No. 18-260

IN THE

Supreme Court of the United States

COUNTY OF MAUI,

Petitioner,

v.

HAWAIʻI 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

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INTRODUCTION

Respondents accuse the County of Maui of rewriting the Clean Water Act (CWA or Act), but it is they who throw aside the Act's long-distinct treatment of water pollution "from any point source[s]," 33 U.S.C. § 1362(12), and "from nonpoint sources," *id.* § 1329(b). Under their theory (at 38), CWA point source permits are required for virtually all water pollution—any that "originate[s] from, collect[s] in, or pass[es] through an identifiable point source before foreseeably reaching a navigable water." The nonpoint source program—enacted to address the "50 percent of all water pollution [that] comes from nonpoint sources," Pet. Br. 25 (internal quotation marks and citation omitted)—is little more than a "residu[um]." Resp. Br. 41.

Respondents' revision of the CWA is precisely the "enormous and transformative expansion" of a federal statute cautioned against in *Utility Air Regulatory Group* v. *EPA*, 573 U.S. 302, 324 (2014) (*UARG*). Congress did not prescribe, in the CWA, a single regulatory scheme for all pollution that reaches water. This Court should "greet … with a measure of skepticism," *id.* at 324, Respondents' attempt to convert the point source program—just "*[o]ne* of the Act's principal tools," *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 624 (2018) (emphasis added)—into the statute's entire "focus[]," Resp. Br. 2.

That is not the only reason to reject Respondents' position. Respondents maintain that their vision of the point source program has a limiting principle: proximate cause or foreseeability. As Respondents freely admit, however, "proximate cause" is merely "shorthand for … policy-based judgment." Resp Br. 20 (internal quotation marks and citation omitted). Foreseeability, this Court recently said, "sweep[s] … broadly" and is

inherently "uncertain[]." *Air & Liquid Sys. Corp.* v. *DeVries*, 139 S. Ct. 986, 994 (2019). These concepts offer neither meaningful limitation nor the predictability required of a national permitting regime—especially when "the consequences to landowners even for inadvertent violations can be crushing." *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring).

Respondents' claim that their reading follows from the statutory definition of "'discharge of a pollutant,'" 33 U.S.C. § 1362(12), is fundamentally flawed. Respondents stake their textual case on the purported *sole* ordinary meaning of the word "from." As this Court has often recognized, however, a preposition like "from" "'has many dictionary definitions and must draw its meaning from its context.'" *Kucana* v. *Holder*, 558 U.S. 233, 245 (2010) (citation omitted). The word has no single standard meaning. Respondents' insistence that one exists betrays the weakness in their argument.

As the County explained, point source permitting is necessary only where pollutants are delivered to navigable waters by a point source or series of point sources. That follows from the CWA's text, structure, context, history, and purposes, as well as the clear-statement rules in *UARG* and *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*).

This reading does not "open a substantial loophole in the CWA," Resp. Br. 2, but honors Congress's design. Simply because certain water pollution falls outside the point source program does not mean it "bypass[es] the CWA." *Id.* at 57. Nonpoint source pollution remains subject to CWA-mandated state nonpoint source management programs, as intended. See 33 U.S.C. § 1329(b)(1); *id.* § 1251(a)(7) ("[I]t is the national policy that programs

for the control of nonpoint sources of pollution be developed and implemented ….").

ARGUMENT

I. Congress Unambiguously Defined Point Source Pollution Based on the Means of Delivery to Navigable Waters.

A. The statutory text clearly sets forth a means-of-delivery test.

As the County explained (at 27–28), the question before this Court turns primarily on the meaning of the phrase "addition … from any point source" in the definition of "'discharge of a pollutant,'" 33 U.S.C. § 1362(12). What does it mean for pollutants to be added to navigable waters "from" any point source? And, what constitutes "any point source"?

1. "From" indicates that "any point source" must be the means of the addition to navigable waters.

"From" is a preposition and a function word. It indicates a grammatical relationship between two other words or phrases—here, "addition" and "any point source." Like other prepositions and function words, "from" might indicate one of many relationships. It may indicate the *starting point* of the "addition," as in "that package came to me from my uncle in Detroit." Or, it may indicate the *means* of the "addition," as in "that package arrived today from the post."

In this case, "from" indicates that "any point source" must be the *means* of the "addition" to navigable waters. That is made apparent by the statutory definition of "point source," which says that a point source is not a *starting point* or even a *source* of pollutants but rather a *means of delivering* them. A

"'point source'" is a "conveyance," 33 U.S.C. § 1362(14), making it "a means or way of conveying" pollutants, *i.e.*, "bear[ing] [them] from one place to another." *Conveyance*, Webster's Third New International Dictionary of the English Language Unabridged 499 (1971) (Webster's); *Convey*, Webster's 499. As such, "from" as used in § 1362(12) plainly identifies the *means* of the "addition" to navigable waters. *From*, Webster's 913 ("means[] or ultimate agent of an action").

Respondents agree (at 17) that the meaning of "from" is critical, but assert (at 18) that the "ordinary meaning" of "from" indicates a *starting point*, and that the "other most pertinent definition" indicates a *source* or *place of origin*. Some *amici* likewise charge the County with relying on "idiosyncratic definitions of the word 'from.'" Br. of *Amici* Upstate Forever et al. 7–8 (Upstate *Amici* Br.).

It is a fact of English language, however, that prepositions and function words are ambiguous without context. Standing alone, they have neither "ordinary" nor "idiosyncratic" definitions. This Court has repeatedly acknowledged that "the word 'under' is a 'chameleon' that 'must draw its meaning from its context.'" *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 630; *accord Pereira* v. *Sessions*, 138 S. Ct. 2105, 2117 (2018). It has said the same of "for." *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 845 (2018). "From" is similarly a common preposition with multiple shades of meaning inescapably informed by the meaning of its neighboring words—here, "any point source."

Respondents and their *amici* next contend that the context provided by "point source" does not support the County's position. They argue that the County reads too much into the definition of "point source" as a conveyance. These criticisms fail.

First, some *amici* boldly assert—ignoring the statutory definition of "point source"—that a point source is not a conveyance at all but "'a generative force or stimulus' or 'a point of origin or procurement.'" Upstate *Amici* Br. 9 (citation omitted). Little response is needed beyond this: "'When a statute includes an explicit definition, we must follow that definition,' even if it varies from a term's ordinary meaning." *Digital Realty Tr., Inc.* v. *Somers*, 138 S. Ct. 767, 776 (2018). The CWA defines "'point source'" as "any discernible, confined and discrete *conveyance* … from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). That definition controls.

Second, Respondents argue that point sources need not *always* be conveyances. They highlight a few examples in the definition that, in their opinion, do not "normally" deliver pollutants to navigable waters. Resp. Br. 30 n.13. Respondents further claim (at 32) that this Court held in *South Florida Water Management District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), that it is "*sufficient*, [but] not … *necessary*," that a point source convey pollutants to navigable waters.

But the statute defines "point source" as a "conveyance" without equivocation. As to the examples, Respondents largely answer their own question: Though some examples may not "normally" deliver pollutants to navigable waters, they require permits when they do. See, *e.g.*, *Sierra Club* v. *BNSF Ry. Co.*, No. C13-967-JCC, 2016 WL 6217108, at *8 (W.D. Wash. Oct. 25, 2016) (coal falling into navigable water from rail cars constituted point source pollution from "rolling stock and container[s]"); *United States* v. *Lucas*, 516 F.3d 316, 332–34 (5th Cir. 2008) (septic system built inside wetlands was "container" requiring point source

permit). Particularly puzzling is Respondents' emphasis on concentrated animal feeding operations, as such facilities convey animal wastes into navigable waters in many obvious ways.

Respondents' tortured reading of *Miccosukee Tribe* is similarly unavailing. The argument there was that a point source permit is required "'only when a pollutant originates from the point source.'" 541 U.S. at 104. This Court disagreed, highlighting the word "conveyance" in the point source definition. It explained: "Th[e] definition makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'" *Id.* at 105. That sentence holds unequivocally that conveyance is a *necessary* characteristic of all point sources.

Third, Respondents and their *amici* argue that the statute redefines "conveyance" as something that *discharges* rather than *carries and delivers*. See Resp. Br. 30; Upstate *Amici* Br. 11. Not so. The statute does not redefine "conveyance"; it prescribes characteristics that limit point sources to certain types of conveyances—specifically, those that are discernible, confined, discrete, and capable of discharging pollutants. In doing so, the Act does not alter the baseline requirement that a "point source" must be a conveyance.

Fourth, Respondents contend that one could say "something comes 'from' a 'conveyance' as long as that conveyance gets it part of the way to its destination." Resp. Br. 31. But this leaves out a very important word: "addition." The question is not whether pollutants "come" "from" a conveyance (or "'spring'" "'from'" one, Upstate *Amici* Br. 9), but whether pollutants are "*additions*" "from" a conveyance.

Considering *all* the language, the County's understanding is the most natural—the prime directive in interpreting statutes. *E.g.*, *United States* v. *Davis*, 139 S. Ct. 2319, 2328 (2019); *Republic of Sudan* v. *Harrison*, 139 S. Ct. 1048, 1056 (2019); *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 823 (2018). Most naturally understood, pollutants are "additions" "from" a conveyance only when delivered by that conveyance. No one would normally say that pollutants are "added" to navigable waters "from" a pipe if that pipe ended half a mile from the water, as the wells here do. While not binding, this Court's "'shorthand description'" of point source discharges is consistent, referring to them as discharges "*into*" navigable waters. Resp. Br. 34; Pet. Br. 30–31.

Fifth, Respondents describe examples of what they believe "the Act must cover" and declare that "Congress *cannot have* intended" what the County says. Resp. Br. 19 (emphasis added). This argument is based on false premises. The means-of-delivery test *does* require permits for pipes protruding out over a river and any other circumstance where a point source is the "last conveyance" discharging into navigable water. Pet. Br. 53. It is also incorrect to say that water pollution outside the means-of-delivery test is "exclude[d]" from the Act. Resp. Br. 19. Such pollution remains subject to the Act's nonpoint source program.

"[T]he best evidence of Congress's intent is the statutory text." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 544 (2012). The text here reflects a coherent regime that regulates pollution based on what delivers it to navigable water.

2. "Any point source" includes one point source or many point sources together as the means of delivery.

Of course, the statutory language does not speak just to an addition of pollutants to navigable waters "from *a* point source," but an addition "from *any* point source." As the County explained (at 32–33), this Court has long recognized that "'any'" includes "'one or *some*.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)) (emphasis added). The inclusion of "any," therefore, merely means that point source permitting is required when pollutants are delivered to navigable waters by one point source or a series of connected point sources.

Respondents do not dispute the definition of "any." Yet they insist (at 33) that "any" opens the door to all point sources that ever touch a pollutant in its journey to navigable waters. They argue that point sources require permitting even if not connected to the point source ultimately adding the pollutant to the water.

That point sources must be connected to require point source permitting, however, follows straightforwardly from the rest of the statutory language. As established, "from" indicates that "any point source" must be *the* means of an "addition" to navigable waters. The statute contemplates a *unitary* delivery mechanism, whether there is one point source or multiple. Thus, when multiple point sources are at issue, permitting is required only for those point sources that *together* deliver pollutants to the water, *i.e.*, a series of uninterrupted point sources. Only when multiple point sources are connected can they all be said to have delivered pollutants to the navigable waters. Contrary to Respondents' assertion, the

meaning of "from" compels, rather than contradicts, the County's understanding of "any point source."

This understanding is also consistent with Justice Scalia's dicta in *Rapanos* v. *United States*, 547 U.S. 715 (2006), as the County explained (at 33–34). Justice Scalia suggested that point-source-to-point-source-to-navigable-water pollution may require point source permitting, though he did "not decide th[e] issue." *Rapanos*, 547 U.S. at 743 (plurality op.). He was right.

Respondents argue (at 2, 19–20) that Justice Scalia was addressing the scenario here: point-source-to-nonpoint-source-to-navigable-water pollution. That is wrong. In language Respondents selectively ignore, Justice Scalia discussed pollutants "[d]ischarge[d] into intermittent channels" and "pass[ing] 'through conveyances'" that "themselves constitute 'point sources' under the Act." *Rapanos*, 547 U.S. at 743 (plurality op.). Justice Scalia's observations provide Respondents no quarter.[1]

B. A means-of-delivery test accords with the CWA's structure.

Respondents fare no better answering the County's structural arguments. As the County explained (at 21–27), the "disparate treatment of discharges from point sources and nonpoint sources is an organizational paradigm of the Act." *Or. Nat. Desert Ass'n* v. *U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008). This structural dichotomy is reflected in the CWA's text,

[1] Respondents dispute that every case cited by Justice Scalia involved pollutants delivered to navigable waters by a point source or series of connected point sources. But Respondents identify no case where those were not the facts. See Resp. Br. 19 n.8 (arguing that one case relied, in the *alternative*, on a *legal theory* inconsistent with the County's position).

compare 33 U.S.C. § 1362(12), *with id.* § 1329(b), and history, see Pet. Br. 21–25; Br. of *Amici* Edison Electric Institute et al. 8–21. The means-of-delivery test maintains this distinction, whereas Respondents' expansive reading of "from" sweeps virtually all water pollution into the point source program.

Respondents essentially admit all of this. They agree that "the CWA regulates nonpoint-source pollution differently from point-source pollution." Resp. Br. 36. But they then devote pages to inaccurately portraying the CWA's nonpoint source program as a "residual" after-thought, *id.* at 41, and repeatedly conflate the Act as a whole with the point source program, *e.g.*, *id.* at 2 (arguing that limits on point source program "would open a substantial loophole in the CWA"), 56 (urging Court to "apply[] the CWA" to the County's wells).

Respondents effectively read out the Act's nonpoint source program. They never mention § 1329(b)(1), which charges States with "controlling pollution *added from nonpoint sources* to the navigable waters." (Emphasis added). They never acknowledge the historical evidence that "Congress maintained the two-track regulatory approach knowing that '50 percent of all water pollution comes from nonpoint sources.'" Pet. Br. 35 (citation omitted). They never recognize the express "national policy that programs for the control of nonpoint sources of pollution be developed and implemented." 33 U.S.C. § 1251(a)(7).

Correspondingly, Respondents provide no meaningful limit to their vision of the point source program. They offer (at 20) that any "point-source release [must] be a proximate cause of the addition of pollutants to navigable waters." But they admit that "proximate cause" is little more than "shorthand for … policy-

based judgment" about what should or should not be "legally cognizable." Resp. Br. 20. (internal quotation marks and citation omitted).

Respondents' "determining factor" for point source permitting, *id.* at 38, is breathtaking. They would require point source permits any time pollution "originate[s] from, collect[s] in, or pass[es] through an identifiable point source before foreseeably reaching a navigable water." *Ibid.* As this Court has explained, a "rule of mere foreseeability" is extremely broad. *Air & Liquid Sys.*, 139 S. Ct. at 994. Would Respondents require permits for a toilet—an "identifiable point source"—that "originate[s]" wastewater and "foreseeably" sends it to the County's wells? Moreover, most groundwater flows to navigable waters. David K. Todd & Larry W. Mays, Groundwater Hydrology at 15 (3rd ed. 2005) ("Most natural [groundwater] discharge occurs as flow into surface water bodies, such as … oceans ...."). Is it not "foreseeable" that virtually all point source releases into groundwater will reach navigable water?

Tellingly, Respondents have now offered the *fourth* different limiting principle, in this case alone, to justify their expansive view of point source permitting. The district court required a point source permit for any "functional[] equivalent to a discharge into the ocean itself." Pet. App. 59. The United States Environmental Protection Agency (EPA) previously argued that the point source program reaches any point source with a "'direct hydrological connection'" to navigable waters. Pet. Br. 15. The Ninth Circuit invented a test requiring traceability in more than *de minimis* amounts, *id.* at 15–16, which Respondents now concede (at 21 n.10) is "atextual" and replace with proximate cause.

In defending their evisceration of the CWA's structure, Respondents argue (at 36) that structure cannot

justify "plac[ing] the County's *point-source* pollution outside the Act's more rigorous regulatory requirements." But the issue is whether the releases from the County's wells constitute point source pollution at all. Respondents' question-begging argument does not answer whether a proper understanding of the Act's structure supports the County's view that those releases fall outside the definition of "discharge of pollutants."

C. Other CWA provisions support a means-of-delivery test.

Beyond the Act's structure, many specific CWA provisions also support the County's reading of "discharge of pollutants." Pet. Br. 36–39. Several provisions describe such discharges as "discharges into" navigable waters by point sources, consistent with the understanding that a point source or series of point sources together must deliver pollutants to navigable waters. The CWA's "substantial" penalties also call for the predictability provided by the means-of-delivery test. *Hawkes*, 136 S. Ct. at 1812.

Respondents are unsurprisingly silent regarding the Act's punitive measures. Their any-foreseeable-point-source theory is a nightmare for potentially regulated persons and entities seeking to know—before committing resources to a project—whether they need a permit. Just figuring out whether and how pollutants may travel with groundwater to navigable waters is extraordinarily complicated, as Respondents' own *amici* confirm. Predicting "the manner by and degree to which point source pollution would be conveyed to a surface water" requires an understanding of geology, hydrology, land use, climate, and an array of site-specific "information or assumptions" about groundwater flow speed and direction, among other things. Br. of *Amici* Aquatic Scientists et al. 22, 24.

As for the Act's repeated use of the phrase "discharges into navigable waters," Respondents first suggest (at 34) that courts do not consider other statutory provisions. That is plainly incorrect. See *Culbertson* v. *Berryhill*, 139 S. Ct. 517, 522 (2019) (looking to "'the structure of the statute and its other provisions'") (citation omitted).

Respondents then quarrel (at 35) with the meaning of "discharges into navigable water" by comparing it to "'washe[s] into … navigable water'" in the Refuse Act. Nothing about that second phrase, however, suggests that "into" means anything other than *entry* or *delivery*. The "washing" delivers the refuse to the water, just as the "discharge" delivers the pollutants to the water.

Respondents also highlight other CWA provisions they believe "strongly reinforce[]" liability here. Resp. Br. 22. They are wrong.

First, Respondents note (at 22) that "wells" are an example in the statutory definition of "point source." Asserting that "the *principal* way a well acts as a 'point source' is by discharging into the subsurface," Respondents reason that "[t]he only plausible explanation for including wells in the definition of 'point source' … is that Congress intended to cover discharges that move from wells through the subsurface to navigable waters." *Ibid.* (emphasis added).

Nothing in the statute supports Respondents' assumption that Congress intended to require point source permits for *all* wells because of their "principal" behavior. As Respondents admit, "wells may discharge directly into surface waters." *Ibid.* Indeed, when the CWA was enacted, Congress was concerned about offshore wells in the ocean. See, *e.g.*, 116 Cong. Rec.

28,184 (1970) (statement of Rep. Fascell); 116 Cong. Rec. 33,389 (1970) (statement of Sen. Nelson). Wells like that may need point source permits. But other wells, like the County's, do not.

Second, Respondents assert (at 23) that § 1342(b)(1)(D) "necessarily contemplates" point source permits for "discharges from wells *through groundwater* to navigable waters." This argument, too, is premised on an erroneous assumption.

The Ninth Circuit held below that the import of this provision (and § 1314(f)(2)(D)) is that disposals in wells are *sometimes*, but not always, point source discharges requiring permits. Pet. App. 25–27. Neither the County nor Respondents challenge that holding in this Court. As Respondents concede (at 23 n.11), "[o]nly disposals that discharge to navigable waters require [point source] permits."

But Respondents make a huge leap from that premise. They assume the *only* way well disposals ever reach navigable waters, and therefore the *only* way such disposals could be point source discharges, is "through groundwater." See Resp. Br. 23 ("Importantly, disposal wells discharge underground ...."). They offer no basis for their assumption, and it is invalid. Disposals could be made into wells in navigable waters. See *Inland Steel Co.* v. *EPA*, 901 F.2d 1419, 1422 (7th Cir. 1990). And if conveyed by the well to the water, the disposal would constitute a prohibited point source discharge unless permitted.

Third, Respondents turn (at 23–24) to § 1362(6)(B), which excepts material "injected into a well to facilitate production of oil or gas" from the definition of "'pollutant'" in certain circumstances. They argue this exception shows Congress did not want these

injections regulated as point source discharges. And because they believe that "passage through the subsurface is the only way such discharges could reach navigable waters," the exception proves, in their view, that Congress understood the point source program to cover subsurface releases. Resp. Br. 24.

The exception does not indicate, however, that Congress was concerned solely about the *point source* program. "Pollutant" appears throughout the CWA, including provisions in the *nonpoint source* program, *e.g.*, 33 U.S.C. § 1314(f)(1), (f)(2)(D), as well as the research program in Title I of the Act, *e.g.*, 33 U.S.C. § 1254(c). The exception covers all these scenarios, exempting these well injections from the point *and* nonpoint source programs, and various other requirements.

Fourth, Respondents argue (at 25–27) that cases interpreting the Refuse Act, 33 U.S.C. § 407, require broadly reading § 1311(a)'s prohibition on point source discharges. But § 407 and § 1311 are *separate* prohibitions that address different means of water pollution with different statutory language. Among other distinctions, § 407 is not limited to "point sources" and uses the broader phrase "from or out of." There is no reason that cases interpreting the Refuse Act should inform the meaning of § 1311(a).

Fifth, Respondents suggest (at 29, 39) that the County's reading of "discharge of pollutants" renders superfluous various statutory exceptions to the point source program for "runoff." Not at all. Runoff is, as Respondents admit (at 38), "quintessential" nonpoint source pollution ordinarily exempt from permitting. The purpose of those provisions is to ensure that a permit is not required in some cases where runoff is

channeled and delivered to navigable waters by a point source (like a naturally occurring ditch).

D. The CWA's legislative history supports a means-of-delivery test.

Respondents offer little response to the CWA's legislative history, which further supports the County's position on what constitutes "discharge of pollutants." As this Court has recognized, Congress sought to eliminate the need to "work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated." *EPA* v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 204 (1976); see also Pet. Br. 39–40. Yet Respondents' test (and the Ninth Circuit's too) requires "that pollutants be physically traceable to a point source." Resp. Br. 20.

Respondents acknowledge that Congress refused several proposals to mandate National Pollutant Discharge Elimination System (NPDES) permitting on precisely the theory they advance here. The then-EPA Administrator urged, as Respondents do, that permits should be required for releases to groundwater because pollutants can reach navigable waters "'through the ground water table.'" Pet. Br. 40 (citation omitted). But Respondents argue (at 46) that the rejected proposals "hardly suggest[]" an intent to create an *exception* for such releases.

This has it backwards. As the Government explains, the history shows a "shared understanding" that the CWA as then-pending (and ultimately enacted) did not "*already* impose[] NPDES permitting requirements on any point source releases into groundwater that ultimately migrated to jurisdictional surface waters." U.S. Br. 29–30. Though "groundwater" appeared then (and still appears now) throughout the Act, it was (and

is) notably absent from the provisions prohibiting point source discharges. See *id.* at 13–14 (discussing definition of "discharge of pollutants").

Respondents and *amici* cite one snippet of legislative history to support their position—a sentence from then-Congressman John Dingell explaining his own view of the term "discharge of pollutants." Such "floor statements by individual legislators rank among the least illuminating forms of legislative history." *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017).

E. A means-of-delivery test is consistent with the CWA's purposes.

Like the Ninth Circuit, Respondents (at 56–57) ultimately resort to vague appeals to purpose. But the means-of-delivery test "advances the CWA's many purposes by honoring the distinction between point and nonpoint source pollution." Pet. Br. 42. It is also "quite mistaken to assume … that 'whatever' might appear to 'further[] the statute's primary objective must be the law.'" *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (citation omitted).

At bottom, this case arises from Respondents' belief (at 49) that nothing "can[] substitute for the CWA's protections of navigable waters from point-source pollution." That is Congress's policy decision to make, however. In the CWA, Congress entrusted nonpoint source pollution, like releases from the County's wells, to the States. Courts cannot override that legislative choice.

Moreover, Respondents simply ignore the States' "comprehensive statutory and regulatory schemes designed to protect and conserve their water resources, including *both* groundwater *and* connected surface waters." Br. of *Amici* State of West Virginia et al. 20–

21 (emphases added); see also Br. of *Amicus* Chamber of Commerce of the United States 5 n.2. Respondents hypothesize (at 56) that if the County prevails, "polluters" will simply "release pollutants onto the ground or into groundwater." But in many States, including Hawai'i, that scenario is specifically covered under state law. See Haw. Code R. § 11-54-1 (providing state water quality standards may be applied when "the discharge of pollutants to the ground or groundwater has adversely affected, is adversely affecting, or will adversely affect the quality of any State water other than groundwater").

Respondents' state *amici* quibble with the adequacy of state-law protections, but their dispute is just thinly veiled distrust of their sister States. They do not argue that States lack the power to enact adequate state-law protections, nor do they dispute that States have done so. They simply prefer a federal "baseline level of regulation nationwide." Br. of *Amici* State of Maryland et al. 19.

Respondents themselves only argue (at 49) that various other federal laws do not "displace" the CWA. This is a straw man. The County does not contend that these federal laws *displace* the CWA, but that they "address[] nonpoint source pollution" *together* with the CWA's nonpoint source program. Pet. Br. 43.

II. The Means-of-Delivery Test Is Confirmed by *UARG* and *SWANCC*.

In addition to the traditional principles of statutory construction, the clear-statement rules in *UARG* and *SWANCC* support the County's position. *Id.* at 44–52. Respondents do not claim that their expansive reading of "discharge of pollutants" is clearly indicated in the

text, arguing instead that none of the three rules is triggered in the first place. They are incorrect.

First, Respondents contend their interpretation would not vastly increase point source permitting. They argue (at 54–55) that "properly constructed" onsite disposal systems (*e.g.*, cesspools and septic tanks) would not come within their point source program. But this convenient litigation position is cold comfort.

The facts are these. Much of the country lives near navigable waters. See Br. of *Amici* Wychmere Shores Condominium Trust et al. 10–11. In Hawai'i alone, "[a]pproximately 6,900 cesspools are located within 750 feet of the shoreline."[2] And septic systems generally "are *not* well maintained."[3] Indeed, studies confirm that pollutants starting at coastal onsite disposal systems foreseeably and traceably reach navigable waters. See, *e.g.*, Leilani M. Abaya, et al., *A multi-indicator approach for identifying shoreline sewage pollution hotspots adjacent to coral reefs*, 129 Marine Pollution Bulletin 70, 73 (2018) (pollutants reach shoreline between nine hours and three days following disposal).

Respondents' assurances about green infrastructure projects are no better. Respondents admit (at 54) that such projects will now need a permit if they "demonstrably and predictably" reach navigable water. Many green infrastructure projects meet that standard,

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[2] Hawai'i State Department of Health, *Hawai'i's Nonpoint Source Management Plan (2015-2020)*, at 12, https://planning.hawaii.gov/czm/initiatives/coastal-nonpoint-pollution-control-program/hawaiis-implementation-plan-for-polluted-runoff-control/.

[3] U.S. EPA, Decentralized Systems Technology Fact Sheet: Septic Tank Soil Absorption Systems, EPA 932-F-99-075, at 1 (Sept 1999), https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P1007ZQR.TXT.

including infiltration basins and rain gardens. Br. of *Amici* Nat'l Conf. of State Legislatures et al. 20.[4]

And what of the "many ordinary and routine agricultural activities [that] can lead to the movement of nutrients or chemical or biological materials from point sources, through the soil into groundwater, and thence to surface water"? Br. of *Amici* Agricultural Business Organizations 20. Respondents are silent as to those and the near-endless list of other activities that likely fall within their any-foreseeable-point-source theory.

Respondents suggest (at 55) that general permits could "reduce compliance burdens," but this misses the point. Respondents' interpretation of "discharge of pollutants" would vastly increase the entities and activities subject to point source permitting. General permits would not change that.

Second, Respondents argue (at 53) that they merely endorse "a longstanding agency interpretation." EPA disagrees. See U.S. Br. 8 ("prior statements concerning pollutant releases to groundwater reflected a 'lack of consistent and comprehensive direction'").

Some *amici* claim there are EPA permits consistent with Respondents' theory, but those few examples hardly establish a consistent agency position. The identified individual permits are less than 0.1% of the roughly

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[4] Respondents' implication that the Water Infrastructure Improvement Act makes green infrastructure projects newly subject to NPDES permitting, see Resp. Br. 54 n.16, is false. The law merely "inform[s] municipalities of the *opportunity* to develop an integrated plan" that may or may not incorporate green infrastructure. 33 U.S.C. § 1342(s)(2), (3)(B) (emphasis added).

44,870 individual NPDES permits nationwide.[5] None is for a residential onsite disposal system, green infrastructure project, or underground injection well of the type here.

Other *amici* assert that a "legion of" lower-court cases read the CWA as Respondents do. Br. of *Amici* Craft Brewers 25. That is incorrect, as the County has shown (at 49–50). The two additional cases mentioned by *amici* are no different. In *League of Wilderness Defenders/Blue Mountains Biodiversity Project* v. *Forsgren*, aircraft sprayers delivered insecticides "directly into rivers." 309 F.3d 1181, 1185 (9th Cir. 2002). The question in *Peconic Baykeeper, Inc.* v. *Suffolk County* was merely whether spray applicators meet the definition of "point source." 600 F.3d 180, 188–89 (2d Cir. 2010). The court did not discuss whether the pollutants had to be, or were, delivered to navigable waters by the spray applicators.

Third, Respondents assert (at 56) that "[t]he states' central role in NPDES permitting obviates any concern" about disturbing the federal-state balance. Again, Respondents miss the point. The CWA strikes a balance between federally mandated permits and state-led nonpoint source management programs. A vast expansion of the point source program, as Respondents urge, would place more water and water pollution under *federal* rather than *state* authority. See also 33 U.S.C. § 1251(b).

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[5] U.S. EPA, NPDES Permit Status Reports, FY 2017 Non-Tribal Permits Detailed Percent Current Status, https://www.epa.gov/sites/production/files/2018-01/documents/final_fy17_eoy_non-tribal_backlog_report_card.pdf.

III. The County's Wells Do Not Require a Point Source Permit.

Applying the means-of-delivery test or the Government's groundwater-exclusion theory, this Court should hold that the County's wells do not require a point source permit and reverse the Ninth Circuit accordingly. Respondents suggest (at 11 n.6) that even if this Court agrees with the means-of-delivery test, it should remand to determine whether the groundwater/effluent mixture is flowing "through fissures or other rock openings that would themselves satisfy the point-source definition." That is neither necessary nor appropriate.

Respondents do not identify a single instance in the record where they pleaded or argued that underground "fissures" or "rock openings" meet the definition of "point source," because they never did so. See, *e.g.*, First Amended Compl. at 23 (D. Haw.), ECF 36. Nor would it have made sense, given that the tracer-dye study concluded that the treated effluent travels in a "broad" "plume" that "discharges from the seafloor mixed with other marine and fresh waters predominantly as diffuse flow." Ninth Circuit Excerpts of Record 411. This Court should not delay the County's relief to allow Respondents to raise this argument for the first time.

Nor should there be a remand to determine whether the groundwater itself is a point source.[6] Groundwater is not itself "confined" or "discrete." 33 U.S.C. § 1362(14). Like any liquid, groundwater has no shape of its own, generally spreading through pores and spaces in soil and rock and continually transforming in chemical

[6] Respondents no longer argue that groundwater is navigable water. See Pet. Br. 10.

content as it does so. Groundwater is also incapable of "discharg[ing]" pollutants, *ibid.*; while pollutants can travel with groundwater to navigable waters, they do not leave the groundwater and enter navigable waters on their own. As the Sixth Circuit has said, "the CWA's text forecloses an argument that groundwater is a point source." *Ky. Waterways All.* v. *Ky. Utils. Co.*, 905 F.3d 925, 933 (6th Cir. 2018); see also 84 Fed. Reg. 16,810, 16,819 (Apr. 23, 2019) ("groundwater is not a point source").

Remand for any of these questions is also unnecessary, of course, if this Court adopts the Government's groundwater-exclusion theory. Pet. Br. 56. Contrary to Respondents' insinuation, the County and the Government are in significant agreement. We agree that the wells are not subject to point source permitting. U.S. Br. 33. More broadly, we agree that the test for point source pollution is not merely whether "*any* spatial gap [exists] between a point source and jurisdictional surface waters." *Id.* at 8; see *supra* 7. And we agree that Respondents would "expand the Act's coverage beyond what Congress envisioned." U.S. Br. 25 (internal quotation marks and citation omitted).

But this Court need not go as far as the Government urges. The Government concludes that pollutants are not "add[ed] … to navigable waters from any point source," 33 U.S.C. § 1362(12), "if the path between the point source and jurisdictional surface waters is too attenuated," U.S. Br. 24. As explained above, the County believes that the better understanding of "from any point source" is informed by the definition of "point source" as a "conveyance." That language answers the question on which this Court granted certiorari, and this Court need go no farther.

CONCLUSION

The judgment below should be reversed.

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