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 RESPONDENTS


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## QUESTION PRESENTED

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

## RULE 29.6 STATEMENT

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

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

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:** **Page(s)**

**Federal Statutes:**

**Federal Regulations & Regulatory Materials:**

**State Statutes:**

**State Regulations & Regulatory Materials:**



**Legislative History:**



**Other:**

## INTRODUCTION

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

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

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

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

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

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

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

## STATUTES INVOLVED

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

## STATEMENT OF THE CASE

### A. Statutory Background

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

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

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

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

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

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

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

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

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

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

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

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

**B. Facts**

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

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

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

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

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

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

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

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

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

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

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

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

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

**C. Proceedings Below**

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

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

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

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

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

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

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

## SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

## ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(*Footnote continued*)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(*Footnote continued*)

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

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

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

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

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

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

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

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

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

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

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

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

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

### B. The County's textual arguments are erroneous.

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

#### 1. "Conveyance"

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

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

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

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

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

**2. "From"**

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

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

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

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

**3. "Any point source"**

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

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

**4. "Into"**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

meaningfully protects the Pacific from the County's effluents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## CONCLUSION

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

Respectfully submitted,

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# APPENDIX

## STATUTES INVOLVED

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

**§ 1251. Congressional declaration of goals and policy**

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

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

**2.** 33 U.S.C. § 1343 provides:

**§ 1343. Ocean discharge criteria**

**(a) Issuance of permits**

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

**(b) Waiver**

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

**(c) Guidelines for determining degradation of waters**

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

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

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

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

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

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

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

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

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

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

**3.** 33 U.S.C. § 1362(6) provides:

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

**4.** 33 U.S.C. § 1362(14) provides:

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