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

BRIEF FOR PETITIONER

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May 9, 2019

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

In the Clean Water Act (CWA), Congress distinguished between the many ways that pollutants reach navigable waters. It defined some of those ways as "point sources"—namely, pipes, ditches, and other "discernible, confined and discrete conveyance[s] … from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The remaining ways of moving pollutants, like runoff or groundwater, are "nonpoint sources."

The CWA regulates pollution added to navigable waters "from point sources" differently than pollution added "from nonpoint sources." It controls point source pollution through permits, *e.g.*, *id.* § 1342, while nonpoint source pollution is controlled through federal oversight of state management programs, *id.* § 1329. Nonpoint source pollution is also addressed by other state and federal environmental laws.

The question presented is:

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

PARTIES TO THE PROCEEDING

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

RULE 29.6 STATEMENT

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

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals as amended is reported at 886 F.3d 737 (9th Cir. 2018) and is reproduced in the Petition Appendix starting at Pet. App. 1. The two opinions of the district court granting Respondents summary judgment are reported at 24 F. Supp. 3d 980 (D. Haw. 2014) and 2015 WL 328227 (D. Haw. Jan. 23, 2015), and are reproduced in the Petition Appendix starting at Pet. App. 32 and Pet. App. 85, respectively.

JURISDICTION

The Ninth Circuit's judgment was entered on February 1, 2018. On March 30, 2018, the Ninth Circuit entered an order and amended opinion denying the County's timely petition for en banc rehearing. By order entered June 4, 2018, this Court extended the time for the County's petition for certiorari to August 27, 2018. The timely filed petition was granted on February 19, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

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

33 U.S.C. § 1251(a)(7) provides: "it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution."

33 U.S.C. § 1251(b) provides: "It is the policy of the Congress to recognize, preserve, and protect the pri-

mary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter."

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

33 U.S.C. § 1329(b) requires federally approved state nonpoint source management programs "for controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters."

33 U.S.C. § 1329(i) provides that for States with approved programs under § 1329(b), "the [U.S. Environmental Protection Agency] Administrator shall make grants under this subsection to such State for the purpose of assisting such State in carrying out groundwater quality protection activities which the Administrator determines will advance the State toward implementation of a comprehensive nonpoint source pollution control program."

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

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

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

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

INTRODUCTION

The Clean Water Act (CWA or Act) is a landmark achievement in the nation's efforts to address water pollution. Congress passed the CWA in 1972 "because it recognized that 'the national effort to abate and control water pollution ha[d] been inadequate in every vital aspect.'" *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 319 (1982) (quoting S. Rep. No. 92-414, at 7 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674). As this Court has said, the intent "was clearly to establish an all-encompassing program of water pollution regulation." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 318 (1981) (*Milwaukee II*).

But Congress did not, in the CWA, prescribe a single regulatory scheme for all water pollution. For example, "the statutory phrase 'waters of the United States' circumscribes the geographic scope of the Act in certain respects." *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 624 (2018). This Court has yet to determine the outer bounds of that geographic scope, but it has held that the phrase does not reach as far as "nonnavigable, isolated, intrastate waters." *Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (*SWANCC*). Nor do the "waters of the United States" include groundwater. See, *e.g.*, 40 C.F.R. § 122.2. At a minimum, both of those types of waters are left to the States to

regulate, consistent with "the policy of the Congress [in the CWA] to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C § 1251(b).

This case concerns another aspect of the CWA's varied approach to water regulation: Congress's decision to address "point source" pollution differently than "nonpoint source" pollution. Pollutants travel to bodies of water in many ways: by pipe, ditch, runoff, and innumerable other methods of transport. The CWA defines some of those ways of moving pollutants as "point sources"—specifically, pipes, ditches, and similar "discernible, confined and discrete conveyance[s] … from which pollutants are or may be discharged." *Id.* § 1362(14). All other methods of pollution transport, like runoff, are referenced simply as "nonpoint sources." *E.g.*, *id.* § 1329.

Since its passage, the CWA has controlled pollution added to navigable waters "from point sources" differently than that added "from nonpoint sources." The Act bans the "addition of any pollutant to navigable waters *from any point source*" without a permit. *Id.* § 1362(12) (emphasis added). But no similar permitting requirement applies to pollution added *from nonpoint sources*. Rather, States were given "nearly exclusive responsibility for containing pollution from nonpoint sources." *Rapanos* v. *United States*, 547 U.S. 715, 803 (2006) (Stevens, J., dissenting). The CWA expressly requires States to create management programs, subject to approval and funding by the United States Environmental Protection Agency (EPA), "for controlling pollution added *from nonpoint sources* to the navigable waters within the State." 33 U.S.C. § 1329(b)(1) (emphasis added). Nonpoint source pollu-

tion is also controlled by many other state and federal environmental laws.

The question in this case, which has recently divided the circuits, is whether a permit is required under the CWA's *point source* program where pollutants are reaching navigable waters by a *nonpoint source*. A plurality, including most lately the Sixth Circuit, have said "no." The point source program applies only where a pollutant "make[s] its way to a navigable water … by virtue of a point-source conveyance." *Ky. Waterways All.* v. *Ky. Utils. Co.*, 905 F.3d 925, 934 (6th Cir. 2018). In contrast, the Ninth Circuit below held that the point source program also extends to circumstances where pollutants are delivered to navigable waters by a nonpoint source, so long as the pollutants are "fairly traceable" to a point source. Pet. App. 24; see also *Upstate Forever* v. *Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651-52 (4th Cir.), *petition for cert. filed*, 87 U.S.L.W. 3069 (U.S. Aug. 28, 2018) (No. 18-268) (adopting "direct hydrological connection" test).

The plurality is correct. Point source permitting is required only where pollutants are being delivered to navigable waters by point sources. The CWA's state nonpoint source management programs (and other state and federal laws) apply where pollutants are being delivered to navigable waters by nonpoint sources. That bright-line and common-sense test follows from the text, structure, context, history, and several purposes of the CWA.

Accordingly, the Ninth Circuit should be reversed. There is no disagreement that the pollutants here reached navigable water only by way of groundwater. And because the groundwater is not a point source, the Ninth Circuit was wrong in concluding that the CWA's

point source permitting program, rather than its nonpoint source program, governs.

Clean water and environmental stewardship are of vital importance to the County and its citizens. Those commitments are not at issue in this case. Nor is there any question *whether* the CWA applies. The question is simply *which* CWA regulatory regime Congress intended to apply, given its deliberate decision to treat point source and nonpoint source pollution differently.

STATEMENT

This case arises out of a dispute over the permits required for four underground injection control (UIC) wells, which dispose of treated effluent (wastewater from area homes and businesses) at the County's Lahaina Wastewater Reclamation Facility. No party questions that the wells must be and are permitted under the federal and state safe drinking water programs, like similar wells around the country. Nor is there any quarrel that the wells comply with those permits. But because the injected effluent mixes with groundwater, which flows diffusely to the Pacific Ocean, the parties disagree over whether a permit is also required under the CWA. Is a permit for point source pollution required, or does this activity fall under the CWA's nonpoint source program and other federal and state laws, like the safe drinking water programs?

I. The County's UIC Wells

The County's Lahaina Wastewater Reclamation Facility treats and disposes of effluent generated by homes and businesses in the western part of Maui. Constructed with EPA funding, the facility commenced operations by the early 1980s, with treated effluent injected into UIC wells. Pet. App. 138 ¶ 3;

Ninth Circuit Excerpts of Record (ER) 381-82, 481 ¶ 19. The effluent meets the R-1 water standard, ER420, 530, Hawai‘i's most rigorous standard for recycled water, Haw. Code R. §§ 11-62-03, 11-62-26. Some is used for resort and golf course irrigation. ER420, 530, 625 ¶ A.8.c. The rest is injected through four wells 180 to 255 feet below ground, immediately mixes with groundwater, and disperses both vertically and horizontally as it enters groundwater through approximately 100-foot well openings. JA79.

As is true of all groundwater in Hawai‘i, the groundwater that receives the effluent migrates toward the ocean. Like much groundwater, this groundwater moves diffusely through an aquifer—an underground layer of permeable rock. That the effluent/groundwater mixture reaches the ocean has been known by federal and state regulators for decades. See *infra* p. 13.

According to an EPA ordered tracer-dye study completed in 2013, more than 90% of the effluent/groundwater mixture enters the ocean through diffuse flow, with no identifiable entry point, along as much as two miles of coastline. JA75; ER429, 479-80 ¶ 14, 493 ¶ 48, 534. Less than 10% enters through clustered ephemeral seeps in the ocean floor (typically only a few inches long and wide that are easily covered by sand and become undetectable). ER534. The study showed an average transit time of 15 months for dye to travel approximately a half mile southwest from two of the four wells to the ocean. ER411; JA72. Dye was also injected into one of the other two wells, but it was not detected in the ocean. The study also showed that the submarine groundwater discharge has noticeably different nutrient levels than the effluent, due to chemical modifications that naturally occur as groundwater migrates. ER423, 447-48.

The effect of the effluent/groundwater mixture on the environment is disputed. Though Respondents claim that the submarine groundwater flow has harmed coral in the area, the County's expert strongly disagrees. On a site visit in 2014, "all reef areas appeared essentially pristine, *i.e.*, no observed bleached, diseased, or otherwise stressed corals." ER604.

II. Statutes Applicable to the Wells

A. Federal and Hawai'i Safe Drinking Water Programs

The federal Safe Drinking Water Act (SDWA), enacted in 1974, protects the nation's drinking water. 42 U.S.C. §§ 300f *et seq*. To that end, the SDWA charges EPA with developing minimum requirements for state programs that prevent UIC wells from contaminating underground sources of drinking water. *Id.* § 300h. EPA has done so by regulation. 40 C.F.R. pt. 144. Though States may seek delegated authority to run their respective UIC programs under the SDWA, EPA administers the program in Hawai'i.[1]

UIC wells are categorized into classes under the SDWA. The wells here are Class V—used to inject non-hazardous fluids underground. *Id.* § 144.81. EPA estimates more than 650,000 Class V wells are operating nationwide.[2] Such things as agricultural

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[1] EPA, Primary Enforcement Authority for the Underground Injection Control Program, https://www.epa.gov/uic/primary-enforcement-authority-underground-injection-control-program#primacy_states (last visited May 7, 2019).

[2] EPA, Class V Wells for Injection of Non-Hazardous Fluids into or Above Underground Sources of Drinking Water, https://www.epa.gov/uic/class-v-wells-injection-non-hazardous-fluids-or-above-underground-sources-drinking-water (last visited May 7, 2019).

field runoff, sanitary sewage, and water for aquifer storage/recharge are injected into Class V wells. *Ibid.* Class V wells include septic system wells for a multiple dwelling, business establishment, or community septic tank. *Ibid.*

Hawai‘i also has a safe drinking water program. Haw. Rev. Stat. § 340E-2. It too regulates UIC wells, see *id.* § 340E-2(e), and the wells here likewise constitute Class V wells under state law, Haw. Code R. §§ 11-23-06, 11-23-07. Hawai‘i UIC permits impose a variety of conditions, including the obligation not to violate any Hawai‘i Department of Health (HDOH) rules relating to "water quality and pollution." *Id.* § 11-23-11.

B. The CWA

Enacted primarily through a series of amendments in the 1970s to the Federal Water Pollution Control Act, the CWA expressly furthers a broad array of purposes. Its "objective" is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve that objective, the Act sets forth several "national goal[s]," including that "the discharge of pollutants into the navigable waters be eliminated by 1985" and that "programs for the control of nonpoint sources of pollution be developed and implemented." *Id.* § 1251(a)(1), (7). The statute also declares that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." *Id.* § 1251(b).

A "principal tool[]" is the Act's ban on the "'discharge of any pollutant by any person,' except in express circumstances." *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 624 (quoting 33 U.S.C. § 1311(a)). A "'discharge of a pollutant'" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Such prohibited additions may be authorized by a permit under the National Pollutant Discharge Elimination System (NPDES) program. An NPDES permit can be issued by a State under an EPA-approved state program, or by EPA itself. *Id*. § 1342(b). In Hawai'i, NPDES permits are issued by the State. Haw. Rev. Stat. § 342D-50; 39 Fed. Reg. 43,759 (Dec. 18, 1974).

The definition of "discharge of a pollutant" includes two important limits on the general prohibition and the attendant need for an NPDES permit. *First*, the definition covers only the addition of pollutants "to navigable waters." "'[N]avigable waters'" are defined as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). That definition notably does not include groundwater, a term used distinctly multiple times elsewhere in the statute and that is absent from the provisions concerning the NPDES program. See, *e.g.*, *id.* § 1252(a) (referring to "pollution of the navigable waters and ground waters" and the "sanitary condition of surface and underground waters"); *id.* § 1256(e) (discussing "the quality of navigable waters and to the extent practicable, ground waters"). Tracking those statutory distinctions, EPA's definition of "Waters of the United States" expressly excludes groundwater. See 40 C.F.R. § 122.2; see also 84 Fed. Reg. 4154, 4190 (Feb. 14, 2019).

Second, a prohibited "discharge of a pollutant" is limited to the addition of pollutants to navigable

waters "from any point source." A "'point source'" is defined as "any discernible, confined and discrete conveyance … from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The statute lists as examples: "pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft." *Ibid.* Many of these are objects or structures that "do not themselves generate pollutants but merely transport them." *S. Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004).

The CWA explicitly seeks to control "*both* point and nonpoint sources of pollution," 33 U.S.C. § 1251(a)(7) (emphasis added), but it does not require NPDES permitting for nonpoint source pollution. Instead, the CWA directs States to adopt nonpoint source management programs, subject to EPA approval, "for controlling pollution added from nonpoint sources to the navigable waters within the State." *Id.* § 1329(b)(1). EPA is directed to provide States with grants to identify and address nonpoint source pollution, such as runoff and groundwater. See, *e.g.*, *id.* § 1285(j) (grants); *id.* § 1314(f) (identifying "runoff" as example of nonpoint source pollution); *id.* § 1329(i) (grants for "carrying out groundwater quality protection activities which … will advance the State toward implementation of a comprehensive nonpoint source pollution control program").

III. Regulation of the County's Effluent Injection

Through permits issued by EPA and HDOH under their respective safe drinking water programs, the facility's wells are regulated as Class V wells. 42 U.S.C. § 300h-1(c); Haw. Rev. Stat. § 340E-2. These permits control the volume, rate, and constituent con-

centrations of injected effluent. EPA's permit imposes a nitrogen limit to address ocean water quality. Pet. App. 139-40 ¶ 7. HDOH's permit specifically requires that the injection wells "not violate" state rules "regulating various aspects of water quality and pollution." ER162. There is no claim that the County has violated its UIC permits.

Hawai'i's Nonpoint Source Management Plan (2015-2020),[3] approved by EPA under § 1329 of the CWA,[4] is specifically designed to monitor and control the impact of wastewater on groundwater and coastal waters. As the CWA envisions, the plan provides a "coordinated approach among federal, state, and local … agencies to implement NPS [nonpoint source] projects and target pollutants and their sources more effectively." *Id*. at 5. The plan specifically recognizes that "groundwater discharge … impacts near-shore areas." *Id*. at 10. And it discusses specific strategies to protect "groundwater quality," including the phase-out of certain sources of groundwater pollution. *Id.* at 68-69. The plan focuses on three priority watersheds, including the one encompassing the County's wells (West Maui). *Ibid*.

Hawai'i's nonpoint source management plan is, in fact, more comprehensive than a CWA nonpoint source program alone because it also implements the Coastal Zone Act Reauthorization Amendments of

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[3] Hawai'i State Department of Health, *Hawai'i's Nonpoint Source Management Plan (2015-2020)*, http://planning.hawaii.gov/czm/initiatives/coastal-nonpoint-pollution-control-program/hawaiis-implementation-plan-for-polluted-runoff-control/.

[4] State of Hawai'i Department of Health, Clean Water Branch http://health.hawaii.gov/cwb/clean-water-branch-home-page/polluted-runoff-control-program/prc-hawaiis-implementation-plan/ (last visited May 7, 2019).

1990 (Coastal Zone Act), 16 U.S.C. § 1455b. The Coastal Zone Act requires a federally approved program that "update[s] and expan[ds]" on the CWA's nonpoint source management program to protect coastal waters from nonpoint sources, *id.* § 1455b(a)(2), such as the effluent/groundwater mixture at issue here.

Both EPA and HDOH have long known that effluent from the Lahaina wells reaches the ocean via groundwater flow. Both agencies received the 1973 pre-construction environmental impact report, which explained that injected effluent would "eventually reach the ocean." Pet. App. 159; ER342. In 1994, EPA was told by HDOH that "all experts agree that the wastewater does enter the ocean." Pet. App. 153-54; ER369.

But neither agency previously suggested this fact requires NPDES permitting. Because it provided CWA grant funding for the facility's construction, EPA had to determine at the outset that the facility was CWA compliant. 33 U.S.C. § 1298(b). It required an NPDES permit for certain early facility operations but not for the wells. ER221, 223-24. Moreover, in its formal response to comments on the first federal UIC permit issued in 1996, EPA repeatedly stated that "[i]f a hydrologic nexus is proven between the injection wells and the ocean, surface water quality standards can be required in the UIC permit to protect ocean water quality." ER312, 316; JA30; see also JA28. In fact, it provided that response to comments specifically calling for an NPDES permit. JA30.

As for HDOH, it has never required an NPDES permit for any Class V UIC well, including the County's wells. ER362. At the start of this litigation, EPA's FY2011 state survey identified more than 5,600 Class V UIC wells in Hawai'i. Pet. App. 151. In an

updated FY2016 survey, the number exceeded 6,600.[5] None of those wells has an NPDES permit.

IV. Proceedings Below

A. District Court Proceedings

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

The district court granted summary judgment for Respondents on these issues in two separate orders. In the first order, the district court found the County liable for failing to have an NPDES permit for two of its wells. The court found the wells are point sources that "indirectly discharge[d] a pollutant into the ocean through a groundwater conduit," though it conceded that it could not "point to controlling appellate law or statutory text expressly allowing" the conduit theory. Pet. App. 56, 63. In the second order, the district court applied the same reasoning to find the County liable for failing to have an NPDES permit for the two remaining wells. *Id.* at 93-99.

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[5] EPA, FY2016 Underground Injection Control Inventory – By State, https://www.epa.gov/uic/underground-injection-well-inventory (last visited May 7, 2019).

B. Ninth Circuit Appeal

The County appealed to the Ninth Circuit, which affirmed the district court. The Ninth Circuit assumed that the groundwater here is neither navigable water nor a point source. It nevertheless concluded that an NPDES permit was required for pollutants reaching navigable waters by means of a nonpoint source.

The Ninth Circuit based its ruling on a new test for point source pollution that turns on the traceability and volume of pollutants reaching navigable waters. It held the County liable because: (1) "the County discharged pollutants from a point source" (*i.e.*, the wells); (2) "pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water"; and (3) pollutants reach navigable water at "more than *de minimis*" levels. *Id.* at 24. The Ninth Circuit put no limit on its new rule, expressly "leav[ing] for another day the task of determining when, *if ever*, the connection between a point source and a navigable water is too tenuous to support liability under the CWA." *Id.* at 25 (emphasis added). In creating its new rule, the Ninth Circuit purported to rely in part on dicta in Justice Scalia's plurality opinion in *Rapanos*. *Id.* at 21-24.

The Ninth Circuit rejected two other tests that, in different terms, proffered similarly expansive views of point source pollution. The court expressly declined to adopt the district court's "conduit theory" of liability. *Id.* at 24. It also rejected the rule proposed by EPA as amicus curiae, which argued that injection of pollutants into groundwater requires an NPDES permit if the groundwater forms a "direct hydrological connection" between the point source and navigable waters. The Ninth Circuit criticized EPA's proposal as "read[ing]

two words into the CWA ('direct' and 'hydrological') that are not there," *id.* at 24 n.3, though it did not explain where the terms in its own test ("fairly," "traceable," and "*de minimis*") are found in the statute. The Ninth Circuit explained only that it believed its reading to "better align[] with the statutory text." *Ibid.*

V. EPA's Interpretive Statement of April 23, 2019

Following a request for public comment, see 83 Fed. Reg. 7126 (Feb. 20, 2018), and as promised in the invited brief of the United States supporting certiorari in this case, EPA published an Interpretive Statement (Statement) on April 23, 2019, relating to the issue here. The Statement sets forth the agency's "first" and "most comprehensive" "guidance" on the NPDES program's "applicability to releases of pollutants from a point source to groundwater that subsequently migrate or are conveyed by groundwater to jurisdictional surface waters." 84 Fed. Reg. 16,810, 16,811 (Apr. 23, 2019). It acknowledges a previous "[l]ack of consistent and comprehensive direction from EPA." *Id.* at 16,820. And, it expressly "departs from the position the Agency took in the *County of Maui* amicus brief" before the Ninth Circuit, determining that the brief "erred" and "failed to take into account Congress's unique treatment of groundwater in the CWA when interpreting the definition of discharge of a pollutant." *Id.* at 16,819-20.

EPA concludes "that the Act is best read as excluding *all* releases of pollutants from a point source to groundwater from NPDES program coverage and liability under [§ 1311] of the CWA, regardless of a hydrologic connection between the groundwater and a jurisdictional surface water." *Id.* at 16,811 (emphasis added). It reaches this conclusion "based on a holistic

analysis of the statute, its text, structure, and legislative history." *Ibid.* According to EPA, Congress "inten[ded] to leave regulation of releases of pollutants to groundwater with the states" and "a mosaic of [other] laws and regulations." *Id.* at 16,814, 16,824.

The Statement does not address how the CWA's text defines the point source program and thereby distinguishes between point and nonpoint source pollution, determining that "this inquiry is not relevant as applied to groundwater." *Id.* at 16,813. Rather, "releases of pollutants from a point source to groundwater are *categorically excluded* from the scope of the NPDES program" and simply "not subject to the point source analysis." *Id.* at 16,821 (emphasis added).

SUMMARY OF ARGUMENT

I. The history of the CWA demonstrates that Congress chose deliberately to control pollution added to navigable waters "from point sources" differently than that added "from nonpoint sources." As one court of appeals has said, this two-track regulatory approach is an organizational paradigm of the Act.

A. In 1972, Congress amended the Federal Water Pollution Control Act to shift from enforcing water quality standards to controlling point source discharges. The amendments prohibited "any addition of any pollutant to navigable waters from any point source" unless authorized by a permit. 33 U.S.C. § 1362(12).

B. At the same time, Congress tasked States with responsibility for controlling pollution from nonpoint sources. Congress maintained that dichotomy in amendments in 1977, and strengthened the nonpoint source program in 1987. That year, Congress added 33

U.S.C. § 1329, requiring States to submit nonpoint source management plans for federal approval.

The question here is whether a statute that draws this distinction requires a *point source* permit where pollutants are being delivered by *nonpoint sources* to navigable waters. The Ninth and Fourth Circuits believe that it does. Other circuits disagree.

II. Every tool of statutory interpretation confirms a bright-line and common sense reading of the CWA: a point source permit is only required for the delivery of pollutants to navigable waters by means of a point source or series of point sources. This follows unambiguously from the text, structure, context, history, and purposes of the CWA. And it is confirmed by several clear-statement rules, which refute the Ninth and Fourth Circuit's readings of the statute.

A.1. The statutory text unambiguously requires point source permitting only where pollutants are delivered to navigable waters by a point source or series of point sources. The CWA prohibits "any addition of any pollutant to navigable waters *from any* point source" unless authorized by a permit. 33 U.S.C. § 1362(12) (emphasis added). Reduced to its essence, the textual question is this: what do "from" and "any" mean?

The answer is provided, in significant part, by the statutory definition of "point source." A "'point source'" is defined as a "discernible, confined and discrete *conveyance* … from which pollutants are or may be discharged." *Id.* § 1362(14) (emphasis added). It is not a point of origin but a means of transport. This definition shows that "*from* any point source" is most naturally understood as indicating that a point source—being a particular way of moving pollutants—

must be what *delivers* rather than *originates* pollutants. Thus, the CWA bars any addition of any pollutant to navigable waters *delivered by* any point source unless authorized by a permit.

The meaning of "any," under this Court's precedent, is "'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (citation omitted). An NPDES permit is required, therefore, whether a point source or a series of point sources is delivering pollutants to navigable waters.

2. This reading—a means-of-delivery test for NPDES permitting—is confirmed by the CWA's structural distinction between point and nonpoint source pollution. It leaves for the nonpoint source program the many circumstances where nonpoint sources deliver pollutants to navigable waters. By contrast, the Ninth and Fourth Circuit's tests enlarge the point source program to cover most (if not all) of those circumstances.

3. The means-of-delivery test is further supported by other CWA provisions. The CWA consistently describes a point source discharge as the release of pollutants "into" navigable waters, which suggests "entry" or "insertion" by the point source or sources. In addition, the CWA's punitive provisions impose significant penalties, which calls for the more predictable results offered by the means-of-delivery test.

4. Several aspects of the CWA's legislative history also support the means-of-delivery test. For example, Congress sought specifically to eliminate the need to prove a connection between a point source and navigable waters, something the Ninth and Fourth Circuit's tests demand but the means-of-delivery test does not. Moreover, Congress specifically refused to adopt

proposals to mandate NPDES permits for precisely the nonpoint source pollution here—pollutants that reach navigable waters by groundwater.

5. Finally, the means-of-delivery test advances the CWA's many purposes by honoring the distinction between point and nonpoint source pollution. The means-of-delivery test does not exempt individuals and entities from regulation. Nonpoint source pollution remains subject to state nonpoint source management programs required and funded by the CWA, as Congress intended. It is also subject to other state and federal laws, like the SDWA and the Resource Conservation and Recovery Act (RCRA).

B. The means-of-delivery test is additionally confirmed by the clear-statement rules in *Utility Air Regulatory Group* v. *EPA*, 573 U.S. 302 (2014) (*UARG*), and *SWANCC*, which refute the Ninth and Fourth Circuit's tests. Both of those tests would have sweeping and transformative effects, including a vast expansion of NPDES permitting to widespread methods of stormwater and runoff management, residential septic tanks, and anything else to which pollutants in navigable waters might be traced. But this Court will not read a statute to have such effects absent a *clear* statement from Congress, and the statutory text cannot be said to clearly set forth either the Ninth or Fourth Circuit's tests.

III. The Ninth Circuit should be reversed under either the means-of-delivery test or EPA's recent Interpretive Statement. The County's wells are not the means that deliver pollutants to navigable waters. The wells inject treated effluent only into groundwater, which the Ninth Circuit assumed (correctly) is neither navigable water nor a point source. And it is the groundwater that conveys to the ocean. Alternatively,

under EPA's view of the statute, the County's injections do not require an NPDES permit because all releases to groundwater are categorically excluded from the point source program.

ARGUMENT

I. In the CWA, Congress Chose Deliberately to Control Pollution Added to Navigable Waters "From Point Sources" Differently Than Pollution Added "From Nonpoint Sources."

A. The CWA changed the focus of federal regulation from enforcing water quality standards to controlling point source discharges.

The CWA grew out of the Federal Water Pollution Control Act, enacted in 1948. Act of June 30, 1948, Pub. L. No. 80-845, 62 Stat. 1155 (1948). That predecessor law was based on "water quality standards," which "serve[d] both to guide performance by polluters and to trigger legal action to abate pollution." *EPA* v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202 (1976). But this legislation "proved ineffective," because it "focused on the tolerable effects rather than the preventable causes of water pollution." *Id.* at 202. It was "very difficult" to govern and police the conduct of individual polluters. *Ibid.* The Senate Committee on Public Works eventually concluded that "the Federal water pollution control program … has been inadequate in every vital aspect," citing the problems with relying on "stream quality." S. Rep. No. 92-414, at 7-8, *reprinted in* 1972 U.S.C.C.A.N. at 3674-75.

In 1972, Congress enacted sweeping amendments, laying the foundation of what is now called the Clean

Water Act. The amendments "were viewed by Congress as a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation." *Milwaukee II*, 451 U.S. at 317. "[A]imed at achieving maximum 'effluent limitations' on 'point sources,'" the amendments shifted the law's focus to "direct restrictions on discharges." *California ex rel. State Water Res. Control Bd.*, 426 U.S. at 204. Congress declared it "'the national goal that the discharge of pollutants into the navigable waters be *eliminated* by 1985.'" *Id.* at 203.

The amendments "established a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit." *Milwaukee II*, 451 U.S. at 310-11. Congress made unlawful "the discharge of any pollutant by any person," 33 U.S.C. § 1311(a), and defined "'discharge of a pollutant'" as "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12). It defined "'point source'" as a subset of the many ways by which pollutants can travel, including pipes, ditches, and any other "discernible, confined and discrete conveyance … from which pollutants are or may be discharged." *Id.* § 1362(14).

This new point source program "facilitate[d] enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated." *California ex rel. State Water Res. Control Bd.*, 426 U.S. at 204. "*Every* point source discharge [was] prohibited unless covered by a permit." *Milwaukee II*, 451 U.S. at 318. And an individual discharger's compliance with its permit was to be "measured against strict technology-based effluent limitations"—that is, "restriction[s] established by a State or the [EPA] on quantities, rates, and concentra-

tions of chemical, physical, biological, and other constituents which are discharged from point sources." *California ex rel. State Water Res. Control Bd.*, 426 U.S. at 204. "With effluent limits," the Senate Committee explained, EPA "need not search for a precise link between pollution and water quality." S. Rep. No. 92-414, at 8, *reprinted in* 1972 U.S.C.C.A.N. at 3675. Water quality standards remained as a "supplement[]" to effluent limitations. *California ex rel. State Water Res. Control Bd.*, 426 U.S. at 205 n.12.

B. Congress chose repeatedly to regulate pollution added from nonpoint sources differently.

The 1972 amendments left the States "nearly exclusive responsibility for containing pollution from nonpoint sources." *Rapanos*, 547 U.S. at 803 (Stevens, J., dissenting). "From the passage of the Act, Congress imposed extensive regulations and certification requirements on discharges from point sources, but originally relied almost entirely on state-implemented planning processes to deal with nonpoint sources." *Or. Nat. Desert Ass'n* v. *U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008).

The Senate Committee concluded that nonpoint sources "are major contributors to the Nation's water pollution problem," but also recognized that "many nonpoint sources of pollution are beyond present technology of control." S. Rep. No. 92-414, at 39, *reprinted in* 1972 U.S.C.C.A.N. at 3705-06. The amendments thus treated nonpoint source pollution differently. They charged EPA with "develop[ing], in conjunction with other appropriate Federal agencies, information regarding nonpoint sources and their control." *Ibid.* And they tasked States with "develop[ing] plans for nonp[oint] source pollution control," and with

submitting those plans to EPA, under what was then enacted as section 208. *Ibid.*

Congress chose to maintain this division of responsibility in 1977, when it revisited the CWA. The Senate Report on amendments to the CWA passed that year explained that "[i]n 1972, the Congress made a clear and precise distinction between point sources, which would be subject to direct Federal regulation, and nonpoint sources, control of which was specifically reserved to State and local governments through the section 208 process." S. Rep. No. 95-370, at 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4334. The report suggested that principles of federalism motivated the decision to stay the course: "Between requiring regulatory authority for nonpoint sources, or continuing the section 208 experiment, the committee chose the latter course, judging that these matters were appropriately left to the level of government closest to the sources of the problem." S. Rep. No. 95-370, at 9, *reprinted in* 1977 U.S.C.C.A.N. at 4335.

Congress again reinforced the Act's distinction between point and nonpoint source pollution ten years later. The Water Quality Act of 1987 amended the CWA's declaration of goals and policies to state, as it still does, that "it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented." 33 U.S.C. § 1251(a)(7). In furtherance of that policy, Congress added 33 U.S.C. § 1329, requiring states to submit for federal approval management programs "for controlling pollution added from nonpoint sources to the navigable waters within the State." *Id.* § 1329(b)(1).

Acknowledging the substantial problem of nonpoint source pollution, Congress chose to strengthen the two-track regulatory approach. These new provisions

"reflect[ed] Congress' awareness that '[t]he evidence of nonpoint pollution continues to grow' and that '[i]t has been estimated that 50 percent of all water pollution comes from nonpoint sources.'" *Nat. Res. Def. Council* v. *EPA*, 915 F.2d 1314, 1318 n.4 (9th Cir. 1990) (quoting S. Rep. No. 99-50, at 8 (1985), *reprinted in* 2 Legislative History of the Water Quality Act of 1987, at 1420, 1429 (1988)). Even so, Congress did not amend the point source permitting program to cover nonpoint source pollution. Indeed, the floor discussion in the Senate reaffirmed the distinction, describing § 1329 as "a path somewhat different from that taken for point sources" and "not an excuse to reduce the effort or relax the requirements *on the point source side*." 133 Cong. Rec. 1279 (1987) (statement of Sen. Durenberger) (emphasis added).

It is not an overstatement to say, as one court has, that the "disparate treatment of discharges from point sources and nonpoint sources is an organizational paradigm of the Act." *Or. Nat. Desert Ass'n*, 550 F.3d at 780. Through the NPDES program, the CWA seeks to control "any addition of any pollutant to navigable waters *from any point source*." 33 U.S.C. § 1362(12) (emphasis added). Through state management programs, the CWA seeks to control "pollution added *from nonpoint sources* to the navigable waters." *Id.* § 1329(b) (emphasis added). There is a clear dichotomy in the statute based on the method of transport "from" which pollutants are added to navigable waters.

Unsurprisingly, the courts of appeals and EPA have consistently "recognized the Act's separate treatment of point and nonpoint source pollution." *Or. Nat. Desert Ass'n* v. *Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998). "[T]he statute clearly indicates that there is a category of nonpoint source pollution, and leaves the

regulation of nonpoint source pollution to the states." *Cordiano* v. *Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009). "The CWA's treatment of point-source discharges differs from its treatment of nonpoint-source pollution." *Ctr. for Native Ecosystems* v. *Cables*, 509 F.3d 1310, 1331 (10th Cir. 2007). "Water pollution arising from nonpoint sources is to be dealt with differently." *United States ex rel. Tenn. Valley Auth.* v. *Tenn. Water Quality Control Bd.*, 717 F.2d 992, 999 (6th Cir. 1983). And, "[p]oint source pollution is distinguished from 'nonpoint source pollution,' which is regulated in a different way and does not require the type of permit at issue in this litigation." *League of Wilderness Defs./Blue Mountains Biodiversity Project* v. *Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002). For its part, EPA's regulations consistently draw a line between point and nonpoint source pollution. See, *e.g.*, 40 C.F.R. § 130.2(g), (h) (defining separately the amount of pollutant "loading" a water can receive from point sources as opposed to nonpoint sources).

The question in this case is whether a *point source* permit should ever be required where pollutants are being delivered to navigable waters by a *nonpoint source*. Some circuits, including most recently the Sixth Circuit, have concluded that the point source program does not reach that far. Point source permitting is required only where the pollutant "make[s] its way to a navigable water … by virtue of a point-source conveyance." *Ky. Waterways All.*, 905 F.3d at 934; see also *Sierra Club* v. *Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (a point source must "be the means by which pollutants are ultimately deposited into a navigable water"); *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481, 491 (2d Cir. 2001) ("[A] 'point source must *introduce* the pollutant into navigable water from the outside world.'").

In contrast, both the Fourth and Ninth Circuits have held that a point source permit may be required even where pollution is delivered to navigable waters by a nonpoint source. The Fourth Circuit has held that an NPDES permit is required so long as the pollutants started at a point source that has a "direct hydrological connection" to the navigable waters. *Upstate Forever*, 887 F.3d at 651-52. The Ninth Circuit below held that a point source permit is required wherever pollutants can be "traced" from navigable waters to a point source, even if the pollutants are delivered to the navigable waters by a nonpoint source. Pet. App. 24 n.3.

II. Point Source Permitting Is Required Only Where Pollutants Are Being Delivered By a Point Source or Series of Point Sources To Navigable Waters.

There is just one permissible reading of the statute: a point source permit is necessary only where pollutants are being delivered to navigable waters by a point source or series of point sources. This follows unambiguously from the text, structure, context, history, and purposes of the CWA. See *Abramski* v. *United States*, 573 U.S. 169, 179 (2014) ("[W]e must (as usual) interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose.") (internal quotation marks omitted). It is also the only reading of the statute that comports with the clear-statement rules applied in *UARG* and *SWANCC*, which apply here, as well.

A. Congress unambiguously defined point source pollution based on the means of delivery to navigable waters.

Starting with the text, every tool of statutory construction, including common sense, confirms a

bright-line test for point source pollution: whether a point source or series of point sources is the *means of delivering* pollutants to navigable waters. *Abramski*, 573 U.S. at 179 (noting "common sense" as a "tool[] of divining meaning"). An NPDES permit is required where pollutants are delivered to navigable waters by point sources, such as a pipe, ditch, or similar means of transport. A point source permit is not required if pollutants are instead being delivered to navigable waters by nonpoint sources, such as runoff or groundwater, which the CWA regulates in a different way.

1. A means-of-delivery test is found clearly in the statutory text.

The meaning of the statutory text turns on two words: "from" and "any." The CWA prohibits "the discharge of any pollutant by any person" without a permit. 33 U.S.C. § 1311(a). The phrase "'discharge of a pollutant'" is further defined as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). So what constitutes an "addition … *from any* point source"?

The meaning of "from"

In isolation, "from" is ambiguous. Like many other prepositions, it "is a 'chameleon' that 'must draw its meaning from its context.'" *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 630 (quoting *Kucana* v. *Holder*, 558 U.S. 233, 245 (2010)). "From" could be used to indicate the "starting point," the "source," the "cause," the "means," the "agent or instrumentality," the "reason," or the "basis" of something. *From*, Webster's Third New International Dictionary of the English Language Unabridged 913 (1971) (Webster's); *From*, The Random House Dictionary of the English Language 570 (1967) (Random House).

Two possible meanings stand out in this case. Is "from" being used to indicate that a "point source" is the *starting point* of the addition of pollutants to navigable waters? Or, is "from" being used to indicate that a "point source" is the *means* or *instrumentality* of the addition of pollutants to navigable waters?

Context—in particular, the statutory definition of "point source"—provides the answer. The statute defines a point source not as a place of origin but as a means of transport. Under the CWA, a "point source" is a certain kind of *conveyance*—specifically, a pipe, ditch, or other "discernible, confined and discrete *conveyance* … from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). A conveyance, of course, is a "means of carrying or transporting something" from one place to another. *Conveyance*, Webster's 499; *Conveyance*, Random House 320. As this Court explained in *Miccosukee Tribe*, the statutory definition "makes plain" that the key characteristic of point sources is not that they may sometimes "generate" pollutants but that they always "transport" pollutants. 541 U.S. at 105.

This definition answers clearly what "from" means in the phrase "from any point source." Replacing "point source" with its definition, the statute reads as such: "any addition of any pollutant to navigable waters from *any pipe, ditch, or similar means of transport*." Given that context, the "most natural[] read[ing]," *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 630, is that "from" means *delivered by*. In other words, the CWA bars "any addition of any pollutant to navigable waters *delivered by* any pipe, ditch, or similar means of transport." See *Upstate Forever*, 887 F.3d at 659 (Floyd, J., dissenting) ("For there to be an 'addition ... from a point source,' the point source must convey,

transport, or introduce the pollutant to navigable waters.") (citation omitted).

In context, "from" is plainly being used to indicate that "any point source" is the *means* or *instrumentality* of the "addition to navigable waters." This is a common use of "from" when discussing something that conveys material or information. For example, many Americans during World War II received news of the D-Day invasion from the radio. The word "from" identifies the radio as the means or instrumentality that delivered the news. Similarly, here, "from" identifies that any pipe, ditch, or similar means of transport is the means or instrumentality that delivers pollutants to navigable waters. See *United States* v. *Wilson*, 133 F.3d 251, 264 (4th Cir. 1997) (violation of CWA requires knowledge of facts, including "method or instrumentality used to discharge the pollutants").

This understanding of "from" comports with the way this Court has interpreted and characterized § 1311(a) over the years. This Court held in *Miccosukee Tribe* that while "a point source need not be the original source" of the pollutant to trigger NPDES permitting, "it need … *convey* the pollutant to 'navigable waters.'" 541 U.S. at 105 (emphasis added). This Court also has consistently characterized § 1311(a) as "prohibit[ing] the discharge of any effluent *into* a navigable body of water unless the point source has obtained an NPDES permit." *Arkansas* v. *Oklahoma*, 503 U.S. 91, 102 (1992) (emphasis added).[6] The repeated use of "into,"

[6] See also, *e.g.*, *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 625 ("NPDES permits issued under § 1342 'authoriz[e] the discharge of pollutants' *into* certain waters") (emphasis added); *Decker* v. *Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 602 (2013) (CWA requires NPDES permits "before discharging pollution from any point source *into* the navigable waters of the United States") (emphasis added);

even if not fully considered, evidences that the statute is most naturally read to cover only point sources that "introduc[e]" or "insert[]" pollutants to navigable waters. *Into*, Webster's Third New International Dictionary of the English Language Unabridged 1185 (1993). This Court should now confirm that under the plain text, an NPDES permit is required only for the addition of pollutants to navigable waters *delivered by* "any point source"—*i.e.*, a means-of-delivery test.

Unlike the means-of-delivery test, the Ninth and Fourth Circuit's tests do not follow from the statutory text. The Fourth Circuit does not even attempt to offer any textual basis for its "direct hydrological connection" test. That is because, as the Ninth Circuit recognized, such a test "reads two words into the CWA ('direct' and 'hydrological') that are not there." Pet. App. 24 n.3. But the Ninth Circuit's test suffers the same flaw. The Ninth Circuit's "*de minimis*" requirement, for example, is both created from whole cloth and irreconcilable with § 1311(a)'s prohibition of "*any* addition of *any* pollutant."

The Ninth Circuit roots its traceability test in a judge-made definition of nonpoint source pollution as pollution "not traceable to any single discrete source."

Sackett v. *EPA*, 566 U.S. 120, 122 (2012) ("The Clean Water Act prohibits, among other things, 'the discharge of any pollutant by any person,' § 1311, without a permit, *into* the 'navigable waters ….'") (emphasis added); *Nat'l Ass'n of Home Builders* v. *Defs. of Wildlife*, 551 U.S. 644, 650 (2007) ("The Clean Water Act (CWA) established a National Pollution Discharge Elimination System (NPDES) that is designed to prevent harmful discharges *into* the Nation's waters.") (citation omitted; emphasis added); *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 489 (1987) (CWA "generally prohibits the discharge of any effluent *into* a navigable body of water unless the point source has obtained an NPDES permit.") (emphasis added).

League of Wilderness Defs., 309 F.3d at 1184. Its "approach," the Ninth Circuit explains, "is firmly grounded in our case law, which distinguishes between point source pollution and nonpoint source pollution based on whether pollutants can be 'traced' or are 'traceable' back to a point source." Pet. App. 24 n.3.

But this approach lacks any grounding in the *statutory text*. The statute defines a "point source" as a particular kind of pollution conveyance; "nonpoint sources" are simply all conveyances that do not satisfy the definition of point source. See *Miccosukee Tribe*, 541 U.S. at 106 (distinction between point and nonpoint sources turns on whether a conveyance "fall[s] within the 'point source' definition"). The Ninth Circuit failed to start from the statutory definition of "point source" as a particular means of delivery. By grounding its analysis instead in its own judge-made definition of nonpoint source, the Ninth Circuit mistakenly introduced and relied upon a concept found nowhere in the statute ("traceability") at the expense of the one actually in the statute ("conveyance").

The meaning of "any"

The remaining question is the meaning of "any" in the phrase "from *any* point source," and it is answered readily by this Court's precedent. This Court has previously noted that "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Gonzales*, 520 U.S. at 5. Plugging in that natural reading, § 1311(a) applies to: "any addition of any pollutant to navigable waters delivered by *one or some* point sources *indiscriminately of whatever kind*." This means that an NPDES permit is required whether pollutants are delivered to navigable waters by a single point source or multiple point sources together (*i.e.*, a series of point

sources). Put more simply, a point source permit is required not only for point-source-to-navigable-water pollution, but also for point-source-to-point-source-to-navigable-water pollution, and so on.

The latter situations are what Justice Scalia suggested, in dicta in *Rapanos*, could require a point source permit. Though he noted specifically that the plurality was "not decid[ing] this issue," Justice Scalia observed that releases by point sources into "intermittent watercourses" might need an NPDES permit if those features act as "intermittent channels" that together deliver pollutants to navigable waters. 547 U.S. at 743 (plurality op.). He noted that "many courts have held that such upstream, intermittently flowing channels themselves constitute 'point sources' under the Act." *Ibid*. That is precisely what the word "any" contemplates; the CWA bars "any addition of any pollutant to navigable waters from one *or multiple* point sources." NPDES permitting is required where pollutants are delivered to navigable waters by a series of point sources, even though only the final point source is "directly" discharging into the navigable water, as Justice Scalia observed.

The Ninth and Fourth Circuits assert that Justice Scalia's dicta supports their conclusion that a point source permit is at least sometimes required where pollutants are delivered to navigable waters by nonpoint sources. See Pet. App. 21-23; *Upstate Forever*, 887 F.3d at 649. But Justice Scalia never once mentions nonpoint sources, much less ever says that a point source permit is required where a nonpoint source is what conveys the pollutants to navigable waters. To the contrary, he quotes and does not question this Court's holding in *Miccosukee Tribe* that a point source "'need[s] [to] convey the pollutant to

"navigable waters."'" 547 U.S. at 743 (plurality op.). *Contra Upstate Forever*, 887 F.3d at 650 n.11 (suggesting that Justice Scalia "clarified" *Miccosukee Tribe*).

It is simply untrue that Justice Scalia's dicta calls for anything more than what the text plainly demands: that "pollutants which travel through multiple *point sources* before discharging into navigable waters are still covered by the CWA." *Ky. Waterways All.*, 905 F.3d at 936. Every case he cited involved pollutants delivered to navigable waters by a point source or series of point sources. See *Sierra Club* v. *El Paso Gold Mines, Inc*., 421 F.3d 1133, 1141 (10th Cir. 2005) (mineshaft discharge through a tunnel to navigable waters); *United States* v. *Velsicol Chem. Corp*., 438 F. Supp. 945, 946-47 (W.D. Tenn. 1976) (chemical facility discharge through a municipal storm sewer to navigable waters); *Miccosukee Tribe*, 541 U.S. at 104 (pump station discharge through a canal to navigable waters); *United States* v. *Ortiz*, 427 F.3d 1278, 1281 (10th Cir. 2005) (industrial facility toilet discharge to a storm drain to navigable waters); *Dague* v. *City of Burlington*, 935 F.2d 1343, 1354-55 (2d Cir. 1991) (landfill seepage discharge through a culvert to navigable waters), *rev'd on other grounds*, 505 U.S. 557 (1992); *Concerned Area Residents for the Env't* v. *Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994) (farm vehicle discharge through a swale, pipe, and ditch to navigable waters).

2. A means-of-delivery test accords with the CWA's structure.

The County's reading of the statutory text—as setting forth a means-of-delivery test for NPDES permitting—aligns with the CWA's "organizational paradigm." *Or. Nat. Desert Ass'n*, 550 F.3d at 780. Under the means-of-delivery test, a point source permit is required only

where one point source, or a series of point sources, is delivering pollutants to navigable waters. The test leaves for the CWA's nonpoint source program the many circumstances where one or more nonpoint sources are delivering pollutants to navigable waters. This is consistent with the CWA's "clear[] indicat[ion] that there is a category of nonpoint source pollution," *Cordiano*, 575 F.3d at 219, and ensures that "the NPDES permit program stands alongside of the system controlling 'nonpoint sources' of pollution," *Nat'l Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580, 587 (6th Cir. 1988).

The same cannot be said of the Ninth and Fourth Circuit's tests. Unlike the means-of-delivery test, both the Ninth and Fourth Circuits would require *point source* permitting in circumstances where a *nonpoint source* is delivering pollutants to navigable waters. The Fourth Circuit would require an NPDES permit so long as the pollutants started at a point source that has a "direct hydrological connection" to navigable waters, even if the pollutants are delivered to the navigable waters by a nonpoint source. *Upstate Forever*, 887 F.3d at 651-52. The Ninth Circuit's test is broader still. It would require a point source permit wherever pollutants can be "traced," through *any* medium and any nonpoint source, between navigable waters and an identifiable point source. Pet. App. 24.

Both tests would greatly enlarge the point source program in contravention of Congress's clear decision "to exempt a class of pollution from the CWA's permit requirement." *Cordiano*, 575 F.3d at 224. In 1987, Congress maintained the two-track regulatory approach knowing that "50 percent of all water pollution comes from nonpoint sources," *Nat. Res. Def. Council*, 915 F.2d at 1318 n.4. But these tests—the Ninth's even

more than the Fourth's—would effectively "eviscerate the point source requirement and undo Congress's choice." *Cordiano*, 575 F.3d at 224. Most (if not all) pollutants that reach navigable waters can surely be traced to an identifiable point source at some stage in their journey. See 84 Fed. Reg. at 16,823 ("These decisions expand the Act's coverage beyond what Congress envisioned, potentially sweeping into the scope of the statute commonplace and ubiquitous activities such as releases from homeowners' backyard septic systems.").

3. Other provisions in the CWA support a means-of-delivery test.

The County's reading of § 1311(a) is also supported by other provisions in the CWA. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders*, 551 U.S. at 666 (internal quotation marks omitted). These other provisions further demonstrate that Congress intended a means-of-delivery test for NPDES permitting.

To begin with, a means-of-delivery test is the only reading of § 1311(a) that tracks the way Congress describes the point source program in other provisions of the CWA. Time and again, the CWA describes a point source discharge—*i.e.*, a "discharge of pollutants"—as the release of pollutants "into" navigable waters by point sources. The word "into" suggests "ent[ry]," "penetra[tion]," "introduction," or "insertion" by the point source. *Into*, Webster's 1884-85; *Into*, Random House 746. That is consistent only with the means-of-delivery test, which requires pollutants be *delivered* by a point source or series of point sources to navigable waters. As the Sixth Circuit has explained, "'into'

leaves no room for intermediary [nonpoint sources] to carry the pollutants." *Ky. Waterways Alliance*, 905 F.3d at 934.

This description of point source discharges as being "into navigable waters" is found throughout the Act. For example, the CWA declares as national goals and policies that "the discharge of pollutants *into* the navigable waters be eliminated by 1985" and that "a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants *into* the navigable waters." 33 U.S.C. § 1251(a)(1), (a)(6) (emphases added). The provision that allows States to seek primary authority over NPDES permitting speaks to "the Governor of each State desiring to administer its own permit program for discharges *into* navigable waters within its jurisdiction." *Id.* § 1342(b) (emphasis added). Likewise, permitted point source discharges must meet "effluent limitations," which are defined as restrictions on pollutants "discharged from point sources *into* navigable waters." *Id.* § 1362(11) (emphasis added). The CWA also consolidates within its purview "[d]ischarges of pollutants *into* the navigable waters" previously subject to several other federal laws. *Id.* § 1371(b) (emphasis added). These are just a few of many instances.

A second set of CWA provisions that support the means-of-delivery test are the statute's punitive measures. As this Court has recognized, the CWA "imposes substantial criminal and civil penalties for discharging any pollutant into waters covered by the Act without a permit from the Corps." *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1812 (2016) (citing 33 U.S.C. §§ 1311(a), 1319(c), (d), 1344(a)). Civil penalties can be as much as $54,833 per day per violation. 40 C.F.R. § 19.4 (2019); 84 Fed. Reg.

2056, 2059 (Feb. 6, 2019). "[T]he consequences to landowners even for inadvertent violations can be crushing." *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring).

These penalties cry out for "some measure of predictability," *ibid.*, so persons can clearly know whether an NPDES permit is required or not. The means-of-delivery test provides a bright-line analysis for homeowners, businesses, municipalities, and regulated entities that need to know—*before* undertaking a project—whether they must undergo the "arduous, expensive, and long" process to obtain a permit. *Id.* at 1815 (majority op.). The question is simply whether pollutants will be delivered by a point source or series of point sources to navigable waters.

By contrast, the Ninth and Fourth Circuit's tests have far less predictable outcomes. Questions of traceability and "direct hydrological connection" will leave regulated entities and regulators "'to feel their way on a case-by-case basis'" at great expense and second-guessing. *Sackett*, 566 U.S. at 124 (quoting *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring)). Even with sophisticated modeling (not readily available to the average homeowner), answers may not be knowable with any certainty until *after* the project is completed and the pollutants' path can physically be mapped.

In this case, though EPA knew for years that the effluent was reaching the ocean, it still required a complex, multi-year, dye-tracer study to determine whether the well injections have "a close and direct hydrological connection to regulated coastal water." ER265. And despite this testing, it remains unknown where effluent from two of the County's injection wells enters the ocean and whether some effluent is entering the ocean "at deeper water depths and further from

shore" than what the dye showed. ER427-28, 434-36, 482 ¶ 24, 484 ¶ 28, 526. How will everyday homeowners planning a septic system safely predict whether they risk "crushing" penalties for failing to obtain an NPDES permit?

4. The CWA's legislative history supports a means-of-delivery test.

Legislative history explaining the creation of the CWA's point source program provides yet additional support for the means-of-delivery test. According to the Senate Committee on Public Works, the 1972 amendments sought to implement a new system that controlled "[t]he discharge of pollutants into the navigable waters," in place of the previous system of "search[ing] for a precise link between pollution and water quality." S. Rep. No. 92-414, at 7-8, *reprinted in* 1972 U.S.C.C.A.N. at 3674-75. In so doing, Congress aimed to make enforcement easier on regulators. The shift to "direct restrictions on discharges [sought to] facilitate enforcement by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated." *California ex rel. State Water Res. Control Bd.*, 426 U.S. at 204.

The means-of-delivery test is more consistent with this history. It does not require "work[ing] backward" to establish any "link" between a navigable water and a point source or sources. The only question that need be answered is the straightforward one posed by the Senate Committee, answerable without any computer modeling or scientific studies: whether the point source (or series of point sources) is or will be "discharg[ing] into the navigable waters" by delivering pollutants to those waters.

In contrast, the Ninth and Fourth Circuit's tests introduce the case-by-case "search for a precise link" that the 1972 amendments were meant to eliminate. While the link that each test requires is not the same water-quality link that concerned the Senate Committee, both tests by their nature require working backward to prove a sufficient "connection between a point source and a navigable water … to support liability under the CWA." Pet. App. 25; see also *Upstate Forever*, 887 F.3d at 651 ("[T]he connection between a point source and navigable waters must be clear.").

Additional relevant history is Congress's refusal to adopt several proposals to mandate NPDES permitting for the precise type of nonpoint source pollution in this case—pollutants that reach navigable waters by way of groundwater. During the Act's enactment, Congress debated several such proposals. The EPA administrator urged that NPDES permits should be mandated for the addition of pollutants to groundwater because those pollutants could reach navigable waters "through the ground water table." Water Pollution Control Legislation – 1971 (Proposed Amendments to Existing Legislation): Hearings Before the H. Comm. On Public Works, 92nd Cong., at 230 (1971) (statement of Hon. William Ruckelshaus, Administrator, EPA). Likewise, then-Representative Les Aspin proposed requiring NPDES permitting for pollutants discharged to groundwater because "ground water gets into navigable waters." 118 Cong. Rec. 10,666 (1972).

Congress rejected these proposals. See S. Rep. No. 92-414, at 73, *reprinted in* 1972 U.S.C.C.A.N. at 3738-39; 84 Fed Reg. at 16,815-16. As the Fifth Circuit has explained, "the legislative history demonstrates conclusively that Congress believed it was not granting

the Administrator any power to control disposals into groundwater. … [Rather, the CWA's] pattern is one of federal information gathering and encouragement of state efforts to control groundwater pollution but not of direct federal control over groundwater pollution." *Exxon Corp.* v. *Train*, 554 F.2d 1310, 1322, 1329 (5th Cir. 1977).

This history, too, supports the County's reading of the statute. Consistent with Congress's rejection of the groundwater amendments, the means-of-delivery test does not require an NPDES permit for point source releases where groundwater delivers pollutants to navigable waters as it does in this case. That is nonpoint source pollution subject to the CWA's nonpoint source program. See *infra* Section III.A. In conflict with this history, the Ninth and Fourth Circuits have required and would require NPDES permits under their tests.

5. A means-of-delivery test is consistent with the CWA's purposes.

The Ninth and Fourth Circuits concluded that the means-of-delivery test would not further the CWA's purpose of "restor[ing] and maintain[ing] the … integrity of the Nation's waters." 33 U.S.C. § 1251(a). That test, they reasoned, "would greatly undermine the purpose of the Act," *Upstate Forever*, 887 F.3d at 652, and "make a mockery of the CWA's prohibitions," Pet. App. 31.

But as this Court has explained on many occasions, appeals to purpose are often the "last redoubt of losing causes," *Dir., Office of Workers' Comp. Programs, Dep't of Labor* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135 (1995), and may not "obscure what the statutory language makes clear," *Nat'l Ass'n*

of Mfrs., 138 S. Ct. at 634. "[T]he textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Rapanos*, 547 U.S. at 752 (plurality op.). In fact, "[t]he limitations expressed in statutory terms [are] often the price of passage, and no statute yet known pursues its stated purpose at all costs." *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (internal quotation marks and alterations omitted).

What the Ninth and Fourth Circuits ignore, moreover, is that the means-of-delivery test advances the CWA's many purposes by honoring the distinction between point and nonpoint source pollution. See *supra* Section II.A.2; see also *Rapanos*, 547 U.S. at 755-56 (plurality op.) ("[C]lean water is not the *only* purpose of the statute."). It promotes the "national policy" that "programs for the control of nonpoint sources of pollution be developed and implemented" and that the CWA's "goals … be met through the control of *both* point and nonpoint sources of pollution." 33 U.S.C. § 1251(a)(7) (emphasis added). It also furthers the CWA's policy of preserving state authority to address pollution and "plan the development and use … of land and water resources." *Id.* § 1251(b).

The means-of-delivery test does not exempt individuals and entities from the CWA. Nonpoint source pollution remains fully subject to state nonpoint source management programs required and funded by the CWA. *Id.* § 1329(b)(1). As Congress intended, such programs exist in every State. See EPA, Contacts for Nonpoint Source (NPS) Pollution Programs, State Contacts.[7] In Hawai'i, that program includes plans

[7] https://www.epa.gov/nps/state-contacts-nps-programs (last visited May 7, 2019).

specifically concerning groundwater quality, monitoring, and protection. See *Hawai'i's Nonpoint Source Management Plan*, at 62, 68, 69.

Respondents complain that the nonpoint source program is "no substitute for the protections an NPDES permit would ensure." Res'pts' Br. in Opp'n (BIO) 28. But that is a policy choice for Congress to make, and one it did make for good reason. Congress expressly decided not to require NPDES permitting for all water pollution, even though it "easily could have drafted [the statute] in that broad manner." *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 632. This Court "is not free to 'rewrite the statute' to [Respondents'] liking." *Id.* at 629.

The CWA's nonpoint source program also is not the only law, state or federal, that addresses nonpoint source pollution, including groundwater pollution and its effects on navigable waters. Through their own laws, States "extensively regulate groundwater pollution, thereby helping to protect all the waters into which they flow as well." *Amici* Br. of State of West Virginia et al. in Support of Certiorari 5 (State *Amici* Cert. Br.); see also 84 Fed. Reg. at 16,824. Among those controls are state drinking water laws that, like Hawai'i's UIC program, require compliance with state rules that address "water quality and pollution." Haw. Code R. § 11-23-11.

At the federal level, there are several applicable environmental protections outside the CWA. Of primary relevance here is the SDWA, which controls UIC wells and protects underground drinking water supplies. 42 U.S.C. §§ 300h-300h-8. As EPA previously said regarding the County's wells, the SDWA permit can address any "hydrologic nexus … between the injection wells and the ocean." JA28, 30.

Other federal statutes include the Coastal Zone Act, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and RCRA. The Coastal Zone Act requires States with approved Coastal Zone Management Programs to develop "Coastal Nonpoint Pollution Control Program[s]." 16 U.S.C. § 1455b(a)(1). CERCLA addresses the release or substantial threat of a release of hazardous substances into the "'environment,'" a term that expressly includes groundwater. 42 U.S.C. § 9601(8). And under RCRA, EPA controls and remediates groundwater contamination. See 42 U.S.C. § 6903(3). That includes contamination from coal ash impoundments, 40 C.F.R. §§ 257.90 *et seq*., which is the subject of the Fourth Circuit's decision in *Upstate Forever* and the Sixth Circuit's decision in *Kentucky Waterways Alliance*. Indeed, the Sixth Circuit concluded that requiring NPDES permitting would "effectively nullify … large portions of RCRA." *Ky. Waterways All.*, 905 F.3d at 938; see also 84 Fed. Reg. at 16,824-26 (discussing SDWA, RCRA, CERCLA).

Finally, even within the CWA, there are additional protections for certain kinds of nonpoint source pollution. Under 33 U.S.C. § 1321(b), the CWA specially regulates nonpoint source releases of "oil and hazardous substances" "into or upon the navigable waters." See *id.* § 1321(a)(2) (excluding permitted point source discharges).

B. The means-of-delivery test is further confirmed by the expansive, novel, and disruptive effects of the Ninth and Fourth Circuit's tests.

In several cases, this Court has held that it will interpret a federal statute to have certain effects only with *clear* indication from Congress. *First*, this Court

"expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *UARG*, 573 U.S. at 324 (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). *Second*, "clear congressional authorization" is needed to endorse a "transformative expansion" of a "long-extant statute." *Ibid. Third*, this Court looks for a "clear statement from Congress" before effectuating "a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174.

All three clear-statement rules further confirm the means-of-delivery test over the Ninth and Fourth Circuit's tests. As described below, the Ninth and Fourth Circuit's tests implicate all three clear-statement rules, and there is no clear indication from Congress warranting either test.

1. The Ninth and Fourth Circuit's tests would vastly expand NPDES permitting.

In *UARG*, this Court declined to grant, without a clear statement from Congress, "[t]he power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide." 573 U.S. at 324. EPA proposed a Clean Air Act interpretation that would have caused one category of permits to jump from about 800 to nearly 82,000, and another category to jump from fewer than 15,000 to about 6.1 million. This Court found that expansive authority to "fall[] comfortably within the class of authorizations" for which it has required "clear congressional authorization." *Ibid.*

The Ninth and Fourth Circuit's reading of the CWA similarly subjects States, localities, Tribes, and

millions of property and business owners to new permitting obligations and the prospect of crippling fines. Excluding facilities operating under general NPDES permits (*e.g.*, industrial stormwater permits) and tribal permits, there are 137,455 facilities operating under NPDES permits nationwide. EPA, NPDES Permit Status Reports, FY 2017 Non-Tribal Backlog Summary Report.[8] The Ninth and Fourth Circuit's tests would vastly increase that number.

Consider just the Class V wells at issue here. EPA estimates there are 650,000 such wells in the country, *supra* note 2, used commonly by municipalities and businesses to dispose of wastewater. Though long regulated under other state and federal programs, these wells have never required an NPDES permit in the nearly half century of the CWA's existence. Now, the public and private owners of these wells and state regulators face the "arduous, expensive, and long" prospect of NPDES permitting. *Hawkes*, 136 S. Ct. at 1815.

Widespread methods of stormwater and runoff management, often promoted by EPA as environmentally friendly approaches, are also implicated. See EPA, *National Management Measures to Control Nonpoint Source Pollution from Urban Areas*, at Management Measure 5, EPA-841-B-05-004 (Nov. 2005)[9]; EPA, *Guidelines for Water Reuse*, at Chapter 1, EPA/600/R-12/618 (Sept. 2012) (*EPA Guidelines for*

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[8] https://www.epa.gov/npdes/npdes-permit-status-reports (last visited May 7, 2019).

[9] https://www.epa.gov/sites/production/files/2015-09/documents/urban_guidance_0.pdf.

Water Reuse) (discussing importance of reuse).[10] Many municipalities have built groundwater recharge systems and other green infrastructure projects that collect stormwater or recycled water and use it to augment public groundwater supplies. See, *e.g., EPA Guidelines for Water Reuse*, at Chapter 3 (discussing various types of water reuse); *Amici* Br. of Ass'n of Cal. Water Agencies et al. in Support of Certiorari 15-25. Regulatory agencies have not required NPDES permits for these systems, *e.g.*, *Hawai'i's Nonpoint Source Management Plan*, at 11-12, which are expected to grow substantially in use in coming decades, see EPA, *2017 Potable Reuse Compendium*, at 1-6, EPA/810/R-17-002 (undated).[11] But all those systems introduce pollutants that could make their way in a "fairly traceable" or "hydrologically connected" manner to navigable waters through groundwater, as Respondents readily concede. BIO 34 n.22.

Individual homeowners, too, will be impacted. More than 22 million homes in the country use septic tank systems. See U.S. Department of Housing and Urban Development and U.S. Census Bureau, *American Housing Survey for the United States: 2011*, at 14, Table C-04-AO, H150/11 (Sept. 2013).[12] In Hawai'i alone, there are roughly 21,000 septic systems and 88,000 cesspools[13] currently covered under the State's

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[10] https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P100FS7K.TXT.

[11] https://www.epa.gov/ground-water-and-drinking-water/2017-potable-reuse-compendium.

[12] https://www.census.gov/library/publications/2013/demo/h150-11.html.

[13] A cesspool is a shallow system used to dispose of sanitary waste. Most consist of a concrete cylinder with an open bottom or perforated sides. Waste enters the top and percolates through the

Nonpoint Source Plan. *Hawai'i's Nonpoint Source Management Plan*, at 12. These systems release pollutants into groundwater that in many cases migrate to navigable waters. See 84 Fed. Reg. at 16,823.

The reach of the Ninth and Fourth Circuit's tests stretches as far as the imagination of any who would bring a civil enforcement suit. There are limitless ways pollutants could end up on or in the ground and be transported to navigable waters by rainfall, snowmelt, or percolation to groundwater: for example, gas that leaks from nozzles at gas stations; rain that percolates through municipal road salt storage yards; reclaimed irrigation water on golf courses and farm fields; storm water detention basins; and vehicles dripping oil on roads. Under the Ninth Circuit's "fairly traceable" standard, the connection to navigable waters need not even be water-based. Pollutants could start at a point source and be carried by wind through the air to navigable waters. Indeed, the Ninth Circuit expressly suggested that there may never be a connection "too tenuous." Pet. App. 25. Predictably, recent lawsuits have sought to rely on the Ninth Circuit's rationale to require NPDES permits for groundwater pollution caused by industrial air emissions and Cape Cod resort septic systems.[14]

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bottom or out the sides. EPA, Large-Capacity Cesspools, https://www.epa.gov/uic/large-capacity-cesspools (last visited May 7, 2019).

[14] See *Conservation Law Found., Inc.* v. *Longwood Venues & Destinations, Inc.*, No. 1:18-cv-11821-WGY (D. Mass. filed Aug. 24, 2018); *Conservation Law Found., Inc.* v. *Wequassett Inn LLP*, No. 1:18-cv-11820-DPW (D. Mass. filed Aug. 24, 2018); *Cape Fear River Watch* v. *Chemours Co. FC, LLC*, No. 7:18-cv-00159-D (E.D.N.C. Feb. 28, 2019) (order granting voluntary dismissal with prejudice).

2. The Ninth and Fourth Circuit's tests would transform a long-extant statute.

The Ninth and Fourth Circuit's tests require clear congressional authorization not only because of their expansive effects, but also because they would change the understanding of a "long-extant statute." *UARG*, 573 U.S. at 324. Until the Ninth Circuit decision below and the Fourth Circuit's decision in *Upstate Forever*, this Court and the federal appeals courts had interpreted the CWA point source program consistent with the means-of-delivery test. As noted above, this Court held in *Miccosukee Tribe* that under § 1311(a), a point source "need[s] [to] … *convey* the pollutant to 'navigable waters.'" 541 U.S. at 105 (emphasis added). And the courts of appeals read the statute the same way.

In *Cordiano*, the Second Circuit held that a firing range did not require an NPDES permit where lead from shell casings migrated from a range berm to navigable water via airborne dust and uncollected surface water runoff. 575 F.3d at 223-24. Although the berm was "an identifiable *source* from which lead pollution reaches jurisdictional wetlands," the court held that fact was "not enough to satisfy the CWA requirement of a *point source discharge*." *Id.* at 224 (emphases added). Requiring an NPDES permit because pollutants in navigable waters are traceable to a point source, the court explained, "would eviscerate the point source requirement and undo Congress's choice." *Ibid.*; see also *Catskill Mountains*, 273 F.3d at 493 ("point source" must be "the proximate source from which the pollutant is directly introduced to the destination water body"); *Waterkeeper All., Inc.* v. *EPA*, 399 F.3d 486, 510 (2d Cir. 2005) (same).

In *Abston*, the Fifth Circuit expressly rejected the argument that an NPDES permit is required if the "original source" of pollutants in navigable waters was a point source, "regardless of how the pollutant found its way from that original source to the waterway." 620 F.2d at 44. Because "[t]he focus of this Act is on the 'discernible, confined and discrete' conveyance of the pollutant," an NPDES permit is required only where a point source is "the means by which pollutants are ultimately deposited into a navigable body of water." *Id*. at 44, 45.

In *Village of Oconomowoc Lake* v. *Dayton Hudson Corp*., the Seventh Circuit rejected a claim that pollutants seeping into groundwater constituted point source pollution because of an alleged hydrological connection to navigable waters. 24 F.3d 962, 965 (7th Cir. 1994); see also Compl. ¶ 50, *Vill. of Oconomowoc Lake* v. *Dayton-Hudson Corp.*, No. CIV. A. 93-C-0797, 1993 WL 668975 (E.D. Wis. Sept. 24, 1993), *aff'd*, 24 F.3d 962 (7th Cir. 1994).

Even the Ninth Circuit had previously applied the means-of-delivery test. In *Trustees for Alaska* v. *EPA*, that court concluded that the need for an NPDES permit turns on "whether the pollution reaches the water through a confined, discrete conveyance," *i.e.*, a point source. 749 F.2d 549, 558 (9th Cir. 1984). In *Greater Yellowstone Coal.* v. *Lewis*, the Ninth Circuit determined that water channeled through an underground stormwater system into navigable waters constituted point source pollution, but that unchanneled seepage reaching navigable waters did not. 628 F.3d 1143, 1153 (9th Cir. 2011).

Respondents contend that EPA has long and consistently adopted the "direct hydrological connection" test. BIO 32. But as the agency has explained, "there

have in fact been a range of prior statements," 84 Fed. Reg. at 16,820, that "[l]ack[ed] … consistent and comprehensive direction," *ibid.* On repeated occasions, including the agency explanation most "close-in-time to the passage of the CWA amendments," EPA rejected Respondents' view, "stat[ing] that discharges to groundwater are not subject to the CWA, without any qualification." *Id.* at 16,817-18 (discussing statements from 1973, 1985, 1992, 1994, 2011, and 2014). And in practical effect, "neither EPA nor states [with delegated authority] have generally required NPDES permits" for "a release to groundwater with a hydrologic connection to jurisdictional surface waters." *Id.* at 16,812. EPA did not previously do so here, for example, despite knowing for decades that the injected effluent was reaching the ocean.

3. The Ninth and Fourth Circuit's tests would readjust the federal-state balance.

Finally, a clear congressional statement is required given the obvious risk to the federal-state balance. The CWA establishes "a regulatory 'partnership'" between the Federal Government and the States, *Int'l Paper*, 479 U.S. at 490, which manifests in many ways, including in the division of responsibility between the point and nonpoint source programs. Any interpretation of the CWA that proposes to alter the terms of that partnership will necessarily "readjust[ ] the balance of state and national authority." *Bond* v. *United States*, 572 U.S. 844, 858 (2014) (internal quotation marks omitted).

Here, as explained above, the Ninth and Fourth Circuit's tests would recalibrate the CWA's point and nonpoint source programs. See *supra* Section II.A.2. Those tests "threaten[] to drown state environmental

protection agencies in a myriad of new and technologically challenging NPDES permit requirements from a novel source of federal liability, and leech away scarce resources from other programs." State *Amici* Cert. Br. 15. That is precisely the sort of "significant impingement of the States' traditional and primary power over land and water use" that requires a clear indication from Congress. *SWANCC*, 531 U.S. at 174.

4. Congress did not clearly authorize the Ninth and Fourth Circuit's tests.

Just as there is no doubt the Ninth and Fourth Circuit's tests would dramatically expand and transform the reach of the NPDES program, there is no clear indication in the CWA that Congress intended such readings of the statute. Nothing in the statutory text *clearly* sets forth the Fourth Circuit's "direct hydrological connection" test. As for the "fairly traceable" test, the Ninth Circuit admits that it derived that concept not from the statutory text but from its "case law." Pet. App. 24 n.3. Even the Ninth Circuit does not proffer its reading as a "clear[]" instruction from Congress, *UARG*, 573 U.S. at 324, saying only that the reading "better aligns with the statutory text," Pet. App. 24 n.3.

Given their sweeping and transformative consequences, and the absence of a clear statement from Congress, neither the Ninth Circuit's test nor the Fourth Circuit's test is a viable reading of the CWA. In fact, that the Ninth and Fourth Circuit's tests would "place plainly excessive demands on limited governmental resources is alone a good reason for rejecting [them]" as unreasonable readings of the statute. *UARG*, 573 U.S. at 323-24.

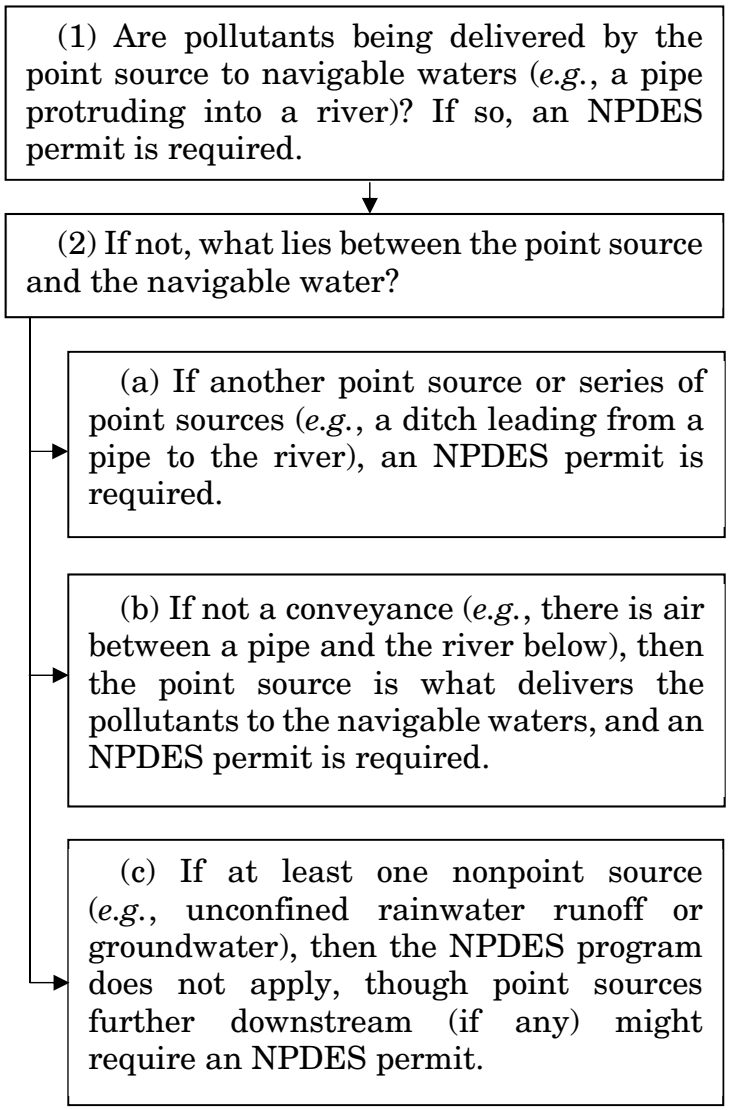
III. The Ninth Circuit Erred in Finding That the County Needed An NPDES Permit.

A. The County's well injections do not require an NPDES permit under the means-of-delivery test.

Under the means-of-delivery test, an NPDES permit is required only where a point source or series of point sources is delivering pollutants to navigable waters. In practical terms, the test asks: *what* is the conveyance that actually adds the pollutants into the navigable waters? There are three possible answers. If the conveyance is a point source or series of point sources together, an NPDES permit is required. If the conveyance is a nonpoint source, the CWA's nonpoint source program and other laws apply. Finally, in some circumstances, the medium immediately adjacent to the navigable waters might not be a conveyance at all. For example, pollutants might fall vertically or project horizontally from a pipe through intervening air before reaching a body of water. In those cases, the question is whether the last conveyance (*e.g.*, the pipe above or back from the water) is a point or nonpoint source.

For the owner of a point source, therefore, the analysis turns solely on what lies downstream. A nonpoint source downstream of the point source breaks the chain of liability, because the point source is no longer delivering pollutants to navigable waters on its own or as part of a series of point sources. A nonpoint source upstream of the point source is irrelevant, however.

In determining whether an NPDES permit is required, the owner of a point source (or a court or regulator) thus might ask the following questions:



The Ninth Circuit should have concluded that the County's well injections do not require an NPDES permit. There is no dispute that the wells fall within the statutory definition of "point source." But unlike some wells—like off-shore wells where backflow up through the well might spill into the ocean—the County's wells are not the means that deliver pollutants to navigable waters. The wells inject treated effluent only into groundwater, which the Ninth Circuit assumed (correctly) is neither navigable water nor a point source. Pet. App. 16 n.2.

The well injections come within category 2(c). Because the injections are not into navigable waters, the answer to the first question is "no." The groundwater is an intervening medium between the point sources (wells) and the navigable waters (ocean). And because the groundwater is a conveyance but not a point source, the answer to the second question is "c." The County's well injections thus do not require an NPDES permit, but rather are subject to the CWA's nonpoint source program and any other applicable laws, like the federal and Hawai'i safe drinking water programs.

B. EPA's Interpretive Statement Provides an Alternative Ground for Reversal.

In its recently issued Statement, EPA does not attempt to define the scope of the point source program under the CWA, but rather concludes that "the statute *categorically* excludes releases to and from groundwater from the permitting requirements of the Act" and "the point source analysis." 84 Fed. Reg. at 16,820, 16,821 (emphasis added). That conclusion does not follow from any "single provision of the CWA." *Id.* at 16,814. Instead, EPA discerns "Congress's intent" by "analyzing the statute in a holistic fashion." *Ibid.*

For purposes of this case, EPA's groundwater-exclusion theory reaches the same result as that advocated by the County: This Court should reverse the finding of liability for the County's well injections. The only basis for liability here is that the effluent enters groundwater and is carried by that groundwater diffusely to the ocean. Under EPA's view of the statute, that activity does not require an NPDES permit. Moreover, like the County, EPA believes that the Ninth and Fourth Circuit's decisions "expand the Act's coverage beyond what Congress envisioned, potentially sweeping into the scope of the statute commonplace and ubiquitous activities such as releases from homeowners' backyard septic systems." *Id.* at 16,823.

Though EPA's theory would also require reversing the Ninth Circuit, the County believes that this Court need not go as far as EPA urges to resolve this case. This Court granted certiorari to define the scope of the CWA's point source program. The CWA's text, structure, context, history, and purposes all point to a clear answer: the means-of-delivery test. When that test is applied here, the County's activity does not require an NPDES permit, but rather is subject to the CWA's nonpoint source program and other applicable state and federal laws.

CONCLUSION

The judgment below should be reversed.

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May 9, 2019