

No. 18-260

IN THE
Supreme Court of the United States

COUNTY OF MAUI,
Petitioner,

v.

HAWAI'I WILDLIFE FUND, *et al.*,
Respondents.

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

**BRIEF OF UNITED STATES SENATORS AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

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STATEMENT OF INTEREST

United States Senators John Barrasso, M.D., Marsha Blackburn, Roy Blunt, John Boozman, Mike Braun, Shelley Moore Capito, Kevin Cramer, Mike Crapo, Joni K. Ernst, Deb Fischer, John Hoeven, Cindy Hyde-Smith, James M. Inhofe, James Lankford, James E. Risch, and Roger F. Wicker respectfully submit this brief as *amici curiae* in support of Petitioner.¹

¹ No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. No one other than *amici* or their members or counsel made a monetary contribution to

John Barrasso, M.D., is a United States Senator from Wyoming and Chairman of the United States Senate Committee on Environment and Public Works.

Marsha Blackburn is a United States Senator from Tennessee.

Roy Blunt is a United States Senator from Missouri.

John Boozman is a United States Senator from Arkansas and a member of the United States Senate Committee on Environment and Public Works.

Mike Braun is a United States Senator from Indiana and a member of the United States Senate Committee on Environment and Public Works.

Shelley Moore Capito is a United States Senator from West Virginia and a member of the United States Senate Committee on Environment and Public Works.

Kevin Cramer is a United States Senator from North Dakota and a member of the United States Senate Committee on Environment and Public Works.

Mike Crapo is a United States Senator from Idaho.

Joni K. Ernst is a United States Senator from Iowa and a member of the United States Senate Committee on Environment and Public Works.

Deb Fischer is a United States Senator from Nebraska.

the brief, and counsel prepared this brief on a pro bono basis. All parties have consented to the filing of this brief.

John Hoeven is a United States Senator from North Dakota.

Cindy Hyde-Smith is a United States Senator from Mississippi.

James M. Inhofe is a United States Senator from Oklahoma and a member of the United States Senate Committee on Environment and Public Works.

James Lankford is a United States Senator from Oklahoma.

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SUMMARY OF ARGUMENT

Congress decided when it enacted the Clean Water Act that the States, not the federal government, were in the best position to regulate groundwater. The Ninth Circuit's extension of federal-discharge permitting over groundwater violates the text of the Clean Water Act, ignores the clear legislative history of the statute, is unnecessary, violates the spirit of cooperative federalism with which the statute was drafted, and is bad public policy.

Under the Clean Water Act, the federal-discharge-permit program applies only to discharges from point sources into the waters of the United States, and groundwater is neither a point source nor a water of the United States. A close reading of the text shows that even where there is a hydrologic connection between groundwater and surface water, the Act does not extend federal permitting power over

groundwater. Instead, it directs the Environmental Protection Agency (EPA) to provide support to the States' regulatory efforts. The statutory history shows that both the House and the Senate were aware of the hydrologic connection between ground and surface waters and still rejected the extension of federal-discharge permitting to groundwater.

There is already sufficient state and federal regulation to protect ground and surface waters without contravening the will of Congress. At the federal level, groundwater quality is already regulated by several federal laws, including the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Resource Conservation and Recovery Act (RCRA), and the Safe Drinking Water Act (SDWA). In addition, all fifty States regulate groundwater through state or cooperative-federalism programs. States should retain the flexibility to consider local laws and environmental conditions to determine the best way to regulate groundwater.

Extending federal-discharge permitting to cover groundwater would violate the spirit of cooperative federalism with which the Clean Water Act was drafted and would result in serious unintended consequences. The Ninth Circuit's interpretation of the Clean Water Act could extend onerous federal permitting requirements to even every-day activities, cause federal-discharge permitting to increase literally hundreds-fold in parts of the country, and impede needed public-infrastructure projects.

This Court should reverse.

ARGUMENT**I. THE CLEAN WATER ACT'S TEXT AND STRUCTURE DEMONSTRATE THAT THE CLEAN WATER ACT DOES NOT REGULATE DISCHARGES INTO GROUNDWATER, EVEN IF THERE IS A HYDROLOGIC CONNECTION BETWEEN THE GROUNDWATER AND THE NAVIGABLE WATERS.**

Shortly after the Ninth Circuit's decision underlying this case, Congress confirmed that the court's extension of federal-discharge permitting over groundwater contravened Congress's will. An explanatory statement attached to the Fiscal Year 2018 omnibus appropriations bill clarified the appropriate scope of the Clean Water Act:

Regulation of Groundwater. – Since enactment in 1972, the Clean Water Act (CWA) has regulated impacts to navigable waters, while regulation of groundwater has remained outside of the Act's jurisdiction. Instead, legislative history surrounding the CWA indicates that Congress intended for groundwater pollution to be regulated through CWA's nonpoint source program and other Federal and State laws. For example, releases into groundwater from solid waste units are regulated at a Federal level by the Resource Conservation and Recovery Act (RCRA). Recently, some courts have imposed a broad view of CWA liability based on a theory of hydrological connection between groundwater and surface water. Other courts have taken a more narrow view and have focused on statutory distinctions between surface water and groundwater. * * * [T]he Com-

mittees encourage the Agency to consider whether it is appropriate to promulgate a rule to clarify that groundwater releases from solid waste units are regulated under RCRA and are not considered point sources, and, that releases of pollutants through groundwater are not subject to regulation as point sources under the Clean Water Act.

164 Cong. Rec. H2045, H2623-24 (daily ed. Mar. 22, 2018) (explanatory statement submitted by Rep. Frelinghuysen); *id.* at H2045 (“Section 4 of the Act states that this explanatory statement shall have the same effect with respect to the allocation of funds and implementation of this legislation as if it were a joint explanatory statement of a committee of conference.”). In 2019, in the conference report accompanying Fiscal Year 2019 appropriations legislation, Congress directed EPA to continue following the guidance contained in the Fiscal Year 2018 omnibus appropriations bill. *See* H.R. Rep. No. 116-9, at 741 (2019) (Conf. Rep.).

EPA also recently released an interpretive statement concluding that the Clean Water Act “is best read as excluding all releases of pollutants from a point source to groundwater from [federal-discharge] program coverage and liability * * * regardless of a hydrologic connection between the groundwater and a jurisdictional surface water.” Interpretive Statement on Application of the Clean Water Act, 84 Fed. Reg. 16,810, 16,811 (Apr. 23, 2019) (“EPA Interpretive Statement”). The Act’s text and structure confirms Congress’s and EPA’s united position that the Clean Water Act excludes groundwater from federal-discharge permitting.

A. The Clean Water Act Requires Federal-Discharge Permits Only For Discharges From Point Sources Into Navigable Waters, And Groundwater Is Neither A Point Source Nor Part Of the Navigable Waters.

1. Under the Clean Water Act, a federal-discharge permit is required for only the “discharge of any pollutant.” 33 U.S.C. §§ 1311(a); 1342(a)(1). The Act, in turn, defines a “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.” *Id.* § 1362(12)(A). Putting the two statutory sections together, for a discharge to be regulated by the Clean Water Act—and thus require a federal-discharge permit—(1) it must originate from a point source and (2) it must flow from the point source to navigable waters. *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (citation omitted) (“As in any statutory construction case, ‘we start, of course, with the statutory text.’”).

The Act further defines the relevant terms. A “point source” is “any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14). And navigable waters are “the waters of the United States, including the territorial seas.” *Id.* § 1362(7). By substitution, to be regulated under the Clean Water Act, a discharge must originate from a discernible, confined, and discrete conveyance, and must flow to the waters of the United States, including its territorial seas.

2. The text and structure of the Clean Water Act confirm that groundwater is not part of the navigable waters of the United States. As a result, discharge of pollutants into groundwater cannot trigger the Clean

Water Act's federal-discharge permitting program.

a. The Clean Water Act treats “navigable waters” and “ground waters” as distinct. Section 102 calls for comprehensive programs to prevent pollution of “the navigable waters and ground waters.” *Id.* § 1252(a). Section 104 contemplates systems for monitoring the quality of “the navigable waters and ground waters.” *Id.* § 1254(a)(5). Section 106 makes grants for state-pollution-control programs contingent on evaluating “the quality of navigable waters and to the extent practicable, ground waters.” *Id.* § 1256(e)(1). And Section 304 requires federal guidelines for preventing pollution in “all navigable waters [and] ground waters,” as well as federal pollution-control guidelines that consider “changes in the movement, flow, or circulation of any navigable waters or ground waters.” *Id.* §§ 1314(a)(2), 1314(f)(2)(F); *see also* Damien Schiff, *Keeping the Clean Water Act Cooperatively Federal—Or, Why the Clean Water Act Does Not Directly Regulate Groundwater Pollution*, 42 *Wm. & Mary Env'tl. L. & Pol'y Rev.* 447, 461 (2018).

The Act's separation of “navigable waters” and “ground waters” would be unnecessary if ground waters were navigable waters. And this Court “is obliged to give effect, if possible, to every word Congress used.” *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). The Court therefore “refrain[s] from concluding here that the different language in the” Clean Water Act's various sections “has the same meaning in each.” *Russello v. United States*, 464 U.S. 16, 23 (1983). It should do the same here.

b. Respondents nonetheless argue that even though groundwater may not be part of the waters of the United States, discharges from point sources *through*

groundwater to the navigable waters require federal-discharge permits because they are the functional equivalent of a discharge from a point source directly into navigable waters. *See* Br. in Opp'n 22. But that argument fares no better. The discharge into the navigable waters is from groundwater. And groundwater is not a point source regulated by the Clean Water Act.²

A point source, again, is “any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged,” such as a pipe, well, or tunnel. 33 U.S.C. § 1362(14). Groundwater, by contrast, “is widely diffused by saturation within the crevices of underground rocks and soil,” *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, No. 3:15-cv-1439 (JAM), 2017 WL 2960506, at *8 (D. Conn. July 11, 2017). It is thus neither confined, nor discrete. *See, e.g.,*

² While the focus of this brief is groundwater, consistent with the Court's question presented, other nonpoint sources should not be subject to federal-discharge permitting either. *See generally, Basic Information about Nonpoint Source (NPS) Pollution*, EPA, <https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution> (last updated Aug. 10, 2018) (“[n]onpoint source pollution can include” urban runoff, sediment from eroding streambanks, and atmospheric deposition); 33 U.S.C. § 1362(14) (exempting “agricultural stormwater discharges” and “return flows from irrigated agriculture” from the definition of a point source); *Pacific Coast Fed'n of Fishermen's Ass'ns v. Glaser*, No. CIV S-2:11-2980-KJM-CKD, 2013 WL 5230266, at *13 (E.D. Cal. Sept. 16, 2013) (subsurface drain tiles that transport discharges solely from irrigated agriculture fall within the return-flows-from-irrigated-agriculture exemption); *see also supra* pp. 6-7 (nonpoint sources are not subject to federal-discharge permitting).

Kentucky Waterways Alliance v. Kentucky Utils. Co., 905 F.3d 925, 933 (6th Cir. 2018) (holding that groundwater is not a point source because it is neither “discernible,” “confined” nor “discrete.”). And it therefore cannot qualify as a “point source” that would fall under the Clean Water Act’s coverage.

B. The Clean Water Act’s Structure Evinces Congress’s Intent To Leave Regulatory Control of Groundwater Pollution To The States.

The Clean Water Act, read as a whole, further confirms that Congress intended for the States, not the federal government, to regulate discharges from point sources into groundwater. *See Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990) (“[W]e are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.” (quoting *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989))).

1. “[T]hroughout the [Clean Water Act], Congress appeared to have four categories of waters in mind—‘navigable waters,’ the contiguous zone, the ocean, and ‘ground waters.’” *Umatilla Waterquality Protective Ass’n v. Smith Frozen Foods*, 962 F. Supp. 1312, 1318 (D. Or. 1997); *see also* 33 U.S.C. §§ 1254(a)(5) (directing EPA to work with the States to monitor the quality of navigable waters, ground waters, the contiguous zone, and the ocean), 1314(a)(2) (directing EPA to publish information on the factors necessary to restore and maintain all navigable waters, ground waters, waters of the contiguous zone, and the ocean). In provisions related to the federal-discharge permitting program, there is no mention of “ground waters” while the other three types of waters are

directly referenced. *See* EPA Interpretive Statement, 84 Fed. Reg. at 16,814-16,815.

First, in addition to regulating the discharge of pollutants from a point source into the navigable waters through federal-discharge permits, the Act prohibits “any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.” 33 U.S.C. § 1362(12). As one court has observed, “[o]nly the first three” of the Clean Water Act’s four categories of waters “are included within the definition of ‘discharge of a pollutant.’” *Umatilla*, 962 F. Supp. at 1318. That “indicat[es] that Congress did *not* consider discharges to groundwater to be discharges that would trigger the [federal-discharge] permit requirement.” *Id.*

Second, the Clean Water Act’s definition of effluent limitations does not include groundwater. Effluent limitations are “any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into *navigable waters, the waters of the contiguous zone, or the ocean.*” 33 U.S.C. § 1362(11) (emphasis added). And permittees are generally required to comply with effluent limitations in order to qualify for federal-discharge permits. *See id.* § 1342(a). If Congress had intended to require federal-discharge permits for discharges into or through groundwater, one would expect groundwater to be included alongside “navigable waters, the water of the contiguous zone, or the ocean” in defining effluent limitation. And “when Congress includes one possibility in a statute, it excludes [others] by

implication.” *Marx v. General Revenue Corp.*, 568 U.S. 371, 392 (2013).

Finally, Section 304(g) requires EPA to publish guidelines to assist States in carrying out their federal-discharge-permit programs. 33 U.S.C. § 1314(g). These guidelines are designed to “control and prevent * * * discharge into the *navigable waters*, the *contiguous zone*, or the *ocean*”—every type of water except groundwater. *Id.* at § 1314(g)(1) (emphases added).

2. Congress clearly intended for *States* to continue to be primarily responsible for the protection of groundwater. The Act makes it the “policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution.” *Id.* § 1251(b). In three different groups of Clean Water Act provisions apart from the discharge permitting program, Congress left it to the *States* to protect groundwater. See *Exxon Corp. v. Train*, 554 F.2d 1310, 1322 (5th Cir. 1977) (finding, “upon close examination * * * of the Act,” a “clear pattern of congressional intent”—“federal information gathering and encouragement of state efforts to control groundwater pollution but [without] direct federal control over groundwater pollution”); EPA Interpretive Statement, 84 Fed. Reg. at 16,816-16,817.

First, Section 208 requires *States* to regulate discharges into groundwater as part of their areawide waste-treatment-management plans. For example, this section requires States to “identify * * * underground mine runoff” and to “set forth procedures and methods (including land use requirements) to control [it] to the extent feasible.” 33 U.S.C. § 1288(b)(2)(F)-

(G). Underground mine runoff is a discharge into groundwater, and Congress used regulatory language, such as “control,” “procedures,” and “requirements” to show that States are in charge of regulating groundwater.

Under Section 208, States must also “identify, if appropriate, salt water intrusion into rivers, lakes, and estuaries * * * from any cause, including * * * ground water extraction, set[ting] forth procedures and methods to control such intrusion to the extent feasible where such procedures and methods are otherwise part of the waste treatment management plan.” *Id.* § 1288(b)(2)(I). In these provisions, Congress once again used regulatory language to make clear that States have the authority to regulate groundwater. These provisions also highlight the effect of groundwater extraction on rivers, lakes, and estuaries, proving that Congress was aware of the connection between groundwater and surface water but chose to address it by leaving regulatory power with the States.

Congress in Section 208 also required state area-wide-waste-treatment-management programs “to control the disposal of pollutants on land or in subsurface excavations * * * to protect ground and surface water quality.” *Id.* § 1288(b)(2)(K). Like Section 208’s other subsections, subsection (b)(2)(K) uses the regulatory word “control” to have States take the lead in combatting groundwater pollution. Once again, Congress acknowledged the connection between ground and surface waters and left States in control of groundwater regulation.

Second, Sections 106, 202, and 319 establish grant programs specifically designed to encourage States to

adopt *additional* measures to protect groundwater. *See id.* §§ 1256, 1282, 1329. Section 106 forbids EPA from awarding pollution-control-program grants to any State that does not include “procedures necessary to monitor * * * the quality of navigable waters and to the extent practicable, ground waters” as part of its program. *Id.* § 1256(e)(1).

Section 202, meanwhile, conditions increased grant amounts for treatment works on a State’s certification that “the quantity of available ground water will be insufficient, inadequate, or unsuitable for public use, including the ecological preservation and recreational use of surface water bodies, unless effluents from publicly owned treatment works after adequate treatment are returned to the ground water consistent with acceptable technological standards.” *Id.* § 1282(a)(1), (b), (b)(1). This provision encourages States to take the lead in protecting groundwater supplies. And it leaves it up to States to determine what counts as “adequate treatment” of pollutants. It also acknowledges that release of effluents into groundwater can undermine “the ecological preservation and recreational use of surface water bodies,” showing, once again, that Congress is aware of the connection between ground and surface waters and chose to leave groundwater regulation to the States.

Likewise, Section 319 addresses state nonpoint source management programs. *Id.* § 1329. Among its provisions, it establishes “[g]rants for protecting groundwater quality” that allow EPA to give grants to States “for the purpose of assisting * * * State[s] in carrying out groundwater quality protection activities * * * to protect the quality of groundwater and to prevent contamination of groundwater from nonpoint sources of pollution.” *Id.* § 1329(i)(1).

Section 319 further authorizes the Administrator to give priority in grant awards to States that “carry out ground water quality protection activities * * * [as] part of a comprehensive nonpoint source pollution control program, including research, planning, ground water assessments, demonstration programs, enforcement, technical assistance, education, and training to protect ground water quality from nonpoint sources of pollution. *Id.* § 1329(h)(5)(D). Section 319 thus shows that Congress contemplated supporting the groundwater-protection efforts of *States* through grantmaking, rather than taking on the issue itself.

Third, instead of directing EPA to regulate groundwater, Sections 102, 104, and 304 require EPA to consult and cooperate with States to develop comprehensive programs and to provide states with guidelines and information to aid *state* regulation of groundwater. *Id.* §§ 1252, 1254, 1314. Section 102 requires EPA to “develop comprehensive programs for preventing * * * the pollution of the navigable waters and ground waters,” working together with “State water pollution control agencies.” *Id.* § 1252(a). Section 104 similarly requires EPA to “establish national programs” to protect water quality, and develop a “water quality surveillance system” to monitor the quality of ground and other waters “in cooperation with the States.” *Id.* § 1254(a), (a)(5). And Section 304 provides that EPA, “after consultation with * * * State agencies,” must “develop and publish * * * criteria for water quality accurately reflecting the latest scientific knowledge” on the health effects of pollutants “in any body of water, including ground water.” *Id.* § 1314(a)(1). All three reaffirm Congress’s intent that EPA provide guid-

ance and support to state efforts to regulate groundwater pollution.

In these sections, the advisory language describing EPA's involvement contrasts with the regulatory language used in Section 208 describing States' responsibility to regulate groundwater. While the States are commanded to develop "procedures and methods," "control" underground mine runoff, and establish land-use "requirements," *id.* §§ 1288(b)(2), (b)(2)(G), EPA is instructed to help develop programs, *id.* § 1252(a); publish "information," *id.* § 1314(a)(2); and develop "guidelines," *id.* §§ 1314(f)(1), (f)(2), (f)(2)(B), (f)(2)(E), (f)(2)(F).

That groundwater is mentioned repeatedly in these three groups of provisions, and not at all in the federal-discharge-permitting provisions of the Act, supports the conclusion that the omission in the permitting sections was deliberate. It is a "familiar principle of statutory construction * * * that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006).

In total, the text and structure of the Clean Water Act shows that Congress left the regulation of groundwater pollution to the States, not the federal government, under the statute.

II. THE CLEAN WATER ACT'S LEGISLATIVE HISTORY DEMONSTRATES THAT CONGRESS DID NOT INTEND THE ACT TO REGULATE DISCHARGES INTO GROUNDWATER.

The Clean Water Act's text and structure is further supported by its legislative history. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 583 (1995) ("The legislative

history confirms what the text of the Act dictates.”). Both the Senate and the House rejected attempts to enact federal control of groundwater pollution. Those explicit rejections foreclose a finding of an implicit extension of federal regulatory power. See *Exxon Corp.*, 554 F.2d at 1329 (“We cannot attribute to Congress an intention to achieve silently and by indirection that which it consistently refused to do directly.”).

1. The 1972 Senate Committee on Public Works report rejected multiple bills extending federal regulatory jurisdiction over groundwater. The Committee explained that “[s]everal bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil, and other subsurface formations.” S. Rep. No. 92-414, at 73 (1971); see also Comm. on Public Works, 93d Cong., A Legislative History of the Water Pollution Control Act Amendments of 1972 (Comm. Print 1973). But “[b]ecause the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt the recommendation.” S. Rep. No. 92-414, at 73.

The Committee “recognize[d] the essential link between ground and surface waters and the artificial nature of any distinction”; indeed, the Committee emphasized that “[t]he importance of groundwater in the hydrologic cycle cannot be underestimated.” *Id.* But instead of direct federal control, the Committee’s bill required that each State’s water-pollution-control plan contain “affirmative controls over the injection or placement in wells of any pollutants that may affect ground water.” *Id.* That provision would “protect ground waters and eliminate the use of deep

well disposal as an uncontrolled alternative to toxic and pollution control” without direct federal regulation. *Id.*

2. The House, too, rejected an attempt to bring groundwater pollution within the Clean Water Act’s permitting regime. Representative Aspin told the House that groundwater was omitted, and warned House members that if explicit references to groundwater were not added, it would not be covered. Representative Aspin stated that “when it comes to enforcement, title IV, the section on permits and licenses, * * * ground water is suddenly missing.” 118 Cong. Rec. 10,666 (1972) (statement of Rep. Aspin). And he warned that “[i]f we do not stop pollution of ground waters through seepage and other means, ground water gets into navigable waters.” *Id.* Representative Aspin therefore argued that “to control only the navigable water and not the ground water makes no sense at all.” *Id.*

But although Representative Aspin introduced an amendment that would “bring[] ground water into the subject of the bill, into the enforcement of the bill,” *id.*, it was ultimately defeated on an 86-34 vote, *see* 118 Cong. Rec. H2643 (daily ed. Mar. 28, 1972) (statement of Rep. Smith, Chairman). And this Court has held that the defeat of a proposed amendment “strongly militates against a judgment that Congress intended a result that it expressly declined to enact.” *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974).

Like the Senate’s rejection of the groundwater-control bills, the House’s consideration and rejection of the Aspin amendment shows that Congress consciously decided to omit groundwater from the Clean

Water Act's enforcement provisions. As the Fifth Circuit has summarized, the legislative history demonstrates that "the House, like the Senate, thought the bill would leave control of groundwater pollution exclusively to the states." *Exxon Corp.*, 554 F.2d at 1329. This Court should conclude the same.

III. OTHER STATE AND FEDERAL ENACTMENTS PROTECT GROUNDWATER WITHOUT STRETCHING THE CLEAN WATER ACT BEYOND ITS TEXT.

Amici's position that the Clean Water Act does not regulate discharges into or through groundwater does not mean that groundwater pollution is not a serious problem. It is. In fact, the Senate Committee on Environment and Public Works held a hearing on the issue in April 2018 where both majority and minority witnesses agreed that groundwater pollution was a real problem. See *The Appropriate Role of States and the Federal Government in Protecting Groundwater: Hearing Before the S. Comm. on Env't & Pub. Works*, 115th Cong. __ (Apr. 18, 2018) ("*Protecting Groundwater Hearing*"). While protection of groundwater is without question of great importance, other tools—state and federal—are better suited to address the problem than the blunt instrument of the Clean Water Act's discharge permitting program.

1. The Clean Water Act recognizes States' independent authority "to adopt or enforce" their own "standard[s] or limitation[s]" over the discharge of pollutants and effluent limitations. 33 U.S.C. § 1370. In fact, *all 50 States* have done so. See Nat'l Ass'n of Clean Water Agencies et al., Comment Letter on Clean Water Act Coverage of "Discharges of Pollutants" via a Direct Hydrologic Connection to

Surface Water at 10 & Attachment A (May 21, 2018) (“NACWA EPA Comment Letter”), *available at* <https://tinyurl.com/y5gfdvan> (50-state survey).

States’ independent authority to regulate groundwater quality is not only consistent with the Clean Water Act’s text, structure, and legislative history, but also allows States to regulate in ways tailored to their unique waterways and needs. And States have long exercised their power to protect intrastate waters and groundwater independent of the federal-discharge permitting program. *See* States of West Virginia et al., Comment Letter on Clean Water Act Coverage of “Discharges of Pollutants” Via a Direct Hydrologic Connection to Surface Water at 9-11 (May 21, 2018), *available at* <https://tinyurl.com/y6q8ay4q>. States have also exercised independent authority to regulate groundwater contamination, often through permitting measures. *See generally id.*; *Protecting Groundwater Hearing* (statement of Martha Clark Mettler, Ass’t Comm’r, Office of Water Quality, Indiana Dep’t of Env’tl. Mgmt) (summarizing varied state-law approaches). These state laws and differing approaches confirm that States are equal to the task of protecting groundwater.

2. Other Federal statutes independent of the Clean Water Act provide appropriate, alternative vehicles for regulating groundwater quality. As EPA acknowledges, “[i]n *other federal statutes*, * * * Congress explicitly envisioned a federal role in regulating groundwater quality.” EPA Interpretative Statement, 84 Fed. Reg. at 16824 (emphasis added). It is through these *other* federal statutes that Congress provided federal authority to address

groundwater contamination otherwise absent from the Clean Water Act.

First, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq. (1980), authorizes federal removal of pollutants or other remedial action “[w]hensoever * * * any hazardous substance is released or there is a substantial threat of such a release into the environment.” 42 U.S.C. § 9604(a)(1)(A). As in the Clean Water Act, “hazardous substance” is defined broadly. *See id.* § 9601(14). Yet, unlike the Clean Water Act, CERCLA specifically includes in its definition of “environment,” “navigable waters” and “any other surface water, *ground water*, drinking water supply, land surface, or subsurface strata * * * within the United States.” *Id.* § 9601(8) (emphasis added). Congress’s inclusion of “ground water” in CERCLA and not the Clean Water Act is telling; it shows that if Congress wanted to include groundwater in the Clean Water Act, it “knew how to.” *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994).

Second, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq. (1976), permits EPA to bring 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.” *Id.* § 6973(a). And “disposal” includes “discharge * * * of any solid waste or hazardous waste into or on any land or water so that such solid * * * waste or any constituent thereof may * * * be * * * discharged into any waters, including *ground waters*.” *Id.* § 6903(3) (emphasis added).

Finally, the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f et seq. (1974), enacted just two years after the Clean Water Act, provides measures specifically geared towards preventing and controlling certain types of groundwater pollution. See Pet. 6-7, 11. Like the Clean Water Act, the SDWA recognizes the role states play in regulating groundwater pollution. See 42 U.S.C. §§ 300h, h-1. EPA under the SDWA is charged with “developing minimum requirements for” state underground injection control “programs that prevent injection wells from contaminating underground sources of drinking water.” Pet. 6; see 42 U.S.C. § 300h. The SDWA thus evidences Congress’s intent to provide for groundwater protection independent of the Clean Water Act and federal-discharge permitting program. Had Congress wanted to regulate groundwater contamination through that mechanism, it could have—and would have—done so explicitly.

IV. EXPANDING FEDERAL JURISDICTION OVER GROUNDWATER WOULD RESULT IN UNINTENDED HARMFUL CONSEQUENCES.

1. The court of appeals’ decision threatens to upend the Clean Water Act’s existing cooperative-federalism regime. The Clean Water Act “establishes a distinctive variety of cooperative federalism,” one “anticipat[ing] a partnership between the States and the Federal Government.” *U.S. Dep’t of Energy v. Ohio*, 503 U.S. 607, 633 (1992) (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992)). Expanding federal regulation over groundwater would supersede state authority and add unnecessary costs and regulatory uncertainty—contradicting the coopera-

tive federalism Congress implemented in the Clean Water Act.

If the Ninth Circuit’s decision is left to stand, the breadth of public activities subject to federal regulation and liability could balloon. Under it, “[e]veryday activities, including farming, ranching, or having a septic tank in your backyard could require a federal-discharge permit. This isn’t what Congress intended when it passed the Clean Water Act.” *Protecting Groundwater Hearing* (statement of Sen. Barrasso, Chairman, S. Comm. on Env’t & Pub. Works). Subjecting these workaday activities to Clean Water Act permitting—a regime that this Court has previously characterized as “arduous, expensive, and long”—would be unworkable. *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016).

The States that have appeared in this case quantify the real-world implications this expanded permitting regime would have. Under this theory, the Ninth Circuit’s approach could subject home septic systems to federal-discharge permitting—as these systems often discharge pollutants into groundwater—where it could be shown that such discharges eventually reach “navigable waters.” This “could increase the number of [federal-discharge] permits by roughly 220,000 in West Virginia alone,” representing “an astronomical 35,000% increase over the number of [federal-discharge] permits—607—issued by West Virginia in fiscal year 2017.” *State of West Virginia et al. Cert. Amicus Br. 13-14* (footnotes omitted). Similarly, “[p]oint sources that require[] [federal-discharge] permitting in Arizona alone could possibly jump more than 200,000%” due to that State’s hundreds of thousands of septic systems. *Br. of Amici Curiae States of Arizona, et al. in Support of Petition*

for Rehearing En Banc 8-9, No. 15-17447 (9th Cir. Mar. 12, 2018), ECF No. 75. This is hardly the regime Congress could have envisioned when it crafted the federal-discharge permitting program almost 50 years ago.

2. Further, whether there is a determination of any hydrologic connection between groundwater and surface water is a “site-specific” inquiry requiring intricate “technical assessments.” *Protecting Groundwater Hearing*, 115th Cong. __ (statement of Amanda Waters, Gen. Counsel, Nat’l Ass’n of Clean Water Agencies). That assessment would include consideration of “topography, hydrology, and geology as well as climate, distance to surface water, and travel time, among other factors.” NACWA EPA Comment Letter, *supra*, at 8. These complex assessments add to the regulatory uncertainty posed by the Ninth Circuit’s ruling. “Due to this complexity, as well as varying state legal frameworks, there is great diversity of state approaches” regarding the regulation of groundwater pollutants. *Protecting Groundwater Hearing*, 115th Cong. __ (statement of Martha Clark Mettler, Ass’t Comm’r, Office of Water Quality, Indiana Dep’t of Env’tl. Mgmt); *see also supra* pp. __ (discussing varied state law approaches). Nevertheless, “states are consistent in their desire to retain their current flexibilities to regulate these discharges using their [own] discretion to determine which laws and regulatory schemes apply.” *Id.* This comports with cooperative federalism principles as well. States are in the best position to assess what works for themselves based on their unique landscapes, existing legal frameworks, and regulatory processes. The Court should respect that individuality and allow States to continue to function

as laboratories of groundwater environmental protection.

3. Expanding the scope of federal-discharge permitting would also divert needed funding away from the maintenance and development of critical public resources and infrastructure. To this end, a broad group of states, municipal organizations, and water utilities have voiced concern over expanding federal regulation of groundwater. *See, e.g.*, Ass'n of California Water Agencies et al. Cert. Amicus Br. 8-25; State of West Virginia et al. Cert. Amici Br. 5-25. Two impacts stand out.

First, public utilities ultimately pass on the cost of environmental compliance to their ratepayers—average Americans. The federal-discharge permitting program and Clean Water Act liability must therefore remain predictable. Imposing new classes of required permits and their concomitant compliance costs will hurt ratepayers who often cannot afford an increase in their utility rates. *See Protecting Groundwater Hearing*, 115th Cong. __ (statement of Amanda Waters, Gen. Counsel, Nat'l Ass'n of Clean Water Agencies).

Second, the Ninth Circuit's extension of Clean Water Act liability can affect countless drinking water pipelines, sewer collection systems, and other public utilities. These systems are often prone to leakage or other episodic failures due to age. *Id.* Along those lines, determinations necessary to issue a permit or regulate may prove infeasible or arbitrary in the context of a release into groundwater. Particularly, whether or how these sources contribute to the groundwater contamination chain may be difficult to pinpoint or measure. “[L]eaks * * * are difficult to

predict and locate, and impossible to eliminate altogether. Under [a direct hydrologic connection] theory, each leak would potentially be regulated as a distinct discharge under the” Clean Water Act. NACWA EPA Comment Letter, *supra*, at 6. And the Clean Water Act is a strict liability statute. 33 U.S.C. § 1311(a). If a utility cannot obtain a permit, it will be exposed to hefty civil penalties and potential financial ruin.

According to water utility trade estimates, “approximately \$600 billion [is projected to be] needed over the next 20 years to address aging public sewer lines and systems.” *Protecting Groundwater Hearing*, 115th Cong. — (statement of Amanda Waters, Gen. Counsel, Nat’l Ass’n of Clean Water Agencies). Additionally, expanding the regulatory scope of federal-discharge permitting “would have the unintended consequence of impeding beneficial and innovative public infrastructure projects such as groundwater recharge systems that are used to convey stormwater or recycled wastewater into aquifers to augment public water supplies, create seawater intrusion barriers, prevent land subsidence, and eliminate surface outfalls to protect water quality.” *Id.* To require utilities and local municipalities to shoulder an added regulatory burden subject to the federal-discharge permitting program would divert limited resources from these other infrastructure priorities that have significant environmental and public health benefits. The Court should avoid those harms by reversing the decision below.

CONCLUSION

For the foregoing reasons, as well as those in Petitioner's brief, the Ninth Circuit's judgment should be reversed.

Respectfully submitted,

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