No. 18-260

IN THE
Supreme Court of the United States

COUNTY OF MAUI, HAWAII,
Petitioner,
v.
HAWAIʻI WILDLIFE FUND; SIERRA CLUB – MAUI GROUP;
SURFRIDER FOUNDATION;
WEST MAUI PRESERVATION ASSOCIATION
Respondents.

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

BRIEF FOR ENERGY TRANSFER PARTNERS, L.P. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Clean Water Act requires a permit for any "discharge of pollutants" into navigable waters. 33 U.S.C. §§ 1311(a), 1342. This permitting requirement applies only to pollutants discharged from a "point source"—that is, "any discernible, confined and discrete conveyance" such as a "pipe" or "container." *Id.* § 1362(12), (14). Pollutants discharged from a nonpoint source such as groundwater or soil, by contrast, are not covered by the Act. The question addressed by *amicus* is whether the permitting requirement nonetheless applies to the discharge of pollutants from a point source to a nonpoint source if the pollutants eventually migrate from the nonpoint source to navigable waters.

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INTEREST OF *AMICI CURIAE*[1]

Energy Transfer L.P. ("Energy Transfer") owns and operates one of the largest and most diversified portfolios of energy assets in the United States. Through its wholly owned subsidiaries and joint ventures, Energy Transfer currently owns and operates more than 86,000 miles of natural gas, natural gas liquids, liquid natural gas, refined products, and crude oil pipelines. These pipelines form a critical part of the nation's energy infrastructure. By facilitating efficient transportation, Energy Transfer's pipelines enable American energy producers to be more cost competitive, boosting domestic energy production and creating substantial benefits to producers, mineral royalty owners including the United States, shippers, and the American consumer.

Construction of new pipelines is a critical part of Energy Transfer's business and its contribution to the American energy infrastructure. Energy Transfer has been in the business of constructing new pipelines for more than two decades, and has substantial experience with the regulatory process for obtaining pipeline construction approvals. Energy Transfer regularly applies for and obtains permits for such construction under the applicable federal and state regulatory schemes, including the Clean Water Act.

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[1] Counsel for each party consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus* represents that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

As a result, Energy Transfer has substantial expertise and a significant interest in the legal requirements applicable to pipeline permitting and construction.

The question presented in this case is of particular significance to companies like Energy Transfer because, as explained herein, the decision below poses a significant impediment to safe and more environmentally friendly "trenchless" construction methods that are routinely employed in the construction of pipelines, power line projects, fiber optic cable systems, and other utilities.

ARGUMENT

The Clean Water Act requires companies like Energy Transfer to obtain a permit before discharging any "pollutant" (a very broad term) from a "point source" into navigable waters. By contrast, the Act's permit requirement does not apply to nonpoint source discharges, which the Act reserves for regulation by other means. Thus, by its terms and structure, the Act does not require a permit to discharge any pollutant from a point source to a nonpoint source, or from a nonpoint source into navigable waters.

The court of appeals nonetheless held that anyone who discharges pollutants from a point source into a nonpoint source may be held liable for failing to obtain a permit if some of that discharge eventually makes its way from the nonpoint source to navigable waters through natural processes such as seepage. Pet. App. 24. That ruling cannot be squared with the text or structure of the Clean Water Act. If allowed to stand, it will interfere with commonplace and environmentally preferable construction activities such as the trenchless methods routinely employed by Energy Transfer and others for the installation of pipelines,

power line projects, fiber optic cable systems, and other utility lines across the country.

Congress did not intend to subject ordinary construction activities to costly permitting requirements merely because of their potential to release safe levels of harmless substances into groundwater or soil. This Court should therefore reverse the decision below and hold that the Clean Water Act does not require a permit for the discharge of pollutants from a point source to a nonpoint source.

I. THE CLEAN WATER ACT DOES NOT REQUIRE A PERMIT FOR DISCHARGING POLLUTANTS INTO A NONPOINT SOURCE SUCH AS GROUNDWATER OR SOIL

The plain text of the Clean Water Act imposes no requirement to obtain a permit for the discharge of pollutants from a point source to a nonpoint source, notwithstanding the possibility that pollutants discharged to a nonpoint source may later migrate to navigable waters.

The Act defines "pollutants" broadly. It includes naturally occurring substances like "rock" or "sand." 33 U.S.C. § 1362(6). And the definition encompasses substances that, by their nature or given the quantities involved, pose no harm to humans, wildlife, or the environment more generally. *See id.* Given the breadth of that definition, the Act expressly allows for activities that result in the addition of pollutants to navigable waters. This case centers on that feature of the Act: *i.e.*, the fact that it prohibits activities that meet the statutory definition of "discharge of pollutants" only if a particular permit has not issued. *Id.* §§ 1311(a), 1342, 1362(12). Congress chose, in other words, to include within the definition of

"pollutants" substances that can be safely released into navigable waters.

Section 301(a) of the Act implements this feature of the Act. It provides that "the discharge of any pollutant by any person shall be unlawful" only if the discharge is not "in compliance" with other specified provisions of the Act. 33 U.S.C. § 1311(a). One of those provisions, Section 402, establishes the National Pollutant Discharge Elimination System ("NPDES"), which authorizes the EPA or a state program approved by the EPA to issue permits for discharges "notwithstanding" Section 301(a). *Id.* § 1342(a). The "discharge of any pollutant" without obtaining an NPDES permit, or in violation of the terms of such a permit, is a crime, subject to steep criminal or civil penalties. *Id.* § 1319(c), (d).

This permitting requirement applies only when the relevant pollutant reaches navigable waters by means of a "discernible, confined and discrete conveyance"—referred to in the statute as a "point source." 33 U.S.C. §§ 1311(a), 1362(12), (14). Specifically, the permit requirement is triggered by activities that meet the statutory definition of a "discharge of pollutants," *id.* § 1311(a), defined as "any addition of any pollutant to navigable waters"—or to the ocean or coastal waters—"from any point source." *Id.* § 1362(12). The Act defines "point source," in turn, as "any discernible, confined and discrete conveyance," including, for example, any "pipe, ditch, channel, tunnel, conduit, well, discrete fissure," or "container." *Id.* § 1362(14).

The Act thus distinguishes between two means by which pollutants could be conveyed to navigable waters—point sources and nonpoint sources. "Nonpoint sources include pollution from diffuse land

use activities such as agriculture, construction and mining that enter the waters primarily through indiscrete and less identifiable natural processes such as runoffs, precipitation and percolation." Frank P. Grad, 2 *Treatise on Environmental Law* § 3.03 n.366.6. The statute gives two examples: "stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14). Other examples of nonpoint sources of pollutants include groundwater and soil. *See*, *e.g.*, *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1140 n.4 (10th Cir. 2005). The Act's permit requirement does not cover discharges of pollutants *from a nonpoint source* to navigable waters. Nor does it apply to a discharge from a point source *to a nonpoint source*. Instead, discharges from nonpoint sources are regulated by other statutes, including state management programs overseen by the EPA, *see* 33 U.S.C. § 1329, and other federal statutes.

The critical distinction between point source and nonpoint source pollution is the "means by which pollutants are ultimately deposited into a navigable body of water." *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980). As this Court has recognized, the definition of point source turns not on the "original source" of the pollutant, but rather the means that "convey[s] the pollutant to 'navigable waters.'" *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 105 (2004). "Tellingly, the examples of 'point sources' listed by the Act include pipes, ditches, tunnels, and conduits, objects that do not themselves generate pollutants but merely transport them." *Id*.

Conversely, the statutory examples of nonpoint source pollution—stormwater discharges and return

flows from irrigated agriculture—are means of conveying pollutants that may originally be conveyed from a point source. The court of appeals gave the example of "residue left on roadways by automobiles which rainwater washes off the streets." Pet. App. 14 (quoting *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 508 (9th Cir. 2013)) (alterations omitted). But automobiles themselves may be point sources; indeed, automobile tailpipes fall squarely within one of the statutory examples of point sources—a "pipe." 33 U.S.C. § 1362(14). Yet the statute expressly treats "stormwater discharges" as nonpoint sources, *id.*, and thus even the court of appeals recognized that stormwater carrying pollution from automobiles would not require a permit. Pet. App. 14.

Similarly, "return flows from irrigated agriculture" are nonpoint source pollution, even though the pollutants they may carry to navigable waters—such as fertilizer—were at some point stored in or dispensed from a "container" or other point source. 33 U.S.C. § 1362(14). The legislative history of this provision confirms that Congress intended to exempt such return flows "regardless of the manner in which the flow was applied to the agricultural lands." S. Rep. No. 95-370, at 35 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4326, 4360. The same is true of other nonpoint sources like groundwater and soils. *See*, *e.g.*, *El Paso Gold Mines*, 421 F.3d at 1140 n.4.

These provisions make clear that an NPDES permit is not required for a discharge from a point source to a nonpoint source that later migrates to navigable waters by "indiscrete and less identifiable natural processes such as runoffs, precipitation and

percolation." Grad, *supra*, § 3.03 n.366.6. If a nonpoint source is the "means by which pollutants are ultimately deposited into a navigable body of water," *Abston*, 620 F.2d at 45, that pollutant is not discharged "from [a] point source," 33 U.S.C. § 1362(12), so no permit is required.

An analogy illustrates why the text and structure of the statute, by distinguishing between these two modes of conveyance, forecloses the Ninth Circuit's interpretation. Recall that the Act prohibits the "addition of any pollutant to navigable waters" "from any point source," which the Act defines as "any discernible, confined and discrete conveyance." 33 U.S.C. §§ 1311(a), 1362(12), (14). Suppose the question was whether a person was conveyed by land vehicle (substituting for point source) or air vehicle (substituting for nonpoint source) from her Maui hotel to a restaurant on the other side of the island. A person who takes a taxi twenty miles from her hotel to the restaurant would say she traveled by land vehicle. The same is true for a traveler who takes a taxi one mile to a bus stop, then takes a bus the next twenty miles. But a person who instead takes a taxi half a mile to a heliport, and then is conveyed by helicopter to a landing pad near the restaurant would not say she arrived (was conveyed) by land vehicle, even though the trip began with a short taxi ride. So too here. If a pollutant is discharged from a point source (the taxi) to a nonpoint source (the helicopter) and then migrates to navigable waters (the flight to the restaurant), it cannot be said that the pollutants

were conveyed to navigable waters from a point source.[2]

Other provisions of the Act confirm this understanding. Section 302, for example, directs the EPA to establish "effluent limitations" to maintain the quality of specific waters. 33 U.S.C. § 1312(a). These limitations are an important part of the permitting regime. In fact, the Act defines "effluent limitations" to include restrictions on the "quantities, rates, and concentrations" of certain pollutants that may be "discharged from point sources *into navigable waters*." *Id.* § 1362(11) (emphasis added). Congress thus clearly had in mind permitting for discharges from a point source "into" navigable waters, not discharges conveyed by nonpoint sources to navigable waters.

This is the only plausible conclusion given that the purpose of the point/nonpoint source distinction is to determine whether a person must obtain a permit *before* engaging in activity that may result in the addition of pollutants to navigable waters. A permitting requirement is effective only if the applicant knows in advance that the law requires a permit and can meaningfully submit an application. An NPDES permit specifies "the type and quantity of

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[2] The same analogy shows the flaw in the reliance by the court of appeals on Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). Pet. App. 21-24. While expressly "not decid[ing] th[e] issue," Justice Scalia suggested in *dicta* that an NPDES permit might be required in some circumstances in which "pollutants discharged from a point source do not emit 'directly into' covered waters." *Rapanos*, 547 U.S. at 743. But as Petitioner has explained, Justice Scalia had in mind only "point-source-to-point-source-to-navigable-water pollution" (travel by taxi to a bus to a restaurant), not pollution that also involves a nonpoint source (the helicopter). Pet'r's Br. 33.

pollutants that can be released" into specific waters. *Miccosukee*, 541 U.S. at 102. To apply for a permit, therefore, an applicant must know in advance not only *that* a discharge from a point source will make its way to navigable waters, but also the quantity of the discharge and the specific navigable water to which it will be added.

The decision below, by contrast, rests the need for a permit on an after-the-fact analysis: Discharging a pollutant from a point source to a nonpoint source requires a permit under the decision of the court of appeals only if it is later determined that the pollutant has migrated from the nonpoint source to navigable waters. Pet. App. 15. To be sure, this was not a problem for Petitioner because the court of appeals determined that it knew ahead of time whether and to what extent its discharges would reach the ocean. *Id.* But the court also explained that the requirement to obtain a permit, and the steep penalties for failing to get one, are a matter of "'strict liability'" and apply even if the responsible party does not "inten[d]" or know that the discharge would reach navigable waters. *Id.* at 15 n.1.

This regime of strict liability makes no sense when the pollutant does not reach navigable waters solely by way of one or more "discernible, confined and discrete conveyance[s]." 33 U.S.C. § 1362(14). Pollutants discharged into nonpoint sources may take unexpected paths, making it impossible to predict that they will reach navigable waters and, if so, which waters and in which quantities. In practice, therefore, expanding the "discharges" covered by the Act to include discharges from point sources to nonpoint sources amounts not just to an extension of the permitting requirement, but also an extension of

strict liability to activities for which permits must be obtained. Because that outcome has no basis in the statute, the decision below should be reversed.

II. READING A PERMIT REQUIREMENT INTO THE CLEAN WATER ACT FOR DISCHARGES INTO GROUNDWATER OR SOIL WOULD INTERFERE WITH COMMONPLACE, ENVIRONMENTALLY SOUND "TRENCHLESS" CONSTRUCTION METHODS FOR INSTALLING UNDERGROUND UTILITY LINES

The lower court's atextual interpretation of the Clean Water Act has serious negative consequences for commonplace activities that Congress did not subject to a permit requirement. This case involves just one of those activities: the use of septic tank systems by municipalities and millions of homes in the United States, which under the decision below could be required to obtain NPDES permits at prohibitive cost. Pet'r's Br. 46-48. But there are others. In particular, the decision below would make it impractical to carry out routine construction of utility lines using well-established and environmentally preferable "trenchless" construction methods. Use of these methods often causes small quantities of naturally occurring "drilling mud" to migrate through groundwater to navigable waters in directions and quantities that cannot be predicted. The decision below would subject such drilling methods to steep criminal and civil penalties for failure to obtain permits.

A. Trenchless construction methods such as horizontal directional drilling are an increasingly common technique used across a wide range of

industries to install utility lines beneath roads, waterbodies, wetlands, urban areas, and other man-made or natural features, without disturbing the surface. In contrast to "traditional open-cut methods of utility pipe installation"—which "involve excavating a trench along the proposed pipeline path and placing the pipe in the trench"—trenchless methods allow the installation of utility pipe with "minimal surface excavation." Muhannad Suleiman *et al.*, Iowa State Univ., *Identification of Practices, Design, Construction, and Repair Using Trenchless Technology* 3 (2010), https://lib.dr.iastate.edu/intrans_reports/64.

Trenchless construction methods include "horizontal directional drilling," "auger and slurry boring," "pipe jacking," "microtunneling," "impact moling," "ramming," and "pipe bursting." Federal Highway Administration, *Manual for Controlling and Reducing the Frequency of Pavement Utility Cuts*, § 4.1, https://www.fhwa.dot.gov/utilities/utilitycuts/man04.cfm ("FHWA Manual") (capitalization omitted). These different methods share "the common advantage of reducing the impact to the surface" by avoiding the need for open-cut trenches. *Id.* § 4.2.2.

The process for horizontal directional drilling "involves drilling a pilot borehole under the waterbody, or targeted feature, then enlarging that borehole through successive reaming," and once the borehole is big enough, attaching pre-assembled pipeline to the reaming tool and pulling the pipe through the borehole back to the entry side. FERC, *Millennium Pipeline Co., LLC, Eastern System Upgrade Project*, *Environmental Assessment*, FERC Docket No. CP16-486-000, at 27-28 (Mar. 2017),

https://www.ferc.gov/industries/gas/enviro/eis/2017/CP16-486-EA.pdf ("Millennium EA"); *see also* Energy Transfer Explains Horizontal Directional Drilling, https://www.youtube.com/watch?v=iwtbqeaxWc8 ("Energy Transfer Video") (illustrating the process). "Because the construction footprint of [horizontal directional drilling] generally is limited to work areas on either side of the obstacle," like a road or wetland, this trenchless method "avoids disturbance" to surrounding areas and activities. ERIC R. SKONBERG ET AL., *Inadvertent Slurry Returns during Horizontal Directional Drilling: Understanding the Frequency and Causes*, *in* THE EIGHTH INTERNATIONAL SYMPOSIUM ON ENVIRONMENTAL CONCERNS IN RIGHTS-OF-WAY MANAGEMENT 613, 613 (John W. Goodrich-Mahoney *et al.* ed., 2008). This advantage over traditional open cut construction has made horizontal directional drilling "the method-of-choice by regulatory agencies for construction in sensitive areas." *Id.*

"Throughout the process of drilling and enlarging the borehole, drilling mud (made of a naturally occurring non-toxic bentonite clay material and water)" is "circulated through the drilling tools to lubricate the drill bit, remove drill cuttings, and stabilize the borehole during reaming and during placement of the pipeline." Millennium EA, at 28. A similar "bentonite slurry" is also used as "drilling fluid" in "slurry boring," FHWA Manual § 4.1.2, and for "[l]ubrication" in pipe jacking and microtunneling, *id.* § 4.1.3. Because this drilling mud is used under high pressure, it is almost certain to make its way into the surrounding soil or groundwater through underground paths of least resistance that cannot be predicted. Suleiman, *supra*, at 38-39.

B. "Trenchless methods are becoming increasingly important as the number of utility pipes for water, gas, and telecommunications and storm and sanitary sewers multiply beneath roads." Suleiman, *supra*, at 3. Each year, "150,000 miles of new conduit is installed . . . in North America," *id*. at 5, and much of that conduit must pass either through or beneath surface features. "The natural gas industry," for example, "estimates that almost 60% of their pipes run below pavement," which would have to be "removed to perform open-cut work." *Id.* at 3. Trenchless methods are used in a wide range of applications to avoid interference with these surface features: "In the private sector, media and communication firms are using [horizontal directional drilling] to install telephone, fiber optic, and cable conduits and lines." *Id.* at 15. And "[t]he public sector utilizes [horizontal directional drilling] for repairing and replacing potable water mains, reclaimed water mains, storm water piping, sewage gravity piping, and force mains." *Id*.

In many circumstances, trenchless methods are the environmentally, economically, and socially preferred method for utility line installation. *See* Iowa State Univ. Inst. for Transp., *Iowa Statewide Urban Design and Specifications*, Ch. 14 - Trenchless Construction, https://intrans.iastate.edu/app/uploads/sites/15/2018/09/Chapter_14-2017.pdf ("Iowa Manual"). Trenchless construction "minimiz[es] disturbances in environmentally sensitive areas," *id.* ch. 14A-1, at 1, and thus "minimize[s] impact on critical habitats," Suleiman, *supra*, at 15. It also reduces "[n]oise," "vibration," "dust," and "[a]ir pollution" and "result[s] in less carbon footprint" than open-cut methods. Amir Tambesh *et al.*, *Comparison of Trenchless and Open-cut Methods for Construction*

of an Underground Freight Transportation (UFT) System 4 (2016), https://www.researchgate.net/publication/311923220_Comparison_of_Trenchless_and_Opencut_Methods_for_Construction_of_an_Underground_Freight_Transportation_UFT_System. In many cases, therefore, it is "more environmentally friendly" than the alternatives. *Id.*

In addition to these environmental benefits, trenchless methods are often less costly than open-cut methods. "[T]he relative cost of [horizontal directional drilling]," for example, has now "fallen below that of traditional trenching for many applications." FHWA Manual § 4.1.1. This is especially true when the "social costs" of construction are factored in. Suleiman, *supra*, at 3; *see also* Tambesh, *supra*, at 4 (same). Trenchless methods are able, for example, "to install utility pipes across busy streets without disrupting traffic," Suleiman, *supra*, at 1. They thus "avoi[d] public inconvenience and lost business revenue caused by a closed roadway." Iowa Manual, ch. 14A-1, at 1. They "allow pipe to be installed deeper, avoiding areas of underground pipe congestion." Suleiman, *supra*, at 3. They "eliminat[e] danger to workers and the public posed by an open trench." Iowa Manual, ch. 14A-1, at 1. And they "reduc[e] the potential damage to adjacent structures." *Id.*

Given these advantages, it should be no surprise that trenchless construction methods are approved and even preferred by multiple state and federal agencies in many circumstances. The Federal Energy Regulatory Commission, for example, has stated that horizontal directional drilling "is generally the preferred method to cross major and sensitive water-bodies because it avoids in-stream construction and

riparian impacts." FERC, Order Authorizing Abandonment and Issuing Certificate ¶ 11, *Nw. Pipeline Corp.*, FERC Docket Nos. CP05-32-000 & CP05-32-001 (2005), https://www.ferc.gov/CalendarFiles/20050913171237-CP05-32-000.pdf. The Army Corps of Engineers, meanwhile, has issued a nationwide permit for "the construction, maintenance, repair, and removal of utility lines . . . in waters of the United States." U.S. Army Corps of Eng'rs, Decision Document, Nationwide Permit 12, at 1 (Dec. 21, 2016), https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll7/id/6725. The permit covers the use of horizontal directional drilling, which the Corps describes as "an important technique for avoiding and minimizing adverse effects to jurisdictional waters and wetlands during the construction of utility lines." *Id.* at 14.[3]

The New York State Department of Environmental Conservation has similarly stated that horizontal directional drilling is its "'preferred methodology for *all stream crossings*.'" *Constitution Pipeline Co. v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 93 (2d Cir. 2017). Indeed, the agency has not only approved the use of horizontal directional drilling; it has insisted that a pipeline company assess the feasibility of *expanding* the use of horizontal directional drilling for additional crossings. *Id.* at 93-95.

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[3] That permit would not satisfy the ruling below, however, because the Corps does not issue NPDES permits. Instead, it authorizes the crossing of navigable waters and the discharge of dredged or fill materials into those waters under the Rivers and Harbors Act and Section 404 of the Clean Water Act, 33 U.S.C. § 1344.

C. The decision below threatens to upend the significant environmental and other benefits recognized by these agencies, by subjecting horizontal directional drilling and other trenchless methods to the NPDES permitting requirements. The drilling mud used in many trenchless methods is made of water and "naturally occurring non-toxic bentonite clay." Millennium EA, at 28. Though "bentonite is environmentally friendly" and commonly used in everyday products such as sunscreen and hand soap, Energy Transfer Video (at 2:25), *supra*, it arguably meets the Clean Water Act's inclusive definition of a "pollutant." And experience has shown that there is a risk that drilling mud will be inadvertently released to the surface through indiscernible, underground pathways, Millennium EA, at 28; *see also* FHWA Manual § 4.2.2, or released into groundwater, from which it can ultimately reach navigable waters.

Under a correct view of the law, any discharge of drilling mud from the drilling path into groundwater and then to navigable waters would be *non*point pollution and would not require an NPDES permit. So too any release to the surface and then to navigable waters, since experience shows that the path to the surface is rarely "discernible," and the rock and soil through which any drilling mud would pass is not a "confined" or "discrete" conveyance. 33 U.S.C. § 1362(14). The inadvertent release of drilling mud as a byproduct of trenchless construction could be regulated in other ways, but would not require an NPDES permit. The party responsible for the release could be required by state or federal law to implement "corrective actions." Millennium EA, at 36. But the release itself would not automatically qualify as a criminal act subject to steep criminal and civil

penalties merely as a result of the failure to anticipate the release and obtain a permit in advance.

The decision below, however, would subject these inadvertent releases from a point source to a nonpoint source to the NPDES permit requirement if the drilling mud reached navigable waters at the surface above the drilling path, or migrated to navigable waters from the surface or through groundwater. Because these inadvertent releases cannot be anticipated in advance, parties engaged in trenchless construction methods that use drilling mud would be compelled to seek and obtain a permit as a precautionary measure for *every* application of horizontal directional drilling or trenchless construction, or risk criminal and civil liability every time.

Requiring a permit for each potential release of drilling mud into navigable waters from a trenchless construction application is not workable. Any permit would have to specify the "quantity" of pollutants that would be released and the specific water into which it would be released. *Miccosukee*, 541 U.S. at 102. But there is no way to know either of these things in advance. Experience has shown that drilling mud inadvertently released from a trenchless construction application can travel significant distances through soil and groundwater. *See* Kelly O. Maloney *et al.*, *Unconventional oil and gas spills: Materials, volumes, and risks to surface waters in four states of the U.S.*, 581-582 SCI. OF THE TOTAL ENV'T 369, 373-74 (2017), https://www.sciencedirect.com/science/article/pii/S0048969716328327?via%3Dihub (spill incident survey finding materials like drilling mud had traveled distances of 0.4 to 9,276 meters from spill site to a stream by ground or overland flow); SKONBERG,

supra, at 620. It is not possible to predict with accuracy whether, where, or in what magnitude it may surface. *See* Suleiman, *supra*, at 38-39. As a result, one could not properly apply for and obtain the permit that would be required by the decision below.

The problem is the same whether the permit requirement is extended to nonpoint-source pollution that is "fairly traceable" to a point source, as the court of appeals held, Pet. App. 24, or that creates a "'direct hydrological connection' between the point source and the navigable water," as the United States urged below, *id.* at 24 n.3, and the Fourth Circuit held in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651-52 (4th Cir. 2018). Without any means of telling in advance whether the drilling path has a hydrological connection to navigable waters, let alone to any particular navigable water, parties engaged in trenchless construction will *always* be required—yet unable—to obtain a permit before commencing construction, lest they risk criminal liability. Congress could not have intended for such an unworkable scheme.

Even if these obstacles could be overcome, the permitting process would be cost prohibitive in many instances and would delay construction by a period of years. Obtaining an "individual" NPDES permit can takes an average of 788 days, and completing the application alone requires an average cost of $271,596. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1812 (2016). That is a significant expenditure even for larger horizontal directional drilling operations, which can cost up to $500 per linear foot, FHWA Manual § 4.2.4, and can be more than a mile long, placing total costs in the multi-million-dollar range. For smaller applications the

cost of applying for a permit could dwarf the cost of the project. A 600-foot drill, for example, can run from just $16 to $164 per foot, *id.* §§ 4.1.1, 4.2.4, yielding costs of just tens or hundreds of thousands of dollars. Requiring a permit would thus spell the end of the preferred construction method for many smaller projects.

These costs would be multiplied for major pipeline construction projects, which involve multiple applications of horizontal directional drilling for different crossings in different locations. The PennEast pipeline, for example, involved the use of horizontal directional drilling for 17 distinct crossings. FERC, *PennEast Pipeline Project*, *Final Environmental Impact Statement Vol. I*, FERC Docket No. CP15-558-000, at ES-5 (Apr. 2017), https://www.ferc.gov/industries/gas/enviro/eis/2017/04-07-17-FEIS/Final-Environmental-Impact-Statement.pdf. Each of these crossings would have required a separate NPDES permit under the decision below—if not multiple permits, one for each possible waterway into which pollutants could theoretically migrate. At $271,596 per permit, that would have meant nearly $5 million in additional permitting costs.

Properly interpreted, the Clean Water Act does not impose such costs. The Act does not require a permit for the release of pollutants from point sources to nonpoint sources, regardless of the later potential migration of substances from nonpoint sources.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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