

No. 18-260

In the Supreme Court of the United States

COUNTY OF MAUI,

Petitioner,

v.

HAWAII WILDLIFE FUND, ET AL.,

Respondents.

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

**BRIEF AMICUS CURIAE FOR
AGRICULTURAL BUSINESS ORGANIZATIONS
SUPPORTING PETITIONER**

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QUESTION PRESENTED

Whether the Clean Water Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

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INTEREST OF THE *AMICI*

Amici curiae are trade associations whose members are responsible for a significant proportion of America's agricultural production or whose members supply goods and services to agricultural producers.¹

The Agricultural Retailers Association (ARA) is a not-for-profit trade association that represents America's agricultural retailers and distributors. ARA members provide goods and services to farmers and ranchers, including fertilizer, crop protection chemicals, seed, crop scouting, soil testing, custom application of pesticides and fertilizers, and the development of comprehensive nutrient management plans. Retail and distribution facilities are scattered throughout all 50 States and range in size from small family-held businesses or farmer cooperatives to large companies with multiple outlets.

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. Through its state and county Farm Bureau organizations, AFBF represents about six million member families in all 50 States and Puerto Rico.

CropLife America (CLA), established in 1933, is the national trade association for the plant science industry, representing developers, manufacturers, formulators, and distributors of crop protection chemicals and

¹ Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties have provided written consent to the filing of this amicus brief.

plant science solutions for agriculture and pest management in the United States. CLA's member companies produce, sell, and distribute virtually all crop protection products, including herbicides, insecticides, and fungicides, which American farmers use to provide consumers with abundant food and fiber. CLA is committed to the safe and responsible use of the industry's products.

The Family Farm Alliance (Alliance) is a grassroots, nonprofit organization composed of family farmers, ranchers, irrigation districts, and allied industries in 16 Western States. The Alliance's mission is to ensure the availability of reliable and affordable irrigation water supplies to Western farmers and ranchers. The day-to-day management activities of many Alliance members are directly tied to groundwater, including diffuse or shallow subsurface flow and groundwater drained through subsurface drainage systems. The Alliance has a long history of collaboration with constructive partners in all levels of government, with conservation and energy organizations, and with Native American tribal interests who seek real solutions to water resources challenges in the West.

The Fertilizer Institute is the leading voice in the fertilizer industry, representing the public policy, communication, and statistical needs of its members, including producers, manufacturers, retailers, and transporters of fertilizer.

The National Cattlemen's Beef Association (NCBA) is the largest and oldest national trade association representing American cattle producers. Through state affiliates, NCBA represents more than 175,000 of America's farmers and ranchers, who provide a significant portion of the nation's supply of food. NCBA works to advance the economic, political, and social interests of

the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests.

The National Corn Growers Association (NCGA) was founded in 1957. NCGA represents nearly 40,000 dues-paying corn farmers nationwide and the interests of more than 300,000 growers who contribute through corn checkoff programs in their States. NCGA and its 50 affiliated state organizations work together to create and increase opportunities for corn growers to help them sustainably feed a growing world.

The National Pork Producers Council (NPPC) is an association of 43 state pork producer organizations and the global voice in Washington, DC for the Nation's approximately 60,000 pork producers. NPPC conducts public policy outreach at both the state and federal level with a goal of meeting growing worldwide consumer demand for pork while simultaneously protecting the water, air, and other environmental resources that are in the care of or potentially affected by pork producers and their farms. NPPC and its members have engaged directly with EPA over the last two decades regarding the development of water quality standards and have made significant capital investments in the design and operation of farms to comply with these environmental regulations.

Each amicus organization is deeply interested in the scope of federal jurisdiction under the Clean Water Act (CWA or Act) and has participated in litigation or rule-making addressing that issue over many years. Many normal farming operations, including crop and forage production involving fertilization and weed and insect pest control, subsurface drainage systems, irrigation systems, or the use of lagoons, basins, pits, or impoundments, may result in material reaching

groundwater and from there being carried to surface waters. Should the Court uphold the Ninth Circuit's erroneous expansion of the CWA, amici's members (or their customers) would face a significantly increased risk of agency enforcement and citizen suits. Millions of agricultural enterprises could be newly subject to the CWA's permitting requirements. In addition, the Act includes longstanding exclusions for agricultural activities that could be compromised by an over-expansive approach to jurisdiction over groundwater and its relation to agricultural production. Amici believe that their long experience operating under the CWA will assist this Court in resolving the question presented, which is an issue of immense importance to the Nation's food producers and their suppliers.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns Maui County's disposal of about four million gallons of treated sewage a day by injecting it through wells into groundwater, from which some of it reaches the ocean near North Kaanapali Beach some 84 days later. There is no doubt that the State of Hawaii has broad authority under state law to regulate that activity. See EPA, *Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System to Releases of Pollutants From a Point Source to Groundwater*, 84 Fed. Reg. 16,810, 16,824 (Apr. 23, 2019) (*Interpretive Statement*). There also is no question that a number of federal statutes address groundwater quality affected by disposal activities: the Safe Drinking Water Act (SDWA), the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). See *id.* at 16,824-26. There is, in short, ample federal and state authority to protect Maui's beaches without

resort to the expansive and novel reading of the Clean Water Act that respondents are seeking.

This Court's consideration of the broad question presented—whether the CWA requires a permit whenever “pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater”—should be informed by the wide variety of far less dramatic ways in which a point source-to-groundwater-to-navigable waters conveyance of pollutants may occur.

In normal agricultural operations there are numerous ways in which material discharged from a point source may reach groundwater, from which it may eventually be conveyed to navigable waters within the jurisdiction of the CWA. Take, for example, crop fertilization. This usually involves application of manure or commercial fertilizers to or below the surface of crop fields to supply the nutrients needed for crop growth. Fertilizer is applied in amounts that the crop can efficiently and productively use (that is, at agronomic rates). While agriculture continues to strive for ever-greater precision in how much nutrients are used, the form they take, and where and when they are applied, perfect precision is impossible. Because crop production systems are biological, physical, and chemical systems subject to outside forces (like unpredictable weather events), it is impossible to ensure that all nutrients are used by crops, with no unused nutrients remaining in the soil. Furthermore, unharvested crop materials (for example, stems, leaves and roots when only grain is harvested) contain nutrients that are returned to the soil as this organic matter decays. Those unutilized or remaining nutrients, when they are picked up by stormwater and flow into surface water, are exempt from the CWA's National Pollution Discharge Elimina-

tion System (NPDES) permitting requirements through the CWA's agricultural stormwater exemption.

However, under respondents' theory, NPDES permitting requirements would be triggered when stormwater unpreventably picks up and carries with it nutrients (which originated from point sources) as it infiltrates into the soil, moves past the root zone, into groundwater, and then to a downgradient surface water. The result would be that farmers, responsibly applying fertilizer to their land, could be subject to the CWA's no-discharge provisions and the risk of potential civil and criminal penalties. It is clear that this is not what Congress intended. Indeed, NPDES permits would be a highly ineffective way in which to address such losses of nutrients to surface waters.

As we explain in Part I of this brief, it is therefore little wonder that each of the tools this Court uses to determine the meaning of a statute shows that point source-to-groundwater-to-navigable waters conveyances lie outside the scope of NPDES permitting. Plain statutory language, the CWA's structure, canons of construction, and legislative history all point to just one permissible reading of the Act: that additions of pollutants to groundwater, regardless of whether they later reach navigable waters, are not within the purview of the NPDES program.

In Part II, we show how disruptive it would be to agriculture and food production to hold otherwise. It would upend American food production to require NPDES permits whenever seepage or other additions to groundwater may end up in waters of the United States. Ordinary farmers and ranchers would be unable to undertake the most basic agricultural activities without risking crushing fines or assuming the often unmanageable cost and prohibitively long delays asso-

ciated with obtaining NPDES permits.² What is more, the NPDES program is *badly ill-suited* to the regulation of agricultural activities. Expanding NPDES permitting to cover agricultural seepage to groundwater would place unmanageable burdens on regulators.

ARGUMENT

I. ADDITIONS OF POLLUTANTS TO GROUNDWATER ARE NOT DISCHARGES OF POLLUTANTS TO NAVIGABLE WATERS UNDER THE ACT

Congress enacted the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. 1251(a). Congress stated that, in pursuing that goal, it would “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution,” and thereby retain the States’ traditional control over “the development and use” of “land and water resources.” 33 U.S.C. 1251(b). To satisfy both policies, Congress established “a program of cooperative federalism” that “anticipates a partnership between the States and the Federal Government” to achieve clean water. *New York v. United States*, 505 U.S. 144, 167 (1992). That scheme is multifaceted, but two of its elements are of special relevance here.

First, the CWA’s two permitting programs apply to “navigable waters,” which are defined as “the waters of

² The windows a farmer has in which to plant and harvest crops (and apply fertilizers) are very tight. What is more, farmers often make the final decision on what to plant, and therefore how much fertilizer needs to be applied, based on market projections and shortly before planting. The short time between this planting decision and the window for planting is simply incompatible with the time it takes to obtain an NPDES permit.

the United States, including the territorial seas.” 33 U.S.C. 1362(7). Discharges to those waters require an NPDES permit under CWA Section 402 (for the “discharge [of] pollutants that can wash downstream”) or a permit under Section 404 (for the discharge of dredged or fill materials, “which ‘are solids that do not readily wash downstream”). *National Ass’n of Mfrs. v. Department of Def.*, 138 S. Ct. 617, 625 (2018) (*NAM*). Water features that are not “waters of the United States” lie within the jurisdiction of the States and fall outside the CWA permitting schemes.

Second, CWA permit requirements are triggered by the “discharge of a pollutant,” which is defined as “any addition of any pollutant to navigable waters” or to “the waters of the contiguous zone or the ocean” from “any point source,” 33 U.S.C. 1362(12). A “point source” is “any discernible, confined and discrete conveyance.” Congress gave examples such as a “pipe, ditch, channel, tunnel, conduit, well,” “container, [or] concentrated animal feeding operation.” 33 U.S.C. 1362(14). All other water pollution is nonpoint source pollution, which is regulated by the States, not directly by EPA. *American Farm Bureau Fed’n v. EPA*, 792 F.3d 281, 289 (3d Cir. 2015). This “disparate treatment of discharges from point sources and nonpoint sources is an organizational paradigm of the Act.” *Oregon Nat. Desert Ass’n v. U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008).

Accordingly, (1) the addition of pollutants to waters that are not “waters of the United States” under the CWA does not fall under the Act’s permitting programs; and (2) additions of pollutants to waters of the United States other than from a “point source” are not covered by those programs. Instead, regulation of additions of either type—to non-navigable waters or from nonpoint sources—is the province of state and local governments. The lower courts that have elided two

stages of movement of pollutants, point source-to-groundwater-to-navigable waters, into a single stage, point source-to-navigable waters, thus destroying key elements of Congress’s federalist scheme for pollution control.

A correct interpretation of the CWA does not allow that result. Traditional tools of statutory interpretation leave no doubt that point source additions to groundwater, like Maui’s well injections (or that may result from routine and common agricultural practices), never require an NPDES permit. That is not just the best reading of the statute; it is the only permissible reading.

A. Requiring NPDES permits for point source additions to groundwater is inconsistent with the CWA’s plain text

“Congress has directly spoken to the precise question at issue” here in “clear and conclusive” terms. *Digital Realty Tr. v. Somers*, 138 S. Ct. 767, 781-782 (2018). When “the statute’s language is plain,” that is “where the inquiry should end.” *Puerto Rico v. Franklin Cal. Tax Free Tr.*, 136 S. Ct. 1938, 1946 (2018).

1. The CWA treats “ground waters” as distinct from “navigable waters”

Although the term “navigable waters” is defined in the CWA as “the waters of the United States” (33 U.S.C. 1362(7)), the term retains “independent significance” by showing “what Congress had in mind”: Congress’s “traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172 (2001) (SWANCC). Water that is underground is obviously not navigable. And it lies far outside traditional federal jurisdiction based on Congress’s commerce power over

water capable of use for commercial navigation. To include groundwater in CWA jurisdiction over “waters of the United States” would be to render the term “navigable” “devoid of significance.” *Rapanos v. United States*, 547 U.S. 715, 731 (2006) (plurality).

To underline the point that navigable waters and groundwater are different objects, Congress on multiple occasions used both terms when it *meant* to reach both. For example, the Act:

- mandates creation of a joint federal-state “water quality surveillance system for the purpose of monitoring the quality of the navigable waters and ground waters and the contiguous zone and the oceans” (33 U.S.C. 1254(a)(5));
- requires EPA to develop and publish information “on the factors necessary to restore and maintain * * * all navigable waters, ground waters, waters of the contiguous zone, and the oceans” (33 U.S.C. 1314(a)(2));
- calls on EPA to develop, in coordination with the States, programs to address pollution “of the navigable waters and ground waters” (33 U.S.C. 1252(a));
- addresses state programs that monitor “the quality of navigable waters and, to the extent practicable, ground waters” (33 U.S.C. 1256(e)(1)); and
- directs EPA to supply information to the States on controlling pollution resulting from “changes in the movement, flow, or circulation of any navigable waters or ground waters” (33 U.S.C. 1314(f)(2)(F)).

Against this background, construing “navigable waters” to include groundwater would run afoul of several

canons of construction. Take first the canon against superfluous statutory language. There would have been no need for Congress to list the term “ground waters” in the foregoing provisions if “navigable waters” already included groundwater. Yet “the rule against superfluity” forbids an interpretation that makes “ground waters” a wholly unnecessary element in each of these provisions. *Lockhart v. United States*, 136 S. Ct. 958, 966 (2016); see *Clark v. Rameker*, 573 U.S. 122, 131 (2014) (“a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous”).

Take next the canon in favor of consistent meanings. “[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.” *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 571 (2012). Thus, “navigable waters” cannot include groundwater in those places where the phrase “navigable waters” appears alone, but exclude it when “navigable waters” and “ground water” appear separately in a provision. Ordinary textual analysis shows that navigable waters do not include groundwater.³

Finally, consider the *expressio unius* canon. Ordinarily, “a negative inference may be drawn from the

³ That is especially so because elsewhere the CWA refers to groundwater alone or in other contexts that reflect its distinct meaning. *E.g.*, 33 U.S.C. 1282(b)(2) (conditioning certain grants on State certifications regarding “available ground water”); 33 U.S.C. 1314(a)(1) (referring to effects of pollutants “an any body of water, including ground water”); 33 U.S.C. 1329(b)(2)(A) (referring to best management practices’ impact “on ground water”); 33 U.S.C. 1329(h)(5)(D) & (i)(1) (requiring EPA to consider States’ “ground water quality protection activities”).

exclusion of language from one statutory provision that is included in other provisions of the same statute.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006). Congress made some provisions of the CWA applicable to both “navigable waters” and “ground water.” So, when Congress used “navigable waters” alone in Section 1362(7) and referred to “navigable waters,” “contiguous zone,” and “oceans” in Section 1362(12), it did not mean also to include groundwater. This indicates that groundwater was “excluded by deliberate choice, not inadvertence.” *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). “Courts are required to give effect to Congress’ express inclusions and exclusions, not disregard them.” *NAM*, 138 S. Ct. at 631.

Congress easily could have defined “navigable waters” as the “waters of the United States, including ground water.” That it did not do so, but instead explicitly said “ground water” wherever in the statute that that is what it meant, is conclusive: “navigable waters,” and hence “waters of the United States,” do not include groundwater. Any interpretation of the Act that treats groundwater as navigable waters, either explicitly or in practical effect, is impermissible.

2. Injection or seepage to groundwater is not an “addition” from a point source

Additional textual indicators refute the idea that additions to groundwater fall within Section 402. NPDES permitting requirements apply to “the discharge of any pollutant” (33 U.S.C. 1311(a)), which is defined as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. 1362(12). The words Congress used—“addition * * * to navigable waters” and “from” a point source—signify a direct conveyance to jurisdictional waters. As this Court said in *South Florida Water Management District v. Mic*

cosukee Tribe, the Act's language makes clear that a discharge occurs only when a point source "convey[s] the pollutant to 'navigable waters.'" 541 U.S. 95, 105 (2004).

Dictionary definitions confirm that "addition" means "the joining or uniting of one thing to another," which carries a sense of directness lacking here. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961); see also, *e.g.*, *ibid.* ("addition" means the "direct chemical combination of two or more substances"); CHAMBERS TWENTIETH CENTURY DICTIONARY (1972) ("add" means "to put, join, or annex (to something else)"; "addition" means "the act of adding").

The phrase "*from* any point source" in Section 1362(12) supports this reading. "From" connotes a physical connection, such as "a point or place where an actual physical movement * * * has its beginning" or that is the "means," "agent," or "instrumentality" of the connection. WEBSTER'S THIRD, *supra*. And combining requirements that an addition be "from" one thing "to" another in particular carries the sense of a direct connection through a "conveyance." That excludes additions to navigable water that physically come not from a point source but from groundwater.

Further confirmation comes from Congress's definition of effluent limitations—the key way point source pollution is controlled—to mean a "restriction" on "quantities, rates, and concentrations of [pollutants] which are *discharged from point sources into navigable waters.*" 33 U.S.C. 1362(11) (emphasis added). The ordinary meaning of "discharged into," like "addition to," is "directly conveyed to." Neither phrase can be rewritten to mean "discharged into groundwater that somewhere connects to navigable water."

B. The statutory structure shows that NPDES permits are not required for point source additions to groundwater

The statutory language alone is therefore clear enough to answer the question presented in the negative. But, in addition, “[i]t is a ‘fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’” *National Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007). “[S]urrounding provisions” and the overall “structure” of the CWA confirm that the Ninth Circuit erred. *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017).

Critically, the Act creates “a program of cooperative federalism” in which authority is divided between the federal government and the States. *New York*, 505 U.S. at 167. “Point source” discharges into “navigable” “waters of the United States” fall on the federal side; non-navigable waters and nonpoint source discharges fall on the States’ side. This division of responsibilities is not about *whether* water is protected from pollution, but about *which government* has primary responsibility for protecting it. As the Agencies recently explained, “[e]nsuring that States retain authority over their land and water resources pursuant to sections 101(b) and section 510”—a requirement never even mentioned by the Ninth Circuit—“helps to carry out the overall objective of the CWA and ensures that the agencies are giving full effect and consideration to the entire structure and function of the Act.” EPA & U.S. Army Corps of Engr’s, *Revised Definition of “Waters of the United States,”* 84 Fed. Reg. 4154, 4169 (Feb. 14, 2019) (*WOTUS Definition*).

Among the provisions of the CWA that give effect to this scheme of cooperative federalism are “dozens of non-regulatory grant, research, nonpoint source, groundwater, and watershed planning programs that were intended by Congress to assist the States in controlling pollution in the nation’s waters, not just its navigable waters.” *WOTUS Definition*, 84 Fed. Reg. at 4,169; see *Interpretive Statement*, 84 Fed. Reg. 16,816-17 (Apr. 23, 2019) (describing numerous CWA provisions calling for information gathering to aid state efforts to regulate discharges to groundwater and addressing state programs to regulate nonpoint source pollution); *supra* at 10. As EPA recognizes, expanding the NPDES program to encompass point source discharges into groundwater, and nonpoint source movement of groundwater into surface water, would make a nonsense of these statutory provisions. *Interpretive Statement*, 84 Fed. Reg. 16,817, 16,824.

Because it “would significantly reduce the need for the more holistic planning provisions of the Act and the state partnerships they entail,” that expansion would be inconsistent with the statutory goals and federalist structure of the CWA. *WOTUS Definition*, 84 Fed. Reg. at 4169. By contrast, maintaining the distinctive federal and state roles set out in “the specific policy directives from Congress” allows full implementation of “the entire structure of the Act” and the “word choices of Congress.” *Ibid.*

This Court should “avoid” interpretations that “mak[e] a mess” of the statute. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017). The Ninth Circuit failed to apply a holistic reading to the CWA that “account[s] for both ‘the specific context in which * * * language is used’ and ‘the broader context of the statute as a whole.’” *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014).

C. Numerous substantive canons and the CWA’s legislative history counsel further in favor of reversal

1. Several additional canons of construction add further support to the conclusion that NPDES permits are not required for discharges to groundwater.

Avoidance of Constitutional Doubt. “[S]tatutes should be interpreted to avoid constitutional doubts.” *Clark v. Martinez*, 543 U.S. 371, 379 (2005). But the Ninth Circuit’s interpretation of the CWA “raise[s] serious constitutional problems” by “alter[ing] the federal-state framework.” *SWANCC*, 531 U.S. at 173. That interpretation effectively eradicated two areas of state power: the States’ authority over additions of pollutants to groundwater and the States’ authority over the movement of pollutants to navigable water from non-point sources such as groundwater. Converting two separate stages in the water cycle where state governments have authority into a single stage where the NPDES program applies “result[s] in a significant impingement of the States’ traditional and primary power over land and water use.” *Id.* at 174; see *Rapanos*, 547 U.S. at 738 (plurality) (these are areas of “quintessential state and local power”). The brief of West Virginia and 19 other States filed in support of certiorari attests to the seriousness of this impingement.

This Court “expect[s] a ‘clear and manifest’ statement from Congress to authorize an unprecedented intrusion into traditional state authority.” *Rapanos*, 547 U.S. at 738 (plurality); see *SWANCC*, 531 U.S. at 174 (finding no clear congressional expression of “a desire to readjust the federal-state balance”). There is no such plain statement in the CWA as to additions to groundwater that eventually reaches navigable waters. To the contrary, all textual and structural clues point in the

other direction. Courts must “read the statute as written to avoid the[se] significant constitutional and federalism questions.” *SWANCC*, 531 U.S. at 174.

Due Process. Violation of the CWA by discharging pollutants into navigable waters without a permit carries the risk of enforcement actions seeking substantial civil penalties, citizen’s suits, and criminal prosecution. See *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 136 S. Ct. 1807, 1812 (2016). Already, groundwater aside, “the Act’s reach is ‘notoriously unclear’ and the consequences to landowners even for inadvertent violations can be crushing.” *Id.* at 1816 (Kennedy, J., concurring); see also *Sackett v. EPA*, 566 U. S. 120, 132-133 (2012) (Alito, J., concurring). That uncertainty would be compounded by an interpretation of the Act that required a permit for additions to groundwater that eventually reach jurisdictional waters.

Fair notice is perhaps the most fundamental guarantee afforded by the Due Process Clause. It forbids “leaving the people in the dark about what the law demands.” *Sessions v. Dimaya*, 138 S. Ct. 1204, 1224 (2018) (Gorsuch, J., concurring in part). But groundwater’s very presence under the soil, and its connections to navigable waters—which may be remote, slow, seasonal, shifting, and effectively unknowable *ex ante*—will not be discernable to most landowners (and certainly not to the average farmer or rancher).⁴ Determining the risk of liability would instead require close

⁴ See, e.g., EPA, *Proceedings of the Ground-Water / Surface-Water Interactions Workshop* 5 (July 2000) (“Determining the location and magnitude of contaminant discharges to surface waters from groundwater plumes is a complex hydrogeological and biogeochemical problem. * * * Geochemical conditions * * * may change drastically over intervals of a few centimeters”).

(and costly) scientific investigation, which even then may not be able reliably to account for seepage conditions or subsurface connections beyond the moment of investigation. Bringing groundwater within the scope of the Act's permitting provisions would therefore "have a significant bearing on whether the Clean Water Act comports with due process." *Hawkes Co.*, 136 S. Ct. at 1817 (Kennedy, J., concurring)

The Rule of Lenity. Beyond these general due process concerns, the risk of criminal fines and imprisonment for discharging pollutants without a permit brings the rule of lenity into play. See 33 U.S.C. 1319(c). That rule forbids an interpretation of the CWA that exposes citizens to criminal prosecution based on the unknown and to some extent unknowable movement of water below the ground. See *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (applying the rule of lenity in a civil case "[b]ecause we must interpret the statute consistently" in both a "criminal or noncriminal context"). Where it is "totally unrealistic to assume that more than a fraction of the persons and entities" to whom the CWA applies "would have knowledge" of subsurface conditions that could lead to surface water contamination, the rule of lenity counsels against an interpretation that would make criminals of many landowners. *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290 (1978) (Powell, J. concurring).

2. Given "all the textual and structural clues" discussed above, "it's clear enough" without resort to legislative history that NPDES permits are not required for additions to groundwater. *Wisconsin Cent. v. United States*, 138 S. Ct. 2067, 2074 (2018). But legislative history is fully in accord with that plain meaning of the statute.

Congress understood that groundwater and surface water move in closely connected hydrologic cycles. See, e.g., S. Rep. No. 92-414, at 73 (1971), reprinted in 2 Leg. Hist. of the Water Pollution Control Act of 1972, at 1491 (Comm. Print 1973) (“Leg. Hist.”) (observing that there is an “essential link between ground and surface waters” and acknowledging “the artificial nature of any distinction” drawn between them). Accordingly, when Congress used the terms “ground water” and “navigable waters” separately and in contradistinction, it did so deliberately and in full knowledge of the line drawing that that requires.

In particular, Congress rejected a proposal that would have subjected both groundwater and navigable waters to the CWA permitting programs. Representative Leslie Aspin proposed an amendment “to brin[g] ground water * * * into the enforcement of the bill” on the theory that “if we do not stop pollution of ground waters through seepage and other means, ground water gets into navigable waters, and to control only the navigable water and not ground water makes no sense at all.” 118 Cong. Rec. 10,666 (1972), 1 Leg. Hist. 589. See *id.* at 10,669, 1 Leg. Hist. 597 (House voted to reject Aspin amendment); S. Rep. No. 92-414, at 73, 2 Leg. Hist. 1491 (Senate rejected similar amendments). Congress chose instead to leave control of groundwater, as well as the diffuse movement of pollutants from groundwater into surface water, to state programs and more targeted federal statutes. See, e.g., 118 Cong. Rec. 10,667, 1 Leg. Hist. 591 (explaining that CWA Section 402(b)(1)(D) predicates approval of a state program on the State having authority to regulate disposal into wells) (remarks of Rep. Clausen).

Congress thus “made a considered decision” to leave groundwater out of the NPDES program. *Thacker v. Tennessee Valley Authority*, No.17-1201, slip op. at 7

(Apr. 29, 2019). This Court should not “negate” that decision by “let[ting the permitting schemes] in through the back door, when Congress has locked the front one.” *Ibid.*; see *Gulf Oil Co. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (Court will not hold that Congress “intended a result that it expressly declined to enact”).

II. REQUIRING PERMITS FOR INDIRECT ADDITIONS OF POLLUTANTS THROUGH GROUNDWATER WOULD WRONGFULLY EXPAND THE REACH OF THE CWA TO ORDINARY AND ROUTINE AGRICULTURAL ACTIVITIES

Inconsistency with the statutory text is, of course, reason enough to hold that seepage into groundwater cannot be an “addition of [a] pollutant to navigable waters.” Any doubt on that score should be resolved in light of the vast practical consequences of holding in favor of respondents.

The breadth of activities that could be impacted if the uncertain and attenuated movement of pollutants through groundwater to navigable waters triggers the NPDES program is enormous. Because most agricultural activity ultimately takes place on or in soil, many ordinary and routine agricultural activities 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—including animal feeding operations, manure storage, and application of fertilizers (manure and chemical) and pesticides. The Ninth Circuit’s ruling—or any similar approach—thus has the potential to turn normal agricultural activity without an NPDES permit into a crime. And it does not stop with direct agricultural activities; the industries that support American agriculture (for

example, fertilizer production and local farm supply retailers) may also be impacted.

Nor is the problem just the sheer scope of the activities that would be covered. It would also be very difficult to apply the NPDES permitting scheme to those activities in any sensible way. NPDES effluent limits that are based on the technology available to treat pollutants and meet water quality standards are designed to address highly engineered and discrete systems with direct, end-of-pipe discharges to surface waters. Those conditions do not exist in agricultural production systems, where stormwater drives the movement of non-point source pollutants. As a result, the NPDES scheme is ill-suited to regulating many of the agricultural activities that can result in the addition of pollutants into groundwater. Attempting to force NPDES permitting in those circumstances would also undermine the specific agricultural exemptions expressly included in the CWA. And the NPDES scheme could displace other regulatory schemes that better protect groundwater. These risks confirm that Congress could not have intended Section 402's permitting scheme to apply any time a pollutant is conveyed indirectly to navigable waters through a point source discharge to groundwater.

A. Many ordinary agricultural activities can result in discharges to groundwater

A vast array of ordinary agricultural activities will be adversely affected if the NPDES permitting scheme is extended to pollutants that travel through groundwater to navigable waters. These include:

Fertilizer application. The use of fertilizers, including manure spreading, can lead to materials entering

groundwater. American farms apply, on average, 130 pounds of fertilizer to each acre of cropland each year.⁵ While much of that is absorbed by crops, agronomy is an inexact science, and part of the nutrient load inevitably remains on or in the soil and can seep below the root zone.⁶ Those fertilizers can enter groundwater in a number of ways. They can get caught up in rain or irrigation runoff, or they can seep into the soil and enter groundwater networks. Though fertilizers that reach groundwater through stormwater runoff or irrigation return flows should not require an NPDES permit under any circumstances, see *infra* at 25, plaintiffs or regulators may argue that those exemptions do not apply when the fertilizers seep through the soil into groundwater.

In particular, nitrogen fertilizers (perhaps the most common fertilizer) are highly soluble and can seep through the soil into groundwater.⁷ And since courts have held that fertilizer spray equipment can be a point source for CWA purposes (*e.g.*, *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994)), under the Ninth Circuit's approach, nearly *every* application of fertilizer potentially would require an NPDES permit.

⁵ *A Look at Fertilizer and Pesticide Use in the US*, Gro Intelligence (June 11, 2018), perma.cc/JNY8-K25F.

⁶ Wolf Scheible & Michael Udvardi, *How You May Need Less Fertilizer in the Future*, Noble Res. Inst. (Apr. 8, 2019), perma.cc/H2NP-4FVV. In addition, nutrients present in non-harvested plant tissues (leaves, stems, roots) can leach below the root zone as the tissues decompose.

⁷ Bernard T. Nolan et al., *A National Look at Nitrate Contamination of Ground Water*, U.S. Geological Survey, Nat'l Water-Quality Assessment Program (Jan. 1998), perma.cc/YA7S-ZE3Q.

Livestock feeding. Concentrated animal feeding operations (CAFOs) are point sources and their discharges are strictly regulated by EPA through its comprehensive CAFO rule. 33 U.S.C. 1362(14); 40 C.F.R. 122.23(a). As a result, livestock farmers take significant steps to prevent the discharge of manure into waters of the United States, including by containing stormwater, building specially designed manure storage facilities, carefully and timely applying manure as a fertilizer, and maintaining extensive records. These efforts mean that only about one-third of the nearly 20,000 “large” CAFOs in the United States require an NPDES permit.⁸ Small and medium-sized animal feeding operations (AFOs)—which operate in a functionally similar manner—also can also be designated as CAFOs if they are discharging pollutants. See 40 C.F.R. 122.23(c). Accordingly, these livestock farmers also take active steps to contain and manage their manure to prevent discharges.

Both CAFOs and AFOs store and manage manure for use as a crop fertilizer. Yet many of the best practices for waste management—such as the use of manure storage or treatment facilities to allow for the timely and appropriate application of manure on fields as fertilizer—could lead to farms being drawn into the CWA’s NPDES permitting requirements, even when small amounts of nutrients unavoidably seep from such structures through soils and into groundwater.

⁸ Many of these CAFOs have voluntarily obtained CAFO permits out of an abundance of caution, despite not legally requiring them. And some States, such as in Michigan and Minnesota, require CAFOs to obtain an NPDES permit as a matter of State, not federal, law. See EPA, *NPDES CAFO Permitting Status Report 2017* (2018), perma.cc/BY3H-3RE4.

Pesticide application. American farmers use over one billion pounds of pesticides each year to supply the Nation with high-quality and affordable food.⁹ Pesticides are highly regulated, by both EPA as well as the USDA, and are subject to a separate regulatory regime (the Federal Insecticide, Fungicide, and Rodenticide Act). And, like fertilizers, once properly applied many pesticides can eventually seep into groundwater from the soil—particularly where the water table is close to the surface and the pesticide is highly water-soluble.¹⁰ Under respondents’ theory, therefore, pesticide use could often trigger the NPDES scheme: a large (and indeterminate) proportion of the ordinary applications of pesticides would require NPDES permits on top of the streamlined and targeted pesticide program Congress deliberately created.

In fact, it may not even be necessary to apply the pesticides to trigger the NPDES scheme; simply handling pesticides is probably enough. A pesticide storage facility, for example—whether on a farm or at a retailer—could be considered a point source under this scheme. If there are any leaks, the pesticide could seep through the soil to groundwater. Similarly, loading and cleaning pesticide spray apparatus in the field could be considered a discharge to groundwater. So too could handling empty pesticide containers as they are collected and recycled. Under the Ninth Circuit’s approach, all of these activities could be swept into the

⁹ Donald Atwood & Claire Paisley-Jones, EPA, *Pesticides Industry Sales and Usage 2008-2012 Market Estimates* at 9 (Jan. 2017), perma.cc/39MU-SRJD.

¹⁰ *Pesticides and Groundwater Protection*, Univ. of Mass. Amherst Ctr. for Agric., Food, & the Env’t, perma.cc/LB4F-42MD.

Section 402 permitting regime—in addition to the myriad other federal and state regulations that already govern the safe handling, storage, and disposal of pesticide products.

Irrigation. Return flows from irrigation are expressly exempted from the NPDES program. 33 U.S.C. 1362(14) (excluding “return flows from irrigated agriculture” from the definition of “point source”). Return flows are usually understood to include irrigation water that returns to navigable waters through groundwater. *E.g.*, *Fishermen Against Destruction of Env’t, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1297 (11th Cir. 2002). But some non-governmental organizations contend that the exemption applies only to surface flows and not to return flows through groundwater. See *Pacific Coast Fed’n of Fishermen’s Ass’ns v. Glaser*, No. CIV S-11-2980-KJM-CKD, 2013 WL 5230266, at *13 (E.D. Cal. Aug. 31, 2012). Amici disagree, as have the courts in *Closter Farms* and *Glaser*—the only two that have considered the issue to date. But if other courts were to restrict the irrigation return flow exemption to surface flows, under the Ninth Circuit’s rule, even spray irrigation could require an NPDES permit.

Agricultural stormwater. Congress also expressly exempted agricultural stormwater from NPDES requirements, even though stormwater may pick up unutilized nutrients (for example) that originated in a point source and may carry them into navigable water. See 33 U.S.C. 1362(14) (term point source “does not include agricultural stormwater discharges”). But some of that stormwater may seep through soil to groundwater. And agricultural stormwater management systems like infiltration basins (also known as sumps or recharge basins) allow stormwater to percolate through the soil to filter out contaminants, though some will remain when it reaches groundwater. It makes no

sense that stormwater runoff would be exempt from NPDES requirements, yet stormwater filtered through soil to groundwater would require an NPDES permit if it contains material that originated in a point source and subsequently reaches navigable waters. But that appears to be the absurd result of respondents' theory.

Farm ponds. Farm ponds have many uses, including for irrigation, aquaculture, fire protection, erosion control, and even recreation.¹¹ Accordingly, hundreds of thousands of farms across the country have one or more such ponds—there are over 50,000 in Virginia alone.¹² But ponds can contain material that qualifies as a pollutant under the CWA—essentially any chemical compound or solid material at all. See 33 U.S.C. 1362(6). And because ponds are often simple unlined depressions that hold water, and water can percolate into the underlying soil, those pollutants can potentially reach the water table.¹³ Because farm ponds can be point sources (see *Highlands Conservancy v. E.R.O., Inc.*, Civ. A. No. A:90-0489, 1991 WL 698124, at *6 (S.D. W. Va. Apr. 18, 1991); *WOTUS Definition*, 84 Fed. Reg. at 4194), each farm pond could potentially be considered a point source that discharges pollutants to navigable waters through groundwater.

Other farm operations. Farmers might also need permits for things that are not unique to agriculture. Like other homes, largely rural farmhouses and build-

¹¹ Ben Falk, *Farm Ponds: Strategies for Multiple Functions*, Cornell Univ. Small Farms Program (July 4, 2011), <https://perma.cc/2X7N-CRV7>.

¹² Louis A Helfrich & Garland B. Pardue, *Pond Construction: Some Practical Considerations*, Va. Cooperative Extension (May 1, 2009), perma.cc/5EYB-FUP4.

¹³ *Ibid.*

ings can have septic systems that filter wastewater through the soil into groundwater.¹⁴ The soil treats and filters the water before it enters the water table. But some amounts of pollutants may nonetheless remain when the water percolates into the groundwater, and that could require an NPDES permit under the Ninth Circuit's approach. Indeed, under respondents' expansive theory even rainwater running off a farmhouse roof, where it has picked up debris, and entering the soil from a drainpipe (a point source), would require an NPDES permit if contaminants drained to groundwater and thence reached navigable waters.

Beyond the direct agricultural activities that could be swept into the NPDES ambit are the activities of the industries that support agriculture. Amici's members include fertilizer and pesticide manufacturers, for example, whose facilities can have wastewater treatment ponds or other impoundments that could be considered point sources. These ponds may not be lined and could also lead to percolation into groundwater—percolations that have little to no environmental impact because the soil acts as a filter, but that could nonetheless require a permit. This would have a direct impact on farmers: the cost of obtaining such permits (or of defending against a citizen suit) inevitably would have to be passed on to the farmers who purchase those fertilizers and pesticides.

¹⁴ Many livestock farms maintain stringent biosecurity measures that require all farm employees and visitors to shower both as they enter the barn, as well as upon exit from the barn. These systems, as well as other facilities for employees, are routinely managed through their own wastewater or septic systems.

B. Requiring NPDES permits for groundwater discharges would be devastating for farmers and ranchers and impractical for regulators

Notably, every type of agricultural discharge to groundwater described above is passive. By contrast to the County of Maui's active injection of treated effluent directly into groundwater as a means of disposal, agricultural releases to groundwater result from natural seepage that inevitably occurs *despite* practices designed to avoid or minimize those discharges, such as the application of manure, chemical fertilizer, and pesticides to crops at agronomic rates. Those activities are an essential part of farming, improve the agricultural utility of the land, and protect the crop—they cannot be equated with disposal of wastes. Troublingly, if this Court adopted respondents' theory, "the implementation of voluntary on-farm manure management [or fertilizer application] systems will provide no regulatory relief for agricultural producers and will even expose them to CWA liability," leaving "[a] significant portion of agricultural producers" to "face a constant, unpreventable risk of discharge" covered by CWA Section 402. Scott Yager & Mary-Thomas Hart, *The Tipping Point Source: Clean Water Act Regulation of Discharges to Surface Water Via Groundwater, and Specific Implications for Nonpoint Source Agriculture*, 23 *DRAKE J. AGRIC. L.* (2018) (forthcoming).

The consequences of requiring NPDES permits for all the agricultural activities described above would be incredibly disruptive to agricultural production in the United States. NPDES permits are extremely expensive, and requiring them in these circumstances would force drastic changes to the operations of most farms and threaten the livelihoods of many thousands of farmers and ranchers across the country. The policy considerations and careful balancing that are neces-

sarily required in undertaking such a wholesale change should properly be made after due consideration by the legislative branch, not the judiciary.

Beyond that, the NPDES program is simply an inapt fit in the context of groundwater, making implementation of the lower court's judgment a practical impossibility. Attempting to implement the Ninth Circuit's holding would also displace regulatory schemes that can and do specifically protect groundwater.

1. Few farmers and ranchers can afford the tens of thousands (or even hundreds of thousands) of dollars and months or years of waiting it may take to obtain an NPDES permit. The process can require retaining consultants, engineers, and lawyers—and in the case of groundwater would demand complex modeling. *Cf.* David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RES. J. 59, 74, 76 (2002). Those costs naturally add up. Landowners seeking comparable individual CWA permits face costs of “over \$271,596” on average. *Id.* at 74. The time it takes to obtain CWA permits is likewise crushing. Relatively efficient nationwide permits “took an average of 313 days to obtain,” whereas for individual permits, “it took an average of 788 days (or two years, two months) from the time they began preparing the application to the time they received [the] permit.” *Id.* at 76. See also *Rapanos*, 547 U.S. at 721 (plurality) (similar). Tens of thousands of dollars in costs and a long wait for a permit would put countless farmers and ranchers out of business.

Yet the costs would not be farmers' alone to bear. The sheer number of potential NPDES permits that would be required for agricultural activities under the

Ninth Circuit’s approach would be administratively infeasible for federal and state agencies.

Congress has already recognized that requiring NPDES permits for ordinary agricultural activity would be unworkable and expressly exempted some of those activities. It created the exemption for return flows from irrigation precisely because “[t]he problems of permitting every discrete source or conduit returning water to the streams from irrigated lands is simply too burdensome to place on the resources of EPA.” 123 Cong. Rec. 38,924, 38,956 (1977). But if every fertilizer or pesticide application or farm pond required a permit, the administrative burden on the EPA would appear to be of much the same magnitude as that which Congress sought to avoid. And for farmers, there would be little left of the exemption Congress expressly enacted for them. It would make no sense to conclude that that was what Congress wanted.

2. Even if it were numerically feasible to administer the NPDES scheme, as a practical matter it would often be impossible to apply the scheme to many agriculture activities that can result in pollutants entering groundwater.

To begin with, NPDES permits are needed only when there is an actual discharge of pollutant; a potential for discharge does not trigger the requirement. *National Pork Producers Council v. EPA*, 635 F.3d 738, 751 (5th Cir. 2011). Accordingly, unless and until it is determined that there is an actual discharge of pollutant, the farmer would not need an NPDES permit. But for many, if not most, agricultural discharges through soil to groundwater, it is unclear if (or when) the pollutant actually enters groundwater. Farmers would thus face a choice: apply for a costly permit that

they may not in fact need, or not apply and then wait for the first regulatory fine or citizen suit.

Furthermore, the NPDES program is an extremely poor fit for agricultural seepage. It was designed to target “end-of-pipe” discharges to jurisdictional waters. See 40 C.F.R. Part 122, Subpart C. But fertilizers and pesticides applied to crop fields enter groundwater, if at all, only intermittently, in variable amounts, and through different points that change depending on soil conditions and other environmental factors. And any eventual release to navigable waters is even more remote, uncertain, and changeable with conditions. There is thus little or no correlation, and certainly no consistent one, between regulation of what comes out of the point source and what, if anything, ever arrives in the waters of the United States.

It follows that it would also be impossible and impractical to designate the discharge point to be the place at which the groundwater connects with navigable waters. Groundwater often does not enter navigable waters through a single point, but at a number of places that can be many miles away from the point source and beyond the control of the owner or operator of the point source. Moreover, the groundwater will almost certainly contain pollutants from a multitude of different sources, making it impossible for any one owner or operator to determine if his or her own control measures are effective—particularly when the pollutant takes months to diffuse through the groundwater before reaching navigable waters. Compounding matters, at certain times of year, surface water can flow back into groundwater; current NPDES regulations do not account for this possibility. Unlike with a direct point source addition to navigable waters, it is impossible to see how technology- or water-quality-based effluent limits could sensibly be used to regulate

seepage to groundwater that eventually, in complex, uncertain, and variable and inconstant ways, reaches navigable waters.

In addition to being impractical to apply NPDES permitting requirements to the vast majority of agricultural activities that would be swept in under the Ninth Circuit's rule, doing so would be bad policy. The release of pollutants into groundwater is regulated extensively by States and other federal laws, including the Safe Water Drinking Act (SDWA), 42 U.S.C. 9601 *et seq.*, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 300(f) *et seq.* At best, the CWA would impose requirements that are merely duplicative of state or other federal requirements. At worst, the CWA's requirements would be inconsistent with those other schemes and, in the case of state regulations, might well preempt them. *E.g.*, *International Paper v. Ouellette*, 479 U.S. 481, 495-97 (1987). Yet, unlike the NPDES program, state groundwater schemes *are* designed to protect groundwater from pollutants that enter through diffuse sources. Adding an additional ill-fitting and conflicting layer of Section 402 regulation could therefore reduce protection for groundwater—precisely the wrong outcome.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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