No. 18-260

IN THE
Supreme Court of the United States

COUNTY OF MAUI,
Petitioner,

v.

HAWAIʻI WILDLIFE FUND, *et al*.,
Respondents.

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

BRIEF FOR *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are thirty-seven law professors and scholars who teach, research, and publish in the subject areas of environmental and natural resources law. The Appendix provides a complete list of their names and titles. Collectively, they have been closely involved for several decades with law, legislation, and policy involving major federal pollution control statutes, prominently including the Clean Water Act. They have written extensively about both the origins of the Act and its application; their published works include comprehensive and definitive histories of the Act, as well as analyses of its implementation. Their legislative involvement with the Act has included both drafting statutory language and testifying. By virtue of their work and experience, they are intimately familiar with the design, operation, and implementation of the Act. They submit this *amicus* brief to assist the Court in determining how best to interpret the Act, and to aid the Court in considering the scope of activities regulated under the Act's NPDES permits.

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[1] Pursuant to Supreme Court Rule 37.3, *amici curiae* state that counsel of record for all parties have consented to the filing of this brief. On April 4, 2019, counsel for the Respondents submitted a letter of blanket consent to the filing of *amicus curiae* briefs. By electronic mail on July 5, 2019, counsel for the Petitioner provided consent to this filing. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The language of the Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act" or "Act") dictates a ruling in favor of the Respondents. The Petitioner's interpretation of this language reads the word "directly" into a key Act definition, thereby limiting the reach of the Act's central prohibition on the unpermitted discharge of pollution to the waters protected by the Act. Under this interpretation, dischargers of pollutants could evade the Act simply by adding pollution from their point sources to navigable waters through groundwater, air, or soil, thereby doing *indirectly* what the Act *directly* prohibits: degrading surface water quality with impunity.

The Petitioner and various *amici* cannot justify this re-writing of the Act's language by asserting that Congress delegated control over groundwater to the states, and suggesting that the ruling below risks a dramatic expansion of the reach of the Act's federal permitting requirements. Congress has never abandoned the requirement that "any" addition of "any" pollutant from "any" point source "to" navigable waters must obtain a federal Clean Water Act permit. *See* 33 U.S.C. §§ 1311(a), 1362(12) (2012). Moreover, background principles of proximate causation prevent the kind of permitting expansion that the Petitioner and *amici* fear.

Congress enacted the Act in 1972 to address its profound concern over the severely degraded state of the nation's water resources. *Id*. §§ 1251-1388. It carefully designed the Act to execute its central

objective of "restoring and maintaining the physical, chemical, and biological integrity of the nation's waters." *Id*. § 1251(a)(1). Its national goal: eliminating the discharge of pollutants into navigable waters by 1985.

The Act's central, operative provision is section 301. *Id*. § 1311. It prohibits "point sources" from discharging pollutants to "navigable waters" without a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to section 402. *Id*. § 1342(a); *see id*. § 1311.[2] NPDES permits impose technology-based effluent limitations to achieve across-the-board pollutant reductions, and include stricter limits where needed to achieve and maintain ambient water quality standards that protect the health of humans and aquatic ecosystems. *Id*. § 1342. The federal government controls these permits; they are the linchpin of a comprehensive effort to prevent and control water pollution.

To further the Act's goals, Congress carefully defined the pivotal terms "point source," "pollutant," and "discharge of a pollutant." *Id*. § 1362. The Act defined the term "discharge of a pollutant" as "any addition of any pollutant *to* navigable waters *from* any point source." *Id*. § 1362(12) (emphasis added). These definitions were considered the "most important" part of the Act—so essential to its success that the Chairman

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[2] The Act applies to "navigable waters," defined as "the waters of the United States." *See* 33 U.S.C. §§ 1251(a), 1362(7). This Brief uses the terms "navigable waters" and "surface waters" to refer to waters within the Act's jurisdiction.

of the House Committee on Public Works explicitly warned that "[t]o revise them in a way to limit their coverage is to severely detract from the effectiveness of the bill." 118 Cong. Rec. 10,206 (1972).

In this case, the Petitioner County of Maui ("County") is adding treated wastewater pollutants to the Pacific Ocean from wastewater injection wells. The pollutants travel via groundwater and enter the ocean through offshore, spring-fed fissures along coral reefs one-half mile away. A tracer-dye test has confirmed that the pollutants discharged by the County are entering the ocean. Indeed, this result is precisely what the County intended; it designed its system to dispose of treated sewage into the ocean via groundwater. On these facts, the plainest reading of the statute is that the County is discharging pollutants *from* point sources *to* navigable waters—a practice the Act prohibits without an NPDES permit.

In an effort to avoid this plain language reading, the County and various *amici* have cobbled together an interpretation of the Act's text, and snippets of legislative history, to suggest the Act exempts pollutant discharges that are not added "directly" to navigable waters from point sources. The fundamental difficulty with this suggestion is the Act's express language, which lacks the very word the County seeks to insert. As this Court has observed, the Act's definition of the term "discharge of a pollutant" employs the phrase "any addition of any pollutant to navigable waters" rather than the phrase "any addition of any pollutant *directly* to navigable waters." *See Rapanos v. U.S.*, 547 U.S. 715, 743 (2006) (Scalia, J., plurality opinion).

Therefore, the statute's plain language does not support the County. This fact alone is sufficient to defeat its argument.

In addition to this fatal flaw, the County's argument violates the Act's central implementing architecture, and misreads the most relevant legislative history. Further, the argument leads to absurd results that would allow dischargers to evade the Act.

First, the County argues that the Act delegated primary control of "non-point" sources of pollutants to the states. This point is irrelevant, because the County is discharging pollution from wells, and the Act's explicit definition of "point source" includes the term "wells."

Second, the County argues that groundwater is a non-point source of pollutants. This is incorrect: the Act makes clear that groundwater is a medium that can be contaminated by pollution, and through which pollutants can be discharged to surface waters. *See* 33 U.S.C. § 1329(i). In this case, groundwater is in no way the source of the pollutants, which are instead channeled to navigable water through a point source—the wells. And the County's argument that groundwater is not part of the "waters of the United States" is beside the point. This case does not concern the regulatory status of groundwater; instead, the issue here is the prohibited pollution of surface waters.

Third, the County and *amici* claim that the Act's legislative history demonstrates Congressional intent to exempt discharges of pollutants through groundwater or other media from the Act's central prohibition on

discharges of pollutants from point sources to surface waters. This claim is belied by both the Act's operational provisions and legislative history. Far from supporting the County's argument, the legislative history confirms the Act's plain language and objectives: where pollutants discharged from defined point sources factually and proximately cause the injury prohibited by the Act by entering surface waters—either directly or through some intermediary delivery medium—the discharger must obtain an NPDES permit.

Various *amici* suggest that the ruling below would unreasonably expand the scope of the NPDES program. But this contention ignores background principles of proximate causation, which protect against such expansion. And the ruling merely reaffirms decades of previous government and judicial interpretations that point sources, such as wells that discharge pollutants into surface water, must obtain NPDES permits where it is reasonably foreseeable that those discharges reach surface waters through groundwater. The longstanding implementation of the Act by the Environmental Protection Agency ("EPA") and the states to regulate such discharges, and the availability of general permits and other regulatory techniques, ensure that the Act's application is not burdensome, and confirm that there is no justification for departing from the Act's plain language.

ARGUMENT

This case can be resolved straightforwardly by reading the plain language of the Clean Water Act and

accounting for the Act's objectives, as implemented by its key provisions and definitions. This analysis establishes that the County's discharge of pollutants through injection wells to navigable waters is unlawful in the absence of an NPDES permit.

I. The Language and Structure of the Clean Water Act Require the County of Maui to Obtain an NPDES Permit for the Discharge of Pollutants to Navigable Waters from Its Wastewater Injection Wells

The Act's central operative provisions, expressed plainly in its purposes and spelled out in its definitions and implementing language, dictate that an NPDES permit is required in this case.

A. The Plain Language of the Act Requires the County to Obtain an NPDES Permit for the Pollutant Discharges from Its Wells

The Act's driving principle is section 301's explicit prohibition of "the discharge of any pollutant by any person" in the absence of a permit. 33 U.S.C. § 1311(a). The only way for a pollutant discharger to overcome this prohibition is to obtain one of two permits: (1) "point source" permits issued under section 402, *id*. § 1342, for pollution of the type being discharged by the County, or (2) "dredge and fill" permits issued under section 404. *Id*. § 1344.

The Act's definitions spell out the meaning of section 301. This Court has emphasized that these definitions are vital to understanding the Act's requirements, and

that its "technical definitions are worked out with great effort in the legislative process." *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 380 (2006).

Therefore, it is essential to begin with an examination of the definitions of section 301's operative words. Matching these definitions to the undisputed facts resolves this case.

First: The Act defines "*discharge of a pollutant*" as "any addition of any pollutant *to* navigable waters *from* any point source." 33 U.S.C. § 1362(12) (emphasis added).

Second: The Act defines the term "*pollutant*" to include "sewage" and "municipal waste." *Id.* § 1362(6).

Third: The Act defines "*point source*" as "any discernable, confined and discrete *conveyance*, including but not limited to any pipe, ditch, channel, tunnel, conduit, *well* . . . from which pollutants are or may be discharged." *Id.* § 1362(14) (emphasis added).[3]

Fourth: The Act defines "*navigable waters*" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). It further defines "*territorial seas*" to mean that part of the ocean extending seaward

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[3] The Act does not define "non-point" source pollution, which courts have ruled arises from many dispersed activities and "is not traceable to any single discrete source." *League of Wilderness Defs. v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002). Point and non-point source pollution are differentiated by whether pollutants added to navigable waters are from "an identifiable conveyance" or "point." *U.S. v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

for three miles from the ordinary low water line. *Id*. § 1362(8).

In this case, it is undisputed that the County designed a system that adds treated sewage (a "pollutant") from its wells ("point sources") through groundwater to the Pacific Ocean's "navigable waters" less than one-half mile away from the injection site. The presence of these pollutants in the nearshore ocean has been confirmed by a tracer-dye test, which documented that a significant amount of the effluent injected into the groundwater is discharged into the ocean through two submarine spring areas located along a nearshore reef. Pet. App. 9-11. These pollutants are degrading both water quality and the reef. *Id*. No party challenges the proven fact that these discharges are—by design—adding pollutants to the nearshore ocean.

The County's actions perfectly track the definition of "discharge of a pollutant" set out in 33 U.S.C. § 1362(12). Dictionary definitions confirm this conclusion:

> (1) The word "any" means "one or some indiscriminately of whatever kind." Merriam-Webster, https://www.merriam-webster.com/dictionary/any (last visited July 13, 2019). That the definition repeats this word three times bespeaks breadth of coverage.
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> (2) "Add" means "To join or unite so as to bring about an increase." Merriam-Webster, https://www.merriam-webster.com/dictionary/add (last visited July 13, 2019). Hence, the County is

> *adding* pollutants by increasing the amount in the Pacific Ocean;
>
> (3) "To" indicates "movement or an action or condition suggestive of movement toward a place, person, or thing reached." Merriam-Webster, https://www.merriam-webster.com/dictionary/to (last visited July 13, 2019). Hence, the County is adding pollutants *to* the Pacific Ocean by discharging them through groundwater; the pollutants' movement is directed towards and reaches that Ocean;
>
> (4) "From" indicates "a starting point of a physical movement." Merriam-Webster, https://www.merriam-webster.com/dictionary/from (last visited July 13, 2019). Hence, the County's wells are the starting point from which the pollutants begin moving to the navigable waters of the Pacific Ocean.

Thus, in plain English, the undisputed facts establish that the County is: (a) *adding* (b) *pollutants* (c) *to* (d) *navigable waters* (e) *from* (f) *a point source*. This is "how the words would be read by an ordinary user of the English language." Brett M. Kavanaugh, *Book Review: Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 n.158 (2014). It is the best reading of the statute, and it should be followed.

The County's preferred reading of this plain language would mean that no NPDES permit is required for pollutant discharges unless those discharges are made "directly" into navigable waters. *See* Brief for Petitioner at 27-44, *Cty. of Maui v. Haw.*

Wildlife Fund, No. 18-260 (May 9, 2019) (arguing for a "means of delivery" test under which a point source must add pollutants directly to navigable waters) [hereinafter Pet. Br.]; *see also, e.g.*, Brief of United States Senators as *Amici Curiae* in Support of Petitioner at 5-19, *Cty. of Maui v. Haw. Wildlife Fund*, No. 18-260 (May 16, 2019) [hereinafter Senators' Br.]. But this tortured construction of the Act's plain words is devoid of support in the enacted text of the key definition, which does not include the word "directly" in front of the word "to." Courts may not "read an absent word into the statute," *Lamie v. U.S.* Tr., 540 U.S. 526, 538 (2004), nor can they "add provisions to a federal statute." *Ala. v. N.C.*, 560 U.S. 330, 352 (2010). As this Court recently noted: "it is our duty to respect not only what Congress wrote but, as importantly, what it didn't write." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019) (Gorsuch, J., plurality opinion).

In *Rapanos*, Justice Scalia considered the suggestion that dischargers "will be able to evade the permitting requirements of 1342(a)" simply by adding pollutants into waters not covered by the Act and allowing those pollutants to reach covered waters—thus doing indirectly what they could not do directly. 547 U.S. at 742-43. He roundly rejected that interpretation of the Act, stating that:

> The Act does not forbid the "addition of any pollutant directly to navigable waters from any point source," but rather the "addition of any pollutant to navigable waters." Thus, from the time of the CWA's enactment, lower courts have [found likely violations of the CWA] . . . 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 (citations omitted). Justice Scalia underscored this point by noting that "[s]ome courts have even adopted both the 'indirect discharge' rationale and the 'point source' rationale in the alternative, applied to the same facts." *Id*. at 744 (citation omitted). He explained that releasing pollutants that are carried to navigable waters from a point source some distance away is "naturally described as an 'addition . . . to navigable waters.'" *Id*. at 744 n.11.

That Congress wrote the definition of discharge by employing the word "to" (rather than "directly to") immediately before "navigable waters" is perfectly consistent with the Act's national goal: eliminating pollution of navigable waters from defined point sources. The word "to" is more expansive in scope than "directly to," and it animates the Act's central thrust: comprehensively to prevent point sources from discharging pollutants to navigable waters without authorization. And NPDES permits are vital to achieving the goal to "abate and control water pollution." *Envtl. Prot. Agency v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 204 (1976). They are the Act's "centerpiece." *Am. Iron & Steel Inst. v. Envtl. Prot. Agency*, 115 F.3d 979, 990 (D.C. Cir. 1997).

The County points to various places in which the Act deploys the term "into" instead of "to," and suggests that this supports its theory that the NPDES program

applies only "at the point of discharge" of pollutants to navigable waters. Pet. Br. at 36-37. But the plain meaning of a provision "cannot be altered by the use of a somewhat different term in another part of the statute." *Estate of Cowan v. Nicklos Drilling Co.*, 505 U.S. 469, 480 (1992). Regardless, these examples from elsewhere in the statute only highlight that Congress knew how to use its words purposefully. *See Sosa v. Alvarez–Machain*, 542 U.S. 692, 711 n.9 (2004) (explaining "the usual rule that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'"). Thus, it is telling that Congress chose to rely upon the word "to"—rather than "directly to" or "into"—in section 502(12). *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply.").

What is more, the County's unsupported reading undermines Congress's decision to place authority for "any" point source discharge under federal regulatory control pursuant to the NPDES program. By exempting indirect discharges to surface waters from NPDES requirements, it renders the regulatory regime's coverage incomplete, and prevents it from achieving the comprehensive protection of the nation's waters that is the Act's central purpose as expressed in section 301.

Thus, under the County's reading, any entity wishing to avoid the requirement to obtain an NPDES permit could do so merely by discharging its pollutants at a

place removed only a slight distance from navigable waters. For instance, the County could decide to discharge its pollutants into the highly-permeable sandy ground of a beach, a few feet inland from the high tide line. It could then argue that no NPDES permit is required, on the theory that its discharge is not "directly" into navigable waters. The County's interpretation would render this evasive tactic a practical operational prescription for avoiding the legal requirements and cost of proper pollutant disposal.

The same theory would allow other polluters to engage in a wide range of similar behaviors, thereby undermining the central prohibition set out in section 301 and in the section 502 definition of "discharge of a pollutant." *See* 33 U.S.C §§ 1311(a), 1362(12). Indeed, a discharger could simply raise its outfall pipe above the surface of the water and argue that the discharge was to the air, and not directly into the water body. This would be an absurd result, and the Court should avoid it. *See Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) (explaining that statutes should be interpreted to avoid unreasonable results "whenever possible").

Where the statutory language is clear, that is the end of the matter. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 297 (2006); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). Accordingly, the Court need go no further than simply applying the plain language of the Clean Water Act to the facts of this case. The County is adding pollutants to navigable waters from point sources without first obtaining an NPDES permit, in violation of the plain language of sections 301

and 502(12) of the Act. Therefore, the judgment below should be affirmed.

B. The Context and Structure of the Act Require the County to Obtain an NPDES Permit for the Pollutant Discharges from Its Wells

In addition to its plain language, both the implementing structure and context of the Clean Water Act make clear that the County may not lawfully discharge pollutants to the Pacific Ocean from injection wells in the absence of an NPDES permit.

Considering the whole context and design of the relevant statute is important when construing the meaning of statutory text. *See, e.g., Dada v. Mukasey*, 554 U.S. 1, 16 (2008) ("In reading a statute, the Court must not 'look merely to a particular clause,' but consider 'in connection with it the whole statute.'"); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("[I]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the statute's purpose and context."); *see also* Robert W. Adler & Brian House, *Atomizing the Clean Water Act: Ignoring the Whole Statute and Asking the Wrong Questions*, 32 J. Envtl. L., http://ssrn.com/abstract=3373349 (forthcoming in 2020) [hereinafter Adler].

For example, in *Chicago v. Environmental Defense Fund*, this Court considered the plain language and structure of the Resource Conservation and Recovery Act, concluding that the statute's plain language and its

over-arching purpose overrode an arguably conflicting statement contained in legislative history. 511 U.S. 328, 337-38 (1994); *see also Va. Uranium*, 139 S. Ct. at 1902 ("What the text states, context confirms.").

Turning to the Act's context, particularly its carefully-constructed implementing provisions, it is clear that the Act contains no exemption for pollutant discharges from point sources (like the County's wells) to surface waters via groundwater. Congress enacted the Act to address the "cancer" of water pollution that had rendered the nation's rivers "little more than sewers to the sea." 118 Cong. Rec. 33,692 (1972) (statement of Sen. Muskie); 117 Cong. Rec 38,797 (1971) (statement of Sen. Muskie). Section 301 states the Act's objective: "to restore and maintain the physical, chemical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). Congress effectuated this objective through the Act's implementing provisions, which were designed to eliminate pollution discharges to the nation's surface waters by 1985. *Id*. § 1251(a)(1).

NPDES permits are the essential vehicle through which Congress implemented the pivotal section 301 ban on all unpermitted pollutant discharges from point sources. Through them, EPA (and states, if they have been delegated NPDES authority) articulates and enforces the reduction, treatment, and control of water pollution. *See Envtl. Prot. Agency v. Cal*., 426 U.S. at 204-05. *Inter alia*, the detailed NPDES requirements include monitoring and reporting, 33 U.S.C. § 1318, and ensure that no pollutant discharges to waters protected by the Act occur "off the record" without public notice

or attention. Adler, *supra*, at 35. The comprehensive nature of the requirements imposed by these permits is reinforced by the enforcement authority the Act grants to the EPA to take action whenever "any person is in violation of any condition or limitation" contained in an NPDES permit. 33 U.S.C. § 1319.

Under this carefully-structured water pollution control plan, all point source discharges to navigable waters must be accounted for in order to achieve the Act's goals. Unless all point sources are covered by permits, some point sources are unfairly forced to bear a higher percentage of the pollutant reduction load in what is a zero-sum game. Adler, *supra*, at 36.

The County's reading of the Act would completely undermine the NPDES program for controlling point source pollution and eliminating unpermitted discharges. Under its approach, pollutants added to surface waters through groundwater never would be regulated under the NPDES permit program. This result is totally at odds with the Act's comprehensive, carefully-designed plan to ensure that all sources of pollution discharging to navigable waters are properly regulated. It violates both the Act's context and its structure. Accordingly, the Court should reject the County's argument.

C. Distinctions Between the Act's Provisions for Controlling Point and Non-point Sources of Pollution Do Not Alter the Requirement that the County Obtain an NPDES Permit

The County and its *amici* argue that Congress's decision to control point and non-point pollution differently evinces its intent to disregard discharges like the County's. Pet. Br. at 4-6, 11; Senators' Br. at 17-19; Brief for the United States as Amicus Curiae Supporting Petitioner at 12-19, *Cty. of Maui v. Haw. Wildlife Fund*, No. 18-260 (May 16, 2019) [hereinafter U.S. Br.]. This argument misses the mark: the question of controlling non-point source pollution is not before the Court, because the County is indisputably discharging pollutants from a defined point source. That these pollutants are carried by groundwater to the ocean does not change that fact. *See infra*, Part II.B. The County's argument bungles the meaning of the Act's operative provisions and erroneously conflates pollution conveyed through groundwater with non-point source pollution.

As originally constructed, the Act largely delegated non-point source pollution management to the states via the concept of "areawide waste treatment management plans." 33 U.S.C. § 1288. However, this provision was widely perceived as failing to redress the problem of non-point source pollution. *See* Adler, *supra*, at 39 n.210; Oliver A. Houck, *Cooperative Federalism, Nutrients, and the Clean Water Act: Three Cases Revisited*, 44 Envtl. L. Rep. 10,426, 10,429 n.43

(2014) [hereinafter Houck]; Robert Glicksman & Matthew R. Batzel, *Science, Politics, Law and the Arc of the Clean Water Act: The Role of Assumptions in the Adoption of a Pollution Control Landmark*, 32 Wash. U. J. L. & Policy 99, 102-04 (2010) [hereinafter "Glicksman"]. Therefore, in 1987, Congress added section 319, 33 U.S.C. § 1329, in an effort to better control non-point source pollution and prevent it from contaminating groundwater. 133 Cong. Rec. 985 (1987) (statement of Rep. Hammerschmidt). Section 319 accomplishes this goal by requiring states to develop Total Maximum Daily Loads ("TMDLs") for impaired water bodies. 33 U.S.C. § 1329. Congress provided for close federal supervision of this process: EPA must review and approve all TMDLS. *Id*.; *see* Houck, *supra*, at 10,429; Glicksman, *supra*, at 135-37.

Congress exempted non-point pollution sources from the Act's NPDES permitting requirements because it is difficult to trace the pollution to one particular source. Thus, it is "very difficult to regulate through individual permits." *League of Wilderness Defs*., 309 F.3d at 1184. As Senator Mitchell noted during debate on the Conference Report accompanying the 1987 Act amendments, "[n]onpoint pollution is caused by general runoff, rather than discharge from a specific pipe." 133 Cong. Rec. 1261 (1987). With non-point source pollution, the pollution from many sources is aggregated, and is theoretically best remedied through Best Management Practices and land-based controls imposed by the states and local governments, in keeping with their traditional authority to develop and enforce property and land-use laws. *See* S. Rep. No. 92-414, at

36-39 (1971); Glicksman, *supra*, at 115-16, 122. In this context, the 9th Circuit's "fairly traceable" formulation is especially relevant, because it negates the notion that the chemical impairments to the ocean in this case come from non-point sources, which, by their nature, are diffuse and untraceable.

Here, the tracer-dye test shows that the pollutant discharge to surface waters indisputably comes from a point source—the County's wells. Pet. App. 9-11; *see* 33 U.S.C. § 1362(14). The County conveys polluted effluent into these wells by design, with the intent that the effluent will enter the groundwater, which in turn will convey the effluent to the ocean. Pet. App. 8-10.

Congress's decision to give the states a primary role for addressing non-point source pollution did not alter the Act's overarching purpose to eliminate pollution of surface waters. Nor did it change its careful design to control point source discharges to surface waters via the NPDES program. While it is vital that pollution from non-point sources be addressed as part of the Act's comprehensive approach to protecting water quality, Adler, *supra*, at 40 n.211, the issue of non-point source pollution control is not before the Court.

II. The Legislative History of the Clean Water Act Confirms the Plain Language of the Statute and Reinforces the Requirement that the County of Maui Obtain an NPDES Permit for the Discharge of Pollutants to Navigable Waters from Its Wells

There is no need to examine legislative history where the plain language of the statute is clear. *See, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568-69 (2005). Legislative history cannot override an unambiguous statutory text. *Murphy*, 548 U.S. at 296-97, 304. The statutory language itself is controlling "[a]bsent a clearly expressed legislative intention to the contrary." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Nonetheless, the County and various *amici* argue that the Act's legislative history supports their effort to limit the definition of "discharge of a pollutant." In fact, that history points in the opposite direction.

Indeed, the Act's legislative history explicitly warns against the danger of modifying the plain language of the statute's definitions, as the County endeavors to do here. Representative Blatnik, the Chairman of the House Committee on Public Works, which drafted the House version of the Act, made clear that this effort is precisely the kind of definitional tinkering that Congress condemned:

> The total utility of the bill is reflected in the definitions of the terms pollutant, pollution, point source, discharge, and toxic pollutant. *To revise any of these definitions is to upset the common*

> *threat [sic] of the bill*. If there is a part of this bill that can be labeled "*most important*" it is these definitions. *To revise them in any way to limit their coverage is to severely detract from the effectiveness of the bill*.

118 Cong. Rec. 10,206 (1972) (emphasis added).[4]

Congress warned against efforts to limit the scope of these definitions, which granted vital new authority over pollutant discharges to the federal government, because its initial efforts to protect the nation's waters by delegating primary authority to the states had failed. The Act's legislative history is rife with colorful statements documenting Congress's recognition of this failure, and of the consequent need for comprehensive federal authority over control of water pollution. *See* Houck, *supra*, at 10,427-28.

In any event, much of the legislative history relied upon by the County and *amici* speaks to a matter that is not at issue here: the regulation and quality of groundwater. Moreover, the legislative history sources invoked by the County and its *amici* have little persuasive weight.

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[4] Chairman Blatnik was intimately involved in efforts to enact federal legislation to protect water quality for nearly two decades. *See* N. William Hines, *History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform*, 4 J. Energy & Envtl. L. 80, 86-88, 97 (2013); William Andreen, *The Evolution of Water Pollution Control in the United States – State, Local, and Federal Efforts*, 1789-1972: Part II, 22 Stan. Envtl. L.J. 215, 274 (2003).

All forms of legislative history are not created equal, and the excerpts relied upon by the County are the least authoritative. Courts afford the most weight to statements contained in the written report of the committees on the bill that was finally enacted. Of these, the Conference Committee Report is the most important source. *See Garcia v. U.S.*, 469 U.S. 70, 76 (1984) (instructing that an authoritative source for finding the Legislature's intent lies in the Committee Reports); *Zuber v. Allen*, 396 U.S. 168, 186 (1969).

Less authoritative are the floor statements of Senators and Congressmen, as this Court has "eschewed reliance on the passing comments of one Member and casual statements from the floor debates." *Garcia*, 469 U.S. at 483 (citation omitted). Courts typically give more weight to the statements of legislation's principal sponsors than to statements of other members of Congress: "It is the sponsors that we look to when the meaning of statutory words is in doubt." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951). And it is a "generally accepted maxim of statutory construction that reports by the legislative committees responsible for formulating the legislation must take precedence in event of conflict over statements in the legislative debates on the floors of the houses of Congress." *Am. Airlines, Inc. v. C.A.B.*, 365 F.2d 939, 949 (D.C. Cir. 1966).

It is, therefore, noteworthy that the County's argument is belied by passages from the Conference Committee and House and Senate Committee Reports, as well as by the statements of the Act's two principal

sponsors. By contrast, the legislative history excerpts on which the County and *amici* rely consist merely of the much less-authoritative floor debates and testimony before committees.

A. The Legislative History Confirms that NPDES Permits Are Required for Discharges of Pollutants that Reach Navigable Waters from Defined Point Sources

The legislative history is crystal clear: Congress intended to prohibit the unpermitted discharge, direct or indirect, of pollutants to navigable waters from defined point sources. During the debate in the House that accompanied consideration of the Conference Committee Report, Representative Dingell, the Act's floor manager, emphasized that the term "discharge of a pollutant" had been defined in a way to ensure that it covered both direct and indirect discharges:

> It is quite clear that section 502(12) of the bill, in defining the term "discharge of a pollutant," *does not in any way contemplate that the discharge be directly from the point source to the waterway*. The situation is analogous to the court's holding in several cases . . . where a discharge from a shore facility flowed "indirectly," that is by force of gravity over land to a waterway.

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

This definitive statement by a leading House sponsor of the Act[5] demonstrates that Congress intended to regulate all discharges from point sources that were added to surface waters. Plainly, whether discharges reached those waters directly or by some other route was immaterial.

Moreover, this position echoes the views of Senator Muskie, the original sponsor of the Senate version of the Act. During the Senate floor debate on the Conference Committee Report, Senator Muskie, who chaired the Subcommittee on Air and Water Pollution that drafted the Senate bill and served as the bill's floor manager, emphasized that there was no need for a discharge to be made directly into navigable waters in order to fall within the Act's coverage. In his presentation of the Conference Report to the full Senate, Senator Muskie noted that both the House and Senate definition of "discharge" included "direct and indirect discharges into the navigable waters." *Id*. at 33,699.

These comments of the two principal sponsors of the bills that eventually became the Act, delivered during consideration of the Conference Committee Report and passage of the final bill, confirm the Act's plain meaning. They affirm that the key term "discharge of a pollutant" covers both the direct and the indirect discharge of pollutants to navigable waters from defined

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[5] Representative Dingell "had introduced the leading House bill on the subject and was a recognized authority on water pollution matters." Andreen, *supra*, at 280 n.2.

point sources. Thus, any such discharges are prohibited without an NPDES permit.

B. The Legislative History Demonstrates that the Congressional Decision to Delegate Primary Responsibility for Groundwater Regulation to the States Was Not Intended to Undermine the Act's Central Prohibition on the Discharge of Pollutants to Navigable Waters

The County and *amici* offer a two-step argument based on Congress's decision to forgo NPDES regulation of groundwater during the deliberations over the Act: they (1) suggest that this evinces an intent to deny the federal government the ability to regulate discharges into surface waters via groundwater, and (2) conclude that the County's discharges, therefore, are not subject to NPDES permit requirements. *See, e.g.*, Pet. Br. at 40-41; Senators' Br. at 17; U.S. Br. at 25-30; Brief of *Amici Curiae* Edison Electric Inst., et al., in Support of Petitioner at 17-20, *Cty. of Maui v. Haw. Wildlife Fund*, No. 18-260 (May 16, 2019). This argument both lacks support in the legislative history and misconstrues the context of deliberations and decisions in the Congress.

Congress's rejection of efforts to protect groundwater quality from non-point source pollution cannot fairly be read to undermine the Act's central purpose to protect surface water quality. Congress made clear its over-arching intention to protect surface waters from pollution discharges by enacting section 301 and

drafting key definitions such as "discharge of a pollutant." Congressional debates over efforts to set national groundwater standards cannot reasonably be interpreted to undercut or weaken this objective.

Efforts to protect groundwater in the Act were concerned primarily with protecting it as a public resource. Thus, the focus of the floor debate over an unsuccessful amendment by Representative Aspin to include groundwater within the NPDES program was on the question of protecting groundwater quality. Representative McClory made clear the intention of that amendment was to ensure groundwater quality: "All ground-water supplies could be threatened unless protection is provided in this bill." 118 Cong. Rec. 10,668 (1972). Representative Harsha noted the amendment "purports to require *water-quality standards for ground water*," and objected because "[w]e do not have the knowledge or the technology to devise water quality standards for ground water." *Id*. (emphasis added).

The Senate's deliberations reflect a similar focus. The Report of the Committee on Public Works states: "[s]everal bills pending before the Committee provided authority to establish *Federally approved standards for groundwaters*." S. Rep. No. 92-414, at 73 (1971) (emphasis added). This effort was rejected because "the jurisdiction regarding groundwaters is so complex and varied from State to State." *Id*.

These deliberations reveal no intention to erode the central command to protect surface water mandated by section 301 and related definitions such as "discharge of

pollutants." Rather, the debates base Congress's decision to forgo regulating groundwater quality via the NPDES program on its concern that setting national groundwater standards was impractical.

Similarly, there is no indication that Congress intended to limit the prohibition of point source discharges to those made directly into surface waters. To the contrary, the legislative history is clear that indirect discharges were to be covered, and that because "[w]ater moves in hydrologic cycles [] it is essential that discharge of pollutants be controlled *at the source*." *Id*. at 77 (emphasis added). To accomplish this goal, the Senate Report emphasized that "[t]he permit system establishes *a direct link between the Federal government and each industrial source of discharge* into the navigable waters." *Id*. (emphasis added).

Subsequent legislative history confirms that Congress did not intend its approach to groundwater or non-point source pollution to exempt from the NPDES program any point source discharges conveyed through groundwater to surface waters. For example, in its deliberations on the 1974 Safe Drinking Water Act, Congress stated that the Act already regulated underground wells whenever there is an associated "discharge into navigable waters." H.R. Rep. No. 93-1185, at 536 (1974). And in considering the 1987 Water Quality Act amending the Act, Congress stated the non-point source program was neither "a substitute for the point source programs already in place under the act" nor "an excuse to reduce the effort or relax the requirements on the point source side." 133 Cong. Rec. 1279 (1987).

In light of this legislative history, it is unsurprising that the government flatly rejects the County's "means of delivery" theory—which it recognizes would result in an exemption from the NPDES program if there were "any spatial gap between a point source release" and navigable waters. *See* U.S. Br. at 34-35. However, relying upon EPA's recent "Interpretive Statement," 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 (Apr. 23, 2019) [hereinafter Interpretive Statement], it suggests the Act is best read to categorically exclude from the NPDES program "releases to and from groundwater." U.S. Br. at 35 (quoting Interpretive Statement, *supra*, at 16,814). According to the government, the delegation of primary authority to the states over groundwater pollution "breaks the causal chain" between a point source discharging pollutants into groundwater, on the one hand, and the navigable surface water that receives those pollutants, on the other. U.S. Br. at 24. Under the government's theory, if a pollutant from a point source so much as touches groundwater before entering surface waters, the point source is exempt from the Act.

This argument is unpersuasive. First, EPA's Interpretive Statement is entitled to respect only to the extent that it has the "power to persuade." *See U.S. v. Mead Corp.*, 533 U.S. 218, 234-35 (2001) (noting that "interpretations" do not warrant *Chevron* deference and quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). And it lacks that power: it reverses decades of its own consistent interpretation that the NPDES

program "may cover discharges of pollutants from point sources to surface water that occur through groundwater." *See, e.g.*, EPA, *Clean Water Act Rule Response to Comments – Topic 10: Legal Analysis*, at 383, 386-87, 390 (2015), https://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_10_legal.pdf; 1991 Final Rule Addressing Water Quality Standards on Indian Lands, 56 Fed. Reg. 64,892 (Dec. 12, 1991).

Indeed, consistent with that long-standing interpretation (which prevailed until the Interpretive Statement was released in April 2019), the government filed an *amicus* brief *opposing* the County below, stating: "[t]his emphatically is not a case about the regulation of groundwater. Instead it is about the regulation of discharges of pollutants to the waters of the United States." Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellees at 21, *Haw. Wildlife Fund v. Cty. of Maui*, 881 F.3d 754 (No. 15-17447) (9th Cir. May 31, 2016). Further: "the jurisdictional status of groundwater itself is irrelevant to whether discharges that move through groundwater to jurisdictional waters require NPDES permits." *Id.* at 25 n.5.

Second, as previously noted, allowing polluters to evade the NPDES program by simply directing their effluent into highly-permeable ground adjacent to surface waters—instead of directly into those waters—would open a significant loophole in the Act that severely compromises its comprehensive water pollution control plan and related water quality goals. As the government stated in its *amicus* brief before the

court of appeals: "exempting discharges through groundwater could lead to absurd results." *Id.* at 16. A result that does not comport with the central purpose of a statute should be avoided. *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015).

Third, in arguing that the NPDES permitting program does not apply to groundwater pollution, the government's new position focuses on the wrong question. U.S. Br. at 9-10. As the government's *amicus* brief below noted, groundwater pollution is not at issue here; the issue is control of pollutants discharged to navigable waters via groundwater. And here, the groundwater functions as a conduit to the navigable waters. On that question, both the statutory text and legislative history are clear: "any" discharges of pollutants "to" navigable waters from "any" point source, whether direct or indirect, are barred without an NPDES permit.

Fourth, the government leans heavily on Congress's decision to devolve initial responsibility for groundwater protection to the states. But that decision does not address whether pollutants carried from a point source by groundwater into surface waters runs afoul of sections 301 and 402.

Finally, the government relies on legislative history that does not support its conclusion. *Id*. at 25-30. That history shows that Congress's decision to forgo NPDES coverage for groundwater was not meant to undermine the Act's central purpose. In fact, the relevant committee reports and statements of the Act's sponsors in both the House and Senate demonstrate that

Congress intended the NPDES permit program to apply to discharges of pollutants from defined point sources so long as it was reasonably foreseeable that such discharges would reach surface waters—whether the delivery process was direct or via some other route (including water treatment facilities).

III. Requiring an NPDES Permit for Point Source Discharges that Are the Factual and Proximate Cause of Surface Water Impairment Does Not Expand the Scope of the Clean Water Act

Ignoring background principles of causation, the County and its *amici* suggest that the ruling below could lead to a broad expansion of the NPDES program to cover a wide range of discharges to groundwater. Pet. Br. at 47; Brief of *Amici Curiae* State of West Virginia, et al., in Support of Petitioner at 6, 30-31, *Cty. of Maui v. Haw. Wildlife Fund*, No. 18-260 (May 16, 2019); *see* Brief of *Amici Curiae* National Association of Clean Water Agencies, et al., in Support of Petitioner at 12-15, *Cty. of Maui v. Haw. Wildlife Fund*, No. 18-260 (May 16, 2019). They contend that the NPDES program could have unlimited reach if this Court decides not to insert the word "directly" in front of the word "to" in the Act's definition of the term "discharge of a pollutant." The answer to this concern can be found in the principle of "proximate causation," which serves to bound the reach of the NPDES program.

This Court traditionally looks to background principles of tort law as a guide in discerning the meaning of statutory language that invokes a causal

relationship. In *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Ore.*, 515 U.S. 687, 696 n.9 (1995), this Court assumed that Congress had incorporated "ordinary requirements of proximate causation and foreseeability" when enacting the prohibition on "taking" species protected by the Endangered Species Act. In her concurring opinion, Justice O'Connor relied upon cases holding that the doctrine of proximate causation protects against liability for "remote and derivative" consequences, and "normally eliminates the bizarre," stating that its principles "inject a foreseeability element into the statute." *Id*. at 711-13. Similarly, in *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-74 (1983), this Court relied upon a proximate causation framework to conclude that the government was not required by the National Environmental Policy Act to study the environmental effects of actions that were too attenuated from changes in the physical environment.

Applying these principles here addresses the concern about the potential ramifications of a ruling that follows the Act's plain language. These principles would prevent the bizarre result feared by the government. They would require that the NPDES program be limited to regulating discharges that actually reach surface waters and that, under a proximate cause analysis, also are "from" the point source. *See, e.g.*, *Waterkeeper Alliance, Inc. v. U.S. Envtl. Prot. Agency*, 399 F.3d 486, 510-11 (2d Cir. 2005) (finding that pollutant discharges from Concentrated Animal Feeding Operations ("CAFOs") that reach surface waters via

groundwater are "from" the CAFOs because the CAFOs are "the proximate source" of those discharges).

Under this approach, the County's discharges from its injection wells would be covered by the NPDES program. As for causation, the pollutants it discharges have been proven to reach navigable waters. And it is equally clear that this result was foreseeable: the County actually intended the result—by designing its treatment system to discharge pollutants from a point source through groundwater to the Pacific Ocean. Pet. App. 8-10.

But proximate cause analysis suggests that other discharges to groundwater would not be subject to NPDES permitting. For example, where pollutants could not reliably be predicted to arrive in surface waters, or reliably be traced to a point source, the causation element would not be satisfied and the discharge would not be deemed "from" the point source. *See, e.g.*, *Rice v. Harken Expl. Co.*, 250 F.3d 264, 271 (5th Cir. 2001) (finding no evidence either of connection between groundwater and surface water or of time interval between discharge into groundwater and appearance in surface water).

Similarly, even if the discharged pollutants were shown to have reached surface waters, or were reliably predicted to do so, the doctrine of proximate cause would protect the discharger from legal liability if it were determined that the pollution was too attenuated, "remote or derivative." *Cf. Greater Yellowstone Coal. v. Larson*, 641 F. Supp. 2d 1120, 1139 (D. Idaho 2009), *aff'd sub nom Greater Yellowstone Coal. v. Lewis*, 628

F.3d 1143 (9th Cir. 2010) (finding that pollutants would arrive in surface waters, but not for at least sixty years, and then in concentrations below the levels established by state water quality standards).

The government suggests that the Act's definition of "discharge of a pollutant," coupled with "Congress's exclusion of groundwater pollution from the NPDES program, and its conferral upon the States of responsibility for regulating such pollution," indicate that point source discharges into groundwater are not the "proximate cause" of pollution that flows through that groundwater to surface waters. U.S. Br. at 24. The government argues that the interposition of groundwater between a point source and surface water "break[s] the causal chain between the two, or alternatively may be described as an intervening cause"—thereby avoiding NPDES permitting requirements. *Id*. (quoting Interpretive Statement). In short, the government invokes the doctrine of proximate causation to suggest that the NPDES permit requirement should not apply, for the reason that such a result would not accord with a policy choice it alleges was made by Congress. *Id*. at 23-24.

This suggestion is not credible. The government is claiming that decisions concerning groundwater pollution amounted to a policy choice to significantly limit the ability of the NPDES program to protect surface water quality. Under this theory, after establishing the NPDES program as the key mechanism for protecting against "any" unpermitted discharge of "any" pollutants from "any" point source "to" surface waters, Congress then implicitly limited the scope of

that program elsewhere in the Act by placing responsibility for groundwater pollution management primarily in the hands of the states. This interpretation would work a dramatic alteration in the structure of the Act; accordingly, it violates basic principles of statutory construction. As this Court has held: "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

Proximate causation depends on "policy issues," including the extent of the original obligation on the actor. *See* U.S. Br. at 23 (citing William L. Prosser, *Handbook of the Law of Torts* § 49, at 283 (3d ed. 1964)). And here, Congress made the key policy choice: it designed the NPDES program to cover "*any*" discharges from "*any*" point sources that add any pollutants "*to*" navigable waters. Section 301(a)'s pivotal language flatly prohibits any pollutant discharge from a point source to surface waters absent an NPDES permit. 33 U.S.C. § 1311(a). The legislative history demonstrates that Congress did not intend to exempt discharges passing through groundwater from this requirement. Thus, it is plainly the discharger's obligation to avoid "any" discharge of pollutants "from" point sources "to" surface waters. This is precisely the policy adopted by the Congress, yet it is now the very policy that the government endeavors to abandon.

Moreover, the government reads too much into Congress's decision to forgo application of the NPDES program to groundwater pollution. This decision in no way affected Section 301's central prohibition against

surface water pollution. *A fortiori*, the decision cannot reasonably be interpreted as somehow rendering discharges from point sources "too attenuated" or as "breaking the causal chain." *See* U.S. Br. at 24.

Finally, to the extent the government is suggesting that pollutant discharges from point sources to surface waters via groundwater cannot be deemed the "proximate cause" of pollution because the pollution is not added "directly" to surface waters, the government is ignoring settled tort law principles. It is well-settled that a tortfeasor can be held responsible for the foreseeable consequences of his actions even if the chain of factual causation is indirect. *See Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 547-49, 548 n.3 (1983) (Marshall, J., dissenting) (citing Restatement of Torts § 279). Thus, with respect to the NPDES program, if a discharger adds pollutants "indirectly" to surface water via groundwater without securing an NPDES permit, the discharger is liable for violating the law.

Background principles of proximate causation help ensure that a straightforward implementation of the Act's prohibition against unpermitted discharges from point sources to navigable waters would not lead to the kind of expansion of the NPDES program that concerns the County and supporting *amici*. Their unfounded conjectures provide no legitimate basis to undermine the central objectives and plain language of the Clean Water Act.

CONCLUSION

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

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