

No. 18-593

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IN THE  
*Supreme Court of the United States*

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STARLINK LOGISTICS INC.,

*Petitioner,*

v.

ACC, LLC; TENNESSEE SOLID WASTE DISPOSAL  
CONTROL BOARD,

*Respondents.*

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On Petition for a Writ of Certiorari  
to the Court of Appeals of Tennessee

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**SUPPLEMENTAL BRIEF FOR PETITIONER**

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## THE COURT SHOULD GRANT THE PETITION

Petitioner StarLink Logistics, Inc., respectfully submits this supplemental brief to address any effect this Court's recent decision in *County of Maui v. Hawaii Wildlife Fund*, No. 18-260 (Apr. 23, 2020), may have on the Court's determination whether to grant or deny the petition for a writ of certiorari in this case. In brief, the *County of Maui* decision removes any doubt that this Court's review of the decision below is warranted.

1. This case involves respondent ACC's ongoing direct discharge of toxic pollutants from point sources on its former landfill in Tennessee into surface waters on petitioner's adjacent land, and the "functional equivalent," *County of Maui*, Slip Op. 15, of such discharges. Pet. App. 2a-3a. The Tennessee Court of Appeals held that ACC is not required to obtain a federal permit or to comply with federal limits on the direct discharge of pollutants into surface waters because conflicting state law displaces the federal law. *Id.* at 12a-19a.

a. Like *County of Maui*, this case involves the provision of the federal Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.*, that prohibits discharges of pollutants to navigable waters unless such discharges are authorized by a permit that complies with the requirements of the National Pollutant Discharge Elimination System (NPDES). 33 U.S.C. § 1342; *see County of Maui*, Slip Op. 2. The question presented in this case is whether that federal law preempts contrary state law. Although States can acquire delegated authority to implement the NPDES program with approval from the federal Environmental Protection Agency (EPA),

they must at a *minimum* prohibit pollutant discharges without an NPDES permit and enforce (as a *floor*) federal discharge limits. 33 U.S.C. § 1342(b)(1)(A); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987). In other words, the CWA preempts any state law that would allow a discharge of pollutants into navigable waters without obtaining and complying with an NPDES-compliant permit.

In the decision below, the Tennessee court of appeals held the opposite, concluding that the State of Tennessee, in implementing the federal NPDES program, was free to ignore both the permit requirement and the minimum effluent levels established by federal law. The court explained that the State is “not obligated to apply federal law” that conflicts with state law, Pet. App. 18a, that petitioner’s “reliance on [federal] law is misguided,” *id.* at 19a, and that neither state agencies nor state courts “are obligated to follow [federal] precedent when the similar state law” can be construed in a different manner, *ibid.* This Court rejected the “large and obvious [groundwater] loophole” in the CWA sought by the defendant and the United States in *County of Maui*, Slip Op. 10; but the Tennessee courts have created an even larger and more obvious state-law loophole that is even more clearly contrary to Congress’s intent and the plain text of the CWA. As explained in the petition, that decision conflicts with decisions of multiple federal courts of appeals and state courts of last resort. Pet. 13-20.

b. The petition for a writ of certiorari was filed on November 2, 2018. After obtaining extensions, respondents filed their briefs in opposition on February 6, 2019. In its brief, ACC argued, *inter alia*, that the CWA does not apply to the discharge of pollutants at

issue here because in this case the toxic pollutants travel from ACC's land to surface waters on petitioner's adjacent land via groundwater—and that such transmissions are not covered by the CWA's NPDES program. ACC BIO 2, 18-21. In its reply brief, filed on February 19, 2019, petitioner explained why ACC is wrong about the facts of this case. *See* pp. 4-5, *infra*. On the same day, this Court granted the petition for a writ of certiorari in *County of Maui*, to answer the question “[w]hether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.” *County of Maui* Pet. i.

The following day, the certiorari materials in this case were distributed for consideration at the Court's conference on March 15, 2019. The docket reflects no further action in the case—presumably because the Court opted to hold the petition in this case pending resolution of *County of Maui*. Now that the Court has resolved the question presented in *County of Maui*, it is even more clear that it should grant the petition in this case and reverse the state court's erroneous reverse-preemption ruling.

2. The Court confirmed in *County of Maui* that the CWA “insist[s] that a person wishing to discharge *any* pollution into navigable waters first obtain EPA's permission to do so.” Slip Op. 2. As noted, the question presented in that case was “whether, or how” that statutory requirement “applies to a pollutant that reaches navigable waters only after it leaves a ‘point source’ and then travels through groundwater before reaching navigable waters.” *Ibid*. The Court ultimately held that the CWA “requires a permit when there is a direct discharge from a point source into

navigable waters or when there is the *functional equivalent of a direct discharge*.” *Id.* at 15. That holding confirms the need for this Court’s review and reversal of the decision below.

a. Initially, the question decided in *County of Maui* does not affect the state court’s reverse-preemption ruling in this case for two reasons: because *County of Maui* did not address any preemption question and because this case involves the *direct* discharge of pollutants from traditional point sources to navigable waters without a permit. ACC’s own admissions in the proceedings below confirm as much.

The state courts expressly premised their holdings in this case on the parties’ admission that ACC is contaminating petitioner’s private property through the point-source discharge of pollutants *directly* to *surface* water. Pet. App. 7a-8a (quoting consent order); *see id.* at 25a & n.2, 28a (opinion of Tennessee Supreme Court) (discussing ACC’s use of “ditches to re-route surface water” and “multiple settling ponds and drainage control ditches”). As the Chancery Court explained, this case involves the discharge of toxic “leachate” that collects in pools on ACC’s land and then “flows through culverts that lie under” a road that “is the property boundary between ACC and Starlink,” “into [the surface waters of] Sugar Creek and Arrow Lake, which are located on Starlink’s property.” *Id.* at 79a-80a (footnote omitted). ACC’s *own expert* in wastewater engineering testified before the state agency that polluted water is discharged from ACC’s land through steel culvert pipes—and that those discharges qualify as point-source discharges under the CWA. *See* Pet. C.A. Reply Br. 17; 33 U.S.C. § 1362(14) (defining “point source” to include “any pipe, ditch,

channel, tunnel, [or] conduit” “from which pollutants are or may be discharged”). Because the pollutants from ACC’s property are discharged from point sources through a pipe (*i.e.*, a culvert) directly into surface waters, the CWA prohibits those discharges without an NPDES permit—regardless of how the rule announced in *County of Maui* applies to this case.

The decision in *County of Maui* therefore provides no reason to deny the petition. Nor does it provide any reason to remand this matter to the state courts for further consideration in light of the decision in *County of Maui*. Those courts *already* understood this case to involve the point-source discharge of pollutants *directly* to surface waters without an NPDES permit. And those courts held that the NPDES requirements of the CWA do not apply because they are displaced by state law. That decision should not be allowed to stand.

b. Because the pollution on ACC’s property is so extensive, ACC is *also* discharging pollutants to surface waters on petitioner’s *adjacent* property *via* groundwater. Under this Court’s decision in *County of Maui*, those distinct discharges *also* require an NPDES permit.

The Court in *County of Maui* set out seven factors a court should consider in determining whether a discharge of pollutants to surface waters via groundwater is the functional equivalent of a direct discharge. Slip Op. 15-16. Application of those factors to this case confirms that, in addition to directly discharging pollutants into surface waters, ACC’s landfill is also transmitting pollutants to surface waters via groundwater in a manner that is the functional equivalent of a direct discharge.

Because petitioner's land is *contiguous* to ACC's land containing the landfill, the amount of time it takes pollutants to travel through groundwater to the surface waters of Arrow Lake and Sugar Creek is minimal. By the same token, the distance such pollutants travel is quite short, *i.e.*, less than half a mile. *See County of Maui*, Slip Op. 16 (factors 1 and 2). Nothing about "[t]he nature of the materials through which the pollutant[s] travel[]," *ibid.* (factor 3), suggests that the discharge is not the functional equivalent of a direct discharge. The geology of the area is limestone, which can give rise to underground streams and caverns that facilitate the rapid flow of groundwater. *See* Pet. App. 25a-26a n. 2, 32a & n.4. The nature of the pollutants entering navigable waters on petitioner's land, *see County of Maui*, Slip Op. 16 (factors 4 through 7), also confirms that any discharge through groundwater is the functional equivalent of a direct discharge. The two primary pollutants discharged from ACC's land are ammonia and chloride. Pet. 7. Those chemicals appear unaltered and in extraordinarily high concentrations in Arrow Lake. *Ibid.*

In sum, the decision in *County of Maui* makes plain that any discharge of pollutants from the point sources on ACC's land to surface waters on petitioner's *adjacent* land via ground water are the functional equivalent of a direct discharge. The fact that *County of Maui* makes clear that those discharges *also* require an NPDES permit is no reason to delay review of the decision below—because the state court already held that the CWA does not apply *at all* when it conflicts with state law.

\* \* \* \* \*



Every day, ACC discharges highly toxic pollutants from point sources on its land—directly and through groundwater—into surface waters on petitioner’s adjacent land without a permit and in concentrations that far exceed the limits established by the CWA. It has done so for decades. The state court held that Tennessee is not bound by the requirements of the CWA because Tennessee has enacted a more lenient law. That is not how the Supremacy Clause works. To the extent this Court’s recent decision in *County of Maui* bears on the preemption question presented by the petition, it only confirms that this Court’s review is warranted.

### CONCLUSION

For the foregoing reasons and the reasons set out in the petition for a writ of certiorari and the reply brief, the petition should be granted for plenary review. In the alternative, the Court may wish to consider summarily reversing the decision below.

Respectfully submitted,

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