No. 18-260

IN THE

Supreme Court of the United States

COUNTY OF MAUI,
Petitioner,
v.

HAWAI‘I WILDLIFE FUND, SIERRA CLUB – MAUI GROUP,
SURFRIDER FOUNDATION, and
WEST MAUI PRESERVATION ASSOCIATION,
Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION
AND ALLIED EDUCATIONAL FOUNDATION
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Clean Water Act, 33 U.S.C. §§ 1311(a) & 1342(a)(1), requires a permit for the discharge of pollutants, when the pollutants originate from a point source but are not conveyed to navigable waters by point sources.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 8

I. PETITIONER'S GROUNDWATER INJECTIONS ARE NOT SUBJECT TO CWA PERMITTING BECAUSE ITS EFFLUENTS ARE NOT CONVEYED TO NAVIGABLE WATERS BY POINT SOURCES 8

A. Releasing a Pollutant into Groundwater Is Not an "Addition" of a Pollutant "to Navigable Waters from Any Point Source" within the Meaning of the CWA 10

B. The Lower Court's Interpretation of the CWA Is Implausible Because Its "Fairly Traceable" Standard Is Vague and Prevents Entities from Determining in Advance when CWA Permits Are Required 15

C. The Rule of Lenity Requires that Any Statutory Ambiguities Be Resolved in Petitioner's Favor 18

Page

II. Congress Does not Authorize Substantially Expanded Federal Regulation of Matters Traditionally Regulated by the States when, as Here, the Relevant Statute includes no Clear Statement to that Effect 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases:

Cochise Consultancy, Inc. v. United States ex rel. Hunt, __ U.S. __, 2019 WL 2078068 (May 13, 2019) 7, 19
Kentucky Waterways Alliance v. Kentucky Utilities Co., 905 F.3d 925 (6th Cir. 2018) 9, 11, 14
Leocal v. Ashcroft 543 U.S. 1 (2004) 19
Liparota v. United States, 471 U.S. 419 (1985) 18
Rapanos v. United States, 547 U.S. 715 (2001) 8, 12, 17, 22
Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001) 10
Sierra Club v. Virginia Electric & Power Co., 903 F.3d 403 (4th Cir. 2018) 9, 11, 13
Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers [“*SWANCC*”], 531 U.S. 159 (2001) 12, 22
United States v. Agosto-Vega, 617 F.3d 541 (1st Cir. 2010) 19
United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999) 19
United States v. Hubenka, 438 F.3d 1026 (10th Cir. 2006) 19
United States v. Plaza Health Labs., Inc., 3 F.3d 6443 (2d Cir. 1993) 19
Upstate Forever v. Kinder Morgan Energy Partners, L.P., 887 F.3d 637 (4th Cir.), *cert. petition docketed*, No. 18-268 (U.S. Sept. 4, 2018) 1

Page(s)

Utility Air Reg. Group v. EPA [“*UARG*”],
573 U.S. 302 (2014) 1, 7, 21, 22
Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962 (7th Cir. 1994) 10
Yates v. United States,
135 S. Ct. 1074 (2015) 7, 18

Statutes and Regulations:

Clean Water Act, 33 U.S.C. § 1251, *et seq*. . . . *passim*
33 U.S.C. § 1251(b) 8, 23
33 U.S.C. § 1311(a) . . . . *passim*
33 U.S.C. § 1319(c)(1) 7, 19
33 U.S.C. § 1319(c)(2) 19
33 U.S.C. § 1329(b) 13
33 U.S.C. § 1342(a)(1) 4, 11
33 U.S.C. § 1362(11) 11
33 U.S.C. § 1362(12) . . . . *passim*
33 U.S.C. § 1362(14) 5, 9
33 U.S.C. § 1365 23
33 U.S.C. § 1365(a)(1) 3

Resource Conservation and Recovery Act (RCRA),
42 U.S.C. §§ 6901, *et seq*. 13
42 U.S.C. § 6902 13
42 U.S.C. § 6903(27) 14

Safe Drinking Water Act,
42 U.S.C. §§ 300f, *et seq*. 13

40 C.F.R. § 122.2 9

Page(s)

Miscellaneous:

EPA, *Interpretive Statement on Application of the Clean Water Act NPDES Program to Releases of Pollutants From a Point Source to Groundwater* [“*Interpretive Statement*”], 84 Fed. Reg. 16810 (April 23, 2019) . 11, 17, 20, 24

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 States.[1] WLF promotes and defends free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF has regularly appeared before this and other federal courts in cases involving claims arising under the Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq.*, and other federal environmental statutes. *See, e.g.*, *Utility Air Reg. Group v. EPA*, 573 U.S. 302 (2014) ["*UARG*"]; *American Farm Bureau Fed. v. EPA*, 792 F.3d 281 (3d Cir. 2015); *Murray Energy Corp. v. Dep't of Defense*, *dism'd*, 713 Fed. Appx. 489 (6th Cir. 2018).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

The decision below and a similar decision from the Fourth Circuit[2] significantly expanded previously

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing.

[2] *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir.), *cert. petition docketed*, No. 18-268 (U.S. Sept. 4, 2018).

recognized limits on CWA permitting requirements. Those courts held that, in many instances, releases of pollutants into groundwater are prohibited by the CWA in the absence of a permit issued under the National Pollutant Discharge Elimination System (NPDES) program. *Amici* believe that the decisions badly misread applicable CWA provisions.

More importantly, *amici* are concerned that the decisions place regulated entities in an untenable situation. Under the Ninth Circuit's new standard, they cannot determine in advance whether their groundwater releases require an NPDES permit, yet they face large monetary sanctions and even criminal penalties if a court later determines that they failed to obtain necessary permits in advance of the discharges. Congress cannot reasonably be understood to have adopted a statutory scheme that places such an unfair burden on regulated entities.

STATEMENT OF THE CASE

Since the early 1980s, Petitioner County of Maui has operated a wastewater treatment plant that processes several million gallons of sewage per day from about 40,000 people living in the western portion of the Island of Maui. Maui injects much of the treated effluent into four wells, from which the effluent migrates into groundwater. A 2013 tracer-dye study determined that a majority of the effluent eventually flows into the Pacific Ocean over an estimated two miles of coastline. That migration process generally takes more than a year, during which time the chemical composition of the effluent changes considerably.

Throughout the decades that the plant has operated, Maui has never sought an NPDES permit for its well injections, nor has any government agency stated that the CWA required a permit. Both EPA and Hawaii administer programs designed to prevent underground injection control (UIC) wells from contaminating underground sources of drinking water. Maui's well injections have complied at all times with the permits issued to it under those programs.

The CWA authorizes "any citizen" to file a civil action against "any person" (including a governmental agency) alleged to be in violation of "an effluent standard or limitation" imposed by the CWA. 33 U.S.C. § 1365(a)(1). Respondents Hawai'i Wildlife Fund, *et al.*, filed a citizen suit against Maui in 2012, alleging that the CWA prohibited Maui from injecting effluent into its wells without an NPDES permit. The district court granted summary judgment to Respondents, concluding that Maui violated the CWA by "indirectly discharg[ing] a pollutant into the ocean through a groundwater conduit." Pet. App. 56.

The Ninth Circuit affirmed. Pet. App. 1-31. The appeals court concluded that Maui's well injections constituted discharges of pollutants "to navigable waters" (the Pacific Ocean) "from [a] point source" (the wells), *id*. at 12-13 (quoting 33 U.S.C. § 1362(12)), and thus were prohibited under § 1311(a) in the absence of an NPDES permit. *Id.* at 13. It rejected Maui's contention that the CWA applies only to pollutants "discharged 'directly' to navigable waters from a point source," stating that the CWA's definition of the phrase "discharge of a pollutant" (§ 1362(12)) does not include the word "directly." *Id.* at 23.

The Ninth Circuit established a three-part standard for determining whether releases of pollutants into ground water are regulated by the CWA and held that Maui was liable under that standard because:

> (1) the County 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 waters, and (3) the pollutant levels reaching the navigable waters are more than *de minimis*.

Pet. App. 24. The appeals court provided no guidance regarding what evidence is sufficient to demonstrate that pollutants are "fairly traceable" from the point source to a navigable water, or when pollution levels are sufficiently low to be classified as "*de minimis*." Indeed, it explicitly deferred addressing those issues: "We leave 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.

SUMMARY OF ARGUMENT

Congress passed the CWA in 1972 to prohibit all unpermitted discharges of pollutants into navigable waters. 33 U.S.C. §§ 1311(a), 1342(a)(1). But by carefully defining what constitutes a "discharge of a pollutant," the CWA makes clear that Congress did not intend to address *all* potential sources of water pollution. Rather, the CWA differentiates between

pollutants added "to navigable waters from [a] point source" and those not added from a point source; only the former are subject to § 1311(a)'s prohibition.

The text, structure, and purposes of the CWA all support Maui's contention that the migration of effluent from its wells, through groundwater, and into the Pacific Ocean does not constitute point-source pollution of the sort subject to CWA regulation. That contention is most clearly demonstrated by the CWA's definition of a "point source," 33 U.S.C. § 1362(14). A "point source" is a "discernable, confined and discrete conveyance"; *i.e.*, it *conveys* a pollutant. But Maui's effluent is not conveyed to the Pacific Ocean by means of a discernable, confined and discrete conveyance. Rather it reaches the ocean only after meandering for more than a year through groundwater, which is anything but a "confined and discrete conveyance."

True, Maui's wells meet the definition of a "point source." But that alone is not enough to constitute the "discharge" of pollutants "to navigable waters" from a point source or point sources, when the pollutants are ultimately conveyed to navigable waters "from" a source (such as groundwater) that does not meet the statutory definition of "a point source." If it were otherwise, the limiting function of the "point source" requirement would be largely obliterated. That is so because virtually all pollutants that reach navigable waters have at some point passed through a "point source" (*e.g.,* spray from a garden hose, chlorinated water leaking from a water main). Under the Ninth Circuit's interpretation of § 33 U.S.C. § 1362(12), all such activity would constitute an "addition of [a] pollutant to navigable waters from any point source,"

no matter that the pollutant is not actually conveyed to navigable waters by means of point sources.

Apparently recognizing the vast regulatory expansion implied by its statutory construction, the Ninth Circuit sought to limit its ruling somewhat by imposing several atextual conditions: the pollutant must be "fairly traceable" from the initial point source to a navigable water, and the level of pollutants reaching a navigable water must be more than "*de minimis*." Pet. App. 24. But the Ninth Circuit made no effort to define those inherently vague terms, leaving regulated entities with no method of discerning when they are required to seek CWA permits.

The problem is not simply that the requisite level of traceability remains undefined. A more serious problem is the near impossibility of discovering in advance how pollutants released into groundwater are likely to migrate. For example, municipalities developing plans to construct waste disposal facilities routinely appropriate millions of dollars without the means of determining in advance whether, and how much of, the effluent they plan to inject into wells may eventually migrate into navigable waters. Yet under the Ninth Circuit's interpretation of the CWA, those municipalities could face massive expenditures (including civil and criminal liability) if a non-negligible level of pollutants later discovered in a navigable water is traced back to their disposal facilities. It is highly improbable that Congress adopted legislation that creates such traps for regulated entities operating in good faith.

Moreover, the rule of lenity applies to any

ambiguity in the CWA's definition of "discharge of a pollutant." 33 U.S.C. § 1362(12). Even "negligent" violations of the CWA's discharge provisions are punishable under the criminal law with prison sentences of up to a year and fines of up to $25,000 per day. 33 U.S.C. § 1319(c)(1). The rule of lenity requires that ambiguities in penal statutes such as the CWA "should be resolved in favor of lenity." *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015). The rule applies regardless whether the CWA is being enforced in a civil or a criminal context because it is a "fundamental rule[ ] of statutory construction" that "a statutory phrase must have a fixed meaning." *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, ___ U.S. ___, 2019 WL 2078068, at *4 (May 13, 2019). That rule of construction requires "avoid[ing] interpretations that would ascribe different meanings" to § 1362(12) depending on the context in which the statute arises. *Ibid.* Because Maui's interpretation of § 1362(12) is (at the very least) a plausible construction of an arguably ambiguous penal statute (as evidenced by its adoption by several federal appeals courts), the rule of lenity requires acceptance of Maui's interpretation.

The Ninth Circuit's expansive interpretation of the CWA should also be rejected because it is inconsistent with this Court's "clear statement" test. If, as the Ninth Circuit held, the CWA imposes strict federal controls on releases into groundwater, that would represent both a vast expansion of federal regulations and a significant encroachment upon a traditional state power. This Court has repeatedly held it will not interpret a statute as having such a sweeping scope without a clear indication in the statute that Congress intended that result. *UARG*, 573

U.S. at 324; *Rapanos v. United States*, 547 U.S. 715, 738 (2001) (plurality). The CWA contains no such indication. To the contrary, in adopting the CWA, Congress explicitly recognized States' "primary" role in addressing water-resource issues. 33 U.S.C. § 1251(b). In the absence of any clear indication that Congress intended, through its adoption of the CWA, to displace States' primary role in regulating groundwater, the Court should decline to interpret the CWA in the expansive manner urged by Respondents.

ARGUMENT

I. PETITIONER'S GROUNDWATER INJECTIONS ARE NOT SUBJECT TO CWA PERMITTING BECAUSE ITS EFFLUENTS ARE NOT CONVEYED TO NAVIGABLE WATERS BY POINT SOURCES

The material facts of this case are largely undisputed. For several decades, Maui has been injecting effluent from a wastewater treatment facility into four wells, from which the effluent reaches groundwater. A 2013 tracer-dye study determined that a majority of the effluent eventually passes through the groundwater and enters the Pacific Ocean over an estimated two miles of coastline. Under those circumstances, Maui's injections are not subject to CWA permitting requirements because they are not additions "to navigable waters from any point source" or "to the waters of the contiguous zone or the ocean from any point source," within the meaning of 33 U.S.C. § 1362(12).

The court below "assume[d] without deciding the groundwater here is neither a point source nor a

navigable water under the CWA." Pet. App. 16 n.2. The Ninth Circuit's assumptions are correct. The CWA defines a "point source" as:

> any discernable, 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.

33 U.S.C. § 1362(14). Groundwater cannot plausibly be included within that definition because it is not a "discernable, confined and discrete conveyance," nor is it similar to any of the objects (*e.g.*, pipes or ditches) enumerated in the statute. Indeed, every federal appeals court that has addressed the issue has concluded that groundwater is not a CWA "point source." *See, e.g., Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 905 F.3d 925, 933 (6th Cir. 2018) ("By its very nature, groundwater is a diffuse medium that seeps in all directions, guided only by the pull of gravity."); *Sierra Club v. Virginia Electric & Power Co.*, 903 F.3d 403, 411 (4th Cir. 2018).

Nor is groundwater included within the "navigable water" and "waters of the United States" protected by the CWA. Indeed, longstanding EPA regulations explicitly exclude "groundwater" from the definition of "waters of the United States." 40 C.F.R. § 122.2. The federal appeals courts agree. *See, e.g.,*

Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994); *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269-70 (5th Cir. 2001).

Thus, the Ninth Circuit's ruling depends entirely on its interpretation of § 1362(12), which defines a "discharge of a pollutant" as "(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." Although conceding that Maui's effluent reaches the Pacific Ocean through a medium (groundwater) that is not itself a CWA "point source," the Ninth Circuit held that such "indirect discharges" from a point source (the wells) are nonetheless sufficient to meet the statutory requirement that the addition of pollutants to the ocean be "from [a] point source." Pet. App. 16-25.

That holding misreads the CWA. Indeed, the text, structure, and purposes of the CWA all support Maui's contention that the migration of effluent from its wells, through groundwater, and into the Pacific Ocean does not constitute point-source pollution of the sort subject to CWA regulation.

A. Releasing a Pollutant into Groundwater Is Not an "Addition" of a Pollutant "to Navigable Waters from Any Point Source" within the Meaning of the CWA

Maui's opening brief cogently explains why its conduct does not constitute the "discharge of a pollutant" subject to the CWA permitting requirements

established by 33 U.S.C. §§ 1311(a) and 1342(a). *Amici* will not repeat each of those arguments here. Rather, we limit our discussion to several points that warrant particular attention.

The CWA Targets Measurable Discharges. The CWA protects the cleanliness of navigable waters through a permitting scheme that specifies numerical limits on the quantity of pollutants that a permit holder may add to the navigable waters. The NPDES program focuses on "effluent limitation," defined as a restriction on "the quantities, rates, and concentrations" of pollutants discharged into navigable waters." 33 U.S.C. § 1362(11). Whether a regulated entity is complying with those restrictions can be determined by measuring discharges *at the point source*.

But no such measurement is practicable if, as here, the alleged "discharge of pollutants" is occurring at locations far removed (in both distance and time) from the release into groundwater at the regulated entity's point source. Measurements taken at the point source would not accurately reflect the extent of pollutants being added to navigable waters because: (1) only some not-yet-determined percentage of pollutants released at the point source will actually enter navigable waters; and (2) the chemical composition of any pollutants entering the navigable waters will have changed considerably during the months or years likely to have elapsed while the pollutants meander through groundwater. *See* EPA, *Interpretive Statement on Application of the Clean Water Act NPDES Program to Releases of Pollutants From a Point Source to Groundwater* ["*Interpretive Statement*"], 84 Fed. Reg.

16810, 16812 (April 23, 2019) ("[T]he travel time and distance between polluted groundwater and surface water can allow for the reduction of the impacts of contamination on the surface water due to natural processes.").

The impracticability of such measurements when pollutants enter the navigable waters via groundwater is a strong indication that the CWA's NPDES permitting system does not cover groundwater releases. *See Kentucky Waterways*, 905 F.3d at 934-35 & n.8. By limiting § 1311(a)'s discharge restrictions to pollutants that are "convey[ed]" to navigable waters by one or more point sources, the CWA makes clear that the restrictions apply only to discharges capable of being quantified. *Sierra Club*, 903 F.3d at 411 ("In regulating discharges of pollutants from point sources, Congress clearly intended to target the *measurable* discharge of pollutants.") (emphasis in original).

Ecological Considerations Do Not Trump Statutory Text and Structure. Respondents contend (and Maui vigorously disputes) that Maui's groundwater releases are damaging coral reefs and other aspects of the Pacific Ocean environment. Those factual disputes are irrelevant to the statutory-construction issue before the Court, in the absence of any ambiguity regarding whether § 1311(a)'s restrictions apply to groundwater releases. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 167, 171 (2001) (holding that Army Corps's desire to protect the habitat of migratory birds did not justify its efforts to expand CWA coverage to include isolated waters); *Rapanos*, 547 U.S. at 741-42 (plurality) (evidence that placing fill

on wetlands not adjacent to navigable waters might have a negative ecological impact was irrelevant to issue of whether the CWA authorized Army Corps to regulate those wetlands).

Moreover, a finding that CWA § 1311(a) does not regulate groundwater releases does not mean that such releases are exempt from government regulation and thus that ecological concerns could be overlooked. Maui's well injections are subject to permitting requirements imposed by both the federal Safe Drinking Water Act, 42 U.S.C. §§ 300f, *et seq.*, and Hawaii state law. Although § 1311(a)'s restrictions apply only to point-source discharges, the CWA also directs that each State adopt federally approved programs "for controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters." 33 U.S.C. § 1329(b). Hawaii has adopted such a program, which continues to examine any impact of Maui's groundwater releases on the Pacific Ocean. As the Fourth Circuit has recognized, simply because a water quality issue falls outside the scope of § 1311(a)'s restrictions "does not mean that it slips through the regulatory cracks." *Sierra Club*, 903 F.3d at 411.

Another federal law that restricts groundwater releases is the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901, *et seq.* RCRA regulates the management of hazardous solid waste. Indeed, the Sixth Circuit based its holding that the CWA does not regulate groundwater pollution in substantial part on its conclusion that a contrary holding would undercut RCRA's regulation of hazardous wastes:

> Reading the CWA to cover groundwater pollution like that at issue in this case [involving coal ash] would upend the existing regulatory framework. RCRA explicitly exempts from its coverage any pollution that is subject to CWA regulation. 42 U.S.C. § 6903(27). In that way, RCRA and the CWA are mutually exclusive—if certain conduct is regulated under the CWA and requires an NPDES permit, RCRA does not apply. Were we to read the CWA to cover [Respondent's] conduct here, [Respondent's] coal ash treatment and storage practices would be exempt from RCRA's coverage. But coal ash is solid waste, and RCRA is specifically designed to cover solid waste. *See id.* § 6902(a)(1). Reading the CWA so as to remove solid waste management practices from RCRA's coverage is thus problematic.

Kentucky Waterways, 905 F.3d at 937-38.

The Ninth Circuit's* "De Minimis" *Rule Should Be Applied in Reverse. *Amici* do not suggest that a polluter can evade § 1311(a) discharge restrictions by minutely altering its discharges. For example, as Maui points out, § 1311(a) still applies even if the end of a polluter's pipe (a point source) is removed from a navigable water and placed at a location several feet above the water—so that pollutants emitted from the pipe fall through several feet of air before entering the navigable water. Pet. Brief 53. Under those circumstances, all of the

pollutant released by the point source(s) is discharged "to navigable waters," and any intervening step is negligible.

The Ninth Circuit created a *de minimis* exception to its groundwater standard: pollutants "fairly traceable from the point source to a navigable water" are not subject to NPDES permitting requirements if "pollutant levels reaching the navigable waters are ... *de minimis*." Pet. App. 24. *Amici* submit that a *de minimis* standard is appropriate, but it should be the precise opposite of the one adopted by the Ninth Circuit. Releases of pollutants are not subject to the NPDES permitting requirements unless the pollutants are "convey[ed]" to navigable water by a point source or a series of point sources, but the permitting requirements apply even if there is a *de minimis* gap between the point source discharge and the entry of the pollutant into navigable water.

B. The Lower Court's Interpretation of the CWA Is Implausible Because Its "Fairly Traceable" Standard Is Vague and Prevents Entities from Determining in Advance when CWA Permits Are Required

Question 2 in Maui's certiorari petition sought review of its claim that the judgment violated its Fifth Amendment due-process rights because the CWA, as interpreted by the lower courts, is overly vague and did not provide fair notice that Maui was required to obtain an NPDES permit. Pet. 36-39. The Court denied review of Question 2.

But while Maui's due-process defense is not now before the Court, its assertion that the Ninth Circuit's CWA liability standard is overly vague remains highly relevant. Maui is correct that, as interpreted by the Ninth Circuit, the CWA fails to provide regulated entities with a method for discerning when they are required to seek CWA permits. That failure counsels strongly against affirmance of the Ninth Circuit's interpretation because Congress is highly unlikely to have adopted a statute that creates such traps for regulated entities operating in good faith.

The Ninth Circuit held that a NPDES permit is required whenever non-negligible levels of pollutants present in navigable water are "fairly traceable" to a regulated entity's releases from a point source—without regard to how the releases were conveyed to navigable water. Pet. App. 24. The inherent vagueness of that standard extends far beyond the Ninth Circuit's failure to define the requisite level of traceability and to "determin[e] 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.

A more serious problem is the backward-looking nature of the Ninth Circuit's standard. The requirement to obtain a pre-discharge NPDES permit is imposed only *after* it is determined that pollutants are present in the navigable water and are "fairly traceable" to effluents released to groundwater many months or years earlier. Such backward-looking standards wreak havoc on the ability of local governments to construct sewage-treatment facilities and other projects designed to address environmental

issues. Groundwater migration patterns vary significantly depending on soil composition and other geological factors, and thus it can be nearly impossible to determine in advance the likelihood that pollutants released to groundwater will eventually migrate to navigable water. *See EPA Interpretive Statement*, 84 Fed. Reg. at 16812. So municipal planners must commit the millions of dollars necessary to design and construct wastewater disposal facilities without knowing the ultimate fate of the effluent they plan to inject into wells. Yet under the Ninth Circuit's "fairly traceable" standard, they can be held civilly and criminally liable for failing to obtain a permit that they did not know they needed when they constructed the facility and authorized well injections. Moreover, they cannot rely on assurances of federal and state regulators that an NPDES permit is unnecessary, because private individuals can bypass those regulators by filing citizen suits under 33 U.S.C. § 1365. And in light of the decision below, and the Fourth Circuit's similar decision in *Kinder Morgan*, one can reasonably expect an avalanche of citizen suits against the operators of the hundreds of thousands of injection wells across the Nation.

The Ninth Circuit's "fairly traceable" standard is akin to the "substantial nexus" standard espoused by some as a basis for determining whether wetlands should be classified as navigable waters under the CWA. The *Rapanos* plurality rejected the "substantial nexus" standard as an implausible construction of relevant CWA provisions because it was "perfectly opaque" and provided no guidance to regulated entities. *Rapanos*, 547 U.S. at 756 n.15 (plurality) (noting the difficulty in determining, under the substantial-nexus

standard, "[w]hen exactly does a wetland 'significantly affect' covered waters, and when are its effects 'in contrast ... speculative or insubstantial'") (citations omitted). The Court should reject the Ninth Circuit's atextual "fairly traceable" test for similar reasons. It is not plausible that Congress intended to adopt such a vague standard that provides little or no notice regarding when those engaged in groundwater releases must obtain NPDES permits.

C. The Rule of Lenity Requires that Any Statutory Ambiguities Be Resolved in Petitioner's Favor

For all the reasons explained by Maui in its opening brief, the CWA unambiguously provides that groundwater injections are not subject to CWA permitting requirements because pollutants' passage through groundwater (not a point source) breaks the necessary link between the initial point-source discharge and any subsequent addition of a pollutant to navigable water. But even if the Court concludes that the CWA is ambiguous on that issue, it should uphold Maui's position based on the rule of lenity.

The Court has long adhered to "the rule that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Yates*, 135 S. Ct. at 1088 (citations omitted). Application of the rule of lenity "ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985).

The CWA unquestionably qualifies as a criminal statute. Mere "negligent" violations of the CWA's discharge provisions are punishable under the criminal law with prison sentences of up to a year and fines of up to $25,000 per day. 33 U.S.C. § 1319(c)(1). "Knowing" violations carry fines of up to $100,000 per day and six years' imprisonment. 33 U.S.C. § 1319(c)(2). Criminal prosecutions for CWA permit violations are not uncommon. *See, e.g., United States v. Hubenka*, 438 F.3d 1026 (10th Cir. 2006); *United States v. Agosto-Vega*, 617 F.3d 541 (1st Cir. 2010); *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999). In at least one case, the Second Circuit applied the rule of lenity to construe an ambiguous CWA provision in the defendant's favor and thereby overturn his criminal conviction for discharging pollutants from a point source without a permit. *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643 (2d Cir. 1993).

Nor is it relevant, for purposes of applying the rule of lenity, that this case arises in a civil context. When a statute "has both criminal and noncriminal applications," the rule of lenity applies regardless "whether we encounter its application in a criminal or noncriminal context"—because the Court "must interpret the statute consistently." *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004). It is a "fundamental rule[ ] of statutory construction" that "a statutory phrase must have a fixed meaning." *Cochise Consultancy*, 2019 WL 2078068, at *4. That rule of construction requires "avoid[ing] interpretations that would ascribe different meanings" to § 1362(12) depending on the context in which the statute arises. *Ibid.*

Maui's well injections are not subject to CWA

permitting requirements unless they qualify, under § 1362(12), as an "addition of any pollutant to navigable waters from any point source." Maui's brief has amply demonstrated that its well injections are *not* added "to navigable waters from a point source." But even if the Court were to determine that § 1362(12) is ambiguous on this point, the rule of lenity mandates that the ambiguity be resolved in Maui's favor.

II. CONGRESS DOES NOT AUTHORIZE SUBSTANTIALLY EXPANDED FEDERAL REGULATION OF MATTERS TRADITIONALLY REGULATED BY THE STATES WHEN, AS HERE, THE RELEVANT STATUTE INCLUDES NO CLEAR STATEMENT TO THAT EFFECT

The Ninth Circuit's expansive interpretation of the CWA should also be rejected because it is inconsistent with this Court's "clear statement" test. If, as the Ninth Circuit held, the CWA imposes strict federal controls on releases into groundwater, that would represent both a vast expansion of federal regulations and a significant encroachment upon a traditional state power.

After comprehensively reviewing the issue, EPA has concluded that "the text, structure, and legislative history of the CWA demonstrate Congress's intent to leave the regulation of groundwater wholly to the states under the Act." *EPA Interpretive Statement*, 84 Fed. Reg. at 16813. The decision below would reverse that determination; it would expand federal power to encompass regulatory authority over the millions of releases of pollutants annually into groundwater. Yet no language in the CWA even hints at an intent to

authorize such regulation; the CWA expressly references discharges into "navigable waters," "waters in the contiguous zone," and "the ocean," 33 U.S.C. § 1362(12), but it is silent as to discharges into groundwater.

In several significant environmental-law cases, the Court has applied a clear-statement rule of statutory construction, under which it rejects interpretations that would significantly expand the scope of federal regulation and impinge on areas traditionally regulated by the States, in the absence of a clear indication in the statute that Congress intended the expansion. In *UARG*, the Court rejected EPA's expansive interpretation of its Clean Air Act powers to regulate greenhouse-gas emissions, explaining:

> EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extent statute an unheralded power to regulate a significant portion of the American economy, ...we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance. ... The power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the

> class of authorizations that we have been reluctant to read into ambiguous statutory text.

573 U.S. at 324.

The Court rejected similarly expansive Army Corps interpretations of the CWA in both *SWANCC* and *Rapanos*, applying a clear-statement rule and noting in particular that the rejected interpretations seriously impinged on land-use authority traditionally exercised by state and local governments:

> As we noted in *SWANCC*, the Government's expansive interpretation would "result in a significant impingement of the States' traditional and primary power over land and water use." 531 U.S., at 174. Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power. ... We ordinarily expect a clear and manifest statement from Congress to authorize an unprecedented intrusion into traditional state authority. ... The phrase "the waters of the United States" hardly qualifies.

Rapanos, 547 U.S. at 737-38 (plurality) (citations omitted).

The expansion of CWA authority wrought by the Ninth Circuit's decision cannot be overstated. The court held that whenever a more-than-negligible level

of a pollutant released from a point source reaches a navigable water, the entity that released the pollutant can be held liable under the CWA *without regard to how the pollutant reached the navigable water*. Left unstated by the Ninth Circuit is that virtually all pollutants at some point in time are channeled through a point source. For example, homeowners release chemicals onto their lawns through a hose and release wastes into the ground through their septic systems. Municipal water systems release chlorinated water into the ground through leaks in their pipes. Although the Ninth Circuit suggests that surface runoff is not subject to NPDES permitting requirements, the Ninth Circuit's standard belies that suggestion—much of the surface runoff likely at some time passed through a point source. Under the Ninth Circuit's expansive definition of "discharge of a pollutant," all an enterprising plaintiffs' lawyer need do to bring a successful (and generally lucrative) citizen suit under 33 U.S.C. § 1365 is to trace pollutants discovered in a navigable water to some point source, no matter how distant in space and time.

The vastly expanded scope of CWA jurisdiction espoused by the Ninth Circuit comes at the expense of state regulators. That expansion is inconsistent with one of the CWA's stated purposes: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, ..." 33 U.S.C. § 1251(b). In particular, as EPA has recognized, "Congress purposely structured the CWA to give states the responsibility to regulate

[groundwater] releases under state authorities." *EPA Interpretive Statement* at 16811.

In the absence of any clear indication that Congress intended, through its adoption of the CWA, to displace States' primary role in regulating groundwater, the Court should decline to interpret the CWA in the expansive manner urged by Respondents.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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