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; WEST MAUI PRESERVATION ASSOCIATION,

Respondents.

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

BRIEF OF WYCHMERE SHORES CONDOMINIUM TRUST AND LONGWOOD VENUES & DESTINATIONS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Wychmere Shores Condominium Trust (the "Trust") owns, and Longwood Venues & Destinations, Inc. ("Longwood") operates, a resort in Harwich Port, Massachusetts known as the Wychmere Beach Club. The Beach Club is served by a wastewater treatment facility that operates under an Individual Groundwater Discharge Permit issued by the Massachusetts Department of Environmental Protection ("DEP").

In 2018, *amici* and other parties were sued in the United States District Court for the District of Massachusetts by the Conservation Law Foundation ("CLF"). *Conservation Law Found. v. Longwood Venues & Destinations, Inc. et al.*, No. 1:18-cv-11821-WGY (D. Mass. filed Aug. 24, 2018).[2] CLF's "citizen suit" alleges that *amici* and their co-defendants are violating the Clean Water Act ("CWA") because (i) while they possess and operate under a permit from the state, they lack a federal National Pollutant Discharge Elimination System ("NPDES") permit; (ii) one or more elements of the wastewater treatment facility and its appurtenances is a "point source;" (iii) treated effluent from the facility contains "pollutants" within the meaning of the CWA; (iv) some of the treated effluent reaches local groundwater after being diffused through the wastewater treatment facility's leach pits, surrounding

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[1] Counsel for all parties have consented in writing to the filing of this brief. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

[2] The other defendants are affiliated persons and entities, e.g., the trustees of the Trust.

crushed stone, and soil, as authorized by the state permit, and (v) some of the allegedly affected groundwater eventually reaches Wychmere Harbor, which is a "water of the United States." Am. Compl. for Decl. & Inj. Relief & Civil Penalties ¶¶ 1–9, *Conservation Law Found. v. Longwood Venues & Destinations, Inc. et al.*, No. 1:18-cv-11821-WGY (D. Mass. filed March 12, 2019), ECF No. 34 ("Amended Complaint").

The complaint against *amici* tacitly admits that the groundwater itself is not a water of the United States. It alleges, rather, that the CWA applies to the wastewater treatment facility, and that *amici* therefore need a federal NPDES permit, only because the local groundwater is "hydrologically connected" to Wychmere Harbor, and the groundwater thus is a "conduit" between the alleged point source and a water of the United States. *Id.* ¶¶ 5, 40.

The claims against *amici* depend on the viability of the legal theory asserted by the Respondents in this case, and adopted by the Ninth Circuit in the decision under review. This Court's decision, therefore, will likely be completely dispositive of the case against *amici*. Even if it is not conclusive, it will provide important guidance to the trial court and, if necessary, to the First Circuit.

SUMMARY OF ARGUMENT

I. *Amici's* experiences as the owner and operator of a state-permitted wastewater treatment facility, and as the defendants to a citizen suit based on the hydrologic-connection theory, are representative of both the success of state regulation and the consequences of the application of the hydrologic-connection theory.

II.A. The hydrologic-connection theory is inconsistent with the Clean Water Act, which memorializes Congress's intent to leave regulation of groundwater to the states.

II.B. Adopting the hydrologic-connection theory will trigger a broad expansion of the federal NPDES program with the potential to ensnare millions of wastewater disposal and treatment systems, simply because such systems may have contact with local groundwater, and the groundwater may be "hydrologically connected" to Waters of the United States.

II.C. The owners and operators of many wastewater disposal and treatment systems will therefore be compelled either (i) to spend significant sums on testing to determine whether their systems are hydrologically connected to navigable waters and therefore covered by the NPDES program, (ii) to spend significant sums making "blind" and possibly-superfluous NPDES applications, or (iii) to expose themselves to the risk of financially-crippling citizen suits (like the one currently pending against *amici*), which can be brought without governmental oversight and which may be brought for environmentally-unproductive or improper reasons.

III. Expansion of the NPDES program is unnecessary, moreover, because rejecting the hydrologic-connection theory will *not* open a regulatory loophole, as some courts fear. *Amici's* experience demonstrates that the remedial purposes of the Clean Water Act can be effectuated without giving short shrift to the "cooperative federalism" that is an organizing principle of the statute.

ARGUMENT

I. *Amici's* Circumstances Illustrate The Extent To Which The Hydrologic-Connection Theory Will Expand The Scope Of The NPDES Program.

The Wychmere Beach Club. In the scheme of things, the Wychmere Beach Club is not a big business. It occupies twenty acres on Cape Cod and operates for the most part during a season that runs from April through November. The Beach Club hosts about 140 private events (such as weddings and corporate retreats) each year, and offers club amenities (e.g., swimming pools, fitness center, dining room, childrens' camp) to approximately 245 members. The Beach Club also has eighteen guest rooms, which are available only to members and event guests, and an equivalent number of employee rooms. Neither the guest rooms nor the employee rooms are occupied out of season. Also on the property are residential condominiums.[3] Except for the individual condominium units, the Trust owns the property, which it purchased in 2010, and Longwood has both managed the condominium and operated the event venue and the club since then.

The Wastewater Treatment Facility. The Trust also owns the on-site wastewater treatment facility that serves the Beach Club. Longwood manages the facility, primarily by contract with a local environmental engineering firm called Bennett Environmental Associates, Inc. ("BEA"). BEA specializes in the operation and maintenance of wastewater treatment systems

[3] For purposes of brevity, the term "Beach Club," as used in this brief, refers collectively to the event venue, the club, and the residences.

and plants, and employs state-licensed wastewater treatment operators for that purpose.

Wastewater generated by the Beach Club goes first to one of three 22,000-gallon anoxic tanks for denitrification and the removal of solids. The effluent from these three tanks is commingled in one 36,000-gallon equalization tank, and from there it moves through several additional stages of treatment:

- Placement in rotating biological contactors for reduction of Biological Oxygen Demand (the amount of oxygen needed to break down organic material in the effluent) and the nitrification of ammonia;
- Conveyance to a weir in which, as needed (including during low flow conditions), a chemical feed adds carbon to sustain microbial growth and treatment efficiency, improving denitrification;
- Recirculation to one of the anoxic tanks for additional treatment as described above, or to one of two secondary clarifiers for additional solids removal;
- Conveyance to one of two tertiary dual media filters, which can remove even very small suspended solids; and finally,
- Placement in one of twenty-two concrete leaching pits, each one surrounded by crushed stone in soil four inches above the highest groundwater elevation.[4]

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[4] Defs.' Answer & Affirmative Defenses to Pl.'s Am. Compl. ¶ 46, *Conservation Law Found. v. Longwood Venues & Destinations, Inc. et al.*, No. 1:18-cv-11821-WGY (D. Mass. Apr. 5, 2019), ECF No. 49.

The volume of wastewater handled, and of effluent generated, by the wastewater treatment facility is relatively small. The facility has the capacity to handle a wastewater flow of up to 80,000 gallons per day ("gpd") but it generally operates well below that limit: for example, in August 2018, at the height of the Beach Club's most recent summer season, the average wastewater flow was only 6,991 gpd. *Cf. Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 742 (9th Cir. 2018) (noting that Lahaina Wastewater Reclamation Facility receives approximately 4 million gpd of sewage and injects as much as 2.8 million gpd of effluent into groundwater via its wells).

The Lack of a NPDES Permit. The wastewater treatment facility at the Beach Club has an Individual Groundwater Discharge Permit issued by the Massachusetts DEP. Neither *amici* nor their predecessors have ever sought or received a NPDES permit. They have operated the facility solely under the Massachusetts regulatory regime because they understood, and continue to understand, that state regulation is both necessary and sufficient. This impression has recently been confirmed to them at least three times, in three different ways, by state and federal regulators.

First, in a report submitted to EPA in February 2016 on the Total Maximum Daily Load for Total Nitrogen in Wychmere Harbor ("the TMDL Report"), the Massachusetts DEP described the wastewater treatment facility at the Beach Club as a "non-point source."[5] Non-point sources are not covered by the NPDES program. When it approved the Commonwealth's TMDL Report, moreover, EPA agreed with DEP's characterization, referencing the "groundwater

[5] Mass. Dep't of Env. Prot., Total Maximum Daily Load for Total Nitrogen in Wychmere Harbor (Feb. 2016).

discharge of wastewater treatment plant effluent" as a non-point source.[6]

Second, in the Interpretive Statement it issued last month on the application of the NPDES program to releases of pollutants from a point source to groundwater, EPA surveyed the history of the program with respect to mechanisms such as septic systems and wastewater treatment facilities, and noted that "[t]o date, neither EPA nor states have generally required NPDES permits for these types of activities, and in the select instances where NPDES permits have been required for discharges from a point source that reaches jurisdictional surface waters via groundwater, they have been based on site-specific factors." 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, 16,812 (Apr. 23, 2019).

Finally, in response to a document subpoena issued by *amici* and their co-defendants in the case against them in the District of Massachusetts, EPA recently affirmed that it has no records reflecting applications for NPDES permits for septic systems or other systems that discharge effluent to the ground or groundwater in the Commonwealth of Massachusetts from January 1, 2009 to the present, and thus has no records reflecting agency action on such applications, either.[7]

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[6] Mem. in Supp. of Defs.' Mot. to Dismiss, Exs. A & B, *Conservation Law Found. v. Longwood Venues & Destinations, Inc. et al.*, No. 1:18-cv-11821-WGY (D. Mass. Nov. 30, 2018), ECF No. 16.

[7] If any such records existed, EPA would have them, because Massachusetts, unlike most other states, does not administer the

The Lawsuit Against *Amici.* In October 2018, CLF served *amici* and several co-defendants with a complaint that asserted a "citizen suit" under the CWA. The complaint, as since amended, alleges in effect that possession of a state permit and compliance with state regulation is *not* sufficient in these circumstances, and that the defendants have for years violated (and are continuing to violate) the CWA by operating the wastewater treatment facility without a NPDES permit.[8]

The Amended Complaint seeks declaratory and injunctive relief and also, pursuant to the statute, asks the Court to award CLF both (i) its costs, including investigative, attorney, witness, and consultant fees, and (ii) penalties that range from $37,500 per day to 53,484 per day, depending on the date of the alleged violation, over a period of more than ten years.[9]

This makes the case a *potentially* expensive proposition, but what makes it a *currently* expensive one is the cost of litigating it under a schedule, set by the District Court, that puts it on the trial list for September 2019.[10] CLF's fact discovery, in addition to the usual interrogatories and requests for admissions and documents, has included a Federal Rule of Civil Procedure 34 request for access to the Beach Club property to perform several days of investigation,

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NPDES program by delegation from the federal agency. *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 14 (1st Cir. 2012).

[8] *See generally* Amended Complaint.

[9] *Id*. ¶ 140.

[10] Case Management Order, *Conservation Law Found. v. Longwood Venues & Destinations, Inc. et al.*, No. 1:18-cv-11821-WGY (D. Mass. Feb. 3, 2019), ECF No. 30.

including (i) inspection of the wastewater treatment facility, (ii) inspection of monitoring wells, (iii) collection of treated sewage samples, (iv) water level measurements and collection of groundwater samples from existing wells, (v) construction of new boreholes and groundwater sampling from them, (vi) observation of lithology, and (vii) water level measurement in the new boreholes. CLF has hired a consultant to perform this work, at its own initial expense, but if the hydrologic-connection theory prevails and CLF wins the lawsuit it will presumably seek reimbursement as part of its "investigative . . . and consulting fees."

II. Adopting The Hydrologic-Connection Theory Will Trigger A Broad Expansion Of The NPDES Program And Threaten The Interests Of Millions Of Parties Who Have Historically Been Regulated By The States.

The hydrologic-connection theory is a blunt instrument, to say the least. As the Ninth Circuit has articulated it, the theory requires only a point source, a discharge to groundwater, and a "fairly traceable" hydrologic connection between the groundwater and a water of the United States. *Hawai'i Wildlife Fund*, 886 F.3d at 749.[11] In the matter before the Court, the hydrologic-connection theory has been applied to a public wastewater treatment facility (2.8 million gpd), *id.* at 742, but the lawsuit against *amici* evidences the

[11] Other versions of the hydrologic-connection theory are equally broad. For example, according to the Fourth Circuit, the CWA applies whenever there is a point source, a discharge to groundwater, and a "direct hydrological connection between ground water and navigable waters." *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 (4th Cir. 2018).

attempted application of the theory to a much smaller, privately-owned facility (a maximum of 80,000 gpd),[12] and nothing about the theory prevents or discourages its application to even smaller and less sophisticated on-site mechanisms, such as a septic system serving a single household.

Adoption of the hydrologic-connection theory would therefore presage a dramatic expansion of the scope of the NPDES program. On Cape Cod, for example, there are currently more than 123,000 on-site wastewater systems, serving more than 80% of local businesses and residences.[13] Given the local geography and topography, one cannot rule out the possibility that a "fairly traceable" or "direct" hydrologic groundwater connection exists between *each* of those systems and the Waters of the United States that surround the Cape. The nationwide percentage is lower—about 18% of American homes had septic systems in 2017—but that translates into more than 22 million systems that discharge effluent to soil and then, potentially, to groundwater.[14]

Because population tends to cluster near large bodies of water, many of those millions of septic systems may "be sufficiently connected to navigable waters," *Upstate Forever*, 887 F.3d at 651, to displace state regulation and to expose their owners to direct federal regulation and liability under the CWA. For example, in 2010 some 123.3 million people, or 39% of

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[12] Amended Complaint ¶ 60.

[13] Cape Cod Commission, Wastewater, http://www.capecodcommission.org/index.php?id=170 (last visited May 10, 2019).

[14] U.S. Dep't of Hous. & Urban Dev. & U.S. Census Bureau, American Housing Survey for the United States: 2011, at 14 (2013).

the nation's population, lived in Coastal Shoreline Counties that are directly adjacent to the open ocean, major estuaries, and the Great Lakes, and 163.8 million people, or 52% of the population, lived in Coastal Watershed Counties, a designation that includes land areas within which a significant amount of water drains into the ocean or Great Lakes.[15]

Congress never intended to give the NPDES program such a broad scope. Rather, as the Fifth Circuit discovered when it reviewed the legislative history in *Exxon Corp. v. Train*, 554 F.2d 1310 (5th Cir. 1977), the CWA embodies Congress's unqualified intention *not* "to interfere with or displace the 'complex and varied' state jurisdictions over groundwaters," *id.* at 1326; *see also id.* at 1331, but "to leave the establishment of standards and controls for groundwater pollution to the states . . . ." *Id.* at 1325. Congress, in other words, made the deliberate choice to draw a single, bright line between (i) discharges of pollutants into navigable waters (subject to regulation under the NPDES program), and (ii) discharges of pollutants into groundwater (subject to state regulation).

Nothing in the CWA authorizes the courts to draw yet another line between sub-classes of discharges in the second category—e.g., between discharges into groundwater that has and does not have a sufficient (whatever that means) "hydrologic connection" to navigable waters. By adopting the hydrologic-connection theory, then, the Ninth Circuit thwarted Congressional intent and exceeded its legislative mandate.

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[15] NOAA, National Coastal Population Report: Population Trends from 1970 to 2020, at 3–4 (Mar. 2013). These figures, moreover, do not include the millions of Americans who may live and work far from the coasts but near to other Waters of the United States.

Just as important, if this Court adopts the hydrologic-connection theory, it will imperil large numbers of home and business owners across the nation unless and until either Congress acts or the judiciary engages in still more (and more detailed) line-drawing exercises. But Congress has shown no such inclination, and the courts may not find the task easy to accomplish when acting, as courts must, on a case-by-case basis. For example, in the decision under review, the Ninth Circuit suggested that the hydrologic-connection theory could be limited to situations in which "the pollutant levels reaching navigable waters are more than *de minimis*." *Hawai'i Wildlife Fund*, 886 F.3d at 748. As the Petitioner points out in its brief, however, this restriction cannot be squared with the statutory prohibition against "*any* addition of *any* pollutant to navigable waters…." 33 U.S.C. § 1362(12) (2010) (emphasis added).

The Ninth Circuit's inability to fashion a textually-consistent *de minimis* limitation illustrates how difficult it may be for the courts to draw the kinds of boundaries that would be needed to rein in the hydrologic-connection theory. Until such limits are set, however, the controlling version of the theory will implicate parties like *amici* and millions of residential septic-system owners, and thus will have pervasive adverse effects. Many, if not most, on-site wastewater systems employ soil absorption methods in which treatment and disposal relies on gradual seepage from leach fields or leach pits into surrounding soils.[16] Even under the best of circumstances, such systems

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[16] U.S. Env. Prot. Agency, Decentralized Systems Technology Fact Sheet: Septic Tank Soil Absorption Systems, EPA (Sept. 1999), https://www.h-gac.com/community/water/ossf/DSTFS_Septic-Tank_Soil-Absorption-Systems.pdf.

include a "planned release" of effluent from the soil into the groundwater.[17] As long as these systems are within shouting distance of an ocean, a bay, a river, or even a wetland, they *may* have a hydrologic connection to waters of the United States, and (if the theory holds sway) they *may* therefore require a federal NPDES permit.

Then again, they may not. In every case, the answer to that question will be literally hidden underground. The groundwater-that-runs-beneath-the-soil-that-lies-beneath-the-leach-field serving one home or business may be connected to navigable water while—depending on local hydrology—the groundwater under a neighboring leach field may not. Consequently, even if the Court could draw a clear distinction between the degrees of hydrologic connections that will and will not bring the NPDES program into play, the only way to determine which side of the line any particular home or business falls on would be to dig—or more precisely, to engage experts to dig, and then to test, and then to interpret the results. Governments and large businesses might be able to bear this expense, but it will be an onerous if not a back-breaking burden for many homeowners and small businesses, and the effort and expense will be entirely wasted whenever the answer turns out to be negative.

Millions of potentially-regulated parties will have little choice but to shoulder this arbitrary burden, however, because the alternatives to prophylactic testing and analysis are unpalatable. A business or home owner could forego testing and file a "blind"

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[17] *Id.*

application for a NPDES permit, but the administrative process itself would be expensive for the individual applicant and the collective burden on the administering agencies would be even greater. To be sure, a potentially-regulated party could forego both testing *and* a NPDES application, and elect to await instruction from the agencies before taking any action, but it could do so only by exposing itself to the risk that, before the government provides its guidance, somebody will come along and file a citizen suit requiring expensive litigation and—in the event of an adverse outcome—statutory penalties.

None of this is required, or in *amici's* opinion even suggested, by the text of the CWA, and nothing in the Ninth Circuit's decision explains how such a regime is supposed to be administered effectively or coherently, in a way that would actually serve the remedial purposes of the statute, while at the same time respecting the explicit legislative goal of avoiding undue federal interference in areas of historic state regulation. 33 U.S.C. § 1251(b) (2011). It is no answer to say that, if the Court simply enshrines the hydrologic-connection theory in law, EPA can work out the details. Redefining the limits of federal jurisdiction, and then standing up and building out an administrative edifice to implement a vast expansion of the NPDES program, would be a herculean task, and even if EPA is given the resources and capacity to do so eventually, the job would take years.

In the meantime, it would fall to the judiciary to adjudicate the cases brought to it. Those cases will overwhelmingly (if not exclusively) be citizen suits. Consequently, the exercise of "prosecutorial" discretion for the newly-expanded NPDES program would not be democratized so much as it would be

anarchized. Anybody who can satisfy the standing requirements could invoke the hydrologic-connection theory on the basis of virtually any motive—impatience with the *rate* of regulatory progress, dissatisfaction with the *substance* of regulatory oversight, personal animus, or greed. Thus, millions of business and home owners will be exposed to nuisance claims, outright shakedowns, and misplaced lawsuits that serve no real environmental purpose (because, for example, they target a deep-pocketed defendant that actually treats its wastewater and therefore makes only a small contribution to the pollution of navigable waters, while ignoring other, less affluent or risk-averse polluters whose contribution is much larger).

As long as the selection of cases depends on the whims and predilections of private plaintiffs, moreover, the resulting patchwork of decisional law may contain gaps and loopholes that will generate constant jurisdictional conflicts between the NPDES program and the "complex and varied" systems of state regulation. Even when those conflicts can be resolved, it will create a "senseless bifurcation" of state and federal jurisdiction on the basis of circumstances that Congress never even considered. *Train*, 554 F.2d at 1330–31.

III. Rejecting The Hydrologic-Connection Theory Is Consistent With The Express Purpose Of The CWA, And Will Not (As Some Have Claimed) Create A "Loophole" Allowing The Unregulated Pollution Of Navigable Waters.

The Ninth and Fourth Circuits have taken the position that rejecting the hydrologic-connection theory would "make a mockery of the CWA's prohibitions," *Hawai'i Wildlife Fund*, 886 F.3d at 752, and "greatly undermine the [remedial] purpose of the Act," *Upstate*

Forever, 887 F.3d at 652, because "if the presence of a short distance of soil and ground water were enough to defeat a claim, polluters could easily avoid liability under the CWA by ensuring that all discharges pass through soil and ground water before reaching navigable waters." *Id*; *see also Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 449 (6th Cir. 2018) (Clay, J., dissenting) (rejecting hydrologic-connection theory would open a "gaping regulatory loophole").

This "loophole" rationale has no basis in law or fact. It is erroneous in the first instance because it misreads the CWA, focusing on the statute's remedial purposes to the unwarranted exclusion of Congress's express intention to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). The principle of "cooperative federalism" that the CWA codified, *Kentucky Waterways All. v. Kentucky Utils. Co.*, 905 F.3d 925, 929 (6th Cir. 2018), becomes especially important where the type of regulation at issue "depends on land use controls, which are traditionally state or local in nature." *Oregon Natural Desert Ass'n v. United States Forest Serv.*, 550 F.3d 778, 785 (9th Cir. 2008) (quoting Marc R. Poirier, Non-point Source Pollution, *in Env. Practice Guide* § 18.13 (2008)).

Cooperative federalism is what impelled Congress to eschew direct federal regulation of groundwater pollution in the first place, leaving that task to the "complex and varied" regulatory structures that the states and their municipalities had already erected and would continue to maintain. *Train*, 554 F.2d at 1331 (quoting S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971), *reprinted in* 1972 U.S. Code Cong. & Admin. News

3739). The hydrologic-connection theory thus inserts the federal NPDES program into what Congress has clearly marked as state and local territory, and nothing in the Ninth Circuit's opinion—or in the opinions of the judges who have worried that respecting the statutory boundary will create a "loophole" for those they consider polluters—demonstrates a basis for overriding Congress's clearly-expressed intent.

That would be true even if one assumes that Congress *misjudged* the states' willingness and ability to effectively regulate the groundwater within their respective jurisdictions: where Congress has drawn a line, the courts will not cross it. If the courts espousing the "loophole" rationale made that unspoken assumption, moreover, they assumed facts not in evidence. As far as *amici* are aware, nobody has yet suggested, much less shown at any relevant level of generality, that federal regulation will be more effective than the existing framework of state regulatory regimes. Adopting the hydrologic-connection theory would—for *amici* and many similarly-situated parties—undeniably add a new level of expense and administrative burden (not to mention the potential for crippling penalties), but its impact on the environment, beneficial or otherwise, is purely a matter of speculation.

Amici believe that their experience in Massachusetts demonstrates that the concerns underlying the "loophole" rationale are in fact illusory. For one thing, giving the Commonwealth primary responsibility for the regulation of its groundwater, as Congress envisioned, has not excluded the federal government from the process. Like Hawaii and every other state, Massachusetts regulates its groundwater under the federal statute, which gives the federal government a meaningful, albeit indirect, role. In compliance with

the CWA, for example, the Massachusetts DEP has issued, and EPA has approved, a Nonpoint Source Management Program Plan for the Commonwealth.[18] Among other things, the Massachusetts Plan designates Cape Cod as a region that requires the development and implementation of an area-wide waste management plan.[19] In 2013, the Cape Cod Commission was assigned that task and instructed specifically to address nutrient pollution of the sort alleged in the lawsuit against *amici*. *Id.* The Commission has been actively carrying out this mandate, producing a Regional Wastewater Management Plan that EPA will also review and approve upon its completion. *Id.*[20]

The Commonwealth of Massachusetts, for its part, takes its statutory responsibility seriously and does its job well. The safe and environmentally sound operation of privately-owned, on-site septic systems and wastewater treatment facilities is clearly a matter of considerable importance to the Commonwealth, which regulates these mechanisms as part of a robust and comprehensive regime for the protection of its groundwater. Wastewater treatment facilities like the one that *amici* own and operate are subject to the Commonwealth's Ground Water Discharge Permit Program. 314 Mass. Code Regs. 5.00 *et seq*. (2016), Massachusetts Clean Waters Act, Mass. Gen. Laws ch. 21, § 26; *see also* 314 Mass Code Regs. 5.03, 5.05(1)(a) (2016) (requiring a DEP permit for discharges of

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[18] *See generally* Mass. Dep't of Env. Prot., Massachusetts Nonpoint Source Management Program Plan 2014–2019 (2014).

[19] *Id.* at 42.

[20] *See also* Cape Cod Commission, Regional Wastewater Management Plan, Cape Cod Commission (last visited May 13, 2019), http://www.capecod commission.org/regionalplans/RWMP (last visited May 13, 2019).

pollutants to ground waters of the Commonwealth except from a facility that discharges treated effluent and is designed to receive and receives less than 10,000 gpd).[21]

The Ground Water Discharge Permit Program is designed, among other things, to ensure that discharges which reach groundwater do not subsequently cause or contribute to violations of the Commonwealth's regulatory standards for surface water quality. 314 Mass. Code Regs. 4.00 *et seq.* (2013). The Massachusetts Surface Water Quality Standards are in turn designed "to secure to the Commonwealth the benefits of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*" 314 Mass. Code Regs. 4.01(4) (2013) (describing the "Purpose" of the Massachusetts Surface Water Quality Standards).

In order to achieve this goal, every Individual Groundwater Discharge Permit the Massachusetts DEP issues must "contain limits which are adequate to protect surface waters for their existing and designated uses and to assure the attainment and maintenance of [the Massachusetts Surface Water Quality Standards]." 314 Mass. Code Regs. 5.10(3) (2016). In particular, the permit limitations must "protect existing uses of hydrologically connected downgradient ground waters and surface waters, and shall not interfere with the maintenance and attainment of beneficial uses in hydrologically connected downgradient waters." *Id.*

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[21] Smaller treatment facilities and septic systems are covered separately by the regulatory program commonly known as "Title V." 310 Mass. Code Regs. 15.000 *et seq.* (2016) ("Standard Requirements for the Siting, Construction, Inspection, Upgrade and Expansion of On-Site Sewage Treatment and Disposal Systems and for the Transport and Disposal of Septage").

Massachusetts, in other words, has a system in place that not only regulates discharges of effluent from wastewater treatment facilities, and not only regulates such discharges for the purpose of protecting *groundwater* that may come into contact with the treated effluent, but also regulates such discharges for the broader purpose of protecting *surface* waters, including surface waters that may be affected because they are "hydrologically connected" to the local groundwater.

Amici's wastewater treatment facility operates within that system, under the terms of an Individual Groundwater Discharge Permit that was most recently renewed in November 2018. The Permit's General Conditions require compliance with various statutory and regulatory provisions, but the Permit also contains Special Conditions that include facility-specific discharge limitations on various effluent characteristics: flow, oil and grease, Total Suspended Solids, Total Nitrogen, Nitrate-Nitrogen, Biochemical Oxygen Demand, and pH value. The Special Conditions also require periodic testing of both influent and effluent at the facility, as well as regular analysis of groundwater samples drawn from four permanent monitoring wells located on the property.

The Commonwealth's regulatory structure, in sum, is reality-tested, consistent with cooperative federalism and, perhaps most important, free of the administrative burdens and wasted expenditures that would follow from the adoption of the hydrologic-connection theory—a theory that permits federal regulation of *some* groundwater, but not other groundwater, and that requires this essential distinction to be made on the basis of a latent characteristic that must be uncovered before it can effectively be discerned. Massachusetts

already regulates *all* of the groundwater in its jurisdiction, eliminating the need for such "senseless bifurcations," and since the Commonwealth regulates its groundwater for, among other things, the express purpose of protecting surface waters and securing the benefits of the Clean Water Act, it does so in a way that effectively promotes both the remedial *and* the cooperatively-federalist goals of that statute.

CONCLUSION

Amici respectfully ask the Court to reverse the judgment below.

Respectfully submitted,

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