GET-26

GET Committee

From:	Mahesh Cleveland <mcleveland@earthjustice.org>
Sent:	Thursday, July 25, 2019 1:18 PM
To:	Mayors.Office@mauicounty.gov; GET Committee; Mike J. Molina; Keani N. Rawlins; Kelly King; Tasha A. Kama; Riki Hokama; Alice L. Lee; Tamara A. Paltin; Shane M. Sinenci; Yukilei Sugimura
Cc:	Isaac Moriwake; David Henkin
Subject:	GET-26: Appellate Briefs of Maui Community Groups and Supporters
Attachments:	2019-7-25 Cover Letter GET-26 Brief Submission-signed.pdf; 20190719144247204_2019-07-19 FdLac Amicus.pdf; 20190719121535073_18-260 bsac Former EPA Administrators.pdf; 2019-7-12 Respondents Brief 18-260.pdf; 20190719133650479_18-260 Amicus in Support of Respondents Anderson and Decatur Counties.pdf; 20190719125028064_18-260 Maryland et al amicus brief.pdf

July 25, 2019

Via Electronic Mail
Mayor Michael P. Victorino
Maui County Council, Governance, Ethics, and Transparency Committee (GET)
Committee Chair Michael J. Molina
Committee Vice Chair Keani N.W. Rawlins-Fernandez
Committee Member Riki Hokama
Committee Member Tasha Kama
Committee Member Kelly T. King
Committee Member Alice L. Lee
Committee Member Tamara Paltin
Committee Member Shane M. Sinenci
Committee Member Yuki Lei K. Sugimura

Re: GET-26: Appellate Briefs of Maui Community Groups and Supporters in Hawai'i Wildlife Fund, et al. v. County of Maui, U.S. Supreme Court Docket 18-260.

Dear Mayor Victorino, GET Committee Chair Molina, Vice Chair Rawlins-Fernandez, and Committee Members:

For your information and consideration, please see attached electronic copies of the briefs filed with the United States Supreme Court by:

(1) Respondents Hawai'i Wildlife Fund, *et al.*;
(2) *Amici Curiae* Anderson County, South Carolina and Decatur County, Tennessee;
(3) *Amici Curiae* State of Maryland, *et al.*;
(4) *Amicus Curiae* Fond Du Lac Band of Lake Superior Chippewa;
(5) *Amici Curiae* Former EPA Administrators.

These and seven other *amicus curiae* ("friend of the court") briefs were filed by a diverse group of supporters in government, science, academia, and the private and non-profit sectors.

As detailed in the briefs, the County's pending appeal requests the Supreme Court to eviscerate the protective provisions of the Clean Water Act (CWA) to the benefit of large-scale polluters and their supporters/beneficiaries (such as the County's *amici* supporters), and to the detriment of America's public waters and the citizens who use them.

Amici Curiae Anderson County, South Carolina and Decatur County, Tennessee point out that limiting the CWA's jurisdiction as requested by the County would undermine local government autonomy, and that the Ninth Circuit decision does not expand CWA regulation to include individual septic or cesspool systems.

Amici Curiae State of Maryland, *et al.* includes the states of California, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, plus the District of Columbia. The states point out, among other things, that federal regulation of discharges to public waters is particularly important for states that exist downstream of other states. Pollution of upstream navigable waters is carried downstream to other states, who cannot bring legal action against upstream polluting states because of the doctrine of sovereign immunity. Federal regulation allows for enforcement of clean water requirements across state lines.

Amicus Curiae Fond Du Lac Band of Lake Superior Chippewa is a federally-recognized Native American Tribe from Minnesota that have treaty-based gathering rights throughout an off-reservation territory that spans three states. The resources to which they are entitled by treaty are primarily harvested from navigable waters, and these resources are already threatened by industrial pollution.

Amici Curiae Former EPA Administrators are three heads of the EPA under both Democratic and Republican administrations. They point out that until very recently, national policy and practice has been to enforce the CWA against point source discharges to navigable waters via groundwater. For the first time in the history of the EPA, the Trump Administration is taking the opposite stance. Indeed, when this case was before the Ninth Circuit, the EPA supported the community groups, and only recently reversed positions.

Other *amici* include an international coalition of scientists with expertise in aquatic ecosystems, a nationwide group of law professors (representing many prestigious environmental law programs), environmental and legal public interest groups, and a coast-to-coast association of craft brewers. Each of these groups have compelling interests that align with protection of national waters. The full list of filings and links to individual briefs can be found at: https://www.supremecourt.gov/docket/docketfiles/html/public/18-260.html.

All *amici* agree that it would be wrong to interpret the CWA to include words that do not exist in the statute, as the County and the Trump Administration propose.

Mahalo for your consideration of these documents, and your continued work on behalf of the people of Maui.

Respectfully yours,

Mahesh Cleveland
Isaac H. Moriwake
David L. Henkin

Earthjustice, Mid-Pacific Office

EARTHJUSTICE

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Earthjustice, Mid-Pacific Office

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 *AMICUS CURIAE* FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae Fond du Lac Band of Lake Superior Chippewa (the "Band") is a federally-recognized tribe and a member of the Minnesota Chippewa Tribe ("MCT"), whose members have resided in northern Minnesota for centuries. *See* 84 Fed. Reg. 1200, 1202 (Feb. 1, 2019). The Band has the inherent sovereign authority and duty to protect the natural resources and retained treaty rights upon which its members depend both on and off the Fond du Lac Reservation (the "Reservation"). *See* Treaty of LaPointe, 10 Stat. 1109 (Sept. 30 1854) [hereinafter, "1854 Treaty"]; Treaty with the Chippewa, 7 Stat. 591 (Oct. 4, 1842) [hereinafter, "1842 Treaty"]; Treaty with the Chippewa, 7 Stat. 536 (July 29, 1837) [hereinafter, "1837 Treaty"]. In this capacity, the Band has Treatment-As-A-State ("TAS") status under the Clean Water Act and administers and enforces water-quality standards on the Reservation. *See* 33 U.S.C. § 1341; Water Certification Standards, FDL

[1] Pursuant to Supreme Court Rule 37.2(a), all parties have consented to this brief's filing. Counsel of record for all parties received the requisite notice of the intent of *amicus curiae* to file this brief. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution toward this brief's preparation or submission.

Ordinance No. 01/06;[2] Water Quality Standards, FDL Ordinance No. 12/98.[3]

The Band also holds off-Reservation usufructuary rights in lands ceded to the United States, which extend throughout the entire northeast portion of Minnesota and parts of Wisconsin and upper Michigan ("Ceded Territories").[4] 10 Stat. 1109; 7 Stat. 536; 7 Stat. 591. The Band retains and exercises these usufructuary rights, including the right to hunt, fish, and harvest manoomin (*Zizania palustris*) – known as wild rice in English – guaranteed under the 1837, 1842, and 1854 Treaties. H. James St. Arnold & Sue Erickson, *Ojibwe Treaty Rights Understanding and Impact* 13-17 (2006).[5] The Band co-manages the Ceded Territories with Minnesota and the other MCT Bands who share usufructuary rights in the Ceded Territories. *Id.* at 19-20.

The Band submits this brief based on its interest as a regulator ensuring the Clean Water Act's National

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[2] A copy of FDL Ordinance No. 01/06 is available at http://www.fdlrez.com/government/ords/01-06ord.pdf.

[3] A copy of FDL Ordinance No. 12/98 is available at https://www.epa.gov/sites/production/files/2014-12/documents/chippewa-tribe.pdf. The Band was granted TAS status on May 16, 1996. *Water Quality Standards Regulations: Fond du Lac Band of the Minnesota Chippewa*, Envtl. Protection Agency, https://www.epa.gov/wqs-tech/water-quality-standards-regulations-fond-du-lac-band-minnesota-chippewa (last visited June 18, 2019).

[4] A map of the 1837, 1842, and 1854 Ceded Territories are available at http://www.fdlrez.com/RM/fdlmaps.htm.

[5] The Great Lakes Indian Fish & Wildlife Commission published this report and a copy is available at https://www.glifwc.org/publications/pdf/OTRUI2006.pdf.

Pollutant Discharge Elimination System ("NPDES") permitting scheme prevents all point source discharges that impact Reservation surface waters and interfere with the Band's usufructuary rights in the Ceded Territories.

SUMMARY OF ARGUMENT

The Band depends on the Clean Water Act to protect its natural resources, including manoomin and freshwater fish. Manoomin and fish are central elements of the Ojibwe diet, and also play an important cultural, spiritual, and economic role in the life of Band members. Pollutants regulated under the Clean Water Act, for example, sulfate and mercury, directly threaten the manoomin and freshwater fish Band members consume; Petitioner's proposed limitation on the Clean Water Act's reach would have devastating consequences for the Band's resources.

Upstream from the Fond du Lac Reservation and in the Ceded Territories lie large iron ore and precious metal reserves. Mining companies mine, or propose to mine, those mineral reserves, posing real threats to water quality in Minnesota's water-rich environment.

The Clean Water Act's plain language requires, as the Ninth Circuit concluded, permitting for pollutants discharged from a point source through groundwater to navigable waters. The canons of construction instruct that this Court must derive a statute's meaning from the words used in the statute without supplementation.

Yet, Petitioner asks this Court to do the opposite, seeking to supplement the statutory text to limit its reach to "any *direct* addition of any pollutant to a navigable water from any point source." Congress, however, prohibited any person from making "*any addition*" – direct or indirect, continuous or intermittent, permanent or temporary – of any pollutant to navigable waters from any point source without a permit.

Petitioner's proposed loophole in the Clean Water Act would allow dischargers to avoid the Clean Water Act's reach by simply moving an outfall underground or onto a beach, leaving surface waters unprotected and contravening the Clean Water Act's purpose. Contrary to Petitioner's assertions, other regulatory requirements do not provide sufficient protections. For example, Minnesota's surface water quality standard to protect manoomin requires no higher sulfate concentration than 10 mg/L; the groundwater standard allows for a sulfate concentration of 250 mg/L. Petitioner simply errs when it asserts that other regulatory regimes can plug the gaping hole Petitioner's interpretation leaves in the bedrock law intended to restore and maintain the integrity of the Nation's waters.

ARGUMENT

I. THE BAND RELIES ON THE CLEAN WATER ACT TO PROTECT CRITICAL NATURAL RESOURCES FROM LARGE INDUSTRIAL POLLUTERS

The Band relies on the Clean Water Act to protect critical natural resources. Traditionally, Ojibwe people, also known as Anishinaabeg or Chippewa, were hunters, fishers, and gatherers, living on both sides of the Great Lakes in what is now United States and Canada. Arnold & Erickson, *supra*, at 6-7. Ojibwe people continue to consume diets rich in traditional foods, including manoomin and fish. For decades, large industrial point sources in the Ceded Territories have discharged, or plan to discharge, through groundwater into surface waters. These discharges contain contaminants that decimate manoomin stands and expose Band members to toxins in the food they eat.

A. Production And Consumption Of Traditional Foods, Including Manoomin And Freshwater Fish, Are Important To The Ojibwe.

Ojibwe culture is rooted in caring for the earth. *See* Fond du Lac Band of Lake Superior Chippewa, *Expanding the Narrative of Tribal Health: The Effects of Wild Rice Water Quality Rules Changes on Tribal Health*, 15 (2018) [hereinafter, "*Wild Rice Tribal Health Study*"].[6]

[6] A copy of *Wild Rice Trial Health Study* is available at https://www.health.state.mn.us/communities/environment/hia/hiainmn.html.

As such, Ojibwe people, living in an environment dominated by lakes and streams, produce and consume greater quantities of foods cultivated in freshwater. *See id.* at 33; J. A. Foran et al., *Evaluation of Mercury Exposure Reduction through a Fish Consumption Advisory Program for Anishinaabe Tribal Members in Northern Wisconsin, Michigan, and Minnesota*, 2010 J. Envtl. & Pub. Health 1, 1 (2010).[7]

Two resources of particular importance to the Ojibwe are manoomin and freshwater fish; large industrial point sources in the Ceded Territories threaten both resources.

1. Manoomin

Manoomin is an aquatic grass native to North America. Minn. Dep't of Nat. Res., *Natural Wild Rice in Minnesota* 7 (2008) [hereinafter, "*Natural Wild Rice*"].[8] Manoomin is a spiritual, cultural, social, nutritional, and medicinal staple of the Ojibwe. Manoomin's importance is rooted in Ojibwe history and spirituality. According to Ojibwe oral tradition, the Ojibwe originally resided along the Atlantic Coast. *See Wild Rice Tribal Health Study*, *supra*, at 8. Seven prophets came to the Ojibwe during a time of prosperity and left the Ojibwe with seven predictions about the future, known

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[7] A copy of this article is available at https://www.hindawi.com/journals/jeph/2010/802584/ (select "Full-Text PDF").

[8] A copy of this article is available at https://files.dnr.state.mn.us/fish_wildlife/wildlife/shallowlakes/natural-wild-rice-in-minnesota.pdf.

as the Seven Fires Prophesy. *See* April E. Lindala, *Anishinaabe Migration and History on the Marquette Iron Range*, https://lib.nmu.edu/voices/anishinaabe.php (last visited July 16, 2019). The prophets instructed the Ojibwe to travel west until they reached a place where food grew upon the water. *Wild Rice Tribal Health Study*, *supra*, at 8. For over five centuries, the Ojibwe migrated west to the Great Lakes region, stretching across the upper Midwestern United States and central Canadian provinces. Thomas Vennum, *Wild Rice and the Ojibway People* 1 (1988).

Since arrival, the Ojibwe relied on manoomin – the food that grows on water – to sustain them physically, socially, and spiritually. *See Wild Rice Tribal Health Study*, *supra*, at 8, 15-16. The migration and fulfillment of the prophesies are essential elements of the teachings of the Seven Fires Prophesy, which forms the spiritual backbone of Ojibwe people. *See id.*; *see also* Lindala, *supra*.

Ojibwe people use manoomin in their cultural practices, social traditions, nutrition, and medicinal customs. *See Wild Rice Tribal Health Study*, *supra*, at 8, 15-16. Manoomin plays a central role in ceremonies and celebrations, which perpetuate and protect its connection to the survival of the Ojibwe. Vennum, *supra*, at 58-59. Manoomin is also a healthy, traditional food. *Wild Rice Tribal Health Study*, *supra*, at 3. Manoomin has been referred to as a "super food" because it offers a healthy composition of protein, minerals, vitamins, dietary fiber, healthy carbohydrates, and low fat content. *Id.* at 33-37; *see also* U.S. Dep't of Agric., *Basic*

Report 20089, Wild Rice, Cooked (2019) (describing manoomin's nutritional properties).[9]

Finally, the seasonal manoomin harvest offers important economic opportunity for Ojibwe harvesters, their tribes, and their business communities. This economic benefit, while separate from the cultural importance of manoomin, is important to tribal economic development, providing hundreds of jobs, millions of dollars in labor income, and millions more in direct and indirect economic effect, all largely in regions where economic growth is needed. *See Wild Rice Tribal Health Study*, *supra*, at 46-47; *see also* Earth Economics, *The Food That Grows Out of the Water: The Economic Benefits of Wild Rice in Minnesota* 4 (2018).[10]

In sum, manoomin is a social, cultural, spiritual, nutritional, medicinal, and economic resource for the Band.

2. Freshwater Fish

Ojibwe people also have a deep connection to freshwater fish and harvesting. Catherine A. O'Neill, *Environmental Justice in the Tribal Context: A Madness to EPA's Method*, 38 Envtl. L. 495, 510 (2008). Not only do fish act as an important means of subsistence, fish are also culturally, spiritually, and politically important.

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[9] A copy of this report is available at https://ndb.nal.usda.gov/ndb/foods/show/20089.

[10] A copy of this report is available at http://www.fdlrez.com/RM/downloads/WQSWildRiceBenefits.pdf.

Id. at 509-10. Fishing fosters economic independence among tribal members and provides an important nutritional resource. *Id.* at 510. Traditional ceremonies also include fish as a central element. *Id.* And Ojibwe people transfer important cultural knowledge when they fish together. *Id.*

Fishing and consuming fish also plays an important role in the Band's ability to exercise its treaty rights and "engage in cultural self-determination." *Id.* Because fish are important to the Ojibwe, Ojibwe people consume fish at a higher rate than the general public. *Id.* at 504, 509-11; *see also* Fond du Lac Reservation Office of Water Protection, *Tribal Report Under Section 305(b), Clean Water Act* 1, 4-5 (2004).[11]

B. The Band's Freshwater Resources Are Sensitive To Water Pollutants, Particularly Sulfate And Mercury.

As a community rooted in caring for the earth and people focused on consuming resources that come from freshwater ecosystems, the Band is particularly concerned with point sources discharging pollutants that damage its resources. In particular, manoomin is highly sensitive to sulfate discharges and fish consumption becomes dangerous to human health when fish tissue becomes contaminated with high levels of methylmercury.

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[11] This report is available at http://www.fdlrez.com/RM/downloads/2003%20tribal%20305(b)%20water%20report.pdf.

1. Sulfate

As an aquatic species, manoomin grows exclusively in water. *Wild Rice Tribal Health Study*, *supra*, at 47. Ideal habitat for manoomin include water bodies with some movement, such as rivers, streams, flowages, and lakes with inlets and outlets. *Id.* at 47-48. Water depth must either remain stable or decline gradually over the growing season. *Id.* at 51. Manoomin is most consistently productive when growing in lake bottoms with soft, organic sediment. *Id.* at 47-48.

Historically, manoomin ranged throughout the upper Midwest. Today, however, manoomin's range has dramatically diminished due cumulatively to land use changes, altered hydrology, climate change, invasive species, and pollution. *Id.* at 49. Given manoomin's historical, economic, cultural, spiritual, and ecological importance, the Band has an understandable concern for the future of manoomin. *Id.* at 3. One major concern: sulfate's effect on manoomin when it converts to sulfide.

Sulfide is a toxic compound known to adversely affect manoomin. Minn. Envtl. Quality Bd., *Governor's Task Force on Wild Rice* 6, 32, 34 (2019).[12] Sulfate interacting with bacteria in water creates sulfide. *Id.* at 6. Because manoomin grows exclusively in water, and sulfate in water becomes toxic sulfide, hydrologic

[12] A copy of this report is available at https://www.eqb.state.mn.us/sites/default/files/documents/FINAL%20Governor%27s%20Task%20Force%20on%20Wild%20Rice%20Report%20January%203%202019%20v2.pdf.

sulfate discharges can significantly harm manoomin. *Id.* at 32. When sulfate becomes sulfide it reduces manoomin seedling growth and development. Minn. Tribal Wild Rice Task Force, *2018 Tribal Wild Rice Task Force Report* 23 (2018).[13] Seedling emergence, survival, biomass growth, viable production, and seed mass all decrease as sulfide levels increase. *Id.* While several factors can impact manoomin's growth and health, sulfide in sediment porewater has been determined to be a primary controlling feature of manoomin occurrence. *Id.* at 23-25.

2. Methylmercury

Methylmercury in fish tissue constitutes another contaminant with major implications for Band-member health. Methylmercury occurs when mercury enters water bodies and is methylated by microorganisms present in the water. O'Neill, *supra*, at 500. In this form, methylmercury is highly bioavailable and easily absorbed by fish in affected waters. *Id.* Over time, methylmercury bioaccumulates in fish, which in turn acts as a source of methylmercury contamination for organisms (including humans) consuming those fish. *Id.* at 500-01.

Methylmercury is a neurological toxin that is harmful to humans. *Mercury*, Minn. Pollution Control Agency, https://www.pca.state.mn.us/water/mercury (last visited July 16, 2019). In 2011, a Minnesota Department of

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[13] A copy of this report is available at http://mnchippewatribe.org/pdf/TWRTF.Report.2018.pdf.

Health study found that eight percent of Minnesota babies born in the Lake Superior basin had unhealthy levels of mercury, which can affect brain and nervous system development. Patricia McCann, *Mercury Levels in Blood from Newborns in the Lake Superior Basin* 11 (2011).[14] Fishing peoples, such as the Ojibwe, face greater harm from mercury pollution because certain seasonal or cultural constraints can result in acute doses of methylmercury when tribal consumption is especially high. O'Neill, *supra*, at 511.

Methylmercury is especially concerning in the St. Louis River watershed, the river forming the northern and eastern border of the Reservation. Fond du Lac Band of Lake Superior Chippewa, *2008 Integrated Resource Management Plan* 19-20 (2008).[15] The St. Louis River watershed's unique hydrology, geology, and topology more easily converts mercury into methylmercury – the form capable of accumulating in fish. *Fish Contaminant Study*, Fond du Lac Band of Lake Superior Chippewa, http://www.fdlrez.com/RM/waterfish.htm. Consequently, mercury discharges into the St. Louis River and its watershed create human health concerns for those consuming fish from tribal waters both on the Reservation and in the Ceded Territories.

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[14] A copy of the Minnesota Department of Health's study is available at https://www.health.state.mn.us/communities/environment/fish/docs/glnpo.pdf.

[15] A copy of the Integrated Resource Management Plan is available at http://www.fdlrez.com/RM/downloads/IRMP.pdf.

C. Large Industrial Point Sources Are Decimating Manoomin With Discharges To Surface Waters That Migrate Through Groundwater.

The Ceded Territories intersect two large mineral deposits: the Mesabi Iron Range and Duluth Complex. As a result, numerous industrial mining operations have been proposed or constructed in and around the Ceded Territories. These large industrial point sources threaten, or have damaged, manoomin and human health by adding elevated levels of sulfate to surface waters by discharging additional mercury in the St. Louis River and its watershed.

1. Minntac

One example in the Mesabi Iron Range is the Minntac mine. In the 1960s, prior to the Clean Water Act's enactment, U.S. Steel Corporation ("U.S. Steel") constructed Minntac to mine taconite – a low grade iron ore. Minn. Pollution Control Agency, *Draft Minntac Water Inventory Reduction Environmental Impact Statement* S-1 (2004) [hereinafter, "*Minntac EIS*"].[16] The Minntac facility includes an 8,000-acre tailings basin,[17] used to dispose waste from ore processing. *In*

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[16] A copy of the *Minntac EIS* is available at https://www.pca.state.mn.us/sites/default/files/minntac-deis.pdf.

[17] Federal courts have held that "when mining activities release pollutants from a discernible conveyance, they are subject to NPDES regulation, as are all point sources." *Trs. for Alaska v. Envtl. Protection Agency*, 749 F.2d 549, 558 (9th Cir. 1984) (discussing consistent findings in 10th and 5th Circuits). This includes

re Determination of the Need for an Envtl. Impact Statement for the Minntac Mine Extension Project in Mountain Iron, St. Louis Cty., Minn. ("*In re Minntac Extension*"), No. A13–0837, 2014 WL 274077, *1 (Minn. Ct. App. 2014). During the ore-extraction process, U.S. Steel mixes the waste – known as fine tailings – with water to create a slurry. *Minntac EIS* at S-5. U.S. Steel discharges the slurry into the tailings basin. Findings of Fact, Conclusions of Law, and Order ¶ 3, *In re Reissuance of an NPDES/SDS Permit to U.S. Steel Corp. for Its Minntac Facility* (Minn. Pollution Control Agency Nov. 30, 2018) [hereinafter, "*Minntac Reissuance Order*"].[18] The slurry fills the tailings basin with pollutants, including sulfate. *See In re Minntac Extension*, 2014 WL 274077, at *1.

U.S. Steel installed environmental controls, but designed the tailings basin to release contaminated water into the environment. *Minntac Reissuance Order* ¶¶ 5-7. U.S. Steel surrounded the tailings basin with dikes, but declined to install a liner or other barrier to prevent contaminated water from seeping through the dikes or the bottom of the tailings basin. *Id.* ¶¶ 6-7. As a result, the tailings basin discharges

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tailings basins. *Wash. Wilderness Coal. v. Hecla Min. Co.*, 870 F. Supp. 983, 988 (E.D. Wash. 1994); *see also Trs. for Alaska*, 749 F.2d at 558 (sluice boxes); *Ohio Valley Envtl. Coal., Inc. v. Hernshaw Ptnrs., LLC*, 984 F. Supp. 2d 589, 599, (S.D. W. Va. 2013) (mining valley fill); *Friends of Santa Fe Cty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1355 (D.N.M. 1995) (overburden piles).

[18] A copy of the *Minntac Reissuance Order* is available at https://www.pca.state.mn.us/sites/default/files/wq-wwprm1-28f.pdf.

pollution through groundwater into adjacent surface waters. *Id.*

In 2005, the Minnesota Pollution Control Agency estimated seepage discharges were approximately 3,000 gallons per minute, equaling 1.5 **billion** gallons of wastewater per year. *See* Findings of Fact, Conclusions of Law, and Order ¶ 8, *In re Determination of Adequacy of the Envtl. Impact Statement for the U.S. Steel – Minntac Water Inventory Reduction Project Mountain Iron, Minn.* (Minn. Pollution Control Agency Nov. 22, 2005) [hereinafter, "*Minntac Adequacy Order*"].[19] Since then, U.S. Steel installed a seepage collection and return system, but approximately 1,000 gallons per minute continue to escape. Minn. Pollution Control Agency, *National Pollutant Elimination System (NPDES)/ State Disposal System (SDS) Permit Program Fact Sheet Permit Reissuance* 11-12 (2016) [hereinafter, "*NPDES Fact Sheet*"].[20]

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[19] A copy of the *Minntac Adequacy Order* is available at https://www.pca.state.mn.us/sites/default/files/minntac-sd.pdf.

[20] A copy of the *NPDES Fact Sheet* is available at https://www.pca.state.mn.us/sites/default/files/Fact%20Sheet%20-%20MN0057207%20-%202016_2.pdf

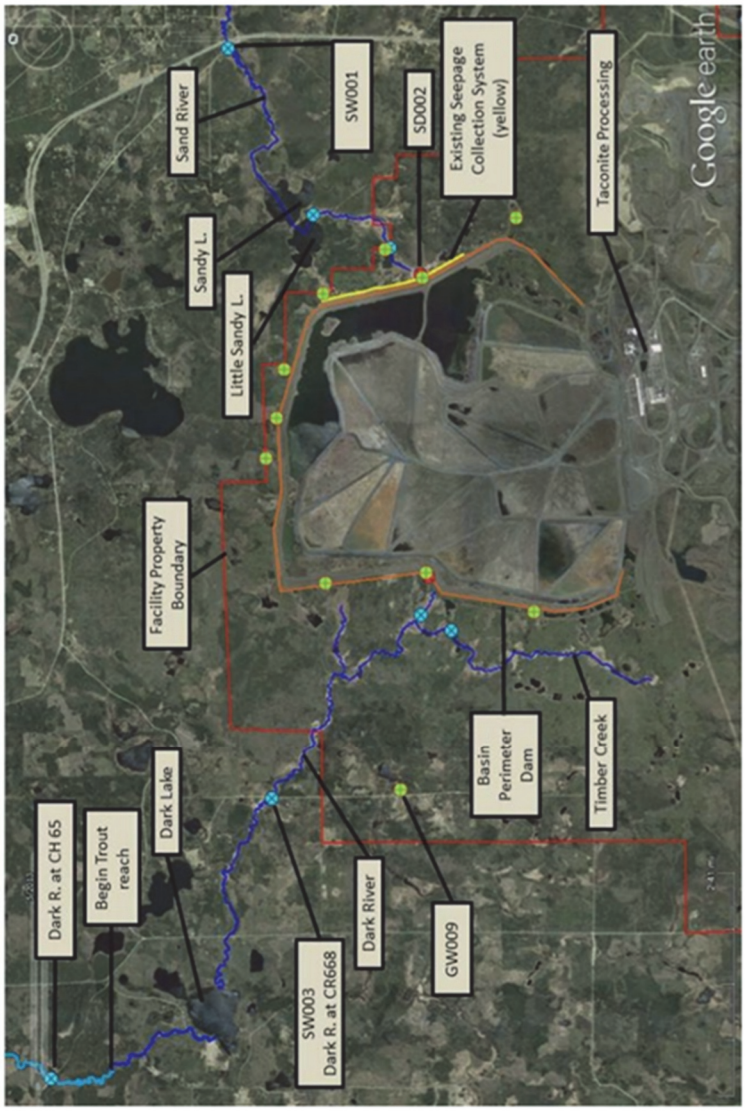

Figure 1. Minntac Tailings Basin.[21]

[21] A copy of this map is available in *NPDES Fact Sheet, supra*, at 14, fig. 2.

The tailings basin's contaminated water discharges into two watersheds: the Sand River and Dark River. The Twin Lakes – also known as Sandy Lake and Little Sandy Lake – lie immediately to the east. Darren J. Vogt, *Sandy Lake and Little Sandy Lake Monitoring (2010-2017)* 2 (2018).[22] The Twin Lakes outlet to the Sand River which merges into the Pike River and, ultimately, Lake Vermillion; all are manoomin-producing lakes and rivers. Kim Lapakko & Ann Jagunich, *Sulfate Release from the USX Tailings Basin and Quantification of Sulfate Sources* 1-2 (1991); *see also MPCA Wild Rice Database,* https://www.pca.state.mn.us/document/wq-s6-43xxlsx (last visited July 16, 2019).

The Twin Lakes once hosted vibrant manoomin stands. Lapakko & Jagunich, *supra*, at 1-2. Historically, the Twin Lakes could seasonally produce 200 acres of manoomin. *Id.* at 1. Since the 1980s, however, manoomin production has steadily declined. *See id.* (noting "fair" crops in 1980 and 1981 and "poor" corps in 1982 and 1984-1987); *see also* Vogt, *supra*, at 16. ("Rice production generally declined through the 1970s and 1980s, with little or no rice found in the lakes during a 1987 survey. Rice production has since remained poor."). Scientists and Minnesota agencies attribute the decimation of the Twin Lakes' manoomin stands to the extremely high sulfate levels in the contaminated water seeping from Minntac's tailings basin. *See* Lawrence A. Baker, *Evaluation of Minntac Tailings*

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[22] A copy of this report is available at http://www.1854treatyauthority.org/management/biological-resources/fisheries/reports.html?id=122&task=document.viewdoc.

Basin on Little Sandy and Sandy Lakes 12 (2016); Letter from Melissa Thompson, Wildlife Lake Specialist, Minn. Dep't of Nat. Res, to Erik Smith, Industrial Division, Minn. Pollution Control Agency (Jan. 24, 2018) ("When the Twin Lakes sulfate amounts range from 66.4 mg/L to 589 mg/L in 2017, and other lakes in the area have natural sulfate amounts around 1-3 mg/L, it is difficult to not acknowledge the impact the seepage is having on downstream habitats.") (on file with Counsel of Record). As of 2017, sulfate levels ranged up to 589 mg/L, more than fifty-eight times higher than the state water quality standard with an overall upward trend. Letter from Thompson to Smith, *supra*, at 2; *see also* Minn. R. 7050.0224 (setting a 10mg/L water quality standard for sulfates); Letter from Margaret Watkins, Grand Portage Water Quality Specialist, and Nancy Schuldt, Fond du Lac Water Projects Coordinator, to Erik Smith, Minnesota Pollution Control Agency 3 (Dec. 22, 2016) (illustrating the trend in sulfate levels over time) (on file with Counsel of Record).

Minntac is only one example of the threat manoomin faces from large industrial polluters in the Ceded Territories. Large mining companies own mineral leases, have explored those mineral resources, and proposed future mining projects within the Ceded Territories. Those projects, like Minntac, risk discharging sulfate into manoomin-growing waters in the Ceded Territories with high levels of sulfate. The Reservation, the 1854 Ceded Territory, current mining projects, and the St. Louis River watershed are illustrated in the map below:

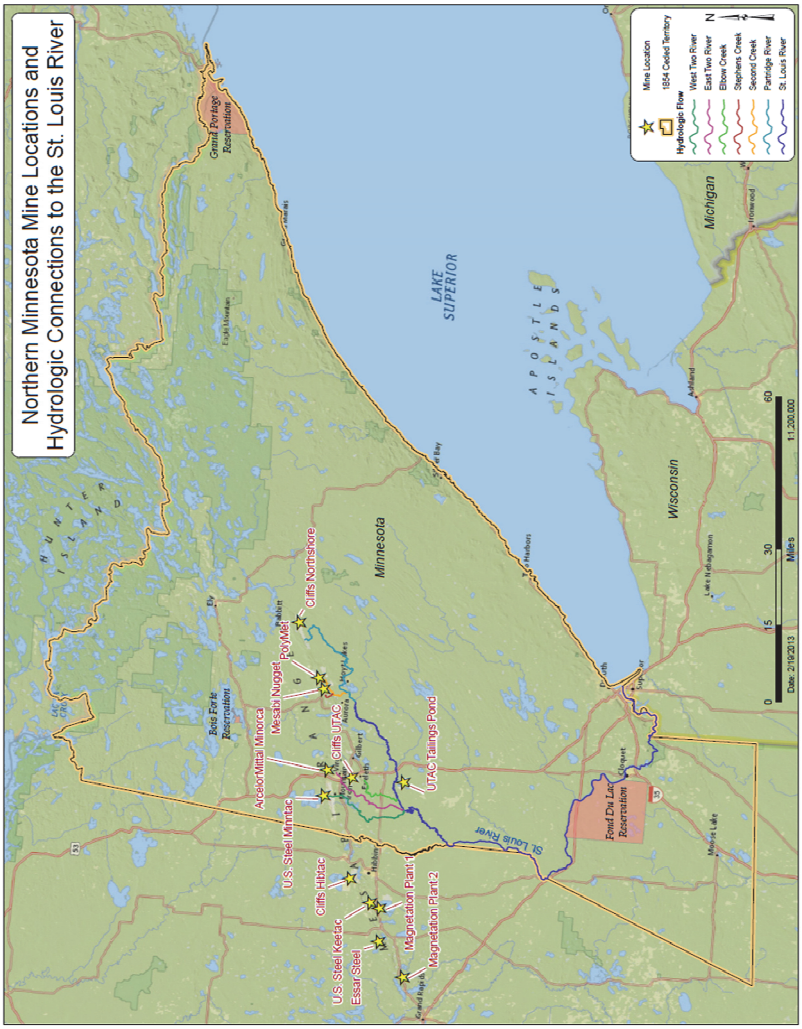

Figure 2. 1854 Ceded Territory with Mine Locations.[23]

[23] Heather Fox, a GIS Specialist for the Grand Portage Reservation, created this map for the Band's use.

2. PolyMet

An example from the Duluth Complex provides an illustration for how industrial point sources discharging to surface water through groundwater could increase mercury concentrations if Petitioner's Clean Water Act interpretation prevails. Poly Met Mining, Inc. ("PolyMet") proposed a copper-nickel mine in the St. Louis River watershed. Minn. Dep't of Nat. Res., *Final Environmental Impact Statement* 1-5 (2015) [hereinafter, "*PolyMet FEIS*"].[24] PolyMet intends to release water contaminated with mercury into the groundwater from two sources.

For a waste rock stockpile, PolyMet proposes to release contaminated water into the groundwater, capture the contaminated groundwater, and subsequently treat the contaminated water prior to discharge at an outfall.[25] Barr Eng'g, NPDES/SDS Permit Application, Vol. II at 42 (2017) [hereinafter, "*NPDES Application*"].[26] PolyMet knows some water will escape the capture system and reach surface waters. PolyMet

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[24] A copy of the *PolyMet FEIS* is available at https://files.dnr.state.mn.us/input/environmentalreview/polymet/feis/NMet_FEIS_Complete.pdf.

[25] The waste rock stockpile is known to be "a major source of sulfate." Don E. Richard, *Summary of Non-Mechanical Treatment Plans for PolyMet* 4 (2016).

[26] A copy of the *NPDES Application* is available at https://www.pca.state.mn.us/regulations/water-quality-permit-northmet (select "NPDES/SDS Permit Application – Vol. II: Mine Site").

Mining, *NorthMet Project Adaptive Water Management Plan* 20 (2017).[27]

PolyMet also plans to use an existing, Minntac-like tailings basin – known to discharge water contaminated with mercury through groundwater to surface waters – and add more waste to the basin. *NPDES Application*, *supra*, Vol. V, at 13-14; *PolyMet FEIS*, *supra*, at 4-41. PolyMet's proposed method to protect the environment is to allow contaminated water to seep into the groundwater, capture the contaminated groundwater, and either send the water back to the tailings basin or treat the water prior to discharge. *NPDES Application*, *supra*, at 20-22. But again, PolyMet knows the containment system will not collect all pollutants and those that escape will discharge through groundwater to surface waters. Barr Eng'g, *Groundwater Modeling of the NorthMet Flotation Tailings Basin Containment System* 2 (2015); Barr Eng'g, *NorthMet Project Water Modeling Data Package Volume 2* 160-68 (2015).[28]

PolyMet illustrates that industrial polluters will continue production and propose new projects that discharge, or have the potential to discharge, mercury into the St. Louis River watershed. PolyMet also illustrates how designed projects like PolyMet could be easily modified to remove containment systems and allow

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[27] A copy of the *NorthMet Project Adaptive Water Management Plan* is available at https://files.dnr.state.mn.us/lands_minerals/northmet/permit_to_mine/appendix_11_4_dec17.pdf.

[28] A copy of this report is available at https://files.dnr.state.mn.us/lands_minerals/northmet/water-approp/references/plant-site-water-model-data-package-vol2-v11.pdf.

discharges into surface waters through groundwater with no treatment at all. Without the Clean Water Act, protecting the Band from these discharges will be much more difficult.

For the foregoing reasons, the Band asserts the Minntac and PolyMet examples strongly support the Ninth Circuit's and Respondents' Clean Water Act interpretation.

II. THIS COURT SHOULD ADOPT RESPONDENTS' CLEAN WATER ACT INTERPRETATION BECAUSE IT IS CONSISTENT WITH THE PLAIN LANGUAGE AND PROTECTS IMPORTANT TRIBAL RESOURCES

Under existing federal environmental laws, the Clean Water Act's plain language represents the only statutory path to protect the Band's natural resources from point source discharges. Petitioner's and the U.S. Environmental Protection Agency's ("EPA") proffered interpretations undermine these protections and allow large industrial discharges to destroy the Band's natural resources in the Ceded Territories. Therefore, consistent with the Clean Water Act's plain language and purpose, the Band respectfully requests this Court adopt Respondents' Clean Water Act interpretation.

A. The Clean Water Act's Plain Language Includes Discharges Fairly Traceable To A Point Source.

The Clean Water Act's clear prohibition that it is illegal to discharge a pollutant from a point source to a navigable water without a NPDES permit includes circumstances, such as those at issue in this case, where a discharger injects treated sewage through groundwater to a navigable water. Similarly, applying the facts related to the Band's protection of manoomin and freshwater fish, the Clean Water Act's prohibitions include circumstances where pollutants are discharged from a tailings basin through groundwater to navigable waters and damage the Band's natural resources. To conclude otherwise would require this Court to disregard the Clean Water Act's plain language and purpose.

The Clean Water Act defines the discharge of a pollutant as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Further, a "point source" is a "conveyance" (for example a "pipe" or "container") "from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). To interpret this language, the Court must first analyze "the statutory language, 'assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009)). This Court enforces "plain and unambiguous statutory language according to its terms." *Id.* The Court need not travel "beyond the borders of the statute" to find the meaning of these

definitions. *United States v. Great N. Ry.*, 287 U.S. 144, 154 (1932).

As Justice Scalia described in his treatise on the canons of statutory construction, courts are guided by a "supremacy-of-text principle." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012). A statute's purpose "must be derived from the text" and that purpose must be "defined precisely" and "described as concretely as possible." *Id.* at 56-57. Importantly, what is *not* included in the text of a statute is equally as significant in divining its meaning and purpose. *See id.* at 57-58 ("[T]he limitations of a text – what a text chooses *not* to do – are as much a part of its 'purpose' as its affirmative dispositions. These exceptions or limitations must be respected, and the only way to accord them their due is to reject the replacement or supplementation of text with purpose.")

Here, the statute means what it says – when pollutants are added to a navigable water from any discrete source, such as a pipe, container, or other "conveyance . . . from which pollutants . . . may be discharged," the discharge requires a permit under the Clean Water Act. In Petitioner's case, no one disputes that the County adds pollutants (treated effluent) to a navigable water (Pacific Ocean) from a point source (injection well). (Pet. Br. 6-7).

Petitioner and its supporting *amici curiae* ignore the definition of a pollutant discharge in the Clean Water Act, and instead impose their own purpose on the Clean Water Act based on a limitation not found in the

text. Petitioner argues that the Clean Water Act's purpose is only to regulate pollutants added *directly* to navigable waters from a point source. (*Id*. at 27-31). In fact, the text prohibits "any addition," not just "any direct addition" of pollutants from a point source to navigable waters. Petitioner engages in the exact practice Justice Scalia condemns and its interpretation should be rejected.

There are three concepts at issue in the relevant definition: (1) addition of pollutants, (2) to a navigable water, (3) from a point source. The Clean Water Act further defines the terms "navigable waters" and "point sources." 33 U.S.C. §§ 1362(7), (14). Applying those definitions, no one disputes that the Pacific Ocean constitutes a navigable water, and the injection well, a point source. The term most relevant to the Court's certified question is the word "addition." What kind of "addition" is intended? Must the "addition" be *direct*, or can it be *indirect*? Is it still an "addition" if the pollutant moves through groundwater to reach a navigable water?

The text answers these questions.

The undefined term "addition" is a general word. "Without some indication to the contrary, general words (like all words, general or not) must be accorded their full and fair scope. They should not be arbitrarily limited." Scalia & Garner, *supra*, at 101. The word "addition" means "the act or process of *adding*; a recipe enhanced by the *addition* of freshly ground pepper." *Addition*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/addition (last visited July 16, 2019).

Far from placing a limitation on the type of addition the Clean Water Act covers, Congress chose to forbid "*any* addition" of pollutants to navigable waters from a point source absent a permit. As this Court previously noted "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (citing Webster's Third New International Dictionary 97 (1976)). In *Gonzales*, the Court construed a mandatory sentencing statute forbidding a sentence that would run concurrently with "any other term of imprisonment" for certain offenses. *Id*. The Court rejected an effort to narrow the statute's application to only federal offenses because "federal" did not appear in the statute. *Id.* "Congress did not add any language limiting the breadth of that word, and so we must read [the statute] as referring to all 'term[s] of imprisonment,' including those imposed by state courts." *Id.*

As in *Gonzales*, here no basis exists to limit the Clean Water Act which, by its plain text, prohibits "any addition" – that is, an addition "of whatever kind" – of pollutants to navigable waters from a point source. By using the term "any," Congress expressly included all kinds of additions – direct or indirect, continuous or intermittent, permanent or temporary, etc.

Petitioner's interpretation requires this Court to re-write the statute, adding a modifier to the statutory definition so it would read: "any *direct* addition of any pollutant to a navigable water from any point source." This Court's canons of construction do not allow such a re-write. The Court "must enforce plain and

unambiguous statutory language according to its terms." *Hardt*, 560 U.S. at 251. That includes not adding words to a statute. *Id.* (where "prevailing party" does not appear in fee shifting statute, it is error to limit eligibility for fees to prevailing parties). Indeed, Petitioner's argument, which asks the Court to add unincluded terms, seeks to "invent" rather than "interpret" the statute. *Id.*

For these reasons, the Ninth Circuit and Respondents correctly interpret the Clean Water Act, and this Court should reject Petitioner's misconstruction.

B. The County's Interpretation Would Not Protect The Band's Important Natural Resources.

The interpretation Petitioner and supporting *amici* offer, if adopted by this Court, would have severe consequences for water quality and natural resource protection. A narrow construction that exempts any point source pollutant discharge through groundwater to navigable waters from the Clean Water Act threatens the Band's resources both on the Reservation and in the Ceded Territories.

1. Dischargers could easily evade the Clean Water Act permit requirement.

Resources on the Reservation and within the Ceded Territories lie downstream from numerous permitted water pollution discharges regulated under the Clean Water Act. *Watershed Health Assessment*

Framework, Minn. Dep't Nat. Resources, http://bit.ly/2Yhq2Sm (mapping tool that highlights all upstream feedlots, wastewater treatment facilities, and open pit mines). Dischargers include both publicly-owned facilities like wastewater treatment works, as well as private industries like mines, paper mills, and power plants. Many of these discharges flow into the St. Louis River watershed and include pollutants ranging from bacteria and nutrients to heavy metals and other toxics.

As described above, the St. Louis River and its watershed are vitally important to the Band. *See* Part I.B.2. Due to historic, pre-Clean Water Act pollution, the St. Louis River was designated a Great Lakes Area of Concern in 1987. *Sediment Studies: St. Louis River Area of Concern*, Minn. Pollution Control Agency, https://www.pca.state.mn.us/water/sediment-studies-st-louis-river-area-concern (last visited July 16, 2019). Overall, more than $420 million has been invested in the St. Louis River's clean-up and restoration since its designation. Minn. Pollution Control Agency et al., *A Roadmap to Delisting: St. Louis River Area of Concern Remedial Action Plan Update* 2 (2013).[29] Yet mining companies continue to propose new projects – like PolyMet – that without stringent Clean Water Act protections could stymie the progress made to remediate the St. Louis River watershed.

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[29] A copy of the Remedial Action Plan Update is available at https://stlouisriver.org/wp-content/uploads/2015/08/RoadmapSummaryBrochureSLR2013.pdf.

The rigid pipe-into-water interpretation Petitioner seeks to force on the statute contravenes the Clean Water Act's purpose and creates a perverse incentive for dischargers to simply discharge unregulated, nonpoint source pollution. In the National Association of Clean Water Agencies et al.'s *Amicus* Brief, for example, *amici* assert that a "discrete source of pollution cannot be a point source when groundwater or another intervening nonpoint source diffuses pollutants and carries them to navigable waters." (*Amicus Curiae* Nat'l Ass'n of Clean Water Agencies Br., 9). In other words, *amici* suggest that if the pollution from a discrete source – wastewater in a pipe, for instance – is first diffused – sprayed on the ground, for example – it is beyond the reach of the Clean Water Act's permitting program.

Such a rule would eviscerate the Clean Water Act. What would prevent existing or new dischargers from simply removing their outfalls from a surface water and instead placing them into adjacent groundwater, or allowing them to discharge on beaches or fields, or even spraying them as mist into the air? In PolyMet's case, this would require little more than removing the containment systems and simply allowing contaminates to flow into the groundwater untreated.

Petitioner's interpretation threatens decades of achievement to clean the Nation's surface waters, creating an incentive for polluters to design their discharges to travel through a "nonpoint" to avoid the need for a NPDES permit. The giant loophole Petitioner's interpretation would create contravenes Congress's intent to "restore and maintain the chemical,

physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The plain meaning of the statutory text compels the result the Ninth Circuit reached. The Clean Water Act's prohibition applies to *any* addition of pollutants to navigable waters from a point source, not just *direct* discharges.

2. Petitioner's assertion that other regulatory requirements sufficiently control groundwater-mediated discharges to surface waters is inaccurate.

Maintaining Clean Water Act jurisdiction over point sources that contaminate surface waters through groundwater seepage is vital to the protection of manoomin in the Ceded Territories. Petitioner suggests Clean Water Act jurisdiction is unnecessary because other existing laws provide the protections the Clean Water Act affords – particularly state laws governing groundwater and drinking water, and the federal Safe Drinking Water Act ("SDWA"), Coastal Zone Act ("CZA"), Comprehensive Environmental Response, Compensations, and Liability Act ("CERCLA"), and Resource Conservation and Recovery Act ("RCRA"). (Pet. Br. 43-44). But Minntac and its damage to manoomin exemplify why limiting the Clean Water Act would allow unregulated discharges to contaminate surface waters and, thereby, destroy the Band's important resource.

a. State Groundwater Protection

Petitioners contend state groundwater protection laws sufficiently regulate underground discharges from point sources such that Clean Water Act jurisdiction is superfluous. (Pet. Br. 43). But in Minnesota, standards governing groundwater are not equivalent to surface water standards and are often inadequate to protect the natural environment, including the protection of manoomin. Where the Clean Water Act's purpose extends to preserving the biological integrity of the Nation's waters, *see* 33 U.S.C. § 1251(a), Minnesota's groundwater laws focus on groundwater's importance for human consumption, *see* Minn. R. 7050.0140 (designating Class 1 waters for "[d]omestic consumption"); 7050.0221 (underground waters designated Class 1); 7060.0200 (nondegradation policy focused on maintaining a potable water supply for future generations). Consequently, Minnesota sets groundwater standards based on impact to human health, rather than impact on the environment.

Minntac's sulfate discharges illustrate why Minnesota's groundwater laws would not sufficiently protect the biological integrity of surface waters, particularly those with manoomin. Sulfate occurs naturally in much of Minnesota's groundwater. *See Sulfate in Well Water*, Minn. Dep't of Health, https://www.health.state.mn.us/communities/environment/water/wells/waterquality/sulfate.html, (last visited July 16, 2019). While humans unaccustomed to drinking water with elevated sulfate may experience diarrhea, most adjust after a few days. *Id.* The Minnesota Department of Health's

only precautions for human sulfate consumption are that water exceeding 250 mg/L may have a "bitter" or "medical taste" and that water with sulfate levels exceeding 500 mg/L should not be used to prepare infant formula. *Id.* Correlated with these human health determinations, Minnesota's groundwater water quality standard for sulfate is 250 mg/L. *See* Minn. R. 7050.0220, subpts. 3a(30), 4a(30) (Class 1B and 1C waters 250 mg/L); 7050.0221, subpts. 1-2 (Class 1A waters apply EPA standards); 40 C.F.R. § 143.3 (secondary maximum contaminant level for sulfate 250 mg/L).

In contrast, as set forth above, manoomin is very susceptible to sulfate levels. *See* Part I.B.1. In 1973, the Minnesota Pollution Control Agency adopted Minn. R. 7050.0224, subpt. 2 "to protect and support the growth of manoomin in Minnesota, and to comply with Clean Water Act requirements set by the U.S. Environmental Protection Agency." *Minn. Chamber of Commerce v. Minn. Pollution Control Agency*, No. A12-0950, 2012 WL 6554544, at *1 (Minn. Ct. App. Dec. 17, 2012). Minnesota set the surface water quality standard for sulfate at 10 mg/L, *see* Minn. R. 7050.0224, subpt. 2, based, in part, on the Minnesota Department of Natural Resource's recommendations that "sulfate concentrations above that level are a 'serious detriment to the natural and cultivated growth of wild rice.'" *Minn. Chamber of Commerce*, 2012 WL 6554544, at *1.

Plainly, without the surface water 10 mg/L standard, protecting, for example, the Twin Lakes from contamination via underground seepage from Minntac's tailings basin would be almost impossible. Seeps from

under the tailings basin could discharge with sulfate levels twenty-five times higher than the surface water standard, in compliance with Minnesota groundwater law, and continue to deplete the manoomin in the Twin Lakes. Consequently, eliminating Clean Water Act jurisdiction over discharges from point sources to surface water through groundwater would undermine the ability of the Band to protect this natural resource now and into the future.

b. CZA, RCRA, SDWA, CERCLA, and Related State Laws

Petitioners also assert the CZA, RCRA, SDWA, CERCLA, and related state laws adequately regulate groundwater and surface water pollution such that Clean Water Act jurisdiction is unnecessary. (Pet. Br. 43-44). Minntac, however, exemplifies exactly why these statutory schemes do not target the point source discharges Congress intended the Clean Water Act to regulate.

First, Petitioners point to the CZA as evidence that sufficient environmental protection exists outside the Clean Water Act. (*Id*. at 44). But the CZA only protects coastal zones, not inland waters like those on the Mesabi Iron Range. *See* 16 U.S.C. § 1455b(a)(1). Thus, for obvious reasons, the CZA would not protect manoomin from the Minntac discharges.

Second, Petitioners assert RCRA and its accompanying regulations allow EPA to "control[] and remediate[] groundwater contamination." (Pet. Br. 44).

"RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996). Congress intended RCRA "to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Id.* (quoting 42 U.S.C. § 6902(b)). But RCRA does not apply to all solid waste; in fact, Congress specifically exempted "[s]pent materials . . . generated within the primary mineral processing industry from which minerals, acids, cyanide, water, or other values are recovered by mineral processing or by beneficiation." 40 C.F.R. § 261.4(a)(17); *see also* Minn. R. 7045.0120 (Minnesota's exemption that mine waste is not hazardous waste). RCRA, thus, does not apply to the waste discharged into the environment from Minntac's tailings basin.

The SDWA similarly would not protect manoomin from Minntac's discharges. In particular, Petitioners point to the SDWA Part C, governing underground injection control wells, as protective of groundwater. (Pet. Br. 43). Congress intended Part C "to assure that underground sources of drinking water will not be endangered by any underground injection." *Nat. Res. Def. Council, Inc. v. Envtl. Protection Agency*, 824 F.2d 1258, 1268 (1st Cir. 1987). But Part C specifically applies to "well[s]," meaning "[a] bored, drilled, or driven shaft whose depth is greater than the largest surface dimension; or, a dug hole whose depth is greater than the

largest surface dimension; or, an improved sinkhole; or, a subsurface fluid distribution system." 40 C.F.R. § 146.3. The seeps underneath Minntac's tailings basin do not meet this definition; the seepage occurs because the basin is not lined and designed to leak. *Minntac Reissuance Order* ¶¶ 5-7.

More generally, however, Congress intended the SDWA "to assure that the water supply systems serving the public meet minimum national standards *for protection of public health*." H.R. Rep. No. 1185, at 1 (1974) (emphasis added). As such, while the Minnesota Department of Health lists sulfate in its "List of Contaminants in Water," as discussed above, the Minnesota Department of Health has few concerns regarding sulfate, as it naturally occurs in wells throughout the state. *Sulfate in Well Water*, *supra*. Consequently, the SDWA and state regulations do not protect manoomin from sulfate contamination where sulfate levels too high for manoomin are considered safe for human consumption.

Finally, Petitioner avers that CERCLA protects groundwater from "hazardous substances" such that regulating point source discharges under the Clean Water Act is unnecessary. (Pet. Br. 44). But Congress fundamentally intended CERCLA to serve a very different purpose than the Clean Water Act: promoting clean-up efforts for sites already contaminated with hazardous waste. *See Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). This contrasts with the Clean Water Act's broader purpose to not only "restore" the Nation's waters, but also to

"maintain" the waters by preventing future pollution. *See* 33 U.S.C. § 1251(a). Further, sulfate arguably does not meet the "hazardous substance" definition under CERCLA. *See* 42 U.S.C. § 9601(14); *Rhodes v. Cty. of Darlington, S.C.*, 833 F. Supp. 1163, 1178 (D.S.C. 1992); 40 C.F.R. § 302.4; *see also* Minn. Stat. §§ 115B.01-115B.53. Thus, the sulfate discharges from Minntac would not qualify the facility for CERCLA remediation.

For these reasons, Petitioner's interpretation not only undermines the Clean Water Act, it leaves valuable environmental resources unprotected by any federal or state scheme. The Band asks this Court to apply the Clean Water Act's plain language, interpret the statute consistent with the Clean Water Act's purpose, and apply the Clean Water Act in a way that protects the Band's important natural resources.

CONCLUSION

Because the Ninth Circuit's and Respondents' Clean Water Act interpretation is consistent with the Clean Water Act's plain language and such an interpretation is necessary to protect the Band's important

resources, *amicus curiae* urges the Court to affirm the Ninth Circuit's decision.

Respectfully submitted,

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JULY 19, 2019

No. 18-260

IN THE

Supreme Court of the United States

COUNTY OF MAUI, HAWAII,

Petitioner,

v.

HAWAII WILDLIFE FUND, ET AL.,

Respondents.

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

BRIEF FOR *AMICI CURIAE*
FORMER ADMINISTRATORS OF THE
U.S. ENVIRONMENTAL PROTECTION AGENCY
IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are a bipartisan group of former Administrators of the United States Environmental Protection Agency (EPA).[2] *Amici*'s leadership of EPA stretches from the 1980s to this decade, including both Republican and Democratic administrations. *Amici* share a commitment to the uniform and consistent application of the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.*, as intended by Congress. In particular, *amici* share the view that the CWA charges EPA with protecting the navigable waters of the United States from pollutants discharged from point sources that travel to surface waters through groundwater. For decades, EPA has consistently articulated that view—and has regulated consistent with that view, including by issuing permits under the National Pollutant Discharge Elimination System (NPDES) program for point-source discharges to surface waters through hydrologically connected groundwater. Accepting the United States' recent reversal in position would effect a significant rollback in regulatory enforcement of the CWA that has been in place for decades.

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[1] In accordance with Supreme Court Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and that no party or counsel other than the *amici curiae* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this *amicus* brief.

[2] *Amici* are identified in an appendix to this brief.

SUMMARY OF ARGUMENT

For decades, EPA has consistently interpreted the CWA to apply the requirements of the NPDES program to the discharge of pollutants from a point source to navigable waters of the United States when it can be proven as a matter of fact that those pollutants travel through groundwater. That position—unbroken until a few months ago—is consistent with the text, structure, and purposes of the CWA. In contrast, the brand new (opposite) position articulated by the Solicitor General has no basis in the statutory text or scheme and would open a huge loophole in the congressionally mandated protection of surface waters. All agree that the CWA does not regulate the quality of groundwater *qua* groundwater. But the CWA *does* protect surface waters by limiting the introduction of pollutants from point sources—including when pollutants demonstrably travel from a point source to surface waters. This Court should reject the Solicitor General and petitioner's invitation to mandate a significant reversal in federal environmental policy by rolling back CWA protections in this context.

ARGUMENT

For decades—until a few months ago—the United States Environmental Protection Agency (EPA) has correctly understood that the Clean Water Act (CWA or Act), 33 U.S.C. § 1251 *et seq.*, regulates the discharge of pollutants from a point source when it can be proven that the pollutants travel to jurisdictional surface waters through groundwater. Indeed, EPA took that position as *amicus* in the court of appeals *in this case*. *See* U.S. C.A. Br. 3-5, 11-24. That longstanding position is correct because it is mandated by the CWA's

text, structure, and purpose. In contrast, the United States' new position—adopted after this Court granted the petition for a writ of certiorari in this case—is inconsistent with the statute and would open an enormous loophole in what Congress intended to be a comprehensive statutory scheme. The Court should reject the United States' newly discovered and misguided interpretation of the CWA and instead adopt EPA's longstanding position.

I. For Decades, EPA Has Correctly Interpreted The CWA To Apply To Point-Source Discharges Of Pollutants To Surface Waters Via Hydrologically Connected Groundwater.

Amici are former Administrators of EPA. They represent EPA leadership spanning Republican and Democratic administrations. And through each of their tenures, the Agency adhered to a consistent view that the CWA's National Pollutant Discharge Elimination System (NPDES) program applies to the discharge of pollutants from point sources to surface waters via groundwater with a direct and demonstrable hydrological connection to the surface waters. That longstanding view is compelled by the text, structure, and purposes of the CWA—which is why EPA espoused that view for decades, including in this case, and why it has long issued NPDES permits for discharges of pollutants similar to those at issue here.

A. The federal CWA is intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 301 of the CWA prohibits "the discharge of any pollutant" except "as in compliance with" specified provisions of the Act. *Id.* § 1311(a); *see id.* § 1362(12). The term "pollutant" is defined to include various types of

waste (including chemical wastes, solid waste, sewage, and biological materials) "discharged into water," and the term "discharge of a pollutant" is defined to include "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(6), (12). The CWA further defines "navigable waters" as "the waters of the United States, including the territorial seas" and defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any . . . well . . . from which pollutants are or may be discharged." *Id.* § 1362(7), (14).

The CWA thus establishes a regime in which point-source discharges of covered pollutants are prohibited unless they are authorized by a permit issued pursuant to the NPDES. 33 U.S.C. § 1342; *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987) ("Section 301(a) of the Act, 33 U.S.C. § 1311(a), generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained an NPDES permit from the Environmental Protection Agency."). The CWA provides that the EPA Administrator or the States, *see* 33 U.S.C. § 1342(b), may "issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding" the general prohibition on discharges in Section 1311(a), "upon condition that such discharge will meet" statutory criteria or criteria established by the Administrator. *Id.* § 1342(a)(1). A typical NPDES permit limits the type and amount of pollutants that may be discharged, and imposes monitoring and reporting requirements on the discharger. *See ibid.*; *id.* § 1362(11). When numeric limitations are not feasible, the permitting agency may include "best management practices" requirements instead. 40 C.F.R. § 122.2; *id.* § 122.44(k). EPA

and States also have authority to issue a "general permit" covering a category of discharges in a specified geographical area where discharges can be managed without issuing individual permits. *Id.* § 122.28.

B. The CWA does not regulate the quality of groundwater; all parties agree that Congress left the regulation of groundwater *qua* groundwater primarily to the States.[3] The NPDES program is instead directed to protecting surface waters, and in particular to regulating any addition of pollutants *from* point sources *to* surface waters. For decades, EPA—the agency Congress charged with overseeing the CWA and the NPDES program—has repeatedly confirmed that the CWA covers the discharge of pollutants *from* point sources *to* surface waters *via* groundwater. That approach makes sense because when groundwater carries pollutants from a point source to surface waters, those pollutants have been "add[ed] . . . to navigable waters from any point source." 33 U.S.C. § 1362(12).

1. In 1990, EPA promulgated a final rule on NPDES permit applications for the discharge of storm water. *NPDES Permit Application Regulations for Storm Water Discharges*, 55 Fed. Reg. 47,990 (Nov. 16, 1990). In that rule, EPA explained that "discharges to ground waters [we]re not covered by th[e] rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body)." *Id.* at 47,997. A year later, the agency reiterated its view

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[3] Groundwater quality is regulated by the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*, to the extent groundwater affects "drinking water sources," *id.* § 300h(b)(1), defined as "underground water which supplies or can reasonably be expected to supply any public water system," *id.* § 300h(d)(2).

that the CWA "requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters." *1991 Final Rule Addressing Water Quality Standards on Indian Lands*, 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991). In that rule, EPA acknowledged "the strong language in the legislative history of the [CWA] to the effect that the Act does not grant EPA authority to regulate pollution of groundwaters"—and, critically, explained that "[i]n these situations, the affected groundwaters are not considered 'waters of the United States' but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters." *Ibid.* The agency reiterated that position again in 1997 and in 1998. *Final General NPDES Permit for Concentrated Animal Feeding Operations (CAFO) in Idaho ID-G-01-0000*, 62 Fed. Reg. 20,177, 20,178 (Apr. 25, 1997) (explaining that, although the CWA "does not give EPA the authority to regulate groundwater quality through NPDES permits," "groundwater may be affected by the NPDES program" "when a discharge of pollutants to surface waters can be proven to be via groundwater"); *Reissuance of NPDES General Permits for Storm Water Discharges from Construction Activities*, 63 Fed. Reg. 7858, 7881 (Feb. 17, 1998) ("EPA interprets the CWA's NPDES permitting program to regulate discharges to surface water via groundwater where there is a direct and immediate hydrologic connection.").

EPA reiterated its long-held view in a variety of other statements published in the *Federal Register* throughout the 1990s and early 2000s. *See*, *e.g.*, *Proposed General NPDES Permit for CAFOs in Idaho*, 60 Fed. Reg. 44,489, 44,493 (Aug. 28, 1995) (explaining

that permit "prohibits the discharge of process wastewater to waters of the United States by means of a hydrologic connection" and that "discharges that enter surface waters indirectly through groundwater are prohibited"); *Notice of Lodging of Consent Decree Pursuant to the CWA; ConAgra, Inc.*, 63 Fed. Reg. 55,409, 55,409 (Oct. 15, 1998) (explaining that consent decree addresses "violations of the CWA . . . including . . . unauthorized discharges of pollutants to surface waters via . . . hydrologically-connected groundwater"); *Hazardous Waste Identification Rule (HWIR): Revisions to the Mixture and Derived-From Rules*, 66 Fed. Reg. 27,266, 27,272 n.4 (May 16, 2001) (explaining that, although "[t]he current federal [NPDES] program under the CWA does not require permitting authorities to issue permits for discharges of wastewater to groundwater," "[t]he exception is those instances in which a discharge to surface water may occur via a hydrologic connection between a groundwater and surface water").

2. On the heels of those consistent and repeated statements of agency interpretation, EPA reiterated that view in 2001 in a "formal agency interpretation," accompanied by extensive legal analysis, as part of a notice of proposed rulemaking for concentrated animal feeding operations (CAFOs). Directly addressing whether the CWA's NPDES program applies to the discharge of pollution from a CAFO through groundwater, EPA "restat[ed] that the Agency interprets the Clean Water Act to apply to discharges of pollutants from a point source via ground water that has a direct hydrologic connection to surface water." *NPDES Permit Regulation and Effluent Limitations Guidelines and Standards for CAFOs*, 66 Fed. Reg. 2960, 3015 (Jan. 12, 2001). The agency then set out an extensive

legal argument in support of its long-held view, explaining both why EPA has authority to "determin[e] that a discharge to surface waters via hydrologically-connected ground waters can be governed by the Act" and why "the Act is best interpreted to cover such discharges." *Ibid.* In light of the text, structure, legislative history, and purposes of the Act—and relying on its "expertise in environmental science and policy, *id.* at 3018—the agency explained its view that "the Act is best interpreted to cover such discharges," *id.* at 3015.

Examining the text and structure of the statute, EPA reasoned that "the terms" of the CWA "clearly indicate Congress' broad concern for the integrity of the Nation's waters" by specifying, *inter alia*, that the requirements of the NPDES program apply to "'the discharge of any pollutant [from a point source] by any person.'" 66 Fed. Reg. at 3015 (quoting 33 U.S.C. § 1311(a)) (brackets in original). The agency acknowledged that "[s]ome sections of the CWA do directly apply to ground water" and noted that those and "other sections of the [CWA] may shed light on the question of whether Congress intended the NPDES program to regulate ground water quality." *Ibid.* But the agency went on to explain that "[t]hat question" "is not the same question as whether Congress intended to protect surface water from discharges which occur via ground water." *Ibid.* "EPA does not argue that the CWA directly regulates ground water quality," the agency explained. *Id.* at 3016. "In the Agency's view, however, the CWA does regulate discharges to surface water which occur via ground water because of a direct hydrologic connection between the contaminated ground water and nearby surface water." *Ibid.*

Examining the legislative history of the CWA, EPA explained that Representative Les Aspin had proposed an amendment to be included in the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, that would have extended the NPDES program to cover "any pollutant to ground waters from any point source." 66 Fed. Reg. at 3016 (quoting *Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 589 (1972)). Although that proposed amendment was ultimately rejected, the agency explained that "provisions in the amendment which would have deleted exemptions for oil and gas well injections were the more likely cause of the amendment's defeat." *Ibid.* EPA went on to explain that "there is no evidence that in rejecting the explicit extension of the NPDES program to all ground water Congress intended to create a ground water loophole through which the discharges of pollutants could flow, unregulated, to surface water." *Ibid.* "Instead," the agency explained, "Congress expressed an understanding of the hydrologic cycle and an intent to place liability on those responsible for discharges which entered the 'navigable waters.'" *Ibid.* The agency thus "determined that discharges via hydrologically connected ground water impact surface waters and, therefore, should be controlled at the source." *Ibid.*

The agency went on to explore its previous statements on this question, explaining that "EPA repeatedly has taken the position that the CWA can regulate discharges to surface water via ground water that is hydrologically connected to surface waters," identifying at least six such occasions. 66 Fed. Reg. at 3016-

3017. In so concluding, "[a]s a legal and factual matter, EPA has made a determination that, in general, collected or channeled pollutants conveyed to surface waters via ground water can constitute a discharge subject to the Clean Water Act"—and explained that "[t]he determination of whether a particular discharge to surface waters via ground water which has a direct hydrologic connection is a discharge which is prohibited without an NPDES permit is a factual inquiry, like all point source determinations." *Id.* at 3017. The interpretive statement also surveyed the case law on this question, explaining that "[t]he reasonableness of the Agency's interpretation is supported by the fact that the majority of courts have determined that CWA jurisdiction may extend to surface water discharges via hydrologic connections." *Ibid.*; *id.* at 3016.

The 2001 proposed rule ultimately emphasized that EPA "has made clear the rationale for its construction"—namely, that "[t]he Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwater and surface waters." 66 Fed. Reg. at 3018 (internal quotation marks omitted). "In these situations," EPA explained, "the affected ground waters are not considered 'waters of the United States' but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters." *Ibid.* (internal quotation marks and emphasis omitted). In the final rule that EPA ultimately adopted, it opted to continue with its existing case-by-case approach to determining which discharges to surface waters through groundwater are subject to the requirements of the NPDES program. *NPDES Permit Regulation and Effluent Limitation Guidelines and*

Standards for CAFOs, 68 Fed. Reg. 7176, 7216 (Feb. 12, 2003). In doing so, the agency explained that the final rule "shall [not] be construed to expand, diminish, or otherwise affect the jurisdiction of the Clean Water Act over discharges to surface water via groundwater that has a direct hydrologic connection to surface water." *Id.* at 7216-7217.

Since 2001, EPA and other federal agencies have reiterated the view that point-source discharges of pollutants that travel to surface waters via groundwater are governed by the NPDES program. In 2015, for example, EPA and the U.S. Army Corps of Engineers promulgated the "Clean Water Rule," which defines the scope of waters protected by the CWA and reaffirmed that, because groundwater itself is not included in that definition, groundwater quality is not subject to regulation under the CWA. *Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054 (June 29, 2015). But EPA later explained, in response to comments to the Clean Water Rule, that EPA "has a longstanding and consistent interpretation that the" CWA "may cover discharges of pollutants from point sources to surface water that occur via ground water that has a direct hydrologic connection to the surface water" and made clear that "[n]othing in this rule changes or affects that longstanding interpretation." EPA, *Clean Water Rule Response to Comments—Topic 10: Legal Analysis* 383 (internal quotation marks omitted).[4]

Even more recently, as noted above, the United States reiterated its position *in this case* in the Ninth

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[4] https://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_10_legal.pdf (last visited July 18, 2019).

Circuit in 2016. That brief traces the history of the EPA's position on the question presented, explaining that "EPA's longstanding position has been that point-source discharges of pollutants moving through groundwater to a jurisdictional surface water are subject to CWA permitting requirements if there is a 'direct hydrological connection' between the groundwater and the surface water." U.S. C.A. Br. 22. Notably, the United States argued in that brief that, "[t]o the extent there is statutory ambiguity about whether the CWA applies to discharges to jurisdictional surface waters through groundwater, EPA's" longstanding interpretation was entitled to deference pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). U.S. C.A. Br. 12, 24. Although the statutory text is clear, such deference makes particular sense in a statutory scheme that this Court has described as "establish[ing]" "a comprehensive regulatory program supervised by an expert administrative agency." *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). The Solicitor General makes no such argument with respect to the new position articulated in his brief in this Court. And, indeed, no degree of deference is due to the United States' new position, which both "conflicts with a prior interpretation" of the agency "and appears" to be "nothing more than a convenient litigating position." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (internal quotation marks omitted).

C. EPA's longstanding position is consistent with the statutory text, which prohibits the unpermitted "discharge of any pollutant by any person," 33 U.S.C. § 1311(a), where "discharge of a pollutant" is

defined to mean "any addition of any pollutant to navigable waters from any point source" or to "the contiguous zone or the ocean." *Id.* § 1362(12). In this case, the parties agree that petitioner has discharged pollutants from a point source and that those pollutants are entering the ocean. The only dispute is whether Congress's use of the words "from" and "to" means "directly into" or whether it instead includes indirect discharges that travel from the point source to surface waters through other media, including groundwater.

1. The word "to" is used "to indicate movement or an action or condition suggestive of movement toward (1) a place, person, or thing that is reached or is thought of as being reached." *Webster's Third New International Dictionary* 2401 (1993). That preposition does not, in its ordinary usage, require a contiguous connection between the starting point and the end point. The word "from" is similarly used "to indicate a starting point: as (1) a point or place where an actual physical movement (as of departure, withdrawal, or dropping) has its beginning." *Id.* at 913. Each word suggests movement from a starting point to an ending point. But neither word—in isolation or in combination—suggests an unbroken connection between start and finish with no intervening step. When a man says he is driving "from Maryland to New York," for example, everyone understands him to mean that Maryland is his starting place and New York is his destination—but no one would interpret his statement to mean that he will not pass through other States on his way from Maryland to New York. Similarly, when a woman says she is mailing a letter "from Texas to Florida," everyone understands her to mean that the letter will be transmitted by a postal delivery service rather than by

her own hand and that the letter will travel through and/or over the intervening States. The CWA's use of the words "from" and "to" should also be understood in this ordinary sense: when the Act prohibits the discharge of pollutants from a point source to surface waters, it includes pollutants that travel through groundwater (or over land or by other traceable means) from the point source to the surface waters. Justice Scalia recognized as much when he explained in his plurality opinion in *Rapanos v. United States* that the CWA "does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" 547 U.S. 715, 743 (2006) (quoting 33 U.S.C. § 1362(12)(A)) (emphases in original).

If there were any doubt about whether the words "to" and "from" include discharges that are directly connected from a point source to navigable water through an intermediary, the rest of the statutory scheme would dispel it. This Court has explained that "[t]he major purpose of the [CWA] was to establish a *comprehensive* long-range policy for the elimination of water pollution," *City of Milwaukee*, 451 U.S. at 318 (internal quotation marks omitted), and has noted that "Congress criticized past approaches to water pollution control as being 'sporadic' and 'ad hoc,'" *id.* at 325 (quoting S. Rep. No. 92-414, at 95 (1971)). Other parts of the relevant provisions confirm the Act's broad goal of safeguarding surface waters. The CWA defines "discharge of a pollutant to mean "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C. § 1362(12)(A) (emphases added). This Court has explained, when interpreting the similarly worded Clean Air Act, 42 U.S.C. § 7401 *et seq.*, that Congress's

repeated use of the word "any" in defining a statutory term indicates that Congress intended the definition to be "sweeping." *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007). In light of that intent, the only statutory interpretation that makes sense is one that includes pollution discharges from a point source to surface waters through groundwater.

2. To be clear, not all transmissions of pollutants *from* a point source *to* surface waters *through* groundwater are covered by the CWA, under EPA's long-held view. Where causation is a feature of statutory liability, ordinary principles of statutory construction usually require a showing of proximate cause—that is, a "direct relation between the injury asserted and the injurious conduct alleged." *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017) (citation omitted). In this context, such a "direct relation" can be established without showing a directly contiguous physical relationship between the starting and finishing points. If an archer shot an arrow from Main Street to Elm Street, her release of the arrow would be the proximate cause of damage inflicted by the arrow's landing, even though the arrow traveled through air and space to get from the beginning of its journey to its end. So too here, when a pollutant travels from a point source to surface waters, there is a "direct relation" between the release and the subsequent pollution when the pollutant travels through groundwater with a direct hydrological connection to the receiving surface waters. Notably, EPA has never claimed that the CWA covers all transmissions of pollutants from a point source to surface waters via groundwater; it has always required a direct hydrological connection between point A and point B. *E.g.*, 56 Fed. Reg. at 64,892; 66 Fed. Reg. at

3016. As EPA has explained, whether a direct hydrological connection exists is a "factual inquiry" that depends on "time and distance" as well as "geology, flow, and slope." 66 Fed. Reg. at 3017. The concept of a direct hydrological connection is not an addition to the statutory text; rather, it is an interpretation of the text that incorporates ordinary principles of proximate cause to determine whether an addition of pollutants to navigable waters is "from" a point source within the meaning of the statute.

3. The Solicitor General's newfound position makes little sense in light of the text and structure of the CWA.

a. The Solicitor General defends the United States' new position primarily by arguing that the NPDES program does not regulate groundwater quality. But that point is uncontested. By its express terms, the CWA protects surface waters—and the NPDES program applies to pollution of "navigable waters," "the contiguous zone[,] or the ocean." 33 U.S.C. § 1362(12)(A), (B). But nothing in EPA's longstanding position purports to regulate groundwater quality. To the contrary, EPA has repeatedly disclaimed any attempt to regulate the pollution of groundwater *qua* groundwater. *See*, *e.g.*, 55 Fed. Reg. at 47,997; 56 Fed. Reg. at 64,892; 62 Fed. Reg. at 20,178; 66 Fed. Reg. at 3015-3016. Instead, EPA has regulated the pollution of *surface waters*, as mandated by the statutory text, which itself contains no exception for pollution that is delivered from a point source to navigable waters via hydrologically connected groundwater. That is a regulation of surface waters, not of groundwater quality. If, for example, a point source injected pollutants into groundwater—even groundwater flowing directly into

adjacent navigable waters—but stopped those pollutants before they reached the surface waters, there would be no addition of pollutants to the navigable waters, and the CWA's NPDES requirements would not apply. Congress left regulation of that type of pollution—and of the quality of groundwater more generally—largely to the States (except where a separate federal law applies).

The Solicitor General's argument in this Court that EPA's longstanding application the statute would necessitate the regulation of groundwater quality is curious in light of the United States' consistent practice of not regulating groundwater quality under the Act and of its explanation below that regulation of the discharge of pollutants from a point source *to* navigable waters *via* groundwater *is not* regulation of groundwater. U.S. C.A. Br. 17. Similarly, the United States presciently refuted the Solicitor General's later reliance (SG Br. 25-29) on the treatment of groundwater in legislative history, explaining that it "only supports the unremarkable proposition with which all courts agree—that the CWA does not regulate 'isolated/nontributary groundwater' which has no [effect] on surface water.'" U.S. C.A. Br. 18 (quoting *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001)) (brackets in original). That proposition, the United States explained, "does not undermine the conclusion that discharges of pollutants through groundwater to jurisdictional surface waters are subject to the NPDES program." *Ibid.*; *see id.* at 19 (explaining that "whether groundwater itself" is "a water within the meaning of the CWA" "is distinct from whether a CWA permit is required when pollutants

travel to jurisdictional surface waters through groundwater with a direct hydrological connection"); *id.* at 21 ("This emphatically is not a case about the regulation of groundwater. Instead it is about the regulation of discharges of pollutants to waters of the United States.").

In the court of appeals, the United States accused petitioner of "erroneously attempt[ing] to conflate the jurisdictional exclusion of groundwater with the role that groundwater can play as the pathway through which pollutants from a point source reach jurisdictional surface waters." U.S. C.A. Br. 25. In this Court, the Solicitor General repeats petitioner's mistake, suggesting (at 30) that adopting EPA's longstanding position would be tantamount to using "the CWA's NPDES permitting requirements" "for the protection of groundwater quality." The NPDES program is indisputably directed to the protection of surface waters—including by regulating point-source pollution that enters surface waters via groundwater. *Amicus* Edison Electric Institute similarly confuses (at 21-32) the regulation of groundwater *qua* groundwater with the regulation of pollutants from a point source added to surface waters through hydrologically connected groundwater, when it argues that EPA has repeatedly declined to exercise NPDES authority over groundwater.

b. Accepting the Solicitor General's new position would create a huge loophole in the regulation of point-source pollution of surface waters. If the NPDES program excludes point-source discharges to navigable waters through groundwater, polluters could avoid the permitting regime by simply depositing their pollutants in a pit several feet from a navigable water like Lake Michigan or the Missouri River and allowing

them to seep into those waters via groundwater. As the United States explained below, however:

> [I]t would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factor directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater.

U.S. C.A. Br. 16 (quoting *N. Cal. River Watch v. Mercer Fraser Co.*, 2005 WL 2122052, at *2 (N.D. Cal. Sept. 1, 2005)). The Solicitor General now rejects that commonsense position.

Notably, the Solicitor General is not willing to commit to a statutory standard that would in all cases require *direct* transmission of pollutants from a point source to surface waters in order to qualify for coverage under the NPDES program. The Solicitor General's position is limited to exempting discharges that travel through groundwater—and he urges the Court "not [to] determine how the NPDES program might apply where pollutants released from a point source travel to jurisdictional surface waters over land." SG Br. 33. The only statutory basis the Solicitor General offers for drawing that line is the one discussed above: the CWA does not regulate the quality of groundwater. *Id.* at 34-35. That distinction is meaningless, however, once it is understood that EPA's longstanding position does not purport to regulate groundwater quality at all. What is left of the Solicitor General's position is an exemption apparently crafted for this litigation, without grounding in the statute or in EPA's historical enforcement of the CWA.

II. Accepting The Solicitor General's Newfound Position Would Require A Significant Retreat From EPA's Longstanding Enforcement Of The CWA.

The Solicitor General argues that if this Court were to accept EPA's longstanding position, that would "work 'an enormous and transformative expansion in EPA's regulatory authority.'" SG Br. 24 (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)). In fact, the opposite is true: accepting the Solicitor General's new position would work an enormous and transformative *rollback* in EPA's regulatory authority.

As the United States explained in its court of appeals brief, for years "EPA and states have been issuing permits for" "point-source discharges to jurisdictional surface waters through groundwater with a direct hydrological connection" "from a number of industries, including chemical plants, concentrated animal feeding operations, mines, and oil and gas waste-treatment facilities." U.S. C.A. Br. 29-30 (citing NPDES Permit No. NM0022306[5]; NPDES Permit No. WA0023434[6]). In 2016, for example, EPA issued an NPDES permit to a wastewater treatment facility in Wisconsin because data showed a direct hydrological connection between groundwater beneath the site and adjacent surface waters. EPA Region 5, NPDES Permit No. WI0073059 (Sept. 22, 2016).[7]

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[5] https://www.env.nm.gov/swqb/NPDES/Permits/NM0022306-Chevron-Questa.pdf.

[6] https://www.epa.gov/sites/production/files/2017-09/documents/r10-npdes-taholah-wa0023434-final-permit-2015.pdf.

[7] https://www.epa.gov/sites/production/files/2017-02/documents/wi0073059fnlprmt09_22_2016_0.pdf.

The Solicitor General therefore errs in asserting that adhering to the status quo would create a dramatic expansion of EPA's regulatory authority over the discharge of pollutants to surface waters. Nor is the Solicitor General correct (at 24-25) that adhering to EPA's longstanding view will suddenly subject private homeowners with faulty septic systems to unprecedented liability under the CWA. EPA already requires a NPDES permit for any septic system that discharges pollutants to surface waters. EPA, *Response to Congress on Use of Decentralized Wastewater Treatment Systems* 5 (Apr. 1997).[8] That requirement has not burdened homeowners because siting requirements for septic systems already seek to avoid discharges to navigable waters. *Ibid.* In any event, when EPA (or a State implementing the NPDES program) determines that a category of numerous discharges poses a threat to surface waters that can be managed without requiring individual permits, the agency can issue a general permit for activities conducted pursuant to proper practices specified in the general permit. EPA has done just that for the innumerable stormwater discharges from small construction projects. *Final NPDES General Permit for Stormwater Discharges from Construction Activities*, 82 Fed. Reg. 6534 (Jan. 19, 2017). And it has done the same for applications of pesticides. *Final NPDES Pesticide General Permit for Point Source Discharges from the Application of Pesticides; Reissuance*, 81 Fed. Reg. 75,816 (Nov. 1, 2016). Other *amici* make the same mistake in asserting that accepting EPA's longstanding interpretation of the

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[8] https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=200047VF.TXT.

CWA would expand liability and costs under the CWA for septic systems and green infrastructure. *See* Senators *Amicus* Br. 22-23; Wychmere *Amicus* Br. 10-12; Nat'l Conf. of State Legislatures *Amicus* Br. 8-19; Nat'l Ass'n of Clean Water Agencies *Amicus* Br. 12-20; Nat'l Ass'n of Home Builders *Amicus* Br. 4-16; Fed. Water Quality Coal. *Amicus* Br. 20-21; Energy Transfer Partners *Amicus* Br. 10-19; Agric. Bus. Orgs. *Amicus* Br. 20-32; U.S. Chamber of Commerce *Amicus* Br. 8-10.

Notably, neither petitioner, the Solicitor General, nor any of petitioner's other *amici* can identify any *actual* problem or unmanageable burden that has resulted from EPA's decades-long application of the NPDES program to the point-source discharge of pollutants that travel to surface waters through groundwater. *Amici*'s suggestions that the approaches adopted below and by the Fourth Circuit in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 (4th Cir. 2018), *petition for cert. pending*, No. 18-268 (filed Aug. 28, 2018)—both of which utilize a fact-specific, case-by-case approach just as EPA has done for decades—are unworkable and contain no limiting principles simply ignore that those courts merely reaffirmed EPA's existing approach to regulating these types of discharges. *See* Kinder Morgan *Amicus* Br. 27; Wash. Legal Found. *Amicus* Br. 16; Fed. Water Quality Coal. *Amicus* Br. 9-10, 18-20; States *Amicus* Br. 12, 18; Wychmere *Amicus* Br. 12; Nat'l Conf. of State Legislatures *Amicus* Br. 36-38; Nat'l Ass'n of Clean Water Agencies *Amicus* Br. 10-11. The same is true of *amici*'s arguments that NPDES permits will be difficult to craft in this context because of challenges in identifying monitoring locations and applying effluent limitations. *See* Kinder Morgan *Amicus* Br. 31;

Pac. Legal Found. *Amicus* Br. 19-20; Wash. Legal Found. *Amicus* Br. 11; Wychmere *Amicus* Br. 13; Fed. Water Quality Coal. *Amicus* Br. 19; Nat'l Conf. of State Legislatures *Amicus* Br. 30-36; Nat'l Ass'n of Clean Water Agencies *Amicus* Br. 12-20; U.S. Chamber of Commerce *Amicus* Br. 10-11; Edison Elec. Inst. *Amicus* Br. 38. As the United States explained in the court of appeals, EPA and States that implement the NPDES program have been issuing permits in this context for years.[9]

Finally, *amici* miss the mark in arguing that continuing to construe the CWA to cover point-source discharges to surface waters via hydrologically connected groundwater would displace various state and federal laws. *See* SG Br. 31; Kinder Morgan *Amicus* Br. 21-24; Wash. Legal Found. *Amicus* Br. 12; Senators *Amicus* Br. 20; Nat'l Ass'n of Clean Water Agencies *Amicus* Br. 29-37; Fed. Water Quality Coal. *Amicus* Br. 15-16; Edison Elec. Inst. *Amicus* Br. 33-39; States *Amicus* Br. 8, 20-24; Fla. Water Env't Ass'n *Amicus* Br. 9-10; Wychmere *Amicus* Br. 16-20. First, as discussed, the CWA does not regulate the quality of groundwater; the NPDES program regulates pollutants flowing from a

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[9] *Amicus* Agricultural Business Organizations' similar claim (at 29) that obtaining this type of NPDES permit costs "tens of thousands (or even hundreds of thousands) of dollars and months or years of waiting" is exceedingly misleading. The only source *amicus* cites discusses the costs associated with securing a very different type of permit—a permit under Section 404 of the CWA, 33 U.S.C. § 1344, for filling wetlands—that is not at issue here. *See* David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 62-63 (2002).

point source to surface waters via groundwater. Second, even where the requirements of the NPDES program apply, States themselves implement the NPDES program in nearly every State and are free to supplement the requirements of the NPDES program with additional protective measures. 33 U.S.C. § 1342(b)(1)(A); *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981) (noting that the CWA "created various federal minimum effluent standards"). Third, *amicus* Edison Electric Institute errs in contending (at 33-37) that EPA's longstanding position "would *supplant* regulations promulgated under [the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6901 *et seq.*,] that are specifically tailored to address groundwater contamination that reaches surface waters" because the RCRA excludes certain point-source discharges that are subject to NPDES permitting. To the contrary, EPA has long adhered to the view that "wastewater releases to groundwater from treatment and holding facilities . . . remain within the jurisdiction of RCRA" *and* "are subject to CWA jurisdiction, based on EPA's interpretation that discharges from point sources through groundwater where there is a direct hydrologic connection to nearby surface waters of the United States are subject to the prohibition against unpermitted discharges, and thus are subject to the NPDES permitting requirements." Memorandum from Michael Shapiro & Lisa K. Friedman, EPA Office of Solid Waste, *Interpretation of Industrial Wastewater Discharge Exclusion from the Definition of Solid Waste* 3 (Feb. 17, 1995).[10]

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[10] https://rcrapublic.epa.gov/files/11895.pdf.

In short, neither petitioner nor any of its *amici* has offered any valid reason to depart from the statutory text or discard decades of settled agency understanding that the CWA governs the point-source discharge of pollutants to surface waters through groundwater with a direct hydrological connection. This Court should reject the Solicitor General's new litigation position, which is not grounded in the statutory text or in sound policy.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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July 19, 2019

APPENDIX

APPENDIX

Amici curiae former Administrators of the U.S. Environmental Protection Agency are:

William Reilly, EPA Administrator 1989-1993,

Carol Browner, EPA Administrator 1993-2001, and

Gina McCarthy, EPA Administrator 2013-2017.

No. 18-260

IN THE

Supreme Court of the United States

COUNTY OF MAUI,

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

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July 12, 2019

QUESTION PRESENTED

When a pollutant released from a point source travels a short distance through groundwater before foreseeably reaching navigable surface waters, does that point-source discharge fall within the Clean Water Act's prohibition of unpermitted additions of any pollutant to navigable waters from any point source?

RULE 29.6 STATEMENT

Respondents Hawai'i Wildlife Fund, Surfrider Foundation and West Maui Preservation Association are nonprofit organizations that have no parent corporations, and no publicly held company has any ownership interest in them.

Respondent Sierra Club – Maui Group is part of the Sierra Club, which is a nonprofit organization that has no parent corporation, and no publicly held company has any ownership interest in it.

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INTRODUCTION

The keystone provision of the Clean Water Act (CWA) is its prohibition of "any addition of any pollutant to navigable waters from any point source" without a permit. 33 U.S.C. § 1362(12)(A); *see id.* §§ 1311(a), 1342. The County of Maui (County) and the United States Environmental Protection Agency (EPA) seek to avoid application of this prohibition to the County's Lahaina Wastewater Reclamation Facility (Lahaina Facility) by asserting that all additions of pollutants "to navigable waters from [a] point source" *via groundwater* are exempt. The CWA's text, and its structure and purposes, foreclose such an exemption.

The County designed the Lahaina injection wells to dispose of millions of gallons of treated sewage daily into the groundwater beneath the Facility, and it did so knowing these pollutants would flow into the Pacific Ocean. The wells undisputedly achieve this purpose: Large quantities of effluent injected at the wells flow into the ocean near the Facility. Likewise, there is no dispute that the wells are "point source[s]" under the CWA, *id.* § 1362(14), that the effluent from them is a "pollutant," *id.* § 1362(6), and that the Pacific immediately off the Maui coastline is a "navigable water[]," *id.* § 1362(7); *see also id.* § 1362(8). A straightforward reading of the CWA's core prohibition, therefore, bars the County's unpermitted "addition of [a] pollutant"—the Facility's effluent—"to navigable waters"—the Pacific—"from [a] point source"—the wells.

The County and EPA—which reversed its position in an "interpretive statement" issued after this Court granted certiorari, 84 Fed. Reg. 16,810 (Apr. 23, 2019)—offer competing rationales for exempting the

County's discharges from the Act's requirements. The County urges a "means-of-delivery test" that would limit the CWA's prohibition to unpermitted discharges that *directly* reach navigable waters through an unbroken chain of point sources. EPA rejects the County's test but proffers a newly minted reading of the Act that would exclude from its prohibition any addition of pollutants to navigable waters from a point source *through groundwater*.

The CWA's text contradicts these cramped readings. EPA does not even attempt to square its reading with the Act's operative provisions. Both the County and EPA rely on unsupported inferences drawn from inapplicable provisions of the Act, and on the implausible theory that Congress, in focusing the CWA on point-source pollution of surface waters, intended to exempt any such pollution that ever travels through groundwater, over any distance, for any amount of time. The Act's terms, however, express Congress's intent to prohibit the unpermitted discharge from disposal wells of pollutants that actually and foreseeably reach navigable surface waters.

Requiring a permit for such point-source discharges serves the Act's purpose of eliminating pollution of navigable waters, and does so without imposing undue regulatory burdens. Either the County's or EPA's view, by contrast, would open a substantial loophole in the CWA, allowing polluters to achieve indirectly what they cannot do directly: discharge pollutants from point sources into navigable waters without a permit. As Justice Scalia pointed out in his plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), the CWA does not permit that result. "The Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but

rather the 'addition of any pollutant *to* navigable waters.'" *Id*. at 743 (quoting 33 U.S.C. § 1362(12)(A)). On that natural reading of the CWA, the County's unpermitted discharges violate the Act.

STATUTES INVOLVED

Statutes involved in this case are reproduced in the County's brief and the appendix to the brief of the United States, except for 33 U.S.C. §§ 1251(a), 1343, 1362(6), and 1362(14), which are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

A. Statutory Background

The relevant statutory text originated in the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, commonly known as the Clean Water Act. The Act "constituted a comprehensive legislative attempt 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'" *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) (quoting 33 U.S.C. § 1251(a)), and established "the national goal" of eliminating "the discharge of pollutants into the navigable waters," 33 U.S.C. § 1251(a)(1).

In enacting the CWA, Congress recognized that existing federal legislation was inadequate to achieve the ambitious goal of protecting the Nation's waters, in part because that legislation attempted to define and maintain standards of water quality rather than directly regulate polluters. *See* S. Rep. No. 92-414, at 7-8 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674-75; *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202-04 (1976). By contrast, the

CWA recognizes that "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414 at 77, *reprinted in* 1972 U.S.C.C.A.N. at 3742.

Congress implemented this new approach in a series of interlocking statutory provisions that prohibit unpermitted discharges of pollutants from point sources to navigable waters. This prohibition, "[o]ne of the Act's principal tools," *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 624 (2018) ("*NAM*"), is set forth in 33 U.S.C. § 1311(a), which provides that "the discharge of any pollutant by any person shall be unlawful," except in compliance with provisions regarding effluent limitations, performance standards, and discharge permits.

Another provision, 33 U.S.C. § 1362, supplies the definitions that establish section 1311(a)'s meaning. Section 1362 defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A). A "pollutant" is "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id.* § 1362(6). A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* § 1362(14). And "navigable waters" are "the waters of

the United States, including the territorial seas." *Id.* § 1362(7).[1]

Section 1311(a) contains "exceptions to the prohibition on discharge of pollutants," including "two permitting schemes that authorize certain entities to discharge pollutants into navigable waters." *NAM*, 138 S. Ct. at 625. The scheme relevant here, the National Pollutant Discharge Elimination System (NPDES), provides that EPA may "issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a)," if the discharge meets applicable effluent limits, performance standards, and other requirements of the Act. 33 U.S.C. § 1342(a)(1).

The Act requires that permits for discharges to the territorial seas ensure compliance with criteria promulgated by EPA to protect the marine environment. 33 U.S.C. § 1343(a), (c); *see also* 40 C.F.R. pt. 125, subpt. M (establishing such criteria). The Act and implementing criteria specify that a permit may not issue if the discharge will "cause unreasonable degradation of the marine environment," 40 C.F.R. § 125.123(b), taking into account impacts on "human health or welfare," "marine life," and "esthetic, recreation, and economic values," 33 U.S.C. § 1343(c)(1)(A)-(C). If the possible extent of degradation cannot be determined, a permit may issue only if "[t]here are no reasonable alternatives" to the proposed discharge. 40 C.F.R. § 125.123(c)(2). EPA's criteria highlight the need to

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[1] The "territorial seas" are the "belt of the seas" extending three miles beyond the coast. *Id.* § 1362(8). The CWA also prohibits discharges from point sources other than vessels to the "contiguous zone" and the "ocean," *id.* § 1362(12)(B), marine waters that that lie beyond the territorial seas. *Id.* § 1362(9)-(10).

protect "special aquatic sites," including "coral reefs" such as those near the Lahaina discharge wells. *Id.* § 125.122(a)(5).

Section 1342(b) provides that EPA may authorize a state to administer the NPDES permit program "for discharges into navigable waters within its jurisdiction," provided the state's permitting program is adequate to meet the Act's requirements. 33 U.S.C. § 1342(b). EPA delegated permitting authority to the State of Hawai'i in 1974. 39 Fed. Reg. 43,759 (Dec. 18, 1974).

The statute expressly provides that disposal wells may be subject to NPDES permitting. To administer its own NPDES program, a state must have "adequate authority" to issue NPDES permits that "control the disposal of pollutants into wells." 33 U.S.C. § 1342(b)(1)(D). This requirement also applies to EPA's own permitting authority because, to ensure parity between federal and state permitting regimes, the CWA explicitly provides that the federal permit program "shall be subject to the same terms, conditions, and requirements as apply to a State permit program … under subsection (b) of this section." *Id.* § 1342(a)(3); *see Arkansas v. Oklahoma*, 503 U.S. 91, 103 (1992).

B. Facts

Since the 1980s, the County has operated four injection wells at the Lahaina Facility to dispose of treated sewage. Pet. App. 7; JA 74, 78-80. The wells inject treated sewage directly into groundwater below the Facility, which is located less than half a mile from the Pacific shoreline. Pet. App. 7; JA 74, 79-80, 85. The County's wells inject three to five million gallons of treated sewage daily. Pet. App. 7-8.

As the County admits, and a tracer-dye study conclusively established, wastewater from the wells flows with the groundwater into the ocean. Pet. App. 8-10, 24, 67; JA 85.[2] The State and EPA have "long known that effluent from the Lahaina wells reaches the ocean." Pet. Br. 13. The County understood as long ago as 1973, during the planning process for the wells, that the wells' discharges would "reach the ocean." Pet. App. 159. That was, in fact, the point of the wells. The County designed them to convey treated sewage to the ocean to avoid having to pipe it directly to an ocean outfall, Pet. App. 8, and the impacts on the receiving waters are comparable to those of a direct outfall. The massive influx of treated sewage from the wells makes up "[a]bout one out of every seven gallons of groundwater entering the ocean near the [Lahaina Facility]." Pet. App. 9.

The County has never secured an NPDES permit for the discharges from its wells to the Pacific. *See* Pet. App. 93. Instead, the County obtained only underground injection control (UIC) permits issued under the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq*., and state law, Haw. Rev. Stat. ch. 340E. Those laws provide for the protection of drinking water sources, not surface water bodies, and the permits expressly state that the County must separately comply with any applicable NPDES permit requirements. *See, e.g.*, SER 20, 40.

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[2] The County's observation that the tracer-dye study did not detect dye from its Well 2 in the ocean does not suggest any doubt that effluents from Well 2 discharge into the Pacific: The County specifically admitted that fact, Pet. App. 93, and it is consistent with modeling by the study's authors. JA 75-76; Ninth Circuit Supplemental Excerpts of Record (SER) 241-42, 255-57.

Neither EPA nor the Hawai‘i Department of Health ever determined that the County was not required to obtain an NPDES permit. Pet. App. 30. Rather, EPA advised the County in January 2010 that it was investigating whether the County was violating the CWA and ordered a tracer-dye study to determine whether the wells were adding pollutants to the ocean. SER 5-11. In March 2010, EPA followed up with an order requiring the County to secure a water quality certification under 33 U.S.C. § 1341(a)(1), based on EPA's determination that the wells "may result in a discharge into navigable waters." Ninth Circuit Excerpts of Record (ER) 122. In 2015, EPA stated that the wells' discharges require an NPDES permit. ER 357-58.

The County touts the quality of the wastewater its wells discharge but does not dispute that the wastewater meets the CWA's definition of "pollutant[s]," which includes "sewage" and "municipal … waste." 33 U.S.C. § 1362(6). Further, the Hawai‘i recycled-water standard the County cites, *see* Pet. Br. 7, contains no limits on nutrients like nitrogen and phosphorus, *see* Haw. Admin. R. § 11-62-26, which are present in high concentrations in treated sewage and pose a significant threat to the marine environment, including coral reefs, *see infra* pp. 9-10.

The County's UIC permits are similarly lax with respect to those nutrients: The permits impose no limits on phosphorus and set limits for total nitrogen that are almost two orders of magnitude higher than the State's water quality standards for the coastal waters just offshore of the wells. *Compare* ER 367 *with* Haw. Admin. R. § 11-54-6(b)(3) (10 mg/liter in UIC permit

versus 0.15 mg/liter in applicable water quality standard).[3] As a result, at the submarine springs where the majority of the County's wastewater enters the ocean, measurements of phosphorus and nitrogen substantially exceed CWA regulatory limits. *See* Haw. Admin. R. § 11-54-6(b)(3); SER 126-42.

The County's assertion that these discharges are harmless is both immaterial to the legal issues and disputed. The district court concluded that "the discharge at the [Lahaina Facility] significantly affects the physical, chemical, and biological integrity of the ocean water." Pet. App. 80; *see also* Pet. App. 78-79. The discharges occur immediately off Kahekili Beach, site of a formerly pristine coral reef. Although the County's paid expert denied any impact to the reef, independent, peer-reviewed studies and government reports have reached the opposite conclusion. *See, e.g.,* Prouty, et al., *Vulnerability of coral reefs to bioerosion from land-based sources of pollution*, 122 J. of Geophysical Res.: Oceans 9319 (2017) (concluding that nutrients from the Lahaina Facility are accelerating bioerosion of Kahekili reef).[4] In the decades since the Lahaina Facility opened, nutrients and other pollutants from injected sewage have devastated the once-pristine reef, stimulating algal growth that smothers

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[3] While the County cites early EPA statements that the UIC permit can protect ocean quality, Pet. Br. 13, EPA later clarified that the nitrogen level in the County's injection permit is "as stringent as the UIC regulations allow," though insufficient to protect marine waters. ER 367; *see also* ER 366 ("The UIC permit is designed to protect groundwater, not surface water. Surface water impacts must be handled with a different authority.").

[4] https://darchive.mblwhoilibrary.org/handle/1912/9534 (last visited July 9, 2019).

the coral. ER 274-84. Hawai'i's Division of Aquatic Resources reported a 40% decline in coral cover at Kahekili from 1994 to 2006. SER 273.

Like its claim that the wastewater discharges are harmless, the County's assertions about the pathways by which its wells' effluent reaches the ocean are disputed. The record contradicts the County's claim that "more than 90%" of the injected wastewater "enters the ocean through diffuse flow, with no identifiable entry point." Pet. Br. 7. The tracer-dye study concluded that 64% of the wastewater from Wells 3 and 4 (which at the time of the study constituted over 80% of the County's discharges) entered the ocean in two submarine spring areas only several meters wide. Pet. App. 67; SER 156-57, 316-18; JA 68-71. Thus, the study identified precise and discrete locations where over half of the injected effluent enters the ocean.

C. Proceedings Below

Respondents are Maui-based organizations that filed a CWA citizen suit seeking remedies for the County's unpermitted discharges of pollutants to the Pacific Ocean from its disposal wells. The district court granted summary judgment, holding on three alternative bases that the County's unpermitted point-source discharges to navigable waters through groundwater violate the CWA. First, the court held that the CWA applies to discharges to navigable waters from a point source even if the point source itself does not convey pollutants directly to the navigable waters. Second, the court concluded that, under the facts here, the groundwater that conveys the wastewater to the ocean is itself a point source. The court highlighted the tracer-dye study's finding "that more than 50% of the effluent originating at the

[wells] is finding its way into the ocean." Pet. App. 69. In the court's view, "[a]ny conveyance that transmits such a high proportion of a pollutant from one place to another" meets the "confined and discrete" aspects of the CWA's point-source definition, "irrespective of … other geologic properties." *Id*.[5] Third, the court held that the groundwater here is itself a part of the navigable waters because of its "significant nexus" to the ocean. Pet. App. 82.

The Ninth Circuit affirmed the district court's finding of CWA liability on the first of these grounds, without reaching the other two. The court concluded that operating the wells without an NPDES permit constituted the unlawful "addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A).[6]

Relying in part on Justice Scalia's observation that the CWA does not forbid the unpermitted "'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters,'" *Rapanos*, 547 U.S. at 743 (plurality) (citation omitted), the court rejected the County's argument that the Act applies only to direct pollution additions. That argument, the Court pointed out, "read[s] into the statute at least one critical term that does not appear on its face—that the pollutants

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[5] The court accordingly did not resolve issues of fact regarding the existence of subsurface features establishing preferential flow pathways. *See* SER 116-17, 183, 185-88, 191-93; JA 75-76.

[6] The Ninth Circuit did not resolve whether the subsurface flow is through fissures or other rock openings that would themselves satisfy the point-source definition. Pet. App. 16 n.2. That issue should remain open for consideration on remand if necessary in light of this Court's resolution of the question presented.

must be discharged 'directly' to navigable waters from a point source." Pet. App. 23. The Act's plain meaning, the court held, renders it applicable where "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." Pet. App. 24. Because the CWA would forbid the County to "build an ocean outfall to dispose of pollutants directly into the Pacific Ocean without an NPDES permit," allowing the County knowingly to achieve the same result via coastal injection wells would "make a mockery of the CWA's prohibitions." Pet. App. 31.

SUMMARY OF ARGUMENT

The CWA's plain terms prohibit "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12)(A), without a permit. *See id.* § 1311(a). The CWA expressly defines the County's wells as point sources, the effluent they discharge as a pollutant, and the Pacific Ocean off the Maui coastline as navigable waters. The introduction of the effluent to the Pacific is an "addition" of pollutants "to" those waters. And that addition comes "from" the County's point-source wells: The wells are both the pollutants' point of departure and a factual cause of their addition to navigable waters.

The CWA's coverage is not limited to pollutants that come to navigable waters *directly* from point sources, without any intermediate means of transmission. Pollutants added to navigable waters come "from" a point source if the point-source discharge was both a factual and a proximate cause of the pollutants' reaching those waters. A point-source discharge to navigable waters through groundwater satisfies these

criteria if, as in this case, pollutants are fairly traceable to the point source (establishing factual causation), and their addition to navigable waters is the foreseeable, natural consequence of their release from that source (establishing proximate causation).

The Act's express inclusion of "well[s]" in its definition of "point source," *id.* § 1362(14), confirms its application to such releases. Other provisions of the Act further illustrate that it covers subterranean movement of pollutants from wells to navigable waters. For example, the Act expressly requires that the NPDES permit program control disposal of pollutants in wells. *Id.* § 1342(b)(1)(D). Further, the definition of "pollutant" provides that, under specified circumstances, the Act covers releases from underground wells of materials related to oil and gas production. *Id.* § 1362(6)(B). Finally, the statutory background against which the CWA was enacted included a prohibition against unpermitted, indirect discharges of pollutants to navigable waters, and Congress explicitly crafted the CWA's NPDES permitting program to continue to regulate those indirect discharges.

To avoid the CWA's application to the County's disposal wells, the County and EPA propose mutually inconsistent, atextual limits on its terms. The County seeks to rewrite the Act to apply only when a point source or series of point sources conveys pollutants *directly* to navigable waters. EPA asks the Court to tack the words "except through groundwater" onto the Act's definition of covered discharges. Either approach would contravene the statute's plain language.

The County's attempt to justify its reading rests in part on an unnatural and cramped reading of the term "from," supplemented by equally strained readings of

other terms in (or not in) the relevant statutory provisions. The County's principal argument, however, is not textual, but structural: It claims that Congress's decision not to use the CWA to regulate *nonpoint-source* pollution implies a decision not to regulate indirect *point-source* discharges. On the contrary, the Act's language, purpose, structure, and history all establish that Congress intended to regulate any pollution of navigable waters that is fairly traceable to, and the foreseeable result of, point-source discharges.

EPA properly rejects the County's reliance on the point-source/nonpoint-source dichotomy but then proceeds down a different interpretive blind alley in an effort to reverse its own longstanding view that discharges to navigable waters through groundwater fall within the Act's scope. EPA's starting point is that the Act does not regulate discharges to groundwater alone, as groundwater does not fall within the Act's definition of "navigable waters." EPA jumps from that premise to the conclusion that the Act excludes discharges to *navigable waters* through groundwater. Nothing in the Act's language or structure supports that illogical leap.

EPA and the County seek to justify limiting the CWA by asserting that other statutes regulate groundwater contamination. But none of those statutes addresses the task at hand: regulating point-source discharges of pollutants to navigable waters. And none of them purports to displace the CWA's application to such discharges.

Giving effect to the CWA's plain terms, within the constraints imposed by the requirements of factual and proximate causation, neither expands the Act's scope nor imposes unreasonable regulatory burdens.

Limiting its application to "direct" discharges to navigable waters, however, would thwart its goal of eliminating pollution of navigable waters, by exempting polluters whose waste outfalls stop just short of navigable waters but inevitably add pollutants to them.

ARGUMENT

I. The CWA's plain language prohibits the County's unpermitted addition of pollutants from disposal wells to the Pacific.

A. The County's "addition" of pollutants "to" navigable waters comes "from" a point source.

The "starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (citation omitted).

The CWA's plain terms provide that, with exceptions not relevant here, it is illegal to add a pollutant from a point source to a navigable water without an NPDES permit. 33 U.S.C. §§ 1311(a), 1342(a), 1362(12)(A). This prohibition squarely covers the County's activity: the wastewater is a *pollutant*; the disposal wells are *point sources*; and, finally, wastewater *from* the wells flows *to* the Pacific, a *navigable water*. Thus, the statutory text conclusively establishes the illegality of the County's unpermitted discharges of wastewater from its disposal wells.

Taking each term in turn, the effluent originating in the County's wells consists of "sewage" and "municipal … waste" and therefore undisputedly meets the CWA definition of "pollutant." *Id.* §1362(6). Likewise, there is no dispute that the County's disposal wells are point sources: The statutory definition of "point source" explicitly includes "*any … well …* from which pollutants are or may be discharged." *Id.* § 1362(14) (emphasis added). Although the County's brief barely acknowledges that part of the "point source" definition, the disposal wells fall squarely within it. Pet. App. 13. Finally, the term "navigable waters" expressly extends to the "territorial seas," 33 U.S.C. § 1362(7)-(8), including the Pacific Ocean immediately offshore of Maui.

Because there is no dispute that the pollutants originate at point sources and reach navigable waters, the CWA's applicability turns largely on the words "addition," "to" and "from": The question in this case is whether there has been "any *addition* of any pollutant *to* navigable waters *from* any point source," *id.* § 1362(12)(A) (emphasis added), when pollutants discharged from a point source travel a short distance through groundwater before reaching navigable waters.

The CWA answers that question in the affirmative. First, section 1311(a) repeatedly uses the expansive word "any": The unpermitted "discharge of *any* pollutant by *any* person shall be unlawful." *Id.* § 1311(a) (emphasis added). Section 1362(12)(A) emphasizes the point, using "any" three more times: "[t]he term 'discharge of a pollutant' … means … *any* addition of *any* pollutant to navigable waters from *any* point source." *Id.* § 1362(12)(A) (emphasis added). As this Court has noted, use of "any" "suggests a broad

meaning," *Ali v. Fed. Bur. of Prisons*, 552 U.S. 214, 219 (2008); *see generally NAM*, 138 S. Ct. at 624 ("'discharge of a pollutant' is defined broadly"). Thus, the statute applies whenever a polluter makes some addition (of whatever kind) of pollutants (of whatever kind) to navigable waters from point sources (of whatever kind).

The County's discharges undoubtedly result in some "addition" of pollutants "to" the Pacific. The relevant definitions of "addition" are "the result of adding: … INCREASE, AUGMENTATION" and "the act or process of adding." Webster's Third New International Dictionary 24 (2002 ed.) (Webster's). "Add," in turn, "means 'to join, annex, or unite (as one thing to another) so as to bring about an increase (as in number, size, or importance).'" *Los Angeles County Flood Control Dist. v. NRDC*, 568 U.S. 78, 82 (2013) (quoting Webster's 24). As this Court has recognized, an "addition" of pollutants "to" a waterbody has taken place whenever the waterbody contains more pollutants than it did before. *See id.* at 82-83; *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 109-112 (2004); *see also S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 381 (2006) ("[S]omething must be added in order to implicate § [1342]."). Here, the effluents from the County's wells are an "addition" of pollutants to navigable waters because they increase the amount of pollutants present in those waters.

The remaining textual question, then, is whether the addition of pollutants comes "from any point source." Because the wells are undisputedly point sources, the question boils down to whether the pollutants come "from" them.

The CWA does not define "from," but, "[w]hen terms used in a statute are undefined, [this Court] give[s] them their ordinary meaning." *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). The ordinary meaning of "from" is "a function word to indicate a starting point: as … a point or place where an actual physical movement … has its beginning." Webster's 913. Its other most pertinent definition is "a function word to indicate the source or original or moving force of something: as (1) the source, cause, means, or ultimate agent of an action or condition …; [or] (4) the place of origin, source, or derivation of a material or immaterial thing." *Id*.

Both these common meanings support the conclusion that the addition of the wastewater to the Pacific comes "from" the point sources where the addition originated—the County's wells. The wells are the "starting point" of the pollutants' "movement" to the navigable waters, and they are the "cause" as well as the "source" and "place of origin" of the pollutants. Thus, in ordinary parlance, the pollutants, and their addition to navigable waters, come "from" the wells. That the pollutants pass through groundwater does not mean that their addition is not "from" the wells, any more than the fact that a letter passes through the mail means it is not "from" its sender.[7]

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[7] This conclusion does not mean that the pollutants could not *also* come "from" an intervening point source. As this Court pointed out in *Miccosukee*, "a point source need not be the original source of the pollutant" if it is one of the means by which the pollutant is "convey[ed]" to navigable waters. 541 U.S. at 105. A point source does not *have to* originate the pollutant to be covered but is plainly covered if it *does*.

B. The Act's terms apply to indirect discharges from point sources that traceably and foreseeably reach navigable waters.

Nothing in the CWA limits the permitting requirement to pollution that reaches navigable waters directly, without passing through any other medium. *See Rapanos*, 547 U.S. at 743 (plurality). Thus, for example, the Act must cover outfall pipes that hang above a river, so that their effluent falls a few feet through the air before reaching navigable waters. Likewise, it necessarily covers outfall pipes that drain onto a beach just short of the tideline, so that their effluent flows a few feet over the sand before reaching the ocean. Reading the Act to exclude such discharges would allow a polluter to avoid the permitting requirement just by cutting off the last few feet of its discharge pipe. Congress cannot have intended that result. Rather, as the *Rapanos* plurality noted and lower courts have held, point-source discharges of pollutants that "*naturally wash[]*" into navigable waters are covered "even if the pollutants discharged from a point source do not emit 'directly into' covered waters." *Id.*[8] Any other reading would permit "water polluters … to evade the permitting requirement …

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[8] The County inaccurately asserts that, in all the cases the plurality cited, point sources delivered pollutants directly to navigable waters. As the plurality noted, however, the Second Circuit in *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994), expressly relied on the "'indirect discharge' rationale" as an alternate basis for CWA liability. 547 U.S. at 744; *see Southview Farm*, 34 F.3d at 119. Regardless, the context makes clear that the plurality's point was not to characterize the type of source that must deliver pollutants to navigable waters, but to emphasize that the defendant's point source

(*Footnote continued*)

simply by discharging their pollutants … upstream of covered waters." 547 U.S. at 742-43.

Of course, in order for CWA liability to attach, pollutants must come "from a point source." The decision below thus properly required that pollutants be "fairly traceable" to the point source. Pet. App. 24. The County insists the "fairly traceable" requirement reads new language into the CWA, but that language simply gives effect to the Act's requirement of factual causation: a defendant cannot be liable under the Act unless pollutants come "from" the defendant's point source. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (interchangeably using the terms "fairly traceable to" and "resulting from" to describe the Article III standing inquiry).

The CWA's textual requirement that pollutants come "from" a point source also implicates "[t]he legal concept of 'proximate cause,'" a "'shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes.'" U.S. Br. 23 (*quoting CSX Transp., Inc. v. McBride*, 564 U.S. 685, 701 (2011) (internal quotation marks omitted)). It is therefore reasonable to read the CWA's triggering language as requiring not only that pollutants be physically traceable to a point source, but also that the point-source release be a proximate cause of the addition of pollutants to navigable waters. In other words, in order for the CWA permitting

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need not accomplish that delivery, because the Act applies to direct *or indirect* additions of pollutants to navigable waters. *See* 547 U.S. at 742-45.

requirement to attach, the pollution of navigable waters must be a "foresee[able]" or "natural and probable" consequence, *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 475 (1876), of the point-source discharge.[9]

This Court need not now determine the range of circumstances that might render the connection between a point source and navigable waters too attenuated to satisfy this requirement.[10] Nothing about the groundwater flow in *this* case breaks the chain of proximate causation between the County's discharges and the resulting contamination of the Pacific. On the contrary, the County not only foresaw that the wastewater would naturally and probably flow to the ocean but intended that result. Groundwater flow thus did not supersede the wells as the cause of the discharge. "A cause can be thought 'superseding' only

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[9] *See also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (construing National Environmental Policy Act to incorporate proximate cause); *cf. Rapanos*, 547 U.S. at 743-45 & n. 11 (plurality) (positing that CWA does not cover discharges that "normally" "stay[] put" and would not be expected to reach navigable waters, but that discharges of "*mobile*" pollutants that "naturally" reach navigable waters are "addition[s] … to navigable waters.").

[10] The Ninth Circuit suggested that a discharge must be more than "*de minimis*" to be covered. Pet. App. 24. The County critiques this proposed limit as atextual. This Court should not decide the issue, because the Ninth Circuit's discussion of the "*de minimis*" limit was unnecessary to its decision—the County's discharges of millions of gallons of effluent daily are not even arguably "*de minimis*." Regardless, the Ninth Circuit's endorsement of one atextual limiting principle is no reason to read into the Act a "direct discharge" requirement that is likewise unsupported by the text, particularly as the familiar "proximate cause" inquiry offers a textually grounded and effective approach to limiting the universe of legally cognizable causes.

if it is a 'cause of independent origin that was not foreseeable.'" *Staub v. Proctor Hosp.*, 562 U.S. 411, 420 (2011) (quoting *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996)).

C. The CWA's provisions concerning disposal of pollutants in wells underscore the Act's application to the Lahaina Facility.

Other language in the CWA strongly reinforces its application to pollutants added to navigable waters from disposal wells by way of groundwater movement. Congress included "any … well" in the definition of "point source." 33 U.S.C. § 1362(14). A "well" is "a shaft or pit dug or bored in the earth." Webster's 2594. While a few wells may discharge directly into surface waters, *see* Pet. Br. 55 (suggesting "off-shore wells where backflow up through the well might spill into the ocean"), the principal way a well acts as a "point source" is by discharging into the subsurface. The only plausible explanation for including wells in the definition of "point source," therefore, is that Congress intended to cover discharges that move from wells through the subsurface to navigable waters.

Several features of the CWA suggest that Congress specifically intended to reference disposal wells, like the Lahaina Facility wells, when it included the word "well" in its list of point sources. First, in the definition of "point source," 33 U.S.C. § 1362(14), the word "well" appears in a list of items "from which pollutants are or may be discharged," *id.*, which suggests it should be understood to refer to (or at least include) disposal or injection wells that discharge pollutants. *Cf. Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) ("[A] word is known by the company it keeps.").

Section 1342(b) confirms this understanding. That section, which sets forth requirements applicable to state "permit program[s] for discharges into navigable waters," provides that EPA may not approve a state NPDES program unless the program provides "adequate authority" "[t]o issue permits which … control the disposal of pollutants *into wells*." 33 U.S.C. § 1342(b)(1)(D) (emphasis added). Importantly, disposal wells discharge underground, and the "permits" referenced in this requirement are permits for discharges of pollutants to navigable waters, *id.* § 1342(a)-(b), which comply with "applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title," *id.* § 1342(b)(1)(A). Those applicable requirements, in turn, apply only to discharges that add pollutants to navigable waters.[11] Thus, section 1342(b) necessarily contemplates regulating discharges from wells *through groundwater* to navigable waters. Reading the Act to exclude such discharges would render the section "inoperative or superfluous, void or insignificant," *Rubin v. Islamic Repub. of Iran*, 138 S. Ct. 816, 824 (2018) (citation omitted), contrary to fundamental principles of statutory construction.

Finally, an express exclusion from the CWA's definition of "pollutant" further illustrates that Congress understood section 1311(a)'s prohibition of unpermitted discharges to extend to underground discharges from wells. Oil and gas production frequently involves the injection of some other fluid (often vast quantities

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[11] Section 1342(b)(1)(D) does not "authorize the regulation of *all* wells used to dispose of pollutants, regardless of absence of any effects on navigable waters." *Inland Steel Co. v. EPA*, 901 F.2d 1419, 1422 (7th Cir. 1990). Only disposals that discharge to navigable waters require NPDES permits. *Id.*

of water and additives) into an oil or gas well to displace hydrocarbons from spaces in underground rock. Concerned that the unpermitted injection of this material would otherwise constitute a prohibited "discharge of a pollutant," Congress narrowed the definition of "pollutant" to exclude "water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well … is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources." 33 U.S.C. § 1362(6)(B).

If section 1311(a)'s prohibition of unpermitted discharges already excluded discharges from wells that travel through groundwater before reaching navigable waters, this exclusion would be unnecessary, as passage through the subsurface is the only way such discharges could reach navigable waters. After all, "[t]here is no reason to create an exception to a prohibition unless the prohibition would otherwise forbid what the exception allows." *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1844 (2018). Moreover, the restriction of the exclusion to situations in which a state "determines that such injection or disposal will not result in the degradation of … surface water resources," 33 U.S.C. § 1362(6)(B), reveals Congress's awareness that subsurface disposal may threaten navigable waters, and its intent to use the CWA's prohibition of unpermitted discharges to mitigate that threat.

D. The statute's background and context support its application to indirect discharges.

The NPDES program replaced and expanded an existing permit requirement under section 13 of the Rivers and Harbors Act of 1899, also known as the "Refuse Act," 33 U.S.C. § 407. *See* S. Rep. No. 92-414, at 70-72, *reprinted in* 1972 U.S.C.C.A.N. at 3736-38. Section 407 long prohibited any person from "discharg[ing] … or caus[ing] … to be … discharged" any "refuse matter … into any navigable water" without a permit from the Secretary of the Army. 33 U.S.C. § 407.

In the years immediately before the CWA's enactment, this Court held that section 407 must be broadly construed, *see United States v. Standard Oil Co.*, 384 U.S. 224, 226 (1966), and lower courts held that it applies to "'indirect' deposits of refuse in navigable water." *United States v. Esso Standard Oil Co. of Puerto Rico*, 375 F.2d 621, 623 (3rd Cir. 1967); *see also United States v. Ballard Oil Co. of Hartford*, 195 F.2d 369, 370 (2d Cir. 1952) (§ 407 violated where spilled oil "found its way into the Connecticut River"). In *Esso*, for example, the Third Circuit found a section 407 violation where, "though Esso did not run a pipe to the water's edge and discharge petroleum products directly into the sea, Esso's discharge of the oil was in such close proximity to the sea that the oil flowed there by gravity alone." 375 F.2d at 623.[12]

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[12] Notably, the court did not rely on a clause in the statute prohibiting depositing "material" on the banks of a navigable water if it might wash into the water and create a threat to navigation, but on the more general prohibition of discharges "into any

(*Footnote continued*)

Importantly, Congress did nothing to narrow *Esso* and other cases' broad reading of section 407 when it used similar (indeed, broader) language to define the CWA's discharge prohibition. As in other instances where Congress has acted against the backdrop of judicial interpretations of an existing statute, "there is no reason to suppose that Congress disagreed with those interpretations." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 590 (2010). Indeed, the House floor manager, Representative Dingell, explicitly invoked *Esso* in explaining that the CWA, "in defining the term 'discharge of a pollutant,' does not in any way contemplate that the discharge be directly from the point source to the waterway." 118 Cong. Rec. 33,758 (1972).

Moreover, Congress expressly integrated the CWA with section 407 by enacting 33 U.S.C. § 1342(a)(4), which deems section 407 permits to be NPDES permits and vice versa, and 33 U.S.C. § 1342(a)(5), which provides that, after October 18, 1972, NPDES permits are the sole means to authorize discharges otherwise prohibited by section 407. In ensuring continuity between section 407 permits and the new NPDES per-

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navigable water," which the court construed to apply to discharges that "wash into navigable water" as well as "other 'indirect' deposits." *Id*.

Other courts reached similar conclusions roughly contemporaneously with the CWA's enactment. *See*, *e.g.*, *United States v. Valley Camp Coal Co.*, 480 F.2d 616, 617 (4th Cir. 1973) (applying § 407 to discharge washed into tributary of a navigable water by rain); *United States v. White Fuel Corp.*, 498 F.2d 619, 622 (1st Cir. 1974) (applying § 407 where oil "leached from [defendant's] property into adjacent navigable waters" through ""indirect percolation" rather than "direct flow").

mits, Congress made clear that NPDES permits extend to indirect discharges just as section 407 permits did. S. Rep. No. 92-414, at 72, *reprinted in* 1972 U.S.C.C.A.N. at 3738 (noting that, in "integrat[ing] … the Refuse Act permit program into the [CWA]," Congress intended to "provide for the establishment of conditions of effluent control for each source of discharge"). Any other reading would create a significant anomaly: Because section 407's discharge prohibition remains in effect, limiting NPDES permits to point sources that directly discharge to navigable waters would leave dischargers with no way to obtain a permit for many indirect discharges that section 407 continues to prohibit.

II. The CWA's language and structure contradict the County's and EPA's readings.

A. The County and EPA propose atextual exceptions to the statute.

The County and EPA offer mutually inconsistent alternative readings of the CWA, neither of which rests on the language of the operative provisions. The County invents a "means-of-delivery test," Pet. Br. 19, under which the Act would apply not to "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12)(A), but only to "an addition of a pollutant to navigable waters from a point source or uninterrupted series of point sources that delivers the pollutant directly to navigable waters." EPA rejects that interpretation as inconsistent with the statute, which requires only that the pollutants come "from" a point source. *See* U.S. Br. 7-8. EPA proceeds, however, to offer an equally unfounded reading, which would cover "any addition of any pollutant to

navigable waters from any point source, except where the pollutant reaches jurisdictional surface waters via groundwater."

Both the County's and EPA's constructions read language into the CWA that is absent from the relevant provisions. As this Court has emphasized, courts "must presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Dodd v. United States*, 545 U.S. 353, 357 (2005) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). Courts may not "rewrite the statute" to achieve a result its text does not support, *Magwood v. Patterson*, 561 U.S. 320, 335 (2010), merely because "they might deem its effects susceptible of improvement," *Badaracco v. Comm'r of Internal Rev.*, 464 U.S. 386, 398 (1984). In particular, courts may not, as both the County and EPA advocate, "read an absent word"—or, here, phrase—"into the statute." *Lamie*, 540 U.S. at 538. Courts "do not—[and] cannot—add provisions to a federal statute." *Alabama v. North Carolina*, 560 U.S. 330, 352 (2010).

Efforts to create atextual exceptions to provisions that already include express exceptions are particularly suspect. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)). Yet both the County and EPA would read an exception (or, as EPA expresses it, a "categorical[] exclu[sion]," U.S. Br. 7) into the Act's prohibition of "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12)(A), which already expressly exempts oil-production-related discharges into disposal

wells, *id.* § 1362(6)(B); return flows from irrigated agriculture, *id.* § 1342(*l*)(1); certain stormwater runoff from oil, gas, and mining operations, *id.* § 1342(*l*)(2); certain runoff from silvicultural activities, *id.* § 1342(*l*)(3); certain stormwater discharges predating October 1, 1994, *id.* § 1342(p)(1); and discharges incidental to normal operation of recreational vessels, *id.* § 1342(r).

An implied exception is especially disfavored when it "would in practical effect render [an express] exception entirely superfluous in all but the most unusual circumstances." *TRW*, 534 U.S. at 29. EPA's and the County's proposed exceptions would do just that. As discussed above, *see supra* pp. 23-24, the existing narrow exclusion of certain oil-production wastes injected into disposal wells from the category of "pollutant[s]," 33 U.S.C. 1362(6)(B), would serve little or no purpose if those discharges were already categorically excluded from the Act because they move through the subsurface before reaching navigable waters.

B. The County's textual arguments are erroneous.

While EPA makes no effort to square its proposed exclusion with the CWA's text, the County does attempt to ground its argument in the statute's language. That effort fails to overcome the plain meaning of the relevant terms, which cover the addition of pollutants to the ocean from the County's wells and are flatly incompatible with the County's "means-of-delivery test."

1. "Conveyance"

The County begins its textual argument by focusing on the point-source definition's use of the word "conveyance." *Id.* § 1362(14). The County contends

that "conveyance"—a "means of carrying or transporting something," Pet. Br. 29—denotes that, in order for the permitting requirement to apply, a point source must itself convey pollutants directly to the navigable water that receives them.

The County's argument distorts the CWA's use of the word "conveyance." The term "conveyance" appears only once in the relevant statutory provisions, in the definition of "point source," 33 U.S.C. § 1362(14), whose applicability to the County's wells is uncontested. Section 1362(14) uses "conveyance" as a noun, to define what a point source *is*: anything, including a well, that is "discernible, confined and discrete" and capable of discharging a pollutant. *Id.*

But section 1362(12), the operative language here, does not use any form of the verb "convey" to describe what a point source must *do* to bring about a "discharge of a pollutant." That provision says merely that the pollutants must come "from" a point source, not that the point source must "convey" the pollutants all the way to the receiving waters. *Id.* § 1362(12).[13] Section 1362(12)'s definition of "discharge of a pollutant" is "any addition of any pollutant to navigable waters from any point source." The County would rewrite it as "the *conveyance* of any pollutant to navigable waters *by* any point source." That is not the statute Congress enacted.

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[13] Notably, Congress also included in the point-source definition "any … container, rolling stock, [or] concentrated animal feeding operation." *Id.* § 1362(14). Like wells, none of these point sources normally discharges directly into navigable waters.

2. "From"

The County next invokes "from," arguing that something comes "from" a "conveyance" only if the conveyance delivers it to its ultimate destination. It could equally be said, of course, that something comes "from" a "conveyance" as long as that conveyance gets it part of the way to its destination, and that it comes "from" a "source" if it originates with the source. Thus, although a pollutant may be said to come "from" whatever finally gets it to navigable waters, it *also* comes "from" the source that started it on its journey, and "from" any conveyances that carried it along the way. To use the County's own example, Americans learned of the D-Day landings "from" the radio sets that ultimately delivered the news to their homes, *see* Pet. Br. 30, but they also learned of them "from" Edward R. Murrow's reporting and "from" the CBS network that made his reports available for broadcast.

This Court's decision in *Miccosukee* does not support the County's view. *Miccosukee* recognized that the CWA extends to point sources that are not the "original source of the pollutant" but that merely "convey the pollutant to 'navigable waters.'" 541 U.S. at 105. But saying the statute "includes within its reach point sources that do not themselves generate pollutants," *id.*, does not suggest that it *excludes* those that do. Rather, *Miccosukee* assumes that originating sources of pollutants fall within the definition of point sources, and emphasizes only that other conveyances *also* meet that definition. *Miccosukee* does not hold or even suggest that a point source *must* "convey" a pollutant all the way to navigable waters for the CWA to cover a discharge. That question was not presented, and the Court had no occasion to address or resolve it. *Cf. Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993)

(holding that decisions that do not "squarely address[]" an issue do not resolve it). Moreover, *Miccosukee*'s statement that a point source "*need only* convey the pollutant to 'navigable waters,'" 541 U.S. at 105 (emphasis added), is a statement about what is *sufficient*, not what is *necessary*. By quoting the phrase without the key word "only," Pet. Br. 30; *see also id*. at 33, the County strips it of its intended meaning and renders it ungrammatical.

The County's assertion that the addition of a pollutant to navigable waters is not "from" a point source unless it is "*delivered by*" the point source to the navigable waters, Pet. Br. 29, also contradicts the County's own articulation of its "means-of-delivery test." According to the County, a pollutant *is* from an originating point source that does *not* deliver it to navigable waters, as long as all the conveyances that come between the original source and the waters are themselves point sources. But if the County's reading of the term "from" were correct, only the last in a series of point sources should qualify for permitting, because the pollutant is "delivered by" only that final source. Conversely, if a pollutant can also be "from" a more remote point source, the intervening media of conveyance need not be point sources. Whether the addition of the pollutant comes "from" the original source, or another source along the way, has nothing to do with whether all other conveyances along its path are point sources.

3. "Any point source"

Next, the County argues that the uninterrupted-chain aspect of its "means-of-delivery" test is supported by the statute's use of the word "any" to modify "point source" in section 1362(12). Because "any"

means "one or some indiscriminately of whatever kind," the County states, it follows "that an NPDES permit is required whether pollutants are delivered to navigable waters by a single point source or multiple point sources together." Pet. Br. 32. The County's point is true as far as it goes: When a discharge is "from" multiple point sources, all of them are subject to the Act. But the term "any point source" carries no implication that a discharge must travel *exclusively* through point sources. After all, "any" means one *or* more indiscriminately. Accordingly, if a pollutant is added to navigable waters from a point source, that source falls within the permit requirement regardless of whether the pollutant moves to navigable waters directly from the point source, through other point sources, or through other nonpoint-source media. "Any" thus provides no support for a "means-of-delivery test"; rather, it establishes that the CWA reaches any point source "from" which pollutants are added to navigable waters, regardless of whether the source is the immediate means by which the pollutants are delivered to the waters. [14]

4. "Into"

The County invokes decisions of this Court using the preposition "into" in characterizing the Act as "prohibit[ing] the [unpermitted] discharge of any effluent *into* a navigable body of water." Pet. Br. 30

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[14] The County's contrary view of the significance of "any" cannot be squared with its limited view of "from." If the County were correct that an addition of a pollutant to navigable waters can only be "from" a point source that "delivers" it to navigable waters, the word "any" could not bring within the Act a point source that does not do so. "Any" does not expand the category to which it applies.

(quoting *Arkansas*, 503 U.S. at 102; emphasis added by the County); *see also id.* at 30 n.6 (citing other opinions). The statute, however, covers additions of pollutants "to" navigable waters, not discharges "into" them. 33 U.S.C. § 1362(12)(A). This Court's general descriptions of the CWA do not alter the controlling statutory language. As this Court has explicitly acknowledged, its "shorthand description" of a statute is not always "entirely accurate." *Levin v. United States*, 568 U.S. 503, 507 n.1 (2013). The Court must "focus on the language of [the statute], not any shorthand description of it." *Dames & Moore v. Regan*, 453 U.S. 654, 675 n.7 (1981).

The County also notes the use of "into" in other CWA sections that "describe[] a point source discharge." Pet. Br. 36. For example, the County cites 33 U.S.C. § 1251(a)(1), which describes the CWA's overall goal as eliminating "the discharge of pollutants into the navigable waters." In addition, the County flags references to discharges "into" navigable waters in provisions describing state applications to operate NPDES permit programs, *id.* § 1342(b), defining the term "effluent limitation," *id.* § 1362(11), and describing authorities under *other* statutes that the CWA supplanted, *id.* § 1371(b). That the statute elsewhere refers to discharges of pollutants "into" navigable waters does not change the operative language of section 1362(12)(A)'s precisely worded definition of "discharge of a pollutant." As this Court has observed, "[t]he plain meaning of [a statutory provision] cannot be altered by the use of a somewhat different term in another part of the statute." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 480 (1992).

In any event, "into" cannot bear the weight the County places on it. Rewriting section 1362(12)(A) to

refer to "any addition of any pollutant into navigable waters from any point source" would not alter its meaning. When used in such a phrase, "into" indicates "something in which a literal or figurative insertion or introduction is made." Webster's 1185. More generally, the word denotes "motion so directed as to terminate, if continued, when the position denoted by *in* has been reached." *Id.* at 1184. Thus, substituting "into" for "to" would by no means suggest that the introduction of pollutants "into" navigable waters must be directly from a point source, with no intervening medium of transport. On the contrary, in another CWA provision where it used the term "into," Congress deemed discharges regulated by the Refuse Act—which include discharges of "refuse matter" that *indirectly* "washe[s] into … navigable water," 33 U.S.C. § 407—to constitute "discharges into the navigable waters," *id.* § 1342(a)(4).

C. The CWA's structure and history do not support the County's and EPA's limiting constructions.

Because the statutory language supports neither the "means-of-delivery test" nor the "categorical exclusion" of discharges via groundwater, the County and EPA rely heavily on assertions about the statute's structure and purpose to support their mutually inconsistent limitations on its text. The County focuses on what it calls the Act's "organizational paradigm" of "disparate treatment of discharges from point sources and nonpoint sources," Pet. Br. 25 (quoting *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008)), to support its view that the Act completely exempts pollution from point sources that reaches navigable waters indirectly. EPA rejects the County's view "that *any* spatial gap between a point

source and jurisdictional surface waters renders the NPDES program inapplicable," U.S. Br. 8, but posits a special exception for point-source discharges that reach navigable waters through groundwater, because of what EPA sees as the Act's "purpose not to regulate groundwater." U.S. Br. 7.

Neither argument is persuasive. Applying the CWA's permitting requirement to the County's wells is fully consistent with the Act's basic structural choice to focus federal regulation on point-source discharges that foreseeably add pollutants to jurisdictional navigable waters.

1. Congress did not foreclose regulation of indirect point-source pollution when it declined to regulate nonpoint-source pollution.

The County's argument rests on an undisputed generalization—that the CWA regulates nonpoint-source pollution differently from point-source pollution. That generalization, however, does not answer the statutory interpretation question here. The CWA aims its more stringent regulatory provisions—its prohibition on "discharge of any pollutant," 33 U.S.C. § 1311(a), and its permit requirements, effluent limitations, and performance standards, *id.* §§ 1342, 1344, 1311, 1312, 1316—at point-source pollution. By contrast, it largely leaves control of nonpoint-source pollution to the states. Nothing in this dichotomy suggests that the CWA should be read to place the County's *point-source* pollution outside the Act's more rigorous regulatory requirements.

The County turns the Act on its head by reading it as if its central feature were non-regulation of nonpoint-source pollution rather than regulation of point-

source pollution. It further posits that the term "nonpoint-source pollution" has such a dominant role in the Act that pollutants that move through groundwater become nonpoint-source pollution even if they originate from a point source. The CWA's terms do not substantiate those premises.

As courts have repeatedly pointed out, "the CWA does not even define nonpoint-source pollution." *Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1331 (10th Cir. 2007); *see*, *e.g.*, *Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club, Inc.*, 575 F.3d 199, 220 (2d Cir. 2009); *Or. Nat. Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 849 n.9 (9th Cir. 1987). As a result, "nonpoint source" is a catchall term for sources that do not fall within the point-source definition, and "nonpoint-source pollution" means "nothing more than a water pollution problem not involving a discharge from a point source." *Cables*, 509 F.3d at 1331 (quoting *Am. Wildlands v. Browner*, 260 F.3d 1192, 1193 (10th Cir. 2001)); *see also* EPA Interpretive Statement, 84 Fed. Reg. at 16,813 ("nonpoint source pollution [is] the broad category of other forms of water pollution that do not fall within the point source definition and [are] not defined under the Act"). Thus, nonpoint-source pollution "is commonly understood to be pollution arising from dispersed activities over large areas that is not *traceable* to a single, identifiable source or conveyance." *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1140 n.4 (10th Cir. 2005) (emphasis added) (citing *League of Wilderness Defenders/Blue Mts. Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002)).

In short, nonpoint-source pollution is defined not by what it is, but by what it is not: It is "pollution that

does not result from the 'discharge' or 'addition' of pollutants from a point source." *Or. Nat. Res. Council*, 834 F.2d at 849 n.9. An EPA guidance document supports this understanding: Nonpoint-source pollution comes from "diffuse sources that are not regulated as point sources"—it is pollution that "does not result from a discharge at a specific, single location (such as a single pipe)." EPA, Office of Water, Nonpoint Source Guidance 3 (1987), https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=910217GL.TXT (last visited July 9, 2019).

Thus, although nonpoint-source pollution "generally results from land runoff, precipitation, atmospheric deposition, or percolation," *id.*, not all pollution involving such processes is nonpoint-source pollution. The determining factor is whether the pollutants originate from, collect in, or pass through an identifiable point source before foreseeably reaching a navigable water. *Compare Southview Farm*, 34 F.3d at 118-19 (holding that flow of pollutants discharged from point sources to navigable waters fell within the Act regardless of whether the pollutants ultimately reached the waters through a point source), *with Simsbury-Avon Preservation Club*, 575 F.3d at 223 (holding that runoff of pollutants from a berm to navigable waters was not a point-source discharge because the berm was not a "confined and discrete conveyance" meeting the point-source definition). Here, the wastewater came from identifiable point sources (the wells), and its subsequent movement does not transform it into nonpoint-source pollution.

Indeed, the Act, its implementing regulations, and case law make clear that even "runoff," often described as the quintessential example of nonpoint-source pollution, can be point-source pollution if, at

some point, it comes from a point source. *See* 40 C.F.R. § 122.2; *see also* 33 U.S.C. § 1342(p) (requiring NPDES permits for point-source stormwater discharges); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 602-05 (2013) (discussing regulation of point-source stormwater discharges). The CWA contains exemptions to this general rule that would be unnecessary if the Act broadly categorized all runoff as nonpoint-source pollution regardless of its relationship to a point source. *See*, *e.g.*, 33 U.S.C. § 1342(*l*)(2)-(3) (exempting certain oil, gas, mining, and silvicultural runoff discharges).

Like runoff discharges, discharges that enter navigable waters through groundwater are not inherently "nonpoint." Nothing in the Act defines groundwater as a "nonpoint source." Indeed, the Act differentiates "groundwater" from "nonpoint sources of pollution." *See*, *e.g.*, 33 U.S.C. § 1329(i)(1) (creating federal grant program "to prevent contamination of groundwater from nonpoint sources of pollution"). To be sure, the Act recognizes that diffuse nonpoint pollution may threaten groundwater, and it relegates such threats primarily to state regulation (with federal support). *See id*. But nothing in the Act's language or structure suggests that *point sources* that threaten *surface water* are exclusively subject to state regulation when pollutants traceable to them actually and foreseeably reach navigable waters via groundwater.

Thus, although pollutants that percolate into groundwater from diffuse sources are nonpoint-source pollution, it does not follow that point-source pollutants automatically become nonpoint-source pollution whenever they travel through the subsurface. Rather, pollution that might under other circumstances "be nonpoint source pollution, which is not subject to

NPDES permitting" is regulable point-source pollution if it can be traced to a specific point source from which it predictably flows to navigable waters. *El Paso Gold Mines*, 421 F.3d at 1140 n.4. Just as "[g]ravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge" when pollutants were "at least *initially* collected or channeled," so the "subsequent percolation" of wastewater initially discharged from a point source is within the Act if it reaches navigable waters. *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (emphasis added).

Because the pollutants here come from point-source wells, it is irrelevant that, as the County notes, Congress declined to extend the Act's prohibitions to nonpoint-source pollution. *See* Pet. Br. 25. Moreover, the County's reliance on the point-source/nonpoint-source dichotomy ignores the clearest lesson of the legislative history the County invokes: Congress chose to exclude nonpoint sources "because [nonpoint-source pollution] arises in such a diffuse way," making it "very difficult to regulate through individual permits." *League of Wilderness Defs.*, 309 F.3d at 1184; *see* S. Rep. No. 92-414, at 39, *reprinted in* 1972 U.S.C.C.A.N. at 3706. That concern does not apply when, as here, there are readily identifiable and easily regulated point sources—namely, the wells. Regulation of such point sources falls squarely within the Act's central principle that "the most effective control mechanism for point sources of discharge is one which will provide for the establishment of conditions of effluent control for each source of discharge." S. Rep. No. 92-414, at 72, *reprinted in* 1972 U.S.C.C.A.N. at 3738.

This is not the first time this Court has been asked to hold the CWA inapplicable to a point-source discharge on the theory that "Congress intended that such pollution instead … be addressed through local nonpoint source pollution programs." *Miccosukee*, 541 U.S. at 106. In *Miccosukee*, the United States made a similar argument for excluding transfers of pollutants from one body of water to another from CWA regulation even if the pollutants were from a point source. This Court declined, noting that the Act "does not … exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition." *Id*. The Court's statement reflects the primacy of the Act's definition of "point source," and its coverage of "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12)(A), regardless of whether the discharge shares some characteristics with nonpoint-source discharges. In arguing that the Act's "disparate treatment" of the residual nonpoint-source pollution category overrides the Act's requirements concerning discharges *meeting* the point-source definition, Pet. Br. 25, the County has the matter backward.

2. The CWA does not categorically exclude discharges to navigable waters through groundwater.

EPA correctly recognizes that "the point and nonpoint source distinction" that is the County's central focus is "not relevant" to whether the Act covers discharges from point sources to navigable waters via groundwater. 84 Fed. Reg. at 16,813. But EPA proffers an equally flawed construction of the CWA, based not on the text of its relevant provisions, but on what EPA describes as its structure and legislative history.

In EPA's view, that structure and history "demonstrate Congress's intent to leave the regulation of groundwater wholly to the states under the Act." *Id.*

Even if true, this assertion does not insulate the County's pollution of *navigable waters* from the CWA's permitting requirement. EPA's contrary view rests on an unsupported interpretive leap: that because Congress chose not to use the CWA's point-source permitting requirements to protect *groundwater* itself, it must also have chosen not to apply them to protect *surface water* from pollution that arrives via groundwater. EPA asserts that, because the CWA "evinces a purpose not to regulate groundwater," it follows that "all releases to groundwater are excluded from the scope of the NPDES program, even where pollutants are conveyed to jurisdictional surface waters via groundwater." U.S. Br. 7 (quoting 84 Fed. Reg. at 16,814). That claim contradicts the Act's language, renders key provisions nonsensical, and bears no relation to the purposes evident from the Act's overall structure.

EPA does not seek deference to its newly altered view of "the best, if not the only, reading of the statute." U.S. Br. 7. EPA's Interpretive Statement is not a regulation, but "guidance" that "neither alters legal rights or obligations nor changes or creates law." 84 Fed. Reg. at 16,811. The statement is not entitled to deference under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), because it is not an exercise of congressionally delegated authority to fill an interpretive gap in the statute. *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

EPA's argument rests on the propositions that (1) the addition of pollutants to groundwater is not *in itself* a "discharge of a pollutant," and (2) the Act delegates protection of groundwater quality to states, with federal assistance and supervision. EPA's premises, however, lead only to the conclusion that the discharge prohibition of section 1311(a) and the permit program under section 1342 do not apply to discharges that add pollutants to groundwater *alone*. Nothing in the Act supports EPA's further conclusion that these provisions do not apply to point sources that discharge to *navigable waters* through groundwater. None of the provisions on which EPA relies either limits the CWA's provisions concerning discharges to navigable waters, or conflicts with the assertion of federal permitting authority over such discharges. Most of the provisions EPA cites, U.S. Br. 16-17, authorize assistance for states to address pollution of *both* "navigable waters" and "ground waters." 33 U.S.C. §§ 1252(a), 1254(a)(5), 1314(a)(2)(A); *see also id.* §1314(a)(1)(A) (addressing "pollutants in any body of water"). The inclusion of "navigable waters" in programs that assist states does not limit CWA authority over discharges to those waters. Why then should the inclusion of "ground waters" preclude federal control over discharges that reach navigable waters through groundwater?

In short, EPA identifies nothing in the Act to suggest that Congress meant to curtail EPA's power to regulate discharges to navigable waters. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 528-30 (2007) (reaching a similar conclusion in analyzing parallel issues under the Clean Air Act). Regulating the addition of pollutants to navigable waters from point sources through groundwater is in no way inconsistent with Congress's

various efforts to promote state action to address groundwater pollution. EPA thus fails to demonstrate that regulating such discharges in accordance with the CWA's terms would be "incompatible" with "the substance of Congress' regulatory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000).

EPA asserts that the Act treats "groundwater pollution in the same manner as nonpoint source pollution," citing a provision requiring states to develop waste management plans to "protect ground and surface water quality." U.S. Br. 18 (citing 33 U.S.C. § 1288). That provision demonstrates only that the Act treats groundwater and *surface water* pollution in the same way insofar as they are *caused* by nonpoint sources. That proposition, however, says nothing about how the Act regulates pollution caused by *point sources* that reaches navigable waters through groundwater, as is the case here.

Even if EPA's analogy were valid, it would point in the opposite direction: Just as the CWA's approach to nonpoint-source pollution becomes irrelevant when a point source enters the picture, *see Miccosukee*, 541 U.S. at 106, so, too, its treatment of discharges to groundwater is irrelevant once pollutants are added to navigable waters.

Moreover, EPA's arguments prove too much. EPA disavows any categorical exclusion from the Act for point-source discharges that reach navigable waters by indirect means *other than* groundwater. U.S. Br. 8. EPA says it will continue to evaluate such discharges on a "case-by-case" basis. *Id.* (quoting 84 Fed. Reg. at 16,814). But EPA fails to explain why it distinguishes indirect discharges through groundwater from other

indirect discharges. EPA's assertion that the CWA embodies a "purpose not to regulate groundwater," U.S. Br. 7 (quoting 84 Fed. Reg. at 16,814), applies equally to everything other than jurisdictional waters. *See Rapanos*, 547 U.S. at 731 (plurality) ("[T]he CWA authorizes federal jurisdiction only over 'waters.'"). The CWA no more regulates solid ground than it does groundwater, but, if the County were to discharge its wastes from pipes onto the ground, over which they flowed to the ocean, EPA would not view the discharge as categorically excluded. *See* U.S. Br. 34. Why the distinction? EPA does not explain.

EPA seeks to bolster its argument by appealing to legislative history, pointing to unsuccessful proposals to regulate all discharges to groundwater. *See* U.S. Br. 26-28. But "legislative history is not the law," and this Court does not "allow 'ambiguous legislative history to muddy clear statutory language.'" *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019) (citation omitted). "[F]ailed legislative proposals" are a particularly tenuous basis for construing legislation. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001) (citation omitted). Further, the legislative history EPA invokes adds nothing to what is evident from the face of the statute: Congress chose not to regulate discharges of pollutants to groundwater as such. The legislative history does not, however, suggest that this choice reflected an intent to exclude from the Act's coverage all discharges to navigable waters through groundwater. At most, the history EPA cites suggests that Congress did not intend to cover *all* discharges to groundwater on the theory they *necessarily* affect surface waters.

See U.S. Br. 27 (quoting statements of Rep. Aspin).[15] That history hardly suggests that Congress meant to create a blanket exemption for traceable point-source discharges that foreseeably reach navigable waters through groundwater.

The judicial decisions EPA invokes to support its legislative-history argument expressly recognize this distinction. In *Village of Oconomowoc Lake v. Dayton Hudson Corp*, 24 F.3d 962 (7th Cir. 1994), Judge Easterbrook relied in part on the same history to conclude that the mere "possibility" of a "connection between ground waters and surface waters" was not enough to require an NPDES permit for a discharge to groundwater. *Id*. at 965. At the same time, the court recognized that, as EPA then maintained, an *actual* "hydrological connection between the ground water and a nearby surface water body" *could* trigger the need for an NPDES permit, *id*. at 966 (quoting EPA, NPDES Permit Application Regulations for Storm Water Discharges ("Storm Water Regulations"), 55 Fed. Reg. 47,990, 47,977 (Nov. 16, 1990)).

Likewise, *Exxon Corp. v. Train*, 554 F.3d 1310 (5th Cir. 1977)—on which EPA relies heavily—concluded that the CWA's language and history did not support requiring an NPDES permit for deep-well injection of wastes that had not reached, and had no potential to reach, navigable waters. *See id.* at 1322-30. But even as it concluded that the Act did not allow "direct federal control over groundwater pollution," *id.* at 1322,

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[15] Representative Aspin's amendment may have been rejected because of another of its provisions, which would have eliminated the statutory exemption for "oil-and-gas-related injections." *U.S. Steel Corp. v. Train*, 556 F.2d 822, 853 n.66 (7th Cir. 1977).

the court expressly disclaimed any limitation on EPA's authority to regulate discharges to navigable waters through groundwater. *See id.* at 1312 n.1 (reserving opinion on result if "the wastes disposed of into wells here do, or might, 'migrate' from groundwaters back into surface waters that concededly are within [EPA's] regulatory jurisdiction").

The Fifth Circuit reaffirmed this view in *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001). *Rice* recognized that, although the CWA excludes coverage of a discharge based only on "a generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater," proof of an actual connection between a discharge and resulting subsurface movement of contaminants into a jurisdictional water presents a different question. *Id.* at 272. The legislative-history discussion in EPA's brief ignores this key distinction.

EPA not only muddies the waters by focusing on the legislative history of provisions Congress did not enact, but also fails to offer a coherent account of provisions Congress *did* enact. For example, EPA never discusses the Act's express inclusion of "well[s]" in its definition of "point source." 33 U.S.C. § 1362(14). Nor does EPA address the Act's recognition that some oil and gas wastes are pollutants when injected into disposal wells. *Id.* § 1362(6)(B). As explained above, these provisions would have little or no meaning if the Act categorically excluded pollutants from point sources that reach navigable waters via groundwater.

Similarly, EPA's short discussion of section 1342(b)(1)(D), which expressly requires state NPDES permit programs to provide for permits that "control

the disposal of pollutants into wells," *see* U.S. Br. 16, 28, entirely ignores the inconvenient fact that NPDES permits by definition cover only discharges to navigable waters. *See* 33 U.S.C. § 1342(b). Section 1342(b)(1)(D) would be meaningless under EPA's view of the statute, because pollutants disposed of into wells can reach a jurisdictional water only by moving through the subsurface, and EPA posits that such discharges are "categorically excluded" from NPDES permitting requirements.

EPA also overlooks that the section 1342(b)(1)(D) requirement applies to federal as well as state permits, because of section 1342(a)(3)'s provision that EPA's permit program "shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder." Thus, EPA's assertion that, in enacting section 1342(b)(1)(D), Congress "declined … to include" point-source discharges that reach navigable waters through groundwater "in the NPDES program," U.S. Br. 29, is flatly wrong.

In sum, the best reading of the statute is that, while Congress did not require permits for all discharges to groundwater, it recognized the "essential link between ground and surface waters," S. Rep. No. 92-414, at 73, *reprinted in* 1972 U.S.C.C.A.N. at 3739, and chose to require permits for those discharges to navigable waters through groundwater that (1) come from identifiable point sources, and (2) foreseeably reach navigable waters.

III. CWA regulation of discharges to surface water via groundwater complements groundwater-protection statutes.

EPA and the County insist that it is not necessary to apply the CWA to discharges that reach navigable waters through groundwater because other statutory regimes address groundwater contamination. But the statutes they cite cannot substitute for the CWA's protections of navigable waters from point-source pollution. Where statutes have their "own scope and purpose," imposing "different requirements and protections" that "complement each other," the Court gives effect to each rather than reading one to displace another. *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 115 (2014).

Take, for example, the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f *et seq*. The SDWA aims to prevent underground injection from endangering "drinking water sources," *id*. § 300h(b)(1), defined as "underground water which supplies or can reasonably be expected to supply any public water system," *id*. § 300h(d)(2). The statute addresses "contaminant[s]" that may result in noncompliance with "any national primary drinking water regulation" or "otherwise adversely affect the health of persons." *Id*.

These protections are important, but they do not address situations like this one, where point-source pollution harms marine life or otherwise adversely affects navigable waters without threatening a drinking water source. Unlike the CWA, the SDWA does not protect sensitive marine ecosystems, let alone the esthetic, recreational, and economic values of the territorial seas. *See* 33 U.S.C. § 1343; 40 C.F.R. §§ 125.122, 125.123; S. Rep. No. 92-414, at 7, *reprinted in* 1972

U.S.C.C.A.N. at 3674 (using the "ocean as a waste treatment system is unacceptable"). The two statutes have complementary and distinct objectives; neither creates an excuse to curtail the other.

Indeed, the express terms of the CWA and the SDWA leave no doubt that they sometimes *both* apply to the same discharge, depending on its environmental impact. For example, both the CWA and the SDWA regulate injection wells used to facilitate oil or gas production. The CWA states that such wells may be subject to CWA regulation if they will result in "degradation of ground or surface water resources." 33 U.S.C. § 1362(6)(B). The SDWA states that such wells may be subject to SDWA regulation if they inject a "contaminant" that may endanger a public drinking water source. 42 U.S.C. § 300h(d)(2); *see Legal Envtl. Assistance Fdn., Inc. v. EPA*, 118 F.3d 1467, 1473-78 (11th Cir. 1997). Whether either, neither, or both statutes apply to a particular well depends on the circumstances.

The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq*., is likewise aimed at a specific problem—disposal of "hazardous" waste and "solid" waste—that overlaps only partially with the CWA's central concern. RCRA's definition of "hazardous waste" is considerably narrower than the CWA's definition of "pollutant." The former applies only to wastes that have characteristics rendering them substantially dangerous to human health or the environment, 42 U.S.C. § 6903(5), while the latter includes a much broader list of things, including "heat," "rock," and "sand," that need not have health or environmental impacts, 33 U.S.C. § 1362(6). No party contends that the wastewater from the County's wells contains hazardous waste subject to RCRA or that RCRA

meaningfully protects the Pacific from the County's effluents.

Moreover, RCRA's express terms contradict the assertion that it displaces the CWA. RCRA states that it is to be "integrate[d]" with the CWA and other environmental statutes, 42 U.S.C. § 6905(b)(1), and provides that "[n]othing in [RCRA] shall be construed to apply to … any activity or substance which is subject to the [CWA] … except to the extent that such application (or regulation) is not inconsistent with the requirements of such Act[]," *Id.* § 6905(a). RCRA also defines "solid waste" not to include certain point-source discharges subject to NPDES permitting. *Id.* § 6903(27); *see Inland Steel*, 901 F.2d at 1421-22. Reading RCRA to displace the CWA in this context would turn the statutes upside down. And reading the two statutes together would hardly "nullify" RCRA. Pet. Br. 44. EPA's regulations provide that, where the CWA applies to a point-source discharge, RCRA continues to have broad application to the upstream collection, storage and treatment of covered wastes. 40 C.F.R. § 261.4(a)(2) cmt.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, is no more relevant. CERCLA addresses remediation of sites contaminated by "hazardous substance[s]." *Id.* § 9601(14); *see id.* §§ 9604-06. The County's wells are not a CERCLA site, and a hazardous-waste *remediation* statute cannot substitute for one designed to *prevent* discharges of pollutants. Moreover, CERCLA expressly excludes "federally permitted release[s]," including releases under NPDES permits, *id.* § 9601(10), from certain of its key provisions, *see id.* §§ 9603(a)-(b), 9607(j). Those exclu-

sions reflect congressional recognition that even releases otherwise covered by CERCLA are subject to the CWA if they are from point sources and reach navigable waters, and that NPDES permits are the primary means of regulating such releases.

EPA also cites the Oil Pollution Act's imposition of damages liability for harm to groundwater. U.S. Br. 33 (quoting 33 U.S.C. § 2701(20)). That provision indicates no congressional intent to limit the CWA's application to discharges to *navigable* waters. Nor does the Coastal Zone Management Act's provision for state plans to address *nonpoint-source* pollution, 16 U.S.C. § 1455b(a)(1), say anything about the scope of the CWA's application to *point sources*. *See id.* § 1456(f) (Coastal Zone Management Act does not "in any way affect any [CWA] requirement"). Hawai'i's implementation of the Coastal Zone Management Act proves the point: The state's plan includes no measures to control discharges to the ocean from the County's injection wells. *See* Hawai'i's Nonpoint Source Management Plan (2015-2020), http://health.hawaii.gov/cwb/files/2013/05/2015-Hawaii-NPS-Management-Plan.pdf (last visited July 9, 2019).

IV. Applying the CWA to the County's wells would not transform the Act's scope, but failing to apply it would thwart its objectives and create opportunities for evasion.

Recognizing that the CWA's terms encompass the County's discharges would not, as EPA and the County argue, trigger "an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *Util. Air Reg. Grp.*

v. EPA, 573 U.S. 302, 324 (2014). In *Utility Air Regulatory Group*, EPA had reversed a longstanding construction of the Clean Air Act while admitting that its expansive new construction could have "calamitous consequences" that would "overthrow" the Act's design. *Id.* at 321. This case involves no similar claim to "discover in a long-extant statute an unheralded power to regulate." *Id.* at 324. Rather, EPA's reversal of position here disclaims regulatory authority over discharges the agency long said fell within the CWA. *See* 84 Fed. Reg. at 16,818-19; *see*, *e.g.*, Storm Water Regulations, 55 Fed. Reg. at 47,997 (stating that point-source discharges to groundwater may be discharges to navigable waters if "there is a hydrological connection between the ground water and a nearby surface water body").

Although EPA now argues that its longstanding position was erroneous and inconsistent with the statutory design, it does not assert that continued adherence to that position would "overthrow" the statute or have "calamitous consequences." Nor could it. Despite decades of regulatory history, EPA has identified neither an overwhelming regulatory burden nor massive unanticipated liabilities if point-source discharges of pollutants to navigable waters through groundwater remain covered by the CWA. No clear congressional authorization is necessary to support continued application of a longstanding agency interpretation that has stood the test of time.

The County, EPA, and their amici point to large numbers of sources that could theoretically require a permit if the CWA remains applicable to indirect point-source discharges to navigable waters. But those sources would need a permit only *if* they would actually and foreseeably add traceable pollutants to

navigable waters. None of the parties suggests, for example, that properly designed disposal wells or green infrastructure projects generally do so. Nor would it stifle green infrastructure development to regulate any green infrastructure projects that demonstrably and predictably pollute navigable waters. To suggest otherwise ignores not only the Act's longstanding focus on preventing point-source pollution, but also recent changes to the CWA that explicitly contemplate that many green infrastructure projects will be carried out in conjunction with discharges subject to CWA regulation and addressed in NPDES permits applicable to those discharges.[16]

As for concerns about potential NPDES regulation of septic tanks, properly constructed septic systems are designed to ensure that "wastewater treatment [occurs] in the soil" before effluent reaches groundwater. *See* EPA, Septic Systems Overview, https://www.

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[16] In January 2019, Congress enacted, and the President signed into law, the Water Infrastructure Improvement Act, Pub. L. No. 115-436, 132 Stat. 5558 (2019), aimed at "promot[ing] the use of green infrastructure," *id.* § 5(b)(2), 132 Stat. at 5561 (adding 33 U.S.C. § 1377a(a)). The legislation defines "green infrastructure" as "measures that use plant or soil systems, permeable pavement or other permeable surfaces or substrates" to "store, infiltrate, or evapotranspirate stormwater and reduce flows to sewer systems or to surface waters," *id.* § 5(a), 132 Stat. at 5561 (adding 33 U.S.C. § 1362(27)), and it amends § 1342 to enable such projects to "be incorporated into [an NPDES] permit," *id.* § 3(a), 132 Stat. at 5588 (adding 33 U.S.C. § 1342(s)(2)); *see also* 33 U.S.C. § 1342(s)(3)(B)(ii). Congress thus expressly contemplated that many green infrastructure projects will be permitted in conjunction with NPDES regulation of discharges to navigable waters.

epa.gov/septic/septic-systems-overview (last visited July 9, 2019). Local regulations requiring "properly planned, designed, sited, installed, operated and maintained" septic systems "ensure that ground water resources will not be threatened" and that tanks will be set back from "surface waters." *Id*. As a result, pollutants from properly designed septic tanks will not foreseeably reach surface waters through groundwater. Moreover, the widely dispersed and small-scale nature of septic tanks makes it unlikely that any pollutants that may reach navigable waters will be traceable to any individual tank. Thus, in most cases, any pollution attributable to malfunctioning septic systems is properly treated as nonpoint-source pollution.[17]

Moreover, EPA and states have tools to ensure that CWA regulation is not unduly burdensome. They may, for example, issue general permits for low-risk discharge activities conducted in accordance with proper practices specified in the permits. Using this authority, EPA has issued general permits covering stormwater discharges from countless small construction projects, 82 Fed. Reg. 6,534 (Jan. 19, 2017), and pesticide applications, 81 Fed. Reg. 75,816 (Nov. 1, 2016). Thus, if a state concluded that significant numbers of septic tanks are point sources that discharge pollutants that foreseeably and traceably reach navigable waters, the state could greatly reduce compliance burdens by issuing a general permit for properly

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[17] *See* EPA, National Management Measures to Control Nonpoint Source Pollution from Urban Areas, Management Measure 6: New and Existing On-Site Wastewater Treatment Systems (2005), https://www.epa.gov/sites/production/files/2015-09/documents/urban_ch06.pdf (last visited July 9, 2019).

constructed tanks that comply with other applicable standards. *See Miccosukee*, 541 U.S. at 108 (CWA general permits can "control regulatory costs"); *see*, *e.g.*, 81 Fed. Reg. at 75,819 (cost to comply with pesticide general NPDES permit "minimal").

The states' central role in NPDES permitting obviates any concern that applying the CWA in accordance with its terms will usurp "state authority to address pollution," Pet. Br. 42, or "upend the traditional federal-state balance," U.S. Br. 11. Nearly every state, including Hawai'i, administers the NPDES program within its borders. *See* https://www.epa.gov/npdes/npdes-state-program-information (last visited July 9, 2019). Moreover, applying the CWA to the County's point-source discharges in no way undermines state authority to regulate nonpoint-source pollution. Properly applied to the County's wells and other point sources that foreseeably and traceably add pollutants to navigable waters via groundwater, the CWA will remain, as this Court has long recognized, "a regulatory 'partnership' between the Federal Government and the source State." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987).

In short, applying the CWA to the County's wells will not transform its scope, impose undue burdens, or undermine state authority over water pollution. Failing to apply the Act according to its terms, by contrast, would thwart the statute's objectives "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and to "eliminate[]" discharges of pollutants into navigable waters, *id.* § 1251(a)(1). As this case illustrates, limiting the CWA would free polluters to release pollutants onto the ground or into groundwater even when they know—even when they *intend*—that the

pull of gravity or the flow of groundwater will inevitably carry the pollutants to navigable waters.

Make no mistake: That is no imaginary risk. Under either the County's or EPA's approach, polluters could exploit groundwater conduits to evade regulation of massive additions of pollutants to navigable waters. And under the County's approach, polluters could also bypass the CWA by ending their sewer pipes just short of the waterline, so that the sewage flows through the sand before entering the navigable waters.

This Court should not create such easy avenues for evasion of the CWA's terms. A statute should not be interpreted "to destroy itself." *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 20 (1995) (citation omitted). The Act does not permit polluters to do indirectly what they are prohibited from doing directly: add pollutants to navigable waters from point sources without an NPDES permit.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

1. 33 U.S.C. § 1251(a) provides, in pertinent part:

§ 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

2. 33 U.S.C. § 1343 provides:

§ 1343. Ocean discharge criteria

(a) Issuance of permits

No permit under section 1342 of this title for a discharge into the territorial sea, the waters of the contiguous zone, or the oceans shall be issued, after promulgation of guidelines established under subsection (c) of this section, except in compliance with such guidelines. Prior to the promulgation of such guidelines, a permit may be issued under such section 1342 of this title if the Administrator determines it to be in the public interest.

(b) Waiver

The requirements of subsection (d) of section 1342 of this title may not be waived in the case of permits for discharges into the territorial sea.

(c) Guidelines for determining degradation of waters

(1) The Administrator shall, within one hundred and eighty days after October 18, 1972 (and from time to time thereafter), promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans, which shall include:

(A) the effect of disposal of pollutants on human health or welfare, including but not limited to plankton, fish, shellfish, wildlife, shorelines, and beaches;

(B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their byproducts through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;

(C) the effect of disposal, of pollutants on esthetic, recreation, and economic values;

(D) the persistence and permanence of the effects of disposal of pollutants;

(E) the effect of the disposal of varying rates, of particular volumes and concentrations of pollutants;

(F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and

(G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study.

(2) In any event where insufficient information exists on any proposed discharge to make a reasonable judgment on any of the guidelines established

pursuant to this subsection no permit shall be issued under section 1342 of this title.

3. 33 U.S.C. § 1362(6) provides:

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

4. 33 U.S.C. § 1362(14) provides:

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

No. 18-260

In The
Supreme Court of the United States

COUNTY OF MAUI,

Petitioner,

v.

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

Respondents.

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

BRIEF OF *AMICI CURIAE* ANDERSON COUNTY, SOUTH CAROLINA AND DECATUR COUNTY, TENNESSEE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI*[1]

The two localities listed as *amici curiae* represent Southeastern, county governments in support of the critical role that the Clean Water Act ("CWA" or the "Act") plays in helping localities foster economic growth while promoting sustainable use of natural resources within our communities.

Anderson County, South Carolina voices an acute concern as it was the site of a 2014 pipeline rupture that released over 369,000 gallons of gasoline. Much of this gasoline traveled fewer than 1,000 feet—and in some instances as little as 400 feet—through groundwater and soil before entering two tributaries of the Savannah River. This event triggered the decision in *Upstate Forever v. Kinder Morgan Energy Partners*, *L.P.,* 887 F.3d 637 (4th Cir. 2018), petition for *cert*. filed, (Aug. 28, 2018) (No. 18–268), in which the Fourth Circuit held "in agreement with the Second and Ninth Circuits that to qualify as a discharge of a pollutant under the CWA, that discharge need not be channeled by a point source until it reaches navigable waters." *See* 887 F.3d at 651.

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[1] *Amici Curiae* are authorized to submit this brief on behalf of their respective counties pursuant to Supreme Court Rule 37.4. Additionally, Respondents have filed a letter with the Clerk indicating blanket consent to the filing of *amicus* briefs, and Petitioner has given *Amici Curiae* written consent for the filing of this brief by electronic mail sent on June 24, 2019. No counsel for any party authored this brief in whole or in part, and no person or entity other than above-named *amici curiae* and their counsel made a monetary contribution intended to fund its preparation or submission.

Decatur County, Tennessee is a small community on the banks of the Tennessee River. The County leverages its unique location to promote economic development along the river, annually hosting the Carl Perkins Bass Classic fishing tournament. The County is also home to a municipal waste landfill operated by a third party. The operator took the risky step of accepting highly reactive industrial aluminum smelting waste, which is now alleged to be causing uncontrolled "point source" discharges of toxic leachate into navigable waters. Having collected fees for the industrial waste, the operator now wants to walk away from the problem and foist responsibility onto local taxpayers. The County and the landfill operator are currently in litigation over the site. *See Waste Services of Decatur, LLC v. Decatur County, Tennessee,* 367 F.Supp.3d 792 (W.D. Tenn. 2019). The operator has filed a motion to dismiss, seeking to avoid CWA liability for discharges that travel the short route from the leachate collection system into Buck Branch Creek via a few hundred feet of groundwater.

SUMMARY OF ARGUMENT

Local government *amici* seek to highlight for the Court how applying the CWA as Congress drafted it aids counties and plays a unique role in preserving local authority. *Amici* support CWA enforcement in cases such as this one to remain politically accountable to our constituents and use the important tool Congress put in place to prevent environmental harm to navigable waters within our jurisdictions.

Many sources of pollution are sited and permitted pursuant to other federal statutes that allow for the exercise of the power of eminent domain, *see, e.g.,* Pub. L. No. 77-197, ch. 333, § 5 (1941) (authorizing construction of petroleum pipeline at issue in *Upstate Forever*), leaving localities with few options to respond to community concerns. *Amici* recognize that citizen-suit enforcement, as upheld by the U.S. Court of Appeals for the Ninth Circuit, provides an essential vehicle for community engagement in environmental decision-making. Put simply, the Court of Appeals' decision helps preserve local accountability by providing citizens and county governments with access to a federal enforcement process. *See* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory,* 90 COLUM. L. REV. 346, 393-95 (1990).

There is no replacement for the National Pollutant Discharge Elimination System ("NPDES") when it comes to protecting navigable waters. Federal provisions that relate to groundwater contamination, *e.g.,* the Safe Drinking Water Act, 42 U.S.C. § 399h-8, are not intended to address the concerns at issue here. The pollution in *Hawaii Wildlife Fund* is not contamination of groundwater *qua* groundwater. Rather, it is the contamination of navigable waters from a discrete point source where pollution flows a short distance on or through another medium. That medium may sometimes be groundwater, but not always. *See, e.g., Peconic Baykeeper, Inc. v. Suffolk County,* 600 F.3d 180, 188 (2d Cir. 2010) (air serving as intermediary between point source discharge from pesticide spray nozzles and navigable waters).

There is no possibility that application of the CWA would require NPDES permits for 22 million residential septic tanks across the country, as Petitioner alleges. *See* Br. of Pet'r, at 47. As local governments working day-in and day-out to address homeowner concerns, we know that State-level wastewater regulations already mandate that septic tanks be constructed to prevent leachate from reaching waterways. Well-maintained septic systems do not cause "pollution of groundwater, wells, rivers, and lakes." *See* South Carolina Department of Health and Environmental Control *"Overview—Septic Tanks," at* https://www.scdhec.gov/environment/your-home/septic-tanks/overview-septic-tanks (last visited July 5, 2019). Petitioner's argument would transform the Ninth Circuit's "fairly traceable" analysis into an "unfairly traceable" test.

Not only is enforcement of the CWA's point source protections good public policy, it is also required by the text of the statute. Petitioner's argument that a point source discharge could avoid regulation because of intermediate travel through groundwater ignores the common definition of a "source" as a "point of origin." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED, at 2177 (1993). The pollution at issue in *Hawaii Wildlife Fund* did not originate in groundwater. Rather, the undeniable "source" of the pollution is the collection of wells at the Lahaina Wastewater Reclamation Facility.

The distinction between point and nonpoint sources is not one of directness versus indirectness, as Petitioner claims, but one of discreteness versus

diffuseness. Point sources require NPDES permits when a discrete "well" can be identified as the original "source" of the pollution. 33 U.S.C. § 1362(14). Nonpoint sources are exempt because nonpoint pollution "arises in such a diffuse way, it is very difficult to regulate through individual permits." *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002).

Pollution from nonpoint sources sometimes flows *directly* into navigable waters—such as run-off from a timber harvest adjacent to a river—but the "directness" of that discharge to the waterbody does not trigger NPDES requirements. Conversely, when a discrete conveyance such as a well *indirectly* contaminates navigable waters, that pollution remains properly regulated as a point source discharge under the CWA, just as it was before the 1972 amendments to the Federal Water Pollution Control Act. *See United States v. Esso Standard Oil Co. of Puerto Rico*, 375 F.2d 621, 623 (3d Cir. 1967). The legislative history of the CWA supports this straightforward reading of the statutory language. *See* 118 Cong. Rec. 33,758-59 (1972) (statement of Representative John Dingell, discussing *Esso* and the term "discharge of a pollutant" in 33 U.S.C. § 1362(12)).

That is why neither the Ninth nor Fourth Circuits have applied the CWA to regulate groundwater whatsoever. Rather, their applications of the CWA recognize that exempting indirect, point source discharges from the NPDES program would open the door to obvious gamesmanship. Instead of running an outfall pipe directly to navigable waters,

an operator could simply bury its pipe a few feet from the river's edge and allow the discharge to flow through soil and groundwater before reaching a protected stream. Such an interpretation would gravely hinder our ability as county governments to aid our residents in alleviating the harms caused by point source contamination.

ARGUMENT

I. Petitioner's Test to Limit CWA Jurisdiction Would Undermine Local Government Autonomy.

A fundamental concern that *amici curiae* have with Petitioner's argument is that it would undermine local government authority and autonomy. The 369,000-gallon spill of petroleum products at issue in *Upstate Forever* highlights the nature of this threat. *Upstate Forever* addresses a discharge from a 3,180-mile interstate pipeline that was sited under federal law and constructed through application of the federal power of eminent domain. *See* Pub. L. No. 77-197, 55 Stat. 610 (1941) (Congress authorizing the "exercise of the right of eminent domain" for construction of the pipeline); Proclamation No. 2505, 55 Stat. 1670 (Aug. 23, 1941) (executive action delineating the route of the pipeline); Kinder Morgan, *Plantation Pipe Line Company (PPL)*, https://www.kindermorgan.com/pages/business/products_pipelines/plantation.aspx (map of the pipeline) (last visited July 2, 2019).

If Anderson County, South Carolina had attempted to prohibit pipeline construction or

impose additional public-safety protections (*e.g.*, ordinances addressing nominal pipe diameter or wall thickness of the pipe), those local ordinances likely would have been stricken as unlawful and preempted by the federal statute declaring the pipeline's construction as necessary for national defense. *See* Pub. L. No. 77-197, 55 Stat. 610 (1941); *Virginia Uranium, Inc. v. Warren,* ___U.S.___, 139 S. Ct. 1894, 1901 (Gorsuch, J., plurality opinion).

The state of affairs in Anderson County, South Carolina is not unique. Indeed, there is a long history of federal statutes allowing for the exercise of eminent domain powers, *see, e.g., Kohl v. United States,* 91 U.S. 367 (1875) (upholding use of eminent domain pursuant to an Act of Congress for the "acquisition of a site for a post-office in Cincinnati"); Energy Policy Act of 2005 § 1221, 16 U.S.C. § 824p (allowing permit holders for certain power line projects to "acquire the right-of-way by the exercise of the right of eminent domain"), leaving localities with limited options to respond to community concerns.

The permitting obligations and citizen-suit provisions of the CWA provide important mechanisms that preserve local opportunities to address unpermitted discharges that contaminate our waters. The CWA's citizen-suit provision expressly allows municipalities, including counties, to "commence a civil action" to enforce point source requirements. *See* 33 U.S.C. § 1365(a), (g); 33 U.S.C. § 1362(4), (5). Thus, local governments have dual responsibilities under the Act. They may be required to obtain permits when they are the discharging entity, and they may be called upon to

initiate enforcement when they and their communities are adversely affected by an unpermitted discharge.

In *Rapanos,* the plurality opinion by Justice Scalia observed:

> [I]t makes no difference to the *statute's* stated purpose of preserving States' 'responsibilities and rights [under the CWA],' § 1251(b), that some States wish to unburden themselves of them. Legislative and executive officers of the States may be content to leave 'responsibilit[y]' with the [U.S. Army] Corps [of Engineers] because it is attractive to shift to another entity controversial decisions disputed between politically powerful, rival interests. That, however, is not what the statute provides.

Rapanos, 547 U.S. 715, 737 n.8 (emphasis in original). In the present case, of course, it is Petitioner that wishes to "unburden" itself of its CWA obligations as a local government by eviscerating an avenue for citizen-suit enforcement brought by residents of the County of Maui.

Local government *amici* are responsible for protecting community members and providing essential services, including drinking water, sewage treatment, and stormwater management. This responsibility necessarily involves our own compliance with the CWA. Erasing CWA protections against unpermitted, point source discharges—simply because the source is not placed directly into a navigable waterway—would allow private

dischargers to skirt the text of the CWA and harm our residents.

Indeed, that is the precise situation faced by Decatur County, Tennessee, where a North Carolina-based landfill operator seeks to avoid liability for water contamination it is alleged to have caused, leaving local residents holding the bag. *See* Water Quality Act of 1987, Pub.L. No. 100–4, § 507, 101 Stat. 7, 78 (1987) ("For purposes of the Federal Water Pollution Control Act, the term 'point source' includes a landfill leachate collection system."). To be clear, it is not just the environmental threat that concerns Decatur County officials; it is the threat to taxpayers who face the prospect of a costly cleanup that would overwhelm the tax base in this poor, rural community. *See* Anita Wadhwani, *Landfill Operator Tries To Walk Away From Environmental Disaster; Small Town Fights Back*, NASHVILLE TENNESSEAN (Apr. 15, 2019), *available at* https://www.tennessean.com/story/news/2019/04/15/decatur-county-landfill-lawsuit-toxic-leachate/3425243002/ (last visited July 12, 2019).

In *Upstate Forever,* Anderson County, South Carolina filed an *amicus* brief in support of its residents, observing that the discharge of "an estimated 370,000 gallons" of petroleum from a Kinder Morgan pipeline "was discovered by local citizens" and that the release flowed a short distance from the pipe to two creeks, both of which were within the Savannah River Basin. *See* Br. of Anderson County, South Carolina as *Amicus Curiae* in Support of Plaintiffs-Appellants Upstate Forever and Savannah Riverkeeper, at 4, Case No. 17-1640, Doc: 23-1 (filed July 19, 2017).

The distance from the point of discharge to Cupboard Creek (a tributary feeding the Savannah River), was as little as 400 feet, or roughly the length of the United States Supreme Court Building. *See The Court Building, at* https://www.supremecourt.gov/about/courtbuilding.pdf (last visited July 5, 2019). Under Petitioner's theory of the CWA, even this undeniable pollution of a navigable water by a point source would be exempt from the Act's permitting requirements because of the intervening 400 feet. That reading of the CWA is unsupported by the text of the statute and would allow an easy opportunity for gamesmanship by polluters.

In situations such as these, where local water quality is harmed by point source pollution, municipalities have the statutorily guaranteed authority to respond. *See* 33 U.S.C. §§ 1362, 1365. County governments like *amici* may even be said to have a responsibility to respond in order to address their constituents' local concerns. *See* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory,* 90 COLUM. L. REV. 346, 393-95 (1990) (discussing Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980)). By attempting to rewrite the text of the Act, Petitioner would remove a vital tool that Congress crafted for local government *amici* to protect our own communities and the Nation's navigable waters.

II. Petitioner Grossly Misreads the Ninth Circuit's Decision to Wrongly Assert It Would Require Expanded Regulation of Septic Tanks.

Petitioner alleges that under the CWA as applied by the Ninth Circuit, individual homeowners would be subject to point source permitting across "22 million homes in the country." *See* Br. of Pet'r, at 47. This claim is as absurd as it sounds. Petitioner's argument overlooks that State regulations have long-controlled residential septic tanks in order to prevent point source discharges into navigable waters. State-compliant septic tanks, therefore, should not violate the Act's NPDES requirements.

In South Carolina, regulations define "[s]afe treatment and disposal of domestic wastewater" to require that any septic tank releases "will not violate federal and state laws or regulations governing water pollution" and "will not pollute or contaminate any waters of the state." *See* S.C. Code Regs. § R. 61-56.100. The South Carolina regulations further mandate, "No septic tank effluent or domestic wastewater or sewage shall be discharged to the surface of the ground or into any stream or body of water in South Carolina without an appropriate permit from the Department." *See* S.C. Code Regs. § 61-56.301. Similarly, Tennessee law requires that residential septic tanks "shall be so located, constructed and maintained that wastes discharged to or from such systems … (3) Do not pollute or contaminate surface or ground water; [and] … (6) Will not violate any other laws or regulations

governing water pollution or sewage disposal." *See* Tenn. Code Ann. § 68-221-401.

As South Carolina's regulators have explained, "[w]ell designed, well-maintained septic tank systems" *do not* cause "pollution of groundwater, wells, rivers, and lakes." *See* South Carolina Department of Health and Environmental Control *"Overview—Septic Tanks," at* https://www.scdhec.gov/environment/your-home/septic-tanks/overview septic-tanks (last visited July 5, 2019). The obligation of the rare, derelict source to comply with the CWA when it threatens navigable waters is not new or pervasive. *See* Tenn. Code Ann. § 68-221-411 ("where a provision of this part is found to be in conflict with a provision of any private or public act or local ordinances or code existing May 4, 1973, the provision which establishes the higher standard for the promotion and protection of the health and safety of the people shall prevail").

Not surprisingly, Hawaii's regulations also require that wastewater must "not contaminate or pollute any drinking water or potential drinking water supply, or the waters of any beaches, shores, ponds, lakes, streams, groundwater, or shellfish growing waters," and further, that wastewater systems will be operated in a way that is "consistent with the State's administration of the National Pollutant Discharge Elimination System" for point source discharges. *See* Haw. Admin. Code § 11-62-02. To meet these standards, Hawaii regulations prohibit the construction of any new cesspools, which might fail to prevent releases of sewage into navigable waters. *See* Haw. Admin. Code § 11-62-36.

As county governments, *amici* depend on State standards to ensure septic systems operate properly in our communities. We have no interest in duplicating protections, but we do have an interest in protecting communities from defective or noncompliant septic systems. The takeaway is that well-maintained septic tanks should not release pollutants into the navigable waters, and poorly designed or neglected systems should be and already are subject to regulation and remediation under both the CWA and State laws—with no problems arising from such common-sense requirements.

Petitioner's argument about "traceability," Br. of Pet'r, at 31, attempts to read the word "fairly" out of the Ninth Circuit's analysis. It calls to mind a comment during oral argument in *Rapanos* from the Chief Justice:

> The … notion in *SWANCC* of a significant nexus suggests that there are some bodies of water or puddles that are going to have a nexus, but it's not going to be significant enough. We didn't just say any nexus. It said significant nexus.

See Transcript of Oral Argument at 50, *Rapanos v. United States*, 547 U.S. 715 (2006) (Nos. 04-1034, 04-1384).

By the same token, the Ninth Circuit did not say "traceable;" it said "fairly traceable." Analyzing whether a discharge is "fairly traceable" to the point source necessarily implies that there will be some additions of pollutants that have such an attenuated connection to any point source that, just as with common-law proximate cause analysis, they would

not be considered fairly traceable or added via an identifiably "direct hydrological connection." *Upstate Forever,* 887 F.3d at 651. As a result, a court would not deem them to be "from" the point source and they would not be subject to the Act's NPDES requirements. Petitioner's misreading of the Court of Appeals would subject homeowners not to a "fairly traceable" analysis, but to an "unfairly traceable" test.

III. Potential Liability Under Other Statutes Does Not Allow Petitioner to Skirt Its NPDES Obligations.

Petitioner misapprehends the States' nonpoint source programs, incorrectly asserting that the County of Maui's pollution of navigable waters from discrete wells would be better addressed through another statutory regime. *See* Br. of Pet'r, at 23. Kinder Morgan, as *amicus curiae* in support of Petitioner, makes a similar error in alleging that eviscerating the point source program "will not create any loophole for creative polluters, as there is simply no regulatory gap in need of filling." *See* Pet. for Writ of Cert. at 28, *Upstate Forever* (No. 18-268). These assurances are the proverbial dog that did not bark. If other statutes impose equally rigorous protections, then why bother to challenge these supposedly duplicative CWA obligations? The reality is that no law outside of the NPDES program is designed to address what is undeniably a discharge from a point source that indirectly contaminates navigable waters. Without enforcement of the CWA's longstanding prohibitions against pollution

from individual, point source dischargers, this protection will be drastically weakened.

Petitioner's citation to the Safe Drinking Water Act ("SDWA"), ignores that while the SDWA helps protect groundwater, it does *not* substitute for the CWA's protection of navigable waters. *See* 42 U.S.C. § 300h-8 ("to ensure the coordinated and comprehensive protection of ground water resources"). Primarily, the SDWA addresses the need for post-contamination treatment of water, in contrast to the CWA's emphasis on the prevention of contamination at the outset. *See* 42 U.S.C. § 300g-1(b)(8) (requiring EPA to "promulgate national primary drinking water regulations requiring disinfection as a treatment technique for all public water systems"). As local governments, we have significant experience navigating federal and State environmental laws, and recognize that the SDWA addresses groundwater as the *end point* in the pollution process rather than as a short medium between a point source and a navigable waterway. Critically, the SDWA aids in requiring treatment of contaminated water for public use, but it is *not* directed at preventing the pollution of navigable waters. Only the CWA does that.

Furthermore, the fact that discharges from wells in Maui, a pipe near Anderson, South Carolina, or a leachate collection system in Decatur County, Tennessee might trigger violations of other environmental, public health, and safety laws does not exempt these sources of pollution from CWA liability under the plain language of the statute. Petitioner has not pointed to any statutory language that would exempt polluters from CWA compliance if

they were also in violation of other laws. In fact, this Court has acknowledged that a complex pollution problem might be subject to both point source and nonpoint source regulation. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106-07 (2004) ("We note … that [33 U.S.C.] § 1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition.") (emphasis in original). *See also United States v. Earth Sciences, Inc.,* 599 F.2d 368, 373 (10th Cir. 1979) ("Mining and the other categories listed in §1314(f)(2) may involve discharges from both point and nonpoint sources, and those from point sources are subject to regulation.").

IV. The Point/Nonpoint Source Distinction Is Not One of Direct Versus Indirect Discharges, But One of Discrete Conveyances Versus Diffuse Sources.

Under the CWA, point sources are "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, [or] well …" 33 U.S.C. § 1362(14). Nonpoint sources, in contrast, are diffuse; "sediment run-off from timber harvesting, for example, derives from a nonpoint source." *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002). *See also League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002) (Nonpoint source pollution "is widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source.").

As the Ninth Circuit further explained in *Forsgren,* "Because [nonpoint pollution] arises in such a diffuse way, it is very difficult to regulate through individual permits." *Id.* That is the critical, distinguishing characteristic between point and nonpoint sources—and a distinction that Petitioner overlooks in its citation to *Forsgren*. *See* Br. of Pet'r, at 26. Point sources require NPDES permits because a discrete "pipe" or "well" can be identified and controlled as the original "source" of the pollution. 33 U.S.C. § 1362(14). Nonpoint sources are exempt because of the pragmatic impossibility of imposing controls on an ill-defined source that did not originate from any discrete conveyance.

When deciding whether pollution in a given situation is coming from a point or nonpoint "source," the question is *not* one of directness versus indirectness, as Petitioner argues, but rather one of discreteness versus diffuseness. The very definition of the word "source" confirms this plain reading of the CWA text. Merriam-Webster includes in its definition that a "source" is "a point of origin." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED, at 2177 (1993). It makes no logical sense to think of the "source" of a discharge as being the last thing the pollution touches before it enters navigable waters. The "source" by common definition is where the pollution begins.

Thus, control measures for nonpoint sources are typically referred to as "best management practices" ("BMPs") that can generally be applied to a farmer's fields or other sources lacking a discrete point of origin. *See* 33 U.S.C. § 1329(a)(1)(C). § 1329(b)(2)(B).

EPA itself has long recognized that nonpoint sources and control methods are inherently diffuse, *e.g.,* "reduced nutrient and pesticide application" on agricultural fields or "timing chemical applications or logging activities based on weather forecasts or seasonal weather patterns" to reduce run-off. *See* U.S. EPA, *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters,* EPA 840-B-92-002, at 1-12 (Jan. 1993).

Similarly, South Carolina has adopted "best management practices" for forestry that recognize diffuse harms to water quality. These practices establish "streamside management zones" to reduce nonpoint source pollution and emphasize measures that address widely dispersed pollution problems, such as erosion from timber harvests or other land use activities. *See* South Carolina Forestry Commission, *South Carolina's Best Management Practices for Forestry,* at 8, *available at* https://www.state.sc.us/forest/bmp manual.pdf.

In many of these instances, the pollution from the nonpoint source flows *directly* into a navigable water, but the "directness" of the pollution to the waterbody does not trigger NPDES permitting requirements. *See, e.g.,* U.S. EPA, *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters,* EPA 840-B-92-002, at 2-4 (Jan. 1993) (including Figure 2-1, which illustrates "Direct Runoff" from agricultural land to a protected stream). Conversely, when a discrete conveyance such as a well or a pipe *indirectly* contaminates navigable waters, that pollution remains properly regulated as a point

source discharge under the CWA, in much the same way it has been regulated since before the 1972 amendments to the Federal Water Pollution Control Act were adopted. *See United States v. Esso Standard Oil Co. of Puerto Rico*, 375 F.2d 621, 623 (3d Cir. 1967).

Nonpoint programs would fail to remedy the significant pollution of navigable waters at issue in *Hawaii Wildlife Fund*, *Upstate Forever,* and *Waste Services of Decatur, LLC*. As local governments, we rely on NPDES permitting, which affords stakeholders the opportunity to ensure that all pollutants released from a point source are accounted for in setting permit limits, and grants permit applicants assurances that "the permit will 'shield' its holder from CWA liability" so long as it remains in compliance. *See Piney Run Preservation Association v. County Commissioners of Carroll County, Maryland,* 268 F.3d 255, 266 (4th Cir. 2001). Indeed, we rely on this regulatory scheme since local governments are often the permit holders themselves. *See id.*

Nonpoint programs lack the requisite specificity of the NPDES permitting program. With regard to the release of hundreds of thousands of gallons of gasoline from a pipe just 400 feet from a tributary of the Savannah River, the problem for Anderson County, South Carolina is not one of identifying "best management practices" for a myriad of contributing factors. *See* 33 U.S.C. § 1329. Rather, the problem is one of enforcing remediation under the CWA from one unpermitted discharge. *Upstate Forever,* 887 F.3d at 643.

In sum, nonpoint pollution programs do not require the same type of source-specific permitting as point source discharges for the obvious reason that nonpoint pollution stems from many diffuse and disparate causes that are not "fairly traceable" to a single point source. That is not the case here. *See Hawaii Wildlife Fund,* 886 F.3d at 749. The underground injection wells at the Lahaina Wastewater Reclamation Facility—like the ruptured pipeline in *Upstate Forever* or the failing leachate collection system in Decatur County, Tennessee—are plainly identifiable and appropriately subject to regulation under the CWA's point source safeguards.

V. The Ninth and Fourth Circuits' Rulings Do Not Regulate Groundwater *Qua* Groundwater.

Contrary to Petitioner's claims, neither the Ninth, Fourth, or Second Circuits have proposed to regulate groundwater whatsoever. *See* Br. for Pet'r, at 5-6 (claiming that "because the groundwater is not a point source, the Ninth Circuit was wrong…"). The Fourth Circuit held that the CWA regulates a point source—a pipeline carrying diesel fuel and gasoline—that has polluted navigable surface waters of the United States. *See Upstate Forever,* 887 F.3d at 651. The Fourth Circuit's use of EPA's phrase "direct hydrological connection" does not exert authority over groundwater but simply describes how pollutants flow "from" the originating point source "to" navigable waters.

Similarly, the Ninth Circuit held that the Act regulates an undisputed point source—the County of Maui's underground injection wells—when a

discharge from that point source flows a short distance on or through another medium before reaching navigable waters. So long as navigable waters' contamination is "fairly traceable" to the point source then the Act applies, and movement via groundwater does not break the chain of causation or serve as a supervening event. A clear indication that the Ninth Circuit's holding does not amount to regulation of groundwater is evidenced by the fact that the Ninth Circuit did not even evaluate whether pollution remained in the groundwater itself. *Hawaii Wildlife Fund*, 886 F.3d at 746 n.2 ("We assume without deciding the groundwater here is neither a point source nor a navigable water").

Each of the Court of Appeals' rulings cite this Court's plurality opinion in *Rapanos,* and explicitly rely upon it. *See Hawaii Wildlife Fund,* 886 F.3d at 748 ("Justice Scalia recognized … that 'from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates § 1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between.'"); *Upstate Forever,* 887 F.3d at 649-50 ("[W]hen analyzing the kinds of connected waters that might fall under the CWA, Justice Scalia observed that '[t]he Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'") (emphasis in original) (internal citations omitted).

The Fourth and Ninth Circuit holdings are buttressed by the Second Circuit, which concluded

that helicopters spraying pesticides, which then indirectly travel through air to navigable waters, must be regulated as point source discharges. *See Peconic Baykeeper,* 600 F.3d at 188 ("Here, the spray apparatus was attached to trucks and helicopters, and was the source of the discharge. The pesticides were discharged 'from' the source, and not from the air."). *See also Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 510-11 (2d Cir. 2005) (upholding regulation of point source discharges from Confined Animal Feeding Operations without requiring wastewater to "be separately channelized" all the way to navigable waters because that would "impose a requirement not contemplated by the Act: that pollutants be channelized not once but twice before the EPA can regulate them").

Critically, the Second Circuit's decision in *Peconic Baykeeper* underscores a fatal flaw in Petitioner's argument. Exempting every indirect point source discharge from CWA jurisdiction—even if it migrates through just one foot of groundwater on its way to navigable waters—would open the door to obvious gamesmanship and a hollowing-out of CWA protections. In *Peconic Baykeeper,* the Court of Appeals reversed a district court, which had "reasoned that because the trucks and helicopters discharged pesticides into the air, any discharge was *indirect*, and thus not from a point source." 600 F.3d at 188 (emphasis added). That is, the district court erred in following the same rationale urged by Petitioner in one version[2] of its proffered test. *See* Br. of Pet'r, at 27-28.

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[2] Petitioner seems to acknowledge that the implications of its "direct into" test are unreasonable, attempting to carve out

Under Petitioner's approach, the path for industries seeking to avoid NPDES permitting would be straightforward. Instead of running a pipe directly to navigable waters, an operator could simply bury its pipe just a few feet from the river's edge and allow the discharge to flow through soil and groundwater before reaching a protected stream. Alternatively, an operator could discharge the outfall via a spray applicator set back from the river and allow polluted mist to permeate the land before reaching a waterway. In either case, the air, land, soil, or groundwater would serve as an intervening medium and break the direct chain between the point source discharge and navigable water. Nothing in the 1972 amendments to the Act would authorize the creation, nearly fifty years later, of this new "escape hatch" for discharging actors.

Indeed, Petitioner's argument would carve out an exemption from CWA responsibilities for certain classes of "fairly traceable" point source discharges, creating a perverse incentive for the worst operators. No NPDES permit would be required, despite the obvious fact that the pollutants from the point source were the "source" of contamination to navigable waters that Congress explicitly sought to

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exceptions to it. *See* Br. of Pet'r, at 43 (pollution <u>not</u> delivered directly to a navigable water by a "conveyance (*e.g.*, there is air between a pipe and the river below)" is still a point source discharge "and an NPDES permit is required."). Petitioner's concession here raises a question as to whether "air" is the only permissible intervening medium. What about four inches—or four hundred feet—of real property between the end of a pipe and a protected water body? Petitioner's flow chart provides no means for making these determinations. Thankfully, the text of the CWA does. *See Upstate Forever,* 887 F.3d at 642-43.

protect. *See N. Cal. River Watch v. Mercer Fraser Co.*, No. C-04-4620 SC, 2005 WL 2122052 at *2 (N.D. Cal. Sept. 1, 2005) (Conti, J) ("[I]t would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via groundwater.").

A further deficiency in Petitioner's interpretation is evidenced in a decision from the U.S. Court of Appeals for the Third Circuit, issued just a few years before the CWA was enacted. *See United States v. Esso Standard Oil Co. of Puerto Rico*, 375 F.2d 621 (3d Cir. 1967). There, the Court of Appeals evaluated liability under § 13 of the Rivers and Harbors Act, 33 U.S.C. § 407, which made it unlawful to "discharge … any refuse matter of any kind … into any navigable water of the United States …." 375 F.2d at 622. The provision is the predecessor to today's NPDES statute. *See* U.S. EPA, Region 1, "A Brief Summary of the History of NPDES," *at* https://www3.epa.gov/region1/npdes/ history.html (last visited June 14, 2019).

Esso had argued that "the remoteness of its activities from the shoreline isolate[d] it from liability under the Act," but the court found that indirect discharges would logically be covered as a matter of common sense: "[T]hough Esso did not run a pipe to the water's edge and discharge petroleum products directly into the sea, Esso's discharge of the oil was in such close proximity to the sea that the oil flowed there by gravity alone." 374 F.2d at 623.

Nowhere did the court reason that a finding of liability under the Rivers and Harbors Act would somehow constitute a new land-use "regulation" of the short distance of real property over which the oil flowed.

The CWA's text requires the same result. *See* 118 Cong. Rec. 33,758-59 (1972) (statement of Rep. Dingell discussing *Esso*). That point source pollution travels through groundwater on its way to navigable waters in no way requires "regulation" of groundwater under the NPDES program. Two hypotheticals outside the realm of environmental law show the clear error in Petitioner's logic. An individual transporting illegal narcotics from North Carolina to South Carolina can be prosecuted for commission of a federal crime even if Drug Enforcement Administration agents apprehend him on a local road far from major interstates. His use of a municipal thoroughfare would not negate the federal crime, nor would it constitute a "regulation" of a town or its local roads. Similarly, a person who uses a gun to kill someone is not absolved just because the bullet ricochets off a wall before arriving at its target. The firearm remains the "source" of the bullet, and the harm it causes remains "fairly traceable" to the assailant. Prosecution would not involve "regulation" of the wall.

By the same token, Petitioner wholly misses the point when it alleges that "groundwater is not a point source," Br. for Pet'r, at 5, since the point source discharge emanates from the injection wells, not from groundwater—indeed, groundwater is not a "source" at all. The analyses in *Hawaii Wildlife Fund, Upstate Forever,* and *Peconic Baykeeper* are

driven by the close connection between the point source discharge and the protected waterbody, not by the intervening medium the pollution might flow on or through. *Hawaii Wildlife Fund*, 886 F.3d at 749 (analyzing whether the pollution is "fairly traceable" to the point source); *Upstate Forever*, 887 F.3d at 651 (analyzing whether there is a "direct hydrological connection" through groundwater between the pipe and polluted navigable waterway); *Peconic Baykeeper*, 600 F.3d at 188 ("The pesticides were discharged 'from' the source, and not from the air."). The same is true for the analysis in *Esso Standard*. *Esso Standard Oil Co. of Puerto Rico*, 375 F.2d at 623 ("It seems clear to us that the first clause of § 13 does reach 'indirect' deposits of refuse in navigable water.").

In each of these cases, whether groundwater, soil, or air remained contaminated after pollution passed through it was irrelevant for purposes of CWA jurisdiction because those intermediate areas were not what was being regulated.

VI. Legislative History, to the Extent Relevant, Demonstrates Congressional Intent to Regulate the Point Source Pollution Problems at Issue Here.

As this Court has affirmed, "legislative history is not the law. 'It is the business of Congress to sum up its own debates in its legislation,' and once it enacts a statute '[w]e do not inquire what the legislature meant; we ask only what the statute means.'" *Epic Systems Corp. v. Lewis*, ___ U.S. ___, 138 S. Ct. 1612, 1631 (2018) (quoting *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951)

(Jackson, J., concurring)); *Ex Parte Collett,* 337 U.S. 55, 61 (1949) ("There is no need to refer to the legislative history where the statutory language is clear.").

Not only has Petitioner attempted to inject legislative history to obfuscate the plain language of the statute, it presents the history wrongly, misreading a statement by an unelected official, then-EPA Administrator William Ruckelshaus. The problem that Mr. Ruckelshaus sought to address was a concern about hard-to-trace pollutants that might permeate groundwater. He explained:

> We would have no desire, Mr. Chairman, under the program to interfere with the existing State program that was adequately protecting water quality. The only reason for the request for Federal authority over ground waters *was to assure that we have control over the water table* in such a way as to insure that our authority over interstate and navigable streams cannot be circumvented, so we can obtain water quality by maintaining a *control over all the sources of pollution*, be they discharged directly into any stream or through the ground water table.

See Water Pollution Control Legislation—1971 (Proposed Amendments to Existing Legislation), Hearing Before the Committee on Public Works, House of Representatives, 92nd Cong., 1st Sess. (July 13, 1971), at 230 (emphasis added).

That is, EPA had sought "control over the water table" and "all sources of pollution" affecting the water table, which would be diffused throughout groundwater and *not* fairly traceable back to one specific point source. Mr. Ruckelshaus was not evaluating the situation at issue in *Hawaii Wildlife Fund*, of a point source polluting a navigable waterway through a groundwater conduit. Rather, his suggestion was for the regulation of groundwater *itself*—in order to grant the U.S. EPA "control over the water table." *See id.* at 230. Petitioner misapprehends the legislative history of the CWA, insisting that Mr. Ruckelshaus's request for direct regulation of groundwater *qua* groundwater is dispositive. It is not.

Importantly, Senator Edmund Muskie, a primary author of the Act, referenced both the House and Senate versions of the CWA and observed that they included "in the definition of 'discharge' . . . direct *and* indirect discharges into the navigable waters." 118 Cong. Rec. 33,699 (1972) (emphasis added). Even more, the clearest statement comes from Representative John Dingell, who commented:

> It is quite clear that section 502(12) of the bill [33 U.S.C. § 1362(12)], in defining the term 'discharge of a pollutant,' does not in any way contemplate that the discharge be <u>*directly*</u> from the point source to the waterway. The situation is analogous to the court's holding in several cases, including *United States v. Esso Standard Oil Company of Puerto Rico*, 375 F.2d 621 (CA 3, 1967), <u>*where a*</u>

> *discharge from a shore facility flowed 'indirectly,' that is by force of gravity over land, to a waterway*.

118 Cong. Rec. 33,758-59 (1972) (emphasis added).

Petitioner also references a statement and proposed amendment by Representative Leslie Aspin, *see* Br. of Pet'r, at 40, yet Rep. Aspin's statement cannot overcome the plain language of the CWA or override clearly worded statements from Rep. Dingell and Sen. Muskie, as "ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *See Consumer Product Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 118 (1980).

Petitioner's argument equates to an assertion that pollutants that come into contact with any amount of groundwater *en route* to navigable waters can never be implicated in NPDES permitting. *See* Br. of Pet'r, at 23-25. This approach would require a patently illogical restriction of the CWA, because the text contains no such exemption. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106-07 (2004) ("§ 1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition.") (emphasis in original).

Petitioner's misreading of the legislative history stems from its failure to consider the context at the time of Mr. Ruckelshaus's testimony. The story of Cleveland, Ohio's Cuyahoga River catching fire because of untreated, industrial pollutants coating the surface of the waterway is well known, *see Solid*

Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 174-75 (2002) (Stevens, J., dissenting), but it was not an isolated incident. In the early 1970s, the Potomac River in Washington, D.C. was foul-smelling, unswimmable, and unfishable as it flowed past the Lincoln and Jefferson Memorials. As the N.Y. TIMES reported, "The heat of summer is enveloping the nation's capital, and with it has come the annual resurgence of a problem residents have come increasingly to dread: a stomach-turning miasma rising from the Potomac River." Gladwin Hill, *The Polluted Potomac: Sewage and Politics Create Acute Capital Problem*, N.Y. TIMES (July 12, 1970), *at* https://www.nytimes.com/1970/07/12/archives/the-polluted-potomac-sewage-and-politics-create-acute-capital.html. The TIMES cited a federal government report that documented how "sludge deposits have blanketed fish spawning grounds," leading to a release of "obnoxious odors when uncovered by ebb tide." *Id.*

Mindful of calamities such as these, Congress charted an ambitious goal for the CWA, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Senate Conference Report recorded that the CWA is to "be given the broadest possible constitutional interpretation." S. Conf. Rep. No. 92-1236, at 144 (1972); *see also* S. Rep. No. 95-370, at 75 (1977) (the Act "exercise[s] comprehensive jurisdiction over the Nation's waters to control pollution to the fullest constitutional extent").

The Ninth and Fourth Circuits' analyses are squarely consistent with this legislative history and the statutory language. Under the plain text of the

statute, contamination of a navigable water is only regulated under the NPDES program if the pollutant is "from" a point source – that is, if it is attributable or "fairly traceable" to one, specific point source, or, put another way, whether it is added to navigable waters via an identifiable, "direct hydrological connection" between that point source and navigable waters. *See Hawaii Wildlife Fund,* 886 F.3d at 749; *Upstate Forever,* 887 F.3d at 651. In at least some instances, this was already the law of the land under the Federal Water Pollution Control Act before the 1972 amendments. *See United States v. Esso Standard Oil Co. of Puerto Rico*, 375 F.2d at 623.

Pollution that permeates groundwater from multiple sources—but that cannot be confirmed to have come from a defined point source—is not covered. That diffuse pollution problem is the one that Mr. Ruckelshaus sought unsuccessfully to address. Mr. Ruckelshaus's legislative disappointment, however, cannot possibly be read to allow regulated entities to dodge liability here, where the pollution problems are acute, concrete, and unquestionably added "from" a specific, statutorily-identified point source—*i.e.,* a "well". *See* 33 U.S.C. § 1362(14). A "well," of course, is as an underground structure, and discharges from one commonly occur into groundwater before migrating to navigable waters. *See* Br. for Respondents Hawaii Wildlife Fund, et *al.*, at 22 (filed July 12, 2019). The U.S. Court of Appeals for the Tenth Circuit, in a case decided a few years after the CWA's enactment, spoke on this very question, finding a "point source" wherever a pollution problem originates from an acute, discrete "point":

> The legislative history indicates to us Congress was classifying nonpoint source pollution as disparate runoff caused primarily by rainfall around activities that employ or cause pollutants. … We believe it contravenes the intent of [the CWA] and the structure of the statute to exempt from regulation *any activity that emits pollution from an identifiable point.*

United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979) (emphasis added).

A point source must obtain an NPDES permit if it is proven that a discrete discharge is contaminating navigable waters. *See Hawaii Wildlife Fund,* 886 F.3d at 749; *Upstate Forever,* 887 F.3d at 651; *Peconic Baykeeper,* 600 F.3d at 188. Such proof has been amply documented here. *See Hawaii Wildlife Fund,* 886 F.3d at 742-43.

CONCLUSION

In *Hawaii Wildlife Fund*, point source discharges have translated into as much as 3,456 gallons of polluted effluent entering the Pacific Ocean per meter of coastline per day. 886 F.3d at 742. In *Upstate Forever*, the ruptured pipeline released 369,000 gallons of gasoline just a short distance (400 feet and 1,000 feet) from two tributaries of the Savannah River. 887 F.3d at 643. In Decatur County, Tennessee, a leachate collection system maintained by a single operator continues to pose a public health threat to the community and an environmental threat to the Tennessee River.

In all of these cases, citizen-suit enforcement of the CWA has demanded that local governments be accountable to their constituencies, and the Act has provided municipalities, as defined at 33 U.S.C. § 1362(4), with the authority to address pollution problems affecting their communities. Local government *amici* depend on the CWA as Congress drafted it. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 18-260

In The Supreme Court of the United States

COUNTY OF MAUI, HAWAI'I,

Petitioner,

v.

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

Respondents.

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

BRIEF OF THE STATES OF MARYLAND, CALIFORNIA, CONNECTICUT, ILLINOIS, MAINE, MICHIGAN, NEW JERSEY, NEW MEXICO, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON, THE COMMONWEALTH OF MASSACHUSETTS, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTERESTS OF AMICI CURIAE

Amici curiae the States of Maryland, California, Connecticut, Illinois, Maine, Michigan, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, and the District of Columbia ("the Amici States") have a substantial interest in the appropriate application of the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") permit program and the Act's prohibition against unpermitted discharges of pollutants into navigable waters. The Amici States rely on the Clean Water Act's cooperative federalism framework to ensure that discharges to navigable waters are monitored and comply with permits that take into account the capabilities of treatment technologies, impacts on water quality, and the Act's overall goal of protecting the nation's waters. More specifically, the Amici States rely on the Act to ensure a stable nationwide regulatory floor protecting their surface waters against pollution flowing downstream across state lines.

This case is not about harnessing the Clean Water Act to regulate groundwater pollution, a subject that is largely a matter of traditional state regulation. Rather, it is about regulating pollution in navigable waters, where that pollution is traceable from a defined point source—the indisputable subject of national regulation under the Clean Water Act. Reversing the court of appeals' decision, or creating a Clean Water Act exception for point source discharges that pass through groundwater or other conduits before reaching navigable waters, would be incongruous with the Act's text

and purposes alike.[1] Not only would such an exception threaten the quality of navigable waters that receive discharges of pollutants from point sources via groundwater, it would give polluters an incentive to skirt Clean Water Act regulation simply by relocating point source discharges of pollution to nearby groundwater. The Amici States urge the Court to affirm the court of appeals' decision and hold that, where pollutants are fairly traceable from a point source to navigable waters through groundwater or other conduits, the underlying point source discharge falls within the scope of the Clean Water Act's NPDES program.

SUMMARY OF ARGUMENT

1. The Clean Water Act bars "any addition of any pollutant to navigable waters from any point source" unless authorized by a permit and in compliance with the Act's requirements. 33 U.S.C. §§ 1311(a), 1362(12). Nothing in the Act's text requires that point sources discharge pollutants *directly* to navigable waters. The Act also contains no exception for discharges that pass

[1] Some of the Amici States filed comments asking the United States Environmental Protection Agency ("EPA") to withdraw the "interpretive statement" it recently issued on this question. *See* Attorneys General of Maryland, California, Colorado, Connecticut, the District of Columbia, Maine, Massachusetts, Michigan, Oregon, Rhode Island, and Vermont, Comment Letter on Proposed Interpretive Statement on Application of the Clean Water Act NPDES Program to Releases of Pollutants from a Point Source to Groundwater (June 7, 2019), https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0166-0220.

through groundwater before reaching navigable waters. Instead, such point source discharges are subject to NPDES permitting if the pollutants are fairly traceable from the point source to navigable waters—a requirement ensuring that pollutants entering navigable waters are truly "from" the point source, as the statute requires.

2. NPDES coverage of point source discharges of pollutants to navigable waters through groundwater or other conduits protects state interests. The NPDES program promotes federalism by empowering states to protect their waters without fear that their efforts will be undercut by pollution crossing jurisdictional boundaries. Excepting discharges that travel through groundwater or other conduits before reaching navigable waters would jeopardize those waters and leave a dangerous and textually unjustified gap in the Clean Water Act's protections. Other federal environmental statutes and purely state-law regulation would not fill that gap.

3. Continuing federal regulation of the discharges at issue is feasible without undue burden. Although Petitioner and its amici cast the lower court's ruling as a vast expansion of the NPDES program, EPA has—until recently—long rejected the categorical exception they propose, and the sky has not fallen. Quite the contrary: agencies have issued just the sorts of permits that Petitioner and its amici claim are impracticable. Further, the only discharges covered by the court of appeals' ruling are those that are fairly traceable from particular point sources to navigable

waters. In appropriate circumstances, general permits provide agencies with a tool to streamline and simplify the process of permitting large numbers of similar sources. Any burdens associated with affirming the court of appeals' ruling do not warrant an exception that Congress itself did not create.

ARGUMENT

I. THE CLEAN WATER ACT'S NPDES PROGRAM DOES NOT CATEGORICALLY EXCEPT POINT SOURCE DISCHARGES TO NAVIGABLE WATERS VIA GROUNDWATER OR OTHER CONDUITS.

A. The Clean Water Act Broadly Prohibits Pollutant Discharges Unless Authorized by NPDES Permits.

Congress enacted the Clean Water Act with the primary objective of "restor[ing] and maintain[ing] the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To help achieve that objective, Congress prohibited "the discharge of any pollutant by any person," except in compliance with listed provisions of the Act. *Id*. § 1311(a).

Consistent with the Clean Water Act's overall objective, Congress broadly defined the prohibited conduct. The Act defines "discharge of a pollutant" to include "*any* addition of any pollutant to navigable waters from *any* point source." *Id.* § 1362(12) (emphasis added). "Pollutant," too, is a broad term. Subject to exceptions inapplicable here, it includes "dredged spoil,

solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." *Id.* § 1362(6). Similarly, "point source" is defined broadly to include (again subject to exceptions inapplicable here) "*any* discernible, confined and discrete conveyance, including but not limited to *any* pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants *are or may be* discharged." *Id.* § 1362(14) (emphasis added).

Despite these broad definitions, Congress did provide a mechanism for otherwise prohibited discharges to occur. Under the NPDES program, EPA may "issue a permit for the discharge of any pollutant[] or combination of pollutants" in compliance with certain conditions. *Id.* § 1342(a)(1).

States may implement the NPDES program within their respective jurisdictions in lieu of EPA. EPA must approve a state's proposal to do so if it determines that certain mandatory components are included. *Id.* § 1342(b). To date, 47 states and the U.S. Virgin Islands have assumed at least partial responsibility for administering the NPDES program. *See* EPA, NPDES State Program Information: State Program Authority, https://www.epa.gov/npdes/npdes-state-program-information (last visited July 12, 2019).

B. The Prohibition on Unpermitted Point Source Discharges to Navigable Waters Contains No Exception for Discharges Through Groundwater or Other Conduits.

On its face, the Clean Water Act's prohibition on the unauthorized "addition of any pollutant *to* navigable waters *from* any point source," 33 U.S.C. § 1362(12) (emphasis added), encompasses both direct and indirect additions of pollutants to navigable waters. Justice Scalia's opinion in *Rapanos v. United States* acknowledged as much:

> The Act does not forbid the "addition of any pollutant *directly* to navigable waters from any point source," but rather the "addition of any pollutant *to* navigable waters." Thus, from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between.

547 U.S. 715, 723 (2006) (plurality op.) (emphasis in original; citations omitted). Notably, the opinion's reference is to pollutants that pass through "conveyances," not just through those conveyances that are also point sources.

The prohibition on unauthorized point source discharges of pollutants to navigable waters contains no

express exception for those discharges that pass through groundwater. With such an exception absent from the text, this Court should not read one in. *See*, *e.g.*, *City of Chi. v. Environmental Def. Fund*, 511 U.S. 328, 334-38 (1994). Indeed, as the United States notes, Congress mentioned groundwater repeatedly in the Clean Water Act. *See* Br. for U.S. as Amicus Curiae Supporting Pet'r ("U.S. Br.") 16-19. But contrary to the conclusion that the United States draws, these repeated references confirm that the subject of groundwater was very much before Congress and that the absence of a groundwater conduit exception must therefore be treated as deliberate. Not only that, but the Act's definition of "point source" specifically includes "well," 33 U.S.C. § 1362(14), and it is unclear how a well could discharge pollutants to navigable waters in any manner *other than* via groundwater.

Equally absent from the statute is the broader exception that Petitioner proposes. According to Petitioner, point source discharges to navigable waters are subject to the Clean Water Act if they pass through conduits that are themselves point sources, yet are excepted if any of the conduits is *not* a point source. *E.g.*, Pet'r Br. 54. But the Clean Water Act does not distinguish among different kinds of conduits; the "addition of any pollutant" must only be "*to* navigable waters" and "*from* any point source." 33 U.S.C. § 1362(12) (emphasis added). And although Petitioner attempts to ground its "means of delivery" test in the phrase "from a point source," Pet'r Br. 28-30, that phrase most logically refers to the regulated point source itself, rather

than the types of conduits that carry pollutants to navigable waters.[2]

Regulating point source pollutants that reach navigable waters through groundwater is not the same as regulating groundwater as a "navigable water" or invading state prerogatives regarding groundwater regulation.[3] The court of appeals' decision does not define "navigable waters" to include groundwater, nor does it otherwise extend the Clean Water Act to cover discharges of pollutants into groundwater as such. Rather, the decision stands for the unremarkable proposition that a point source discharge to navigable waters (*i.e.*, jurisdictional waters) remains a point source discharge to navigable waters even if it passes through groundwater along the way. Whether or not Congress "intend[ed] for the CWA to expand federal jurisdiction to groundwater," Br. of Amici Curiae State of W. Va., *et al.* ("W. Va. Br.") 11, is therefore irrelevant.

Nor does the court of appeals' decision raise the specter of unfettered liability for discharges into

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[2] Those conduits may themselves be regulated, however, if they are point sources. *See South Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 104-05 (2004).

[3] The precise contours of "navigable waters," which the Clean Water Act defines by reference to "the waters of the United States," have been the subject of considerable litigation and regulation. *See*, *e.g.*, *Rapanos*, 547 U.S. 715; Revised Definition of Waters of the United States, 84 Fed. Reg. 4154 (Feb. 14, 2019). This brief takes no position on the proper definition of "navigable waters" or "the waters of the United States," and in submitting this brief, no Amicus State intends to change any position it previously has taken on those questions.

groundwater. For such discharges to be subject to the NPDES program, the fact that groundwater connects to navigable waters is not enough. Rather, such discharges are covered only if the pollutants can be fairly traced from navigable waters to the point source, for only then can it be said that the discharge to navigable waters is "*from* [the] point source." 33 U.S.C. § 1362(12) (emphasis added). In those circumstances, it is only sensible—and consistent with the statutory text—to require the point source to comply with effluent limitations designed to protect navigable waters, as the text requires.

Practical considerations underscore the problems with the exception that Petitioner seeks. Accepting Petitioner's position would allow savvy entities to avoid altogether the Clean Water Act's prohibition on unpermitted discharges from point sources. Instead of discharging directly into a river, a polluter might move its discharge pipe into immediately adjacent groundwater and, if Petitioner's position were correct, thereby evade the Clean Water Act.[4] Petitioner and its amici do not

[4] This sort of gamesmanship is by no means fanciful. In Colorado, the operator of a silver mine sought to terminate its discharge permit because it had moved its discharges from surface water to a nearby pipe buried in waste rock material. The state permitting agency denied the termination request because the unconsolidated nature of that material, coupled with the discharge's proximity to the surface water at issue, created a direct hydrologic connection between the discharge and that surface water. *See* Colorado Department of Public Health & Environment, Permit Termination Request Denial—December 2016 Request Permit No. CO0000003 (June 1, 2017), https://environmentalrecords.colorado.gov/HPRMWebDrawer/Record/1013777/File/Document.

explain why Congress would have meant to give polluters a road map to evade Clean Water Act permitting requirements, threaten the integrity of the nation's waters, and jeopardize the interests of states downstream. Such a result would be antithetical to the Act's prohibition against unpermitted discharges of pollutants to navigable waters, as well as its stated goal of "restor[ing] and maintain[ing] the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

II. EXCEPTING DISCHARGES VIA GROUNDWATER OR OTHER CONDUITS WOULD UNDERMINE STATES' ABILITY TO PROTECT THEIR NAVIGABLE WATERS.

Petitioner and its amici argue that the court of appeals' decision denigrates states' interests because it encroaches on state sovereignty and leaves states with untenable regulatory burdens. *See*, *e.g.*, Pet'r Br. 51-52; W. Va. Br. 27-34. The Amici States disagree. An interpretation of the Clean Water Act that is consistent with the statutory text and furthers the Act's purposes—including coverage of the discharges at issue in this case—is necessary to *protect* state interests, and concerns about increased burdens are significantly overstated.

A. The Clean Water Act Promotes Federalism by Empowering States to Protect Their Navigable Waters.

The Clean Water Act gives states a central role in regulating point source discharges. "[I]t is the policy of Congress," the Clean Water Act declares, "that the States . . . implement the permit programs under sections 1342 and 1344 of this title." 33 U.S.C. § 1251(b); *see* 33 U.S.C. § 1342(b) (providing that, if EPA determines that certain conditions are satisfied, EPA "shall" authorize a state to administer the NPDES program). Congress's stated desire for states to implement the NPDES permit program—the Clean Water Act's principal means of regulating point source pollution—is one reflection of its solicitude for "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b).

At the same time, the Act establishes minimum standards to which NPDES programs must adhere. Delegation of permitting authority depends on a state's ability to "apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 [of Title 33]." 33 U.S.C. § 1342(b)(1)(A). And although states are free to implement water quality protections that are more stringent than the standards established under the Clean Water Act, they may not fall below those standards. *See id.* § 1370 (providing that states cannot "adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent" than

those established "under this chapter"). Thus, while some variation is allowed from state to state, the Act ensures that no state can adopt or enforce water quality controls that fall below a national regulatory floor.

States rely on this regulatory floor in two ways. First, they rely on the Clean Water Act's minimum nationwide standards to protect their waters against upstream, out-of-state pollution that they cannot regulate directly. Although pollutants discharged in one state can travel downstream to the waters of another, states typically cannot apply their own laws to polluters outside their boundaries. *See generally International Paper Co. v. Ouelette*, 479 U.S. 481, 491-97 (1987). The Clean Water Act's NPDES program protects downstream states by ensuring that upstream, out-of-state point source discharges are subject at least to nationwide minimum standards. *See*, *e.g.*, 33 U.S.C. § 1370 (state standards cannot be "less stringent" than federal standards); *id.* § 1342(b) (requirements for states to exercise delegated permitting authority, including that their NPDES programs must "insure that the public, and *any other State the waters of which may be affected*, receive notice of each application for a permit" and "provide an opportunity for public hearing before a ruling on each such application" (emphasis added)); 40 C.F.R. § 122.4(d) (NPDES permits must ensure compliance with water quality standards of downstream states). The NPDES program's protections become meaningless, however, when a source is not subject to the program at all.

Second, states rely on the Clean Water Act's regulatory floor for assurance that protecting water quality will not cause businesses to relocate to jurisdictions with less stringent water quality protections. Indeed, these concerns hamstrung state efforts to control water pollution prior to 1972. *See*, *e.g.*, A Legislative History of the Water Pollution Control Amendments of 1972, at 452 (1972) (statement of Rep. Reuss, quoting Governor Wendell Anderson of Minnesota, that "[e]very governor in the country knows what is the greatest political barrier to effective pollution control," namely, "the threat of our worst polluters to move their factories out of any State that seriously tries to protect its environment" and "the practice of playing off one State against the other"). Congress responded by prohibiting all point sources from discharging pollutants to navigable waters (absent a permit) and barring states from setting standards below the national floor. *See* 33 U.S.C. §§ 1311(a), 1370. Far from encroaching upon states' rights, that national floor empowers states to protect their navigable waters without fear that other states will undermine those efforts.

B. An Exception for Discharges Through Groundwater or Other Conduits Would Significantly Erode the National Regulatory Floor and Degrade Water Quality.

A bar on unauthorized point source discharges to navigable waters via groundwater (or other conduits) is one component of the federal regulatory floor on

which the Amici States depend. Petitioner and its amici, however, suggest that excepting such discharges from the NPDES program would pose little cause for concern because they already are subject to other federal statutes, as well as state regulation not required by the Clean Water Act. *See*, *e.g.*, Pet'r Br. 43-44; W. Va. Br. 21-24; U.S. Br. 31-33. These contentions are incorrect.

1. Other Federal Laws Do Not Ameliorate the Consequences of Creating an Exception for Discharges Via Groundwater or Other Conduits.

Petitioner and its amici cite a host of federal laws that would remain in place even if this Court were to reverse the court of appeals' decision. None of those laws adequately mitigates the consequences of such a ruling.

First, Petitioner and its amici are wrong to suggest that the Clean Water Act's *nonpoint* source programs are relevant here. *See*, *e.g.*, Pet'r Br. 23-26; W. Va. Br. 15-17. Those programs provide funding and technical support to help states control the discharge of pollutants to navigable waters from diffuse sources, such as some storm water and farm field runoff.[5] *See*, *e.g.*, 33 U.S.C. § 1329. This support is useful, to be sure, but it is beside the point. The discharges of pollutants in this case—as well as other discharges implicating the

[5] Concentrated animal feeding operations, by contrast, are regulated as point sources. 33 U.S.C. § 1362(14).

question presented—are from *point* sources, such as wastewater injection wells, coal ash impoundments, and leaking pipelines. *See*, *e.g.*, *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737, 744-45 (9th Cir. 2018) (injection wells discharging to Pacific Ocean via groundwater); *Yadkin Riverkeeper v. Duke Energy Carolinas LLC*, 141 F. Supp. 3d 428, 436-37, 444 (M.D.N.C. 2015) (coal ash lagoons discharging to the Yadkin River via groundwater); *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 647-48 (4th Cir. 2018) (gasoline pipeline leaking via groundwater into creeks, adjacent wetlands, and lakes); *see also* 33 U.S.C. § 1362(14) (defining "point source"). The pollutants merely pass through a groundwater conduit before reaching navigable waters. And because they are traceable from a particular point source (as required by the decision below), controlling their discharge does not pose the challenges ordinarily associated with controlling nonpoint source pollution.

Nor do other federal pollution control and remediation statutes adequately fill the gap that would result from a groundwater-conduit exception, as Petitioner and its amici argue. *See*, *e.g.*, Pet'r Br. 43-44; U.S. Br. 31-33. The Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901 – 6992, for instance, does not substitute for regulation under the Clean Water Act. The "primary purpose" of RCRA, this Court has observed, "is to reduce the generation of hazardous wastes and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996).

The "hazardous waste" that RCRA regulates is a narrower category than the "pollutants" that the Clean Water Act regulates.[6] And RCRA is primarily focused on the management of wastes, rather than the protection and overall health of navigable waters.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 – 9675, is an even poorer substitute. CERCLA is not designed to limit pollutant discharges or contamination in the first instance. Instead, it is primarily focused on promoting the "timely cleanup of hazardous waste sites" once they are created and "ensur[ing] that the costs of such cleanup efforts [are] borne by those responsible for the contamination." *Burlington N. and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009) (citations omitted). Moreover, CERCLA governs "hazardous substances," generally defined to include substances with particular characteristics or substances that have been specially designated under certain other statutes, *see* 42 U.S.C. § 9601(14), again in contrast with the Clean Water

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[6] *Compare* 42 U.S.C. § 6903(5) (defining "hazardous waste" for purposes of RCRA to mean certain solid waste that may "cause, or significantly contribute to[,] an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness" or "pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed") *with* 33 U.S.C. § 1362(6) (defining "pollutant" under the Clean Water Act to include, among other things, "sewage, garbage, . . . biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, [and] cellar dirt").

Act's broad definition of "pollutant," *see* 33 U.S.C. § 1362(6).

Likewise, the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f – 300j-27, would not fill the gap in Clean Water Act coverage that would result from reversal of the court of appeals' decision. *See* Pet'r Br. 43. The SDWA protects drinking water—not navigable waters—by authorizing EPA to set maximum contaminant levels to protect the public health and welfare, 42 U.S.C. § 300f(1) – (2), and by establishing standards governing the operation of underground injection wells, *id.* §§ 300h – 300h-8. Even those provisions are limited in scope. For instance, the statute does not regulate any contaminant unless EPA has made certain findings in connection with its impact on drinking water. *See*, *e.g.*, *id.* § 300g-1(b)(1)(A) – (B) (directing regulation of contaminants that, among other things, have the potential to adversely affect human health and are sufficiently likely to occur in public water systems "with a frequency and at levels of public health concern"). And as the record in this case demonstrates, the SDWA in fact is insufficient to incidentally protect navigable waters. *See Hawai'i Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 980, 999, 1003-04 (D. Haw. 2014) (finding that even after compliance with a permit issued under the SDWA, "more than 50% of the effluent originating at the [facility] is finding its way into the ocean," significantly damaging nearby coral).[7]

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[7] Additionally, neither the Coastal Zone Management Act (Pet'r Br. 44) nor the Oil Pollution Act of 1990 (U.S. Br. 33)

2. State Regulation Does Not Adequately Protect Against the Consequences of Reversal.

Petitioner and its amici also insist that a Clean Water Act exception for discharges through groundwater or other conduits poses little cause for concern because, they say, state regulation is and will remain robust. *See*, *e.g.*, W. Va. Br. 20-27. These reassurances are mistaken. Although state regulation plays an important role in protecting water quality, overall it is too uneven to fill the gap left by Petitioner's requested exception.

For instance, Petitioner's amici generally emphasize the degree to which existing state law protects groundwater. *See* W. Va. Br. 21-24 (arguing that listed state laws "highlight [that the] absence of a requirement to obtain an NPDES permit is not equivalent to an unfettered license to discharge pollutants into groundwater"). Again, however, this case is not about protection of groundwater as such. It is about protection of *navigable* waters from point source discharges of pollutants that traceably travel *through* groundwater. Regulation of groundwater quality (or discharges into groundwater) may incidentally offer a measure of

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provides an adequate substitute for Clean Water Act coverage. The Coastal Zone Management Act's requirement that each participating state prepare a "Coastal Nonpoint Pollution Control Program," 16 U.S.C. § 1455b(a)(1), does not regulate point source pollution, and the Oil Pollution Act establishes damages liability for certain oil spills, *see* 33 U.S.C. § 2702(a).

protection for navigable waters, but it is not designed to do so.

Further, the state laws that Petitioner's amici cite offer little in the way of consistency. Some provisions are drafted broadly. *See* Mich. Comp. Laws § 324.3109(1) (providing that a "person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious"). Others, however, appear to be drawn more narrowly. *See*, *e.g.*, Kan. Stat. § 65-164(a) – (b) (prohibiting the discharge of "sewage," defined as "any substance that contains any of the waste products or excrementitious or other discharges from the bodies of human beings or animals or chemical or other wastes from domestic, manufacturing or other forms of industry," into state waters). This inevitable lack of uniformity prevents states from relying dependably on a consistent baseline level of regulation nationwide. *See supra* at 12-13.

In some instances, moreover, the level of state regulation is tied to federal standards, so that weakening the latter can weaken the former. In certain states, state law currently *prohibits* regulation that goes beyond federal requirements (even though federal law, of course, permits it). *See*, *e.g.*, Ariz. Rev. Stat. Ann. § 49-203(A)(2) (instructing the director to adopt "a permit program that is consistent with but no more stringent than the requirements of the clean water act for the point source discharge of any pollutant or combination of pollutants into navigable waters"); Ky. Rev. Stat. Ann. § 224.16-050(4) (providing that "the cabinet shall not impose . . . any effluent limitation, monitoring

requirement, or other condition which is more stringent than . . . federal regulation"); Miss. Code Ann. § 49-17-34(2) ("All rules, regulations and standards relating to air quality, water quality or air emissions or water discharge standards . . . shall be consistent with and shall not exceed the requirements of federal statutes and federal regulations, standards, criteria and guidance."). In other states, state law references or directly incorporates federal standards. *See*, *e.g.*, W. Va. Code § 22-11-4(a)(1) (instructing director to "perform any and all acts necessary to carry out the purposes and requirements of this article and of the [Clean Water Act] . . . relating to this state's participation in the [NPDES]"). State regulation thus is not independent of the level of federal regulation and cannot dependably fill the gap resulting from an atextual groundwater-conduit exception. Indeed, adopting that exception might well preclude some states from regulating discharges to navigable waters via groundwater, given existing state law prohibiting or restricting regulation more stringent than federal standards. *See*, *e.g.*, Ariz. Rev. Stat. § 49-203(A)(2); Ky. Rev. Stat. Ann. § 224.16-050(4); Miss. Code Ann. § 49-17-34(2).

Finally, any protections currently provided by state law do not guarantee similar protections in the future, in the absence of Clean Water Act protection. Without such protection, a state that vigorously protects its waters today may, for whatever reason, decide to protect its waters less vigorously tomorrow. It would be a mistake, therefore, to treat the current landscape of state regulation as a basis for creating the exception

that Petitioner and its amici seek, and that Congress did not provide.

III. Regulating Groundwater-Conduit Discharges Under the NPDES Program Is Feasible Without Undue Burden.

Alternatively, Petitioner and its amici argue that discharges to navigable waters via groundwater should be excepted from Clean Water Act coverage because (they say) the process of issuing permits for such discharges would be unduly burdensome for applicants and for state permitting authorities alike. *See*, *e.g.*, W. Va. Br. 27-34. Not so. Any consideration of burden is beside the point, because Congress did not include an exception for groundwater-conduit discharges. But even if it were appropriate to consider regulatory burdens, the lower court's ruling is far less onerous than Petitioner and its amici claim, and any resulting burdens are fully justified.

As an initial matter, claims about dramatically increased burdens rest on an incorrect premise, namely, that the court of appeals' decision amounts to a novel expansion of the NPDES program. *See*, *e.g.*, Pet'r Br. 45-48. EPA's own position—until recently—had long been that discharges to navigable waters via groundwater are not exempt from Clean Water Act regulation. For nearly twenty-five years, EPA's manual for NPDES permit writers has expressly provided that discharges via groundwater can fall within the NPDES program. In 1996, that manual recognized that

groundwater is not part of the "waters of the United States," but that "[i]f . . . there is a discharge to groundwater that results in a 'hydrological connection' to a nearby surface water, the Director may require the discharger to apply for an NPDES permit." U.S. EPA, EPA-833-B-96-003, NPDES Permit Writers' Manual 13 (1996), https://www3.epa.gov/npdes/pubs/owm0243.pdf. The 2010 manual—which remains the latest version—takes a similar tack. Although that manual acknowledges that "[t]he CWA does not give EPA the authority to regulate ground water quality through NPDES permits," it makes clear that "[i]f a discharge of pollutants to ground water reaches waters of the United States, . . . it could be a discharge to the surface water (albeit indirectly via a direct hydrological connection, i.e., the ground water) that needs an NPDES permit." U.S. EPA, EPA-833-K-10-001, NPDES Permit Writers' Manual 1-7 (2010), https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf. These statements in EPA's most comprehensive guidance to agencies implementing the NPDES program are consistent with multiple EPA regulatory preambles over the years.[8] They are also consistent with

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[8] *See* National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 3017 (Jan. 12, 2001) ("As a legal and factual matter, EPA has made a determination that, in general, collected or channeled pollutants conveyed to surface waters via ground water can constitute a discharge subject to the Clean Water Act."); Reissuance of NPDES General Permits for Storm Water Discharges from Construction Activities, 63 Fed. Reg. 7858, 7881 (Feb. 17, 1998) ("EPA interprets the CWA's NPDES permitting program to

EPA's previous explanation of its "longstanding position" at an earlier stage of this very case.[9] That EPA's pronouncements have long reflected the lack of a categorical exception for discharges through a groundwater conduit confirms that the court of appeals' decision is far from novel.

This conclusion is unaffected by the fact that EPA has reversed course and *now* believes, erroneously, that discharges to navigable waters via groundwater are exempt from NPDES permitting. *See* Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System

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regulate discharges to surface water via groundwater where there is a direct and immediate hydrologic connection . . . between the groundwater and the surface water."); Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991) (discharges to groundwater with a direct hydrological connection to surface water "are regulated because such discharges are effectively discharges to the directly connected surface waters"); EPA National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990) (stating that rulemaking addressed only "discharges to waters of the United States," so that "discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body)").

[9] *See* Br. for the U.S. as Amicus Curiae Supporting Pls.-Appellees, *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018) (No. 15-17447), ECF No. 40, 2016 WL 3098501, at *22 ("EPA's longstanding position has been that point-source discharges of pollutants moving through groundwater to a jurisdictional surface water are subject to CWA permitting requirements if there is a 'direct hydrological connection' between the groundwater and the surface water.").

Program to Releases of Pollutants from a Point Source to Groundwater, 84 Fed. Reg. 16,810 (Apr. 23, 2019). That EPA has reached this conclusion by way of "interpretive guidance" in 2019—in an apparent effort to influence this litigation[10]—cannot erase the historical fact that, for nearly three decades, the lack of a groundwater-conduit exception has been the agency's repeatedly articulated position. There is no reason to think that the consequences of that prior "longstanding position" have been grievous or destabilizing.

In fact, it is just the opposite. Permitting agencies have issued permits for discharges reaching navigable waters via groundwater. As the following examples demonstrate, coverage of such discharges is not novel and does not create unmanageable burdens:

- The NPDES permit renewed in 2012 by the State of Colorado for the Western Sugar Company's sugar beet factory and associated wastewater treatment facility authorizes the company to discharge effluent into groundwater via a series of unlined ponds in accordance with certain limitations and conditions, based on a hydrologic connection between the groundwater and the South Platte River. *See* Colorado Discharge Permit System Fact

[10] EPA's "interpretive statement" asserts that it is meant to "provide[] necessary clarity on the Agency's interpretation of the statute" in connection with the grant of certiorari in this case. 84 Fed. Reg. at 16,812. EPA's newfound interpretation accordingly should be treated as a "convenient litigating position," *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012), and receive no deference here.

Sheet to Permit Number CO-0041351, https://environmentalrecords.colorado.gov/HPRMWebDrawer/Record/237726 (last visited July 16, 2019).

- The NPDES permit issued by EPA in 2017 for the Hollywood Casino Wastewater Treatment Plant, located in Jamul, California, authorizes the plant to discharge effluent into groundwater infiltration basins in accordance with certain limitations and conditions. The infiltration basins are located within 100 feet of Willow Creek. EPA concluded that "wastewater discharged to the infiltration basins has potential to result in surface water discharges to Willow Creek and is therefore subject to regulation through an NPDES permit." NPDES Permit No. CA0084284 Fact Sheet, at 2, https://www.epa.gov/sites/production/files/2017-08/documents/ca0084284-jamul-hollywood_casino_waste_water_treatment_plant-npdes-permit-factsheet-2017-08.pdf (last visited July 16, 2019).

- The NPDES permit issued by EPA in 2015 for the Tahola Village Wastewater Treatment Plant, located on the reservation of the Quinault Indian Nation, authorizes the plant to discharge effluent into groundwater in accordance with certain limitations and conditions. The effluent "is mixed and diluted into a groundwater plume prior to entering the Quinault River as surface water." NPDES Permit No. WA0023434 Fact Sheet, at 9, https://www.epa.gov/sites/production/files/2017-09/

documents/r10-npdes-taholah-wa0023434-fact-sheet-2015.pdf (last visited July 16, 2019).

- The NPDES permit reissued by EPA in 2016 to Chevron Mining, Inc. at Questa Mine in New Mexico, authorizes various discharges that ultimately reach the Red River. The permit acknowledges that it is not regulating groundwater quality, but includes provisions specifically addressing discharges to the Red River via groundwater seeps and springs. *See* NPDES Permit No. NM0022306, at 4, 6-10, 23, 48, https://www. env.nm.gov/swqb/NPDES/Permits/NM0022306-Chevron-Questa.pdf (last visited July 16, 2019).
- The NPDES permit reissued by EPA in 2016 for the Neopit Wastewater Treatment Facility, located on the Menominee Indian Reservation, authorizes the tribe's wastewater treatment plant to discharge effluent "to groundwater via seepage cells to Tourtillotte Creek" in accordance with certain limitations and conditions. *See* NPDES Permit No. WI-0073059-2, at 1, https://www.epa.gov/sites/production/files/2017-02/documents/wi0073059fnlprmt09_22_2016_0.pdf (last visited July 16, 2019).

Permits such as these confirm that regulating groundwater-conduit discharges to navigable waters is neither novel nor infeasible.

Even assuming some novelty, though, there is no merit to the argument that NPDES regulation of groundwater-conduit discharges would be unduly

burdensome. That argument is difficult to square with the suggestion that states *already* regulate discharges directly to groundwater in a manner sufficiently protective of navigable waters. *See* W. Va. Br. 20-27. If this is really true (although the Amici States dispute that it is, *see supra* at 18-20), then regulating discharges that are fairly traceable to navigable waters through a groundwater conduit should add only an incremental burden.

In all events, Petitioner and its amici drastically overstate the administrative burden of regulation. Affirming the court of appeals' decision will not mean that *every* point source discharging into groundwater must seek an NPDES permit, only those with discharges that can fairly be traced to navigable waters. That important limitation is consistent with the Clean Water Act's focus on protecting navigable waters and ensures that regulated discharges are indeed "*from* [the] point source." 33 U.S.C. § 1362(12) (emphasis added).

Besides glossing over this limitation, Petitioner and its amici ignore the availability of general permits to minimize administrative burdens. Petitioner and its amici raise the specter of massive numbers of permit applications, each requiring individualized analysis and assessment. *See*, *e.g.*, Pet'r Br. 45-48; W. Va. Br. 30-31. Yet permitting agencies—whether state or federal—are empowered to issue general permits that address numerous similar point sources in a streamlined

process.[11] EPA's regulations provide that a general permit, written to cover a particular geographic area, may be issued for a *category* of similar sources. *See* 40 C.F.R. § 122.28(a)(2). Once an agency has issued a general permit, a discharger generally need only submit a "notice of intent," not a full individualized application, to be authorized by the general permit and bound by its conditions. *Id.* § 122.28(b)(2). Further, even the requirement to submit a notice of intent can be forgone in certain circumstances. *Id.* § 122.28(b)(2)(v); *see Miccosukee Tribe*, 541 U.S. at 108 n.* (explaining that "[g]eneral permits greatly reduce [the] administrative burden [associated with NPDES applications] by authorizing discharges from a category of point sources within a specified geographic area," and that "[o]nce EPA or a state agency issues such a permit, covered entities, in some cases, need take no further action to achieve compliance with the NPDES besides adhering to the permit conditions").

Thus, by way of example, it is simply not the case that affirming the court of appeals' decision would require the submission and review of millions of individualized permit applications for residential septic tanks, as Petitioner and its amici contend. *See*, *e.g.*, Pet'r Br. 47; W. Va. Br. 30-32. To begin, the permitting

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[11] Courts have upheld or approved of the use of general permits in the NPDES program. *See Environmental Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 853 (9th Cir. 2003) (explaining that "[g]eneral permitting has long been recognized as a lawful means of authorizing discharges"); *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1380-82 (D.C. Cir. 1977) (noting that the Clean Water Act allows the use of general permits).

requirement applies only where a source's discharged pollutants are fairly traceable to navigable waters, and Petitioner and its amici provide no reason to think this is commonly the case for residential septic tanks.[12] But even setting that point aside, a state could issue a single general NPDES permit for residential septic tanks with certain characteristics within its boundaries. That general permit would specify certain conditions for permittees to satisfy, but it would not require the individualized application and review process that Petitioner and its amici portend. A septic tank owner or operator concerned about the possibility of traceable discharges to navigable waters via groundwater would simply submit a notice of intent to be bound by that general permit. Indeed, in appropriate circumstances, the state might provide that discharges complying with applicable conditions are authorized even without a notice of intent. 40 C.F.R. § 122.28(b)(2)(v); *cf. Miccosukee Tribe*, 541 U.S. at 108 (noting argument that "the States or EPA could control regulatory costs by issuing general permits" to the category of point sources at issue).

Also inapt is the suggestion that discharges to navigable waters via groundwater should be exempt from the Clean Water Act because of the supposed difficulty of setting effluent limitations for such discharges. *See* W. Va. Br. 32-33. Nothing in the definition of "effluent limitation" requires that compliance be

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[12] Indeed, existing state law often limits septic tanks' proximity to surface waters. *See*, *e.g.*, Colo. Code Regs. § 1002-43:43.7; Md. Code Regs. 26.04.02.04; 25 Pa. Code § 73.13; S.C. Code Ann. Regs. 61-56.200.

assessed where a pollutant leaves the point source, rather than where it enters or affects navigable waters. *See* 33 U.S.C. § 1362(11) (defining "effluent limitation" as "any restriction established . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters"); *Natural Res. Def. Council, Inc. v. County of L.A.*, 725 F.3d 1194, 1200, 1209 (9th Cir. 2013).

Still, to the extent that there are burdens associated with obtaining and issuing permits for groundwater-conduit discharges or complying with conditions necessary to protect the quality of navigable waters, these provisions provide no reason to create the extratextual exception that Petitioner and its amici seek. Congress included no such exception in the Clean Water Act. Moreover, the Act's stated purpose of "restor[ing] and maintain[ing] the chemical, physical and biological integrity of the Nation's waters" dictates that it is fair to require polluters to bear those burdens, rather than saddling the public with the burdens of added pollution to navigable waters.[13]

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[13] Nor is a categorical groundwater-conduit exception justified by the claimed burdens associated with determining whether a discharge is subject to NPDES permitting. *See* W. Va. Br. 32-33. For many sources, the prospect of Clean Water Act liability should be clear both to the source's owner or operator and to state regulators. Coal ash impoundments, for instance, often are located immediately adjacent to navigable waters, because of power plants' need for cooling water. *See*, *e.g.*, *Yadkin*, 141 F. Supp. 3d at 436-37. To the extent that there is doubt about whether discharges would be fairly traceable to navigable waters, Petitioner

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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and its amici provide no reason why it is sensible to require the public to tolerate the ensuing pollution, rather than require the polluting source to either take the measures necessary to forestall such discharges or apply for an NPDES permit.

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