No. 18-260

IN THE

Supreme Court of the United States

COUNTY OF MAUI, HAWAI'I,

Petitioner,

v.

HAWAI'I WILDLIFE FUND; SIERRA CLUB–MAUI GROUP; SURFRIDER FOUNDATION; WEST MAUI PRESERVATION ASSOCIATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* FEDERAL WATER QUALITY COALITION IN SUPPORT OF PETITIONER

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STATEMENT OF INTERESTS OF *AMICUS CURIAE*[1]

Amicus Federal Water Quality Coalition (the "Coalition") is a group of industrial companies, municipal entities, agricultural parties, and trade associations that are directly affected, or have members that are directly affected, by regulatory decisions made under the federal Clean Water Act (33 U.S.C. § 1251, et seq.) (the "Act"). Coalition member entities or their members own and operate facilities located on or near waters of the United States. These entities operate pursuant to individual or general National Pollutant Discharge Elimination System wastewater or stormwater permits, which impose control requirements on the discharge of pollutants to jurisdictional surface waters.

Regulation of releases of pollutants via groundwater that have a "fairly traceable" connection to surface water impacts Coalition member permits and the operation of their facilities, as well as the entire National Pollutant Discharge Elimination System permitting program ("Program"). The Ninth Circuit decision, if upheld,

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission. The Utility Water Act Group and the Edison Electric Institute are members of the Coalition but will be filing separate *amicus* briefs. The Utility Water Act Group and the Edison Electric Institute are not signatories to this *amicus* brief and have not made any monetary contributions intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

would require National Pollutant Discharge Elimination System permits for releases to groundwater, which are fairly traceable from a point source to a surface water and more than *de minimis*, a position that would harm Coalition members throughout the country by significantly expanding the scope of regulated activity. The decision is likely to lead to a substantial expansion of the activities and operations that are subject to requirements under the Program, which has never, until now, regulated releases via groundwater. In light of the substantial impact this case will have on its members, the Coalition has a direct interest in maintaining the current, well-established Program, which does not cover releases to groundwater and which the Ninth Circuit decision will undermine if not reversed.

SUMMARY OF ARGUMENT

The Ninth Circuit's novel "traceability theory"—recognizing Clean Water Act liability for releases of pollutants that are fairly traceable from a point source to a surface water via groundwater in greater than *de minimis* amounts—unconstitutionally expands the scope of EPA authority in direct conflict with the plain language and Congressional intent of the Act. The Act regulates discharges of pollutants from a point source to navigable waters. 33 U.S.C.§ 1362(12). Groundwater, however, is neither a point source nor a navigable water. Nonetheless, the Ninth Circuit held that the Program covers releases of pollutants from a point source that travel through groundwater, a nonpoint source, into surface water. *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 749 (9th Cir. 2018). The Ninth Circuit's holding would require permits for releases of pollutants to groundwater that

are "fairly traceable" from the point source to navigable waters, where the discharge is the functional equivalent of a discharge into navigable waters and the pollutant levels reaching navigable waters are more than *de minimis*. *Id.*

The Ninth Circuit decision rewrites the Act and ignores legislative intent. The decision broadly and unjustifiably expands the scope of the Program, thereby affecting EPA, state agencies, and regulated entities, including Coalition members, without any indication that Congress intended such an effect. The Congressional intent behind the Program, as well as the Act generally, is to allow the states to take a primary role in the regulation of pollutant discharges to their waters. 33 U.S.C. § 1251(b).

Further, the Ninth Circuit's "traceability theory" of liability is unnecessary to protect against pollution of groundwater, because numerous federal and state programs already regulate groundwater, including releases via groundwater. Notably, the releases from underground wells, at issue in this case, are regulated pursuant to both the Safe Drinking Water Act and state programs administered by the Hawai'i Department of Health.

Finally, expanding the Program to cover releases via groundwater would have serious practical implications for federal and state agencies and the regulated community. No statutory or regulatory roadmap exists for regulation of such releases via groundwater pursuant to the "traceability theory." Under the current Program, applying the "traceability theory" of liability to releases via groundwater would require site-specific, fact-intensive inquiries involving complex, time-consuming, and costly technical assessments.

Recognizing the "traceability theory" would require an overhaul of the Program, which only Congress has the authority to effect. Congress could do so by issuing clear legislative directives authorizing EPA to establish a comprehensive regulatory program covering releases of pollutants via groundwater through National Pollutant Discharge Elimination System permitting. In the absence of such clear legislative directives, however, the Ninth Circuit has no basis for supplementing the current regulatory regime.

If broadly applied, the Ninth Circuit decision would cause substantial and unwarranted changes in the administration of the Program, contrary to the language of the Act, as well as underlying Congressional intent. The decision should be vacated.

ARGUMENT

I. The Ninth Circuit's "Traceability Theory" Unconstitutionally Rewrites the Act.

A. The Act's Plain Language Does Not Authorize Regulation of Releases via Groundwater.

The Act prohibits the "discharge of any pollutant" except discharges that comply with the permitting, water quality, and technology-based standards provisions of the statute. 33 U.S.C. § 1311(a). As used in the Act, the phrase "discharge of any pollutant" refers both to "any addition of any pollutant to navigable waters from any point source" and to "any addition of any pollutant to the waters of the contiguous zone of the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12).

The Act defines "navigable waters," in turn, as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). And, EPA has consistently excluded groundwater from the definition of "waters of the United States." *See* 40 C.F.R. § 122.2. Consequently, Clean Water Act jurisdiction does not extend to waters—such as groundwater—that are not point sources or "navigable waters."

The Act defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1367(14). Groundwater is not a "discernible, confined and discrete conveyance," so cannot be considered as a "point source" by the Act's own definition. *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 745–46, n.2 (9th Cir. 2018) ("We assume without deciding the groundwater here is neither a point source nor a navigable water under the [Act]").

Consistent with longstanding Agency practice, EPA's new, proposed definition of "waters of the United States" expressly excludes groundwater. *See* 84 Fed. Reg. 4154, 4190 (Feb, 14, 2019). The proposed rule explains, "The agencies have never interpreted 'waters of the United States' to include groundwater and would continue that practice through this proposed rule by explicitly excluding groundwater." *Id.*

B. The Ninth Circuit's "Traceability Theory" Represents a Significant Departure from Established Precedent.

The Act does not regulate groundwater as a "water of the United States" or as a "point source," and the existence of non-jurisdictional groundwater between a point source and a navigable water breaks the causal chain offederal Clean Water Act jurisdiction over the release of pollutants from a point source to a navigable water. The Ninth Circuit's "traceability theory" represents a significant departure from well-established case law that recognizes the limits of federal authority over the regulation of releases via groundwater.

Under existing case law, natural or manmade surface water bodies can themselves qualify as "point sources" subject to regulation under the Act, if they function as discrete, confined conveyances to "add" "pollutants to navigable waters. *See, e.g., Umatilla Waterquality Protective Ass'n v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1320–21 (D. Or. 1997) (summarizing cases from Ninth, Fifth and Tenth Circuit courts of appeals and holding that an unlined brine pond constitutes a point source but that the Program does not apply to releases of pollutants via groundwater from such a point source); *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 988 (E.D. Wash. 1994) (finding "man-made ponds" to be point sources and citing Ninth, Fifth, and Tenth circuit case law).

Groundwater itself is not a point source. *See, e.g.*, *Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC*, 794 F. Supp. 2d 602, 619–20 (D. Md. 2011)

(dismissing Clean Water Act citizen suit claim as baseless because releases via migrations of groundwater or soil runoff is not point source pollution); *PennEnvironment v. PPG Indus., Inc.*, 964 F. Supp. 2d 429, 454–55 (W.D. Pa. 2013) (citing the Tenth, Ninth, Fifth, and Second Circuits to hold that "a 'discharge' occurring through migration of groundwater. . . represents 'nonpoint source' pollution because there is no 'discernible, confined and discrete conveyance.'"); *Tri-Realty Co. v. Ursinus Coll.*, No. 11-5885, 2013 WL 6164092, at *8 (E.D. Pa. Nov. 21, 2013) (citing the Tenth, Ninth, and Second Circuits to hold that "diffuse downgradient migration of pollutants on top of or through soil and groundwater. . . is nonpoint source pollution outside the purview of the [Act].").

Existing case law clearly acknowledges that releases via groundwater constitute nonpoint-source pollution. *Id.* The Act "contains no mechanism for direct federal regulation of nonpoint source pollution." *Shanty Town Assocs. Ltd. P'ship v. EPA*, 843 F.2d 782, 791 (4th Cir. 1988). As such, the Program cannot cover releases via groundwater, because groundwater is a nonpoint source, which is not directly subject to federal Clean Water Act regulation. *See id.* The fact that a "fairly traceable" or other hydrologic connection exists between groundwater and navigable waters does not obviate the statutory requirement that a regulated discharge of a pollutant must enter navigable waters through a "discernible, confined and discrete conveyance." *See* 33 U.S.C. § 1367 (14). In other words, how a pollutant enters a navigable water is determinative, and the distinction between point and nonpoint sources depends on "whether the pollution reaches the water through a confined, discrete conveyance." *Trs. for Alaska v. EPA*, 749 F.2d 549, 558

(9th Cir. 1984); *see also* 84 Fed. Reg. 16810, 16814 (April 23, 2019) (rejecting federal authority over releases via groundwater).

C. The Ninth Circuit's Holding Misapplies Case Law to Support the "Traceability Theory."

As numerous courts have recognized, the Act does not subject releases of pollutants to surface waters via groundwater to the Program. *E.g., Kentucky Waterways All. v. Kentucky Utilities Co.*, 905 F.3d 925, 934 (6th Cir. 2018) ("The [Act]'s text also forecloses the hydrological connection theory.); *accord Tennessee Clean Water Network v. Tennessee Valley Auth.*, 905 F.3d 436, 444 (6th Cir. 2018); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1193 (E.D. Cal. 1988). The plaintiffs in *Kentucky Waterways*, like Respondents here, place great weight on the fact that the Act's prohibition of unpermitted point source discharges "to navigable waters," does not include the adverb "directly." *See id.* at 934 (citing 33 U.S.C. § 1362(12)(A)). As the court in *Kentucky Waterways* explains, however, the term "directly" would be superfluous, because the term "into" already suggests directness. *Id.* "It refers to a point of *entry*." *Id.* (citations omitted). Accordingly, "the phrase 'into' leaves no room for intermediary mediums to carry the pollutants." *Id.*

The Ninth Circuit cites Justice Scalia's plurality opinion in *Rapanos v. United States*, stating that the Act does not forbid the "'addition of any pollutant directly to navigable waters from any point source,' but rather the 'addition of any pollutant to navigable waters.'" *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 748 (9th Cir.

2018) (citing 547 U.S. 715, 743, (2006) (plurality opinion)). The court in *Kentucky Waterways* responds to this point, too, explaining that Justice Scalia's "quote has been taken out of context in an effort to expand the scope of the Act well beyond what the *Rapanos* Court envisioned." *Kentucky Waterways*, 905 F.3d at 936.

Justice Scalia highlighted the absence of the word "directly" from § 1362(12)(A) only to explain that the Act covers pollutants traveling through multiple point sources before discharging into navigable waters. *Id.* (citing *Rapanos*, at 743). Justice Scalia's language explains that intermediary point sources do not break the chain of Clean Water Act liability, but in no way suggests that nonpoint sources would not break the chain of liability. *Id.* Consistent with Justice Scalia's rationale in *Rapanos*, EPA's recent Interpretive Statement clarifies this point: "The interposition of groundwater between a point source and the navigable water thus may be said to break the causal chain between the two, or alternatively may be described as an intervening cause." 84 Fed. Reg. 16810, 16814 (April 23, 2019).

The Ninth Circuit cites several other cases in support of its opinion recognizing jurisdiction over indirect discharges, but such cases do not involve groundwater and, indeed, support Petitioner's distinction here between point and nonpoint source pollution. For example, the court relies on one of its own cases, *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143 (9th Cir. 2010). There, the Ninth Circuit held that precipitation flowing into pits containing "newly extracted waste rock," "filter[ed]" hundreds of feet underground, and "eventually entering the surface water" did not constitute point source pollution

under the Act. *Id.* at 1147, 1153. In so holding, the court explained that when rainwater runoff collects in a storm drain before reaching surface water, it is a point source discharge; when it filters through pits and the ground prior to reaching surface water, it is nonpoint source pollution. *Id.* at 1152–53. The court improperly likens the stormwater drain system in *Greater Yellowstone*, which was clearly a point source, to the groundwater here, which courts consistently have held does not constitute a point source. *See Cty. of Maui*, 886 F.3d at 746–47 (9th Cir. 2018). In fact, *Greater Yellowstone* draws precisely the distinction between point and nonpoint source pollution that Petitioner highlights here: the drain system in *Greater Yellowstone* constitutes point source pollution, while the releases via groundwater in *Maui* do not. The Ninth Circuit's inapt and unsupported comparison to *Great Yellowstone* highlights the central issue with the "traceability theory," which ignores the jurisdictional requirement that pollutants enter a navigable water through a "discernible, confined and discrete conveyance."

The Ninth Circuit also cites *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994), and *Sierra Club v. Abston Const. Co.*, 620 F.2d 41 (5th Cir. 1980), in support of its novel "traceability theory." Again, contrary to the court's suggestion, neither case involves a release from a nonpoint source, such as groundwater. In *Concerned Area Residents*, evidence showed that liquid manure pollution reached navigable waters either directly from a tanker, a point source, or through an intermediary ditch, also a point source. 34 F.3d at 118–19 ("We believe that the swale coupled with the pipe under the stonewall leading into the ditch that leads into the stream was in and of

itself a point source."). Similarly, *Abston Construction* held that although the Act's definition of "point source" pollution excluded unchanneled and uncollected surface waters, rainfall collected or channeled by coal miners in connection with mining operations constitutes point source pollution. *Sierra Club v. Abston Const. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (explaining, "erosion of spoil pile walls results in discharges into a navigable body of water *by means of ditches, gullies and similar conveyances*, even if the miners have done nothing beyond the mere collection of rock and other materials."). Unlike the releases here—which travel via groundwater, a nonpoint source—the releases at issue in *Concerned Area Residents* and *Abston Construction* involve no break in the causal chain of federal Clean Water Act jurisdiction over the discharge of pollutants from the point source to the navigable water.

Finally, the Ninth Circuit cites *Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180 (2d Cir. 2010), and *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002), in support of its "traceability theory." Neither of these cases, however, involve groundwater as a theoretical "point source." In *Peconic Baykeeper*, the court held that the trucks and helicopters used to spray the pesticides were "point sources" for the purposes of the Act but did not address whether a discharge of a pollutant to a navigable water occurred from the point source. 600 F.3d at 188-89; *cf. League of Wilderness Defs./Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1192–93 (9th Cir. 2002) (holding that "the aerial spraying of pesticide being conducted by the Forest Service is point source pollution and requires an [National Pollutant Discharge Elimination System] permit.").

The cases cited by the Ninth Circuit are consistent with Petitioner's position that Congress intended to regulate through the Act only those discharges of pollutants from point sources to jurisdictional surface waters. The rationale that Congress, implicitly and by extension, intended to regulate releases of pollutants via groundwater is conclusory, overly broad, and contrary to the language of the Act. The court's "traceability theory" would profoundly frustrate the regulatory framework.

D. The Ninth Circuit's "Traceability Theory" Contravenes Legislative History and Usurps Congressional Authority.

In contrast to the Ninth Circuit's arguments for coverage of groundwater under the Act, the constitutionally-sound rationale applied by other courts highlights Congress' intent not to extend the Act's jurisdiction to groundwater. *Umatilla Waterquality*, 962 F. Supp. at 1318 (explaining, "when Congress wanted certain provisions of the [Act] to apply to groundwater, it stated so explicitly."). For example, in *Umatilla,* the court pointed to 33 U.S.C. § 1252(a), which instructs EPA to "develop comprehensive programs for preventing . . . pollution of the navigable waters and ground waters . . ." and to 33 U.S.C. § 1254(a)(5), which discusses "monitoring the quality of the navigable waters and ground waters and the contiguous zone and the oceans."

The National Pollutant Discharge Elimination System permitting provisions of the Act make no reference to groundwater. The Act's silence on groundwater in the context of permitting highlights the lack of Congressional intent for such permitting provisions to cover releases

of pollutant via groundwater, particularly in contrast with the express references to groundwater elsewhere in the statute. *Id.; see also Kelley v. United States,* 618 F. Supp. 1103, 1105 (W.D. Mich. 1985) (discussing Congress' inclusion of groundwater in research provisions of the Act and choice not to include groundwater in regulatory provisions). The *Umatilla* court also noted that, of the four categories of water described throughout the Act—navigable waters, groundwater, the contiguous zone, and oceans—the definition of "discharge of a pollutant" excludes groundwater while expressly including navigable waters and waters of the contiguous zone and the ocean. 962 F. Supp. at 1318 (citing 33 U.S.C. § 1362(12)).

As a number of courts have pointed out, the legislative history of the Act supports the plain-language reading that the Act does not regulate groundwater. *See Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994); *Umatilla Waterquality*, 962 F. Supp. at 1318-19; *Kelley*, 618 F. Supp. at 1105–06. Indeed, the report accompanying the Senate version of the Act shows that Congress declined to regulate groundwater through the Act because "jurisdiction regarding groundwaters is so complex." S. Rep. No. 414, 92d Congress, 1st Sess. 73 (1972), U.S. Code Cong. & Admin. News 1972, pp. 3668, 3749 (cited in *Village of Oconomowoc Lake*, 24 F.3d at 965; *Umatilla Waterquality*, 962 F. Supp. at 1319; *Kelley*, 618 F. Supp. at 1105-06).

Additionally, Representative Aspin proposed an amendment to include specific references to groundwater and adding the term "ground waters" to the definition of "discharge of pollutant" found in Section 502(12). 118 Cong. Rec. 10,666 (1972), 1 Leg. Hist. 589 (remarks

of Rep. Aspin). The House rejected the so-called Aspin Amendment, which expressly sought to include groundwater within the ambit of the Act. *Id.* at. 10,667, 1 Leg. Hist. 590-91 (remarks of Rep. Clausen) (cited in *Umatilla Waterquality*, 962 F. Supp. at 1319; *Washington Wilderness Coalition*, 870 F. Supp. at 989-90; *McClellan Ecological*, 707 F. Supp. at 1194; *Kelley*, 618 F. Supp. at 1106).

Both the report accompanying the Senate's version of the Act and the House of Representatives' rejection of the Aspin Amendment evince a clear legislative intent not to regulate releases of pollutants via groundwater through the National Pollutant Discharge Elimination System program.

II. Congress Intended for State Programs and Other Federal Programs to Address Groundwater Protection.

Since the Ninth Circuit's decision recognizing the "traceability theory" to conclude that the Petitioner's releases from underground injection wells required a National Pollutant Discharge Elimination System permit, EPA has issued a definitive Interpretive Statement rejecting authority over such releases of pollutants via groundwater. Specifically, the Interpretive Statement announced that, "because the [Act] clearly evinces a purpose not to regulate groundwater, and because groundwater is extensively regulated under other statutory regimes. . . groundwater is categorically excluded from the [Act]'s coverage." 84 Fed. Reg. 16810, 16814 (April 23, 2019).

As the Interpretive Statement explains, in contrast to the Program, there are a number of federal programs, within and outside the Act, that do address groundwater concerns. Specifically, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Safe Drinking Water Act all include express provisions for the protection of groundwater. Similarly, RCRA contains provisions, like the groundwater protections standard, expressly aimed at groundwater protection. See 42 U.S.C. § 9621; 40 C.F.R. § 264.92.

For example, Resource Conservation and Recovery Act remedial plans often require groundwater monitoring to ensure acceptable pollutant levels in groundwater. Further, the Comprehensive Environmental Response, Compensation and Liability Act already specifically establishes a groundwater classification system for determining appropriate cleanup standards for the removal or remediation of contaminated sites. *See* 42 U.S.C. § 6973(a); 40 C.F.R. § 300.430. Indeed, EPA has stated that "[t]he mission of the Superfund program is to protect human health and the environment. . . by restoring contaminated groundwaters to beneficial use." S*ummary of Key Existing CERLCA Policies for Groundwater Restoration*, OSWER Directive 9283.1-33 (June 26, 2009). Numerous Comprehensive Environmental Response, Compensation and Liability Act remedial and removal activities—including groundwater monitoring, pump and treat systems, in situ treatment, and containment using vertical engineered barriers—are aimed directly at protecting groundwater.

The Safe Drinking Water Act also provides protection to groundwater resources, through enforcement as to actions that imminently and substantially endanger human health. 42 U.S.C. § 300i(a). The Safe Drinking Water Act's approach to protecting drinking water also includes regulatory programs, such as the Underground Injection Control Program, that were expressly designed to protect source water and groundwater from contamination. Congress has already recognized the need to protect groundwater and established programs to do so. The specific references to groundwater protection in these statutes, compared with the notable lack of reference to groundwater in the National Pollutant Discharge Elimination System permitting provisions of the Act, highlight the significance of Congress' decision to regulate groundwater through certain federal programs but not through the Program.

Furthermore, Congress enacted the Act with respect for states' inherent powers over local water resources by limiting the Act's scope to "waters of the United States." *See* 33 U.S.C. § 1362(7), (12). EPA has recognized that safeguarding state authority to manage state waters is one of the Act's primary goals. 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution[.]"); *see also* 33 U.S.C. § 1329 (establishing state nonpoint source management programs). The Ninth Circuit's "traceability theory" would deprive the powers that Congress intended to leave to states.

As the legislative history detailed above demonstrates, Congress did not design the Program to accommodate the

regulation of releases of pollutants via groundwater, but left the issue to the states, many of which have implemented their own programs to regulate groundwater.[2]

Importantly, such state programs do not operate like the Program. In fact, the state programs differ widely, to address specific regional groundwater issues in ways that the Program cannot. Notably, some of the groundwater programs listed above require permits for certain industrial activities affecting groundwater, others establish groundwater quality standards, and others prohibit specific practices such as underground injection. The Act contemplates such regional regulation of groundwater and expressly authorizes states to regulate beyond the Act's regulatory floor. 33 U.S.C. § 1370.

The Ninth Circuit's decision—announcing federal authority over releases of pollutants via groundwater—upends the existing regulatory structure and frustrates the cooperative federalism written into the Act.

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2. *See, e.g.,* Ariz. Rev. Stat. §§ 49-223–224, 49-241–252 (issuing "groundwater protection permits"); N.M. Stat. Ann. §§ 74-6-3–4 (establishing a water quality control commission that administers groundwater abatement and discharge plans); S.C. Code Ann. §§ 48-1-90(A)(1), 48-1-10(2), (20) (requiring discharge permits for "seep[age]"); W. Va. Code § 22-11-8(b) (regulating underground injection of wastes); N.C. Gen. Stat. § 143-215 (establishing groundwater standards and regulating "waste not discharged to surface waters"); Md. Code Ann., Envir. § 9-322 (requiring groundwater discharge permits for certain operations); Va. Code Ann. § 62.1-254 (establishing the Groundwater Act of 1992 to "conserve, protect, and beneficially utilize the groundwater. . . ."); D.C. Municipal Regulations Parts 1150–1158 (establishing groundwater quality standards); MI Admin. Code R. 323.2201–2240 (establishing a groundwater quality program); F.A.C. 62-621.300 (administering groundwater discharge permits).

III. The "Traceability Theory" Presents Profound Practical Problems.

Courts have reached different conclusions as to the Act's jurisdiction over releases of pollutants via groundwater based largely on whether they focused on the Act's broad objectives or the Act's plain language and legislative history. On the one hand, courts—such as the Sixth Circuit—that comprehensively considered the Act's text, structure, and legislative history, as well as the programmatic and practical implications, hold that it does not. *Kentucky Waterways All.*, 905 F.3d at 937 ("Reading the [Act] to cover groundwater pollution like that at issue in this case would upend the existing regulatory framework."); *Tennessee Clean Water Network*, 905 F.3d at 444 ("allowing the CWA to cover pollution of this sort would disrupt the existing regulatory framework."). On the other hand, courts—such the Fourth and Ninth Circuits—that have focused on the broad objective stated in Section 101(a) rather than the plain language tend to reach a contrary conclusion. Accordingly, the Ninth Circuit's focus on the Act's broad objectives with little regard for the practical applicability of the "traceability theory" creates significant confusion and regulatory uncertainty.

The Fourth Circuit recognized a theory similar to the "traceability theory" in *Upstate Forever v. Kinder Morgan Energy Partners*, ruling that an alleged discharge of pollutants from a point source, which travelled a short distance through groundwater to reach surface waters, fell within the scope of the Act. No. 17-1640 (4th Cir. Apr. 12, 2018). The Fourth Circuit ruled that a point source need not convey the pollutant-discharge to navigable waters to trigger Program permitting requirements. *Id.*

Kinder Morgan involved an underground pipeline rupture that spilled several hundred thousand gallons of gasoline into groundwater, after which trace amounts of gasoline migrated into surface waters. Clearly concerned with remediation, the court recognized liability under the Act. What the Fourth Circuit ignored, however, were the state and federal regulatory schemes already in place to address such releases. Indeed, the State of South Carolina is actively overseeing the successful remediation of the Kinder Morgan spill. States designed such programs to address groundwater concerns, and there is simply no need or justification for rewriting the Program to regulate these releases through the Act.

Implementation of a federal permitting program for groundwater would present daunting practical challenges. None of the cases upholding the "hydrological connection theory" or "traceability theory" establishes any roadmap for regulation. Rather, the cases are fact-specific and have extremely narrow and limited applicability in a regulatory context. The application of such theories in a regulatory context would require complex, time-consuming, and costly technical assessments of site-specific factors, such as topography, climate, the distance to a jurisdictional surface water, geologic factors, and the like. *See* 68 Fed. Reg. at 7216 ("highly dependent on site-specific variables"); *Umatilla Waterquality*, 962 F. Supp. at 1320 (noting that a groundwater's connection to a surface water is "often not obvious").

To develop a regulatory program based on the "traceability theory" or other similar theory, either a court or the Agency would need to define what constitutes a "fairly traceable" connection, which must necessarily

include the minimum distance between the groundwater and the navigable water, the time for pollutants to travel through groundwater, or some combination of spatial and temporal factors. To date, factors that courts have considered include distance to navigable waters, the time it takes groundwater to travel, depth of the groundwater, flow in terms of both direction and rate, climate, geology, soil type, topography, elevation, and slope. *See, e.g, Greater Yellowstone Coal*, 641 F. Supp. at 1138 (considering the travel time, distance, geology, flow, and slope of the groundwater at issue). Each court that has undertaken a scientific analysis of the groundwater at issue has considered a different set of site-specific factors, and it is not possible from analysis of these cases to deduce any discernible rule. Absent a consistent, coherent set of standard tests, each permittee would have to undertake its own review, at the risk of criminal and civil liability, to evaluate whether and how it would be regulated by the Program for releases via groundwater.

Further, the "traceability theory" would significantly expand the scope of regulation to include regulation of sources that release pollutants via groundwater to jurisdictional surface waters. For example, the Program does not regulate releases of pollutants via groundwater from public sewer systems, concentrated animal feeding operations, retention ponds, surface impoundments, ash ponds, underground storage tanks, septic tanks, green infrastructure projects designed specifically to infiltrate stormwater into the ground and groundwater, accidental and historical releases, solid waste disposal operations, and injection wells that discharge pollutants to groundwater through various types of potentially "discrete conveyances." Pursuant to the "traceability

theory" or "hydrologic connection theory," each of these sources would require permitting for releases of pollutants via groundwater to surface waters, which would require a fact-specific determination for every single permittee.

Septic systems, for example, historically have not required National Pollutant Discharge Elimination System permits for releases of pollutants via groundwater. *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 345 (E.D. Va. 1997) (holding that septic systems are nonpoint sources). To permit septic systems, or any of the other traditionally nonpoint sources listed above, EPA would have to develop, and states would have to adopt and implement, an entirely new regulatory scheme that attempts to regulate diffuse, nonpoint sources through a permitting system developed specifically for point sources.

For example, EPA would need to establish a regulatory scheme for determining where one would monitor the point of "discharges" to groundwater, how one would determine compliance with effluent limits, how one would apply a mixing zone, and how one would consider dilution and attenuation within the soil and groundwater in determining the appropriate discharge limits. The Act and the current Program regulations answer none of these questions.

Additionally, such a change could potentially require EPA and states to reevaluate, and possibly revise, nearly every total maximum daily load that has been adopted and approved nationwide (along with the load and wasteload allocations contained in them), to account for the astronomical influx of nonpoint sources into the point-source permitting program. As the Supreme Court

recognized in *Utility Air Regulatory Group v. EPA*, only Congress can establish such new regulatory programs. 134 S. Ct. 2427 (June 23, 2014) (rejecting EPA's claim of authority to rewrite statutory language to regulate greenhouse gases under the Clean Air Act). Recognition of the Ninth Circuit's "traceability theory" absent a clear Congressional directive and administrative rulemakings to implement the theory creates significant confusion and uncertainty such that imposing liability pursuant to the "traceability theory" under the current Program would deprive regulated entities of due process.

In accordance with *Utility Air Regulatory Group* and separation-of-powers principles, this Court should reject the Ninth Circuit's judicial revision of the Act. Beyond the constitutional considerations, the significant practical issues associated with covering releases of pollutants via groundwater through the current Program further demonstrate that only Congress, not the judiciary, can authorize EPA to regulate releases of pollutants via groundwater. To do so, Congress would have to issue clear legislative directives authorizing EPA to establish a comprehensive regulatory program covering releases of pollutants via groundwater through National Pollutant Discharge Elimination System permitting. If upheld, the Ninth Circuit decision would substantially and unconstitutionally change the administration of the Program in direct contravention of the Act's plain language, significant federal case law recognizing the limits of EPA authority to regulate groundwater, and legislative history.

CONCLUSION

For the foregoing reasons, the judgment below should be vacated.

Dated this 16th day of May, 2019.

Respectfully submitted,

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