

In The
Supreme Court of the United States

COUNTY OF MAUI,

Petitioner,

v.

HAWAII WILDLIFE FUND; SIERRA CLUB -
MAUI GROUP; SURFRIDER FOUNDATION;
WEST MAUI PRESERVATION ASSOCIATION,

Respondents.

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

**BRIEF FOR AMICI CURIAE FLORIDA WATER
ENVIRONMENT ASSOCIATION - UTILITY COUNCIL;
FLORIDA RURAL WATER ASSOCIATION; AND
FLORIDA ELECTRIC POWER COORDINATING
GROUP - ENVIRONMENTAL COMMITTEE IN
SUPPORT OF PETITIONER**

Gary V. Perko
Counsel of Record
Mohammad O. Jazil
Kristen C. Diot
HOPPING GREEN & SAMS, P.A.
119 S. Monroe St., Ste 300
Tallahassee, FL 32301
(850) 222-7500
GaryP@hgslaw.com
MohammadJ@hgslaw.com
KristenD@hgslaw.com
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT..... 3

ARGUMENT..... 5

I. Extension of NPDES permitting jurisdiction
over releases to groundwater fails to give
proper effect to the whole-text of the Clean
Water Act. 5

 A. The Ninth Circuit’s new “traceability” or
 “functional equivalency” test for NPDES
 applicability contravenes the plain
 meaning of the statutory text. 6

 B. The Ninth Circuit’s holding conflicts
 with the structure of cooperative
 federalism embodied in the Clean Water
 Act and implemented by the State of
 Florida. 9

CONCLUSION11

TABLE OF AUTHORITIES

Cases

<i>Estate of Cowart v. Nicklos Drilling Co.</i> , 505 U. S. 469, 476 (1992)	5
<i>Exxon Corp. v. Train</i> , 554 F.2d 1310, 1329 (5th Cir. 1977)	7
<i>Hawai'i Wildlife Fund v. County of Maui</i> , 886 F.3d 737 (9th Cir. 2018)	<i>passim</i>
<i>K Mart Corp. v. Cartier</i> , 486 U.S. 281, 291 (1988)	5
<i>Ky. Waterways All. v. Ky. Utils. Co.</i> , 905 F.3d 925, 929 (6th Cir. 2018)	6, 7, 8
<i>Ohio Valley Envtl. Coal., Inc. v. United States Army Corps of Eng'rs</i> , 828 F.3d 316, 319 (4th Cir. 2016)	6
<i>Roberts v. Sea-Land Servs, Inc.</i> , 566 U. S. 93 (2012)	5
<i>South Florida Water Management District v. Miccosukee Tribe of Indians</i> , 541 U.S. 95, 105 (2004)	7
<i>Star Athletica, L.L.C. v. Varsity Brands, Inc.</i> , 137 S. Ct. 1002, 1010 (2017)	5
<i>Sturgeon v. Frost</i> , 136 S. Ct. 1061 (2016)	5
<i>Walters v. Metro. Ed. Enters., Inc.</i> , 519 U. S. 202, 207 (1997)	5

Statutes

33 U.S.C. § 1251(a).....	6
33 U.S.C. § 1251(b).....	5
33 U.S.C. § 1311(a).....	6
33 U.S.C. § 1342.....	6
33 U.S.C. § 1342(b).....	6, 8
33 U.S.C. § 1362(7).....	7

33 U.S.C. § 1362(11).....	8
33 U.S.C. § 1362(12).....	6
33 U.S.C. § 1362(12)(A).....	7
33 U.S.C. § 1362(14).....	6, 7
Chapter 403, Florida Statutes.....	10

Rules

40 C.F.R. § 122.2	7
Fla. Admin. Code Ann. r. 62-4.030	10
Fla. Admin. Code Ann. r. 62-520	10
Fla. Admin. Code Ann. r. 62-520.310(2).....	10
Fla. Admin. Code Ann. r. 62-528.....	10
Fla. Admin. Code Ann. r. 62.2-610	10

Federal Register

60 Fed. Reg. 25,718 (May 12, 1995)	9
--	---

Other Authorities

Antonin Scalia & Bryan A. Garner, <i>Reading Law: The Interpretation of Legal Texts</i> 167 (2012)	5
David J. Weary & Daniel H. Doctor, U.S. Geological Survey, <i>Karst in the United States: A Digital Map Compilation and Database: U.S. Geological Survey</i> , Open-File Report 2014–1156, at 5 (2014), https://pubs.usgs.gov/of/2014/1156/pdf/of2014-1156.pdf (report), https://pubs.usgs.gov/of/2014/1156/pdf/of2014-1156_hi-res-pdfs/of2014-1156_figure_1.pdf (high resolution map).....	1
Florida Department of Environmental Protection, Groundwater Management Section, “Groundwater – Surface Water Interaction & Basin Assessments,” https://floridadep.gov/dear/water-quality-evaluation-tmdl/content/groundwater-management-section	10

Into, Oxford English Dictionary (2d ed. 1989)..... 8
Into, Webster Third New International Dictionary,
Unabridged (2018)..... 8, 9

INTERESTS OF AMICUS CURIAE¹

Groundwater, quite literally, comes close to the surface in Florida. According to the U.S. Geological Survey's official map of Karst areas in the United States, virtually the entire state of Florida exhibits Karst topography, with soluble carbonate (limestone) rock often lying "at or near" the land surface.² As a result, Florida's hydrogeology allows for diffuse and pervasive movement of groundwater.

The Florida *Amici* include the Florida Water Environment Association – Utility Council ("Utility Council"), the Florida Rural Water Association ("FRWA"), and the Florida Electric Power Coordinating Group – Environmental Committee ("FCG–EC"). Their members include public and private entities that provide water supply, stormwater management, wastewater treatment, and electric services to the public throughout Florida. Those operations often result in releases to

¹ On April 4, 2019, counsel for Respondents provided a letter to the Court consenting to the filing of any briefs amici curiae in support of either party or of neither party, filed within the time allowed by this Court's rules. Counsel for the Petitioner provided written consent to the filing of this brief on May 13, 2019. No counsel for a party authored this brief in whole or in part, and no person, other than Amici or their counsel, made any monetary contribution to the preparation or submission of this brief.

² See David J. Weary & Daniel H. Doctor, U.S. Geological Survey, *Karst in the United States: A Digital Map Compilation and Database: U.S. Geological Survey*, Open-File Report 2014–1156, at 5 (2014), <https://pubs.usgs.gov/of/2014/1156/pdf/of2014-1156.pdf> (report), https://pubs.usgs.gov/of/2014/1156/pdf/of2014-1156_hi-res-pdfs/of2014-1156_figure_1.pdf (high resolution map).

ground waters that are already extensively regulated by the State of Florida. But those operations would require very different and potentially less effective regulation in the form of National Pollutant Discharge Elimination System (“NPDES”) permits if this Court upholds the Ninth Circuit’s holding in *Hawai’i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018).

The Utility Council is a 53-member association of the State’s public and private wastewater utilities responsible for treating wastewater from millions of Floridians.

The FRWA represents both large and small, public and private water and wastewater systems throughout Florida with the primary purpose of assisting these water and wastewater systems with every phase of operation so that they can provide essential services to millions of Floridians. FRWA’s 1,817 water utility members include counties, municipalities and special purpose districts throughout Florida.

The FCG–EC represents twenty-two investor-owned electric utilities, rural electric cooperatives, and municipal electric utilities on environmental issues affecting the electric utility industry in Florida. FCG–EC members provide electricity to nearly five million customers in Florida, which represents over half of the State’s electrical energy supply.

While the Florida *Amici* might sometimes differ in purpose and priorities, they speak with one voice about the profound importance of adhering to a

reading of the Clean Water Act's NPDES permitting requirements that remains consistent with the statutory text and with the structure of cooperative federalism upon which the Act is premised.

Several of the Florida *Amici's* members must already obtain and comply with state permits for groundwater releases associated with their operations. If upheld, the Ninth Circuit's holding in *County of Maui* could extend NPDES permitting jurisdiction over those same groundwater releases and, as a result, expose them to duplicative and potentially inconsistent regulatory requirements. As such, extension of NPDES permitting requirements to groundwater releases jeopardizes the ability of the Florida *Amici's* members to manage their operations in a consistent manner and could potentially penalize them for investments in infrastructure made to comply with the State of Florida's existing groundwater regulatory regime.

SUMMARY OF THE ARGUMENT

Statutory interpretation begins and ends with the text, so as to ensure that the statute is given its clear meaning as written. Courts must look at the whole text, including its structure, to determine that plain meaning.

In this case, the statutory text is clear. The Clean Water Act only requires NPDES permits for "point source" discharges that "convey" pollutants "into" a "navigable water." Because groundwater is neither a "navigable water" nor a "point source," releases into groundwater do not trigger NPDES permitting requirements even if pollutants released

into groundwater eventually reach navigable waters. This straightforward textual analysis comports with the structure of the Clean Water Act, which recognizes and preserves the primary role of the States in addressing nonpoint source pollution.

The Ninth Circuit departed from the statutory text when it held that releases to groundwater require NPDES permits where “pollutants are *fairly traceable* from [a] point source to a navigable water such that the discharge is the *functional equivalent* of a discharge into the navigable water.” *Cty. of Maui*, 886 F.3d at 749 (emphases added). As a result, this judicially-created “traceability” or “functional equivalency” test for NPDES applicability injects great uncertainty into the regulatory process, and it threatens to expose regulated interests to duplicative and potentially inconsistent regulatory requirements, particularly in states like Florida that have already established comprehensive regulatory programs to ensure that releases to groundwater do not impair surface waters.

This Court should reverse *County of Maui* and instead give clear meaning to the text of the Clean Water Act’s NPDES permitting provisions, thereby reducing regulatory uncertainty and upholding the statutory structure which recognizes and preserves the primary role of the States over nonpoint source pollution.

ARGUMENT

I. Extension of NPDES permitting jurisdiction over groundwater releases fails to give proper effect to the whole-text of the Clean Water Act.

Because the scope of NPDES permitting is a matter of statute, “[t]he controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written.” *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992). Statutory interpretation thus begins and ends “with the text, giving each word its ‘ordinary, contemporary, common meaning.’” *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (quoting *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997)). But “[s]tatutory language ‘cannot be construed in a vacuum.’” *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (quoting *Roberts v. Sea-Land Servs, Inc.*, 566 U. S. 93, 101, (2012)). “In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.” *K-Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988). In other words, the court must “consider the entire text, in view of its structure and of the physical and logical relation of its many parts.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) (explaining the “Whole-Text Canon” of construction).

This case concerns one component of a comprehensive statute that Congress enacted to “restore and maintain the chemical, physical, and

biological integrity of the Nation’s waters” while at the same time “recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources.” 33 U.S.C. § 1251(a), (b). Based on this recognition of the States’ primary role, the Clean Water Act established a program of cooperative federalism whereby point source discharges to navigable waters are regulated under the federal NPDES permitting program, *id.* § 1342, but all other nonpoint sources of water pollution fall “within the regulatory ambit of the states.” *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925, 929 (6th Cir. 2018); *see also* 33 U.S.C. § 1362(12), (14). In furtherance of that cooperative federalism structure, the Act also allows states to administer their own NPDES permitting programs so long as the state programs meet certain minimum federal requirements. 33 U.S.C. § 1342(b); *see also, Ohio Valley Env’tl. Coalition, Inc. v. U.S. Army Corps of Eng’rs*, 828 F.3d 316, 319 (4th Cir. 2016).

A. The Ninth Circuit’s new “traceability” or “functional equivalency” test for NPDES applicability contravenes the plain meaning of the statutory text.

The specific statutory text at issue relates to Clean Water Act provisions that make the “discharge of any pollutant by any person . . . unlawful” without an NPDES permit. 33 U.S.C. §§ 1311(a), 1342. “Discharge of a pollutant” is a statutory term of art, defined in relevant part as “any addition of any pollutant to navigable waters

from any point source.” *Id.* § 1362(12)(A). A “point source” is “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.” *Id.* § 1362(14). A “navigable water” includes any of “the waters of the United States, including the territorial seas.” *Id.* § 1362(7). But the term “waters of the United States” does not include groundwater. *See* 40 C.F.R. § 122.2. Likewise, groundwater is not a “point source” because, “[b]y its very nature, groundwater is a ‘diffuse medium’ that seeps in all directions, guided only by the general pull of gravity. *Ky. Waterways All.*, 905 F.3d at 933 (citation omitted). Thus, the Act does not impose “direct federal control over groundwater pollution.” *Exxon Corp. v. Train*, 554 F.2d 1310, 1322 (5th Cir. 1977).

Yet, in *County of Maui*, the Ninth Circuit extended direct federal NPDES control over releases to groundwater where “pollutants are fairly traceable from [a] point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water.”³ 886 F.3d at 749. This new “traceability” or “functional equivalency” test for NPDES applicability contravenes the plain text of the statutory definition of “point source,” which unequivocally requires a “discernable, confined, and discrete conveyance” to a navigable water. *See* 33 U.S.C. § 1362(14) (emphasis added). As this Court recognized in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004), “[t]hat definition

³ The *County of Maui* court “assume[d] without deciding the groundwater here is neither a point source nor a navigable water under the [Clean Water Act].” 886 F.3d at 746 n.2.

makes plain” that, although “a point source need not be the original source of the pollutant[,] it need[s] [to] . . . convey the pollutant to ‘navigable waters.’” (Emphasis added). See also *Ky. Waterways All.*, 905 F.3d at 934 n.8 (“‘Conveyance’ is a well-understood term; it requires a channel or medium—i.e., a facility—for the movement of something from one place to another.” (Citations omitted)).

The Ninth Circuit’s holding that an *indirect* discharge to navigable waters via groundwater can trigger NPDES permitting requirements is also belied by other Clean Water Act provisions that make clear Congress’ intent to require NPDES permits only for point source discharges “into” navigable waters. For example, NPDES-permitted discharges must comply with “effluent limitations,” which the statute defines as restrictions on the amount of pollutants that may be “discharged from point sources *into* navigable waters.” 33 U.S.C. § 1362(11) (emphasis added). Similarly, the provision allowing a state to administer NPDES permitting refers to a “permit program for discharges *into* navigable waters within its jurisdiction[.]” *Id.* § 1342(b) (emphasis added). As the Sixth Circuit recently recognized: “The term ‘into’ indicates directness. It refers to a point of *entry*.” *Ky. Waterways All.*, 905 F.3d at 934 (emphasis in original) (citing *Into*, Webster Third New International Dictionary, Unabridged (2018); *Into*, Oxford English Dictionary (2d ed. 1989)). “Thus, for a point source to discharge *into* navigable waters, it must dump *directly* into those navigable waters—the phrase ‘into’ leaves no room for

intermediary mediums to carry the pollutants.” *Id.* (emphasis in original).

The plain text of these statutory provisions makes clear that NPDES permits are only required for “point sources” that “convey” pollutants “into” “navigable waters.” There is simply no textual support for the Ninth Circuit’s “traceability” or “functional equivalency” test for NPDES applicability.

B. The Ninth Circuit’s holding conflicts with the structure of cooperative federalism embodied in the Clean Water Act and implemented by the State of Florida.

While a straightforward textual analysis of the specific provisions governing NPDES permitting applicability justifies reversal, the Florida *Amici* write separately to highlight how the Ninth Circuit’s holding would conflict with the structure of cooperative federalism as embodied in the Clean Water Act and implemented in Florida.

In 1995, Florida received NPDES program approval from the U.S. Environmental Protection Agency (“EPA”). 60 Fed. Reg. 25,718 (May 12, 1995). But both prior to and after receiving NPDES program approval, Florida has had in place a separate, comprehensive program that regulates releases to groundwater in a manner that ensures that pollutants dispersed into groundwater do not impair “waters of the United States” in contravention of the Clean Water Act.

Florida’s regulatory program establishes classes of ground waters and specific standards designed to protect them. *See* Fla. Admin. Code Ann. r. 62-520. Florida requires permits for groundwater releases via underground injection wells, as well as more diffuse sources, such as land application systems.⁴ Florida “now also integrates groundwater data into its watershed assessments to help in the evaluation of groundwater impacts on surface water quality.”⁵ Moreover, Florida’s rules specifically provide that a “discharge to ground water shall not impair the designated use of contiguous surface waters.” *Id.* r. 62-520.310(2). As a result, under Florida law, an applicant for a groundwater permit bears the burden of demonstrating reasonable assurances that the release to groundwater will not impair contiguous surface waters. *See id.* r. 62-4.030 (“The [State] may issue a permit only after it receives reasonable assurance that the installation will not cause pollution in violation of any of the provisions of Chapter 403, [Florida Statutes], or the rules promulgated thereunder.”).

⁴*See* Fla. Admin. Code Ann. r. 62-528 (Florida rules governing underground injection control wells); Fla. Admin. Code Ann. r. 62-610.100(7) (Florida rules establishing “design and operation and maintenance criteria for land application systems that may discharge reclaimed waters or domestic wastewater effluent to . . . ground waters.”).

⁵ *See* Florida Department of Environmental Protection, Groundwater Management Section, “Groundwater – Surface Water Interaction & Basin Assessment,” (Jan. 29, 2018, at 11:25 am) <https://floridadep.gov/dear/water-quality-evaluation-tmdl/content/groundwater-management-section>.

Thus, Florida's regulatory program recognizes the potential hydrological connection between ground water and surface water and, moreover, it ensures that releases to groundwater do not impair surface waters, including waters that would be considered "navigable waters" under the Clean Water Act. Florida's program therefore serves the Clean Water Act's fundamental objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," while adhering to the statutory structure that seeks to preserve the States' primary role in addressing water pollution. And it does so without adopting an artificial construction of the term "point source" to include releases to groundwater that are somehow "functionally equivalent" to a discharge into a navigable water.

If upheld, the Ninth's Circuit's holding in *County of Maui* would turn the statutory structure on its head by imposing direct federal control over releases to groundwater even though groundwater constitutes neither a "point source" nor a "navigable water."

CONCLUSION

The Florida *Amici* accordingly urge the Court to reject the Ninth Circuit's new "traceability" or "functional equivalency" test and instead adopt a textual analysis that gives plain and clear meaning to the whole text of the Clean Water Act. Otherwise, regulatory uncertainty will prevail, and regulated interests will be exposed to duplicative and potentially inconsistent requirements, particularly in states like Florida that have already established

programs to ensure that releases to groundwater do not impair waters of the United States.

Respectfully submitted.

Gary V. Perko
Counsel of Record
Mohammad O. Jazil
Kristen C. Diot
HOPPING GREEN & SAMS, P.A.
119 S. Monroe St., Ste 300
Tallahassee, FL 32301
(850) 222-7500
GaryP@hgslaw.com
MohammadJ@hgslaw.com
KristenD@hgslaw.com

Counsel for Amicus Curiae

Date: May 16, 2019