No. 18-260

In The
Supreme Court of the United States

COUNTY OF MAUI,

Petitioner,

v.

HAWAI`I WILDLIFE FUND; SIERRA CLUB - MAUI GROUP; SURFRIDER FOUNDATION; WEST MAUI PRESERVATION ASSOCIATION,

Respondents.

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

BRIEF OF *AMICI CURIAE* ANDERSON COUNTY, SOUTH CAROLINA AND DECATUR COUNTY, TENNESSEE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI*[1]

The two localities listed as *amici curiae* represent Southeastern, county governments in support of the critical role that the Clean Water Act ("CWA" or the "Act") plays in helping localities foster economic growth while promoting sustainable use of natural resources within our communities.

Anderson County, South Carolina voices an acute concern as it was the site of a 2014 pipeline rupture that released over 369,000 gallons of gasoline. Much of this gasoline traveled fewer than 1,000 feet—and in some instances as little as 400 feet—through groundwater and soil before entering two tributaries of the Savannah River. This event triggered the decision in *Upstate Forever v. Kinder Morgan Energy Partners*, *L.P.,* 887 F.3d 637 (4th Cir. 2018), petition for *cert*. filed, (Aug. 28, 2018) (No. 18–268), in which the Fourth Circuit held "in agreement with the Second and Ninth Circuits that to qualify as a discharge of a pollutant under the CWA, that discharge need not be channeled by a point source until it reaches navigable waters." *See* 887 F.3d at 651.

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[1] *Amici Curiae* are authorized to submit this brief on behalf of their respective counties pursuant to Supreme Court Rule 37.4. Additionally, Respondents have filed a letter with the Clerk indicating blanket consent to the filing of *amicus* briefs, and Petitioner has given *Amici Curiae* written consent for the filing of this brief by electronic mail sent on June 24, 2019. No counsel for any party authored this brief in whole or in part, and no person or entity other than above-named *amici curiae* and their counsel made a monetary contribution intended to fund its preparation or submission.

Decatur County, Tennessee is a small community on the banks of the Tennessee River. The County leverages its unique location to promote economic development along the river, annually hosting the Carl Perkins Bass Classic fishing tournament. The County is also home to a municipal waste landfill operated by a third party. The operator took the risky step of accepting highly reactive industrial aluminum smelting waste, which is now alleged to be causing uncontrolled "point source" discharges of toxic leachate into navigable waters. Having collected fees for the industrial waste, the operator now wants to walk away from the problem and foist responsibility onto local taxpayers. The County and the landfill operator are currently in litigation over the site. *See Waste Services of Decatur, LLC v. Decatur County, Tennessee,* 367 F.Supp.3d 792 (W.D. Tenn. 2019). The operator has filed a motion to dismiss, seeking to avoid CWA liability for discharges that travel the short route from the leachate collection system into Buck Branch Creek via a few hundred feet of groundwater.

SUMMARY OF ARGUMENT

Local government *amici* seek to highlight for the Court how applying the CWA as Congress drafted it aids counties and plays a unique role in preserving local authority. *Amici* support CWA enforcement in cases such as this one to remain politically accountable to our constituents and use the important tool Congress put in place to prevent environmental harm to navigable waters within our jurisdictions.

Many sources of pollution are sited and permitted pursuant to other federal statutes that allow for the exercise of the power of eminent domain, *see, e.g.,* Pub. L. No. 77-197, ch. 333, § 5 (1941) (authorizing construction of petroleum pipeline at issue in *Upstate Forever*), leaving localities with few options to respond to community concerns. *Amici* recognize that citizen-suit enforcement, as upheld by the U.S. Court of Appeals for the Ninth Circuit, provides an essential vehicle for community engagement in environmental decision-making. Put simply, the Court of Appeals' decision helps preserve local accountability by providing citizens and county governments with access to a federal enforcement process. *See* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory,* 90 COLUM. L. REV. 346, 393-95 (1990).

There is no replacement for the National Pollutant Discharge Elimination System ("NPDES") when it comes to protecting navigable waters. Federal provisions that relate to groundwater contamination, *e.g.,* the Safe Drinking Water Act, 42 U.S.C. § 399h-8, are not intended to address the concerns at issue here. The pollution in *Hawaii Wildlife Fund* is not contamination of groundwater *qua* groundwater. Rather, it is the contamination of navigable waters from a discrete point source where pollution flows a short distance on or through another medium. That medium may sometimes be groundwater, but not always. *See, e.g., Peconic Baykeeper, Inc. v. Suffolk County,* 600 F.3d 180, 188 (2d Cir. 2010) (air serving as intermediary between point source discharge from pesticide spray nozzles and navigable waters).

There is no possibility that application of the CWA would require NPDES permits for 22 million residential septic tanks across the country, as Petitioner alleges. *See* Br. of Pet'r, at 47. As local governments working day-in and day-out to address homeowner concerns, we know that State-level wastewater regulations already mandate that septic tanks be constructed to prevent leachate from reaching waterways. Well-maintained septic systems do not cause "pollution of groundwater, wells, rivers, and lakes." *See* South Carolina Department of Health and Environmental Control *"Overview—Septic Tanks,"* *at* https://www.scdhec.gov/environment/your-home/septic-tanks/overview-septic-tanks (last visited July 5, 2019). Petitioner's argument would transform the Ninth Circuit's "fairly traceable" analysis into an "unfairly traceable" test.

Not only is enforcement of the CWA's point source protections good public policy, it is also required by the text of the statute. Petitioner's argument that a point source discharge could avoid regulation because of intermediate travel through groundwater ignores the common definition of a "source" as a "point of origin." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED, at 2177 (1993). The pollution at issue in *Hawaii Wildlife Fund* did not originate in groundwater. Rather, the undeniable "source" of the pollution is the collection of wells at the Lahaina Wastewater Reclamation Facility.

The distinction between point and nonpoint sources is not one of directness versus indirectness, as Petitioner claims, but one of discreteness versus

diffuseness. Point sources require NPDES permits when a discrete "well" can be identified as the original "source" of the pollution. 33 U.S.C. § 1362(14). Nonpoint sources are exempt because nonpoint pollution "arises in such a diffuse way, it is very difficult to regulate through individual permits." *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002).

Pollution from nonpoint sources sometimes flows *directly* into navigable waters—such as run-off from a timber harvest adjacent to a river—but the "directness" of that discharge to the waterbody does not trigger NPDES requirements. Conversely, when a discrete conveyance such as a well *indirectly* contaminates navigable waters, that pollution remains properly regulated as a point source discharge under the CWA, just as it was before the 1972 amendments to the Federal Water Pollution Control Act. *See United States v. Esso Standard Oil Co. of Puerto Rico*, 375 F.2d 621, 623 (3d Cir. 1967). The legislative history of the CWA supports this straightforward reading of the statutory language. *See* 118 Cong. Rec. 33,758-59 (1972) (statement of Representative John Dingell, discussing *Esso* and the term "discharge of a pollutant" in 33 U.S.C. § 1362(12)).

That is why neither the Ninth nor Fourth Circuits have applied the CWA to regulate groundwater whatsoever. Rather, their applications of the CWA recognize that exempting indirect, point source discharges from the NPDES program would open the door to obvious gamesmanship. Instead of running an outfall pipe directly to navigable waters,

an operator could simply bury its pipe a few feet from the river's edge and allow the discharge to flow through soil and groundwater before reaching a protected stream. Such an interpretation would gravely hinder our ability as county governments to aid our residents in alleviating the harms caused by point source contamination.

ARGUMENT

I. Petitioner's Test to Limit CWA Jurisdiction Would Undermine Local Government Autonomy.

A fundamental concern that *amici curiae* have with Petitioner's argument is that it would undermine local government authority and autonomy. The 369,000-gallon spill of petroleum products at issue in *Upstate Forever* highlights the nature of this threat. *Upstate Forever* addresses a discharge from a 3,180-mile interstate pipeline that was sited under federal law and constructed through application of the federal power of eminent domain. *See* Pub. L. No. 77-197, 55 Stat. 610 (1941) (Congress authorizing the "exercise of the right of eminent domain" for construction of the pipeline); Proclamation No. 2505, 55 Stat. 1670 (Aug. 23, 1941) (executive action delineating the route of the pipeline); Kinder Morgan, *Plantation Pipe Line Company (PPL)*, https://www.kindermorgan.com/pages/business/products_pipelines/plantation.aspx (map of the pipeline) (last visited July 2, 2019).

If Anderson County, South Carolina had attempted to prohibit pipeline construction or

impose additional public-safety protections (*e.g.,* ordinances addressing nominal pipe diameter or wall thickness of the pipe), those local ordinances likely would have been stricken as unlawful and preempted by the federal statute declaring the pipeline's construction as necessary for national defense. *See* Pub. L. No. 77-197, 55 Stat. 610 (1941); *Virginia Uranium, Inc. v. Warren,* ___U.S.___, 139 S. Ct. 1894, 1901 (Gorsuch, J., plurality opinion).

The state of affairs in Anderson County, South Carolina is not unique. Indeed, there is a long history of federal statutes allowing for the exercise of eminent domain powers, *see, e.g., Kohl v. United States,* 91 U.S. 367 (1875) (upholding use of eminent domain pursuant to an Act of Congress for the "acquisition of a site for a post-office in Cincinnati"); Energy Policy Act of 2005 § 1221, 16 U.S.C. § 824p (allowing permit holders for certain power line projects to "acquire the right-of-way by the exercise of the right of eminent domain"), leaving localities with limited options to respond to community concerns.

The permitting obligations and citizen-suit provisions of the CWA provide important mechanisms that preserve local opportunities to address unpermitted discharges that contaminate our waters. The CWA's citizen-suit provision expressly allows municipalities, including counties, to "commence a civil action" to enforce point source requirements. *See* 33 U.S.C. § 1365(a), (g); 33 U.S.C. § 1362(4), (5). Thus, local governments have dual responsibilities under the Act. They may be required to obtain permits when they are the discharging entity, and they may be called upon to

initiate enforcement when they and their communities are adversely affected by an unpermitted discharge.

In *Rapanos,* the plurality opinion by Justice Scalia observed:

> [I]t makes no difference to the *statute's* stated purpose of preserving States' 'responsibilities and rights [under the CWA],' § 1251(b), that some States wish to unburden themselves of them. Legislative and executive officers of the States may be content to leave 'responsibilit[y]' with the [U.S. Army] Corps [of Engineers] because it is attractive to shift to another entity controversial decisions disputed between politically powerful, rival interests. That, however, is not what the statute provides.

Rapanos, 547 U.S. 715, 737 n.8 (emphasis in original). In the present case, of course, it is Petitioner that wishes to "unburden" itself of its CWA obligations as a local government by eviscerating an avenue for citizen-suit enforcement brought by residents of the County of Maui.

Local government *amici* are responsible for protecting community members and providing essential services, including drinking water, sewage treatment, and stormwater management. This responsibility necessarily involves our own compliance with the CWA. Erasing CWA protections against unpermitted, point source discharges—simply because the source is not placed directly into a navigable waterway—would allow private

dischargers to skirt the text of the CWA and harm our residents.

Indeed, that is the precise situation faced by Decatur County, Tennessee, where a North Carolina-based landfill operator seeks to avoid liability for water contamination it is alleged to have caused, leaving local residents holding the bag. *See* Water Quality Act of 1987, Pub.L. No. 100–4, § 507, 101 Stat. 7, 78 (1987) ("For purposes of the Federal Water Pollution Control Act, the term 'point source' includes a landfill leachate collection system."). To be clear, it is not just the environmental threat that concerns Decatur County officials; it is the threat to taxpayers who face the prospect of a costly cleanup that would overwhelm the tax base in this poor, rural community. *See* Anita Wadhwani, *Landfill Operator Tries To Walk Away From Environmental Disaster; Small Town Fights Back*, NASHVILLE TENNESSEAN (Apr. 15, 2019), *available at* https://www.tennessean.com/story/news/2019/04/15/decatur-county-landfill-lawsuit-toxic-leachate/3425243002/ (last visited July 12, 2019).

In *Upstate Forever,* Anderson County, South Carolina filed an *amicus* brief in support of its residents, observing that the discharge of "an estimated 370,000 gallons" of petroleum from a Kinder Morgan pipeline "was discovered by local citizens" and that the release flowed a short distance from the pipe to two creeks, both of which were within the Savannah River Basin. *See* Br. of Anderson County, South Carolina as *Amicus Curiae* in Support of Plaintiffs-Appellants Upstate Forever and Savannah Riverkeeper, at 4, Case No. 17-1640, Doc: 23-1 (filed July 19, 2017).

The distance from the point of discharge to Cupboard Creek (a tributary feeding the Savannah River), was as little as 400 feet, or roughly the length of the United States Supreme Court Building. *See The Court Building, at* https://www.supremecourt.gov/about/courtbuilding.pdf (last visited July 5, 2019). Under Petitioner's theory of the CWA, even this undeniable pollution of a navigable water by a point source would be exempt from the Act's permitting requirements because of the intervening 400 feet. That reading of the CWA is unsupported by the text of the statute and would allow an easy opportunity for gamesmanship by polluters.

In situations such as these, where local water quality is harmed by point source pollution, municipalities have the statutorily guaranteed authority to respond. *See* 33 U.S.C. §§ 1362, 1365. County governments like *amici* may even be said to have a responsibility to respond in order to address their constituents' local concerns. *See* Richard Briffault, *Our Localism: Part II—Localism and Legal Theory,* 90 COLUM. L. REV. 346, 393-95 (1990) (discussing Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980)). By attempting to rewrite the text of the Act, Petitioner would remove a vital tool that Congress crafted for local government *amici* to protect our own communities and the Nation's navigable waters.

II. Petitioner Grossly Misreads the Ninth Circuit's Decision to Wrongly Assert It Would Require Expanded Regulation of Septic Tanks.

Petitioner alleges that under the CWA as applied by the Ninth Circuit, individual homeowners would be subject to point source permitting across "22 million homes in the country." *See* Br. of Pet'r, at 47. This claim is as absurd as it sounds. Petitioner's argument overlooks that State regulations have long-controlled residential septic tanks in order to prevent point source discharges into navigable waters. State-compliant septic tanks, therefore, should not violate the Act's NPDES requirements.

In South Carolina, regulations define "[s]afe treatment and disposal of domestic wastewater" to require that any septic tank releases "will not violate federal and state laws or regulations governing water pollution" and "will not pollute or contaminate any waters of the state." *See* S.C. Code Regs. § R. 61-56.100. The South Carolina regulations further mandate, "No septic tank effluent or domestic wastewater or sewage shall be discharged to the surface of the ground or into any stream or body of water in South Carolina without an appropriate permit from the Department." *See* S.C. Code Regs. § 61-56.301. Similarly, Tennessee law requires that residential septic tanks "shall be so located, constructed and maintained that wastes discharged to or from such systems … (3) Do not pollute or contaminate surface or ground water; [and] … (6) Will not violate any other laws or regulations

governing water pollution or sewage disposal." *See* Tenn. Code Ann. § 68-221-401.

As South Carolina's regulators have explained, "[w]ell designed, well-maintained septic tank systems" *do not* cause "pollution of groundwater, wells, rivers, and lakes." *See* South Carolina Department of Health and Environmental Control *"Overview—Septic Tanks," at* https://www.scdhec.gov/environment/your-home/septic-tanks/overview septic-tanks (last visited July 5, 2019). The obligation of the rare, derelict source to comply with the CWA when it threatens navigable waters is not new or pervasive. *See* Tenn. Code Ann. § 68-221-411 ("where a provision of this part is found to be in conflict with a provision of any private or public act or local ordinances or code existing May 4, 1973, the provision which establishes the higher standard for the promotion and protection of the health and safety of the people shall prevail").

Not surprisingly, Hawaii's regulations also require that wastewater must "not contaminate or pollute any drinking water or potential drinking water supply, or the waters of any beaches, shores, ponds, lakes, streams, groundwater, or shellfish growing waters," and further, that wastewater systems will be operated in a way that is "consistent with the State's administration of the National Pollutant Discharge Elimination System" for point source discharges. *See* Haw. Admin. Code § 11-62-02. To meet these standards, Hawaii regulations prohibit the construction of any new cesspools, which might fail to prevent releases of sewage into navigable waters. *See* Haw. Admin. Code § 11-62-36.

As county governments, *amici* depend on State standards to ensure septic systems operate properly in our communities. We have no interest in duplicating protections, but we do have an interest in protecting communities from defective or noncompliant septic systems. The takeaway is that well-maintained septic tanks should not release pollutants into the navigable waters, and poorly designed or neglected systems should be and already are subject to regulation and remediation under both the CWA and State laws—with no problems arising from such common-sense requirements.

Petitioner's argument about "traceability," Br. of Pet'r, at 31, attempts to read the word "fairly" out of the Ninth Circuit's analysis. It calls to mind a comment during oral argument in *Rapanos* from the Chief Justice:

> The … notion in *SWANCC* of a significant nexus suggests that there are some bodies of water or puddles that are going to have a nexus, but it's not going to be significant enough. We didn't just say any nexus. It said significant nexus.

See Transcript of Oral Argument at 50, *Rapanos v. United States*, 547 U.S. 715 (2006) (Nos. 04-1034, 04-1384).

By the same token, the Ninth Circuit did not say "traceable;" it said "fairly traceable." Analyzing whether a discharge is "fairly traceable" to the point source necessarily implies that there will be some additions of pollutants that have such an attenuated connection to any point source that, just as with common-law proximate cause analysis, they would

not be considered fairly traceable or added via an identifiably "direct hydrological connection." *Upstate Forever,* 887 F.3d at 651. As a result, a court would not deem them to be "from" the point source and they would not be subject to the Act's NPDES requirements. Petitioner's misreading of the Court of Appeals would subject homeowners not to a "fairly traceable" analysis, but to an "unfairly traceable" test.

III. Potential Liability Under Other Statutes Does Not Allow Petitioner to Skirt Its NPDES Obligations.

Petitioner misapprehends the States' nonpoint source programs, incorrectly asserting that the County of Maui's pollution of navigable waters from discrete wells would be better addressed through another statutory regime. *See* Br. of Pet'r, at 23. Kinder Morgan, as *amicus curiae* in support of Petitioner, makes a similar error in alleging that eviscerating the point source program "will not create any loophole for creative polluters, as there is simply no regulatory gap in need of filling." *See* Pet. for Writ of Cert. at 28, *Upstate Forever* (No. 18-268). These assurances are the proverbial dog that did not bark. If other statutes impose equally rigorous protections, then why bother to challenge these supposedly duplicative CWA obligations? The reality is that no law outside of the NPDES program is designed to address what is undeniably a discharge from a point source that indirectly contaminates navigable waters. Without enforcement of the CWA's longstanding prohibitions against pollution

from individual, point source dischargers, this protection will be drastically weakened.

Petitioner's citation to the Safe Drinking Water Act ("SDWA"), ignores that while the SDWA helps protect groundwater, it does *not* substitute for the CWA's protection of navigable waters. *See* 42 U.S.C. § 300h-8 ("to ensure the coordinated and comprehensive protection of ground water resources"). Primarily, the SDWA addresses the need for post-contamination treatment of water, in contrast to the CWA's emphasis on the prevention of contamination at the outset. *See* 42 U.S.C. § 300g-1(b)(8) (requiring EPA to "promulgate national primary drinking water regulations requiring disinfection as a treatment technique for all public water systems"). As local governments, we have significant experience navigating federal and State environmental laws, and recognize that the SDWA addresses groundwater as the *end point* in the pollution process rather than as a short medium between a point source and a navigable waterway. Critically, the SDWA aids in requiring treatment of contaminated water for public use, but it is *not* directed at preventing the pollution of navigable waters. Only the CWA does that.

Furthermore, the fact that discharges from wells in Maui, a pipe near Anderson, South Carolina, or a leachate collection system in Decatur County, Tennessee might trigger violations of other environmental, public health, and safety laws does not exempt these sources of pollution from CWA liability under the plain language of the statute. Petitioner has not pointed to any statutory language that would exempt polluters from CWA compliance if

they were also in violation of other laws. In fact, this Court has acknowledged that a complex pollution problem might be subject to both point source and nonpoint source regulation. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106-07 (2004) ("We note … that [33 U.S.C.] § 1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition.") (emphasis in original). *See also United States v. Earth Sciences, Inc.,* 599 F.2d 368, 373 (10th Cir. 1979) ("Mining and the other categories listed in §1314(f)(2) may involve discharges from both point and nonpoint sources, and those from point sources are subject to regulation.").

IV. The Point/Nonpoint Source Distinction Is Not One of Direct Versus Indirect Discharges, But One of Discrete Conveyances Versus Diffuse Sources.

Under the CWA, point sources are "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, [or] well …" 33 U.S.C. § 1362(14). Nonpoint sources, in contrast, are diffuse; "sediment run-off from timber harvesting, for example, derives from a nonpoint source." *Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002). *See also League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002) (Nonpoint source pollution "is widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source.").

As the Ninth Circuit further explained in *Forsgren,* "Because [nonpoint pollution] arises in such a diffuse way, it is very difficult to regulate through individual permits." *Id.* That is the critical, distinguishing characteristic between point and nonpoint sources—and a distinction that Petitioner overlooks in its citation to *Forsgren*. *See* Br. of Pet'r, at 26. Point sources require NPDES permits because a discrete "pipe" or "well" can be identified and controlled as the original "source" of the pollution. 33 U.S.C. § 1362(14). Nonpoint sources are exempt because of the pragmatic impossibility of imposing controls on an ill-defined source that did not originate from any discrete conveyance.

When deciding whether pollution in a given situation is coming from a point or nonpoint "source," the question is *not* one of directness versus indirectness, as Petitioner argues, but rather one of discreteness versus diffuseness. The very definition of the word "source" confirms this plain reading of the CWA text. Merriam-Webster includes in its definition that a "source" is "a point of origin." *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED, at 2177 (1993). It makes no logical sense to think of the "source" of a discharge as being the last thing the pollution touches before it enters navigable waters. The "source" by common definition is where the pollution begins.

Thus, control measures for nonpoint sources are typically referred to as "best management practices" ("BMPs") that can generally be applied to a farmer's fields or other sources lacking a discrete point of origin. *See* 33 U.S.C. § 1329(a)(1)(C). § 1329(b)(2)(B).

EPA itself has long recognized that nonpoint sources and control methods are inherently diffuse, *e.g.*, "reduced nutrient and pesticide application" on agricultural fields or "timing chemical applications or logging activities based on weather forecasts or seasonal weather patterns" to reduce run-off. *See* U.S. EPA, *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters,* EPA 840-B-92-002, at 1-12 (Jan. 1993).

Similarly, South Carolina has adopted "best management practices" for forestry that recognize diffuse harms to water quality. These practices establish "streamside management zones" to reduce nonpoint source pollution and emphasize measures that address widely dispersed pollution problems, such as erosion from timber harvests or other land use activities. *See* South Carolina Forestry Commission, *South Carolina's Best Management Practices for Forestry,* at 8, *available at* https://www.state.sc.us/forest/bmp manual.pdf.

In many of these instances, the pollution from the nonpoint source flows *directly* into a navigable water, but the "directness" of the pollution to the waterbody does not trigger NPDES permitting requirements. *See, e.g.,* U.S. EPA, *Guidance Specifying Management Measures for Sources of Nonpoint Pollution in Coastal Waters,* EPA 840-B-92-002, at 2-4 (Jan. 1993) (including Figure 2-1, which illustrates "Direct Runoff" from agricultural land to a protected stream). Conversely, when a discrete conveyance such as a well or a pipe *indirectly* contaminates navigable waters, that pollution remains properly regulated as a point

source discharge under the CWA, in much the same way it has been regulated since before the 1972 amendments to the Federal Water Pollution Control Act were adopted. *See United States v. Esso Standard Oil Co. of Puerto Rico*, 375 F.2d 621, 623 (3d Cir. 1967).

Nonpoint programs would fail to remedy the significant pollution of navigable waters at issue in *Hawaii Wildlife Fund*, *Upstate Forever,* and *Waste Services of Decatur, LLC.* As local governments, we rely on NPDES permitting, which affords stakeholders the opportunity to ensure that all pollutants released from a point source are accounted for in setting permit limits, and grants permit applicants assurances that "the permit will 'shield' its holder from CWA liability" so long as it remains in compliance. *See Piney Run Preservation Association v. County Commissioners of Carroll County, Maryland,* 268 F.3d 255, 266 (4th Cir. 2001). Indeed, we rely on this regulatory scheme since local governments are often the permit holders themselves. *See id.*

Nonpoint programs lack the requisite specificity of the NPDES permitting program. With regard to the release of hundreds of thousands of gallons of gasoline from a pipe just 400 feet from a tributary of the Savannah River, the problem for Anderson County, South Carolina is not one of identifying "best management practices" for a myriad of contributing factors. *See* 33 U.S.C. § 1329. Rather, the problem is one of enforcing remediation under the CWA from one unpermitted discharge. *Upstate Forever,* 887 F.3d at 643.

In sum, nonpoint pollution programs do not require the same type of source-specific permitting as point source discharges for the obvious reason that nonpoint pollution stems from many diffuse and disparate causes that are not "fairly traceable" to a single point source. That is not the case here. *See Hawaii Wildlife Fund,* 886 F.3d at 749. The underground injection wells at the Lahaina Wastewater Reclamation Facility—like the ruptured pipeline in *Upstate Forever* or the failing leachate collection system in Decatur County, Tennessee—are plainly identifiable and appropriately subject to regulation under the CWA's point source safeguards.

V. The Ninth and Fourth Circuits' Rulings Do Not Regulate Groundwater *Qua* Groundwater.

Contrary to Petitioner's claims, neither the Ninth, Fourth, or Second Circuits have proposed to regulate groundwater whatsoever. *See* Br. for Pet'r, at 5-6 (claiming that "because the groundwater is not a point source, the Ninth Circuit was wrong…"). The Fourth Circuit held that the CWA regulates a point source—a pipeline carrying diesel fuel and gasoline—that has polluted navigable surface waters of the United States. *See Upstate Forever,* 887 F.3d at 651. The Fourth Circuit's use of EPA's phrase "direct hydrological connection" does not exert authority over groundwater but simply describes how pollutants flow "from" the originating point source "to" navigable waters.

Similarly, the Ninth Circuit held that the Act regulates an undisputed point source—the County of Maui's underground injection wells—when a

discharge from that point source flows a short distance on or through another medium before reaching navigable waters. So long as navigable waters' contamination is "fairly traceable" to the point source then the Act applies, and movement via groundwater does not break the chain of causation or serve as a supervening event. A clear indication that the Ninth Circuit's holding does not amount to regulation of groundwater is evidenced by the fact that the Ninth Circuit did not even evaluate whether pollution remained in the groundwater itself. *Hawaii Wildlife Fund*, 886 F.3d at 746 n.2 ("We assume without deciding the groundwater here is neither a point source nor a navigable water").

Each of the Court of Appeals' rulings cite this Court's plurality opinion in *Rapanos,* and explicitly rely upon it. *See Hawaii Wildlife Fund,* 886 F.3d at 748 ("Justice Scalia recognized … that 'from 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 § 1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between.'"); *Upstate Forever,* 887 F.3d at 649-50 ("[W]hen analyzing the kinds of connected waters that might fall under the CWA, Justice Scalia observed that '[t]he 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.'") (emphasis in original) (internal citations omitted).

The Fourth and Ninth Circuit holdings are buttressed by the Second Circuit, which concluded

that helicopters spraying pesticides, which then indirectly travel through air to navigable waters, must be regulated as point source discharges. *See Peconic Baykeeper,* 600 F.3d at 188 ("Here, the spray apparatus was attached to trucks and helicopters, and was the source of the discharge. The pesticides were discharged 'from' the source, and not from the air."). *See also Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 510-11 (2d Cir. 2005) (upholding regulation of point source discharges from Confined Animal Feeding Operations without requiring wastewater to "be separately channelized" all the way to navigable waters because that would "impose a requirement not contemplated by the Act: that pollutants be channelized not once but twice before the EPA can regulate them").

Critically, the Second Circuit's decision in *Peconic Baykeeper* underscores a fatal flaw in Petitioner's argument. Exempting every indirect point source discharge from CWA jurisdiction—even if it migrates through just one foot of groundwater on its way to navigable waters—would open the door to obvious gamesmanship and a hollowing-out of CWA protections. In *Peconic Baykeeper,* the Court of Appeals reversed a district court, which had "reasoned that because the trucks and helicopters discharged pesticides into the air, any discharge was *indirect*, and thus not from a point source." 600 F.3d at 188 (emphasis added). That is, the district court erred in following the same rationale urged by Petitioner in one version[2] of its proffered test. *See* Br. of Pet'r, at 27-28.

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[2] Petitioner seems to acknowledge that the implications of its "direct into" test are unreasonable, attempting to carve out

Under Petitioner's approach, the path for industries seeking to avoid NPDES permitting would be straightforward. Instead of running a pipe directly to navigable waters, an operator could simply bury its pipe just a few feet from the river's edge and allow the discharge to flow through soil and groundwater before reaching a protected stream. Alternatively, an operator could discharge the outfall via a spray applicator set back from the river and allow polluted mist to permeate the land before reaching a waterway. In either case, the air, land, soil, or groundwater would serve as an intervening medium and break the direct chain between the point source discharge and navigable water. Nothing in the 1972 amendments to the Act would authorize the creation, nearly fifty years later, of this new "escape hatch" for discharging actors.

Indeed, Petitioner's argument would carve out an exemption from CWA responsibilities for certain classes of "fairly traceable" point source discharges, creating a perverse incentive for the worst operators. No NPDES permit would be required, despite the obvious fact that the pollutants from the point source were the "source" of contamination to navigable waters that Congress explicitly sought to

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exceptions to it. *See* Br. of Pet'r, at 43 (pollution *not* delivered directly to a navigable water by a "conveyance (*e.g.*, there is air between a pipe and the river below)" is still a point source discharge "and an NPDES permit is required."). Petitioner's concession here raises a question as to whether "air" is the only permissible intervening medium. What about four inches—or four hundred feet—of real property between the end of a pipe and a protected water body? Petitioner's flow chart provides no means for making these determinations. Thankfully, the text of the CWA does. *See Upstate Forever,* 887 F.3d at 642-43.

protect. *See N. Cal. River Watch v. Mercer Fraser Co.*, No. C-04-4620 SC, 2005 WL 2122052 at *2 (N.D. Cal. Sept. 1, 2005) (Conti, J) ("[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 groundwater.").

A further deficiency in Petitioner's interpretation is evidenced in a decision from the U.S. Court of Appeals for the Third Circuit, issued just a few years before the CWA was enacted. *See United States v. Esso Standard Oil Co. of Puerto Rico*, 375 F.2d 621 (3d Cir. 1967). There, the Court of Appeals evaluated liability under § 13 of the Rivers and Harbors Act, 33 U.S.C. § 407, which made it unlawful to "discharge … any refuse matter of any kind … into any navigable water of the United States …." 375 F.2d at 622. The provision is the predecessor to today's NPDES statute. *See* U.S. EPA, Region 1, "A Brief Summary of the History of NPDES," *at* https://www3.epa.gov/region1/npdes/ history.html (last visited June 14, 2019).

Esso had argued that "the remoteness of its activities from the shoreline isolate[d] it from liability under the Act," but the court found that indirect discharges would logically be covered as a matter of common sense: "[T]hough Esso did not run a pipe to the water's edge and discharge petroleum products directly into the sea, Esso's discharge of the oil was in such close proximity to the sea that the oil flowed there by gravity alone." 374 F.2d at 623.

Nowhere did the court reason that a finding of liability under the Rivers and Harbors Act would somehow constitute a new land-use "regulation" of the short distance of real property over which the oil flowed.

The CWA's text requires the same result. *See* 118 Cong. Rec. 33,758-59 (1972) (statement of Rep. Dingell discussing *Esso*). That point source pollution travels through groundwater on its way to navigable waters in no way requires "regulation" of groundwater under the NPDES program. Two hypotheticals outside the realm of environmental law show the clear error in Petitioner's logic. An individual transporting illegal narcotics from North Carolina to South Carolina can be prosecuted for commission of a federal crime even if Drug Enforcement Administration agents apprehend him on a local road far from major interstates. His use of a municipal thoroughfare would not negate the federal crime, nor would it constitute a "regulation" of a town or its local roads. Similarly, a person who uses a gun to kill someone is not absolved just because the bullet ricochets off a wall before arriving at its target. The firearm remains the "source" of the bullet, and the harm it causes remains "fairly traceable" to the assailant. Prosecution would not involve "regulation" of the wall.

By the same token, Petitioner wholly misses the point when it alleges that "groundwater is not a point source," Br. for Pet'r, at 5, since the point source discharge emanates from the injection wells, not from groundwater—indeed, groundwater is not a "source" at all. The analyses in *Hawaii Wildlife Fund, Upstate Forever,* and *Peconic Baykeeper* are

driven by the close connection between the point source discharge and the protected waterbody, not by the intervening medium the pollution might flow on or through. *Hawaii Wildlife Fund*, 886 F.3d at 749 (analyzing whether the pollution is "fairly traceable" to the point source); *Upstate Forever*, 887 F.3d at 651 (analyzing whether there is a "direct hydrological connection" through groundwater between the pipe and polluted navigable waterway); *Peconic Baykeeper*, 600 F.3d at 188 ("The pesticides were discharged 'from' the source, and not from the air."). The same is true for the analysis in *Esso Standard*. *Esso Standard Oil Co. of Puerto Rico*, 375 F.2d at 623 ("It seems clear to us that the first clause of § 13 does reach 'indirect' deposits of refuse in navigable water.").

In each of these cases, whether groundwater, soil, or air remained contaminated after pollution passed through it was irrelevant for purposes of CWA jurisdiction because those intermediate areas were not what was being regulated.

VI. Legislative History, to the Extent Relevant, Demonstrates Congressional Intent to Regulate the Point Source Pollution Problems at Issue Here.

As this Court has affirmed, "legislative history is not the law. 'It is the business of Congress to sum up its own debates in its legislation,' and once it enacts a statute '[w]e do not inquire what the legislature meant; we ask only what the statute means.'" *Epic Systems Corp. v. Lewis*, ___ U.S. ___, 138 S. Ct. 1612, 1631 (2018) (quoting *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951)

(Jackson, J., concurring)); *Ex Parte Collett,* 337 U.S. 55, 61 (1949) ("There is no need to refer to the legislative history where the statutory language is clear.").

Not only has Petitioner attempted to inject legislative history to obfuscate the plain language of the statute, it presents the history wrongly, misreading a statement by an unelected official, then-EPA Administrator William Ruckelshaus. The problem that Mr. Ruckelshaus sought to address was a concern about hard-to-trace pollutants that might permeate groundwater. He explained:

> We would have no desire, Mr. Chairman, under the program to interfere with the existing State program that was adequately protecting water quality. The only reason for the request for Federal authority over ground waters *was to assure that we have control over the water table* in such a way as to insure that our authority over interstate and navigable streams cannot be circumvented, so we can obtain water quality by maintaining a *control over all the sources of pollution*, be they discharged directly into any stream or through the ground water table.

See Water Pollution Control Legislation—1971 (Proposed Amendments to Existing Legislation), Hearing Before the Committee on Public Works, House of Representatives, 92nd Cong., 1st Sess. (July 13, 1971), at 230 (emphasis added).

That is, EPA had sought "control over the water table" and "all sources of pollution" affecting the water table, which would be diffused throughout groundwater and *not* fairly traceable back to one specific point source. Mr. Ruckelshaus was not evaluating the situation at issue in *Hawaii Wildlife Fund*, of a point source polluting a navigable waterway through a groundwater conduit. Rather, his suggestion was for the regulation of groundwater *itself*—in order to grant the U.S. EPA "control over the water table." *See id.* at 230. Petitioner misapprehends the legislative history of the CWA, insisting that Mr. Ruckelshaus's request for direct regulation of groundwater *qua* groundwater is dispositive. It is not.

Importantly, Senator Edmund Muskie, a primary author of the Act, referenced both the House and Senate versions of the CWA and observed that they included "in the definition of 'discharge' . . . direct *and* indirect discharges into the navigable waters." 118 Cong. Rec. 33,699 (1972) (emphasis added). Even more, the clearest statement comes from Representative John Dingell, who commented:

> It is quite clear that section 502(12) of the bill [33 U.S.C. § 1362(12)], in defining the term 'discharge of a pollutant,' does not in any way contemplate that the discharge be <u>directly</u> from the point source to the waterway. The situation is analogous to the court's holding in several cases, including *United States v. Esso Standard Oil Company of Puerto Rico*, 375 F.2d 621 (CA 3, 1967), <u>*where a*</u>

> *discharge from a shore facility flowed 'indirectly,' that is by force of gravity over land, to a waterway*.

118 Cong. Rec. 33,758-59 (1972) (emphasis added).

Petitioner also references a statement and proposed amendment by Representative Leslie Aspin*, see* Br. of Pet'r, at 40, yet Rep. Aspin's statement cannot overcome the plain language of the CWA or override clearly worded statements from Rep. Dingell and Sen. Muskie, as "ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *See Consumer Product Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 118 (1980).

Petitioner's argument equates to an assertion that pollutants that come into contact with any amount of groundwater *en route* to navigable waters can never be implicated in NPDES permitting. *See* Br. of Pet'r, at 23-25. This approach would require a patently illogical restriction of the CWA, because the text contains no such exemption. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106-07 (2004) ("§ 1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition.") (emphasis in original).

Petitioner's misreading of the legislative history stems from its failure to consider the context at the time of Mr. Ruckelshaus's testimony. The story of Cleveland, Ohio's Cuyahoga River catching fire because of untreated, industrial pollutants coating the surface of the waterway is well known, *see Solid*

Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 174-75 (2002) (Stevens, J., dissenting), but it was not an isolated incident. In the early 1970s, the Potomac River in Washington, D.C. was foul-smelling, unswimmable, and unfishable as it flowed past the Lincoln and Jefferson Memorials. As the N.Y. TIMES reported, "The heat of summer is enveloping the nation's capital, and with it has come the annual resurgence of a problem residents have come increasingly to dread: a stomach-turning miasma rising from the Potomac River." Gladwin Hill, *The Polluted Potomac: Sewage and Politics Create Acute Capital Problem*, N.Y. TIMES (July 12, 1970), *at* https://www.nytimes.com/1970/07/12/archives/the-polluted-potomac-sewage-and-politics-create-acute-capital.html. The TIMES cited a federal government report that documented how "sludge deposits have blanketed fish spawning grounds," leading to a release of "obnoxious odors when uncovered by ebb tide." *Id.*

Mindful of calamities such as these, Congress charted an ambitious goal for the CWA, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Senate Conference Report recorded that the CWA is to "be given the broadest possible constitutional interpretation." S. Conf. Rep. No. 92-1236, at 144 (1972); *see also* S. Rep. No. 95-370, at 75 (1977) (the Act "exercise[s] comprehensive jurisdiction over the Nation's waters to control pollution to the fullest constitutional extent").

The Ninth and Fourth Circuits' analyses are squarely consistent with this legislative history and the statutory language. Under the plain text of the

statute, contamination of a navigable water is only regulated under the NPDES program if the pollutant is "from" a point source – that is, if it is attributable or "fairly traceable" to one, specific point source, or, put another way, whether it is added to navigable waters via an identifiable, "direct hydrological connection" between that point source and navigable waters. *See Hawaii Wildlife Fund,* 886 F.3d at 749; *Upstate Forever,* 887 F.3d at 651. In at least some instances, this was already the law of the land under the Federal Water Pollution Control Act before the 1972 amendments. *See United States v. Esso Standard Oil Co. of Puerto Rico*, 375 F.2d at 623.

Pollution that permeates groundwater from multiple sources—but that cannot be confirmed to have come from a defined point source—is not covered. That diffuse pollution problem is the one that Mr. Ruckelshaus sought unsuccessfully to address. Mr. Ruckelshaus's legislative disappointment, however, cannot possibly be read to allow regulated entities to dodge liability here, where the pollution problems are acute, concrete, and unquestionably added "from" a specific, statutorily-identified point source—*i.e.,* a "well". *See* 33 U.S.C. § 1362(14). A "well," of course, is as an underground structure, and discharges from one commonly occur into groundwater before migrating to navigable waters. *See* Br. for Respondents Hawaii Wildlife Fund, et *al.*, at 22 (filed July 12, 2019). The U.S. Court of Appeals for the Tenth Circuit, in a case decided a few years after the CWA's enactment, spoke on this very question, finding a "point source" wherever a pollution problem originates from an acute, discrete "point":

> The legislative history indicates to us Congress was classifying nonpoint source pollution as disparate runoff caused primarily by rainfall around activities that employ or cause pollutants. … We believe it contravenes the intent of [the CWA] and the structure of the statute to exempt from regulation *any activity that emits pollution from an identifiable point*.

United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979) (emphasis added).

A point source must obtain an NPDES permit if it is proven that a discrete discharge is contaminating navigable waters. *See Hawaii Wildlife Fund,* 886 F.3d at 749; *Upstate Forever,* 887 F.3d at 651; *Peconic Baykeeper,* 600 F.3d at 188. Such proof has been amply documented here. *See Hawaii Wildlife Fund,* 886 F.3d at 742-43.

CONCLUSION

In *Hawaii Wildlife Fund*, point source discharges have translated into as much as 3,456 gallons of polluted effluent entering the Pacific Ocean per meter of coastline per day. 886 F.3d at 742. In *Upstate Forever*, the ruptured pipeline released 369,000 gallons of gasoline just a short distance (400 feet and 1,000 feet) from two tributaries of the Savannah River. 887 F.3d at 643. In Decatur County, Tennessee, a leachate collection system maintained by a single operator continues to pose a public health threat to the community and an environmental threat to the Tennessee River.

In all of these cases, citizen-suit enforcement of the CWA has demanded that local governments be accountable to their constituencies, and the Act has provided municipalities, as defined at 33 U.S.C. § 1362(4), with the authority to address pollution problems affecting their communities. Local government *amici* depend on the CWA as Congress drafted it. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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