No. 18-260

In the Supreme Court of the United States

COUNTY OF MAUI, HAWAII, PETITIONER

v.

HAWAII WILDLIFE FUND, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a "discharge of a pollutant," 33 U.S.C. 1362(12), occurs when a pollutant is released from a point source, travels through groundwater, and ultimately migrates to navigable waters.

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INTEREST OF THE UNITED STATES

This case concerns the application of the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, to pollutants that are released from a point source, travel through groundwater, and ultimately migrate to navigable waters. Along with the States, see, *e.g.*, 33 U.S.C. 1342(b), the United States Environmental Protection Agency (EPA) implements the Act, see 33 U.S.C. 1251(d), and the United States both enforces the CWA and is a potential defendant in suits alleging the unpermitted discharge of a pollutant from federal facilities. The United States has a strong interest in ensuring that the respective roles of the federal government and the States in regulating the release of pollutants are appropriately balanced under the Act. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-8a.

STATEMENT

1. Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a), while "recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," 33 U.S.C. 1251(b). Subject to certain exceptions that are not implicated here, the CWA prohibits the "discharge of any pollutant" unless the discharge is authorized by a permit issued in accordance with the Act. 33 U.S.C. 1311(a). The Act defines the term "'discharge of a pollutant'" to include "any addition of any pollutant to navigable waters from any point source," as well as additions of pollutants to "waters of the contiguous zone or the ocean" from any point source other than a vessel or other floating craft. 33 U.S.C. 1362(12)(A)-(B).

The CWA defines the term "'navigable waters'"—which are sometimes called jurisdictional surface waters—as "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7); see 33 U.S.C. 1362(8) (defining "territorial seas"). The Act defines the term "'point source'" as "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." 33 U.S.C. 1362(14). The Act recognizes that certain other sources of diffuse pollution, referred to as "nonpoint source" discharges, will also occur, see, *e.g.*, 33 U.S.C. 1288(b)(2)(F),

1329, but it does not include such releases within the definition of the term "discharge of a pollutant," 33 U.S.C. 1362(12).

The CWA "anticipates a partnership between the States and the Federal Government," *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992), and it establishes permitting programs through which appropriate federal or state officials may authorize discharges of pollutants from point sources into the waters of the United States. Under the National Pollutant Discharge Elimination System (NPDES) program, the EPA may permit the discharge of pollutants other than dredged or fill material. 33 U.S.C. 1342(a).[1] The EPA may authorize a State that meets certain statutory criteria to administer its own NPDES program. 33 U.S.C. 1342(b). When a State receives such authorization, the EPA retains oversight and enforcement authority. 33 U.S.C. 1319, 1342(d). As suggested by its name, the goal of the NPDES program is to eliminate uncontrolled point source discharges to waters of the United States.

The CWA authorizes enforcement actions to be brought either by government officials, 33 U.S.C. 1319, or by private citizens under specified circumstances, 33 U.S.C. 1365. A citizen suit may be brought against a person "who is alleged to be in violation of" specified CWA requirements. 33 U.S.C. 1365(a)(1).

2. Petitioner owns and operates four wells at a wastewater treatment plant that processes four million gallons of sewage per day from approximately 40,000 people. Pet. App. 7. Treated wastewater is then injected via petitioner's wells into the groundwater, some of

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[1] A separate permitting program established by the Act governs the discharge of dredged or fill material into navigable waters, see 33 U.S.C. 1344, but that program is not implicated here.

which enters the Pacific Ocean via submarine seeps. *Id.* at 7-9. Those wells operate under permits that authorize underground injection of wastewater pursuant to the Safe Drinking Water Act, 42 U.S.C. 300f *et seq.* See Pet. App. 37; Pet. 7.

Respondents are citizen plaintiffs who allege that petitioner violated the CWA by "discharging effluent through groundwater and into the ocean without the [NPDES] permit required." Pet. App. 10-11. Respondents introduced into evidence the results of a "Tracer Dye Study," which showed that 64% of the pollutants injected into two of petitioner's wells ultimately reached the Pacific Ocean. *Id.* at 9-10. In a series of rulings, the district court held in favor of respondents, based in part on its determination that a "party is liable under the Clean Water Act if, without an NPDES permit, it indirectly discharges a pollutant into the ocean through a groundwater conduit." *Id.* at 56 (emphasis omitted); see *id.* at 32-84, 85-100.

The court of appeals affirmed. Pet. App. 1-31. The court first held that each of petitioner's wells was a "point source" under the Act. *Id.* at 13-16. The court then addressed petitioner's argument that, in order for a CWA "discharge" to occur, "the point source itself must convey the pollutants directly into the navigable water," rather than indirectly through groundwater (as in the case of wastewater from petitioner's wells). *Id.* at 16 (emphasis omitted). The court rejected that argument, holding that "an indirect discharge from a point source to a navigable water suffices for CWA liability to attach." *Id.* at 19.

In support of that conclusion, the Ninth Circuit relied in part on Justice Scalia's plurality opinion in *Ra-*

panos v. *United States*, 547 U.S. 715 (2006), which suggested that the NPDES program covers circumstances in which pollutants flow from point sources through intermittent streams before reaching jurisdictional surface waters. In the court of appeals' view, that opinion recognized that "the CWA does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" Pet. App. 21 (quoting *Rapanos*, 547 U.S. at 743). While acknowledging that the *Rapanos* plurality opinion was not "controlling" in the Ninth Circuit, the court viewed that opinion as nonetheless supporting its conclusion that pollutants need not "be discharged 'directly' to navigable waters from a point source" to fall within the Act's coverage. *Id.* at 23.

The Ninth Circuit accordingly held petitioner liable under the CWA because

> (1) [petitioner] discharged pollutants from a point source, (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable water are more than *de minimis*.

Pet. App. 24. The court viewed its "'fairly traceable'" standard (point 2 above) as more faithful to the CWA than an alternative test, advocated by the United States in its Ninth Circuit amicus brief (see p. 13 n.3, *infra*), that would have "requir[ed] a 'direct hydrological connection' between the point source and the navigable water." Pet. App. 24 n.3.

3. Shortly after the Ninth Circuit issued its decision in this case, the EPA requested public comment on "whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or

other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to CWA regulation." 83 Fed. Reg. 7126, 7126 (Feb. 20, 2018). The EPA's request noted that federal courts had disagreed about the Act's applicability to discharges through groundwater, *id.* at 7127-7128, and it sought the views of interested parties regarding whether "subjecting such releases to CWA permitting is consistent with the text, structure, and purposes of the CWA," *id.* at 7128. The EPA received more than 50,000 public comments in response to its request. See EPA, *Clean Water Act Coverage of Discharges of Pollutants via a Direct Hydrologic Connection to Surface Water*, Docket No. EPA-HQ-OW-2018-0063 (Feb. 20, 2018).[2]

On April 23, 2019, the EPA published an "Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater." 84 Fed. Reg. 16,810. The agency explained that its Interpretive Statement was intended to "advise the public on how EPA interprets the relevant provisions of the CWA." *Id.* at 16,811. The Interpretive Statement set forth the agency's "comprehensive analysis of the CWA's text, structure, [and] legislative history" insofar as relevant to the applicability of NPDES program requirements to releases of pollutants to groundwater from a point source. *Ibid.*

At the outset of its analysis, the EPA observed that responses to its 2018 request for comment had generally advocated one of two opposing views. Some commenters had argued, consistent with the Ninth Circuit's decision in this case, that "a 'discharge of a pollutant'

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[2] https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0063-0001.

may occur when a pollutant has been added to a navigable water via groundwater with some connection to the navigable water." 84 Fed. Reg. at 16,813. Other commenters had advanced the view, "sometimes described as the 'terminal point source' theory," under which "any intermediary between the point source and the navigable water means that a pollutant has not been discharged 'to the navigable water from the point source.'" *Id.* at 16,814 (quoting 33 U.S.C. 1362(12)(A)) (brackets omitted).

The EPA explained that its own interpretation "differ[ed] from these two theories." 84 Fed. Reg. at 16,814. In the agency's view, "the best, if not the only, reading of the statute is 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." *Ibid.* Relying on evidence from the Act's text, structure, and legislative history, the EPA concluded that "the CWA clearly evinces a purpose not to regulate groundwater," and that "any circumstance in which a pollutant is released from a point source to groundwater is categorically excluded from the CWA's coverage." *Ibid.*; see *ibid.* (discussing absence of groundwater regulation in "[t]he operative, enforceable provisions of the Clean Water Act that make up the NPDES permitting program"); *id.* at 16,815 (discussing evidence of "Congress's intent to deliberately leave groundwater out of the definition of 'discharge of a pollutant'"); *id.* at 16,816-16,817 (discussing other provisions of the Act that recognize the States' role in regulating groundwater).

The EPA determined that, in light of Congress's evident intent that pollutant releases to groundwater should not be subject to NPDES requirements, "[t]he

interposition of groundwater between a point source and the navigable water thus may be said to break the causal chain between the two, or alternatively may be described as an intervening cause." 84 Fed. Reg. at 16,814. The agency did not endorse the "'terminal point source' theory," which asserts that *any* spatial gap between a point source and jurisdictional surface waters renders the NPDES program inapplicable. *Ibid.*; see Pet. Br. 19 (describing its theory as a "means-of-delivery test"). Rather, the Interpretive Statement explained that, for circumstances where pollutants move from point sources to jurisdictional surface waters without traveling through groundwater, the agency would leave in place its prior "case-by-case approach," under which the determination "[w]hether a [NPDES] permit is required * * * is necessarily a fact-specific inquiry, informed by the point source definition and an analysis of intervening factors." 84 Fed. Reg. at 16,814.

The EPA acknowledged that its prior statements concerning pollutant releases to groundwater reflected a "lack of consistent and comprehensive direction." 84 Fed. Reg. at 16,817. Some government briefs (including the government's Ninth Circuit amicus brief in this case) and EPA guidance documents had stated "that discharges to groundwater with a direct hydrologic connection to jurisdictional surface waters are subject to the CWA." *Id.* at 16,818. The EPA explained, however, that its prior statements—many of which provided little or no analysis and were contained in documents that dealt primarily with other topics—"t[ook] insufficient account of the explicit treatment of groundwater under the CWA, as reflected in the statute's text, structure, and legislative history." *Id.* at 16,819.

Finally, the EPA determined that its view was supported by policy considerations. The agency explained that, "[c]onsistent with Congress's intent in structuring the CWA," its interpretation of the Act "will continue to give states primacy for regulating ubiquitous groundwater discharges from sources such as septic tanks which are known to affect jurisdictional surface water quality in some instances." 84 Fed. Reg. at 16,823-16,824; see *id.* at 16,824 (describing "state laws and regulations that prohibit or limit discharges of pollutants to groundwater"). At the same time, the EPA identified several statutes that establish a "clear federal role" in regulating discharges into groundwater and protecting "groundwater quality." *Id.* at 16,824; see *id.* at 16,824-16,826 (discussing examples). The EPA concluded that "[t]here is sufficient legal authority to address releases of pollutants to groundwater that subsequently reach jurisdictional surface waters at both the state and federal level without expanding the CWA's regulatory reach beyond what Congress envisioned." *Id.* at 16,823.

SUMMARY OF ARGUMENT

The CWA prohibits unpermitted "discharge[s] of any pollutant," 33 U.S.C. 1311(a), which include "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. 1362(12)(A). That permitting requirement does not apply where, as here, a pollutant is released from a point source to groundwater, even if the pollutant ultimately migrates to navigable waters.

A. The NPDES program does not apply to groundwater pollution. The CWA's definition of "discharge of a pollutant" applies only where pollutants are added to one of three categories of water: navigable waters, waters of the contiguous zone, and the ocean. 33 U.S.C. 1362(12)(A) and (B). All three are surface waters, and

they are sometimes referred to as "jurisdictional surface waters" because they reflect the limits of the NPDES program's coverage.

Groundwater is distinct from surface water, and the Act addresses them separately. But in contrast to the Act's treatment of jurisdictional surface waters, Congress confined the federal role in protecting groundwater under the NPDES program to providing the States with informational, organizational, and resource-based assistance. Several CWA provisions treat groundwater pollution in the same manner as nonpoint source pollution, over which the States have sole regulatory authority. See, *e.g.*, 33 U.S.C. 1288(a), 1329(h)(5)(D).

B. The Ninth Circuit concluded that a release to groundwater can qualify as a "discharge of a pollutant" under certain circumstances—namely, where the pollutant eventually migrates to a jurisdictional surface water and is "fairly traceable from the point source to a navigable water" at more than *de minimis* levels. Pet. App. 24. In the court's view, such a release may properly be considered an "indirect discharge" to a navigable water, *id.* at 22, a concept for which the court found support in Justice Scalia's plurality opinion in *Rapanos* v. *United States*, 547 U.S. 715 (2006). But Justice Scalia's opinion focused on circumstances in which pollutants are released "into noncovered intermittent watercourses that lie upstream of covered waters." *Id.* at 743. Releases of pollutants to groundwater raise distinct concerns, in light of Congress's deliberate exclusion of groundwater pollution from the NPDES program and Congress's separate treatment of such pollution under distinct CWA provisions and other federal statutes. Given that congressional choice, the EPA has correctly

concluded that "[t]he interposition of groundwater between a point source and the navigable water thus may be said to break the causal chain between the two, or alternatively may be described as an intervening cause." 84 Fed. Reg. at 16,814.

Adoption of the Ninth Circuit's "fairly traceable" standard would also substantially enlarge the EPA's regulatory authority beyond what Congress intended. Among other things, it could sweep within the NPDES program private septic tank systems—currently used by millions of homeowners without a permit—which often release pollutants such as nutrients into the water table. Application of NPDES permitting requirements to such activities would upend the traditional federal-state balance and disserve Congress's intent.

The Congress that enacted the CWA was keenly aware of the link between groundwater and surface waters, and in particular of the potential for pollutants to reach jurisdictional surface waters by migrating through groundwater. Yet Congress rejected proposals to regulate groundwater under the NPDES program, including as a means of preventing "indirect" surface-water pollution. Instead, Congress has safeguarded the quality of groundwater, and of surface water connected to groundwater, through other federal legislation. Congress has also authorized the States to adopt their own protections for groundwater—which many have done. The text and history of the CWA, and of complementary federal legislation, reflect Congress's decision to address groundwater pollution through measures *other than* the NPDES program.

C. Respondents allege that petitioner released a pollutant (treated wastewater) into the ground, where groundwater carried it to a navigable water (the ocean).

Because releases of pollutants to groundwater are categorically excluded from regulation under the NPDES program, respondents' allegations necessarily fail. The Court need not address whether or how NPDES permitting requirements would apply where pollutants travel from a point source to surface water by some route other than through groundwater. Releases of that type raise distinct issues, and the EPA and the United States accordingly evaluate them on a case-by-case basis, "informed by the point source definition and an analysis of intervening factors." 84 Fed. Reg. at 16,814. A broader ruling would unnecessarily call those practices into question.

ARGUMENT

UNDER THE CLEAN WATER ACT, A RELEASE OF POLLUTANTS TO GROUNDWATER IS NOT SUBJECT TO NPDES REQUIREMENTS, EVEN IF THE POLLUTANTS SUBSEQUENTLY MIGRATE TO JURISDICTIONAL SURFACE WATERS

The CWA prohibits the unpermitted "discharge of any pollutant," 33 U.S.C. 1311(a), a term defined to include "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. 1362(12)(A). As the text, structure, and legislative history of the Act make clear, a pollutant that is released to groundwater has not been "add[ed] * * * to navigable waters from [a] point source" within the meaning of the statute, even if the groundwater eventually carries that pollutant to a jurisdictional surface water. The contrary interpretation adopted by the Ninth Circuit—under which pollutants released into groundwater are subject to the NPDES permitting regime whenever they "are fairly traceable from [a] point source to a navigable water" at

more than *de minimis* levels, Pet. App. 24—is inconsistent with Congress's evident intent to exclude pollutant releases into groundwater from the NPDES program.[3]

A. The NPDES Regime Protects Only Surface Waters And Does Not Regulate Releases Of Pollutants To Groundwater

1. The CWA's prohibition on unpermitted pollutant "discharge[s]," 33 U.S.C. 1311(a), applies to releases that involve the addition of pollutants "to *navigable waters* from any point source," 33 U.S.C. 1362(12)(A) (emphasis added), as well as to releases involving the addition of pollutants "to the waters of *the contiguous zone* or *the ocean* from any point source other than a vessel or other floating craft," 33 U.S.C. 1362(12)(B) (emphases added). The three italicized categories comprise all waters subject to the NPDES permitting regime. Each of the three is a defined term under the Act. See 33 U.S.C. 1362(7), (9), and (10).

Other CWA provisions confirm the exclusive focus of the NPDES regime on pollutant discharges to navigable waters, the ocean, and the contiguous zone. Those three categories are used to define the term "'effluent limitation'" as "any restriction * * * on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point

[3] In the court of appeals, the government filed an amicus brief supporting respondents. Since that time, however, the EPA has comprehensively reexamined the question whether pollutant releases into groundwater may trigger NPDES permitting requirements. That agency endeavor was informed by a notice-and-comment process that elicited more than 50,000 public comments. This brief reflects the government's reconsideration of the issue in light of that notice-and-comment process and further agency analysis.

sources into *navigable waters, the waters of the contiguous zone, or the ocean.*" 33 U.S.C. 1362(11) (emphasis added). NPDES permits often incorporate effluent limitations as a mechanism for controlling discharges of pollutants to jurisdictional surface waters. See, *e.g.*, 33 U.S.C. 1311(b), (d), and (e); see also *EPA* v. *California ex rel. Water Res. Control Bd.*, 426 U.S. 200, 204-205 (1976). The EPA is also required to establish guidelines for pretreatment of certain pollutants to assist the States in implementing the NPDES program, and those guidelines likewise must seek "to control and prevent the discharge [of such pollutants] into the *navigable waters, the contiguous zone, or the ocean.*" 33 U.S.C. 1314(g)(1) (emphasis added).

All three of the categories of water covered by the NPDES regime are surface waters. That is evidently true of the ocean and the "contiguous zone," which is defined by reference to an international treaty, see 33 U.S.C. 1362(9), as extending seaward up to 12 nautical miles from the coast, see Convention on the Territorial Sea and the Contiguous Zone art. 24, *opened for signature* Apr. 29, 1958, 15 U.S.T. 1612-1613, 516 U.N.T.S. 220, 222 (entered into force Sept. 10, 1964). The same is true of "'navigable waters,'" defined to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7); see 33 U.S.C. 1362(8) (defining "territorial seas"). Although the "'waters of the United States'" that the CWA protects are not strictly limited to those "deemed 'navigable' under the classical understanding of that term," *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985), the CWA's applicability to such waters nevertheless reflects the federal government's "traditional jurisdiction over waters that were or had been navigable in fact or

which could reasonably be so made," *Solid Waste Agency of N. Cook Cnty.* v. *Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001). Only surface waters meet that description.

2. The CWA addresses groundwater through provisions separate and distinct from those that address the three categories of jurisdictional surface waters just described. Groundwater is generally understood as water below the earth's surface in the saturated zone, "the area in which all interconnected spaces in rocks and soil are filled with water." 84 Fed. Reg. at 16,812; see *Webster's Third New International Dictionary* 1004 (1993) (defining "groundwater" as "water within the earth that supplies wells and springs"). At issue in this case, for instance, are subsurface flows beneath the ground. Pet. App. 10; see *id.* at 9, 34-35 (describing experiment that detected subsurface movement by pollutants of one-half mile over 84 days). Groundwater is not navigable and cannot be made navigable, and it is different in kind from the waters that have historically been treated as "waters of the United States." See 40 C.F.R. 122.2(2)(v) (specifying that "Groundwater" does not qualify as "'waters of the United States'"). Releases to groundwater accordingly fall outside the statutory definition of a CWA "discharge of a pollutant." 33 U.S.C. 1362(12).

By enacting a definition of "discharge of a pollutant" that does not encompass pollutant releases to groundwater, Congress made clear its expectation that groundwater pollution would be addressed through mechanisms *other than* the NPDES program. Indeed, the lone operative NPDES provision that mentions groundwater relates to *the States'* traditional role in protecting groundwater. In specifying requirements for the EPA to approve state NPDES programs, the Act instructs that the EPA must determine that adequate authority

exists "under State law" to "control the disposal of pollutants into wells." 33 U.S.C. 1342(b)(1)(D). This "simple requirement" to ensure "that *state* permit programs have adequate authority to issue permits which control the disposal of pollutants into wells, which is not fleshed out elsewhere in the Act or mirrored in any of the sections setting forth the [EPA's] powers," shows Congress's intention to "stop short of establishing federal controls over groundwater pollution." *Exxon Corp.* v. *Train,* 554 F.2d 1310, 1324-1325 (5th Cir. 1977).

3. Other CWA provisions that address issues of groundwater quality do so in one of two ways, both of which reflect Congress's recognition of state regulatory primacy in this sphere. First, the Act directs the EPA to gather information that may assist state efforts to regulate discharges to groundwater. Second, the Act addresses groundwater in the context of state programs to manage nonpoint source pollution. Taken together, these provisions confirm that the States retain responsibility for regulating groundwater pollution, while providing federal support and resources to assist the States' regulatory efforts.

a. Title I of the CWA contains several provisions that direct the EPA to address groundwater pollution through information gathering and coordination with the States. The EPA must, among other things, "prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and *ground waters* and improving the sanitary condition of surface and *underground waters*." 33 U.S.C. 1252(a) (emphases added). In performing those functions, the EPA must cooperate with "State water pollution control agencies, interstate agencies and the municipalities," and it is further authorized to

"make joint investigations with any such agencies of the condition of any waters in any State or States, and of the discharges" to such waters. *Ibid.* The EPA also must establish national programs "in cooperation with the States, and their political subdivisions," in order to "establish, equip, and maintain a water quality surveillance system for the purpose of monitoring the quality of the navigable waters and *ground waters* and the contiguous zone and the oceans." 33 U.S.C. 1254(a)(5) (emphasis added).

Title II of the CWA provides federal resources to the States to enhance groundwater protection. See *Exxon*, 554 F.2d at 1323 (Congress "employed the power of the federal purse to encourage protection by the states of underground waters."). In authorizing the EPA to make grants to the States to construct publicly owned treatment works, for example, Congress specially provided for increased funding for such construction if a State certifies that the quantity of "available groundwater will be insufficient, inadequate, or unsuitable for public use" unless effluents from public works, after adequate treatment, "are returned to the ground water." 33 U.S.C. 1282(b)(2).

Title III of the Act requires the gathering of information relevant to groundwater protection and provides mechanisms for funding relevant state efforts. See, *e.g.*, 33 U.S.C. 1314(a)(1)(A) (directing the EPA to develop and publish water quality criteria regarding, among other things, expected effects on health and welfare "from the presence of pollutants in any body of water, including ground water"); 33 U.S.C. 1314(a)(2)(A) (directing the EPA to develop and publish information regarding, among other things, the factors necessary to

restore and maintain the chemical, physical, and biological integrity of "all navigable waters, ground waters, waters of the contiguous zone, and the oceans"); *ibid.* (requiring publication of information on the "factors necessary to restore and maintain the chemical, physical, and biological integrity of all navigable waters, ground waters, waters of the contiguous zone, and the oceans"). Those and other similar provisions, which facilitate the gathering of information without "transforming this information into enforceable limitations, strongly suggest[] that Congress meant to stop short of establishing federal controls over groundwater pollution." *Exxon*, 554 F.2d at 1324.

b. Other groundwater-focused CWA provisions treat groundwater pollution in the same manner as nonpoint source pollution. Nonpoint source pollution is another distinct area in which the Act preserves state primacy, offering support for state programs rather than establishing enforceable federal regulatory requirements.

Two such provisions stand out. First, Congress addressed concern over nonpoint source pollution affecting groundwater by requiring the States to submit to the EPA "areawide waste treatment management plans," which must include processes for controlling the disposal of pollutants on land or in subsurface excavation to "protect ground and surface water quality." 33 U.S.C. 1288(a) and (b)(2)(K). Such plans must include a process to identify mine-related sources of pollution, including "underground mine runoff," and must include procedures and methods to control those sources of runoff. 33 U.S.C. 1288(a) and (b)(2)(G).

Similarly, among its other measures aimed at helping the States control pollution from nonpoint sources,

the CWA authorizes the EPA in its grant-making to prioritize instances where States have implemented or propose to implement programs to "carry out ground water quality protection activities which the [EPA] determines are part of a comprehensive nonpoint source pollution control program." 33 U.S.C. 1329(h)(5)(D). States may also receive groundwater-specific grants to help them "carry[] out groundwater quality protection activities" that will "advance the State toward implementation of a comprehensive nonpoint source pollution control program." 33 U.S.C. 1329(i)(1). Congress intended for such support "to protect the quality of groundwater and to prevent contamination of groundwater from nonpoint sources of pollution." *Ibid.*

In sum, as the EPA's recent Interpretive Statement explains, "[t]he foundational definitional terms and provisions that establish the NPDES program extend *only* to discharges of pollutants to * * * jurisdictional surface waters." 84 Fed. Reg. at 16,814. By contrast, Congress "included references to groundwater in provisions aimed at providing information, guidance, and funding to states, to enable them to regulate pollutant discharges to groundwater." *Ibid.* Thus, "the [CWA's] structure and references to groundwater therein are reflective of Congress's intent to leave regulation of releases of pollutants to groundwater with the states." *Ibid.*

B. The Release Of A Pollutant To Groundwater Is Not A "Discharge Of A Pollutant" Under Section 1311, Even If The Pollutant Eventually Migrates To Jurisdictional Surface Waters

The Ninth Circuit "assume[d] without deciding [that] the groundwater here is neither a point source nor a navigable water under the CWA." Pet. App. 16 n.2. The court nevertheless held that the release of a pollutant to

groundwater may be subject to NPDES requirements if the pollutant eventually migrates to a jurisdictional surface water. In the court's view, such an "indirect discharge from a point source to a navigable water suffices for CWA liability to attach," *id.* at 19, at least where pollutants are "fairly traceable from the point source to a navigable water" at levels that "are more than *de minimis*," *id.* at 24. That conclusion is inconsistent with Congress's evident desire to exclude pollutant releases to groundwater from the NPDES permitting program, and it would unduly broaden the reach of the NPDES system.

1. In support of its view that the CWA's definition of "discharge" encompasses pollutant releases to groundwater that migrates to navigable waters, the Ninth Circuit relied on Justice Scalia's plurality opinion in *Rapanos* v. *United States*, 547 U.S. 715 (2006). Writing for himself and three other Members of the Court, Justice Scalia concluded that the CWA term "navigable waters" does not encompass "channels containing merely intermittent or ephemeral flow." *Id.* at 733-734. In the course of his analysis, Justice Scalia addressed and rejected the government's argument that reading the term "'navigable waters'" to exclude intermittent channels would allow "water polluters * * * to evade the permitting requirement of § 1342(a) simply by discharging their pollutants into noncovered intermittent watercourses that lie upstream of covered waters." *Rapanos*, 547 U.S. at 742-743. Justice Scalia explained:

> Though we do not decide this issue, there is no reason to suppose that our construction today significantly affects the enforcement of § 1342, inasmuch as lower courts applying § 1342 have not characterized intermittent channels as "waters of the United States." 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." § 1362(12)(A) (emphasis added); § 1311(a). Thus, from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between.

Id. at 743 (citation omitted).[4]

The Ninth Circuit read Justice Scalia's opinion as endorsing an "'indirect discharge' rationale." Pet. App. 22. While recognizing that the *Rapanos* plurality opinion was not "controlling," the court described the opinion as "persuasive" support for the proposition that a pollutant release may fall within the permitting requirement imposed by Section 1311 even if the pollutant is not "discharged 'directly' to navigable waters from a point source." *Id.* at 23. Instead, the court held, it suffices if "the 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." *Id.* at 24.

2. The Ninth Circuit's analysis is unpersuasive. Justice Scalia's discussion did not address groundwater but instead focused solely on circumstances in which pollutants are released "into noncovered intermittent watercourses that lie upstream of covered waters." *Rapanos*,

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[4] Justice Scalia also described an alternative theory under which "intermittently flowing channels [may] themselves constitute 'point sources under the Act,'" and observed that "[s]ome courts have even adopted both the 'indirect discharge' rationale and the 'point source' rationale in the alternative." *Rapanos*, 547 U.S. at 743-744.

547 U.S. at 743; see *ibid.* (circumstances where "the discharge [is] into intermittent channels"). All the lower court decisions that Justice Scalia offered as examples of the indirect discharge theory, see *id.* at 743-744, involved releases into such intermittent watercourses. See *Sierra Club* v. *El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1136-1137, 1141 (10th Cir. 2005) (abandoned mine tunnels), cert. denied, 547 U.S. 1065 (2006); *Concerned Area Residents for the Env't* v. *Southview Farm*, 34 F.3d 114, 118-119 (2d Cir. 1994), cert. denied, 514 U.S. 1082 (1995) (flow over farm field collected into swale connected by a pipe to a ditch); *United States* v. *Velsicol Chem. Corp.*, 438 F. Supp. 945, 946-947 (W.D. Tenn. 1976) (city sewer system).

Releases of pollutants to groundwater raise issues distinct from those implicated by releases to intermittent watercourses or other media. As described above, Congress chose to exclude groundwater pollution from the NPDES program, leaving the States to regulate groundwater quality while offering federal informational and financial assistance. That congressional policy choice would be subverted if releases to groundwater were held to come within the NPDES program's scope whenever the released pollutants migrated to navigable waters and were "fairly traceable" to a point source. Pet. App. 24. Applying NPDES requirements to pollutants that flow through intermittent watercourses or via other means raises no similar concern.

In concluding that pollutants found in jurisdictional surface waters were "fairly traceable" to petitioner's releases, the Ninth Circuit found it sufficient that "the Tracer Dye Study and [petitioner's] concessions conclusively establish that pollutants discharged from all four wells emerged at discrete points in the Pacific Ocean,

with 64 percent of the wells' pollutants reaching the ocean." Pet. App. 24. The court further explained that "[t]he Study also traced a southwesterly path from the wells' point source discharges to the ocean." *Id.* at 24-25. The court "le[ft] for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA." *Id.* at 25. The Fourth Circuit, while holding that pollutant releases into groundwater may require a NPDES permit if the pollutants ultimately migrate to jurisdictional surface waters, has held that a CWA plaintiff must establish a "direct hydrologic connection" between the point source and the navigable waters. *Upstate Forever* v. *Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 (2018), petition for cert. pending, No. 18-268 (filed Aug. 28, 2018); but see *Kentucky Waterways Alliance* v. *Kentucky Utils. Co.*, 905 F.3d 925 (6th Cir. 2018); *Tennessee Clean Water Network* v. *Tennessee Valley Auth.*, 905 F.3d 436 (6th Cir. 2018), petition for cert. pending, No. 18-1307 (filed Apr. 15, 2019).

The tests articulated by the Fourth and Ninth Circuits give insufficient weight to Congress's evident intent that groundwater pollution should be addressed under the CWA through mechanisms specifically directed to that end, rather than subsumed within the NPDES program. The legal concept of "'proximate cause'" often serves as "shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes." *CSX Transp., Inc.* v. *McBride*, 564 U.S. 685, 701 (2011) (opinion of Ginsburg, J.); see William L. Prosser, *Handbook of The Law of Torts* § 49, at 283 (3d ed. 1964) (proximate causation turns on "policy issues which determine the extent of the [defendant's] original obligation and of its

continuance, rather than [on] the mechanical sequence of events which goes to make up causation in fact"). The CWA's definition of "discharge of a pollutant" is naturally read to contemplate such an inquiry. A release is not properly viewed as "addi[ng] * * * [a] pollutant *to* navigable waters *from* [a] point source," 33 U.S.C. 1362(12)(A) (emphases added), if the path between the point source and jurisdictional surface waters is too attenuated.

Passage of pollutants through intermediate groundwater likewise should preclude a determination that the pollutants were added "to" jurisdictional surface waters "from" a "point source." As the EPA's Interpretive Statement explains, "[t]he interposition of groundwater between a point source and the navigable water thus may be said to break the causal chain between the two, or alternatively may be described as an intervening cause." 84 Fed. Reg. at 16,814. Congress's exclusion of groundwater pollution from the NPDES program, and its conferral upon the States of responsibility for regulating such pollution, indicate that the movement of pollutants through groundwater is not the type of factor on which NPDES permitting requirements should turn. Cf. *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) ("At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'") (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, at 264 (5th ed. 1984)).

3. Construing the Act's definition of "discharge" as encompassing releases to groundwater also threatens to work "an enormous and transformative expansion in EPA's regulatory authority." *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 324 (2014). For instance,

"[o]ver 26 million homes in the United States employ septic systems to treat and dispose of household waste," and "even well-functioning septic systems can contribute pollutants such as nutrients to groundwater." 84 Fed. Reg. at 16,812. Such systems often release "pollutants such as nutrients" into the ground, *ibid.*, where they may enter the water table and eventually "find their way to jurisdictional surface waters through groundwater," *id.* at 16,823. Interpreting the Act to cover such releases could require some septic tank owners, for the first time, to obtain NPDES permits. See *id.* at 16,812 ("To date, neither EPA nor states have generally required NPDES permits for these types of activities."). The same could be true for those engaging in other common forms of water management, including "green infrastructure projects" that "release stormwater and recycled wastewater to the ground to recharge depleted aquifers and prevent or reduce runoff to surface waters." *Ibid.*

The Ninth Circuit's interpretation would thus "expand the Act's coverage beyond what Congress envisioned, potentially sweeping into the scope of the statute commonplace and ubiquitous activities." 84 Fed. Reg. at 16,823. This Court previously has cautioned against taking such a step "without clear congressional authorization." *Utility Air Regulatory Grp.*, 573 U.S. at 324. Nor is the Court typically inclined to read the CWA in a manner that would substantially "readjust the federal-state balance" absent a "clear statement from Congress." *Solid Waste Agency of N. Cook Cnty.*, 531 U.S. at 174.

4. The legislative debates that preceded the CWA's enactment reveal Congress's awareness of the relation-

ship between groundwater and surface waters, including the potential for pollutants to migrate via groundwater to jurisdictional surface waters. Congress nevertheless rejected proposals to regulate groundwater under the NPDES program, even as a means of protecting surface waters. See *Village of Oconomowoc Lake* v. *Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir.) ("Members of Congress have proposed adding ground waters to the scope of the Clean Water Act," but "Congress elected to leave the subject to state law."), cert. denied, 513 U.S. 930 (1994).

In a hearing before the House Public Works Committee, for instance, EPA Administrator William Ruckelshaus testified in support of creating federal standards for regulating groundwater, out of concern about the indirect effects of groundwater pollution on surface waters:

> The only reason for the request for Federal authority over ground waters was to assure that we have control over the water table in such a way as to insure that our authority over interstate and navigable streams cannot be circumvented, so we can obtain water quality by maintaining a control over all the sources of pollution, be they discharged directly into any stream or through the ground water table.

Water Pollution Control Legislation—1971 (Proposed Amendments to Existing Legislation): Hearings Before the House Comm. on Public Works, 92d Cong., 1st Sess. 230 (1971).

Representative Leslie Aspin similarly expressed concern that groundwater was "conspicuously included" in all sections of the bill *except* the one establishing the NPDES program (Title IV). *Water Pollution Control Legislation—1971 (H.R. 11896, H.R. 11895): Hearings Before the House Comm. on Public Works*, 92d Cong.,

1st Sess. 727 (1972) (*Hearings*). Representative Aspin questioned whether a meaningful "distinction" could be drawn between groundwater and surface waters:

> Sometimes a navigable water and ground-water source run into each other, or come close to each other, so that seepage from the polluted groundwater source could pollute the navigable water or vice versa. To say that the Federal Government can regulate the ecology of one, but not the other, is silly and counterproductive.

Hearings 728.

Representative Aspin accordingly proposed an amendment to regulate groundwater under the NPDES program by adding the term "ground waters" to the definition of "discharge of pollutant" now found in 33 U.S.C. 1362(12). See *Hearings* 728. He explained the rationale for his amendment by invoking the need to protect surface waters against the introduction of pollutants via groundwater:

> [T]he amendment brings ground water into the subject of the bill, into the enforcement of the bill. Ground water appears in this bill in every section, in every title except title IV. It is under the title which provides EPA can study ground water. It is under the title dealing with definitions. But when it comes to enforcement, title IV, the section on permits and licenses, then ground water is suddenly missing. * * * If we do not stop pollution of ground waters through seepage and other means, *ground water gets into navigable waters*, and to control only the navigable water and not the ground water makes no sense at all.

118 Cong. Rec. 10,666 (1972) (emphasis added). The House rejected the Aspin amendment by a vote of 86 to 34. See *id.* at 10,669; see also *id.* at 10,667 (remarks of Rep. Clausen opposing amendment).

The Senate was similarly aware of the link between surface waters and groundwater. The Committee on Public Works explained that it preferred to address the indirect effects of groundwater pollution on surface waters, not by regulating releases to groundwater under the NPDES regime, but by strengthening state efforts to protect groundwater:

> Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil, and other subsurface formations. Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.
>
> *The Committee recognizes the essential link between ground and surface waters and the artificial nature of any distinction.* Thus the Committee bill requires in section 402 that each State include in its program for approval under section 402 affirmative controls over the injection or placement in wells o[f] any pollutants that may affect ground water. This is designed to protect ground waters and eliminate the use of deep well disposal as an uncontrolled alternative to toxic and pollution control.

S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971) (Senate Report) (emphasis added).

The Senate Committee proposed language, now codified at 33 U.S.C. 1342(b)(1)(D), requiring the States to maintain programs for deep-well disposal to eliminate

uncontrolled well disposal as a potential cause of surface water pollution. See Senate Report 73. The Committee declined, however, to include groundwater in the NPDES program. See *ibid.* The CWA's legislative history thus shows that both Houses of Congress were aware of the connection between groundwater and jurisdictional surface waters, including the potential for pollutants to migrate through groundwater to surface waters. Congress nevertheless rejected appeals to apply the NPDES program to groundwater pollution, preferring instead to address the issue by providing federal assistance to the States.

To be sure, the approach to groundwater that Congress specifically considered and rejected was broader than the rule adopted by the Ninth Circuit in this case. By adding the term "ground waters" to the definition of "discharge of pollutant," Representative Aspin's proposed amendment would have made *all* pollutant releases into groundwater subject to the NPDES program, based on the general tendency of polluted groundwater to impair the quality of jurisdictional surface waters. The Ninth Circuit did not adopt that categorical rule, but held that NPDES permitting requirements apply when actual migration of pollutants is shown—*i.e.*, when identified pollutants in jurisdictional surface waters are "fairly traceable" to point source releases that migrate through groundwater.

Despite that distinction, the legislative deliberations described above are highly relevant to understanding the intent of the Congress that enacted the CWA. Neither the Members of Congress who supported Representative Aspin's amendment, nor those who opposed it, suggested that the bill under consideration *already* imposed NPDES permitting requirements on any point

source releases into groundwater that ultimately migrated to jurisdictional surface waters. To the contrary, although Members of Congress disagreed as to whether such releases *should* be covered by the NPDES program, their shared understanding was that the CWA as enacted did not have that effect.

5. Although releases to groundwater are not subject to the CWA's NPDES permitting requirements, Congress has provided in other ways for the protection of groundwater quality, including as a means of safeguarding surface waters. The States also have adopted measures to protect against groundwater contamination, a role that the Act contemplates and encourages. Together, these state and federal provisions "form a mosaic of laws and regulations that provide mechanisms and tools for EPA, states, and the public to ensure the protection of groundwater quality, and to minimize related impacts to surface waters." 84 Fed. Reg. at 16,824.

a. In addition to supporting state efforts to prevent groundwater pollution through funding, information-gathering, and coordination assistance, see pp. 16-18, *supra*, the CWA authorizes the States to regulate discharges to waters more stringently than federal law requires. See 33 U.S.C. 1370(1) (Act does not "preclude or deny the right of any State * * * to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution"); see also 33 U.S.C. 1370(2). Many state programs effectively prohibit or limit discharges of pollutants to groundwater. 84 Fed. Reg. at 16,824. In response to the EPA's February 2018 request for comment, the attorneys general of Alabama, Arkansas, Colorado, Georgia, Kansas, Louisiana, Minnesota, Missouri, Nebraska, Nevada, Oklahoma, South

Carolina, South Dakota, Texas, West Virginia, and Wyoming submitted comments describing state laws that protect intrastate waters, including groundwater, wholly apart from their States' obligations under the CWA. *Ibid.*

b. Unlike the CWA, other federal laws provide for "a clear federal role" in protecting groundwater. 84 Fed. Reg. at 16,824. Those provisions reinforce the conclusion that, insofar as Congress deemed federal groundwater protection to be necessary and appropriate, it relied on measures specifically crafted to that end, rather than on the more general provisions of the NPDES permitting program. See *id.* at 16,824-16,826.

Under the Safe Drinking Water Act (SDWA), 42 U.S.C. 300f *et seq.*, the EPA has established requirements for state programs to regulate the underground injection of fluids to protect drinking water sources (*i.e.*, underground water that supplies, or can reasonably be expected to supply, public water systems). See 42 U.S.C. 300h. The EPA's underground injection control program under the SDWA includes regulatory requirements for several classes of wells; bans certain types of waste wells; and imposes reporting and other requirements for operating and closing wells. See 42 U.S.C. 300h(b); 40 C.F.R. 144.1(g).

The Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*, was enacted "to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Meghrig* v. *KFC W., Inc.*, 516 U.S. 479, 483 (1996) (quoting 42 U.S.C. 6902(b)). The RCRA reg-

ulates the "'disposal'" of hazardous waste, defined to include waste "discharged into any waters, including ground waters." 42 U.S.C. 6903(3). Among other things, the RCRA requires groundwater monitoring at hazardous waste treatment, storage, and disposal facilities, see 42 U.S.C. 6924(*o*) and (p); 40 C.F.R. 264.90-264.99; and restricts the release of regulated substances from underground storage tanks, 42 U.S.C. 6991b(c); 40 C.F.R. Pt. 280. See also 40 C.F.R. 257.90-257.98 (imposing special rules to address groundwater contamination resulting from coal combustion).

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, provides another measure of federal protection from releases of hazardous substances to "ground water" and "subsurface strata," as well as to "surface water." 42 U.S.C. 9601(8); see 42 U.S.C. 9604(a)(1). In remedial actions under CERCLA, the cleanup level for groundwater must be that "which at least attains Maximum Contaminant Level Goals established under [SDWA] and water quality criteria established under * * * the Clean Water Act." 42 U.S.C. 9621(d)(2)(A). Thus, when setting CERCLA cleanup levels for remedying discharges to groundwater that reach surface water, water-quality standards appropriately may incorporate CWA requirements applicable to the receiving surface water. See 84 Fed. Reg. at 16,826 (citing Memorandum from James E. Woodford & John E. Reeder, Directors, Office of Solid Waste and Emergency Response, to Superfund National Policy Managers, *Summary of Key Existing EPA CERCLA Policies for Groundwater Restoration* 8 (June 26, 2009) (Directive 9283.1-33)).

Federal law also addresses liability for damages to groundwater caused by oil spills. In the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, Congress authorized awards of damages for harm to "'natural resources,'" and it defined that term to include "ground water." 33 U.S.C. 2701(20). Like the SDWA, RCRA, and CERCLA provisions described above, the OPA's definition of natural resources indicates that when Congress intends to establish federal protections for groundwater, it refers to groundwater specifically.

C. This Court Need Not Address The Application Of The NPDES Program To Circumstances Where Pollutants Do Not Travel Through Groundwater

In light of "Congress's unique treatment of groundwater in the CWA," 84 Fed. Reg. at 16,819, the NPDES program is categorically inapplicable to releases of pollutants to groundwater. This case solely involves allegations that pollutants were released from a point source "into groundwater, through which the pollutants then enter[ed] a 'navigable water.'" Pet. App. 13 (brackets omitted). The principle articulated above is accordingly sufficient to determine that respondents' allegations do not state a violation of the Act. This Court need not decide whether and how the Act would apply when pollutants travel from a point source to jurisdictional surface waters through a medium other than groundwater.

In particular, the Court need not determine how the NPDES program might apply where pollutants released from a point source travel to jurisdictional surface waters over land. The EPA's Interpretive Statement described and reaffirmed the agency's "case-by-case approach to determining whether pollutant releases to jurisdictional surface waters that do not travel through groundwater require an NPDES permit. Whether a

permit is required for such a release is necessarily a fact-specific inquiry, informed by the point source definition and an analysis of intervening factors." 84 Fed. Reg. at 16,814.

Accordingly, the United States has sometimes determined that point source releases of pollutants that traveled over land to jurisdictional surface waters constituted unpermitted "discharges" prohibited by Section 1311. See 84 Fed. Reg. at 16,820 n.4. Examples include:

- where the defendant, "using a backhoe, breached the wall of the reservoir causing the wastewater to flow into Rockcamp Run," 12-cr-243 D. Ct. Doc. 1, at 4 (S.D. Ohio Nov. 29, 2012);
- where the defendant's hose "discharg[ed] dark, foamy, and odiferous liquid into a wooded draw which flowed downward into the Palestine Creek," 12-cr-149 D. Ct. Doc. 8-1, at 2 (S.D. Iowa Oct. 25, 2012);
- where methanol leaked from the defendant's tank, "breached containment, including a dike wall, ran down the riverbank and discharged into the Elk River," 14-cr-275 D. Ct. Doc. 9, at 23 (S.D. W. Va Mar. 24, 2015); and
- where boron ash wastewater flowed through a drainage pipe that emptied into a slope approximately 15 yards uphill from a tributary of the Sangamon River; and was pumped from an excavation onto parking lots, which then ran into the Sangamon tributary, 06-cr-30002 D. Ct. Doc. 1, at 5-6 (C.D. Ill. Jan. 5, 2006).

The EPA and the United States thus have previously rejected, and continue to reject, the "terminal point source" theory that *any* spatial gap between a point

source release and jurisdictional surface waters necessarily precludes application of NPDES requirements. The releases at issue in this case were not subject to NPDES requirements, however, because Congress addressed groundwater pollution through other CWA mechanisms that recognize state primacy in this sphere, rather than subsuming groundwater-protection efforts within the NPDES program. Because the CWA "categorically excludes releases to and from groundwater from the permitting requirements of the Act irrespective of the directness of the hydrological connection" between the groundwater and jurisdictional surface water, 84 Fed. Reg. at 16,820, the Court can resolve this case without casting doubt on government enforcement actions of the sort described above.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 33 U.S.C. 1311(a) provides:

Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

2. 33 U.S.C. 1342(a)-(c) provides:

National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last

day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will no-

tify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into

such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program.

The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) LIMITATIONS ON PARTIAL PERMIT PROGRAM RETURNS AND WITHDRAWALS.—A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of—

(A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

3. 33 U.S.C. 1362 provides in pertinent part:

Definitions

Except as otherwise specifically provided, when used in this chapter:

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(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water

along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

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