No. 18-260

IN THE
Supreme Court of the United States

COUNTY OF MAUI,
Petitioner,
v.

HAWAI'I WILDLIFE FUND; SIERRA CLUB – MAUI GROUP;
SURFRIDER FOUNDATION; AND
WEST MAUI PRESERVATION ASSOCIATION,
Respondents.

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

BRIEF OF UPSTATE FOREVER AND SAVANNAH RIVERKEEPER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

FRANK S. HOLLEMAN III
NICHOLAS S. TORREY
LESLIE GRIFFITH
SOUTHERN ENVIRONMENTAL LAW CENTER
601 West Rosemary Street
Suite 220
Chapel Hill, NC 27516
(919) 967-1450

CHRISTOPHER K. DESCHERER
SOUTHERN ENVIRONMENTAL LAW CENTER
463 King Street, Suite B
Charleston, SC 29403
(843) 720-5270

MICHAEL K. KELLOGG
Counsel of Record
SEAN A. LEV
THOMAS G. SCHULTZ
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(mkellogg@kellogghansen.com)

July 19, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

LEGISLATIVE MATERIALS

ADMINISTRATIVE MATERIALS

U.S. Envtl. Prot. Agency:

OTHER MATERIALS

INTEREST OF *AMICI CURIAE*[1]

Amici are two nonprofit conservation groups that have an interest in this case because they are parties to a related case pending before this Court, *Kinder Morgan Energy Partners, L.P. v. Upstate Forever*, No. 18-268 (U.S. filed Aug. 28, 2018). In that case, after the Fourth Circuit held that the Clean Water Act ("CWA" or "Act") covers indirect additions of pollutants from point sources to navigable waters, Kinder Morgan sought certiorari. This Court then invited the views of the Solicitor General in both *Kinder Morgan* and *Maui*, ultimately granting certiorari in *Maui* and holding *Kinder Morgan* pending a decision in this case.

The facts of *Kinder Morgan* illustrate the operation of the CWA in a different context than those of *Maui*. Kinder Morgan operates an underground petroleum pipeline that runs near tributaries of the Savannah River in Anderson County, South Carolina. In 2014, the pipeline ruptured, pouring more than 369,000 gallons of petroleum into the surrounding soil and groundwater. These pollutants quickly reached Brown's Creek, a tributary of the Savannah River a few hundred feet from the pipeline.

Two years after the spill, pollutants from Kinder Morgan's pipeline continued to flow through

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that the parties have consented to the filing of this brief.

groundwater and soil into navigable waters. After Kinder Morgan refused to stop the flow of pollutants into the tributaries, *amici* brought suit in the District of South Carolina.

Kinder Morgan moved to dismiss the complaint. It acknowledged that its pipeline was a "point source," that Brown's Creek is "navigable waters," and that gasoline from its pipeline had flowed into Brown's Creek. But it asserted that it was not required to remediate this pollution because "[t]he [p]ipeline did not discharge any product *directly* into any of these bodies of water." Defs.' Br. in Supp. of Mot. To Dismiss at 3, No. 8:16-CV-04003-HMH, ECF 14-1 (D.S.C. Feb. 17, 2017) (emphasis added). In other words, because the pollutants discharged by Kinder Morgan's pipeline had reached navigable waters by way of groundwater, those pollutants were no longer "from" Kinder Morgan's pipeline, but were in fact "from" the groundwater. And because "groundwater [i]s not a point source," *id.* at 12, the CWA did not apply. The district court granted Kinder Morgan's motion to dismiss, adopting its argument that *amici* had "failed to allege . . . that the pipeline discharged petroleum directly into navigable waters." *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 252 F. Supp. 3d 488, 494 (D.S.C. 2017).

The Fourth Circuit vacated and remanded. The court emphasized that "[t]he plain language of the CWA requires only that a discharge come 'from' a 'point source.'" *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 650 (4th Cir. 2018). The court then consulted the dictionary definition of "from," which "indicates 'a starting point: as (1) a point or place where an actual physical movement . . . *has its beginning*.'" *Id.*

(quoting *Webster's Third New International Dictionary* 913 (2002) ("*Webster's Third*")) (emphasis in *Kinder Morgan*).

Applying this definition, the Fourth Circuit reasoned that "a point source is the starting point or cause of a discharge under the CWA, but that starting point need not also convey the discharge *directly* to navigable waters." *Id.* (emphasis added). In reaching this holding, the court relied in part on Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), which observed that "the [CWA] 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.'" 887 F.3d at 650 (quoting 547 U.S. at 743 (plurality)) (emphases in *Rapanos*). The court also reasoned that Kinder Morgan's interpretation of the CWA "effectively would require that any discharge of a pollutant cognizable under the CWA be seamlessly channeled by point sources until the moment the pollutant enters navigable waters," which would "impose a requirement not contemplated by the Act." *Id.* Kinder Morgan's certiorari petition followed.

Amici thus have an interest in ensuring that the Court is presented with a faithful reading of the plain text of the CWA and a full discussion of the important statutory interests at stake.

SUMMARY OF ARGUMENT

The CWA prohibits "any addition of any pollutant to navigable waters from any point source" without a permit. 33 U.S.C. §§ 1311(a), 1362(12). In this case, pollutants from underground wells operated by petitioner County of Maui move through groundwater into navigable waters off the coast of

Hawaii. The question is whether these pollutants are added to navigable waters "from" petitioner's wells (a defined point source) within the meaning of the statute.

I. The plain text of the CWA is dispositive.

A. The word "from" "indicate[s] a starting point[,] as . . . a point or place where an actual physical movement (as of departure, withdrawal, or dropping) has its beginning." *Webster's Third* 913 (first definition). Here, because the "starting point" of the pollutants' movement was a point source, those pollutants were added "from" that point source.

Petitioner's argument that the word "from" in the CWA means "delivered by" is not supported by any of the dictionaries it cites. It is also contrary to common usage. When you receive a birthday card from your mother, that card is "from" your mother even if it is delivered by the mailman. So, too, are the pollutants "from" petitioner's wells even if they are delivered to navigable waters by way of groundwater.

B. Also atextual is the suggestion of some *amici* that pollutants are not "add[ed] . . . to navigable waters" if they are first released into groundwater. There is no dispute here that pollutants from petitioner's point source have reached navigable waters. That was proven scientifically. Under the terms of the statute, it is irrelevant whether these pollutants were added to navigable waters directly or after traveling through some other medium. They still ended up in navigable waters, and "any" such addition is covered by the CWA.

II. The statutory context of the word "from" within the CWA confirms this definition. The CWA focuses on controlling the "sources" of pollutants, not

the media through which they reach navigable waters. Indeed, the word "point source" itself is defined to include many sources of pollutants that necessarily add pollutants to navigable waters through other media, such as "well[s]," "rolling stock [i.e., train cars]," "container[s]," and "concentrated animal feeding operation[s]." 33 U.S.C. § 1362(14).

III. The history and purpose of the CWA provide further confirmation. Congress's express purpose was to control the discharge of pollutants "at the source." S. Rep. No. 92-414, at 7 (1971) ("S. Rep."), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3679. Petitioner would transfer the focus of the statute away from the source to the means by which pollutants reach navigable waters, with absurd results. If the CWA covers only pollutants added "directly" from a point source to navigable waters, then a polluter could design a pipeline that dumped pollutants into groundwater 10 feet away from a lake and avoid all liability when those pollutants were added to the lake.

IV. The Ninth and Fourth Circuits' standards are faithful attempts to determine whether a pollutant is "from" a point source. By contrast, the multi-prong test proposed by petitioner is not grounded in the text and could not be administered. Petitioner's test concedes that the CWA covers some indirect additions of pollutants to navigable waters, such as additions of pollutants through undefined "non-conveyances" (such as air), and that it covers the original point source in a series, even when that point source is not the "means of delivery." These concessions are ultimately fatal; there is simply no principled distinction between additions of pollutants through air or downstream ditches and pipes (which

petitioner acknowledges are covered) and additions of pollutants through groundwater (which petitioner asserts are exempt).

ARGUMENT

I. The Plain Text Of The CWA Is Dispositive

A. Pollutants Are "From Any Point Source" If Their Starting Point Is A Point Source

"'The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written[,]' . . . giving each word its 'ordinary, contemporary, common meaning.'" *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (citations omitted). Under the CWA, a permit is required for "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The phrase "from any point source" encompasses pollutants whose starting point is a point source and that travel to navigable waters through other media, such as over land, through the air, or via groundwater.

1. *The Word "from" Indicates a "Starting Point," Not a "Means of Delivery"*

The word "from" "indicate[s] a starting point[,] as . . . a point or place where an actual physical movement (as of departure, withdrawal, or dropping) has its beginning." *Webster's Third* 913 (first definition); *see also Random House Unabridged Dictionary* 770 (2d ed. 1993) ("*Random House*") ("from" is "used to specify a starting point in spatial movement") (first definition); *American Heritage Dictionary* 705 (5th ed. 2011) ("[u]sed to indicate a specified place or time as a starting point") (first definition). These definitions make clear that the word "from" – especially when used to describe

"actual physical" or "spatial" movement – refers to the "starting point" or "beginning" of that movement. Thus, when the CWA refers to pollutants added to navigable waters "from any point source," it means pollutants whose "starting point" is a point source. Under this plain definition, the medium through which pollutants travel to reach navigable waters has no bearing on where they are "from"; what matters is where their movement to the navigable water "begins."

Common usage of the word "from" reinforces this simple principle. The birthday card is "from" your mother even if it was delivered to you by a postman. When you land in San Francisco after leaving from New York, you have flown "from" New York even if you had a layover in Chicago.

This understanding of the word "from" – as designating a point source or place of origin – is as old as the English language itself. *See*, *e.g.*, Geoffrey Chaucer, *The Canterbury Tales* General Prologue, lines 12-16 ("Then longen folk to goon on pilgrimages, . . . And specially, ***from*** every shires ende / Of Engelond, to Canterbury they wende") (emphases added); William Shakespeare, *Henry IV* Part I, act 3, sc. 1, lines 55-57 (Glendower: "I can call spirits ***from*** the vasty deep." Hotspur: "Why, so can I, or so can any man, But will they come when you do call for them?"); John Milton, *Paradise Lost*, Bk. 1, lines 44-47 ("the Almighty Power / Hurld [Satan] headlong flaming ***from*** th' Ethereal Skie / With hideous ruine and combustion down / To bottomless perdition").

Petitioner argues (at 30-31) that the word "from" encompasses only a pollutant's "means of delivery." But petitioner relies on two idiosyncratic definitions

of the word "from" plucked from the ends of long lists of dictionary definitions and stripped of context. Specifically, petitioner asserts (at 29) that "from" refers to the "means" or "instrumentality" of something, and then jumps from these definitions to the assertion that "'from' means *delivered by*," a phrase not even used in petitioner's chosen dictionaries. That is wrong for several reasons.

First, the dictionary definitions on which petitioner relies – i.e., the "means" or "instrumentality" of something – are not the standard definitions of the word "from." The word "means" does not appear in any definition of "from" in *Random House*, and it appears in *Webster's* only in the seventh definition of the word. Similarly, the word "instrumentality" does not appear in any *Webster's* definition of "from," and it appears only in the sixth definition of "from" in *Random House*. "[C]onstruing statutory language is not merely an exercise in ascertaining 'the outer limits of [a word's] definitional possibilities,'" *FCC v. AT&T Inc.*, 562 U.S. 397, 407 (2011) (citation omitted), and petitioner cannot alter the "ordinary meaning" of the word "from" by mining the depths of dictionaries for non-standard definitions, *see Muscarello v. United States*, 524 U.S. 125, 131 (1998) (finding no "linguistic reason to think that Congress intended to limit the word 'carries' in the statute to any of these special definitions").

Second, the non-standard dictionary definitions of "from" offered by petitioner apply in contexts that are not relevant here. The definitions of "from" as a "means" or "instrumentality" of something make clear that they apply when "from" is used to describe abstract or metaphorical concepts, not physical movement. For instance, *Random House*'s definition

of "from" as an "instrumentality" gives as an example "death from starvation." Similarly, *Webster's* definition of "from" as a "means" gives as an example "all his misfortunes spring from that piece of folly." By contrast, where "from" is used to describe "actual physical" or "spatial movement" – such as in the phrase "from any point source" – it refers to the "starting point" or "beginning" of something. *See supra* p. 6.

Third, even petitioner's dictionary definitions do not support petitioner's second logical leap: that pollutants "from" a point source must be "delivered by" that point source. A point source can be the "means" or "instrumentality" of the addition of pollutants to navigable waters even if those pollutants reach navigable waters through other media, just as one's "misfortunes [can] spring from [a] folly" even if subsequent missteps exacerbate one's problems. And if the meaning of "from" were not enough, Congress has expressly chosen to include "*any* addition" of pollutants from "*any* point source" within the ambit of the CWA. Even if "point source" were defined as a "means" or "instrumentality," then, the CWA covers *any* means or instrumentality – even those remote from navigable waters. *See infra* p. 12.

2. *The Term "Point Source" Refers to the Source of a Pollutant, Not Its Means of Delivery*

The CWA's use of the term "point source" confirms that the statutory phrase "from any point source" refers to the "source" or "cause" of a pollutant – not its means of delivery.

The ordinary meaning of "source" is "a generative force or stimulus" or "a point of origin or procurement." *Webster's Third* 2177; *see Bond v.*

United States, 572 U.S. 844, 861 (2014) ("In settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term."). Thus, when the CWA refers to pollutants "from any point source," it refers to pollutants whose "point of origin" is a point source. The undisputed "point of origin" of the pollutants in *Maui* is petitioner's wells; in *Kinder Morgan*, it is a broken pipeline.

The statutory definition of the term "point source" confirms that a pollutant may be "from" a point source even if it is "add[ed] . . . to navigable waters" after traveling through other media. The term "point source" is defined to include "wells," "concentrated feeding animal operations," "containers," and "rolling stock" (i.e., train cars) – all "sources" of pollutants that do not discharge pollutants *directly* into navigable waters. Reading the phrase "from any point source" to require the *direct* discharge of pollutants into navigable waters would effectively read these point sources out of the CWA.

Petitioner asserts that, because a "point source" is defined as "any discernible, confined and discrete *conveyance*," 33 U.S.C. § 1362(14) (emphasis added), a point source must be a "means of carrying or transporting something." Pet. Br. 29 (quoting *Webster's* definition of "conveyance"). Based on this definition, petitioner argues that a point source must "always 'transport' pollutants" and that the phrase "from any point source" must therefore mean "delivered by" a point source. *Id.*

This argument is unavailing. *First*, it cannot be the case that a "point source" must "always 'transport' pollutants" from some location to navigable waters, as petitioner asserts. Rather, the statutory definition of "point source" includes many

sources of pollutants that do not themselves transport anything, such as "well[s]," "container[s]," and "concentrated animal feeding operation[s]." 33 U.S.C. § 1362(14). Petitioner's interpretation of "point source" would read these examples out of the statute.

Second, the complete statutory definition of the term "point source" (which petitioner omits) clarifies what is meant by "conveyance": a point source is a "discernible, confined and discrete conveyance . . . from which pollutants are or may be *discharged*." *Id.* (emphasis added). In the context of the CWA, a "discharge" means a "'flowing or issuing out.'" *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 376 (2006) (quoting *Webster's New International Dictionary* 742 (2d ed. 1954)). This makes clear that the relevant "conveying" or "transporting" of pollutants under the CWA is the "flowing or issuing out" of those pollutants "from" a point source – not the direct transporting of those pollutants *by* a point source from some other location.

In this regard, petitioner misreads this Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). There, a canal "collect[ed] ground water and rainwater from a 104-square-mile area in south central Broward County." *Id.* at 100. This water included phosphorous from farms in the area. *Id.* When the water in the canal reached a certain level, a pump station connected to the canal pumped this polluted water into undeveloped wetlands. The question was whether the pump station was a "point source." *Id.* at 105. The Court held that it was, rejecting the argument that the pump station was not a point source because it did not itself "generate

pollutants." *Id.* The Court reasoned that "a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'" *Id.*

Petitioner seizes on this excerpt, asserting (at 30) that this Court "held in *Miccosukee*" that a point source must "*convey* the pollutant to 'navigable waters.'" But the *Miccosukee* Court simply did not address whether a point source must *directly* add pollutants to navigable waters or whether pollutants are "from" a point source even if they pass through other media. It merely held that a point source need not "generate" pollutants."[2] That same principle applies to petitioner's wells, which collect pollutants generated by others and discharge those pollutants into navigable waters.

3. *Instead of Limiting the CWA's Scope to Additions of Pollutants to Navigable Waters "Directly" from a Point Source, Congress Made Clear That the CWA Encompasses "Any Addition" of "Any Pollutants" from "Any Point Source"*

Had Congress wanted to limit the CWA's reach to pollutants that were added to navigable waters *directly* from a point source, it would have said so. As Justice Scalia observed in *Rapanos*, Congress could simply have added the qualifier "directly" to

---

[2] Indeed, the "original source" that "generated" the phosphorus in *Miccosukee* was the nucelosynthesis that occurs during a supernova. But as the *Miccosukee* Court recognized, the word "from" in the CWA does not refer to the genesis of a pollutant's *existence.* Rather, it refers to the "starting point" of that pollutant's "actual physical *movement*" toward navigable waters. *See supra* p. 6.

the CWA. *See* 547 U.S. at 743 (plurality) ("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.'").

Here, however, Congress made clear that the CWA covers "any" addition of "any pollutant" from "any" point source. "When used (as here) with a 'singular noun in affirmative contexts,' the word 'any' ordinarily 'refer[s] to a member of a particular group or class without distinction or limitation' and in this way 'impl[ies] *every* member of the class or group.'" *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) (citations omitted). Thus, in the context of the CWA, the phrase "any addition" includes both "direct" and "indirect" additions of pollutants. The phrase "any point source" refers to point sources that are both immediately adjacent to and separated from navigable waters. And the phrase "any pollutant" encompasses pollutants added directly to navigable waters and pollutants added through other media.

Petitioner argues (at 32-33) that "any" simply means "one or some," such that "any point source" refers to "a single point source or multiple point sources." (Petitioner does not address the CWA's other uses of the word "any.") Under petitioner's view, if a pollutant travels through a series of point sources to reach navigable waters, the CWA covers the original point source; but if a pollutant travels from a point source through some other medium, the original point source is exempt. *Id.*

But "any" does not mean "one or some"; it means "every member of the class or group." *Iancu*, 138 S. Ct. at 1354. As long as pollutants are added to navigable waters from any point source, that point

source is covered by the CWA, whether the pollutants are added directly, through groundwater, or through a second, downstream point source. It makes little sense to think that Congress wanted to cover only direct discharges from a point source, but created an arbitrary exception to include "series of point sources" within the scope of the Act's coverage by using the phrase "any point source." "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.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626-27 (2018) (citation omitted).

Yet this is how petitioner attempts to explain Justice Scalia's clear statement in *Rapanos* that the CWA covers "the discharge into intermittent channels of any pollutant *that naturally washes downstream*." 547 U.S. at 743 (plurality). Petitioner claims (at 33) that Justice Scalia meant only that the CWA covered additions of pollutants "from one *or multiple* point sources." Not so: Justice Scalia's opinion explains that CWA liability attaches to point sources that do not discharge pollutants "directly into" navigable waters, 547 U.S. at 743 (plurality), and that pollutants carried from a point source to navigable waters via "indirect discharge" are subject to the Act, *id.* at 744. Justice Scalia's straightforward logic does not hinge on an idiosyncratic definition of the statutory term "any."

Petitioner's concession that the CWA covers some indirect additions of pollutants to navigable waters is ultimately fatal. There is no principled distinction between pollutants that travel from a point source to navigable waters through another point source and pollutants that travel to navigable waters through

some other medium, such as groundwater. In petitioner's proposed regime, if a pipe bursts and gasoline from that pipe travels through an irrigation ditch to navigable waters, that gasoline is "from" the pipe; but if the same pipe bursts and gasoline from that pipe travels diffusely over a roadway to navigable waters, the gasoline is no longer "from" the pipe, because the roadway is not a "point source." Petitioner "does not explain why Congress would draw such seemingly arbitrary distinctions." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1761 (2018).

B. Pollutants Are "Add[ed] . . . To Navigable Waters" If They Enter Navigable Waters

Petitioner does not dispute that pollutants from its wells are being "add[ed] . . . to navigable waters," *see* Pet. Br. 7-8, instead disputing that those pollutants are "from" its wells. Certain *amici* (including the United States) take something like the reverse position, arguing that pollutants are not "add[ed] . . . to navigable waters" if they are first released into groundwater. *See*, *e.g.*, U.S. Br. 12 ("[A] pollutant that is released to groundwater has not been 'add[ed] . . . to navigable waters['] . . . , even if the groundwater eventually carries that pollutant to a jurisdictional surface water."). These arguments are just as misguided as petitioner's.

Pollutants are "add[ed] . . . to navigable waters" if they reach navigable waters. In the context of the CWA, the verb "add" means "'to join, annex, or unite (as one thing to another) so as to bring about an increase (as in number, size, or importance) or so as to form one aggregate.'" *Los Angeles Cty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 568 U.S. 78, 82 (2013) (quoting *Webster's Third* 24).

When pollutants reach navigable waters, they "join" those waters "so as to bring about an increase" in the amounts of pollutants present in those waters. It is irrelevant whether these pollutants are added to navigable waters directly from a point source or whether they travel from a point source through some other medium; in either event, they have been "add[ed]" to navigable waters.

This is the common-sense meaning of "any addition" of pollutants to navigable waters from any point source: the amount of pollutants from the point source increases in the navigable waters. Accomplishing this addition indirectly rather than directly does not negate the increase from the point source.

Again, if there were any doubt about the meaning of the phrase "addition . . . to navigable waters," the CWA's inclusion of the modifier "*any* addition" removes it. *See supra* p. 12. The inclusion of this modifier means that the CWA applies as long as pollutants are "added to" navigable waters – even if they are also "added to" other media along the way, such as groundwater.

The United States' repeated protestations that the CWA "does not encompass pollutant releases to groundwater," U.S. Br. 15, is thus a red herring. Neither respondent nor *amici* have argued that the addition of pollutants to groundwater *alone* triggers liability under the CWA. *See*, *e.g.*, Resp. Br. 43 ("EPA's premises . . . lead only to the conclusion that the [CWA's] prohibition[s] . . . do not apply to discharges that add pollutants to groundwater *alone*.").

Rather, the trigger for liability under the CWA is the addition of pollutants "to navigable waters."

Those pollutants are "add[ed] . . . to navigable waters" even if they pass through other media, including groundwater. As the Ninth Circuit explained: "We are not suggesting that the CWA regulates all groundwater. Rather, in fidelity to the statute, we are reinforcing that the Act regulates point source discharges to a navigable water, and that liability may attach when a point source discharge is conveyed to a navigable water through groundwater." Pet. App. 16 n.2.

In any event, the United States' grudging concession (at 34) that "point source releases of pollutants that travel[] over land to jurisdictional surface waters [may] constitute[] unpermitted 'discharges' prohibited by [the CWA]" ultimately dooms its argument in the same way it dooms petitioner's. *See supra* pp. 14-15. There is no functional difference between a pollutant that "travels over land to jurisdictional surface waters" and a pollutant that travels through groundwater to those same waters. If one pollutant has been "added to" navigable waters, then so has the other.

II. The Structure Of The CWA Confirms Its Plain Meaning

The CWA's structure reinforces the simple principle that a pollutant is added to navigable waters "from" a point source even if it passes through other media. *See Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) ("'[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'") (citation omitted).

The CWA replaced a broken 1965 regulatory regime in which "water quality standards were to be set as the control mechanism." S. Rep. at 8, 1972

U.S.C.C.A.N. 3675. Under that framework, "[i]f the wastes discharged by polluters reduce[d] water quality below [specified] standards, action may be begun against the polluters." *Id.* at 4, 1972 U.S.C.C.A.N. 3671. That system proved unworkable because it "focused on the tolerable effects rather than the preventable causes of water pollution . . . [,] mak[ing] it very difficult to develop and enforce standards to govern the conduct of individual polluters." *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202-03 (1976).

The CWA effected "a major change in the enforcement mechanism of the Federal water pollution control program" by switching "from water quality standards to effluent limits" – direct restrictions on the discharges of pollutants at their points of origin. S. Rep. at 7, 1972 U.S.C.C.A.N. 3675. These effluent limits were intended to "eliminat[e] waste at the source," rather than treating the effects of that pollution. *Id.* at 12, 1972 U.S.C.C.A.N. 3679.

The CWA thus pursues its goal of "restor[ing] and maintain[ing] . . . the Nation's waters" by targeting the "sources" of pollutants. *See*, *e.g.*, 33 U.S.C. § 1251(a)(5) ("it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of *sources* of pollutants in each State") (emphasis added).

In the context of the CWA, a "source" is generally a man-made cause of pollution, as evidenced by the CWA's numerous references to the "operation" and "ownership" of such sources. *See*, *e.g.*, *id.* § 1317(d) ("[I]t shall be unlawful for any owner or operator of any source to operate any source in violation of any

such effluent standard or prohibition or pretreatment standard."); *see also United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993) ("The [CWA] generally targets industrial and municipal sources of pollutants, as is evident from a perusal of its many sections."). Naturally occurring elements – such as groundwater – are not "sources" of pollutants under the CWA.

The CWA divides regulatory responsibility between the federal and state governments based upon the "source" of the pollutant: Discharges from defined "point sources" are subject to federal permitting requirements, while additions of pollutants from nonpoint sources are regulated by the States. *See Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008) ("The CWA's disparate treatment of discharges from point sources and nonpoint sources is an organizational paradigm of the Act."). The CWA defines "point sources" to include such causes of pollution as "pipe[s]," "well[s]," and "container[s]." The CWA itself does not define "nonpoint sources," but does give a few examples of such sources, including "mining activities," 33 U.S.C. § 1329(h)(5)(A), "agricultural stormwater discharges," *id.* § 1362(14), and "return flows from irrigated agriculture," *id.* EPA guidance explains that "nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe)." EPA Office of Water, *Nonpoint Source Guidance* 3 (1987), https://bit.ly/2XxzwHN.

The CWA's clear focus on the sources of pollutants confirms that the word "from," as used in the CWA, refers to the source of the pollutants – i.e., their "point of origin" – and not to the means by which pollutants are delivered to navigable waters from a

source. Indeed, nowhere does the CWA impose liability or divide regulatory responsibility based on the media through which pollutants pass. The sections of the CWA that mention "groundwater" do so in the context of "*protecting* groundwater quality" as part of separate programs, 33 U.S.C. § 1329(i) (heading) (emphasis added). The CWA does not treat "groundwater" or any other natural medium as a "source" of pollutants. Rather, the relevant "source" of pollutants, under the CWA, is the structure that discharges the pollutants. Again, in *Maui*, that source is petitioner's wells; in *Kinder Morgan*, it is Kinder Morgan's pipeline.

III. The History And Purpose Of The CWA Confirm Its Plain Meaning

There is no need to resort to legislative history or appeals to policy to discern the plain meaning of the CWA. *See Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019) ("[L]egislative history is not the law."). But to the extent the Court determines that such considerations are relevant, they simply reinforce the CWA's plain meaning.

A. The Legislative History Of The CWA Shows That Congress Intended To Require Permits For Both Direct And Indirect Additions Of Pollutants To Navigable Waters

Legislative history provides ample evidence that Congress intended for the CWA to regulate discharges of pollutants to navigable waters through other media, including groundwater. The CWA reflected Congress's judgment that "it is essential that discharge of pollutants be controlled at the source," replacing an outmoded 1965 standard based on "the maximum level of pollution allowable in

interstate waters." S. Rep. at 4, 77, 1972 U.S.C.C.A.N. 3671, 3742.

Congress abandoned its failed attempt to deal with the effects of pollutants after they entered navigable waters and, with the Act, switched to controlling pollutants "at the source," including both direct and indirect additions of pollutants to navigable waters from that source. Thus, Representative Dingell, in reporting the conference committee bill to the House, explained that "[i]t is quite clear that [the CWA], 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*." H.R. Res. 1146, 92d Cong. (1972) (emphasis added). Groundwater was no exception; as the Senate report accompanying the 1972 passage of the CWA explained, "it must be remembered that rivers, streams and lakes themselves are largely supplied with water from the ground – not surface runoff." S. Rep. at 73, 1972 U.S.C.C.A.N. 3739. The Report thus recognized the "essential link between ground and surface waters and the artificial nature of any distinction." *Id.*

Moreover, "[t]he 1972 [C]ongress modeled the [CWA] after the Rivers and Harbors Act of 1899 [RHA]." *Plaza Health Labs.*, 3 F.3d at 647-48 (citing S. Rep. at 5, 76, 1972 U.S.C.C.A.N. 3672, 3738). The RHA, like the CWA, targeted man-made causes of pollution that could reach navigable waters through natural causes, making it illegal to "deposit . . . material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or

otherwise." 33 U.S.C. § 407. Congress's decision to model the CWA on the RHA – which covered discharges of pollutants into areas where they were "liable to be washed into . . . navigable water[s]," *id.*, not only discharges directly into navigable waters – lends further support to the notion that the CWA is intended to cover the indirect discharge of pollutants into navigable waters.

Petitioner nevertheless points (at 40) to the defeat of a proposed amendment to the CWA by Representative Aspin. That is another red herring: Representative Aspin's amendment would have triggered CWA liability for any addition of pollutants *to* groundwater – regardless of whether they ever reached navigable waters. As noted *supra* p. 16, neither respondent nor *amici* have argued that the CWA covers additions of pollutants to groundwater – only that the CWA covers additions of pollutants to navigable waters through groundwater.

Petitioner also asserts that its "means of delivery" test comports with Congress's intent "to make enforcement easier on regulators [in the CWA] . . . 'by making it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated.'" Pet. Br. 39 (quoting *California ex rel. State Water Res. Control Bd.*, 426 U.S. at 204). Of course, limiting the CWA to discharges of pollutants "directly from" point sources to navigable waters would "make enforcement easier on regulators" by leaving them with far less to regulate than the statutory text covers, but that was not the intent of Congress. Rather, Congress's intent was to target the "sources" of pollutants instead of the effects of those pollutants. *See supra* p. 21. Petitioner's

"means of delivery" test would frustrate this purpose by exempting many point sources of pollutants that cause the addition of pollutants to navigable waters, hamstringing regulators in much the same way that the prior effects-based regime did.

Moreover, Kinder Morgan's undisputed pollution of navigable waters with large amounts of gasoline from its pipe – like the fact that the Maui facility was designed to discharge to the ocean – shows that determining "which point sources are responsible" is often readily apparent and provides no grounds for departing from the statutory text.

B. The Ninth And Fourth Circuits' Holdings Comport With Longstanding Regulatory Practice And A Long Line Of Precedent

The Ninth and Fourth Circuits' decisions accord with those of prior courts – including this Court – over decades, as well as EPA's decades-long implementation of the CWA. Thus, contrary to petitioner's assertions (at 44), the Ninth and Fourth Circuits' holdings would not "disrupt[]" the status quo; they are the status quo.

"[F]rom the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates [the CWA], even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Rapanos*, 547 U.S. at 743 (plurality) (citing authority). The Second, Fourth, Seventh, Ninth, and Tenth Circuits have so held. *See Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 515 (2d Cir. 2005) (CWA covers pollutants that "enter surface water via groundwater"); *U.S. Steel Corp. v. Train*, 556 F.2d 822, 852 (7th Cir. 1977) (the CWA

"includes the authority to control disposals into [underground] wells"), *overruled on other grounds by City of West Chicago v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632 (7th Cir. 1983); *Quivira Min. Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985) (CWA covers discharges "through underground acquifers [sic] . . . into navigable-in-fact streams"); *Kinder Morgan*, 887 F.3d at 651; Pet. App. 24.

The only exceptions to this judicial consensus are a recent pair of Sixth Circuit decisions by divided panels. *See Kentucky Waterways All. v. Kentucky Utils. Co.*, 905 F.3d 925 (6th Cir. 2018); *Tennessee Clean Water Network v. Tennessee Valley Auth.*, 905 F.3d 436 (6th Cir. 2018), *cert. petition pending*, No. 18-1307 (U.S. Apr. 15, 2019). But both decisions rely critically on questionable interpretations of a term – "into" – that appears nowhere in the relevant statutory text. *See*, *e.g.*, *Tennessee Clean Water*, 905 F.3d at 444 ("The term 'into' indicates directness. It refers to a point of *entry*. Thus, for a point source to discharge *into* navigable waters, it must dump *directly* into those navigable waters—the phrase 'into' [sic] leaves no room for intermediary mediums to carry the pollutants.") (citations omitted). The word "into" appears only in a wholly separate provision of the CWA – the definition of "effluent limitation" – that has no relevance here. *See id.* at 451 (Clay, J., dissenting) ("[T]he majority's quoted definition of 'effluent limitation' from § 1362(11) – the supposed origin of the loophole – is not relevant to this case."). *Kentucky Waterways* and *Tennessee Clean Water* thus illustrate that the only way to reach petitioner's desired holding is by replacing the actual words of the CWA's relevant provision with more convenient ones.

EPA has for decades followed this judicial consensus. As the agency explained to the Ninth Circuit in 2016, its "longstanding position is that a discharge from a point source to jurisdictional surface waters that moves through groundwater with a direct hydrological connection comes under the purview of the CWA's permitting requirements." U.S. C.A. Br. 5, Dkt. #40. EPA espoused this interpretation at least as early as 1990, *see* Final Rule, *National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges*, 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990), and faithfully applied that interpretation for decades after, *see*, *e.g.*, Notice, *Reissuance of NPDES General Permits for Storm Water Discharges From Construction Activities*, 63 Fed. Reg. 7858, 7881 (Feb. 17, 1998) ("EPA interprets the [CWA] to regulate discharges to surface water via groundwater where there is a direct and immediate hydrologic connection"); Proposed Rule, *National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations*, 66 Fed. Reg. 2960, 3017 (Jan. 12, 2001) (similar).

EPA recently abandoned this long-held understanding. *See* Notice, *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). But EPA's about-face merely illustrates the mental gymnastics required to avoid the CWA's plain text: EPA now asserts that "the statute categorically excludes releases to and from groundwater from the permitting requirements of the [CWA]." *Id.* at

16,820. But EPA identifies no such exclusion in the text of the CWA, and it concedes that its rule is not based on any "single provision" of the CWA, *id.* at 16,814, but rather on "a holistic analysis of the statute, its text, structure, and legislative history," *id.* at 16,811.

EPA dismisses its own prior statements as "collateral" and tries to muddy its previous guidance by pointing to a handful of prior occasions on which EPA noted that "discharges to groundwater are not subject to the CWA." *Id.* at 16,817. By now, this is a familiar sleight-of-hand; this case deals not with discharges *to* groundwater, but with discharges *through* groundwater to navigable waters. *See supra* p. 16. On this latter question, both EPA and prior courts have been clear that the Act applies.

Petitioner is thus wrong to characterize (at 44) the Ninth and Fourth Circuits' holdings as "expansive, novel, and disruptive." Circuit courts and agencies have for decades applied a straightforward and uniform interpretation of the CWA that accords with its plain text. The Ninth and Fourth Circuits' holdings are simply the latest decisions in this long line of precedent.

For the same reasons, petitioner is wrong to assert (at 45) that the Ninth and Fourth Circuits' holdings "would vastly expand NPDES permitting." Petitioner suggests (at 46-47), without serious analysis, that all 650,000 underground injection control wells in the United States and all 22 million American homes that use septic tanks would become subject to permitting requirements under the Ninth and Fourth Circuits' tests. But EPA has applied the same test since 1990, and petitioner's regulatory hellscape has not materialized. That is because, as

both the Fourth and Ninth Circuits made clear, "a discharge through ground water does not always support liability under the Act. Instead, the connection between a point source and navigable waters must be clear." *Kinder Morgan*, 887 F.3d at 651 (citation omitted); *see* Pet. App. 24 (rejecting notion that "the [CWA] is triggered when pollutants reach navigable water, *regardless of how they get there*").

Thus, while EPA has long recognized that the rare septic systems "which discharge to a surface water must, and can," meet requirements of the NPDES permitting program,[3] widespread NPDES permit requirements have proven unnecessary because septic systems should not discharge to surface waters in practice, either directly or indirectly. This is unsurprising, given that existing siting requirements already require locating conventional septic systems to avoid discharges of pollutants to surface waters.

In short, the "sweeping and transformative consequences" prophesied by petitioner (at 52) have never materialized during the nearly three decades that EPA has applied the CWA to indirect additions of pollutants to navigable waters. *See Washington State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1020 (2019) (Gorsuch, J., concurring in the judgment) (rejecting a "hypothetical parade of horribles [that] has yet to take its first step in the real world").[4]

---

[3] EPA, *Response to Congress on Use of Decentralized Wastewater Treatment Systems* 5 (1997), https://bit.ly/2JFrUj3.

[4] The decision below is also consistent with "the venerable maxim *de minimis non curat lex* ('the law cares not for trifles')";

C. Petitioner's Interpretation Of The CWA Would Eviscerate The Statute

The CWA's express purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). By contravening the statutory text, petitioner's novel interpretation of the CWA would frustrate that purpose and create a dangerous loophole in the statute under which any polluter could discharge pollutants into a lake, river, or stream simply by burying the source of that discharge a few feet from the water's edge. As one court has observed:

> [I]t would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater.

Northern California River Watch v. Mercer Fraser Co., No. C-04-4620 SC, 2005 WL 2122052, at *2 (N.D. Cal. Sept. 1, 2005). Petitioner has no answer for these arbitrary results.

IV. Considerations Of Administrability Favor Respondents

As with legislative history, there is no need for the Court to consider administrability in determining the plain meaning of the CWA. *See New Prime Inc. v.*

---

invoking it does not add words to the statute because it "is part of the established background of legal principles against which all enactments are adopted." *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992).

Oliveira, 139 S. Ct. 532, 543 (2019) ("If courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would . . . thwart rather than honor 'the effectuation of congressional intent.'") (alterations in original; citation omitted). But to the extent the Court deems such considerations relevant, they again favor respondents. The Ninth and Fourth Circuits' tests are firmly grounded in the statutory text: at bottom, they simply ask whether a pollutant is "from" a point source. By contrast, petitioner's proposed multi-factor test injects questions that appear nowhere in the statutory text – such as whether a pollutant travels by air, through groundwater, or through another point source – and ultimately leads to bizarre and unworkable results.

A. The Ninth And Fourth Circuits' Tests Comport With The CWA's Text And Are Easily Administrable

Both the Ninth and Fourth Circuits reached the unremarkable conclusion that "the CWA requires only that a discharge come 'from' a 'point source,'" but "does not require a discharge *directly* to navigable waters . . . [or] a discharge *directly* from a point source." *Kinder Morgan*, 887 F.3d at 650 (emphases added); *see* Pet. App. 19 ("[A]n indirect discharge from a point source to a navigable water suffices for CWA liability to attach."). Both courts then addressed how to determine whether a pollutant was "from" a point source, reaching semantically distinct but functionally similar conclusions.

The Ninth Circuit held that pollutants present in navigable waters must be "fairly traceable" to a point source to be "from" that source under the CWA. Pet.

App. 24. The Fourth Circuit similarly reasoned that pollutants discharged by a point source into groundwater that subsequently reach navigable waters can be considered "from" that point source if there is a "direct hydrological connection" between the groundwater into which the pollutants are initially discharged and the navigable waters they ultimately reach. *Kinder Morgan*, 887 F.3d at 651. At the end of the day, though, the Fourth Circuit "s[aw] no functional difference between the Ninth Circuit's fairly traceable concept and the direct hydrological connection concept developed by EPA that we adopt today." *Id.* at 651 n.12.

Petitioner argues (at 31) that these tests "read[] . . . words into the CWA . . . that are not there." To the contrary, both tests represent attempts by different courts to describe the necessary fact-specific inquiry a court must undertake in any CWA liability case: whether a pollutant is added to navigable waters "from" a point source. Such tests necessarily add gloss to the statutory language, but they remain helpful and appropriate as long as they are "grounded in the text of the statute." *Star Athletica*, 137 S. Ct. at 1015.

This Court need not decide today which formulation, if either, more appropriately effectuates the statutory language. The issue before the Court is simply whether the CWA requires a permit when pollutants are added from a point source to navigable waters through an intermediary such as groundwater. Pet. Br. i. The Ninth Circuit itself "le[ft] for another day the task of determining when, if ever, the connection between a point source and a navigable water is too tenuous to support liability under the CWA," Pet. App. 25, and this Court need

not reach an issue not passed upon by the court below, *see Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) ("Ordinarily, we do not decide in the first instance issues not decided below.").

B. Petitioner's Atextual "Means Of Delivery" Test Conflicts With The CWA And Introduces Needless Complexity

In contrast to the Ninth and Fourth Circuits' tests, which simply implement the statutory term "from any point source," petitioner's convoluted multi-factor test – under which the CWA covers some indirect additions of pollutants to navigable waters but not others – lacks any textual basis and leads to arbitrary and bizarre results. Petitioner's proffered test takes simple statutory language – "any addition of any pollutant to navigable waters from any point source" – and transforms it into a flow chart that occupies almost an entire page of petitioner's brief (at 54).

Under petitioner's test, the CWA covers (1) pollutants added directly from a point source to navigable waters; (2) pollutants added from a point source to navigable waters through another point source; and (3) pollutants added from a point source to navigable waters through something that is "not a conveyance."

Petitioner's test thus concedes that the CWA covers at least two categories of pollutants that are added from point sources to navigable waters through other media. Petitioner tries to tie its first exception – pollutants that travel from a point source to navigable waters through a second point source – to the word "any" in the statute. As discussed *supra* pp. 13-14, that attempt fails. Petitioner cannot plausibly

separate discharges through a separate downstream point source, on the one hand, and discharges through other media, on the other.

Petitioner does not even attempt (at 54) to square its second proffered exception – pollutants that reach navigable waters through something that is "not a conveyance" – with its central contention that the word "from" captures only the *immediate* source of pollutants. Though petitioner never explains what it means to be "not a conveyance," this latter exception appears to be petitioner's attempt to carve out situations where, for example, "there is air between a pipe and the river below." But there is no principled distinction between pollutants that fall through air and pollutants that flow through groundwater: in both cases, natural forces (such as gravity) "deliver" the pollutants to navigable waters. Petitioner's arbitrary exception thus simply illustrates that impossibility of applying petitioner's interpretation consistently and reconciling it with the statutory text.

In any event, petitioner's attempt to carve out exceptions for some indirect discharges ultimately dooms its argument that the CWA covers only point sources that "deliver" pollutants directly to navigable waters. There is simply no way to reconcile petitioner's convoluted series of exceptions with the straightforward statutory text, which covers "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). A pollutant is either "from" a point source or it is not, but the origin of that pollutant does not depend on whether it passes through air, groundwater, another point source, or some other medium. If Congress wanted

to create such a complex regulatory regime, it would have said so.

CONCLUSION

The Ninth Circuit's judgment should be affirmed.

Respectfully submitted,

FRANK S. HOLLEMAN III
NICHOLAS S. TORREY
LESLIE GRIFFITH
SOUTHERN ENVIRONMENTAL LAW CENTER
601 West Rosemary Street
Suite 220
Chapel Hill, NC 27516
(919) 967-1450

CHRISTOPHER K. DESCHERER
SOUTHERN ENVIRONMENTAL LAW CENTER
463 King Street, Suite B
Charleston, SC 29403
(843) 720-5270

MICHAEL K. KELLOGG
Counsel of Record
SEAN A. LEV
THOMAS G. SCHULTZ
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(mkellogg@kellogghansen.com)

July 19, 2019