No. 18-260

IN THE

Supreme Court of the United States

COUNTY OF MAUI, HAWAII,

Petitioner,

v.

HAWAII WILDLIFE FUND, ET AL.,

Respondents.

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

BRIEF FOR *AMICI CURIAE*
FORMER ADMINISTRATORS OF THE
U.S. ENVIRONMENTAL PROTECTION AGENCY
IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are a bipartisan group of former Administrators of the United States Environmental Protection Agency (EPA).[2] *Amici*'s leadership of EPA stretches from the 1980s to this decade, including both Republican and Democratic administrations. *Amici* share a commitment to the uniform and consistent application of the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.*, as intended by Congress. In particular, *amici* share the view that the CWA charges EPA with protecting the navigable waters of the United States from pollutants discharged from point sources that travel to surface waters through groundwater. For decades, EPA has consistently articulated that view—and has regulated consistent with that view, including by issuing permits under the National Pollutant Discharge Elimination System (NPDES) program for point-source discharges to surface waters through hydrologically connected groundwater. Accepting the United States' recent reversal in position would effect a significant rollback in regulatory enforcement of the CWA that has been in place for decades.

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[1] In accordance with Supreme Court Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and that no party or counsel other than the *amici curiae* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this *amicus* brief.

[2] *Amici* are identified in an appendix to this brief.

SUMMARY OF ARGUMENT

For decades, EPA has consistently interpreted the CWA to apply the requirements of the NPDES program to the discharge of pollutants from a point source to navigable waters of the United States when it can be proven as a matter of fact that those pollutants travel through groundwater. That position—unbroken until a few months ago—is consistent with the text, structure, and purposes of the CWA. In contrast, the brand new (opposite) position articulated by the Solicitor General has no basis in the statutory text or scheme and would open a huge loophole in the congressionally mandated protection of surface waters. All agree that the CWA does not regulate the quality of groundwater *qua* groundwater. But the CWA *does* protect surface waters by limiting the introduction of pollutants from point sources—including when pollutants demonstrably travel from a point source to surface waters. This Court should reject the Solicitor General and petitioner's invitation to mandate a significant reversal in federal environmental policy by rolling back CWA protections in this context.

ARGUMENT

For decades—until a few months ago—the United States Environmental Protection Agency (EPA) has correctly understood that the Clean Water Act (CWA or Act), 33 U.S.C. § 1251 *et seq.*, regulates the discharge of pollutants from a point source when it can be proven that the pollutants travel to jurisdictional surface waters through groundwater. Indeed, EPA took that position as *amicus* in the court of appeals *in this case*. *See* U.S. C.A. Br. 3-5, 11-24. That longstanding position is correct because it is mandated by the CWA's

text, structure, and purpose. In contrast, the United States' new position—adopted after this Court granted the petition for a writ of certiorari in this case—is inconsistent with the statute and would open an enormous loophole in what Congress intended to be a comprehensive statutory scheme. The Court should reject the United States' newly discovered and misguided interpretation of the CWA and instead adopt EPA's longstanding position.

I. For Decades, EPA Has Correctly Interpreted The CWA To Apply To Point-Source Discharges Of Pollutants To Surface Waters Via Hydrologically Connected Groundwater.

Amici are former Administrators of EPA. They represent EPA leadership spanning Republican and Democratic administrations. And through each of their tenures, the Agency adhered to a consistent view that the CWA's National Pollutant Discharge Elimination System (NPDES) program applies to the discharge of pollutants from point sources to surface waters via groundwater with a direct and demonstrable hydrological connection to the surface waters. That longstanding view is compelled by the text, structure, and purposes of the CWA—which is why EPA espoused that view for decades, including in this case, and why it has long issued NPDES permits for discharges of pollutants similar to those at issue here.

A. The federal CWA is intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 301 of the CWA prohibits "the discharge of any pollutant" except "as in compliance with" specified provisions of the Act. *Id.* § 1311(a); *see id.* § 1362(12). The term "pollutant" is defined to include various types of

waste (including chemical wastes, solid waste, sewage, and biological materials) "discharged into water," and the term "discharge of a pollutant" is defined to include "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(6), (12). The CWA further defines "navigable waters" as "the waters of the United States, including the territorial seas" and defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any . . . well . . . from which pollutants are or may be discharged." *Id.* § 1362(7), (14).

The CWA thus establishes a regime in which point-source discharges of covered pollutants are prohibited unless they are authorized by a permit issued pursuant to the NPDES. 33 U.S.C. § 1342; *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987) ("Section 301(a) of the Act, 33 U.S.C. § 1311(a), generally prohibits the discharge of any effluent into a navigable body of water unless the point source has obtained an NPDES permit from the Environmental Protection Agency."). The CWA provides that the EPA Administrator or the States, *see* 33 U.S.C. § 1342(b), may "issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding" the general prohibition on discharges in Section 1311(a), "upon condition that such discharge will meet" statutory criteria or criteria established by the Administrator. *Id.* § 1342(a)(1). A typical NPDES permit limits the type and amount of pollutants that may be discharged, and imposes monitoring and reporting requirements on the discharger. *See ibid.*; *id.* § 1362(11). When numeric limitations are not feasible, the permitting agency may include "best management practices" requirements instead. 40 C.F.R. § 122.2; *id.* § 122.44(k). EPA

and States also have authority to issue a "general permit" covering a category of discharges in a specified geographical area where discharges can be managed without issuing individual permits. *Id.* § 122.28.

B. The CWA does not regulate the quality of groundwater; all parties agree that Congress left the regulation of groundwater *qua* groundwater primarily to the States.[3] The NPDES program is instead directed to protecting surface waters, and in particular to regulating any addition of pollutants *from* point sources *to* surface waters. For decades, EPA—the agency Congress charged with overseeing the CWA and the NPDES program—has repeatedly confirmed that the CWA covers the discharge of pollutants *from* point sources *to* surface waters *via* groundwater. That approach makes sense because when groundwater carries pollutants from a point source to surface waters, those pollutants have been "add[ed] . . . to navigable waters from any point source." 33 U.S.C. § 1362(12).

1. In 1990, EPA promulgated a final rule on NPDES permit applications for the discharge of storm water. *NPDES Permit Application Regulations for Storm Water Discharges*, 55 Fed. Reg. 47,990 (Nov. 16, 1990). In that rule, EPA explained that "discharges to ground waters [we]re not covered by th[e] rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body)." *Id.* at 47,997. A year later, the agency reiterated its view

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[3] Groundwater quality is regulated by the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*, to the extent groundwater affects "drinking water sources," *id.* § 300h(b)(1), defined as "underground water which supplies or can reasonably be expected to supply any public water system," *id.* § 300h(d)(2).

that the CWA "requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters." *1991 Final Rule Addressing Water Quality Standards on Indian Lands*, 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991). In that rule, EPA acknowledged "the strong language in the legislative history of the [CWA] to the effect that the Act does not grant EPA authority to regulate pollution of groundwaters"—and, critically, explained that "[i]n these situations, the affected groundwaters are not considered 'waters of the United States' but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters." *Ibid.* The agency reiterated that position again in 1997 and in 1998. *Final General NPDES Permit for Concentrated Animal Feeding Operations (CAFO) in Idaho ID-G-01-0000*, 62 Fed. Reg. 20,177, 20,178 (Apr. 25, 1997) (explaining that, although the CWA "does not give EPA the authority to regulate groundwater quality through NPDES permits," "groundwater may be affected by the NPDES program" "when a discharge of pollutants to surface waters can be proven to be via groundwater"); *Reissuance of NPDES General Permits for Storm Water Discharges from Construction Activities*, 63 Fed. Reg. 7858, 7881 (Feb. 17, 1998) ("EPA interprets the CWA's NPDES permitting program to regulate discharges to surface water via groundwater where there is a direct and immediate hydrologic connection.").

EPA reiterated its long-held view in a variety of other statements published in the *Federal Register* throughout the 1990s and early 2000s. *See*, *e.g.*, *Proposed General NPDES Permit for CAFOs in Idaho*, 60 Fed. Reg. 44,489, 44,493 (Aug. 28, 1995) (explaining

that permit "prohibits the discharge of process wastewater to waters of the United States by means of a hydrologic connection" and that "discharges that enter surface waters indirectly through groundwater are prohibited"); *Notice of Lodging of Consent Decree Pursuant to the CWA; ConAgra, Inc.*, 63 Fed. Reg. 55,409, 55,409 (Oct. 15, 1998) (explaining that consent decree addresses "violations of the CWA . . . including . . . unauthorized discharges of pollutants to surface waters via . . . hydrologically-connected groundwater"); *Hazardous Waste Identification Rule (HWIR): Revisions to the Mixture and Derived-From Rules*, 66 Fed. Reg. 27,266, 27,272 n.4 (May 16, 2001) (explaining that, although "[t]he current federal [NPDES] program under the CWA does not require permitting authorities to issue permits for discharges of wastewater to groundwater," "[t]he exception is those instances in which a discharge to surface water may occur via a hydrologic connection between a groundwater and surface water").

2. On the heels of those consistent and repeated statements of agency interpretation, EPA reiterated that view in 2001 in a "formal agency interpretation," accompanied by extensive legal analysis, as part of a notice of proposed rulemaking for concentrated animal feeding operations (CAFOs). Directly addressing whether the CWA's NPDES program applies to the discharge of pollution from a CAFO through groundwater, EPA "restat[ed] that the Agency interprets the Clean Water Act to apply to discharges of pollutants from a point source via ground water that has a direct hydrologic connection to surface water." *NPDES Permit Regulation and Effluent Limitations Guidelines and Standards for CAFOs*, 66 Fed. Reg. 2960, 3015 (Jan. 12, 2001). The agency then set out an extensive

legal argument in support of its long-held view, explaining both why EPA has authority to "determin[e] that a discharge to surface waters via hydrologically-connected ground waters can be governed by the Act" and why "the Act is best interpreted to cover such discharges." *Ibid.* In light of the text, structure, legislative history, and purposes of the Act—and relying on its "expertise in environmental science and policy, *id.* at 3018—the agency explained its view that "the Act is best interpreted to cover such discharges," *id.* at 3015.

Examining the text and structure of the statute, EPA reasoned that "the terms" of the CWA "clearly indicate Congress' broad concern for the integrity of the Nation's waters" by specifying, *inter alia*, that the requirements of the NPDES program apply to "'the discharge of any pollutant [from a point source] by any person.'" 66 Fed. Reg. at 3015 (quoting 33 U.S.C. § 1311(a)) (brackets in original). The agency acknowledged that "[s]ome sections of the CWA do directly apply to ground water" and noted that those and "other sections of the [CWA] may shed light on the question of whether Congress intended the NPDES program to regulate ground water quality." *Ibid.* But the agency went on to explain that "[t]hat question" "is not the same question as whether Congress intended to protect surface water from discharges which occur via ground water." *Ibid.* "EPA does not argue that the CWA directly regulates ground water quality," the agency explained. *Id.* at 3016. "In the Agency's view, however, the CWA does regulate discharges to surface water which occur via ground water because of a direct hydrologic connection between the contaminated ground water and nearby surface water." *Ibid.*

Examining the legislative history of the CWA, EPA explained that Representative Les Aspin had proposed an amendment to be included in the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, that would have extended the NPDES program to cover "any pollutant to ground waters from any point source." 66 Fed. Reg. at 3016 (quoting *Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 589 (1972)). Although that proposed amendment was ultimately rejected, the agency explained that "provisions in the amendment which would have deleted exemptions for oil and gas well injections were the more likely cause of the amendment's defeat." *Ibid.* EPA went on to explain that "there is no evidence that in rejecting the explicit extension of the NPDES program to all ground water Congress intended to create a ground water loophole through which the discharges of pollutants could flow, unregulated, to surface water." *Ibid.* "Instead," the agency explained, "Congress expressed an understanding of the hydrologic cycle and an intent to place liability on those responsible for discharges which entered the 'navigable waters.'" *Ibid.* The agency thus "determined that discharges via hydrologically connected ground water impact surface waters and, therefore, should be controlled at the source." *Ibid.*

The agency went on to explore its previous statements on this question, explaining that "EPA repeatedly has taken the position that the CWA can regulate discharges to surface water via ground water that is hydrologically connected to surface waters," identifying at least six such occasions. 66 Fed. Reg. at 3016-

3017. In so concluding, "[a]s a legal and factual matter, EPA has made a determination that, in general, collected or channeled pollutants conveyed to surface waters via ground water can constitute a discharge subject to the Clean Water Act"—and explained that "[t]he determination of whether a particular discharge to surface waters via ground water which has a direct hydrologic connection is a discharge which is prohibited without an NPDES permit is a factual inquiry, like all point source determinations." *Id.* at 3017. The interpretive statement also surveyed the case law on this question, explaining that "[t]he reasonableness of the Agency's interpretation is supported by the fact that the majority of courts have determined that CWA jurisdiction may extend to surface water discharges via hydrologic connections." *Ibid.*; *id.* at 3016.

The 2001 proposed rule ultimately emphasized that EPA "has made clear the rationale for its construction"—namely, that "[t]he Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwater and surface waters." 66 Fed. Reg. at 3018 (internal quotation marks omitted). "In these situations," EPA explained, "the affected ground waters are not considered 'waters of the United States' but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters." *Ibid.* (internal quotation marks and emphasis omitted). In the final rule that EPA ultimately adopted, it opted to continue with its existing case-by-case approach to determining which discharges to surface waters through groundwater are subject to the requirements of the NPDES program. *NPDES Permit Regulation and Effluent Limitation Guidelines and*

Standards for CAFOs, 68 Fed. Reg. 7176, 7216 (Feb. 12, 2003). In doing so, the agency explained that the final rule "shall [not] be construed to expand, diminish, or otherwise affect the jurisdiction of the Clean Water Act over discharges to surface water via groundwater that has a direct hydrologic connection to surface water." *Id.* at 7216-7217.

Since 2001, EPA and other federal agencies have reiterated the view that point-source discharges of pollutants that travel to surface waters via groundwater are governed by the NPDES program. In 2015, for example, EPA and the U.S. Army Corps of Engineers promulgated the "Clean Water Rule," which defines the scope of waters protected by the CWA and reaffirmed that, because groundwater itself is not included in that definition, groundwater quality is not subject to regulation under the CWA. *Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054 (June 29, 2015). But EPA later explained, in response to comments to the Clean Water Rule, that EPA "has a longstanding and consistent interpretation that the" CWA "may cover discharges of pollutants from point sources to surface water that occur via ground water that has a direct hydrologic connection to the surface water" and made clear that "[n]othing in this rule changes or affects that longstanding interpretation." EPA, *Clean Water Rule Response to Comments—Topic 10: Legal Analysis* 383 (internal quotation marks omitted).[4]

Even more recently, as noted above, the United States reiterated its position *in this case* in the Ninth

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[4] https://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_10_legal.pdf (last visited July 18, 2019).

Circuit in 2016. That brief traces the history of the EPA's position on the question presented, explaining that "EPA's longstanding position has been that point-source discharges of pollutants moving through groundwater to a jurisdictional surface water are subject to CWA permitting requirements if there is a 'direct hydrological connection' between the groundwater and the surface water." U.S. C.A. Br. 22. Notably, the United States argued in that brief that, "[t]o the extent there is statutory ambiguity about whether the CWA applies to discharges to jurisdictional surface waters through groundwater, EPA's" longstanding interpretation was entitled to deference pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). U.S. C.A. Br. 12, 24. Although the statutory text is clear, such deference makes particular sense in a statutory scheme that this Court has described as "establish[ing]" "a comprehensive regulatory program supervised by an expert administrative agency." *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). The Solicitor General makes no such argument with respect to the new position articulated in his brief in this Court. And, indeed, no degree of deference is due to the United States' new position, which both "conflicts with a prior interpretation" of the agency "and appears" to be "nothing more than a convenient litigating position." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (internal quotation marks omitted).

C. EPA's longstanding position is consistent with the statutory text, which prohibits the unpermitted "discharge of any pollutant by any person," 33 U.S.C. § 1311(a), where "discharge of a pollutant" is

defined to mean "any addition of any pollutant to navigable waters from any point source" or to "the contiguous zone or the ocean." *Id.* § 1362(12). In this case, the parties agree that petitioner has discharged pollutants from a point source and that those pollutants are entering the ocean. The only dispute is whether Congress's use of the words "from" and "to" means "directly into" or whether it instead includes indirect discharges that travel from the point source to surface waters through other media, including groundwater.

1. The word "to" is used "to indicate movement or an action or condition suggestive of movement toward (1) a place, person, or thing that is reached or is thought of as being reached." *Webster's Third New International Dictionary* 2401 (1993). That preposition does not, in its ordinary usage, require a contiguous connection between the starting point and the end point. The word "from" is similarly used "to indicate a starting point: as (1) a point or place where an actual physical movement (as of departure, withdrawal, or dropping) has its beginning." *Id.* at 913. Each word suggests movement from a starting point to an ending point. But neither word—in isolation or in combination—suggests an unbroken connection between start and finish with no intervening step. When a man says he is driving "from Maryland to New York," for example, everyone understands him to mean that Maryland is his starting place and New York is his destination—but no one would interpret his statement to mean that he will not pass through other States on his way from Maryland to New York. Similarly, when a woman says she is mailing a letter "from Texas to Florida," everyone understands her to mean that the letter will be transmitted by a postal delivery service rather than by

her own hand and that the letter will travel through and/or over the intervening States. The CWA's use of the words "from" and "to" should also be understood in this ordinary sense: when the Act prohibits the discharge of pollutants from a point source to surface waters, it includes pollutants that travel through groundwater (or over land or by other traceable means) from the point source to the surface waters. Justice Scalia recognized as much when he explained in his plurality opinion in *Rapanos v. United States* 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.'" 547 U.S. 715, 743 (2006) (quoting 33 U.S.C. § 1362(12)(A)) (emphases in original).

If there were any doubt about whether the words "to" and "from" include discharges that are directly connected from a point source to navigable water through an intermediary, the rest of the statutory scheme would dispel it. This Court has explained that "[t]he major purpose of the [CWA] was to establish a *comprehensive* long-range policy for the elimination of water pollution," *City of Milwaukee*, 451 U.S. at 318 (internal quotation marks omitted), and has noted that "Congress criticized past approaches to water pollution control as being 'sporadic' and 'ad hoc,'" *id.* at 325 (quoting S. Rep. No. 92-414, at 95 (1971)). Other parts of the relevant provisions confirm the Act's broad goal of safeguarding surface waters. The CWA defines "discharge of a pollutant to mean "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C. § 1362(12)(A) (emphases added). This Court has explained, when interpreting the similarly worded Clean Air Act, 42 U.S.C. § 7401 *et seq.*, that Congress's

repeated use of the word "any" in defining a statutory term indicates that Congress intended the definition to be "sweeping." *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007). In light of that intent, the only statutory interpretation that makes sense is one that includes pollution discharges from a point source to surface waters through groundwater.

2. To be clear, not all transmissions of pollutants *from* a point source *to* surface waters *through* groundwater are covered by the CWA, under EPA's long-held view. Where causation is a feature of statutory liability, ordinary principles of statutory construction usually require a showing of proximate cause—that is, a "direct relation between the injury asserted and the injurious conduct alleged." *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1306 (2017) (citation omitted). In this context, such a "direct relation" can be established without showing a directly contiguous physical relationship between the starting and finishing points. If an archer shot an arrow from Main Street to Elm Street, her release of the arrow would be the proximate cause of damage inflicted by the arrow's landing, even though the arrow traveled through air and space to get from the beginning of its journey to its end. So too here, when a pollutant travels from a point source to surface waters, there is a "direct relation" between the release and the subsequent pollution when the pollutant travels through groundwater with a direct hydrological connection to the receiving surface waters. Notably, EPA has never claimed that the CWA covers all transmissions of pollutants from a point source to surface waters via groundwater; it has always required a direct hydrological connection between point A and point B. *E.g.*, 56 Fed. Reg. at 64,892; 66 Fed. Reg. at

3016. As EPA has explained, whether a direct hydrological connection exists is a "factual inquiry" that depends on "time and distance" as well as "geology, flow, and slope." 66 Fed. Reg. at 3017. The concept of a direct hydrological connection is not an addition to the statutory text; rather, it is an interpretation of the text that incorporates ordinary principles of proximate cause to determine whether an addition of pollutants to navigable waters is "from" a point source within the meaning of the statute.

3. The Solicitor General's newfound position makes little sense in light of the text and structure of the CWA.

a. The Solicitor General defends the United States' new position primarily by arguing that the NPDES program does not regulate groundwater quality. But that point is uncontested. By its express terms, the CWA protects surface waters—and the NPDES program applies to pollution of "navigable waters," "the contiguous zone[,] or the ocean." 33 U.S.C. § 1362(12)(A), (B). But nothing in EPA's longstanding position purports to regulate groundwater quality. To the contrary, EPA has repeatedly disclaimed any attempt to regulate the pollution of groundwater *qua* groundwater. *See*, *e.g.*, 55 Fed. Reg. at 47,997; 56 Fed. Reg. at 64,892; 62 Fed. Reg. at 20,178; 66 Fed. Reg. at 3015-3016. Instead, EPA has regulated the pollution of *surface waters*, as mandated by the statutory text, which itself contains no exception for pollution that is delivered from a point source to navigable waters via hydrologically connected groundwater. That is a regulation of surface waters, not of groundwater quality. If, for example, a point source injected pollutants into groundwater—even groundwater flowing directly into

adjacent navigable waters—but stopped those pollutants before they reached the surface waters, there would be no addition of pollutants to the navigable waters, and the CWA's NPDES requirements would not apply. Congress left regulation of that type of pollution—and of the quality of groundwater more generally—largely to the States (except where a separate federal law applies).

The Solicitor General's argument in this Court that EPA's longstanding application the statute would necessitate the regulation of groundwater quality is curious in light of the United States' consistent practice of not regulating groundwater quality under the Act and of its explanation below that regulation of the discharge of pollutants from a point source *to* navigable waters *via* groundwater *is not* regulation of groundwater. U.S. C.A. Br. 17. Similarly, the United States presciently refuted the Solicitor General's later reliance (SG Br. 25-29) on the treatment of groundwater in legislative history, explaining that it "only supports the unremarkable proposition with which all courts agree—that the CWA does not regulate 'isolated/nontributary groundwater' which has no [effect] on surface water.'" U.S. C.A. Br. 18 (quoting *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001)) (brackets in original). That proposition, the United States explained, "does not undermine the conclusion that discharges of pollutants through groundwater to jurisdictional surface waters are subject to the NPDES program." *Ibid.*; *see id.* at 19 (explaining that "whether groundwater itself" is "a water within the meaning of the CWA" "is distinct from whether a CWA permit is required when pollutants

travel to jurisdictional surface waters through groundwater with a direct hydrological connection"); *id.* at 21 ("This emphatically is not a case about the regulation of groundwater. Instead it is about the regulation of discharges of pollutants to waters of the United States.").

In the court of appeals, the United States accused petitioner of "erroneously attempt[ing] to conflate the jurisdictional exclusion of groundwater with the role that groundwater can play as the pathway through which pollutants from a point source reach jurisdictional surface waters." U.S. C.A. Br. 25. In this Court, the Solicitor General repeats petitioner's mistake, suggesting (at 30) that adopting EPA's longstanding position would be tantamount to using "the CWA's NPDES permitting requirements" "for the protection of groundwater quality." The NPDES program is indisputably directed to the protection of surface waters—including by regulating point-source pollution that enters surface waters via groundwater. *Amicus* Edison Electric Institute similarly confuses (at 21-32) the regulation of groundwater *qua* groundwater with the regulation of pollutants from a point source added to surface waters through hydrologically connected groundwater, when it argues that EPA has repeatedly declined to exercise NPDES authority over groundwater.

b. Accepting the Solicitor General's new position would create a huge loophole in the regulation of point-source pollution of surface waters. If the NPDES program excludes point-source discharges to navigable waters through groundwater, polluters could avoid the permitting regime by simply depositing their pollutants in a pit several feet from a navigable water like Lake Michigan or the Missouri River and allowing

them to seep into those waters via groundwater. As the United States explained below, however:

> [I]t would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factor 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.

U.S. C.A. Br. 16 (quoting *N. Cal. River Watch v. Mercer Fraser Co.*, 2005 WL 2122052, at *2 (N.D. Cal. Sept. 1, 2005)). The Solicitor General now rejects that commonsense position.

Notably, the Solicitor General is not willing to commit to a statutory standard that would in all cases require *direct* transmission of pollutants from a point source to surface waters in order to qualify for coverage under the NPDES program. The Solicitor General's position is limited to exempting discharges that travel through groundwater—and he urges the Court "not [to] determine how the NPDES program might apply where pollutants released from a point source travel to jurisdictional surface waters over land." SG Br. 33. The only statutory basis the Solicitor General offers for drawing that line is the one discussed above: the CWA does not regulate the quality of groundwater. *Id.* at 34-35. That distinction is meaningless, however, once it is understood that EPA's longstanding position does not purport to regulate groundwater quality at all. What is left of the Solicitor General's position is an exemption apparently crafted for this litigation, without grounding in the statute or in EPA's historical enforcement of the CWA.

II. Accepting The Solicitor General's Newfound Position Would Require A Significant Retreat From EPA's Longstanding Enforcement Of The CWA.

The Solicitor General argues that if this Court were to accept EPA's longstanding position, that would "work 'an enormous and transformative expansion in EPA's regulatory authority.'" SG Br. 24 (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)). In fact, the opposite is true: accepting the Solicitor General's new position would work an enormous and transformative *rollback* in EPA's regulatory authority.

As the United States explained in its court of appeals brief, for years "EPA and states have been issuing permits for" "point-source discharges to jurisdictional surface waters through groundwater with a direct hydrological connection" "from a number of industries, including chemical plants, concentrated animal feeding operations, mines, and oil and gas waste-treatment facilities." U.S. C.A. Br. 29-30 (citing NPDES Permit No. NM0022306[5]; NPDES Permit No. WA0023434[6]). In 2016, for example, EPA issued an NPDES permit to a wastewater treatment facility in Wisconsin because data showed a direct hydrological connection between groundwater beneath the site and adjacent surface waters. EPA Region 5, NPDES Permit No. WI0073059 (Sept. 22, 2016).[7]

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[5] https://www.env.nm.gov/swqb/NPDES/Permits/NM0022306-Chevron-Questa.pdf.

[6] https://www.epa.gov/sites/production/files/2017-09/documents/r10-npdes-taholah-wa0023434-final-permit-2015.pdf.

[7] https://www.epa.gov/sites/production/files/2017-02/documents/wi0073059fnlprmt09_22_2016_0.pdf.

The Solicitor General therefore errs in asserting that adhering to the status quo would create a dramatic expansion of EPA's regulatory authority over the discharge of pollutants to surface waters. Nor is the Solicitor General correct (at 24-25) that adhering to EPA's longstanding view will suddenly subject private homeowners with faulty septic systems to unprecedented liability under the CWA. EPA already requires a NPDES permit for any septic system that discharges pollutants to surface waters. EPA, *Response to Congress on Use of Decentralized Wastewater Treatment Systems* 5 (Apr. 1997).[8] That requirement has not burdened homeowners because siting requirements for septic systems already seek to avoid discharges to navigable waters. *Ibid.* In any event, when EPA (or a State implementing the NPDES program) determines that a category of numerous discharges poses a threat to surface waters that can be managed without requiring individual permits, the agency can issue a general permit for activities conducted pursuant to proper practices specified in the general permit. EPA has done just that for the innumerable stormwater discharges from small construction projects. *Final NPDES General Permit for Stormwater Discharges from Construction Activities*, 82 Fed. Reg. 6534 (Jan. 19, 2017). And it has done the same for applications of pesticides. *Final NPDES Pesticide General Permit for Point Source Discharges from the Application of Pesticides; Reissuance*, 81 Fed. Reg. 75,816 (Nov. 1, 2016). Other *amici* make the same mistake in asserting that accepting EPA's longstanding interpretation of the

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[8] https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=200047VF.TXT.

CWA would expand liability and costs under the CWA for septic systems and green infrastructure. *See* Senators *Amicus* Br. 22-23; Wychmere *Amicus* Br. 10-12; Nat'l Conf. of State Legislatures *Amicus* Br. 8-19; Nat'l Ass'n of Clean Water Agencies *Amicus* Br. 12-20; Nat'l Ass'n of Home Builders *Amicus* Br. 4-16; Fed. Water Quality Coal. *Amicus* Br. 20-21; Energy Transfer Partners *Amicus* Br. 10-19; Agric. Bus. Orgs. *Amicus* Br. 20-32; U.S. Chamber of Commerce *Amicus* Br. 8-10.

Notably, neither petitioner, the Solicitor General, nor any of petitioner's other *amici* can identify any *actual* problem or unmanageable burden that has resulted from EPA's decades-long application of the NPDES program to the point-source discharge of pollutants that travel to surface waters through groundwater. *Amici*'s suggestions that the approaches adopted below and by the Fourth Circuit in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 (4th Cir. 2018), *petition for cert. pending*, No. 18-268 (filed Aug. 28, 2018)—both of which utilize a fact-specific, case-by-case approach just as EPA has done for decades—are unworkable and contain no limiting principles simply ignore that those courts merely reaffirmed EPA's existing approach to regulating these types of discharges. *See* Kinder Morgan *Amicus* Br. 27; Wash. Legal Found. *Amicus* Br. 16; Fed. Water Quality Coal. *Amicus* Br. 9-10, 18-20; States *Amicus* Br. 12, 18; Wychmere *Amicus* Br. 12; Nat'l Conf. of State Legislatures *Amicus* Br. 36-38; Nat'l Ass'n of Clean Water Agencies *Amicus* Br. 10-11. The same is true of *amici*'s arguments that NPDES permits will be difficult to craft in this context because of challenges in identifying monitoring locations and applying effluent limitations. *See* Kinder Morgan *Amicus* Br. 31;

Pac. Legal Found. *Amicus* Br. 19-20; Wash. Legal Found. *Amicus* Br. 11; Wychmere *Amicus* Br. 13; Fed. Water Quality Coal. *Amicus* Br. 19; Nat'l Conf. of State Legislatures *Amicus* Br. 30-36; Nat'l Ass'n of Clean Water Agencies *Amicus* Br. 12-20; U.S. Chamber of Commerce *Amicus* Br. 10-11; Edison Elec. Inst. *Amicus* Br. 38. As the United States explained in the court of appeals, EPA and States that implement the NPDES program have been issuing permits in this context for years.[9]

Finally, *amici* miss the mark in arguing that continuing to construe the CWA to cover point-source discharges to surface waters via hydrologically connected groundwater would displace various state and federal laws. *See* SG Br. 31; Kinder Morgan *Amicus* Br. 21-24; Wash. Legal Found. *Amicus* Br. 12; Senators *Amicus* Br. 20; Nat'l Ass'n of Clean Water Agencies *Amicus* Br. 29-37; Fed. Water Quality Coal. *Amicus* Br. 15-16; Edison Elec. Inst. *Amicus* Br. 33-39; States *Amicus* Br. 8, 20-24; Fla. Water Env't Ass'n *Amicus* Br. 9-10; Wychmere *Amicus* Br. 16-20. First, as discussed, the CWA does not regulate the quality of groundwater; the NPDES program regulates pollutants flowing from a

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[9] *Amicus* Agricultural Business Organizations' similar claim (at 29) that obtaining this type of NPDES permit costs "tens of thousands (or even hundreds of thousands) of dollars and months or years of waiting" is exceedingly misleading. The only source *amicus* cites discusses the costs associated with securing a very different type of permit—a permit under Section 404 of the CWA, 33 U.S.C. § 1344, for filling wetlands—that is not at issue here. *See* David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Resources J. 59, 62-63 (2002).

point source to surface waters via groundwater. Second, even where the requirements of the NPDES program apply, States themselves implement the NPDES program in nearly every State and are free to supplement the requirements of the NPDES program with additional protective measures. 33 U.S.C. § 1342(b)(1)(A); *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981) (noting that the CWA "created various federal minimum effluent standards"). Third, *amicus* Edison Electric Institute errs in contending (at 33-37) that EPA's longstanding position "would *supplant* regulations promulgated under [the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6901 *et seq.*,] that are specifically tailored to address groundwater contamination that reaches surface waters" because the RCRA excludes certain point-source discharges that are subject to NPDES permitting. To the contrary, EPA has long adhered to the view that "wastewater releases to groundwater from treatment and holding facilities . . . remain within the jurisdiction of RCRA" *and* "are subject to CWA jurisdiction, based on EPA's interpretation that discharges from point sources through groundwater where there is a direct hydrologic connection to nearby surface waters of the United States are subject to the prohibition against unpermitted discharges, and thus are subject to the NPDES permitting requirements." Memorandum from Michael Shapiro & Lisa K. Friedman, EPA Office of Solid Waste, *Interpretation of Industrial Wastewater Discharge Exclusion from the Definition of Solid Waste* 3 (Feb. 17, 1995).[10]

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[10] https://rcrapublic.epa.gov/files/11895.pdf.

In short, neither petitioner nor any of its *amici* has offered any valid reason to depart from the statutory text or discard decades of settled agency understanding that the CWA governs the point-source discharge of pollutants to surface waters through groundwater with a direct hydrological connection. This Court should reject the Solicitor General's new litigation position, which is not grounded in the statutory text or in sound policy.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

Amici curiae former Administrators of the U.S. Environmental Protection Agency are:

William Reilly, EPA Administrator 1989-1993,

Carol Browner, EPA Administrator 1993-2001, and

Gina McCarthy, EPA Administrator 2013-2017.