2(i). Under the Ninth Circuit's decision, TMDLs are irrelevant where there are interspersed "point sources" that are now responsible for pollutants being directly added to, or "channeled" through, the concrete-improved or man-made facilities.

The Los Angeles and San Gabriel Rivers are not unique. There are many other waters in California and throughout the nation that have been improved with concrete or otherwise for flood control protection and other purposes. For example, in Riverside County there is the Chino Creek Reach 2, which is described as the concrete channel to confluence with

San Antonio Creek, and in Orange County there is Laguna Canyon Channel.[5] Both waters are included on the state's EPA-approved 2010 List of Water Quality Limited Segments for not meeting certain water quality standards. 2010 Limited Segments Report at **219, 231. Under the Ninth Circuit's decision below, the improved portions of these waters would no longer be considered waters of the United States, and water quality standards would no longer apply.

Besides affecting the application of water quality standards, the Ninth Circuit's decision also clouds the law as to when a person or agency must obtain a dredge and fill permit under section 404 of the CWA. 33 U.S.C. § 1344(a). Municipalities, flood control districts, and others occasionally find it necessary to work within the concrete-improved portions of these waters. Depending on the activity, these entities often find it necessary to first obtain dredge and fill permits from the Corps. With the Ninth Circuit's decisions, these same agencies, including the Corps, are now left with an uncertainty as to whether such permits are required. This uncertainty not only creates a regulatory vacuum, but may expose these entities to potential fines and criminal sanctions should they not obtain a dredge and fill permit, but later the Corps or a court determines that the concrete-improved portion of the waters is a water of the

[5] 2010 Limited Segments Report at **219, 231.

United States under the Ninth Circuit's other decisions.

Because of the Ninth Circuit's decision, those regulated under the CWA who are now regulated with respect to discharges to concrete-improved sections of streams (i.e., are required to ensure the protection of water quality standards or obtain dredge and fill permits) are in regulatory limbo. Case-by-case litigation through the appellate level for each water is the only method available for actually determining what the court below may consider to be a water of the United States, and where and how regulated parties must ultimately allocate resources for compliance. Unfortunately, the Ninth Circuit decisions collectively provide no consistent test or standard for lower courts and others to rely upon. Moreover, the Ninth Circuit's decision causes entities that own or operate concrete-improved or man-made facilities that are located in navigable waters to take on responsibility for ensuring compliance with downstream water quality standards even though the sources of pollution may be broad and wide. Making a single entity responsible for the contributions of many is inconsistent with the CWA, and does not ensure that the nation's waters will be protected.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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