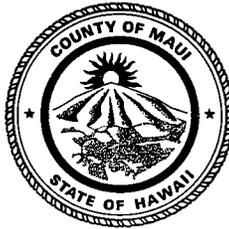


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October 29, 2018

T O: Don S. Guzman, Chair  
Parks, Recreation, Energy, and Legal Affairs Committee

F R O M: Richelle M. Thomson, Deputy Corporation Counsel *RM*  
*for*

SUBJECT: **PRL-1(20) Litigation Matters:**  
Hawaii Wildlife Fund et al., v. County of Maui, Docket No. 18-260,  
Supreme Court of the United States (PRL-1(20))

For the committee's review are the following additional documents, related to the County's petition for certiorari to the U.S. Supreme Court:

1. County's Petition for Writ of Certiorari, filed August 27, 2018.
2. County's Supplemental Brief for Petitioner, filed October 5, 2018.
3. Amicus brief of Pacific Legal Foundation.
4. Amicus brief of the attorneys general for West Virginia and 17 additional states, and the governors of Kentucky and Mississippi.
5. Amicus brief of the Association of California Water Agencies, California Association of Sanitation Agencies, International Municipal Lawyers Association, Idaho Water Users Association, Idaho Water Resources Board, League of California Cities, National Association of Clean Water Agencies, National Association of Counties, National League of Cities, National Water Resources Association, WaterReuse Association, and Western Coalition of Arid States.

No.

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IN THE  
**Supreme Court of the United States**

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COUNTY OF MAUI,  
*Petitioner,*

v.

HAWAI'I WILDLIFE FUND; SIERRA CLUB - MAUI GROUP;  
SURFRIDER FOUNDATION;  
WEST MAUI PRESERVATION ASSOCIATION,  
*Respondents.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit**

---

**PETITION FOR WRIT OF CERTIORARI**

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August 27, 2018

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## QUESTIONS PRESENTED

In the Clean Water Act (CWA), Congress differentiated between point source and nonpoint source pollution in controlling pollution of navigable waters. 33 U.S.C. § 1251(a)(1) & (7). The CWA regulates point source pollution through permits, *id.* § 1342, while nonpoint source pollution is controlled through federal oversight of state management programs, *id.* § 1329, and other non-CWA programs.

This Court has read the CWA to make plain that the dividing line between point source and nonpoint source pollution turns on whether pollutants are delivered to navigable waters by a point source. Several courts of appeals have reached similar conclusions.

Parting with those cases, the Ninth Circuit concluded that point source pollution also includes pollutants that reach navigable waters by nonpoint sources so long as the pollutants can be “traced” in more than “*de minimis*” amounts to a point source. This holding expands CWA permitting to millions of sources previously regulated under the CWA nonpoint source program and other regulatory programs.

The questions presented are:

1. Whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater?

2. Whether the County of Maui had fair notice that a CWA permit was required for its underground injection control wells that operated without such a permit for nearly 40 years?

**LIST OF PARTIES**

The names of all parties appear in the case caption on the cover page.

**RULE 29.6 STATEMENT**

Petitioner County of Maui is a governmental corporation with no parent corporation or shares held by a publicly traded company.

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**PETITION FOR WRIT OF CERTIORARI  
OPINIONS BELOW**

The opinion of the Ninth Circuit Court of Appeals as amended is reported at 886 F.3d 737 (9th Cir. 2018) and is reproduced in the Appendix starting at App. 1. The three opinions of the United States District Court for the District of Hawai'i granting Respondents summary judgment, and denying the County summary judgment, are reported at 24 F. Supp. 3d 980 (D. Haw. 2014); 2015 WL 328227 (D. Haw. Jan. 23, 2015); and 2015 WL 3903918 (D. Haw. June 25, 2015). They are reproduced in the Appendix starting, respectively, at App. 32, App. 85 and App. 101.

**JURISDICTION**

The Ninth Circuit's judgment was entered on February 1, 2018. On March 30, 2018, the Ninth Circuit entered an order and amended opinion denying the County's timely petition for en banc rehearing. By order entered June 4, 2018, this Court extended the time for the County's certiorari petition to August 27, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

**STATUTORY PROVISIONS INVOLVED**

33 U.S.C. § 1251(a)(1) provides: "it is the national goal that the discharge of pollutants into navigable waters be eliminated by 1985[.]"

33 U.S.C. § 1251(a)(7) provides: "it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in

an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.”

33 U.S.C. § 1311(a) provides: “Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.”

33 U.S.C. § 1329 requires federally approved state nonpoint source management programs.

33 U.S.C. § 1342(a)(1) provides, in pertinent part: “Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title ...”

33 U.S.C. § 1362(7) defines “navigable waters” as “waters of the United States, including the territorial seas.”

33 U.S.C. § 1362(12) defines a “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.”

33 U.S.C. § 1362(14) defines a “point source” in relevant part as “any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged.”

## INTRODUCTION

Four years ago, this Court reversed an interpretation of the Clean Air Act because it expanded federal jurisdiction to “millions” of sources that previ-

ously did not require permits under the Clean Air Act. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (“*UARG*”). Citing several precedents, this Court explained that it “typically greet[s] ... with a measure of skepticism” the purported “discover[y] in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy.’” *Ibid.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). This Court “expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance,’” such as “[t]he power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide.” *Ibid.*

This case calls for a similar response to the Ninth Circuit’s radical expansion of point source permitting beyond the scope long given by this Court and several courts of appeals. The Clean Water Act (CWA) requires National Pollutant Discharge Elimination System (NPDES) permits for the discharge of pollutants to navigable waters from point sources (defined as “discernible, confined and discrete conveyance[s],” 33 U.S.C. § 1362(14)). But the CWA regulates non-point source pollution differently. It is controlled through United States Environmental Protection Agency (EPA) oversight of state management programs, as well as by other non-CWA programs.

The Ninth Circuit has swept into the NPDES permitting program millions of sources long regulated as nonpoint sources of pollution. For years, this Court and several appeals courts have read the CWA

to distinguish between point source and nonpoint source pollution based on an intuitive, bright-line test: whether pollutants are delivered to navigable waters by means of one or more point sources. Creating its own more expansive test, the Ninth Circuit concluded that point source pollution also includes, on a case-by-case basis, pollutants that reach navigable waters by nonpoint sources like groundwater so long as the pollutants are “traceable” to a point source.

Without this Court’s intervention, a wide array of sources previously regulated outside the NPDES point source program, like the underground injection control (UIC) wells at issue here, will be brought suddenly within it. Part of a wastewater treatment facility built nearly 40 years ago with EPA funding and encouragement, the UIC wells in this case are a common method used by municipalities to dispose of treated wastewater (called effluent) generated by homes and businesses. EPA and the Hawai‘i Department of Health (HDOH) regulate the County’s wells under federal and state safe drinking water programs. Though these agencies have known since the facility’s design in the early 1970s that the effluent would enter groundwater, which in turn would carry it to the ocean, neither required an NPDES permit until this litigation. Now the County and its taxpayers are unexpectedly faced with massive liability in fines and injunctive relief for failing to have such a permit. And the same fate is likely to befall millions of other sources, including the roughly 6,600 UIC wells and 21,000 septic systems in Hawai‘i. In-

deed, recent notices of intent to file citizen suits for groundwater pollution follow and expand on the Ninth Circuit's rationale.

Certiorari is warranted for three reasons. *First*, intervention is needed to resolve a conflict between this Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), several appeals court decisions consistent with *Miccosukee*, and the Ninth Circuit's decision. *Second*, the Ninth Circuit's expansion of NPDES point source permitting is akin to the expansion of Clean Air Act permitting this Court reversed in *UARG*. *Third*, the Ninth Circuit's conclusion that the County had fair notice of an obligation to obtain an NPDES permit for its wells is directly at odds with *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012).

#### STATEMENT

This case arises out of a dispute over the type of regulation applicable to four UIC wells at the County's Lahaina Wastewater Reclamation Facility. No party questions that the wells are subject to and permitted under the federal and state safe drinking water programs, and are in compliance with those permits. The parties disagree over whether a CWA NPDES permit is also required, or whether well disposal constitutes nonpoint source pollution that is regulated under the CWA's nonpoint source program and other regulatory programs.

## I. Statutory Background

### A. Federal and Hawai'i Safe Drinking Water Programs

Enacted in 1974, the federal Safe Drinking Water Act (SDWA) protects the nation's drinking water. 42 U.S.C. §§ 300f *et seq.* Among other things, it charges EPA with developing minimum requirements for UIC programs that prevent injection wells from contaminating underground sources of drinking water. *Id.* § 300h-1. EPA has promulgated regulations doing so. 40 C.F.R. pt. 144. Though States may seek delegated authority to run the UIC program, EPA administers a federal UIC program in Hawai'i.

The wells here are Class V wells under federal law—wells used to inject non-hazardous fluids underground. *Id.* § 144.81. EPA estimates there are more than 650,000 Class V wells operating nationwide.<sup>1</sup> Such things as agricultural field runoff, sanitary sewage, and water for aquifer storage/recharge are injected into Class V wells. *Ibid.*

Hawai'i also has a safe drinking water program. Haw. Rev. Stat. § 340E-2. It too regulates UIC wells, with Class V wells managed similarly to Class V wells under federal law. Haw. Code R. §§ 11-23-06, 11-23-07.

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<sup>1</sup> EPA, Class V Wells for Injection of Non-Hazardous Fluids into or Above Underground Sources of Drinking Water, <https://www.epa.gov/uic/class-v-wells-injection-non-hazardous-fluids-or-above-underground-sources-drinking-water> (last visited Aug. 17, 2018).

## B. The CWA

### 1. Point Source v. Nonpoint Source

The CWA controls pollution of navigable waters through point source permitting and nonpoint source pollution management programs. This point source/nonpoint source distinction is an “organizational paradigm of the Act.” *Or. Nat. Desert Ass’n v. U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008). *See also Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) (“Congress consciously distinguished between point source and nonpoint source discharges.”).

Absent an NPDES permit issued under 33 U.S.C. § 1342, the CWA prohibits the “discharge of any pollutant,” *id.* § 1311(a), defined as “any addition of any pollutant to navigable waters from any point source,” *id.* § 1362(12). A “point source” is “any discernible, confined and discrete conveyance ... from which pollutants are or may be discharged.” *Id.* § 1362(14). An NPDES permit can be issued by a State under an EPA-approved state program, or by EPA itself. *Id.* § 1342(b). In Hawai‘i, NPDES permits are issued by the state. Haw. Rev. Stat. § 342D-50; 39 Fed. Reg. 43,759 (Dec. 18, 1974).

“All other sources of pollution are characterized as ‘nonpoint sources.’” *Or. Nat. Desert Ass’n*, 550 F.3d at 780. Nonpoint source pollution does not require an NPDES permit. Instead, the CWA directs States to adopt nonpoint source management programs, subject to EPA approval, “for controlling pollution added from nonpoint sources to the navigable

waters within the State and improving the quality of such waters.” 33 U.S.C. § 1329(b)(1). *See also id.* § 1251(a)(7). Nonpoint source pollution is also addressed by other federal statutes, including the SDWA, the Coastal Zone Act Reauthorization Amendments of 1990 (“Coastal Zone Act”), 16 U.S.C. § 1455b, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.*, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 42 U.S.C. §§ 9601 *et seq.*

## 2. Navigable Waters v. Groundwater

The CWA distinguishes between groundwater and navigable waters. “Navigable waters” are defined as “waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). That definition does not include groundwater, a term used multiple times elsewhere in the statute. See 40 C.F.R. § 122.2 (groundwater excluded from the definition of “Waters of the United States”).

This bright-line distinction is reflected directly in the CWA’s legislative history. During the CWA’s enactment, Congress specifically debated several proposals to extend NPDES permitting to groundwater that may connect to navigable waters. The EPA administrator urged Congress to require NPDES permits for the addition of pollutants to groundwater because those pollutants could reach navigable waters “through the ground water table.” See *Water Pollution Control Legislation – 1971 (Proposed Amendments to Existing Legislation): Hearings Before the H. Comm. On Public Works, 92nd Cong., at 230 (1971) (statement of Hon. William Ruckelshaus,*

Administrator, EPA). Likewise, then-Representative Les Aspin proposed extending NPDES permitting to pollutants discharged to groundwater because “ground water gets into navigable waters.” 118 Cong. Rec. 10,666 (1972).

Congress rejected these pleas. See S. Rep. No. 92-414, at 73 (1971), *reprinted in* S. Comm. on Public Works, 93rd Cong., 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 1491 (1973) (“Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters .... Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.”). As the Fifth Circuit has said, “the legislative history demonstrates conclusively that Congress believed it was not granting the Administrator any power to control disposals into groundwater. ... [Rather the CWA’s] pattern is one of federal information gathering and encouragement of state efforts to control groundwater pollution but not of direct federal control over groundwater pollution.” *Exxon Corp. v. Train*, 554 F.2d 1310, 1322, 1329 (5th Cir. 1977).

## **II. Factual Background**

### **A. The County’s UIC Wells**

The County’s Lahaina Wastewater Reclamation Facility treats wastewater generated by homes and businesses in the western part of Maui. Constructed with EPA funding, operations commenced by the early 1980s, with treated effluent injected into UIC

wells. Before injection, effluent is treated to meet R-1 water standards, Hawai'i's highest standards for recycled water. Haw. Code R. §§ 11-62-03, 11-62-26. As a result, some treated effluent is used for resort and golf course irrigation. Upon injection, effluent immediately mixes with groundwater and disperses both vertically and horizontally as it enters groundwater through approximately 100-foot well openings.

As is true of all groundwater in Hawai'i, the groundwater that receives the effluent migrates toward the ocean. According to an EPA tracer study, more than 90% of the effluent/groundwater mixture enters through diffuse flow, with no identifiable ocean entry point. Less than 10% enters through seeps in the ocean floor (small fissures typically only a few inches long and wide). The seeps are ephemeral, as they are easily covered by sand and become undetectable. The study showed an average transit time of 15 months for dye to travel approximately a half mile southwest from the wells to the ocean. It also showed that the submarine groundwater discharge has noticeably different nutrient levels than the effluent, due to chemical modifications that naturally occur as groundwater migrates.

Both EPA and HDOH have always known that effluent from the Lahaina wells reaches the ocean via groundwater flow. Both agencies received the 1973 pre-construction environmental impact report explaining that injected effluent would "eventually reach the ocean." App. 159. A 1991 environmental review reaffirmed this, finding the effluent "flows toward the ocean" and "probably enters the ocean

with the fresh groundwater.” App. 157. And in 1994, both agencies understood that “all experts agree that the wastewater does enter the ocean.” App. 153-154. Neither agency suggested this requires NPDES permitting.

### **B. Regulation of the County’s Effluent Injection**

The facility’s wells are regulated as Class V wells through permits issued by EPA and HDOH under their respective safe drinking water programs. 42 U.S.C. § 300h-1(c); Haw. Rev. Stat. § 340E-2. These permits regulate the volume, rate and constituent concentrations of injected effluent. EPA’s permit imposes a nitrogen limit to address ocean water quality. App. 139-140, ¶ 7. There is no contention the County violated its UIC permits.

Hawai‘i’s nonpoint source pollution management program, subject to EPA approval under the CWA, is specifically designed to control the migration of effluent from the County’s wells to coastal waters. *Hawai‘i’s Nonpoint Source Management Plan* (2015-2020)<sup>2</sup> implements an integrated plan to comply with nonpoint source statutory programs under both the CWA and the Coastal Zone Act. 33 U.S.C. § 1329, 16 U.S.C. § 1455b. This plan is more stringent than a CWA nonpoint source program alone because the

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<sup>2</sup> Hawai‘i State Department of Health, *Hawai‘i’s Nonpoint Source Management Plan* (2015-2020), <http://planning.hawaii.gov/czm/initiatives/coastal-nonpoint-pollution-control-program/hawaiis-implementation-plan-for-polluted-runoff-control/>.

Coastal Zone Act requires a federally approved program that “update[s] and expand[s]” on the CWA’s nonpoint source management program to protect coastal waters from nonpoint sources, 16 U.S.C. § 1455b(a)(2), such as the effluent/groundwater mixture at issue here. *Hawai‘i’s Nonpoint Source Management Plan*, at 10 (“[G]roundwater discharge also impacts near-shore areas.”). As the CWA envisions, Hawai‘i’s plan provides a “coordinated approach among federal, state, and local ... agencies to implement NPS [nonpoint source] projects and target pollutants and their sources more effectively.” *Id.* at 5. Hawai‘i’s plan focuses on three priority watersheds, including the one encompassing the County’s wells (West Maui). *Ibid.*

### **C. Agency Evaluation of NPDES Permitting**

HDOH never required the County to have an NPDES permit for its well disposal. For example, in 2010 HDOH explained to EPA that the CWA was inapplicable because the wells injected into groundwater, not navigable waters. App. 152 (“Please note CWA content using term “ground water” to separate ground water from Navigable waters when ground water is involved.”). In a March 2014 letter sent in response to a County inquiry, HDOH said it had “not made a decision yet” on the need for an NPDES permit for the County’s wells. App. 146-147. And in a May 2015 meeting with the County, HDOH maintained that NPDES permitting only applies to discharges to navigable waters and the district court’s ruling was “unprecedented.” App. 143, ¶ 32.

HDOH's treatment of the County's wells is consistent with its treatment of UIC wells statewide. At the start of this litigation, EPA's FY2011 state survey identified more than 5,600 Class V UIC wells in Hawai'i, none of which were required to have an NPDES permit. App. 151. By EPA's updated FY2016 survey, there were more than 6,600.<sup>3</sup> None of the additional 1,000 wells have NPDES permits either.

Despite involvement with the Lahaina facility since the planning stages, EPA also never took the position, until this litigation, that the wells required an NPDES permit. App. 138-143. Because it provided CWA grant funding, EPA had to determine at the outset that the facility was CWA compliant. 33 U.S.C. § 1298(b). It required an NPDES permit for certain early facility operations but not for the wells. Over the years, EPA was confronted with several opportunities to take the position that the wells required an NPDES permit, but never did. App. 138-143. For example, in 1999, EPA sued the County for alleged CWA violations but did not identify the wells as requiring an NPDES permit. App. 140, ¶ 8. And in 2008, 2009, and 2011, EPA responded to public comments claiming that the wells required NPDES permits but did not direct the County to obtain such permits. App. 140-142, ¶¶ 11, 13, & 14.

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<sup>3</sup> EPA, FY2016 Underground Injection Control Inventory-By State, <https://www.epa.gov/uic/underground-injection-well-inventory> (last visited Aug. 17, 2018).

Even after this lawsuit's initial filing, EPA did not immediately change its position. At first, it elected to "steer[] clear" of any NPDES permitting decision, preferring to watch from the "sideline." App. 149, App. 150. Only after the district court's first summary judgment ruling did EPA tell HDOH the wells needed an NPDES permit.

### **III. Proceedings Below**

#### **A. District Court Proceedings**

In 2012, Respondents sued the County, claiming injection of effluent without an NPDES permit violates the CWA. The County responded that the wells do not require an NPDES permit because they inject into groundwater, which is not navigable water and thus outside the CWA's prohibition. The subsequent migration of effluent to the ocean via diffuse subterranean groundwater flow, the County contended, is nonpoint source pollution that likewise falls outside the scope of NPDES permitting.

In three separate orders, the district court granted summary judgment for Respondents. In the first order, the district court found the County liable under the CWA for failure to have an NPDES permit for two of its wells. The court found the wells are point sources that "indirectly discharge[d] a pollutant into the ocean through a groundwater conduit," though it conceded that it could not "point to controlling appellate law or statutory text expressly allowing" the conduit theory. App. 56, App. 63. Alternatively, the court found the County liable because the groundwater is a point source discharging pollutants

into the ocean. App. 69-72. In the second order, the district court applied the same reasoning to find the County liable for failure to have an NPDES permit for the two remaining wells. App. 93-99. And in the final order, the district court found that the County had “fair notice” of its liability for failure to have an NPDES permit. App. 113-114.

### **B. Ninth Circuit Appeal**

The County appealed to the Ninth Circuit, which affirmed the district court. The Ninth Circuit premised its liability finding solely on the notion that NPDES permitting includes circumstances where pollutants reach navigable waters by means other than a point source, such as through groundwater.

The Ninth Circuit crafted a new test for NPDES permitting of point source pollution based on the traceability and volume of pollutants reaching navigable waters. It found the County liable because: (1) “the County discharged pollutants from a point source” (*i.e.*, the wells); (2) “pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water”; and (3) pollutants reach navigable water at “more than *de minimis*” levels. App. 24. The Ninth Circuit provided no limit to its new rule, expressly “leav[ing] for another day the task of determining when, *if ever*, the connection between a point source and a navigable water is too tenuous to support liability under the CWA.” App. 25 (emphasis added).

In creating its new rule, the Ninth Circuit rejected two other tests for determining whether pollution that reaches navigable waters by means other than a point source nevertheless requires an NPDES point source permit. The Ninth Circuit expressly declined to adopt the district court's "conduit theory" of liability. App. 24. It also rejected the rule proposed by EPA as *amicus curiae*, which argued that disposal of pollutants into groundwater requires an NPDES permit if the groundwater forms a "direct hydrological connection" between the point source and navigable waters. The Ninth Circuit criticized EPA's proposal as "read[ing] two words into the CWA ('direct' and 'hydrological') that are not there," App. 24 n.3, though it did not explain where the words in its test ("fairly," "traceable," and "*de minimis*") are found in the statute.

Finally, the Ninth Circuit concluded that the County had fair notice of its liability under the NPDES point source program because its actions "fall squarely within the '[p]lain [l]anguage of the [s]tatute.'" App. 29-30 (quoting *United States v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 980 (9th Cir. 2008)).

**REASONS FOR GRANTING THE PETITION****I. The Ninth Circuit Wrongly Parted With This Court And Several Appellate Courts In Determining Where Congress Drew The Line In The CWA Between Point Source And Nonpoint Source Pollution.**

In conflict with this Court and several courts of appeals, the Ninth Circuit incorrectly expanded NPDES point source permitting to cover nonpoint source pollution, which is regulated in other ways. As described below, this Court and several appeals courts have read the CWA to draw a bright line between point and nonpoint source pollution based on a single critical requirement: whether pollutants are delivered to navigable waters by means of one or more point sources. In contrast, the Ninth Circuit also includes within point source pollution circumstances where pollutants reach navigable waters by means other than a point source, such as groundwater, so long as the pollutants can be “traced” to a point source. Only the former reading is consistent with the text, structure, and history of the CWA.

This Court should grant certiorari to restore nationwide uniformity to NPDES point source permitting and reaffirm its previous case law.

**A. The Ninth Circuit has created a growing conflict over the distinction between point source and nonpoint source pollution.**

This Court addressed the meaning of the phrase “discharge of any pollutant” in *Miccosukee*, and clear-

ly stated that point source pollution under the CWA requires that a point source “convey” the pollutant to navigable waters. 541 U.S. at 105. After reviewing the statutory definitions of “discharge of a pollutant” and “point source,” the unanimous Court highlighted the word “conveyance” in the definition of point source, reasoning that the key characteristic of point sources is not that they may generate pollutants but rather that they “transport” pollutants. *Ibid.* Recognizing that, the Court held the “definition makes plain” that while a point source need not be the “original source” of the pollutant, “it need[s] [to] ... **convey** the pollutant to ‘navigable waters.’” *Ibid.* (emphasis added).

The Second and the Fifth Circuits have read the CWA in the same way. It is not sufficient that pollutants were released into the environment by a point source. Rather, one or more point sources must carry them to navigable waters. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 224 (2d Cir. 2009) (CWA “requires that pollutants reach navigable waters by a ‘discernible, confined and discrete conveyance’”); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 493, 494 (2d Cir. 2001) (CWA’s “plain meaning” requires that “point source” refers to “the proximate source from which the pollutant is directly introduced to the destination water body”); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (point sources must “be the means by which pollutants are ultimately deposited into a navigable body of water.”). *See also Upstate Forever v. Kinder Morgan Energy*

*Partners, L.P.*, 887 F.3d 637, 659 (4th Cir. 2018) (Floyd, J., dissenting) (observing this Court and several appellate courts have concluded the “discharge of a pollutant,” that triggers NPDES permitting occurs only where point sources “convey, transport, or introduce the pollutant to navigable waters.”).

In *Cordiano*, the Second Circuit held that a firing range did not require an NPDES permit when lead from shell casings migrated from a range berm to navigable water via airborne dust and uncollected surface water runoff. 575 F.3d at 223-24. Although the berm was “an identifiable *source* from which lead pollution reaches jurisdictional wetlands,” *i.e.*, the pollution in navigable water was fairly traceable to the berm, the court held that fact was “not enough to satisfy the CWA requirement of a *point source discharge*.” *Id.* at 224 (emphases added). Imposing CWA liability merely because pollutants in navigable waters are traceable to a point source, the court explained, “would eviscerate the point source requirement and undo Congress’s choice.” *Ibid.*

In *Abston*, the Fifth Circuit expressly rejected the argument that an NPDES permit is required if the “original source” of pollutants in navigable waters was a point source, “regardless of how the pollutant found its way from that original source to the waterway.” 620 F.2d at 44. “Whether or not the law should prohibit such pollution,” the CWA “does not.” *Ibid.* Because “[t]he focus of this Act is on the ‘discernible, confined and discrete’ conveyance of the pollutant,” an NPDES permit is required only where a point source is “the means by which pollutants are

ultimately deposited into a navigable body of water.” *Id.* at 44, 45.

Consistent with these cases, the Fifth and Seventh Circuits have considered and rejected that point source pollution includes pollution that travels from a point source through groundwater (a nonpoint source) to navigable waters. *Rice v. Harken Expl. Co.*, 250 F.3d 264 (5th Cir. 2001); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994). In *Rice*, the court rejected this “unwarranted expansion” of the CWA, supporting its analysis with a close review of the statute’s history. 250 F.3d at 271. “Congress was aware that there was a connection between ground and surface waters,” the court wrote, but decided “to leave the regulation of groundwater to the States,” and courts must “respect Congress’s decision.” *Id.* at 271-72. In *Oconomowoc*, the court held that NPDES permitting does not extend to pollutants seeping into groundwater regardless of a hydrological connection to navigable waters. 24 F.3d at 963, 965.<sup>4</sup>

In contrast to these cases, the Ninth Circuit does not require that one or more point sources actually convey pollutants to navigable waters. It imposes

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<sup>4</sup> Numerous district courts concur. See, e.g., *Umatilla Water-quality Protective Ass’n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1318-20 (D. Or. 1997); *Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC*, 794 F. Supp. 2d 602, 619-20 (D. Md. 2011); *PennEnvironment v. PPG Indus., Inc.*, 964 F. Supp. 2d 429, 454-455 (W.D. Pa. 2013); and *Tri-Realty Co. v. Ursinus Coll.*, No. 11-5885, 2013 WL 6164092, at \*8 (E.D. Pa. Nov. 21, 2013).

NPDES point source permitting merely because pollutants in navigable waters are “fairly traceable” to a point source.

The Ninth Circuit conspicuously fails to discuss this Court’s straightforward textual analysis in *Miccosukee*, seeking instead to ground its ruling on dictum regarding “indirect discharges” in Justice Scalia’s plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). App. 21-23. But Justice Scalia’s *Rapanos* opinion is fully consistent with *Miccosukee*, which he quoted without question. *Rapanos*, 547 U.S. at 743. Justice Scalia allowed that discharges into “intermittent watercourses” might need NPDES permits if those sometimes-dry features act as “intermittent channels” that convey pollutants to navigable waters. *Ibid.* He then made a special point to note that “[i]n fact, many courts have held that such upstream, intermittently flowing channels themselves constitute ‘point sources’ under the Act.” *Ibid.*

It is a stretch to suggest, as the Ninth Circuit did, that Justice Scalia endorsed the notion that a point source discharge under the CWA includes pollution that reaches navigable waters by means other than a point source. Indeed, every case cited by Justice Scalia involved pollution conveyed by one or more point sources to navigable waters. See *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1141 (10th Cir. 2005) (mineshaft discharge through a tunnel to navigable waters); *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945, 946-47 (W.D. Tenn. 1976) (chemical facility discharge through a municipal

storm sewer to navigable waters); *Miccosukee*, 541 U.S. at 104 (pump station discharge through a canal to navigable waters); *United States v. Ortiz*, 427 F.3d 1278, 1281 (10th Cir. 2005) (industrial facility toilet discharge to a storm drain to navigable waters); *Dague v. City of Burlington*, 935 F.2d 1343, 1354-55 (2d Cir. 1991) (landfill seepage discharge through a culvert to navigable waters), *rev'd on other grounds*, 505 U.S. 557 (1992); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994) (farm vehicle discharge through a swale, pipe, and ditch to navigable waters).

The Ninth Circuit's confusion about *Rapanos* underscores the need for review here, as it is not alone in its misapprehension of Justice Scalia's opinion. In a recent ruling, the Fourth Circuit also suggested *Rapanos* had overtaken *Miccosukee*. *Kinder Morgan*, 887 F.3d at 650 n.11. District courts, too, are hopelessly confused and divided about the "indirect discharge" language in *Rapanos*. Compare App. 59-60 (*Rapanos* allows for discharges through nonpoint source groundwater) with *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, No. 3:15-cv-1439 (JAM), 2017 WL 2960506, at \*7 (D. Conn. July 11, 2017), *appeal docketed*, *26 Crown St. Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, No. 17-2426 (2d Cir. Aug. 4, 2017) (*Rapanos* requires a "surface connection"). Review would allow the Court to resolve the confusion.

So, too, do EPA's actions in this area confirm the need for this Court's intervention. Though the agen-

cy supported Respondents as *amicus curiae* before the Ninth Circuit, it published a Federal Register notice earlier this year raising questions about the Ninth Circuit’s ruling. 83 Fed. Reg. 7126, 7128 (Feb. 20, 2018). EPA documented a lack of clarity in its previous statements on this issue, and noted the substantial and “mixed case law on whether certain releases of pollutants to groundwater are within the jurisdictional reach of the CWA,” citing several cases, including *Rice*, *Oconomowoc*, and the Ninth Circuit decision below. *Id.* at 7128. The agency solicited comments by May 21, 2018, on “whether subjecting such releases to CWA permitting is consistent with the text, structure, and purposes of the CWA.” *Ibid.* In short, even the federal agency generally responsible for the CWA has acknowledged a real and significant lack of uniformity and certainty over the central legal question in this case.

Only this Court, however, can reconcile the “mixed case law” discussed above and highlighted in EPA’s Federal Register notice. Under this Court’s precedent, no action by EPA could countermand the Ninth Circuit’s flawed interpretation of the CWA. “A court’s prior judicial construction of a statute trumps an agency construction ... if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). That is the case here. The Ninth Circuit purported to follow the unambiguous terms of the CWA, see App. 29-30 (holding that the County’s ac-

tions “fall squarely within the [p]lain [l]anguage of the [s]tatute”), even criticizing EPA’s *amicus* brief for being unfaithful to the text, App. 24 n.3. Now only this Court can reaffirm that *Miccosukee* properly reads the CWA, as discussed more fully below.

**B. The Ninth Circuit erroneously expanded NPDES permitting to non-point source pollution.**

The bright line this Court drew in *Miccosukee* between point and nonpoint source pollution—holding that point source pollution occurs only where pollution reaches navigable waters by way of a point source—is the only line consistent with the CWA’s text, structure, and history.

As this Court explained in *Miccosukee*, its reading of the CWA derives directly from the statutory text—in particular, the statute’s definition of a point source as “a discernible, confined, and discrete conveyance.” 541 U.S. at 105. The use of the word “conveyance” to define “point source” makes clear that the focus of the CWA’s prohibition on point source pollution is on the “means of carrying or transporting” pollutants and not their point of origin. See *Conveyance*, Webster’s New International Dictionary of the English Language Unabridged (3d ed. 1993). As this Court observed in *Miccosukee*, the examples of point sources listed by the CWA “[t]ellingly” are discernible, confined, and discrete “objects that do not themselves generate pollutants but merely transport them.” 541 U.S. at 105. It follows plainly, therefore, that the difference between point source and nonpoint source pollution should turn on wheth-

er the pollution is “conveyed” by one or more point sources into navigable waters.

No other line between point source and nonpoint source pollution can claim such a clear basis in the text of the CWA. In this case alone, three tests have been advanced to define the line: the district court’s “conduit” theory, EPA’s “direct hydrological connection,” and the Ninth Circuit’s “fairly traceable” and more than “*de minimis*” standard. All are entirely atextual. The district court readily conceded it could not identify “statutory text expressly allowing” its theory. App. 63. EPA’s theory, as the Ninth Circuit recognized, “reads two words into the CWA (‘direct’ and ‘hydrological’) that are not there.” App. 24 n.3. The Ninth Circuit’s own test suffers the same flaw, which it tacitly admits, arguing only that its rule “better aligns with the statutory text,” is “consistent with Article III standing principles,” and “is firmly grounded in our case law.” *Ibid.*

Unsurprisingly, the various district courts expanding point source pollution to include groundwater migration, like the Ninth Circuit, have created a hodgepodge of inconsistent standards relying on various terms not found in the statutory text. *See, e.g., McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1196 (E.D. Cal. 1988), *vacated on other grounds, McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir. 1995) (NPDES permitting applicable when “the groundwater is *naturally connected* to surface waters”) (emphasis added); *Ass’n Concerned Over Res. & Nature, Inc. v. Tenn. Aluminum Processors, Inc.*, No. 1:10-

00084, 2011 WL 1357690, at \*17 (M.D. Tenn. Apr. 11, 2011) (“groundwater is subject to the CWA provided an *impact* on federal waters”) (emphasis added); *Ohio Valley Envtl. Coal. Inc. v. Pocahontas Land Corp.*, No. 3:14-11333, 2015 WL 2144905, at \*8 (S.D. W.Va. May 7, 2015) (a “[d]efendant may be required to seek a[n] NPDES permit even if groundwater is *somehow hydrologically connected* ... to surface waters”) (emphasis added).

*Miccossukee*’s approach is also supported by other CWA provisions describing point source pollution as discharges by point sources “into” navigable waters. The provision that allows States to seek primary authority over NPDES permitting speaks to “the Governor of each State desiring to administer its own permit program for discharges *into* navigable waters within its jurisdiction.” 33 U.S.C. § 1342(b) (emphasis added). Likewise, permitted point source discharges must meet “effluent limitations,” which are defined as restrictions on quantities, rates, or concentrations of pollutants “discharged from point sources *into* navigable waters.” *Id.* § 1362(11) (emphasis added). In both cases, “into” contemplates point sources conveying or delivering pollutants to navigable waters.

In addition, the CWA’s structure and history are replete with indications that pollutants traveling through groundwater should constitute nonpoint source pollution, as they do under *Miccossukee*’s reading of the CWA. The terms “ground waters” or “underground waters” appear in at least 12 sections of the CWA, such as the provisions concerning identifi-

cation of nonpoint source pollution, *id.* § 1314(f), and provisions relating to monitoring groundwater and technical assistance and grants to States, *e.g.*, *id.* §§ 1252(a), 1254(a)(5), 1256(e)(1). But those terms do not appear in the provisions concerning NPDES permitting, which refer only to point sources and navigable waters. See *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (“[W]hen Congress includes particular language in one section of a statute but omits it in another[,] ... this Court presumes that Congress intended a difference in meaning.”) (internal quotation marks and citation omitted). And as noted above (*supra* pp. 8-9), Congress specifically considered and rejected several proposals to extend NPDES permitting to groundwater that carries pollutants to navigable waters.

Consistent with all of this, there are numerous other regulatory programs that address nonpoint source pollution, including groundwater pollution and its effects on navigable waters. For example, the CWA directs States to adopt EPA approved programs “for controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters.” 33 U.S.C. § 1329(b)(1). Every State has such programs. See EPA, *Contacts for Nonpoint Source (NPS) Pollution Programs, State Contacts*.<sup>5</sup> In Hawai‘i, that program includes plans specifically concerning groundwater quality, monitoring, and protection. See *generally Hawai‘i’s Nonpoint Source Management Plan*. Fur-

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<sup>5</sup> [www.epa.gov/nps/state-contacts-nps-programs](http://www.epa.gov/nps/state-contacts-nps-programs) (last visited Aug. 17, 2018).

thermore, as in many other states, the pollution and quality of groundwater is within Hawai'i's jurisdiction. Haw. Rev. Stat. §§ 174C-3, 174C-4.

At the federal level, Congress has enacted several laws addressing groundwater pollution. As mentioned, the SDWA controls UIC wells like those at issue here and protects underground drinking water supplies. 42 U.S.C. §§ 300h-300h-8. Similarly, the Coastal Zone Act specifically addresses coastal non-point source pollution, with Hawai'i's plan uniquely focused on West Maui. 16 U.S.C. § 1455b; *Hawai'i's Nonpoint Source Management Plan*. RCRA's control and remediation of groundwater contamination includes coal ash impoundments, 40 C.F.R. §§ 257.90 *et seq.*, which are the subject of several cases like this one seeking to expand CWA point source jurisdiction.<sup>6</sup> And CERCLA addresses hazardous substances released into the "environment," a term that expressly includes groundwater. 42 U.S.C. § 9601(8).

Thus, even if the Ninth Circuit's expansion of NPDES permitting was not plainly at odds with the statute's text, structure, and history, it is wrong because it upsets the existing federal-state framework for regulating groundwater. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001), this Court cautioned against reading the CWA in a way that would "readjust the federal-state balance" absent a "clear

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<sup>6</sup> See *Ky. Waterways All. v. Ky. Utils. Co.*, No. 18-5115 (6th Cir. filed Feb. 1, 2018); *Tenn. Clean Water Network v. Tenn. Valley Auth.*, No. 17-6155 (6th Cir. filed Oct. 3, 2017); *Sierra Club v. Va. Elec. & Power Co.*, No. 17-1895 (4th Cir. filed Aug. 2, 2017).

statement from Congress.” There is nothing in the CWA that comes close to a clear indication that Congress intended the Ninth Circuit’s expansive approach to NPDES permitting. Rather, the CWA history and text show the opposite. As explained above (*supra* pp. 7-9), Congress intentionally left groundwater regulation to the states. This is reflected in “the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution ... of land and water resources.” 33 U.S.C. § 1251(b).

Finally, in contrast to *Miccosukee*, the Ninth Circuit’s approach runs headlong into the concerns this Court has expressed about the reach and scope of the CWA. As Justice Kennedy wrote in *U.S. Army Corps of Engineers v. Hawkes Co.*, “the reach and systemic consequences of the Clean Water Act remain a cause for concern.” 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring). In addition to being faithful to the Act’s text and history, the *Miccosukee* approach provides a bright-line test that provides much-needed certainty to NPDES permitting. The Ninth Circuit’s traceability rule does the opposite, leaving regulated entities and regulators “to feel their way on a case-by-case basis.” *Sackett v. EPA*, 566 U.S. 120, 124 (2012) (quoting *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring)).

Indeed, it is difficult to picture how permits will be written in many circumstances that fall within the Ninth Circuit’s rule, including those in this case. Among many questions, where should the discharge be measured for compliance with effluent limita-

tions? At injection, or where the pollutants eventually enter navigable waters? In this case, the pollutant levels vary significantly after effluent leaves the wells and interacts with the groundwater. If monitoring is to occur where the pollutants eventually enter navigable waters, what is to be done if a consistent and discrete point of discharge is not known? Again, this case is illustrative. With more than 90% of the flow estimated to enter the ocean as diffuse flow, its point of entry is, practically speaking, unknown.

Nor does adherence to the bright line between point and nonpoint source pollution make a “mockery” of the CWA and allow uncontrolled pollution, as the Ninth Circuit feared. App. 31. Nonpoint source pollution remains fully subject to control under state nonpoint source management programs, and a panoply of other environmental programs, as Congress intended. A polluter therefore cannot, contrary to the Ninth Circuit’s fear if the CWA’s distinction between point and nonpoint source pollution is followed, simply pull back its pipe from the edge of navigable water and freely release pollutants into the environment.

## **II. The Ninth Circuit’s Vast Expansion Of A Federal Permitting Regime Is Akin To That Reversed By This Court In *UARG*.**

The Ninth Circuit’s novel reading of the CWA exponentially subjects States, localities, Tribes, and millions of property owners to new liability and the prospect of crippling fines for activities that have long been regulated under other state and federal

programs. Consider just the Class V wells at issue in this case. EPA estimates there are 650,000 such wells in the country. *Supra* note 1. Municipalities commonly use these wells to dispose of treated wastewater. Businesses use them too. NPDES permits have not been required for these wells in the nearly half century of the CWA's existence. Now, the public and private owners of these wells and state regulators face the arduous and expensive prospect of NPDES permitting for them. See *Hawkes*, 136 S. Ct. at 1815 (noting that NPDES permitting process "can be arduous, expensive, and long").

It is not just owners and operators of UIC wells that face new CWA liability. Widespread methods of wastewater disposal add pollutants that are "fairly traceable" through groundwater to navigable waters. Also implicated are groundwater recharge systems and other green infrastructure projects that collect stormwater or recycled water and use it to augment public groundwater supplies. See, e.g., EPA, *Guidelines for Water Reuse*, EPA/600/R-12/618 (Sept. 2012), Chapter 3 (discussing various types of water reuse).<sup>7</sup> Those systems introduce pollutants that also could make their way in a "fairly traceable" manner to navigable waters through groundwater.

These systems are widely used, due in part to EPA's efforts promoting them as environmentally friendly water and waste disposal methods. See EPA, *National Management Measures to Control*

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<sup>7</sup> Hereafter "*EPA Guidelines for Water Reuse*," <https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P100FS7K.TXT>.

*Nonpoint Source Pollution from Urban Areas*, at Management Measure 5, EPA-841-B-05-004 (Nov. 2005)<sup>8</sup>; *EPA Guidelines for Water Reuse*. Entities developed water and wastewater systems employing those systems. Regulatory agencies have not required NPDES permits for these nonpoint sources. *E.g.*, *Hawai'i's Nonpoint Source Management Plan*, at 11-12. But now these entities face crippling costs in penalties and remedies in citizen suits for doing precisely what EPA encouraged.

Homeowners, too, will be impacted. More than 22 million homes in the country use septic tank systems. See U.S. Department of Housing and Urban Development and U.S. Census Bureau, *American Housing Survey for the United States: 2011*, at 14, Table C-04-AO, H150/11 (Sept. 2013).<sup>9</sup> In Hawai'i alone, there are roughly 21,000 septic systems and 88,000 cesspools covered under the State's Nonpoint Source Plan. *Hawai'i's Nonpoint Source Management Plan*, at 12. These systems release pollutants into groundwater that in many cases migrate to navigable waters. The Ninth Circuit's reading of the CWA applies equally to them as to industrial operations.

Finally, it is not just the disposal of pollutants to navigable waters via groundwater that is newly swept into NPDES point source permitting. Under the Ninth Circuit's rule, any activity causing pollu-

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<sup>8</sup> [https://www.epa.gov/sites/production/files/2015-09/documents/urban\\_guidance\\_0.pdf](https://www.epa.gov/sites/production/files/2015-09/documents/urban_guidance_0.pdf).

<sup>9</sup> <https://www.census.gov/library/publications/2013/demo/h150-11.html>.

tants to reach navigable waters could be subject to NPDES permitting—so long as the pollutants are fairly traceable to a point source and reach navigable waters in more than *de minimis* amounts. The possibilities are limitless when one considers the numerous ways pollutants could end up on or in the ground and then transported to navigable waters by rainfall, snowmelt, or percolation to groundwater (*e.g.*, gas that leaks from nozzles at gas stations; rain that percolates through municipal road salt storage yards; irrigation water on golf courses and farm fields; storm water detention basins; vehicles dripping oil on roads). As one court explained:

[N]on-point-source pollution ... could invariably be reformulated as point-source pollution by going up the causal chain to identify the initial point sources of the pollutants that eventually ended up through nonpoint sources to come to rest in navigable waters.

26 *Crown Assocs.*, 2017 WL 2960506, at \*8. Pollutants could even be carried by wind through the air from a point source to navigable waters.

These cascading concerns about the Ninth Circuit's decision are not hypothetical. Purporting to follow the Ninth Circuit, the Fourth Circuit recently concluded that an NPDES permit was required for pollutants that seeped into groundwater from a pipeline spill and traveled to navigable waters. *Kinder Morgan*, 887 F.3d at 652-653. Several other appeals courts are currently considering a variety of factual

applications to which the Ninth Circuit's test might apply.<sup>10</sup> One citizen suit claimed NPDES permits were required for all septic tanks in Cape Cod. *Conservation Law Found., Inc. v. EPA*, 964 F. Supp. 2d 175 (D. Mass. 2013). And recent CWA notices of intent to file citizen suits for groundwater pollution caused by industrial air emissions and resort septic systems seek to follow and expand on the Ninth Circuit's rationale.<sup>11</sup> Excluding facilities operating under general NPDES permits (e.g., industrial stormwater permits) and tribal permits, there are 137,455 facilities operating under NPDES permits nationwide. EPA, NPDES Permit Status Reports, FY 2017 Non-Tribal Backlog Summary Report.<sup>12</sup> The Ninth Circuit's test would increase that number by several orders of magnitude.

This is precisely the problem that led this Court to reverse in *UARG*. There, EPA proposed a Clean Air Act interpretation that would have caused one category of permits to jump from about 800 to nearly 82,000, and another category of permits to jump from fewer than 15,000 to about 6.1 million. This Court

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<sup>10</sup> See *supra* note 6 and 26 *Crown Street Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, No. 17-2426 (2d Cir. filed Aug. 4, 2017).

<sup>11</sup> Letter from Heather A. Govern, Esq., Conservation Law Foundation, to James Apteker, CEO, Longwood Venues and Destinations, Inc., et al. (June 21, 2018) (on file with author); Letter from Heather A. Govern, Esq., Conservation Law Foundation, to Mark J. Novota, Managing Partner, Wequassett Inn LLP, et al. (June 21, 2018) (on file with author).

<sup>12</sup> <https://www.epa.gov/npdes/npdes-permit-status-reports> (last visited Aug. 17, 2018).

found that interpretation unreasonable “because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.” 134 S. Ct. at 2444. So, too, here. This Court should grant certiorari and similarly reject the purported “discover[y] in a long-extant statute an unheralded power to regulate a significant portion of the American economy.” *Ibid.* (internal quotation marks omitted).

### **III. The Ninth Circuit’s Ruling On Fair Notice Is Directly At Odds With This Court’s Ruling In *FCC v. Fox Television Stations*.**

Independent of whether the Ninth Circuit’s rule is a permissible interpretation of NPDES point source permitting, this Court should grant certiorari because the County did not have fair notice an NPDES permit was required under a straightforward application of *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012).

In *Fox*, this Court set aside two orders of the Federal Communications Commission because they failed to give “fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent.” *Id.* at 258. “A fundamental principle in our legal system,” this Court explained, “is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.” *Id.* at 253. That raises two due process concerns: first, “regulated parties should know what is required of them so they may act accordingly”; and second, “precision and guidance are necessary so that those enforcing the law do not act

in an arbitrary or discriminatory way.” *Ibid.* This Court found both concerns implicated because the FCC regulations were unclear on their face and, independently, “the lengthy procedural history ... show[ed] that the broadcasters did not have fair notice.” *Id.* at 254.

Both elements of *Fox* exist here. *First*, contrary to the Ninth Circuit’s assertion, the County’s actions do not “fall squarely” within the plain language of the statute. As discussed above, this Court’s opinion in *Miccosukee* shows that the statutory language “makes plain” that an NPDES permit is not needed here because a point source did not “convey the pollutant to ‘navigable waters.’” 541 U.S. at 105 (emphasis added). At the very least, however, the differing interpretations reflected in *Miccosukee* and the Ninth Circuit’s decision (as well as the several other interpretations offered in this case, see *supra* p. 25) establish that the County did not “know what is required of them so [it could] act accordingly.” *Fox*, 567 U.S. at 253; see also *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law”).

*Second*, just as in *Fox*, a long regulatory history independently shows that the County did not have fair notice. The County built its facility relying on UIC wells for effluent disposal with HDOH’s authorization, as well as EPA funding. For almost 40

years, these agencies maintained UIC permits were the proper mechanism to regulate well disposal. When explicitly asked, HDOH said NPDES permits were inapplicable because effluent was disposed into groundwater, not discharged into navigable waters, and that the district court's ruling was unprecedented. EPA issued UIC permits for the facility's operation, and brought a countywide CWA enforcement action without raising NPDES concerns for the wells. After the litigation commenced, EPA refused to answer whether an NPDES permit was required, explicitly stating that it preferred to remain on the "sideline." App. 149. EPA only took a position after the district court ruled.

The Ninth Circuit puts great weight on a statement by HDOH in April 2014 that, in its view, shows HDOH had not "solidified its position" on whether an NPDES permit was required. App. 30. But that statement arose after this litigation began and was further undercut by HDOH's equivocation in May 2015, and therefore cannot possibly have provided the County fair notice. Equally important, this Court in *Fox* rejected the government's reliance on a statement in which the FCC had suggested that "televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. § 1464." 567 U.S. at 256 (internal quotation marks and citation omitted). Like in *Fox*, an equivocal, "isolated[,] and ambiguous statement" is not sufficient to provide the fair notice required by due process. *Ibid.*

**CONCLUSION**

The Petition for Certiorari should be granted.

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**In The  
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COUNTY OF MAUI,

*Petitioner,*

v.

HAWAII WILDLIFE FUND; SIERRA CLUB –  
MAUI GROUP; SURFRIDER FOUNDATION;  
WEST MAUI PRESERVATION ASSOCIATION,

*Respondents.*

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

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**SUPPLEMENTAL BRIEF FOR PETITIONER**

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**SUPPLEMENTAL BRIEF FOR PETITIONER**

Pursuant to Rule 15.8 of the Rules of this Court, Petitioner respectfully submits this Supplemental Brief to alert this Court to two recent decisions from the U.S. Court of Appeals for the Sixth Circuit that deepen the conflict in authority described in the Petition regarding the meaning of the Clean Water Act (CWA).

As explained in the Petition (at 18-24), there is a growing split in authority over the critical distinction that Congress drew in the CWA between point source and nonpoint source pollution. On one hand, this Court and several courts of appeals have read the CWA to distinguish between those two types of pollution based on an intuitive, bright-line test: point source pollution is delivered to navigable waters by means of a point source, whereas nonpoint source pollution is not. On the other hand, the Ninth Circuit concluded below that point source pollution sometimes includes pollutants that reach navigable waters by nonpoint sources, like groundwater, if the pollutants are “traceable” to a point source. That decision was joined in April of this year by a similar decision from the Fourth Circuit. See *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018), *petition for cert. filed*, 87 U.S.L.W. 3069 (U.S. Aug. 28, 2018) (No. 18-268).

This division in authority is both of extreme importance and the result of flawed reasoning. The Ninth Circuit’s decision has expanded the CWA’s point source permitting to millions of sources long regulated

as nonpoint sources of pollution, and injected significant uncertainty into a program that needs clarity and nationwide uniformity. See Pet. 30-36. It is also wrong. As set forth in the Petition (at 24-30), the Ninth Circuit's decision cannot be squared with the CWA's text, structure, context, or history. And it is premised on an erroneous reading of Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), which only this Court can definitively put to rest.

Since the filing of the Petition, the Sixth Circuit has issued two decisions that deepen the conflict in authority—unequivocally rejecting the Ninth Circuit's (and the Fourth Circuit's) expansive view of point source pollution. See *Ky. Waterways All. v. Ky. Utils. Co.*, No. 18-5115, 2018 WL 4559315 (6th Cir. Sept. 24, 2018); *Tenn. Clean Water Network v. Tenn. Valley Auth.*, No. 17-6155, 2018 WL 4559103 (6th Cir. Sept. 24, 2018) (applying *Ky. Waterways*). Both cases involved pollutants escaping the disposal sites for coal ash, a byproduct of burning coal to produce electricity. In each case, the plaintiffs argued that there was point source pollution under the CWA because, as in this case, pollutants were entering groundwater and being carried by that groundwater to navigable waters. The Sixth Circuit refused this argument, expressly “disagree[ing] with the decisions from our sister circuits in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, . . . , and *Hawai'i Wildlife Fund v. Cty. of Maui*. . . .” *Ky. Waterways*, 2018 WL 4559315, at \*5 (citations omitted).

In direct conflict with the Ninth and Fourth Circuits, the Sixth Circuit held that point source pollution

under the CWA includes only pollution that “make[s] its way to a navigable water . . . by virtue of a point-source conveyance.” *Id.* at \*7. That does not cover pollution carried to navigable waters by groundwater, “which is a nonpoint-source conveyance.” *Ibid.* A CWA point source permit is not required for “pollutants [that] travel from a point source *through* nonpoint sources en route to navigable waters.” *Ibid.*

The Sixth Circuit’s reasoning tracks many of the arguments in the Petition. The court explained that its interpretation is compelled by the text of several provisions of the CWA, *id.* at \*6-7, and consistent with the statute’s legislative history, *id.* at \*10 n.10. It found support in the CWA’s “purpose of fostering cooperative federalism,” *id.* at \*8, noting that the CWA “envision[s] significant state involvement in environmental regulation” and “leaves all forms of nonpoint-source pollution to state regulation,” *ibid.* In addition, the plaintiffs’ theory would “upend” and “effectively nullify” other environmental laws and regulations with which the CWA is intended to “work in tandem,” such as the Resource Conservation and Recovery Act (RCRA) and the Environmental Protection Agency’s rule under RCRA that specifically addresses coal ash storage and treatment, *id.* at \*9.

The Sixth Circuit also explicitly rejected the reliance of the Ninth and Fourth Circuits on Justice Scalia’s plurality opinion in *Rapanos*. The court explained that those courts relied on a quotation “taken out of context in an effort to expand the scope of the

CWA well beyond what the *Rapanos* Court envisioned.” *Id.* at \*8. Properly understood, Justice Scalia’s opinion does not support a point-source-to-nonpoint-source-to-navigable-water theory of pollution, but merely “make[s] clear” “that pollutants which travel through multiple *point sources* before discharging into navigable waters are still covered by the CWA” point source program. *Ibid.*

The Sixth Circuit’s decisions confirm in many ways the need for this Court’s prompt intervention. The Sixth Circuit is the third federal appeals court this calendar year to weigh in on the meaning of point source pollution under the CWA. And it has reached the third different interpretation of the statute. The Ninth Circuit below concluded that point source pollution under the CWA broadly reaches pollution that is “fairly traceable” to a point source and reaches navigable waters in more than *de minimis* amounts. App. 24. The Fourth Circuit similarly expanded the concept of point source pollution, but adopted a test expressly rejected by the Ninth Circuit: In the five states that make up that circuit, point source pollution under the CWA now exists where there is a “direct hydrological connection” between a point source and navigable waters. *Compare Upstate Forever*, 887 F.3d at 651 n.12, with App. 24 n.3. And the Sixth Circuit is the first this year to agree with this Court’s interpretation in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). As noted in the Petition (at 35), recent CWA notices of intent to file

citizen suits make clear that more cases are on their way.\* Guidance is desperately needed.

Moreover, the Sixth Circuit's decisions involve a third type of pollutant source, highlighting the extraordinary reach of the question at issue. Underground injection wells, pipeline leaks, and coal ash disposal sites are just the tip of a very large iceberg that awaits millions of unsuspecting individuals and entities, who previously had no reason to be concerned with CWA point source permitting, if the decisions of the Ninth and Fourth Circuits stand. That is the kind of "enormous and transformative expansion" in regulatory authority that warrants this Court's attention. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014).

Finally, the Sixth Circuit's discussion of *Rapanos* shows clearly that the conflict in authority can only be resolved by this Court. As the Sixth Circuit recognized, both the Ninth and Fourth Circuits claim to find effectively controlling support for their rulings in Justice Scalia's opinion in *Rapanos*. See App. 21-24; *Upstate Forever*, 887 F.3d at 649-50. That is a mistaken reading of the opinion, but also one that only this Court can definitively settle. This issue is as much about a faithful reading of the CWA's text and history as it is about

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\* Indeed, complaints have followed from both of the notices specifically referenced in the Petition. See *Conservation Law Found., Inc. v. Longwood Venues & Destinations, Inc.*, No. 1:18-cv-11821 (D. Mass. filed Aug. 24, 2018); *Conservation Law Found., Inc. v. Wequassett Inn LLP*, No. 1:18-cv-11820 (D. Mass. filed Aug. 24, 2018).

the meaning of this Court's precedents. This Court's intervention is required, and urgently so.

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**CONCLUSION**

The Petition should be granted.

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**On Petition for Writ of Certiorari  
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### **Question Presented**

Whether the Clean Water Act (CWA) requires a permit when pollutants originate from a point source but reach navigable waters by virtue of a nonpoint source, such as groundwater.

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### Interest of Amicus Curiae<sup>1</sup>

Founded in 1973, Pacific Legal Foundation (PLF) is the nation's oldest and largest nonprofit legal foundation that seeks to protect the right of private property and related liberties in courts throughout the country. In executing this mission, PLF and its attorneys have been frequent participants in litigation concerning the Clean Water Act (CWA). *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018) (counsel for seventeen respondents); *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1812, 1816 (2016) (counsel for respondents); *Sackett v. E.P.A.*, 566 U.S. 120, 132-33 (2012) (counsel for petitioners). PLF supports a balanced approach to environmental law, one that avoids the unreasonable elevation of environmental concerns over other important values.

Directly relevant to the cases at hand, PLF represented the petitioner in *Rapanos v. United States*, 547 U.S. 715 (2006). Below, both the Ninth Circuit and the Fourth Circuit cited *Rapanos* for the proposition that the CWA regulates pollution that reaches navigable waters through groundwater. Petitioner's Appendix (Pet. App.) 21-25; *Upstate*

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<sup>1</sup> Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received the requisite notice of the intent of Amicus Curiae to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution 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 the brief's preparation or submission.

*Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 649-51 (4th Cir. 2018). PLF opposes this property-threatening interpretation because it misreads the reasoning of Justice Scalia’s plurality opinion in *Rapanos*, contradicting the overarching theme of that decision—namely, to limit not expand the CWA’s reach.

### **Introduction and Summary of Argument<sup>2</sup>**

Under the CWA, any person who directly discharges pollutants into a navigable water without a permit violates federal law. Recently, two circuit courts have held parties to be in violation of the CWA for having discharged pollutants into groundwater, because these pollutants eventually reached regulated surface waters. This Court has not addressed whether the CWA regulates such pollution.

The Court of Appeals for the Fourth and Ninth Circuits have ruled that the CWA does, and, in so doing, have greatly expanded the reach of federal water quality regulation beyond what Congress intended through the CWA. *Cf.* 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 . . .”).

The substantial expansion of the CWA is particularly problematic because this Court has held that the EPA and Army Corps have already

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<sup>2</sup> This brief has also been submitted in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 18-268, because there are similar questions of law in each case.

interpreted the Act to be broader than what Congress intended and, arguably, what the Constitution allows. *See Rapanos*, 547 U.S. at 739 (plurality op.); *id.* at 780-82 (Kennedy, J., concurring in the judgment). *See also Hawkes Co.*, 136 S. Ct. at 1817 (Kennedy, J., concurring); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-74 (2001). And this was *before* the Fourth and Ninth Circuits expanded the scope of the CWA to include groundwater pollution that reaches regulated surface waters. Thus, certiorari should be granted to put a stop to the lower courts' improper expansion of an already bloated statute through an unwarranted reading of Justice Scalia's *Rapanos* plurality opinion.

The need for this Court's review is especially acute given that the lower courts' continuing expansion of the CWA augurs intolerable burdens for landowners throughout the country. Under the reasoning of the Fourth and Ninth Circuits, any landowner who owns a septic tank, or who otherwise is responsible for the addition of pollutants to a groundwater basin, is potentially subject to CWA liability. Even without the courts of appeals' interpretive expansion, the burdens of CWA jurisdiction and the risk of CWA liability are tremendous. *See, e.g., Hawkes Co.*, 136 S. Ct. at 1816 (Kennedy, J., concurring) (“[T]he reach and systemic consequences of the Clean Water Act remain a cause for concern.”); *Sackett*, 566 U.S. at 132 (Alito, J., concurring) (“[T]he combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA’s tune.”).

That the Fourth and Ninth Circuits' decisions threaten to add to those fearsome burdens underscores the need for this Court's review.

## Argument

### I.

#### **Certiorari Should Be Granted To Check the Lower Courts' Expansion of the Clean Water Act's Already Overbroad Scope, Which Expansion Has Been Effected Through a Misreading of Justice Scalia's Plurality Opinion in *Rapanos v. United States***

In holding that pollution discharges into groundwater can in some instances be directly regulated under the CWA, the Fourth and Ninth Circuits relied on Justice Scalia's plurality opinion in *Rapanos*. Specifically, the lower courts cited the plurality's discussion of how certain waters that may not qualify as "waters of the United States" may nevertheless constitute regulable "point sources" of pollution. See Pet. App. 21-25; *Kinder Morgan*, 887 F.3d at 649-51. But far from justifying federal regulation of groundwater pollution, the plurality's discussion was intended simply as a rhetorical response to the charge of the concurring and the dissenting opinions that the plurality's reading of the CWA would necessarily result in a dramatic reduction of regulable surface water pollution. See *Rapanos*, 547 U.S. at 742-44. The plurality opinion nowhere addresses whether groundwater pollution could ever be subject to direct CWA regulation. But what that opinion does certainly address are the problems posed by an over-expansive reading of the CWA, and the

critical need to ensure that the statute not be used as a device to justify federal regulation of all water pollution in this country. *See Rapanos*, 547 U.S. at 757 (plurality op.); *id.* at 780-82 (Kennedy, J., concurring in the judgment).

**A. The *Rapanos* Plurality Sought To Narrow the Scope of the Clean Water Act**

In *Rapanos*, the Court addressed whether EPA and the Corps had exceeded their jurisdiction under the CWA in attempting to regulate intermittent, ephemeral tributaries and their adjacent wetlands. *See Rapanos*, 547 U.S. at 757 (plurality op.); *id.* at 780-82 (Kennedy, J., concurring in the judgment).

Specifically, the Court in *Rapanos* was tasked with determining whether certain wetlands and their adjacent tributaries were regulable “waters of the United States.” *Rapanos*, 547 U.S. 730-31. When drafting the CWA, Congress gave the EPA and Corps jurisdiction over traditional navigable waters. Over time however, the agencies expanded their jurisdiction to include waters that are not traditionally navigable. At the time of *Rapanos*, the agencies had expanded their scope of jurisdiction to include an expansive variety of surface waters and wetlands, including intermittent and ephemeral waters. *Id.* at 733. Therefore, the Court had to decide how far the CWA extended beyond traditionally navigable waters.

Justice Scalia, writing for the plurality, posited that only wetlands that actually abutted traditional navigable waterways could be regulated under the CWA. Additionally, he determined that “the waters of

the United States' include only relatively permanent, standing or flowing bodies of water." *Id.* at 732. Most importantly, the plurality expressly rejected the notion that navigable waters could include stretches of intrastate land. *Id.* at 733-34 ("The plain language of the statute simply does not authorize this 'Land Is Waters' approach . . ."). Thus, the *Rapanos* plurality decision ultimately narrowed agency jurisdiction over waters under the Act. *See id.* at 729-32.

**B. The Lower Courts' Conclusion That the *Rapanos* Plurality Supports Clean Water Act Regulation of Groundwater Misconstrues That Opinion**

The dissenting and concurring opinions in *Rapanos*, challenging the plurality opinion, argued that a narrow interpretation would result in a significant reduction of the Act's control of surface water pollution. *See Rapanos*, 547 U.S. at 769-70 (Kennedy, J., concurring in the judgment); *id.* at 800 (Stevens, J., dissenting). The plurality's opinion addressed these concerns by showing that liability could still attach to a pollutant discharge that had to pass through several point sources. *Id.* at 742-45. The Fourth and Ninth Circuits used the plurality's argument to support the inclusion of groundwater under the CWA. But despite the lower courts' interpretations, at no point did the plurality say that liability could still attach even in the absence of a continuous chain of point sources. *See id.*

In *County of Maui*, the Ninth Circuit decision, the court interpreted the *Rapanos* plurality to allow liability to attach under the CWA when pollution is discharged into groundwater that eventually conveys

the pollution to the ocean. *See* Pet. App. 21-25. The petitioner contended that pollutants must travel via a confined and discrete conveyance to navigable waters for CWA liability to attach. *Id.* at 21. The Ninth Circuit rejected this argument, holding that a person need not directly add a pollutant to a navigable water or point source to be held liable. *Id.* at 24. Instead, the court found that any discharge into groundwater that then conveys the pollution to navigable water is enough. *Id.* The court never determined whether the groundwater through which the pollutants travelled was a point source, only that it had the means to convey pollutants from a point source to a navigable water. *See id.* 21-25.

In *Kinder Morgan*, the Fourth Circuit decision, the court reached a similar conclusion. *See Kinder Morgan*, 887 F.3d at 649-51. The court interpreted the *Rapanos* plurality to allow liability to attach when a person discharges pollutants into the ground, which eventually make their way to a regulated tributary. *Id.* at 649-51. The court found that the CWA only requires that the pollutant just come *from* a point source and that, under the *Rapanos* plurality, it does not need to be directly discharged from a point source into a navigable water. *Id.* at 650. Again, the court did not determine that the groundwater was a point source, but rather that it had the means to transport pollutants from a point source to a navigable water. *See id.* at 649-51.

Both of the lower courts misconstrue the *Rapanos* plurality decision. The *Rapanos* plurality suggested that liability may attach to discharges that “naturally” but not “directly” reach regulated waters.

*Rapanos*, 547 U.S. at 742-44. This language, used in context, was written to justify the narrowing of the definition of “waters of the United States” by demonstrating that protections for surface waters would remain in place. Because certain no-longer-navigable-waters under the plurality’s definition could still qualify as point sources, the Court reasoned that few pollution discharges would escape regulation under its reading. *Id.* But this reading was not an attempt to expand the scope of the Act, which is exactly what the lower courts’ use of the argument achieves. See *Kentucky Waterways Alliance v. Kentucky Utils. Co.*, No. 18-5115, 2018 WL 4559315, at \*8 (6th Cir. Sept. 24, 2018).

As the plurality explained, prior lower court decisions had affirmed liability for pollutant discharges “even if the pollutants discharged from a point source do not emit ‘directly into’ covered waters, but pass ‘through conveyances’ in between.” *Rapanos*, 547 U.S. at 743. Indeed, as the plurality’s ensuing discussion and citations make clear, the question being entertained was whether liability could still attach to a pollutant discharge that had to pass through several point sources, *not* whether liability could still attach even in the absence of a continuous chain of point sources.

The first case the plurality cited was *United States v. Velsicol Chemical Corp.*, 438 F. Supp. 945, 946-47 (W.D. Tenn. 1976). *Velsicol* involved a discharge of pollutants into a sewer system that directly connected to the Mississippi River. The defendant argued that, because it did not own the sewer system, it could not be held liable for

discharging pollutants into a navigable water. *Id.* The court found that because the sewer system was a point source that conveyed the pollution to a navigable water, the defendant was liable under the Act. *Id.*

In the second cited case, *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137 (10th Cir. 2005), the court held a gold mine responsible for discharging pollutants into a navigable water. During the springtime, snowmelt washed zinc and manganese down a six-mile tunnel that eventually drained into Cripple Creek and then the Arkansas River. *Id.* The court found that the tunnel was a point source that conveyed the pollution to a navigable water and, thus, that the mine was liable. *Id.*

The *Rapanos* plurality explained that these types of violations were likely point source discharges into other point sources stating, “many courts have held that such upstream, intermittently flowing channels themselves constitute ‘point sources’ under the Act.” *Rapanos*, 547 U.S. at 743. Thus, the plurality was entertaining a point-source-to-point-source-to-regulated-water theory of liability. *See id.* There is a significant difference between this theory and that adopted by the lower courts here.

One problem with the lower courts’ use of the *Rapanos* plurality is that groundwater is not a point source. *See* 33 U.S.C. § 1362(14); *Kentucky Waterways*, 2018 WL 4559315, at \*6. *See also* Allison L. Kvien, Note, *Is Groundwater That is Hydrologically Connected to Navigable Waters Covered under the CWA?: Three Theories of Coverage & Alternative Remedies for Groundwater Pollution*, 16 Minn. J.L. Sci. & Tech. 957, 986 (2015) (“Contrasting even the

most ‘confined and discrete’ groundwater with traditional point sources such as pipes makes the contention that groundwater can be a point source look like a rather weak one.”). But the bigger problem is that the Fourth and Ninth Circuits’ interpretation misses the forest for the trees. The whole point of the *Rapanos* plurality was to prevent the continued and unjustified expansion of the CWA. *See Rapanos*, 547 U.S. at 729-32. Yet that is exactly what the lower courts’ employment of the *Rapanos* plurality achieves. Certiorari should be granted to keep the lower courts faithful to the CWA’s authentic and relatively modest scope, as outlined in the *Rapanos* plurality.

## II.

### **Certiorari Should Be Granted To Check the Lower Courts’ Expansion of the Clean Water Act’s Already Overbroad Scope and Thereby Protect the Property and Due Process Rights of Landowners Throughout the Country**

The Fourth and Ninth Circuits’ expansion of the CWA to reach at least some forms of groundwater pollution substantially worsens, in two key and related ways, the already burdensome regime that the statute imposes on landowners. First, that expansion makes it all the more difficult for landowners to determine whether their normal land-use activities are covered by the Act. Second, it thereby increases substantially the permitting burden, and potential legal liability, for landowners throughout the country, while perversely impeding sound environmental policy.

As to the first point, the significance of the lower courts' enlargement of the CWA is best understood by underscoring just how bad the status quo is without that enlargement. Well before the Fourth and Ninth Circuits' decisions, this Court noted the dramatic administrative expansion of the Act and the commensurate challenge for property owners in ascertaining whether their normal land-use activities are regulated under the Act. *See Rapanos*, 547 U.S. at 722 (plurality op.) (“[An] immense expansion of federal regulation of land use . . . has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations.”); *Sackett*, 566 U.S. at 132 (Alito, J., concurring) (“The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified . . . as wetlands covered by the Act . . .”). *Cf. Nat’l Ass’n of Mfrs.*, 138 S. Ct. at 624 (referring to the Clean Water Act’s implementing regulations as “a complex administrative scheme”). The Fourth and Ninth Circuits’ decisions substantially exacerbate these concerns.

Nearly all groundwater is hydrologically connected to surface water. *See James W. Hayman, Regulating Point-Source Discharges to Groundwater Hydrologically Connected to Navigable Waters: An Unresolved Question of Environmental Protection Agency Authority Under the Clean Water Act*, 5 *Barry L. Rev.* 95, 122-24 (Spring 2005). Whether a pollutant can be tracked back to a discrete source will all depend upon the existence of a hydrological connection, the directness of the connection, the nature of the ground, the distance and flow path, the time spent

underground, and the transformation of the pollutants during this time. *Id.* And some pollutants, particularly those generated by livestock, are not necessarily unique to one definable source. *Id.* As such, any discharge to groundwater could be subject to liability. Perhaps a well-funded government entity or large corporation could “reasonably be expected to hire the army of hydrologists, engineers, and lawyers to determine its liability in this complex situation, but what’s an ordinary property owner who lives dozens of miles from the nearest navigable water to do?” Jonathan Wood, PERC, *Environmental Markets Work Better than Indecipherable Regulations*, Apr. 2, 2018, <https://www.perc.org/2018/04/02/if-the-goal-is-to-guide-human-action-environmental-markets-work-better-than-indecipherable-regulations/>.

Proposed limitations on liability—such as the requirement of more than a *de minimis* discharge, or a “direct” groundwater connection—do little to solve the regulatory problems associated with groundwater conveyance liability. These limitations have no statutory warrant, have never been defined, and cannot be easily administered. And no reported case has ever relied upon a *de minimis* determination to deny liability. *See* Pet. App. 25 (“We leave for another day the task of determining when, *if ever*, the connection between a point source and a navigable water is too tenuous to support liability under the CWA.”) (emphasis added). Thus, landowners are still

left with no notice of whether their groundwater discharges<sup>3</sup> are subject to liability.

Second, expanding CWA regulation to any form of groundwater threatens to impose significant new regulatory burdens and liability. Permitting costs under the CWA can be staggering. *Rapanos*, 547 U.S. at 721 (plurality op.); *Hawkes Co.*, 136 S. Ct. at 1812 (majority op.). Equally “crushing” is the liability that the Act imposes for unpermitted discharges. *Hawkes Co.*, 136 S. Ct. at 1816 (Kennedy, J., concurring). *Accord Sackett*, 566 U.S. at 132 (Alito, J., concurring).

Perhaps ironically, the lower courts’ unwarranted expansion of CWA liability will likely retard, not accelerate, the cleanup of groundwater pollution. Keeping groundwater regulation out of the CWA could help to incentivize those in the environmental community to fill the groundwater pollution information gap and then encourage, through free-market practices, unwitting polluting property

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<sup>3</sup> Pollution discharges into groundwater can happen in a variety of ways. Chemical storage tanks, septic systems, hazardous waste sites, fertilizing crops or lawns, landfills, road salts, and atmospheric contaminants are all ways in which pollution can enter groundwater. See Groundwater Foundation, *Groundwater Contamination*, <http://www.groundwater.org/get-informed/groundwater/contamination.html> (last visited Sept. 24, 2018). While not the only landowners facing liability, farmers likely face the biggest risk of being prosecuted for groundwater contamination due to regular farming practices, like fertilizing crops, because fertilizers have the ability to soak into the ground and, thus, groundwater. Traditionally the agencies have deemed these types of discharges nonpoint source discharges. See EPA, *Basic Information about Nonpoint Source Pollution*, <https://www.epa.gov/nps/basic-information-about-nonpoint-source-pollution> (last visited Sept. 24, 2018).

owners to alter their land-use practices. Jonathan H. Adler, *Conservative Principles for Environmental Reform*, 23 Duke Env'tl. L. & Pol'y F. 253, 278-80 (2013) (contending that "environmental protection efforts would benefit from greater decentralization" because (i) "most environmental problems are local or regional in nature," (ii) it "creates the opportunity for greater innovation in environmental policy," and (iii) the federal government could then focus "on those environmental concerns where a federal role is easiest to justify, such as in supporting scientific research and addressing interstate spillovers").

In fact, a significant body of scholarship supports the general policy presumption that the environment would do better by less, not more, federal regulation. See Jonathan H. Adler & Andrew P. Morriss, *Symposium: Common Law Environmental Protection—Introduction*, 58 Case W. Res. L. Rev. 575, 576 (2008); Roger Meiners & Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 Geo. Mason L. Rev. 923, 925 (1999) ("[M]ost federal pollution control efforts are fundamentally misguided. The common law, combined with various state-level controls, was doing a better job addressing most environmental problems than the federal monopoly, which directed most environmental policy for the last part of this century. America's move down the track of central environmental planning is incompatible with . . . environmental protection itself."); William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. Rev. 1547, 1556 (2007) ("The common law system's independence and private incentives to challenge the

status quo are particularly valuable antidotes to complacency and ineffective regulation.”).

Additionally, environmental regulation that is designed to avoid environmental harm before it occurs, rather than to mitigate harm after it happens, is easier and cheaper to implement. Wood, *Environmental Markets Work Better*, *supra*. Regulating groundwater under the CWA will inevitably result in more after-the-fact harms—and thus more inefficient enforcement—because most landowners will not be in the position to know whether they are violating the Act with groundwater discharges. Hence, the costs of regulating groundwater under the CWA likely outweigh any benefit to the environment.

\* \* \* \* \*

Over the last dozen years, this Court has repeatedly agreed to review decisions of the courts of appeals that unjustifiably expand the CWA’s reach or otherwise increase the burdens and liabilities on property owners engaged in run-of-the-mill land-use activities. The decisions of the Fourth and Ninth Circuits, stretching the CWA to regulate groundwater pollution, unfortunately reflect a continuing tin ear in the lower courts to this Court’s repeated calls for a balanced approach to the CWA’s interpretation and administration. Thus, just as with the lower courts’ decisions in *Rapanos*, *Sackett*, *Hawkes Co.*, and *National Association of Manufacturers*, the rulings of the Fourth and Ninth Circuits should be reviewed in this Court.

**Conclusion**

The petition for certiorari should be granted.

DATED: October, 2018.

Respectfully submitted,

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No. 18-260

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**In the Supreme Court of the United States**

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COUNTY OF MAUI, HAWAI'I

*PETITIONER,*

v.

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

*RESPONDENTS.*

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

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**BRIEF OF *AMICI CURIAE* STATE OF WEST  
VIRGINIA, 17 OTHER STATES, AND THE  
GOVERNORS OF KENTUCKY AND  
MISSISSIPPI IN SUPPORT OF PETITIONER**

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## **QUESTION PRESENTED**

Whether the Clean Water Act's prohibition on the discharge of pollutants and associated permitting regime apply only to discharges conveyed from a point source into "the waters of the United States," or whether they also apply to discharges into groundwater or soil that eventually migrate to jurisdictional waters?

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INTRODUCTION AND  
INTERESTS OF *AMICI CURIAE* <sup>1</sup>

Preserving, regulating, and maintaining the natural bounty within their borders is a primary responsibility of every State. Although true for any natural resource, that duty (and attendant power) is particularly acute with respect to water. This Court has repeatedly held, for instance, that the States’ “power to control . . . fishing, and other public uses of water” is “an essential attribute of [their] sovereignty.” *United States v. Alaska*, 521 U.S. 1, 5 (1997); *Kansas v. Nebraska*, 135 S. Ct. 1042, 1067 (2015) (“Authority over water is a core attribute of state sovereignty”); see also *Martin v. Waddell’s Lessee*, 41 U.S. 367, 410 (1842) (explaining that as successors to the English crown in the wake of the American Revolution, “each state became themselves sovereign; and in that character hold[s] the absolute right to all their navigable waters, and the soils under them, for their own common use”).

The Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*, was designed to complement—not usurp—the States’ role as primary stewards of the environment. While the overall purpose of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), Congress also expressly “recognize[d], preserve[d], and protect[ed]” the “primary responsibilities and

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<sup>1</sup> Pursuant to Supreme Court Rule 37.2(a), *amici* have timely notified counsel of record of their intent to file an *amicus* brief in support of the Petitioner.

rights of *[the] States*” in this realm, 33 U.S.C. § 1251(b) (emphasis added). Thus, at the same time Congress established the CWA’s federal regulatory framework, it made clear that the States retained their traditional authority “to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.” 33 U.S.C. § 1251(b). The CWA therefore reflects a “careful balanc[ing] [of] competing policies and interests” specifically designed to protect the “sovereign interests of the States.” *Arkansas v. Oklahoma*, 503 U.S. 91, 106-07 (1992).

Left uncorrected, the decision below, *Hawai‘i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018), together with the Fourth Circuit’s similar, recent decision in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018), would upend a critical component of this balance. The Ninth Circuit’s decision—based on a standard divorced from the CWA’s text, structure, and intent—would greatly expand the scope of waters subject to federal jurisdiction and the CWA’s regulatory requirements. This decision deepens a growing divide among lower courts, and infringes on the sovereign prerogative of States to manage their water resources—especially those such as groundwater that are often wholly *intrastate*. It also threatens to impose an unnecessary and unworkable bureaucratic burden on state environmental protection agencies at the expense of those entities’ important, ongoing conservation efforts.

*Amici curiae*—the States of West Virginia, Alabama, Arkansas, Colorado, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Nebraska, Nevada, Oklahoma, South Carolina, Texas, Utah, and Wyoming, and the Governors of Kentucky and Mississippi—have important interests in both ensuring the safety and quality of their water resources and in preventing unlawful incursions upon their sovereignty. Each *amici* State enforces its own statutory and regulatory regimes designed to protect, conserve, and develop its water resources for the public good. The Ninth Circuit’s unjustified expansion of the CWA’s jurisdictional breadth will significantly burden—if not effectively displace—those protective measures.

*Amici* recognize that the CWA is a vital tool for protecting the health and utility of our nation’s water resources. But it is far from the *only* regulatory regime that combats water pollution, and it represents an unwieldy and impractical mechanism by which to regulate and protect groundwater and other intrastate water resources. *Amici* urge this Court to grant certiorari, repudiate the flawed and overreaching decision below, and restore the proper balance between state and federal regulation that the CWA—correctly read—demands.

### SUMMARY OF ARGUMENT

Certiorari is warranted for at least the following three reasons:

*First*, the text and structure of the CWA reflect Congress's intent to implement a regulatory framework that respects the primary responsibility of States to manage and preserve their water resources. By limiting the jurisdictional reach of the CWA to pollutants discharged from "point sources" into "the waters of the United States," Congress left largely undisturbed the States' traditional power to regulate and combat pollution of intrastate water resources, such as groundwater. The decision below threatens this textually enshrined balance of state and federal authority, expanding the CWA's jurisdictional reach beyond recognition. And because the vast majority of States have assumed responsibility for implementing the CWA's permitting regime that regulates discharges conveyed by point sources, the burdens imposed by this expansion will fall predominantly on the States and their environmental protection agencies—and in all likelihood, drain resources that would otherwise be available for enforcing other state-level environmental laws.

*Second*, despite universal agreement that groundwater does not itself fall within the ambit of "the waters of the United States," there is a growing split of authority on whether discharges into non-qualifying waters may nonetheless be swept up by the CWA if they *pass through* groundwater and eventually reach jurisdictional waters. The decision below—like the Fourth Circuit's *Kinder Morgan* decision—flouts the CWA's textual limits by holding that they can. Only this Court can correct this

unwarranted expansion of the CWA and restore uniformity as to its proper scope.

*Finally*, the flawed approach of the court below is unnecessary to protect our nation's water resources—either surface or ground. There is no denying the connection between groundwater and surface waters. Nevertheless, consistent with the “cooperative federalism” framework baked into the CWA, the States extensively regulate groundwater pollution, thereby helping to protect all the waters into which they flow as well. Additionally, other federal statutes are specifically tailored to combat and regulate potential groundwater contamination. Allowing the decision below to stand undermines these protective measures and adds new, unnecessary strain on the limited resources of the States.

#### **REASONS FOR GRANTING THE PETITION**

##### **I. The Decision Below Thwarts Congress's Intent In The CWA To Maintain The States' Primary Authority Over Intrastate Water Resources.**

###### **A. This Court's review is necessary to restore the CWA's textual and structural limitations.**

The Ninth Circuit's decision is both textually and precedentially unmoored. As this Court has explained, “[t]he Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: [R]estor[ation] and maintain[ence] [of] the chemical,

physical, and biological integrity of the Nation's waters." *Arkansas*, 503 U.S. at 101 (citing 33 U.S.C. § 1251(a)). This partnership makes the CWA one of the paradigmatic examples of "cooperative federalism." See, e.g., *United States v. Cooper*, 482 F.3d 658, 667 (4th Cir. 2007). Indeed, this conclusion is unavoidable in light of the statute's plain text, where Congress expressly affirmed the "primary responsibilities and rights of [the] States" to regulate pollution and preserve both "land and water resources." 33 U.S.C § 1251(b).

The language and structure of the CWA illustrate how Congress intended this cooperative, two-tiered regulatory framework to work. As the centerpiece of the *federal* portion of this scheme, the National Pollutant Discharge Elimination System ("NPDES") establishes a general prohibition on the discharge of pollutants into the nation's waters. 33 U.S.C § 1311(a) (providing that "[e]xcept as in compliance [with various other sections of the CWA] . . . the discharge of any pollutant by any person shall be unlawful"). Critically, however, the jurisdictional breadth of this program is limited in at least two ways that flow from the statutory definition of "discharge of a pollutant," which is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

*First*, a "discharge of a pollutant" occurs only when a qualifying substance is added to "navigable waters," 33 U.S.C. § 1362(12), which, in turn, is defined as "the waters of the United States," 33 U.S.C.

§ 1362(7). The precise breadth of “the waters of the United States” is an open question. See, e.g., *Georgia v. Pruitt*, 2018 WL 2766877 (S.D. Ga. June 8, 2018) (granting preliminary injunction against enforcement of 2015 definition of “the waters of the United States”); 83 Fed. Reg. 32,227 (July 12, 2018) (supplemental notice of proposed rulemaking regarding the definition of “Waters of the United States”). Nevertheless, this Court has been clear that “the waters of the United States” does *not* “refer to water in general,” but instead encompasses only “relatively permanent, standing or flowing bodies of water” such as “streams, oceans, rivers, lakes, and bodies of water forming geographical features.” *Rapanos v. United States*, 547 U.S. 715, 732-33 (2006) (Scalia, J., plurality op.); *id.* at 778 (Kennedy, J., concurring) (rejecting conception of “navigable waters” that would “permit federal regulation [of water] alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters”); see also *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) (“‘Waters of the United States’ must be a subset of ‘water’; otherwise why insert the qualifying clause in the statute?”).

Notably, groundwater—which encompasses as much as 98% of the Earth’s “accessible fresh water”<sup>2</sup>—falls outside this definition. See, e.g., *Rice v. Harken*

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<sup>2</sup> Vandas, Winter & Battaglin, *Water and the Environment* 4, American Geological Institute (2002), available at <http://www.agiweb.org/environment/publications/water.pdf>.

*Expl. Co.*, 250 F.3d 264, 269 (5th Cir. 2001) (citing *Exxon Corp. v. Train*, 554 F.2d 1310, 1322 (5th Cir.1977)); *Oconomowoc Lake*, 24 F.3d at 965; *Ken. Waterways Alliance v. Ken. Utils Co.*, 303 F. Supp.3d 530, 542 (E.D. Ky. 2017) (collecting authority and explaining that “[c]ourts have overwhelmingly found that groundwater, even if hydrologically connected to navigable waters, is not itself a navigable water under the CWA”). Cf. *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 486 (1987) (“the [CWA] applies to virtually all surface water in the country”) (emphasis added). Not even the court below—nor the Fourth Circuit in *Kinder Morgan*—purports to cross this statutory line. See *Cty. of Maui*, 886 F.3d at 746 n.2 (“We assume without deciding the groundwater here is neither a point source nor a navigable water under the CWA.”); *Kinder Morgan*, 887 F.3d at 652 (“We do not hold that the CWA covers discharges to ground water itself.”).

*Second*, a discharge must be conveyed to jurisdictional waters by a “point source,” that is, “any discernible, confined and discrete conveyance.” 33 U.S.C. § 1362(14). Each of these descriptors matter. Every example in the statute’s nonexhaustive list of point sources—“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)—is a readily identifiable and discrete object or feature capable of channeling and transporting pollutants to navigable waters. Groundwater is none of these things; instead of being “discernible, confined and discrete,” by its

very nature it is diffuse and amorphous. *Ky. Waterways Alliance v. Ky. Utils Co.*, --- F.3d. ---, 2018 WL 4559315, at \*6 (6th Cir. Sept. 24, 2018) (“By its very nature, groundwater is a ‘diffuse medium’ that seeps in all directions”); *26 Crown Assocs., LLC v. Greater New Haven Reg’l Water Pollution Control Auth.*, 2017 WL 2960506, at \*8 (D. Conn. July 11, 2017) (“It is basic science that ground water is widely diffused by saturation within the crevices of underground rocks and soil.”) (citation omitted).

As courts routinely recognized before the recent Fourth and Ninth Circuit decisions, in the CWA “Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the Act to regulate *only the former.*” *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) (emphasis added). To be sure, the CWA reaches some *indirect* discharges into navigable waters, such as where a pollutant (whatever its origin) is conveyed by a series of point sources—a pipe, for example, then a drainage ditch, and so on—before eventually reaching “the waters of the United States.” Pollution that is conveyed to jurisdictional water by a nonpoint source, however, is outside the scope of the NPDES permitting regime: The CWA “clearly indicates that there is a category of nonpoint source pollution,” and leaves its regulation “*to the states.*” *Simsbury-Avon Pres. Club, Inc. v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009) (citing 33 U.S.C. § 1251(a)(7)) (emphasis added); see also *Oregon Nat. Desert Ass’n v. U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008) (“The CWA’s disparate treatment of

discharges from point sources and nonpoint sources is an organizational paradigm of the Act.”); *Am. Farm Bureau Fed’n v. E.P.A.*, 792 F.3d 281, 299 (3d Cir. 2015) (“[T]he [CWA] assigns the primary responsibility for regulating point sources to the EPA and nonpoint sources to the states.”).

Individually and in concert, these two textual limits cabin the CWA’s jurisdiction. By default, discharges *into* groundwater do not require NPDES permits, because groundwater is not part of “the waters of the United States.” Neither do discharges that seep into the ground and are eventually conveyed to navigable waters via migration through groundwater—because groundwater is also not a point source.

The standard announced by the Ninth Circuit would replace this text-based reading with an infinitely elastic theory of CWA jurisdiction. As this Court recognized almost half a century ago, it is readily apparent that “[s]urface water and groundwater systems are connected in most landscapes.” *Vanas et. al.*, *supra* n.2, at 26; see *Cappaert v. United States*, 426 U.S. 128, 142 (1976); see also *Exxon Corp. v. Train*, 554 F.2d 1310, 1325 (5th Cir. 1977) (discussing material in the CWA’s legislative history documenting the “essential link between ground and surfaces waters”). The practical effect of the analysis below—that federal jurisdiction attaches whenever a discharge that migrates through groundwater to “the waters of the United States” is “fairly traceable” to a point source, *Cty. of Maui*, 886

F.3d at 749—is thus to extend the reach of the CWA not only to virtually *all* of the nation’s waters, but to any *land* capable of absorbing water as well.

This sprawling jurisdictional creep has no grounding in either the statute or this Court’s precedent. In *Rapanos*, for instance, Justice Scalia’s plurality opinion rejected the “expansive theory” of federal jurisdiction advanced by the Army Corps of Engineers in part because adopting it would have placed “virtually all” planning as to the “development and use . . . of land and water resources” under federal control. 547 U.S. at 737. As Justice Scalia explained, such a result would be at odds with Congress’s express intent to preserve “the primary rights and responsibilities of the States” under the CWA. 33 U.S.C. § 1251(b). The same concern animated this Court’s decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, where it rejected another unduly far-reaching formulation of “the waters of the United States” that would have “result[ed] in a significant impingement of the States’ traditional and primary power over land and water use.” 531 U.S. 159, 174 (2001). As it did in both those instances, this Court should intervene here to reverse an unwarranted expansion of the CWA.

**B. The decision below will impose significant and unworkable bureaucratic burdens on state environmental protection agencies.**

This Court’s intervention is also needed because the Ninth Circuit’s misreading of the CWA has

significant consequences for the States. Although NPDES permitting is the centerpiece of the CWA's federal regulatory framework, as a practical matter, the States largely implement that program. See 33 U.S.C. § 1342(b); *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 650 (2007) (explaining that although the EPA has the initial responsibility for administering the NPDES permitting system, a "State may apply for a transfer of permitting authority to state officials"). Congress expressly designed the CWA to operate this way, explaining its goal that the States should "implement the [NPDES] permit programs." 33 U.S.C. § 1251(b). And that intent has been largely realized: 46 States have sought and received authority to implement the NPDES permitting regime pursuant to Section 1342(b). 81 Fed. Reg. 31,344-01; see also 71 Fed. Reg. 65,509-01 (table outlining when each State obtained EPA approval to issue and oversee NPDES permitting); see also *Kentucky Waterways*, --- F.3d ---, 2018 WL 4559315, at \*2 n.1.

Because the vast majority of States have assumed primary responsibility over NPDES, the burdens from expanding that regime's scope would fall directly on the States and state environmental protection agencies. This Court has previously acknowledged that the NPDES permitting process is "arduous, expensive, and long." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016). As it stands, state environmental protection agencies already spend nearly 1.6 million hours and nearly 70

million dollars each year processing NPDES permits.<sup>3</sup> Those numbers are likely to increase by several orders of magnitude if this Court allows the Ninth Circuit's "fairly traceable" test to stand.

As one example, home septic systems typically discharge pollutants (as the term is broadly defined in the CWA) into groundwater, but homeowners have not historically been required to apply for an NPDES permit. Under the Ninth Circuit's standard, however, a home septic system could qualify as a point source requiring an NPDES permit wherever it can be shown that its discharges migrate through groundwater and eventually reach jurisdictional waters. The potential scope of such liability is vast. Given the EPA's estimate that approximately 25% of American homes rely on septic systems,<sup>4</sup> adoption of the Ninth Circuit's standard could increase the number of NPDES permits by roughly 220,000 in West Virginia alone.<sup>5</sup> This represents an astronomical 35,000% increase over the number of NPDES permits—607—issued by

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<sup>3</sup> See EPA ICR No. 0229.21 Supporting Statement, Information Collection Request for National Pollutant Discharge Elimination System (NPDES) Program (Renewal), EPA ICR at \*17, tbl. 12.1 (Dec. 2015), *available at* <https://www.reginfo.gov/public/do/DownloadDocument?objectID=60917402>.

<sup>4</sup> EPA, *Do your Part—Be SepticSmart!* 2 (Sept. 2012), *available at* [https://www.epa.gov/sites/production/files/2015-06/documents/septicmart\\_longhomeownerguide\\_english508\\_0.pdf](https://www.epa.gov/sites/production/files/2015-06/documents/septicmart_longhomeownerguide_english508_0.pdf).

<sup>5</sup> See United States Census Bureau, *QuickFacts West Virginia*, <https://www.census.gov/quickfacts/fact/table/wv/PST045217> (estimating current population of West Virginia to be 1,815,857).

West Virginia in fiscal year 2017,<sup>6</sup> and that accounts for only *one* potential new category of point sources that would, for the first time, be subject to the NPDES permitting regime.

The same result could hold for wastewater treatment plants and other relatively common underground injection wells. Municipalities and other entities use more than 650,000 wells nationwide in the process of purifying and reusing wastewater, and around 180,000 wells to facilitate oil and gas mining. See generally EPA, *Protecting Underground Sources of Drinking Water from Underground Injection (UIC)*, available at <https://www.epa.gov/uic>. Even though both categories of wells are already subject to a variety of state and federal regulations, see *id.*, under the Ninth Circuit's standard they could be (and, as this case itself demonstrates, some have been) required to obtain NPDES permits or face liability. See Pet. 6-7, 10, 13-14. The Ninth Circuit's approach could extend the jurisdictional scope of the CWA to untold other sources as well—irrigation systems, underground storage tanks that spring a leak, mine sites undergoing voluntary state cleanup programs, and others.

What is more, the diffuse nature of groundwater dispersal means that States likely would not be able to complete this torrent of new NPDES permitting

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<sup>6</sup> West Virginia Department of Environmental Protection, *Fiscal Year 2016-17 Annual Report 2*, available at <https://dep.wv.gov/pio/Documents/2016-17%20Annual%20Report.pdf>.

tasks with any clarity, and certainly not without considerable, unjustifiable cost. Groundwater may (or may not) seep through many feet of soil and take multiple directions before ultimately reaching jurisdictional waters, and the direction and speed of flow depend on geography and gravity, not design. Cf. *Kentucky Waterways*, --- F.3d ---, 2018 WL 4559315, at \*6 (“One cannot look at groundwater and discern its precise contours as can be done with traditional point sources like pipes, ditches, or tunnels”). These factors would make it extremely challenging to draft a permit with precise discharge parameters, much less monitor compliance. It is one thing to measure outflow from a pipe into navigable waters to ensure discharge levels are compliant with an NPDES permit; it is quite another to track the volume of pollutants that reach navigable waters after seeping into the ground and joining the subsurface network of groundwater flows. At a minimum, States overseeing an NPDES regime that applies to groundwater would likely need to repeatedly produce or procure, at considerable time and expense, the environmental impact studies necessary to develop the data that might (or might not) enable them to regulate with any kind of precision, coherence, and scientific integrity.

All told, the Ninth Circuit’s standard threatens to drown state environmental protection agencies in a myriad of new and technologically challenging NPDES permit requirements from a novel source of federal liability, and leech away scarce resources from other programs better equipped to address groundwater pollution. See Part III, *infra*. Congress

did not intend to foist such burdens on the States, and this Court should not countenance them either.

**II. Only This Court Can Resolve Lower Courts' Disagreement Whether The CWA Reaches Discharges That Migrate To Navigable Waters Through Groundwater.**

The decision below is the second time this year that a federal appellate court has held that the CWA's regulatory framework applies to discharges that only indirectly reach navigable waters via groundwater migration. *Cty. of Maui*, 886 F.3d at 747, 749; *Kinder Morgan*, 887 F.3d at 650-51. These conclusions conflict with at least two earlier decisions from the Seventh and Fifth Circuits. See *Oconomowoc Lake*, 24 F.3d at 964 (Seventh Circuit); *Rice*, 250 F.3d at 269 (Fifth Circuit). And division among the lower courts has only continued to grow: Since the Petition was filed, the Sixth Circuit issued decisions in a pair of companion cases expressly rejecting the Ninth and Fourth Circuits' analysis. *Kentucky Waterways*, --- F.3d ---, 2018 WL 4559315; *Tennessee Clean Water Network v. Tennessee Valley Authority*, --- F. 3d. ---, 2018 WL 4559103 (6th Cir. Sept. 24, 2018). The Court should grant the Petition to resolve this disagreement over the meaning of a statute with critical implications for the States and the nation as a whole.

Below, the Ninth Circuit held that the jurisdictional scope of the CWA encompasses "an indirect discharge from a point source to a navigable water" when that discharge is "fairly traceable from the point source to a navigable water." *Cty. of Maui*,

886 F.3d at 747, 749. Similarly, in *Kinder Morgan*, the Fourth Circuit held that the CWA “does not require a discharge [to be] directly to navigable waters”; it is enough if “a point source is *the starting point or cause* of a discharge” and a “direct hydrological connection” exists between the point source and jurisdictional waters. 887 F.3d at 650-51 (emphasis added).

Just last week, the Sixth Circuit unequivocally repudiated both approaches. *Kentucky Waterways*, --- F.3d ---, 2018 WL 4559315, at \*5 (“[W]e disagree with the decisions from our sister circuits in *Kinder Morgan* and *County of Maui*”) (citations omitted). Both *Kentucky Waterways* and *Tennessee Clean Water* involved a claim that discharges from power plant coal ash collection ponds traveled through groundwater to jurisdictional waters. *Kentucky Waterways*, --- F.3d ---, 2018 WL 4559315 at \*3-5, *Tennessee Clean Water*, --- F.3d ---, 2018 WL 4559103 at \*2-4. The plaintiffs in *Kentucky Waterways* argued that groundwater qualified as a point source and alternatively embraced the “hydrological connection” view to establish CWA jurisdiction over the collection ponds; the *Tennessee Clean Water* plaintiffs relied solely on the “hydrological connection” theory. *Kentucky Waterways*, --- F.3d ---, 2018 WL 4559315 at \*5; *Tennessee Clean Water*, --- F.3d ---, 2018 WL 4559103 at \*5 n.5.

The Sixth Circuit flatly rejected these claims. “[T]he text and statutory context of the CWA make [it] clear” that “the CWA does not extend its reach” to

discharges into groundwater. *Kentucky Waterways*, --- F.3d ---, 2018 WL 4559315 at \*5; see also *id.* at \*7 (“The CWA’s text also forecloses the hydrological connection theory”). The court explained that the power plant at issue was discharging pollutants into groundwater and that the groundwater, in turn, was “adding pollutants to [jurisdictional waters].” *Id.* --- F.3d ---, 2018 WL 4559315 at \*7. Nevertheless, the court further explained, “groundwater is not a point source.” *Id.* Thus, the court concluded “when the pollutants [enter] the [waters of the United States], they are not coming from a point source; they are coming from groundwater, which is a nonpoint-source conveyance. The CWA has no say over [such] conduct.” *Id.*

The Sixth Circuit conclusion follows in the wake of the Seventh and Fifth Circuits’ earlier decisions. In *Oconomowoc Lake*, the Seventh Circuit refused to extend CWA jurisdiction to a retention pond collecting “oil, grease, and other pollutants” where the “water seep[ed] into the ground—carrying hydrocarbons and other unwelcome substances.” 24 F.3d at 963-64. Although the court’s primary holding turned on whether the retention pond was part of “the waters of the United States,” *id.* at 964, the court also expressly rejected the “hydrological connection” theory, *id.* at 965. Even granting the premise that “water from the pond will enter the local ground waters, and thence underground aquifers that feed lakes and streams that are part of the ‘waters of the United States,’” the court nonetheless held that the CWA does not “assert[] authority over ground waters, *just because*

*these may be hydrologically connected with surface waters.*” *Id.* (emphasis added). The court found instead that Congress’s “omission of ground waters” from the CWA was “not an oversight,” *id.*, even if these discharges eventually reach “waters of the United States.”

The Fifth Circuit has consistently adopted a similar position. For instance, in *Exxon Corp. v. Train*, it identified and discussed a “clear pattern of congressional intent with respect to groundwaters,” namely “the encouragement of state efforts to control groundwater pollution [and] not of direct federal control.” 554 F.2d at 1322. Engaging in a thorough analysis of the CWA’s text and legislative history, it emphasized that Congress had rejected an amendment that would have brought *all* groundwater (hydrologically connected to surface water or not) within the jurisdictional ambit of the CWA. See *id.* at 1328-30.

The holding in *Exxon* was, in turn, a critical component of the Fifth Circuit’s later decision in *Rice*. See 250 F.3d at 269. There, the court rejected a claim that a petroleum company illegally discharged oil into “navigable waters”<sup>7</sup> based on a theory that the

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<sup>7</sup> *Rice* involved a claim brought under the Oil Pollution Act of 1990 (“OPA”), 33 U.S.C. §2701 *et seq.*, rather than the CWA. 250 F.3d at 265. Both statutes, however, regulate discharge of pollutants into “navigable waters,” defined identically as “the waters of the United States,” and the OPA’s legislative history “strongly indicate[s] that Congress generally intended the term

“discharges have seeped through the ground into groundwater which has, in turn, contaminated several bodies of surface water” “through subsurface flow from the contaminated groundwater . . . into [a] river.” *Id.* at 265, 270-71. The court explained that liability extends only to “discharges . . . into or upon the navigable waters,” not indirect discharges through groundwater that reach jurisdictional waters “by gradual, natural seepage.” *Id.* at 271. “In light of Congress’s decision not to regulate ground waters under the CWA/OPA,” the court refused to extend OPA jurisdiction so far, emphasizing instead its duty to “construe the OPA in such a way as to respect Congress’s decision to leave the regulation of groundwater *to the States.*” *Id.* at 272 (emphasis added).

Only this Court can resolve the fundamental question animating this growing division: Does the CWA apply to discharges that reach “the waters of the United States” only by migration through nonjurisdictional groundwater? Granting the Petition would allow this Court to reject the flawed analysis below, and instead affirm—as the statutory text and principles of cooperative federalism require—that groundwater is neither navigable water nor a point source, and ultimately beyond the CWA’s reach.

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‘navigable waters’ to have the same meaning in both the OPA and the CWA.” *Id.* at 267-68.

### **III. Proper Interpretation Of The CWA Will Not Leave Groundwater or Connected Surface Water Unprotected.**

This Court should also grant the petition because there is no need for the atextual overreach in the decision below. The CWA was never intended to allow the EPA to regulate every possible aspect of water contamination, and any concern to the contrary about leaving groundwater (and any hydrologically connected surface water) unprotected is unfounded. See, e.g., *Sierra Club v. Virginia Elec. & Power Co.*, --- F.3d. ---, 2018 WL 4343513, at \*6 (4th Cir. Sept. 12, 2018) (“[T]he fact that [some groundwater] pollution falls outside the scope of the Clean Water Act’s regulation does not mean that it slips through the regulatory cracks.”). States take seriously their responsibility to protect the natural resources within their borders, see, e.g., *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W. Va. 221, 488 S.E.2d 901 (1997), and *other* federal statutes are better-tailored to address the problem of groundwater contamination in certain circumstances.

As an initial matter, while the CWA does not authorize direct federal regulation of groundwater pollution, other federal statutes are better tailored to do so. For example, the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*, requires States to set minimum standards for the “subsurface emplacement of fluids” that include a prohibition on such discharges without a state permit. See 42 U.S.C. § 300h(b), (d)(1); 40 C.F.R. § 144.12. Further, the Resource Conservation and Recovery Act (“RCRA”) and Comprehensive

Environmental Response, Compensation, and Liability Act (“CERCLA”) permit enforcement actions against entities responsible for groundwater contamination in appropriate circumstances, as well as authorizing ameliorative and other remedial actions. See, e.g., 42 U.S.C. § 6973(2) (RCRA permits an action against “any person” whose “handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment.”); 42 U.S.C. § 9604(a) (EPA may order the removal of pollutants or other corrective action if a “hazardous substance is released” or there is otherwise a “substantial threat of such a release into the environment”). Indeed, although the Sixth Circuit in *Kentucky Waterways* rejected plaintiffs’ claim regarding discharges from coal ash ponds under the CWA, it held that such claims are cognizable under RCRA. 2018 WL 4559315, at \*9-11.

More importantly, States have long exercised their authority to regulate in this space. The CWA itself expressly provides that States retain power the power to “adopt or enforce” any environmental protection they deem necessary to protect their land and water resources. 33 U.S.C. § 1370. The *amici* States have each enacted statutory protections designed to protect and conserve their groundwater resources, and by extension the surface waters they often feed. Examples of such laws include—but are by no means limited to—the following:

- In West Virginia, “[i]t is unlawful for any person,” without a state permit, to “[a]llow

sewage, industrial wastes or other wastes, or the effluent therefrom, produced by or emanating from any point source, to flow into the waters of this state.” W. Va. Code § 22-11-8(b); see also W. Va. Code § 22-11-3(23) (defining “water” to include “all water on or beneath the surface of the ground”). Similarly, West Virginia’s Department of Environmental Protection “establish[es] maximum contaminant levels permitted for groundwater,” which must “recognize the degree to which groundwater is hydrologically connected with surface water and other groundwater” and “provide protection for such surface water and other groundwater.” W. Va. Code § 22-12-4(b)-(c).

- The law of Arizona, in light of its arid climate, is especially focused on the protection of its groundwaters through its comprehensive aquifer protection permit and water quality standards programs. Ariz. Rev. Stat. §§ 49-203(A)(4), 223, 224(B).
- In Colorado, it is unlawful to discharge any statutorily defined pollutant into any state waters without first having obtained the necessary permit by state authorities. Colo. Rev. Stat. §25-8-501(1). “State waters” include any and all “subsurface waters which are contained in or flow in or through” the State. Colo. Rev. Stat. § 25-8-103 (19).

- Kentucky directly prohibits the discharge of pollutants into groundwater, providing that “no person shall, directly or indirectly . . . discharge into any of the waters of the Commonwealth . . . any pollutant, or any substance that shall cause or contribute to the pollution of the waters of the Commonwealth” except as authorized by state regulatory authorities. Ky. Rev. Stat. § 224.70-110. “Waters of the Commonwealth” is defined to include “all . . . bodies or accumulations of water, *surface and underground*, natural or artificial, which are situated wholly or partly within, or border upon, this Commonwealth, or are within its jurisdiction, except those private waters which do not combine or effect a junction with natural surface or underground waters.” Ky. Rev. Stat. § 224.1-300(6).
- Michigan law provides that a “person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious” to a broad array of interests, including public health, commercial, industrial and agricultural land uses, and the protection of wild flora and fauna. Mich. Comp. Laws § 324.3109(1). The term “waters of the state” is explicitly defined to include “groundwaters . . . within the jurisdiction of this state.” Mich. Comp. Laws § 324.3101(aa).
- In South Carolina, it is “unlawful for a person, directly or indirectly, to throw, drain, run,

*allow to seep*, or otherwise discharge into the environment of the State organic or inorganic matter” without a permit. S.C. Code § 48-1-90(A)(1) (emphasis added).

Where, as here, the States have taken up the mantle of protecting groundwater and nonpoint source pollution within their borders, it would be particularly inappropriate to allow the decision below—and the circuit split it deepens—to stand. The States deeply appreciate the value of their natural resources and the danger posed to *all* waters from groundwater contamination. Reaffirming the CWA’s textual limits will not undermine these important state-level protections. To the contrary, curbing the potential tsunami of compliance costs the Ninth Circuit’s expansive theory of CWA jurisdiction invites will allow States to focus their efforts and resources on enforcing laws better tailored to ensuring the purity of their waters—both surface *and* ground.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

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COUNTY OF MAUI,  
*Petitioner,*

v.

HAWAII WILDLIFE FUND; SIERRA CLUB – MAUI  
GROUP; SURFRIDER FOUNDATION; WEST MAUI  
PRESERVATION ASSOCIATION,  
*Respondents.*

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

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**AMICUS CURIAE BRIEF OF THE ASSOCIATION OF  
CALIFORNIA WATER AGENCIES, CALIFORNIA  
ASSOCIATION OF SANITATION AGENCIES,  
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION,  
IDAHO WATER USERS ASSOCIATION, IDAHO WATER  
RESOURCES BOARD, LEAGUE OF CALIFORNIA CITIES,  
NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES,  
NATIONAL ASSOCIATION OF COUNTIES, NATIONAL  
LEAGUE OF CITIES, NATIONAL WATER RESOURCES  
ASSOCIATION, WATEREUSE ASSOCIATION AND  
WESTERN COALITION OF ARID STATES IN SUPPORT OF  
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## INTERESTS OF AMICI CURIAE

*Amici* are organizations from across the United States whose members are public and private entities that provide water supply, water conservation, flood and stormwater management, and wastewater treatment services to the public.<sup>1</sup>

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 California Association of Sanitation Agencies (“CASA”) is a nonprofit mutual benefit corporation comprised of more than 100 local public agencies that provide wastewater collection, treatment, water recycling, renewable energy and biosolids management services to millions of California residents, businesses, industries, and institutions.

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

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<sup>1</sup> Pursuant to Rule 37.6 of the Rules of the Supreme Court, no counsel for a party 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. Counsel of record received notice at least 10 days prior to the due date of the amicus curiae’s intention to file this brief. All counsel of record have consented to the filing of this brief.

mission is to advance responsible development of municipal law through education and advocacy.

The Idaho Water Users Association (“IWUA”) is a nonprofit corporation representing over 300 canal companies, irrigation districts, water districts, groundwater districts, municipal and public water suppliers, hydroelectric companies, aquaculture interests, agri-businesses, professional firms, and individuals dedicated to the wise and efficient use of the Idaho’s water resources.

The Idaho Water Resources Board (“IWRB”) is an agency of the State of Idaho responsible for the formulation and implementation of the Idaho state water plan, financing of water projects, and the operation of programs that support sustainable management of Idaho’s water resources. Of relevance to the matters in this case, IWRB assists with the planning and operation of managed aquifer recharge programs designed to increase sustainability of the Eastern Snake River Plain Aquifer (“ESPA”) in the State of Idaho consistent with the Eastern Snake Plain Aquifer Comprehensive Aquifer Management Planning Process (“CAMP”). IWRB currently funds operation of seven off-canal managed aquifer recharge sites and numerous on-canal recharge projects on the ESPA.

The League of California Cities (“LCC”) is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians.

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 Association of Clean Water Agencies (“NACWA”) is a nonprofit trade association representing the interests of publicly owned wastewater and stormwater utilities across the United States. NACWA’s members include nearly 300 municipal clean water agencies that own, operate, and manage publicly owned treatment works, wastewater sewer systems, stormwater sewer systems, water reclamation districts, and all aspects of wastewater collection, treatment, and discharge. Clean water utilities provide services that are essential to protecting public health and the environment; regulatory certainty is necessary to allow utilities to make and plan prudently for investments of public funds.

The National League of Cities (“NLC”) is the country’s largest and oldest organization serving municipal governments and represents more than 19,000 United States cities and towns. NLC advocates on behalf of cities on critical issues that affect municipalities and warrant action.

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 WaterReuse Association is an internationally-recognized organization made up of water utilities, businesses, government agencies and not-for-profit organizations dedicated to recycling water to ensure communities have a safe, reliable and cost-effective supply of water. WaterReuse advocates for policies, laws and funding at the state and federal level to increase the practice of recycling water.

The Western Coalition of Arid States (“WESTCAS”) is an organization of water and wastewater service providers who advocate for water resources in the arid southwest. Members are from Arizona, California, Colorado, Nevada, New Mexico and Texas. WESTCAS was formed in 1992 to collectively address water quality issues in an area of the country where precipitation is limited and unique arid ecosystems are the norm.

*Amici* submit this brief based on their compelling interest in ensuring that the Clean Water Act National Pollutant Discharge Elimination System (“NPDES”)<sup>2</sup> permitting scheme, and attendant Clean Water Act liability, remains predictable and lawfully within the scope of the Clean Water Act.

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<sup>2</sup> Codified at 33 U.S.C. §§ 1251 *et seq.* (1972).

## SUMMARY OF ARGUMENT

On February 1, 2018, the Ninth Circuit Court of Appeals entered judgment in *Hawaii Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018), and on March 30, 2018, entered an order and amended opinion denying the County of Maui’s petition for *en banc* rehearing.

The Ninth Circuit’s decision in the Maui case created a new test for determining whether a Clean Water Act NPDES permit is required. The Court of Appeals held the County of Maui liable for violating the Clean Water Act “because (1) the County discharged pollutants from a point source, (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable water are more than de minimis.” (*County of Maui*, 886 F.3d. at 749.)

The Ninth Circuit’s newly created “fairly traceable” test redefines and significantly expands the circumstances under which an NPDES permit is required for *amici*’s member’s critical services. Implementation of the test will affect core functions of government and public infrastructure, and, by extension, those public and private entities that provide such services.

*Amici* respectfully submit this brief in support of Petitioner and Appellant County of Maui’s (“County”) Petition for Writ of Certiorari pursuant to Rule 37 of the Rules of the Supreme Court of the

United States, and request the Court grant the County's Petition for the following reasons:

1. The Ninth Circuit's decision created a split of opinion<sup>3</sup> among the Courts of Appeals that impacts *amici's* member agencies. Following the *Maui* case, whether a Clean Water Act NPDES permit is required for discharges to groundwater depends on which part of the country the discharge is occurring in.

Inconsistent application of the NPDES program subverts the federal interest in protecting water quality while preserving the states' autonomy over groundwater and water supply. It also infringes on the ability of *amici's* members to manage their own operations in a consistent manner, and potentially penalizes public agencies who have invested in infrastructure under the reasonable belief that their activities do not implicate the Clean Water Act's NPDES program.

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<sup>3</sup> Since the Ninth Circuit issued its decision in *Hawaii Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018), other circuits have issued decisions in line with the Ninth Circuit that further contribute to the circuit split. See e.g., *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 641 (4th Cir. 2018) petition docketed No. 18-268 (Sept. 4, 2018); *Kentucky Waterways All. v. Kentucky Utilities Co.*, \_\_F.3d \_\_, No. 18-5115, 2018 WL 4559315, at \*1 (6th Cir. Sept. 24, 2018); *Tennessee Clean Water Network v. Tennessee Valley Auth.*, \_\_F.3d \_\_, No. 17-6155, 2018 WL 4559103, at \*1 (6th Cir. Sept. 24, 2018).

2. The Ninth Circuit's decision upends existing regulatory structures and imposes duplicative requirements on *amici's* members. There are other authorities, including other provisions of the Clean Water Act and other federal and state laws, that are better designed to address pollution resulting from discharges to groundwater.
3. The County of Maui's Petition for Certiorari provides the Supreme Court with an opportunity to consider regulation of discharges to groundwater in terms of how such regulation will impact public infrastructure and resources. Subjecting *amici's* members' operations to additional or independent Clean Water Act jurisdiction will have broad implications for their ability to run their systems. Cases brought under the theory that a hydrologic connection is sufficient to trigger NPDES liability are already impacting members' operations. For example, in *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, No. 3:15-cv-1439, 2017 WL 2960506 (D. Conn. July 11, 2017), appeal docketed, No. 17-2426 (2d Cir. Aug. 4, 2017), the plaintiffs allege that the local sewer agency must obtain an NPDES permit for each basement backup that allows pollutants to seep into groundwater and enter navigable waters. If the *26 Crown* plaintiffs succeed, the potential implications are extreme, requiring an

NPDES permit for basements across the country.

It is not *amici's* position that releases of pollutants into groundwater should go unregulated. To the contrary, releases of pollutants into groundwater are regulated through other legal mechanisms. *Amici* and their members are committed to protecting public health and the environment but feel strongly that the NPDES program is not the appropriate legal and practical solution for managing groundwater. *Amici* therefore respectfully request that the Court grant Petitioner and Appellant County of Maui's Petition for Writ of Certiorari.

## ARGUMENT

### I. THE NINTH CIRCUIT'S DECISION DIVIDES THE CIRCUITS AND IMPOSES LIABILITY ON PROJECTS THAT HAVE BEEN IN PLACE FOR DECADES

The Ninth Circuit's decision in the *County of Maui* case has created a split of opinion among the Circuit Courts of Appeal.<sup>4</sup> Since the Ninth Circuit

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<sup>4</sup> Compare *Hawaii Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018) (relying on hydrologic connection theory) and *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 641 (4th Cir. 2018) (same), petition docketed No. 18-268 (Sept. 4, 2018) with *Kentucky Waterways All. v. Kentucky Utilities Co.*, \_\_\_F.3d \_\_\_, No. 18-5115, 2018 WL 4559315, at \*1 (6th Cir. Sept. 24, 2018) (rejecting hydrologic connection theory); *Tennessee Clean Water Network v. Tennessee Valley Auth.*, \_\_\_F.3d \_\_\_, No. 17-6155, 2018 WL 4559103, at \*1 (6th Cir. Sept. 24, 2018) (same).

issued its decision in February 2018, decisions in the Fourth and Sixth Circuits have further compounded the split and increased regulatory uncertainty nation-wide.

As noted by the County of Maui in its Petition, the Ninth Circuit decision significantly expands the NPDES program into areas that Congress defined as nonpoint sources. These sources are not unregulated under the Clean Water Act, but regulation is explicitly excluded from the NPDES program and much of the regulatory authority is reserved to the states. *Amici* support the County's position and view of the split.

*Amici* write separately on this issue to highlight the uncertainty created by the Ninth Circuit's decision and the risk now posed to *amici's* members who built infrastructure in reliance on a regulatory scheme that the Ninth Circuit has now upended. Expansion of the NPDES program to numerous new categories of nonpoint sources has created a complicated regulatory patchwork, such that whether a Clean Water Act NPDES permit is required depends not on the text of the Act, but on the part of the country in which the discharge occurs.

Some of the earliest cases to consider the issue held that such discharges are not subject to the Clean Water Act's NPDES program.

As far back as 1977, in dicta, the 5th Circuit described the NPDES program as excluding discharges to groundwater. *Exxon v. Train*, 554 F.2d 1310 (5th Cir. 1977). Congress declined to amend the Clean Water Act to address the situation, and in

1994, the Seventh Circuit, in *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994) found that fact critical in holding that Congress did not intend to regulate discharges to groundwater with the NPDES program:

The omission of ground waters from the regulations is not an oversight. Members of Congress have proposed adding ground waters to the scope of the Clean Water Act, but these proposals have been defeated, and the EPA evidently has decided not to wade in on its own. . . . [W]e are confident that the statute Congress enacted excludes some waters, and ground waters are a logical candidate. Two courts have held that ground waters are not part of the (statutory) 'waters of the United States.' [citation]. The possibility of a hydrological connection cannot be denied [citation] but neither the statute nor the regulations makes such a possibility a sufficient ground of regulation.

*Village of Oconomowoc*, 24 F.3d at 965.

*Amici's* members have relied on the basic premise that discharges to groundwater are not subject to the Clean Water Act's NPDES program, both because that interpretation is truest to the text of the Act, and because until 2018, the only court of appeal to issue a decision on the matter held that this is the case. As described below, *amici's* members engage in many activities that result in discharges to groundwater – sometimes inadvertently and

sometimes intentionally. In issuing its decision in the *Maui County* case, the Ninth Circuit upended a regulatory regime that has been in place for decades.

Now, like the Scarecrow in the Wizard of Oz, Circuit Courts across the country are pointing in opposite directions. Shortly after the Ninth Circuit issued its decision, the Fourth Circuit adopted the *Maui* rationale in a case involving discharges from a fractured pipeline, that flowed through groundwater, and into surface waters. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 641 (4th Cir. 2018), petition docketed No. 18-268 (Sept. 4, 2018).

Most recently, on September 24, 2018, the Sixth Circuit addressed the issue in two companion cases: *Kentucky Waterways Alliance v. Kentucky Utilities*, No. 17-6155, 2018 WL 4559315, \*7 (6th Cir. Sept. 24, 2018), and *Tennessee Clean Water Network v. Tennessee Valley Authority*, No. 3:15-cv-00424, 2018 WL 4559103, \*6 (6th Cir. Sept. 24, 2018).

In both cases, the court rejected the theory that an NPDES permit is required where pollutants are discharged *through* groundwater that conveys them to navigable waters, explaining that “[the pollutants] are not coming *from* a point source; they are coming from groundwater, which is a nonpoint-source conveyance.” *Kentucky Waterways Alliance*, WL 4559315 at \*7 - \*8. As the court explained, groundwater itself cannot be a point source because of its diffuse nature, and as a result “[t]he CWA has no say over that conduct.” *Id.* The Sixth Circuit went on to emphasize Congress’ clear intent to reserve power over discharges to groundwater to the

states, focusing on the Act's specific purpose to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use ... of land and water resources." *Id.* at \*8, quoting 33 U.S.C. § 1251(b).

Maui County built its groundwater discharge facility using United States Environmental Protection ("EPA") funding in reliance on the Safe Drinking Water Act's underground injection control ("UIC") permits as authorized by both EPA and the State of Hawaii. For almost 40 years, these agencies maintained that UIC permits were the proper mechanism to regulate well disposal. The state of Hawaii maintained that NPDES permits were not required because the discharge was to groundwater. EPA only took a position after the district court issued a decision in favor of Hawaii Wildlife Fund.

The situation in Maui is not unique. Wastewater treatment operators, water supply purveyors, flood control districts, and stormwater management agencies have all made investments in infrastructure based on the reasonable belief that the NPDES program would not apply to activities involving discharges to groundwater. The Ninth Circuit's decision in the *Maui* case has upended that regulatory structure. To remedy this situation, and to consider the full range of impacts associated with regulating discharges to groundwater under the Clean Water Act, *amici* request that the Court grant the *County of Maui's* Petition for Certiorari.

## II. *AMICPS* MEMBERS' FACILITIES ARE EXTENSIVELY AND ADEQUATELY REGULATED UNDER OTHER PROGRAMS

Congress did not create the NPDES program to address every situation in which pollutants make their way into surface waters. *26 Crown Assocs.*, 2017 WL 2960506, at \*6 (CWA does not prohibit “every act that involves the noxious pollution of clean water.”). The Clean Water Act was established on the premise that states would retain authority over, among other things, water supply and groundwater. This is evident in Congress’ decision to include in the CWA an express reservation for state authority over water supplies, 33 U.S.C. §§ 1251(g); 1370, and to decline to amend the CWA to expressly regulate groundwater. *See Village of Oconomowoc, infra.*

To that end, Congress and the states have relied on numerous other authorities to regulate groundwater while protecting traditional interests in state and local regulation. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 529-30 (2d Cir. 2017) (interpretation exempting water transfers reasonable, in part, because “several alternatives could regulate pollution in water transfers even in the absence of an NPDES permitting scheme”) *Kentucky Waterways Alliance v. Kentucky Utilities*, No. 17-6155, 2018 WL 4559315, \*7 (6th Cir. Sept. 24, 2018), and *Tennessee Clean Water Network v. Tennessee Valley Authority*, No. 3:15-cv-00424, 2018 WL 4559103, \*6 (6th Cir. Sept. 24, 2018).

The Clean Water Act itself contains a variety of programs and alternatives to NPDES permitting, which account for potential contributions from groundwater to surface waters that are subject to the Act. These include Section 311, which regulates discharges of oil and hazardous substances to surface waters and adjoining shorelines, and tools such as total maximum daily loads; “processes, procedures, and methods to control [nonpoint source] pollution” and nonpoint source management programs. 33 U.S.C. §§ 1288(b), 1314(f)(2)(A)-(F), 1321, 1329(b).

The CWA is just one part of the larger web of applicable federal law. Other federal statutes are also specifically intended to handle pollutants that reach groundwater or otherwise affect surface waters, such as the Safe Drinking Water Act’s UIC program, which was at issue in the *Maui* case, 42 U.S.C. §§ 300h-300h-80; the Coastal Zone Act, which regulates discharges of pollutants into coastal waters, 16 U.S.C. § 1451-1466; the Comprehensive Environmental Response, Compensation, and Liability Act, which addresses hazardous substances released into the “environment,” a term that expressly includes groundwater 42 U.S.C. § 9601(8); and the Resource Conservation and Recovery Act which provides “cradle to grave” control and responsibility over hazardous waste, 42 U.S.C. § 6973(a); *United States v. Waste Indus., Inc.*, 734 F.2d 159, 164-65 (4th Cir. 1984) (Congress expressly intended that [RCRA] ... close loopholes in environmental protection.”).

In addition, states may adopt more stringent requirements beyond federal regulations. See 33

U.S.C. § 1370 (preserves States' ability to adopt any requirement to control pollution). All 50 states have adopted laws and regulations that prohibit or regulate the release of pollutants into groundwater. Because the release of pollutants into groundwater is already prohibited and/or regulated in *every state*, there is no practical reason to extend the NPDES program beyond what Congress intended.

But, the Ninth Circuit's "fairly traceable" test does just that. The test adds a duplicative overlay of regulations through a permitting program that was never intended to address the type of sources at issue in the *Maui* case.

### **III. THE NINTH CIRCUIT'S DECISION WILL HAVE FAR REACHING IMPACTS TO PUBLIC INFRASTRUCTURE AND RESOURCES**

There are multiple cases pending before this Court, or in Courts of Appeals across the country that involve regulation of discharges to groundwater under the Clean Water Act. *See, e.g., Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 641 (gasoline pipeline), petition docketed No. 18-268 (4th Cir. Sept. 4, 2018); *Tennessee Clean Water Network v. Tennessee Valley Auth.*, \_\_F.3d \_\_, No. 17-6155, 2018 WL 4559103, at \*1 (6th Cir. Sept. 24, 2018) (coal powered power plant); *Kentucky Waterways All. v. Kentucky Utilities Co.*, \_\_ F.3d \_\_, No. 18-5115, 2018 WL 4559315, at \*1 (6th Cir. Sept. 24, 2018) (coal combustion residuals).

*Amici* support Supreme Court review of any of these cases. However, because the Ninth Circuit's decision in the *Maui* case presents the issue in the

context of public infrastructure – and the case will have broad implications for public infrastructure – *amici* feel strongly that the Court should the County’s Petition.<sup>5</sup>

Under the Ninth Circuit’s “fairly traceable” test, if an entity releases any pollutant into the ground from a conveyance that could be classified as a point source,<sup>6</sup> and that pollutant migrates to any “waters of the United States,” the release will require an NPDES permit. The decision will significantly expand the number and type of wastewater, stormwater, water supply and other types of critical infrastructure sources that are subject to the requirements of the Clean Water Act’s NPDES program. Many activities that the public rely on and that local government has invested in will be required to meet unattainable standards. In some cases, projects that benefit public health and the environment will not be implemented.

#### **A. Wastewater Treatment Operations**

Public clean water utilities operate wastewater treatment plants and other critical infrastructure to convey, store, and treat wastewater and stormwater. These utilities provide services that are essential to protecting public health and the environment.

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<sup>5</sup> *Amici* have additional concerns about the unique geology of Maui and its applicability to groundwater conditions in the rest of the United States. If the Court grants review in the *Maui* case, *amici* will provide additional briefing on this issue.

<sup>6</sup> The Clean Water Act’s definition of the term “point source” is extremely broad, including any “discrete conveyance.” 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2.

Working closely with state and federal regulators, clean water utilities have collectively achieved an astonishing level of pollution reduction under the Clean Water Act, both at their own facilities and at thousands of industrial facilities regulated under the federal pretreatment program. Given their reliance on public ratepayer funds, the ability of these utilities to continue the critical work they do requires careful planning and regulatory certainty.

Clean water utilities own, operate, and manage the nation's most critical infrastructure systems for protecting public health and the environment, including publicly owned treatment works ("POTWs") that are subject to stringent NPDES permit requirements for discharges to surface waters. These permits include limits on the pollutants in those discharges to meet water quality standards in the receiving waters.

Clean water utilities also operate collection systems that convey wastewater to their POTWs, ranging in size from a few hundred miles to several thousands of miles of buried pipe. NPDES permits generally require utilities to operate and maintain these collection systems, *but collection systems are not typically covered by the POTW's permit.* Consequently, utilities implement a number of methods to locate and address issues, including collection system inspection using closed circuit television inspections and rehabilitation and repair of any leaks. Some states, such as California, also have separate requirements for collection systems that are specifically designed to ensure proper system maintenance and repair.

Regardless of diligent and rigorous maintenance and repair, these facilities and systems—many of which may be more than 100 years old—can leak. Such leaks could fall within the scope of the “fairly traceable” theory. Clean water utilities work diligently to prevent any leak. With tens of thousands of miles of pipelines in wastewater treatment systems, leaks can and do happen because they are difficult to predict and locate, and impossible to completely eliminate.

If the Ninth Circuit decision stands, each leak would potentially be regulated as a distinct discharge under the CWA, which would be impractical, if not impossible, to regulate and manage. And—particularly in light of the potential for citizen suits—such regulation could undermine the ability of utilities to plan and prioritize investments to maximize overall benefits to public health and the environment.

### **B. Water Supply and Reuse**

Regulation of discharges through groundwater under the NPDES program will interfere with water supply and reuse operations in multiple ways. The Clean Water Act’s definition of the term “pollutant” is extremely broad, *see* 33 U.S.C. § 1362(6); 40 C.F.R. § 122.2, and many constituents that are present in potable water can be classified as pollutants under the Act. An NPDES permit would, by definition, impose limits on how and where those “pollutants” can be discharged.

In the groundwater setting, even releases that contain low levels of pollutants would be required to attain standards that were developed to manage

discharges that go directly into surface waters. Compliance would require water utilities to spend millions (potentially billions) of dollars controlling releases that in most cases pose little threat to the environment and that Congress and the states have appropriately regulated with other programs.

### **1. Water Supply System**

Potable water delivery in the United States involves the use of pipelines and aqueducts that can and do leak to groundwater. In order to ensure that untreated groundwater cannot enter potable water lines, water in the lines is kept at high pressure so that the potable water will flow out in the event of a leak. Older systems have leaks that, in many cases, are not discoverable.

Pressurizing the lines is a safe, time tested method of delivering potable water to peoples' homes. Nonetheless, because potable water contains disinfectants such as chlorine or chloramine, discharges of potable water to groundwater from pressurized lines could implicate the NPDES program under the Ninth Circuit's *Maui* decision if those discharges reach surface waters.

NPDES permitting could require water purveyors to reduce chlorine to level, which would interfere with the safety of the water provided, to spend millions of dollars on infrastructure improvements that address a problem that poses very little risk to the environment, or to face citizen suits or enforcement actions. This is an untenable outcome that would severely interfere with the ability of water purveyors to deliver healthy, potable water to the public.

On a larger scale, municipal water purveyors move water vast distances across the country. The delivery system is made up of canals, aqueducts, pipelines and reservoirs. Water escapes from these facilities and into underlying or surrounding groundwater formations, and in some cases back to surface waters. Similarly, agricultural water delivery entities employ canals and laterals to deliver water and settling ponds to remove sediment from the water. Many of these facilities – particularly unlined facilities – seep into groundwater that is connected to surface water. The Ninth Circuit’s decision would potentially require NPDES permits for every irrigation delivery system with unlined canals or settling ponds and infringe on their ability to operate in the same way permitting would impact potable supply delivery.

## **2. Managed Groundwater Recharge Projects**

States and communities throughout the nation, particularly in the west, are grappling with increasingly limited water supplies. As demand increases, groundwater levels in many parts of the country continue to decline. One way water supply system operators are addressing this problem is through managed recharge projects. In addition, in areas where the surface water and groundwater are connected, recharge is a proven mechanism to revitalize natural streams.

Managed recharge is accomplished by diverting water into unlined canals and/or basins and allowing that water to seep into the ground. Some, if not most, of the recharged water will stay in the aquifer.

However, some portion of the recharged water will flow to springs or seeps that feed surface water streams and rivers. In Idaho, for example, declining groundwater supplies have resulted in reduced spring flows from the Eastern Snake Plain Aquifer that feeds the Snake River and its tributaries. Declining water supplies have affected agricultural and municipal uses and have resulted in multiple water use conflicts throughout the region.

In 2009, Idaho's legislature enacted House Bill 264, Idaho House Bill 264, Ch. 233, eff. Apr. 23, 2009, approving the Eastern Snake Plain Comprehensive Aquifer Management Plan ("CAMP"). 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 ESPA and to restore spring flows that feed the Snake River and its tributaries.

The Ninth Circuit's ruling could unnecessarily subject these managed recharge operations to a requirement to obtain NPDES permit authorization – even though such activities were never intended to be subject to the NPDES permit program.

### **3. Water Reuse**

To address limited supplies, many water agencies are pursuing water recycling projects. Recycled waste is treated wastewater that is given new life by being put to use for irrigation, surface or

groundwater replenishment, watershed restoration, and agricultural purposes.<sup>7</sup>

Communities across the country are incorporating this kind of water reuse into their water management strategies as a proven method for ensuring a safe, reliable, locally controlled water supply. By 2027, the volume of recycled water produced in the United States is projected to increase 37% from 4.8 billion gallons per day to 6.6 billion gallons per day.<sup>8</sup>

Like potable water, recycled water can contain low levels of chlorine, nitrogen, and total dissolved solids. These constituents are present at levels that are safe for public health and (depending on the level of treatment) human consumption. Nonetheless, the Ninth Circuit's ruling could impede the implementation of reuse projects by requiring NPDES permits in cases where the recycled water may end up in surface waters after being discharged to groundwater. This could occur in the case of groundwater recharge or injection (like in Maui), seepage from recycled water storage ponds and use of recycled water for irrigation, or other similar activities.

The demand for recycled water by end users may also decrease as customers fear the potential regulatory costs and legal exposure they may face if

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<sup>7</sup> Notably, recycled water is produced by municipal wastewater treatment plants that are already subject to stringent regulatory requirements, including NPDES permits.

<sup>8</sup> Bluefield Research, U.S. Municipal Water Reuse: Opportunities, Outlook, & Competitive Landscape 2017–2027 (2017).

using or impounding recycled water triggers NPDES compliance requirements. Thus, the court’s “fairly traceable” test could cause a significant setback to water reuse policies and public support, which have gained important momentum in recent years.

Critically, EPA has never required NPDES permits for these types of projects, and in fact encumbers them. The Agency recognizes water reuse as “play[ing] a critical role in helping states, tribes, and communities meet their future drinking water needs.”<sup>9</sup> Even if federal agencies do not target reuse projects, the uncertainty surrounding whether an NPDES permit may be needed and the potential for citizen suits could be a barrier to further implementation of reuse projects.

### **C. Stormwater Management and Flood Control Projects**

The Ninth Circuit’s decision also threatens to impact various types of infrastructure built to store, treat, and otherwise manage storm flows and urban runoff. For example, low impact development and other green infrastructure that is used to help address urban runoff has been strongly encouraged by the EPA and is a required aspect of many municipal separate storm sewer system (“MS4”) NPDES permits. EPA has encouraged and funded the development of green infrastructure, which is designed to allow stormwater to percolate into the ground and disperse in order to mitigate impacts on surface waters. Many municipalities have invested

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<sup>9</sup> U.S. Environmental Protection Agencies, 2017 Potable Reuse Compendium (2017).

heavily in green infrastructure with the support and guidance of EPA and state regulatory authorities. Some of this infrastructure is owned by MS4 permittees, some is constructed on private property as part of a development project. The infrastructure is built to improve water quality, but not all of it is covered by an NPDES permit.

Under the Ninth Circuit's decision, however, green infrastructure would potentially require its own NPDES permit, creating regulatory uncertainty, significantly increasing compliance costs, and creating a massive administrative burden for permitting agencies. Indeed, one of the reasons that some municipalities are tasked with imposing green infrastructure requirements on new development is because the EPA and state NPDES permitting agencies lack the resources to issue permits for every discharge that triggers NPDES compliance. The Ninth Circuit's decision increases that burden.

Every instance where stormwater runoff drains into green infrastructure—for the very purpose of preventing pollutants from entering surface waters—could be viewed as a release to groundwater that might be “fairly traceable” to surface water. This type of approach is inconsistent with how states have categorized stormwater and the infiltration of stormwater and is inconsistent with the purpose of the Act. *See, e.g., Oyster Pond Embayment System TMDL at 4, 14 (Feb. 7, 2008)* (Massachusetts assigned load allocations to stormwater runoff as nonpoint source pollution, knowing that “the vast majority of stormwater percolates into the ground and aquifer and proceeds into the embayment

systems *through groundwater migration.*") (emphasis added).

At the urging of E.P.A., public agencies across the U.S. are increasingly relying on green infrastructure to retain, percolate, and infiltrate stormwater into the ground to control pollutants, and to recharge depleted drinking water aquifers. Green infrastructure is recognized as one of the most effective solutions to the water quantity and quality problems associated with polluted stormwater runoff. EPA has determined that green infrastructure provides a "cost-effective, resilient approach to managing wet weather impacts that provides many community benefits."<sup>10</sup> By subjecting green infrastructure to the NPDES program, the Ninth Circuit's decision would have a chilling effect on the use of this valuable and environmentally beneficial tool for addressing polluted stormwater runoff.

## CONCLUSION

Subjecting *amici's* operations to additional NPDES permitting will interfere with important public health and safety operations that Congress never intended the NPDES program to reach. *Amici* strongly believe that the split of opinion among the Circuit Courts of Appeals needs addressing, and that any decision on this matter should consider the environmental and public health benefits that

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<sup>10</sup> U.S. Environmental Protection Agency, What Is Green Infrastructure?, <https://www.epa.gov/green-infrastructure/what-green-infrastructure> (last visited May 17, 2018).

*amici's* members provide to the public, and how expanding the NPDES program will interfere with those operations. The *Maui* case provides the Court with that opportunity and *amici* therefore request that the Court grant the County's Petition for Writ of Certiorari.

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