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IN THE SUPREME COURT OF THE UNITED STATES

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COUNTY OF MAUI, HAWAII,)

Petitioner,)

v.) No. 18-260

HAWAII WILDLIFE FUND, ET AL.,)

Respondents.)

- - - - -

Washington, D.C.

Wednesday, November 6, 2019

The above-entitled matter came on
for oral argument before the Supreme Court of the
United States at 10:04 a.m.

APPEARANCES:

ELBERT LIN, ESQ., Richmond, Virginia;

on behalf of the Petitioner.

MALCOLM L. STEWART, Deputy Solicitor General,

Department of Justice, Washington, D.C.; for the

United States, as amicus curiae, supporting

the Petitioner.

DAVID L. HENKIN, ESQ., Honolulu, Hawaii;

on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 18-260, the
5 County of Maui versus the Hawaii Wildlife Fund.

6 Mr. Lin.

7 ORAL ARGUMENT OF ELBERT LIN

8 ON BEHALF OF THE PETITIONER

9 MR. LIN: Mr. Chief Justice, and may
10 it please the Court:

11 This case is not about whether the
12 releases from Maui's underground injection wells
13 should be regulated at all but how. They are
14 already regulated under several existing state
15 and federal environmental programs, including
16 the Clean Water Act's nonpoint source program.
17 But is a Clean Water Act point source permit
18 also required? The question is where the line
19 falls between the Clean Water Act's federal
20 point source program and its state law nonpoint
21 source program.

22 And the answer is in the text. The
23 text defines a point source as a discernible,
24 confined, and discrete conveyance, and it
25 thereby makes clear that the trigger for point

1 source permitting is not where a pollutant comes
2 from but how it reaches navigable waters.

3 An NPDES permit is thus required only
4 when a point source or series of point sources
5 is the means of delivering pollutants to
6 navigable waters. This understanding is
7 confirmed by the fact that it offers the
8 predictability one would expect in a permitting
9 regime, where regulated entities need to know
10 beforehand whether a permit is required and
11 where, in this particular statute, penalties for
12 noncompliance are so severe.

13 It also maintains an important role
14 for state nonpoint source programs under the
15 Clean Water Act.

16 Respondents, however, would rewrite
17 the statute to all but eviscerate the line
18 between point and nonpoint source pollution and
19 radically change the status quo. In this case,
20 they would impose a new federal permit on wells
21 that have operated the same way for 40 years,
22 during which time EPA expressly rejected calls
23 for NPDES permitting. There are more than
24 500,000 similar underground injection wells in
25 the country and nearly 6,000 in Hawaii alone.

1 This expansion of the nonpoint source
2 program and diminution of the -- excuse me, this
3 expansion of the point source program and
4 diminution of the nonpoint source program is not
5 warranted by the text, as is underscored by the
6 fact that Respondents now offer the fourth
7 different reading of the statute to support
8 liability in this case.

9 CHIEF JUSTICE ROBERTS: Counsel, I --
10 I want to make sure I understand what your test
11 is. You say that the -- it has to be the means
12 -- it -- I guess the point source has to be the
13 means of conveyance to the jurisdictional water?

14 MR. LIN: Yes, Your Honor.

15 CHIEF JUSTICE ROBERTS: What does that
16 mean? That if it ever runs into groundwater, it
17 is not the means of conveyance but the
18 groundwater is?

19 MR. LIN: That's correct, Your Honor.
20 The -- it -- what we mean by "means of
21 conveyance" is at the point source. The
22 discernible, confined, and discrete conveyance
23 must carry and deliver the pollutant to the
24 navigable waters.

25 CHIEF JUSTICE ROBERTS: So the -- so

1 any intervention of groundwater removes the
2 jurisdiction of the point source program?

3 MR. LIN: That's right, because
4 groundwater is a nonpoint source. And if the
5 groundwater is -- in this case is diffusely
6 flowing through the ground and that's what
7 carries the pollutants to the navigable
8 waters --

9 JUSTICE GINSBURG: But the well -- the
10 well is the source of the pollution, so it would
11 seem that that should be the object of
12 regulation. And it is a conveyance. It is one
13 of two conveyances in this case. But it is a
14 means of delivery, although the groundwater is
15 also a means of delivery.

16 MR. LIN: Yes, Your Honor, the wells
17 are a point source, and we don't dispute that it
18 is a discernible, confined, and discrete
19 conveyance, but not all point sources require
20 point source permits.

21 If that were the case, as Respondents
22 suggest, there would be very, very little, if
23 anything, left for nonpoint source regulation.
24 And so our contention, Your Honor, is that if
25 you're reading the statutory text and

1 considering the words "addition from any point
2 source," that that contemplates that the point
3 source must be the thing or point sources must
4 together -- as one functional point source must
5 be what actually delivers the pollutants to
6 the --

7 CHIEF JUSTICE ROBERTS: So if --

8 JUSTICE KAGAN: I guess I --

9 CHIEF JUSTICE ROBERTS: So, if you
10 have a point source under pressure that, you
11 know, just -- that doesn't seep up, kind of
12 shoots the pollutants out, and there, you know,
13 that motion gets to the jurisdictional water,
14 would that be covered? Would that be pollution
15 of the jurisdictional water by that point
16 source?

17 MR. LIN: It --

18 CHIEF JUSTICE ROBERTS: I'm
19 envisioning two different things, one where it's
20 -- the pollutant is put in the groundwater and
21 then gradually, you know, seeps into the -- into
22 the ocean, and one where it's sort of forcefully
23 expelled, although it goes through the
24 groundwater.

25 MR. LIN: Your Honor, I think if it

1 still goes through the groundwater, the -- the
2 question under the statute is what is the --
3 what is the conveyance, what is the thing that
4 carries and delivers the pollutants. I think
5 even if it's forcefully put into the
6 groundwater, the groundwater is what's carrying
7 it.

8 Now I can imagine, Your Honor,
9 scenarios as we discuss in our brief where
10 you've got, say, a point source, a pipe that's
11 very close to the water's edge and -- and expels
12 the pollutants into the water. The thing that's
13 carrying it, the last conveyance in that factual
14 scenario, would be the pipe. The pipe is a
15 discernible, confined, and --

16 JUSTICE BREYER: So what happens if
17 you just take the pipe and you decide what we'll
18 do is we're going to end the pipe 35 feet from
19 the river or from the ocean or something? Now
20 you know perfectly well that it'll drip down
21 into the ground and it'll be carried out into
22 the navigable water.

23 In your theory, that isn't covered?

24 MR. LIN: In that scenario, Your
25 Honor, the land is the conveyance and that

1 pollution would be regulated under the nonpoint
2 source --

3 JUSTICE BREYER: Well, no, the
4 conveyance is the groundwater that is underneath
5 the land into which the pipe drips the
6 pollutant.

7 MR. LIN: Yes, Your Honor. If it
8 seeps into the ground --

9 JUSTICE BREYER: Yeah.

10 MR. LIN: -- then the groundwater is
11 what's carrying and delivering the pollutants --

12 JUSTICE BREYER: Yeah.

13 MR. LIN: -- and that scenario would
14 be regulated under the nonpoint source program.
15 The Congress --

16 JUSTICE BREYER: All right, but then
17 what we have is, I take it, an absolute road map
18 for people who want to avoid the point source
19 regulation. All we do is we just cut off the --
20 cut off the -- the pipes or whatever, five feet
21 from the ocean or five feet from the navigable
22 stream or five feet from -- you see? You
23 understand the problem.

24 What I'm looking for in this case is
25 what's a standard that will prevent evasion,

1 which I'm not -- I don't see how yours prevents
2 evasion.

3 MR. LIN: Your Honor --

4 JUSTICE BREYER: And at the same time
5 doesn't turn everything into -- undercut the
6 groundwater program.

7 MR. LIN: If I may, I would quarrel
8 with your use of the word "evasion," because I
9 think what's important to remember is it's a
10 comprehensive scheme. Congress didn't design a
11 -- it didn't just put the point source program
12 out into the world on a hope and a prayer that
13 there would be some other regulatory program
14 that would cover the other scenarios, including
15 the one that you're talking about, Justice
16 Breyer.

17 There -- there is a nonpoint source
18 program. There are laws, including in Hawaii,
19 that would explicitly prohibit the scenario that
20 you're talking about. Hawaii Code 354D -- three
21 -- 354D-50, it says that you can't alter the way
22 your -- your -- your discharge system is
23 structured without permission from the director
24 of --

25 JUSTICE KAGAN: But Congress --

1 MR. LIN: -- the Hawaii --

2 JUSTICE KAGAN: Excuse me, Mr. Lin.
3 Congress wanted the point source program to do
4 something. The Congress wanted point sources
5 that were discharging pollutants to receive a
6 permit before they did so. And I think what
7 Justice Breyer is saying is that nobody would
8 ever have to go through that process of getting
9 a permit if they knew that they could do
10 something like what Justice Breyer was
11 suggesting, just stop the pipe five feet before
12 the ocean.

13 MR. LIN: And I think, Your Honor, the
14 key there is that they knew they could. And
15 "could" -- "could" is the operative word because
16 the state law regulations that are in place are
17 significant. And so it's a -- it's a -- yes,
18 Your Honor, there's a clear choice that our
19 reading of the statute offers, which is, do you
20 want to be subject to permitting or subject to
21 state law regulation?

22 And state law regulation in many, many
23 states, including Hawaii, doesn't allow the
24 scenario that --

25 JUSTICE SOTOMAYOR: But that's the

1 problem --

2 MR. LIN: -- Justice Breyer is talking
3 about.

4 JUSTICE SOTOMAYOR: -- but that's the
5 problem, isn't it? Because it presumes the
6 state will regulate, and some states don't. So
7 what you're doing is cutting off permitting
8 because you're limiting the word "to" -- or --
9 or morphing the word "to navigable waters" and
10 changing it into "into navigable waters."

11 And that's what Justice Scalia looked
12 at was the plain text and said "to" is different
13 than "into." And so, for us, the question, I
14 believe, is, do you read the plain language and
15 does it say from a point source, it's the well,
16 to the ocean? It can be traced, yes. I think
17 the words are pretty clear.

18 MR. LIN: A few --

19 JUSTICE SOTOMAYOR: To accept yours,
20 you have to put in the word "into."

21 MR. LIN: A few answers to that, Your
22 Honor.

23 JUSTICE SOTOMAYOR: To -- to -- to
24 accept your meaning, we have to transform "in"
25 into "into."

1 MR. LIN: If I may, let me turn first
2 to the question of states and whether states
3 would regulate.

4 So I think the answer to your question
5 is, could there -- could there be states that
6 would simply allow this to be a wild west, where
7 there's no regulation of nonpoint source
8 pollution? And the answer to that is absolutely
9 not.

10 There's a couple reasons why that's
11 not true. First, 1329 of the Clean Water Act
12 requires every state to have a nonpoint source
13 management program.

14 Second, there are grants and
15 incentives in place, hundreds of millions of
16 dollars a year, to encourage states to regulate.

17 And, third, there are water -- there's
18 a water quality back-stop in the Clean Water
19 Act, so any water, states are required every two
20 years to identify waters that are impaired, that
21 are not meeting water quality standards --

22 JUSTICE KAGAN: But, Mr. Lin --

23 MR. LIN: -- that have --

24 JUSTICE KAGAN: -- the question is
25 what this statute means. The question is not

1 whether there's a possible state back-stop. The
2 question is what Congress was doing in this
3 statute.

4 And Justice Sotomayor indicated to you
5 that this statute reads pretty firmly. It
6 requires a permit when there's any addition of
7 any pollutants to navigable waters from any
8 point source.

9 So, here, it's from a point source,
10 which is the well, and it's to navigable waters,
11 which is the ocean, and it's an addition. How
12 does this statute not apply?

13 MR. LIN: Your Honor, I think it comes
14 down to what -- what work is "from" doing in the
15 statute. And "from" is a preposition, as this
16 Court has recognized, for other prepositions,
17 like "under." It -- it takes its meaning from
18 the words that are around it. And the words
19 here that "from" is indicating the relationship
20 between are "addition" and "point source."

21 Now, if "point source" were not a
22 defined term, which is what my friends here
23 urge, and you looked at simply the ordinary
24 meaning of the word "source," I think we would
25 have -- be having a very different discussion,

1 but "point source" is defined as a conveyance.

2 JUSTICE KAGAN: Well, it's defined as
3 more than a conveyance. Conveyance is the
4 umbrella term. But then, actually, they go
5 further and they say that there are particular
6 things that are point sources, some of which
7 sound like conveyances and some of which, quite
8 frankly, don't.

9 Nobody ever thought that a container
10 sounded like a conveyance. Nobody ever thought
11 that a concentrated animal feeding operation
12 sounded like a conveyance. And, most
13 importantly here, nobody really thinks that a
14 well sounds much like a conveyance.

15 But "well" is specifically defined to
16 be a point source. This is a well. So you can
17 read this -- this provision that I just read
18 you, any addition of any pollutant to navigable
19 waters from any well. That's what we have here.

20 MR. LIN: Your Honor, if I could start
21 with the statutory language, I think the wells
22 as an example is important to address, but if
23 you -- I think if you look at the words
24 "addition from any point source," and you
25 substitute in, for point source, pipe, which is

1 in the statute and nobody disagrees is a -- is a
2 point source, addition to a lake, to an ocean,
3 to a river, a navigable water, an addition to a
4 lake of pollutants from a pipe, addition to a
5 lake of sewage water from a pipe.

6 I think, I submit, Your Honor, that
7 the ordinary understanding of that, what one
8 pictures in one's mind is a pipe that is next to
9 the water, not a pipe that is a mile away. And
10 I think that's because you're talking about in
11 addition, which is a verb that just has --

12 JUSTICE KAVANAUGH: That -- that --

13 MR. LIN: -- delivery -- yes, Your
14 Honor?

15 JUSTICE KAVANAUGH: Keep going.
16 Sorry.

17 MR. LIN: -- that has delivery in it
18 and it's -- it's being associated with
19 conveyance, which is a thing that transports,
20 carries, and delivers.

21 JUSTICE KAVANAUGH: That sounds like
22 the directly argument that Justice Scalia's
23 opinion rejected.

24 MR. LIN: Yes, Your Honor. I -- the
25 Rapanos plurality that Justice Scalia wrote, we

1 think it's factually consistent with our
2 reading. We think he was concerned about point
3 source to point source pollution. But as to the
4 textual argument --

5 JUSTICE KAVANAUGH: Well, why -- why
6 is point source to point source to navigable
7 water covered and point source to nonpoint
8 source to navigable water not covered?

9 MR. LIN: Textually, we think that
10 point source to point source is covered because
11 it is the phrase "any point source," not the
12 phrase "a point source," that must be the means.
13 And because "any" includes one or more, you
14 could have more than one point source.

15 And the only way more than one point
16 source can -- where all of the point sources are
17 carrying, delivering, is where they are
18 integrated and operating as one point source.

19 JUSTICE KAVANAUGH: If -- if the word
20 "from" -- suppose I think you have a strong
21 argument on the word "from," and so, too, does
22 the opposing side have a strong argument on the
23 ordinary meaning of the word "from."

24 What then should we look at to help us
25 decide how to interpret it?

1 MR. LIN: Your Honor, as this Court
2 has said many times recently, you have to look
3 at all the other tools of statutory --

4 JUSTICE KAVANAUGH: And what --

5 MR. LIN: -- interpretation.

6 JUSTICE KAVANAUGH: -- and what --
7 what are the best ones for you?

8 MR. LIN: A couple of them.

9 JUSTICE KAVANAUGH: Give me one or two
10 that -- that you think are best for you.

11 MR. LIN: If I had to go with two, I
12 would start with structure, the fact that nobody
13 disputes that there should be a point source
14 program and a nonpoint source program, and that
15 their reading renders the nonpoint source
16 program, by their own admission, into a
17 residuum, whereas ours leaves a meaningful role
18 for the nonpoint source program.

19 The second tool of statutory
20 interpretation, Your Honor, is to look at the
21 context and the other provisions, including the
22 punitive provisions, which, as this Court has
23 recognized, impose civil penalties of more -- of
24 more than \$50,000 a day.

25 We're talking about a permitting

1 regime. And what would we have expected
2 Congress to have written? Something that
3 requires an after-the-fact analysis of
4 traceability or something that could be
5 determined ahead of time by mere observation,
6 that there is here a discernible and confined,
7 discrete conveyance that is delivering the
8 pollutants to the water. I need to go get a
9 permit.

10 JUSTICE ALITO: The term "from" could
11 be read very broadly to mean that a discharge
12 requires a permit if the pollutant emerges at
13 some point from a point source and by some
14 means, no matter how remote, some quantity of
15 the pollutant eventually makes its way into the
16 waters of the United States.

17 Now I take it that interpretation
18 which Respondents once advocated is no longer
19 their position. So what concerns me is whether
20 there is any limiting principle that can be
21 found in the text and is workable and does not
22 lead to absurd results.

23 MR. LIN: Your Honor, I think the
24 limiting principle is the means of delivery
25 test, which is that you -- that -- that what

1 Congress wanted regulated entities and
2 regulators and courts to look at is, how is the
3 pollutant reaching the navigable water? Is it a
4 discernible, confined, and discrete conveyance?

5 Now that is a case-by-case factual
6 determination and there are lines that need to
7 be drawn, but we think in the overwhelming
8 majority of cases it's going to be clear.

9 Your Honor, in terms of whether "from"
10 could be more broadly read, I think, yes, if the
11 statute were written differently, if it said,
12 for example, emitted from a point source, that
13 might be a different case.

14 JUSTICE ALITO: What about the
15 limiting principle that the Respondents now
16 propose, which is that it has to be fairly
17 traceable and there has to be proximate
18 causation and, therefore, foreseeability, is --
19 can that be found in the text and is it
20 workable?

21 MR. LIN: Your Honor, we don't think
22 it can be found in the text because we don't
23 read "from" -- we don't think Congress intended
24 "from" to mean causation. So, one, we don't
25 think it can be found in the text. Two --

1 JUSTICE KAGAN: But that would be a
2 normal way of reading the word "from," wouldn't
3 it; in other words, to say, to decide whether
4 something is from something else, you have to
5 look as to whether it's from something else?

6 (Laughter.)

7 MR. LIN: Your Honor, if I may.

8 CHIEF JUSTICE ROBERTS: Yes.

9 MR. LIN: Your Honor, with respect, I
10 think it -- it -- that assumes that a certain
11 kind of word is following from. If you said,
12 for example, Your Honor, this arrived from
13 Miami, Miami is a place of origin, and so, yes,
14 "from" is indicating the source, the place where
15 that started.

16 But, if you said this arrived today
17 from a truck, I posit, Your Honor, I submit that
18 truck is being used as a conveyance there. It's
19 not necessarily the point of origin.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Stewart.

24

25

1 ORAL ARGUMENT OF MALCOLM L. STEWART
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONER

4 MR. STEWART: Mr. Chief Justice, and
5 may it please the Court:

6 The first point I'd like to make about
7 the -- the definition of discharge of a
8 pollutant is that the combination of the words
9 "to" and "from" import more than either term in
10 isolation; that the statute defines the term
11 "discharge of a pollutant" to mean any addition
12 of a pollutant to navigable waters or to the
13 ocean from a point source.

14 And, for example, if at my home I pour
15 whiskey from a bottle into a flask and then I
16 bring the flask to a party at a different
17 location and I pour whiskey into the punch bowl
18 there, nobody would say that I had added whiskey
19 to the punch from the bottle.

20 It would be true that the punch --
21 that the whiskey originated in the bottle, its
22 route was fairly traceable from the bottle to
23 the punch bowl, and it wound up in the punch
24 bowl, but you wouldn't say it was added to the
25 punch from the bottle.

1 Now, at the other extreme, if I
2 brought the bottle to the party and I poured it,
3 the whiskey from a few inches above the surface
4 of the punch and so it traveled through air or
5 if it traveled through a funnel so it passed
6 over a solid surface, in ordinary parlance, we
7 wouldn't say that simply because there was some
8 spatial gap between the bottle and the punch,
9 therefore, I didn't add it from the -- the
10 bottle to -- to the punch.

11 In between those two extremes, I don't
12 think that the "to" and "from" will get you all
13 the way home. I think the Court needs to look
14 at other provisions of the Clean Water Act to
15 determine what sort of break in the chain will
16 cause the -- the -- the release no longer to be
17 a discharge from the point source to the
18 navigable waters.

19 But the fairly traceable test that the
20 Ninth Circuit adopted just can't be right. It
21 would encompass -- you know, if transmuted over
22 to the whiskey example, it would encompass
23 situations where I poured the whiskey from the
24 bottle into the flask. Nobody would treat that
25 as addition of the whiskey to the punch from the

1 bottle.

2 Now, with respect to groundwater in
3 particular, the reason that EPA has concluded
4 that groundwater in particular will break the
5 causal chain so that it will no longer be an
6 addition from the point source to the navigable
7 water, groundwater is really treated in the
8 Clean Water Act as its own thing, and in large
9 part, that's because of its distinct physical
10 characteristics, but there's a body of both
11 state and federal law that regulates groundwater
12 specifically, in part to protect the drinking
13 water supply because groundwater is obviously
14 important for that, in part because of potential
15 downstream effects on the quality of navigable
16 waters.

17 CHIEF JUSTICE ROBERTS: And in -- in
18 your test, any little bit of groundwater is
19 enough to break the chain?

20 MR. STEWART: Yes. Now -- now the
21 hypothetical --

22 CHIEF JUSTICE ROBERTS: Yes. I mean
23 -- okay. So two inches?

24 MR. STEWART: Two inches. But the --
25 the hypothetical in which somehow the pollutant

1 will be released from a pipe and will travel
2 through two inches of groundwater but won't
3 travel over land doesn't seem realistic. That
4 is, if you imagine a pipe releasing pollutants
5 five feet from the shore and some of --

6 JUSTICE SOTOMAYOR: What's the
7 difference between the groundwater and the land?

8 MR. STEWART: The big difference is
9 that groundwater --

10 JUSTICE SOTOMAYOR: The land is not a
11 conveyance.

12 MR. STEWART: The -- the -- the big --
13 the big difference for purposes of applying the
14 statute is that the land is not -- the land
15 right next to the bank is not subject to its own
16 body of distinct federal and state regulation in
17 the way that groundwater is.

18 JUSTICE KAVANAUGH: Why -- why --

19 JUSTICE KAGAN: Sorry, Mr. Stewart, I
20 didn't get the idea of your -- what -- what do
21 you say to the hypothetical, which is the pipe
22 goes five feet to the shore?

23 MR. STEWART: If it goes five feet to
24 the shore and the pollutant travels onto the
25 land, travels across the land and into the

1 water, you know, through its own force, it spews
2 out of the pipe or simply through the force of
3 gravity because you're on an incline, we would
4 say that's covered.

5 JUSTICE KAGAN: So, if the pipe is on
6 the -- is on the land and spews onto the land,
7 it's regulated and you need a permit; but, if
8 the pipe is underground, it's not and you don't
9 need a permit?

10 MR. STEWART: You would not need a --
11 you would not need a NPDES permit because you
12 would not be discharging onto -- you would not
13 be discharging to the navigable water --

14 JUSTICE BREYER: It's the same
15 problem.

16 JUSTICE KAGAN: But just to follow up
17 with Justice Breyer's -- Justice Breyer said
18 that this was a road map. I guess you said the
19 hypothetical is -- is -- is not realistic. But
20 why isn't it realistic? You've just provided a
21 road map. You know, put your pipe underground.

22 MR. STEWART: Well, I think if you
23 were going to -- to do it in the form of a well
24 or do it in the form of a contraption that had
25 the physical consequences of a well, that is,

1 you were injecting pollutants into the
2 groundwater from the surface, you would be
3 subject to this distinct body of regulation.

4 The Clean Water Act requires states
5 that want to implement their own -- to
6 administer their own NPDES programs to regulate
7 disposals into wells. The Safe Drinking Water
8 Act regulates disposals into wells that will
9 affect drinking water quality.

10 So I don't think that the potential
11 for evasion is --

12 JUSTICE SOTOMAYOR: The problem I see
13 is that all those other statutes have different
14 focuses. So you look at CERCLA or OPA, they're
15 remedial. They're after the fact. This statute
16 is preventative. We want to avoid having to
17 clean it up. That's why we give a permit.

18 And I don't see many of the other
19 statutes you cited in your brief as really
20 addressing that significant problem, which is
21 the preventive issue. And so there is a purpose
22 to the permit.

23 MR. STEWART: There's --

24 JUSTICE SOTOMAYOR: It's the only one
25 that serves that permit -- that purpose.

1 MR. STEWART: I guess I'd say a couple
2 of things. And the first point I would make is
3 to -- to refer to what Mr. Lin was saying during
4 the -- the earlier part of the argument about
5 nonpoint source pollution and the fact that the
6 Clean Water Act has a robust body of law that
7 encourages states to develop effective programs
8 for combating nonpoint source solution.

9 JUSTICE SOTOMAYOR: But that's --
10 that's --

11 MR. STEWART: It --

12 JUSTICE SOTOMAYOR: -- one manner of
13 curing the problem. The other is to not exempt
14 groundwater. They exempted a whole series of
15 other means of delivery, but they chose not to
16 exempt groundwater.

17 MR. STEWART: It's -- it's simply
18 illustrative of the fact that the NPDES program
19 is not intended as a cure-all. It's not
20 intended to deal with every form of activity
21 that might ultimately result in --

22 JUSTICE KAGAN: Well, that's true,
23 Mr. Stewart, and -- and -- and nobody's saying
24 that the federal government can go in and start
25 regulating groundwater as groundwater. And,

1 likewise, nobody's saying that it can go in and
2 start regulating nonpoint sources as nonpoint
3 sources.

4 But, here, the question is the
5 pollution is coming from a point source, an
6 undisputed point source, and going into the
7 navigable water, and the only question is
8 whether the fact that there's some kind of
9 intermediary between the two, even, of, you
10 know -- and Mr. Lin says some kind of
11 intermediary; you say ground, underground --
12 whether that makes a difference.

13 The -- the -- the point of this
14 regulation is to go at the source, and the
15 source is still -- is a point source regulated
16 -- emitting pollutants.

17 MR. STEWART: Yeah --

18 JUSTICE KAGAN: It leaves -- I guess
19 what I'm saying is this leaves a very large
20 sphere of activity that the federal government
21 is still not touching. All it's doing is
22 insisting that when the federal government
23 permitting program applies to point sources, it
24 applies to those point sources regardless of
25 whether it goes two inches underground.

1 MR. STEWART: I -- I guess the other
2 thing I would say is when -- when we're
3 distinguishing between nonpoint source and point
4 source pollution, we are at least in general
5 looking at the means by which the pollutants are
6 conveyed into -- to the waters.

7 And so, for example, if you apply
8 fertilizer to your lawn and a rainstorm comes
9 and the fertilizer is washed into a nearby
10 river, the -- the contraption that you use to
11 apply the fertilizer might fit the statutory
12 definition of a point source, but that would
13 still be treated as nonpoint source pollution.
14 It would be what they refer to sometimes as --
15 as sheet flow, unchannelized rainwater that
16 washes into a navigable water. So --

17 CHIEF JUSTICE ROBERTS: Mr. Stewart,
18 Justice Breyer has been trying gamely --

19 MR. STEWART: I'm sorry.

20 CHIEF JUSTICE ROBERTS: -- to question
21 you.

22 MR. STEWART: I'm sorry.

23 JUSTICE BREYER: Just if you have a
24 reaction to this. If I don't accept -- I'm not
25 saying -- but if I don't accept because I think

1 these two programs are quite different, ground
2 source and point source, different purposes, et
3 cetera, and I'm worried about the evasion or
4 area, you see, that we talked about first.

5 So it seems to me this case, in my
6 mind at the moment, is what's the standard for
7 separating the sheep from the goats? And you're
8 basically saying the Ninth Circuit's way too
9 broad and so are they, so we come up with zero,
10 okay? Close to zero.

11 Now the best -- I want to try out one
12 thing, if you think -- have any reaction to it.
13 If it's -- it's regulated or under this, if it's
14 the functional equivalent of a direct discharge.
15 Now the reason that I put that is because that
16 leaves a lot of room for the EPA to write
17 regulations, to decide what is the functional
18 equivalent of a direct discharge. And it's
19 narrower than the Ninth Circuit. You want to --
20 if you have to have a reaction to that, have it.

21 MR. STEWART: I mean, I -- I guess the
22 reason I'm skeptical of that from our point of
23 view is I think the people -- without further
24 guidance from the Court, I think the people on
25 the other side of the case and their amici would

1 say, if it can be shown that the pollutants that
2 were released from the point source ultimately
3 wound up in the navigable waters, then it is the
4 functional equivalent.

5 JUSTICE BREYER: Then what we do is we
6 -- basically, it would be up to the EPA, policed
7 by the courts, to see that they've come up with
8 a -- a reasonable decision, consistent with the
9 basic objectives of the statute, dah-dah-dah,
10 okay?

11 So we don't know exactly what the --
12 you see the point.

13 MR. STEWART: Yes. May I?

14 I guess part of -- obviously, if we
15 had rule-making authority and could -- could
16 flesh that out, it would be helpful. I still
17 have concerns about any approach that could be
18 interpreted as saying if the pollutants make it
19 to the navigable water, then it's covered.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Mr. Henkin.

23 ORAL ARGUMENT OF DAVID L. HENKIN

24 ON BEHALF OF THE RESPONDENTS

25 MR. HENKIN: Mr. Chief Justice, and

1 may it please the Court:

2 The Clean Water Act prohibits
3 unpermitted additions of pollutants to navigable
4 waters from any point source. This prohibition
5 is not limited to pollutants that flow directly
6 from a point source to navigable waters. The
7 word "directly" is nowhere in the text.

8 Rather, all that's required is that
9 the pollutants be from a point source. The Act
10 expressly defines "point source" to include
11 wells, and the common use of "from" is to
12 indicate the starting point, cause, or source of
13 something. When you buy groceries, you say they
14 came from the store, not from your car, even
15 though that's the last place they were before
16 they entered your house.

17 Likewise, the millions of gallons of
18 treated sewage entering the Pacific Ocean off
19 West Maui every day come from Petitioner's wells
20 under any understanding of the term.

21 For three decades, EPA interpreted the
22 Clean Water Act prohibition this way. In all
23 that time, the parade of horrors Petitioner
24 imagines never happened because applying the
25 prohibition isn't nearly as complicated as

1 Petitioner suggests.

2 Consider three scenarios. First, in
3 cases like this one, large quantities of
4 pollutants in navigable waters are easily traced
5 upstream to the point source discharger who
6 should have gotten a permit.

7 Second, it generally is impossible to
8 trace small amounts of pollutants to an
9 individual point source, so the prohibition
10 doesn't apply.

11 Third, when small amounts of pollution
12 are traceable to an individual source, EPA and
13 states can adopt general permits to reduce the
14 regulatory burden. General permits cover entire
15 classes of discharges, like stormwater from
16 construction sites and spraying pesticides, and
17 allow the discharges as long as you meet the
18 permit's requirements.

19 Applying the Clean Water Act as
20 written protects our nation's waters and does
21 not impose a significant burden on small
22 dischargers.

23 By contrast, as this panel -- as this
24 Court has noted, Petitioner's test would enable
25 large-scale polluters to evade the law just by

1 pulling their pipes back a few feet to the
2 water's edge, or, as EPA now agrees, by pointing
3 them underground, as Petitioner did here, using
4 the groundwater as a sewer to pollute navigable
5 waters.

6 There's no question that polluters
7 would do exactly that. As discussed in the
8 brief of the State of Maryland, recently, a
9 silver mine in Colorado tried to cancel its
10 NPDES permit simply by pulling its pipe out of
11 the neighboring creek and sticking it into the
12 groundwater.

13 CHIEF JUSTICE ROBERTS: Well, that's
14 the extreme problem on the other side. But, to
15 the extreme issue on your side, what is the
16 limiting principle?

17 As far as I understand, once you get
18 the pollutant into groundwater, I mean,
19 groundwater goes into the ocean, so if you get
20 it into groundwater, it's -- it's covered by the
21 permit?

22 MR. HENKIN: Mr. Chief Justice, the --
23 the limiting principles would be traceability
24 and proximate cause.

25 CHIEF JUSTICE ROBERTS: All right.

1 Now traceability is a technological issue
2 because we know that the water, including the
3 pollutants, has gotten to whatever it is, the
4 ocean or something, whatever the jurisdictional
5 water is. It's just a question of how
6 sophisticated the instruments are that can trace
7 it. And I don't know. I don't know exactly how
8 far, how fast the groundwater is going. So --
9 so that doesn't seem to me to be a -- a
10 significant limitation.

11 And what was the other one that you
12 mentioned?

13 MR. HENKIN: Proximate cause, which
14 comes from the notion of -- of this is -- this
15 is -- this statute regulates behavior that
16 causes something. It's the addition of
17 pollutants to navigable waters from a point
18 source, and "from" has the meaning of a cause.
19 So --

20 CHIEF JUSTICE ROBERTS: Well,
21 proximate cause is notoriously manipulable.
22 What -- give me an example where you think there
23 would be an intervening cause, where you have,
24 in addition to the groundwater, the groundwater
25 eventually makes it to the ocean, but there's an

1 intervening cause.

2 MR. HENKIN: Well, for example, if
3 someone is discharging into an injection well,
4 they've got a Safe Drinking Water Act permit and
5 that permit told them that this groundwater
6 doesn't go anywhere. It's isolated. It's --

7 CHIEF JUSTICE ROBERTS: No, I'm
8 looking for a limited principle when the
9 groundwater does go to jurisdictional waters.

10 MR. HENKIN: Well, proximate cause
11 cuts off factual causation when it's -- it's too
12 attenuated. And so the case -- there was a
13 case, Greater Yellowstone Coalition, in which
14 EPA made a finding that, where there was
15 evidence that discharges from a mine would enter
16 groundwater, and it would take 60 to, I believe,
17 400 years to get to a navigable water, and the
18 time that it did that, it would be de minimis,
19 the amounts, and EPA determined that that was --
20 that cut off the causal chain.

21 Now we're not suggesting --

22 JUSTICE GINSBURG: What --

23 MR. HENKIN: -- it needs to go --

24 JUSTICE GINSBURG: -- what about --

25 MR. HENKIN: -- as far as that --

1 JUSTICE GINSBURG: -- what about the
2 Fourth Circuit test? I take it you are
3 advancing the Ninth Circuit fairly traceable
4 test. But the Fourth Circuit test, which I'm
5 not sure I comprehend it, is direct hydrological
6 connection. What's the difference between those
7 two?

8 MR. HENKIN: Justice Ginsburg, in our
9 view, our test is narrower. Direct hydrologic
10 connection is the test that EPA and -- and --
11 and states had applied for three decades until
12 EPA changed its position in April.

13 And that looks mainly at the -- the --
14 the facts on the ground, the factual hydrologic
15 connections. And so that would be the
16 traceability I was discussing with -- with the
17 Chief Justice.

18 We bound that factual causation, so
19 even if there is causation in fact, the law when
20 you're looking at holding people responsible for
21 what they caused, will -- will not always hold
22 them legally responsible if it's -- if it's not
23 foreseeable, if it's too attenuated, if it's too
24 remote.

25 JUSTICE KAVANAUGH: Is there an

1 example --

2 JUSTICE ALITO: I'm not sure I really
3 see much of a distinction between the direct
4 hydrological connection or a hydrological
5 connection and what you're -- and what you're
6 advocating.

7 Let's take the example of a wastewater
8 treatment facility. Can you think of any
9 situation in which there is traceability -- and
10 I don't know what the difference is between
11 fairly traceable and unfairly traceable, but put
12 that aside -- when -- when it's traceable, but
13 it wouldn't be foreseeable?

14 MR. HENKIN: No, Justice Alito. I
15 think with the wastewater treatment plant, I
16 would find it hard to think of a situation in
17 which a wastewater treatment plant, which is
18 designed to dispose of, not to store, but to
19 dispose in this case of millions of gallons of
20 treated sewage every day, when they designed
21 this facility back in 1973, a decade before
22 putting it into operation, they knew what they
23 were doing.

24 They drilled -- this is not a case in
25 which we have percolation down through the soil

1 eventually getting into groundwater. They
2 drilled these injection wells directly into the
3 groundwater, expressly for the purpose of
4 conveying it to the ocean --

5 JUSTICE ALITO: Okay. Well, back to
6 this facility. Let's take an example of the
7 ordinary family out in the country that has a
8 septic tank, and they buy it from somebody who
9 installs them and they get the building permit
10 that's required by that rural municipality.

11 And then it turns out that some of --
12 some things are leaching out of the septic tank
13 10 years later and making its way into waters of
14 the United States.

15 So they would be violating -- they
16 would be violating the Clean Water Act for lack
17 of a permit and would be subject to all the
18 penalties that go with that for every day of the
19 violation?

20 MR. HENKIN: Well, Justice Alito, if I
21 understand your hypothetical correctly, at the
22 time that they purchased the house, they had no
23 reason to believe that any pollutants would be
24 getting to the ocean.

25 And that would be a reasonable

1 assumption for a homeowner because septic tanks,
2 as both, I think, the homeowners brief -- or the
3 National Home Builders brief, as well as
4 Anderson County brief point out, the reason that
5 we have these types of regulations locally has
6 nothing to do with the Clean Water Act.

7 It's so that a septic tank is properly
8 installed and it's going to use the ground as a
9 treatment system, but it doesn't even pollute
10 groundwater, much less any down --

11 JUSTICE ALITO: Well, what -- I mean,
12 what if they buy it from -- and they don't have
13 a lot of money and so they shop around and they
14 buy it from the lowest cost provider and the
15 lowest cost installer -- and then, if it turns
16 out, well, it should have been foreseeable that
17 because you bought this from this cheap outfit
18 that there was going to be a problem, that would
19 be a violation?

20 MR. HENKIN: Well -- well,
21 fortunately, Justice Alito, it's -- it's a --
22 it's a highly regulated thing, a septic tank.
23 And so they not only need to get a purveyor, but
24 they're going to have to follow the rules of the
25 locality in the state.

1 So I have personal --

2 JUSTICE GORSUCH: But -- but --

3 MR. HENKIN: -- experience with this
4 because I built a house --

5 JUSTICE GORSUCH: -- but, counsel --

6 MR. HENKIN: -- and I had to put in a
7 septic tank.

8 JUSTICE GORSUCH: -- could you just
9 answer Justice Alito's question? I'd be
10 grateful if you would. I mean, there are other
11 regulations for nonpoint sources as well and for
12 -- for septic tanks, but, under the
13 foreseeability test or traceability test that
14 you're proposing, why wouldn't the septic tank
15 that foreseeably, objectively, it's not their
16 personal, right, you don't want a subjective
17 test, you want an objective test?

18 MR. HENKIN: Correct, Your Honor.

19 JUSTICE GORSUCH: So all that talk
20 about what they personally think is irrelevant.
21 Why -- why aren't they liable under your test?

22 MR. HENKIN: Well, Justice Gorsuch, if
23 -- if -- if a reasonable person in the position
24 of the homeowner would have no reason to believe
25 the septic tank is going to get to navigable

1 waters, the pollutants from the septic tank,
2 they wouldn't be held liable. And in addition,
3 the reason --

4 JUSTICE GORSUCH: Well, again, we're
5 positing -- I think you're fighting the
6 hypothetical, and one -- you know, I'll give it
7 one more shot.

8 MR. HENKIN: Oh --

9 JUSTICE GORSUCH: You know, that --
10 that -- that you've got great proof because
11 water runs downhill, and gravity tends to work
12 its wonders with water, and that the snow in the
13 Rockies tends to wind up in the Mississippi
14 River, and that this septic tank happens to be
15 built pretty close to a navigable river, and it
16 was put in by a shoddy installer, or whatever
17 facts you have that are objective. Forget about
18 the homeowner's subjective intentions.

19 You're going to have a pretty good
20 case, let's posit, hypothetically, that it was
21 foreseeable that this septic tank -- and we
22 might put in San Francisco's green water
23 treatment plants and a whole lot else -- are
24 foreseeable and they're going to wind up in the
25 waters of the United States.

1 What -- what limiting principle do you
2 have to offer the Court?

3 MR. HENKIN: Well, you also have the
4 concept of traceability. So usually, when you
5 have one septic tank, you have more, and so just
6 because you find pollutants in the water doesn't
7 mean you know which one it's from.

8 The definition of "point source"
9 includes, as its first term, discernible. And
10 so that's why the point source program focuses
11 on whether you have a discernible point source.

12 JUSTICE BREYER: You're trying with
13 this. You're trying with this. But, look, I
14 learned in the eighth grade, and it may be
15 wrong, that water does run downhill --

16 (Laughter.)

17 JUSTICE BREYER: -- and that virtually
18 every little drop of rain that falls finds its
19 way to the sea. And -- and that's an
20 overstatement but not too much. So it's not
21 just the septic tank; the miner gets up and
22 every morning he throws his shaving water
23 outside the house at Mount -- at Pikes Peak,
24 okay?

25 Now there's a very good chance that

1 that will end up in a river, and your brief, the
2 brief on the -- of the scientists, really
3 convinced me they're geniuses and they can trace
4 all kinds of things.

5 So the problem that I saw, that I
6 think we're all saying with the traceability
7 test is I've overstated it but not by too much,
8 and, therefore, it puts all kinds of people in
9 the position of having to get a permit. Have
10 you ever tried to do that? That's a big
11 complicated thing, okay?

12 So we're looking, at least I am, for
13 something not quite as broad as traceability but
14 something that doesn't run into the problems
15 that you properly point out.

16 So all kinds of things -- I mean,
17 that's why I put this functional equivalent of a
18 direct discharge which imposes some kind of
19 limit on the EPA. They can write -- this is for
20 them. They should write rules, okay? But
21 traceability and causation. There we are, every
22 little drop of rain. I mean, you know.

23 MR. HENKIN: Well, Justice Breyer, we
24 believe that the way the statute is written,
25 that traceability and proximate cause was a fair

1 reading of the plain language of the statute.
2 But the question presented to the Court is
3 simply whether the mere fact that discharges
4 that, concededly, are from a point source reach
5 a navigable water through some distance of
6 groundwater, whether that cuts off Clean Water
7 Act liability.

8 The answer to that is clearly no,
9 because --

10 JUSTICE BREYER: All right. Clearly
11 no.

12 MR. HENKIN: And -- and --

13 JUSTICE BREYER: But we have to write
14 an opinion. And in writing the opinion --

15 MR. HENKIN: Yes.

16 JUSTICE BREYER: -- I think we're
17 going to have to have a standard. And I don't
18 just look at the language. That's very
19 important, the language.

20 MR. HENKIN: Yes.

21 JUSTICE BREYER: But I am worried
22 about 500 million people or something suddenly
23 discovering that they have to go apply for a
24 permit for the EPA.

25 MR. HENKIN: And -- and --

1 JUSTICE BREYER: Now traceability and
2 causation don't quite seem to do it. So I
3 wonder if you have any sort of fall-back
4 position there that -- that would cure my worry
5 without getting into the evasion problems.

6 MR. HENKIN: Well, Justice Breyer, we
7 could certainly embrace functional equivalent,
8 because there's no question that Congress
9 intended to regulate discharges whether it goes
10 through the air. Now everyone -- everyone here
11 agrees that the air is not a point source, but
12 everyone also agrees if the point source
13 discharges into the river, through the air, it's
14 covered.

15 We and the United States agree that if
16 it also flows over the land, which is also not
17 covered by the Clean Water Act, it's covered.
18 And I would -- I would -- I would submit that
19 there's nothing in the language of the statute
20 that exempts point source discharge just because
21 it touches a little bit of groundwater.

22 Congress could have done that. There
23 are a number -- as Justice Sotomayor mentioned,
24 there are a number of enumerated exemptions in
25 the Clean Water Act for things that would

1 otherwise be point source discharges. So
2 directly in the definition of point source, you
3 exclude things like agricultural return --
4 irrigation return flows and agricultural
5 stormwater.

6 CHIEF JUSTICE ROBERTS: Well, I --

7 MR. HENKIN: Then you turn --

8 CHIEF JUSTICE ROBERTS: -- don't -- I
9 don't mean to be critical of the author of the
10 phrase, but what does "functional equivalent"
11 mean?

12 (Laughter.)

13 CHIEF JUSTICE ROBERTS: What do you
14 understand it to mean? I mean, the -- what
15 we're looking for -- as for an equivalent, it's
16 an equivalent to a point source, right? Which
17 is --

18 MR. HENKIN: Right.

19 CHIEF JUSTICE ROBERTS: Okay. I -- I
20 think of a pipe.

21 MR. HENKIN: Yes.

22 CHIEF JUSTICE ROBERTS: Well, what's
23 the functional equivalent of a pipe when you're
24 talking about groundwater?

25 MR. HENKIN: Well, Mr. Chief Justice,

1 in this case, when Petitioner was designing
2 their wastewater treatment plant -- and I should
3 mention in Miccosukee, this Court emphasized
4 that applying NPDES permits to -- to wastewater
5 -- municipal wastewater treatment plants is
6 really what Congress was all about in enacting
7 the law in 1972, when, I also might add, there
8 was no Safe Drinking Water Act --

9 CHIEF JUSTICE ROBERTS: Well, but
10 that's --

11 MR. HENKIN: -- in 1972.

12 CHIEF JUSTICE ROBERTS: -- that's a
13 big wind-up. The question is --

14 MR. HENKIN: Yes.

15 CHIEF JUSTICE ROBERTS: -- what's the
16 functional -- what's a functional equivalent?

17 MR. HENKIN: The -- when they were
18 planning this, they thought about doing ocean
19 outfall and they said no, we can dispose of it
20 just as well through injection wells. That's
21 the functional equivalent from the -- the
22 question is, do you have an identifiable point
23 source and it's the same to the receiving body,
24 water body, if you do it through the
25 groundwater, over the ground, through the air,

1 or directly into it.

2 If the pollutants are getting into it,
3 if there's an addition of pollutants, any
4 addition of pollutants to the navigable water
5 from an identifiable point source -- now these
6 very remote --

7 CHIEF JUSTICE ROBERTS: I know it's --
8 I understand it's not your -- but it sounds an
9 awful lot like as vague as fairly traceable. If
10 all of those things are functional -- it seems
11 to me that your answer to me is that the
12 functional equivalent is anything that gets to a
13 jurisdictional water.

14 MR. HENKIN: It -- our -- that -- that
15 -- I mean, that's why we suggest it as the test,
16 that it would be traceable and so you would have
17 causation in fact, and you would use principles
18 of proximate cause, which this Court has
19 embraced in other situations, like in the
20 Endangered Species Act. It prohibits -- it
21 prohibits take of endangered species through
22 habitat modification.

23 JUSTICE BREYER: Don't worry, he'll
24 have an opportunity, because you didn't make
25 this phrase up.

1 (Laughter.)

2 JUSTICE BREYER: And -- and it's a
3 little bit -- and we do have -- we do discuss
4 these things. So -- so we will discuss them.

5 (Laughter.)

6 JUSTICE BREYER: I -- I was looking
7 for something, which I'm not wedded to the one I
8 said, but I'm looking for something that does
9 give the EPA some leeway on this but doesn't go
10 as far as what traceability and causation do,
11 which seem to say the sky's the limit.

12 And -- and that -- that's -- that's
13 what I'm looking for. Now I think functional
14 equivalent might or might not, but that's for --
15 a matter for us to discuss, I think. Your
16 initial reaction was a little narrower, not too
17 bad. I don't know what theirs is, but -- but
18 I'm not wedded to it.

19 MR. HENKIN: Well, Justice Breyer, I
20 think ultimately the question before the Court,
21 the question presented, is whether or not mere
22 passage through a little bit of groundwater cuts
23 off Clean Water Act liability.

24 JUSTICE KAVANAUGH: On that --

25 JUSTICE KAGAN: Mr. Henkin, could --

1 maybe I don't understand the science of this and
2 perhaps like scientists can do everything. But
3 wouldn't the question for these sort of septic
4 tank examples be that your traceability
5 requirement has to be that you look at the ocean
6 and you find these pollutants in the ocean, and
7 you have to say these pollutants came from a
8 particular place --

9 MR. HENKIN: Yeah.

10 JUSTICE KAGAN: -- could you say that
11 as to a septic tank?

12 MR. HENKIN: No, in -- in our view,
13 Justice Kagan, you -- you normally could not. I
14 mean, if there's only one septic tank -- if
15 you're in an area where there's just one septic
16 tank and you found fecal coliform or something
17 that's indicative of a septic tank, you might be
18 able to do that. But, normally, when I built my
19 house, everyone was on septic tanks because the
20 sewer didn't go out to where we live --

21 JUSTICE KAGAN: So you couldn't say --

22 MR. HENKIN: -- and that's normally
23 the situation.

24 JUSTICE KAGAN: -- whether it's from
25 your house or your house or your house or your

1 house. Now I suppose somebody could say, well,
2 then you all have to get permits. Is that
3 right? Is that the way you understand the
4 traceability requirement?

5 MR. HENKIN: Not at all. Not at all.

6 CHIEF JUSTICE ROBERTS: Not at all?
7 So all you have to do is get a bunch of
8 neighbors and all put the septic tanks in, and
9 then you're scot free?

10 MR. HENKIN: If you -- if you cannot
11 determine which point source, if it's not an
12 identifiable point source to control, so you
13 don't know -- you don't who's doing it, then
14 that is -- that is archetypal nonpoint source
15 pollution. So if --

16 CHIEF JUSTICE ROBERTS: Okay. So
17 you're saying if -- if it's one house, one
18 septic tank, that person will need a permit. If
19 it's a residential development and you have 100
20 septic tanks, which would seem to me to be 100
21 times worse, they don't need a permit.

22 MR. HENKIN: If you don't know which
23 house might have a septic tank that has -- that
24 was poorly installed that didn't follow -- you
25 know, they didn't follow the rules or had some

1 aberration of geology such that it would be
2 polluting the ocean, you --

3 JUSTICE KAGAN: I mean, I would think
4 that that's --

5 MR. HENKIN: -- didn't know which one
6 it was.

7 JUSTICE KAGAN: -- a usual thing in
8 law, right? Like, you can't hold somebody
9 responsible for somebody --

10 MR. HENKIN: Yeah.

11 JUSTICE KAGAN: -- for something
12 unless you knew that they were responsible for
13 that thing.

14 MR. HENKIN: Absolutely correct.

15 JUSTICE KAGAN: And -- and if there
16 are 20 other people who could be responsible for
17 that thing, then you can't hold them responsible
18 for that thing, can you?

19 MR. HENKIN: That's absolutely
20 correct.

21 JUSTICE KAGAN: So, here, we don't --

22 CHIEF JUSTICE ROBERTS: So if you have
23 20 people --

24 JUSTICE KAGAN: -- here, we don't have
25 that problem.

1 CHIEF JUSTICE ROBERTS: It's an Agatha
2 Christie novel. You have 20 people and they all
3 shoot the gun at the guy at the same time.

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: They're all --
6 no one's guilty?

7 JUSTICE KAGAN: But that's tort law,
8 right?

9 JUSTICE GINSBURG: Maybe if we could
10 --

11 (Laughter.)

12 JUSTICE KAVANAUGH: Well, that's --

13 JUSTICE GINSBURG: Mr. Henkin?

14 JUSTICE GORSUCH: I would be curious
15 what counsel thinks about that.

16 JUSTICE GINSBURG: Mr. Henkin, you
17 have been asked in various forms the question
18 that was put in the reply brief on page 11, and
19 it is: Would you require permits for a toilet,
20 an identifiable point source, that originates
21 wastewater and foreseeably sends it to the
22 county's wells? So how do you answer that?

23 MR. HENKIN: Justice Ginsburg, we
24 would not hold them responsible for a different
25 reason. I think that Petitioner would hold them

1 responsible because a toilet could be a point
2 source that goes into a pipe and it goes into a
3 waste treatment plant that goes into a pipe and
4 then goes into ocean outfall. That's point
5 source to point source to point source. And,
6 eventually, they would hold the toilet flusher
7 liable, perhaps, under their theory.

8 But, fortunately, Congress, in
9 promulgating the Clean Water Act, provides
10 specifically for people flushing their toilet,
11 that if it goes to a wastewater treatment plant
12 and it's not a hazardous waste that you're
13 flushing down the toilet, there's no
14 pretreatment standard and you don't need to get
15 a permit. So that specific example, Congress
16 dealt with.

17 And that -- that's an important part
18 of the statute, which is Congress, when it
19 wanted to exempt things from point source
20 control, it carved out --

21 JUSTICE KAVANAUGH: On your --

22 MR. HENKIN: -- specific exceptions.

23 JUSTICE KAVANAUGH: -- on your -- can
24 I go back to your colloquy with the Chief
25 Justice and Justice Kagan? Because it seems to

1 me that's one of the contextual points that the
2 other side points up here.

3 You make a good argument about the
4 word "from" in the text. The other side has its
5 responses. And to figure out how to interpret
6 that, one of the things they say we should look
7 at is structure, and another thing is context.

8 And on the context, the things they
9 point out -- and I want you to give you -- have
10 a chance to respond -- are this would be a
11 massive increase in the permitting program, they
12 say; the costs of permitting are high, they say,
13 and I think you agree with that when you have to
14 get a permit.

15 And the uncertainty about when and
16 whether you would need to get a permit, which I
17 think is the colloquy you had with the Chief
18 Justice and Justice Kagan, as well as
19 transforming the federal/state balance. So
20 those are the contextual points that they raise
21 to help us figure out this interesting and
22 difficult question about the text.

23 And I'll give you a chance to respond
24 to those contextual points because that's what's
25 bothering me.

1 MR. HENKIN: Okay. Justice Kavanaugh,
2 with respect to the issue of whether it would be
3 a massive expansion, we -- the Court has --
4 benefits here from 30 years of experience. This
5 is not a new test that was articulated by the
6 court below.

7 But EPA for 30 years consistently
8 said, and implementing states consistently
9 followed, that discharges that reach navigable
10 water via groundwater require a permit. And
11 everyone under the sun has not required a
12 permit.

13 With respect to, I mean, they mention
14 something like half a million injection wells.
15 Well, injection wells, to get -- they're on that
16 list from the EPA because they got a UIC permit,
17 an injection control permit.

18 And in doing that, they had to look at
19 the hydrology of -- of the situation. And you'd
20 know a lot about whether or not you were likely
21 to pollute a navigable water.

22 And -- and -- and cited particularly
23 in the EPA official's brief, there is just a
24 wealth of information there on permits that have
25 been issued by EPA and states over these past 30

1 years for concentrated animal feeding
2 operations, for wastewater treatment plants,
3 that similar to theirs put --

4 JUSTICE KAVANAUGH: Suppose I agree
5 with you on this, just hypothetically, that EPA
6 has been doing something like this and so it
7 wouldn't be a massive increase. So say you --
8 say I agree with you on that.

9 Then I -- I do think the uncertainty
10 point's a big point for you to deal with because
11 you have to know in advance whether to get the
12 permit or else you're going to be paying a huge
13 amount at the back end.

14 And so some clear line for the
15 property owner, I think, is -- is really
16 important here.

17 MR. HENKIN: Well, in -- in our
18 perspective, specifically with individual
19 homeowners and septic tanks, if your -- if
20 you've installed your septic -- septic tank
21 according to local ordinances and state
22 regulation, which are intended to protect
23 groundwater, you know, much less navigable
24 waters, if it's not polluting the groundwater,
25 it's certainly not polluting the navigable

1 waters.

2 If you complied with that, if you --
3 if you maintain it properly, you have --
4 objectively, you have no reason to believe that
5 it's polluting the ocean, and so you would not
6 have any foreseeability, any obligation to get a
7 permit.

8 In addition, if there was some
9 aberrant situation --

10 JUSTICE KAVANAUGH: You also don't
11 want to be the subject of citizen suits, and so
12 you would like that line not to be something
13 that's objectively clear after a lot of
14 litigation but objectively clear on the front
15 end.

16 MR. HENKIN: Understood. But Congress
17 enacted the citizen suit provision at the same
18 time as the Clean Water Act in 1972. And I --
19 I'm not aware of any lawsuit against an
20 individual septic tank owner for the violation,
21 notwithstanding, again, a consistent
22 interpretation up until April of this year by
23 the Environmental Protection Agency that
24 discharges via groundwater are covered.

25 And the reason for that is, in order

1 to establish traceability and foreseeability and
2 all that, you need a big discharger like the
3 Petitioner here. You -- you've got millions of
4 gallons per day in an intentionally designed
5 facility.

6 Congress did not intend to create a
7 loophole. I want to briefly address the United
8 States' argument there's something about the
9 structure of the Act, something special about
10 groundwater.

11 Well, nearly every provision that they
12 cite that talks about these programs for
13 groundwater in the same breath say and surface
14 waters and navigable waters. Congress treated
15 them the same.

16 And so, in the same way that those
17 provisions don't exempt surface waters, waters
18 of the United States, they don't exempt
19 groundwater.

20 JUSTICE ALITO: Well, the Court has
21 spoken about hiding elephants in mouse holes.
22 Was groundwater an elephant at the time when the
23 Clean Water Act was enacted? And, if it was,
24 how do you account for the fact that there isn't
25 any direct reference to it in the definition of

1 a conveyance or any of the other provisions that
2 are directly relevant here?

3 MR. HENKIN: Well, Justice Alito,
4 there's no reference in any of the NPDES
5 permitting program or the definition of a point
6 source to regulating discharges via air, yet
7 Petitioner concedes if the pipe is hanging over
8 the water's edge, it can pass through air.

9 The United States concedes --

10 JUSTICE ALITO: I mean, do you think
11 that that's really comparable, where you have a
12 pipe that's over the river and the pollutant is
13 coming out of the river and going through the
14 air, that anybody's going to seriously argue
15 that, well, because it went through the air, it
16 wasn't covered?

17 Do you really think that's comparable
18 to groundwater that can travel a long distance?

19 MR. HENKIN: Well, Justice Alito, I
20 could imagine a situation in which you have a
21 pipe hanging out over the water and it's
22 trickling into the water, and there's a strong
23 wind, and every once in a while the trickle gets
24 batted upon the shore.

25 So that's not covered because it's now

1 on the shore. And then it's -- then the wind
2 dies down and it goes into the water. So
3 there's really, you know, there's no difference
4 in this situation.

5 The same thing with respect to land.
6 There's no reference to land in the NPDES
7 permitting. And -- and yet we can all conceive
8 how it would create a -- a road map for evasion
9 if you can cut your pipe five feet short of the
10 shore line.

11 JUSTICE ALITO: Well, I don't know
12 about that. If you have a pipe that stops short
13 of the water and you do that because you know
14 that the pollutant, when it comes out of the
15 pipe, is going to flow downhill into the river,
16 I -- I don't know that you're going to be able
17 to avoid the conclusion that whatever it is that
18 takes it down that slope is a conveyance.

19 MR. HENKIN: Well, a conveyance has to
20 be confined in some way. So, for example, this
21 wastewater treatment plant comes out at Kahekili
22 Beach Park, which belongs to the county.

23 So let's say instead they ran their
24 discharge pipe to the beach park, they paved the
25 land so it wouldn't create any furrow, any

1 ditch, any -- any sheet flow that ran into the
2 ocean. But they would say it's nonpoint source
3 pollution because it stops short of the water's
4 edge.

5 Now the United States would concede
6 that that is covered, but if, instead of doing
7 that, they went to the beach park and they put a
8 lot of gravel down and they knew that it would
9 run into the gravel and then, you know, go into
10 the groundwater for like three inches before
11 getting to the ocean itself, because the ocean,
12 if you -- if you've been to the beach, you dig
13 in the sand, you get down to water pretty
14 quickly. Well, that's groundwater, unless and
15 until it's on the surface, and then it's the
16 ocean.

17 So, under the United States' theory,
18 this -- this pipe that then goes into the sand
19 and then goes through a very small stretch of
20 groundwater, that's all of a sudden exempted.

21 So, to use, you know, Mr. -- Mr.
22 Stewart's example about the whiskey and the
23 punch and the flask, and he said you would never
24 say the whiskey that's in the punch came from
25 the bottle, you'd say it came from the flask,

1 well, here, Congress was trying to prohibit
2 whiskey in punch.

3 So if all of a sudden --

4 (Laughter.)

5 MR. HENKIN: -- you tasted the punch
6 and you said this tastes like whiskey, you'd
7 say, where did that come from? You wouldn't
8 point to -- you'd say it came from the whiskey
9 bottle. That's how we know it's whiskey.

10 And, here, we know we have whiskey,
11 whiskey in the form of a injection well that is
12 discharging 3 to 5 million gallons per day into
13 the ocean.

14 And there's nothing about the Clean
15 Water Act that would allow a polluter to evade
16 it by -- by -- by -- by pouring the whiskey via
17 the groundwater.

18 JUSTICE ALITO: Well, I didn't know
19 Mr. Stewart was spiking punch.

20 (Laughter.)

21 JUSTICE ALITO: But would you say in
22 his extent -- extend his example, that it came
23 from a barrel in Scotland?

24 MR. HENKIN: Well, let's say the
25 whiskey was spoiled in some way. And I'm not a

1 whiskey drinker and I don't mean to offend any
2 whiskey drinkers. But, if the whiskey were
3 spoiled some way, you might ask, where did this
4 whiskey come from? And you might trace it back
5 to the barrel in Scotland, particularly if it's
6 poisonous or harmful in some way. So it all
7 depends on the context.

8 What Congress wanted to do here was
9 regulate pollution at the source when we can.
10 And the source here clearly is their injection
11 well.

12 JUSTICE KAVANAUGH: But -- but
13 Congress knew about the ground -- groundwater
14 issue and there were debates about this precise
15 groundwater issue, maybe not this precise, but
16 the groundwater issue, and there were proposals,
17 as you're well aware, and some of the amicus
18 briefs go through this at great length, to put
19 in regulation of groundwater, and Congress
20 rejected those.

21 So how do we assess that in thinking
22 about this?

23 MR. HENKIN: Well -- well, Justice
24 Kavanaugh, those debates quite clearly resulted
25 in a vote that said, we are not going to enact

1 national standards to control the quality of
2 groundwater. So there is no regulation under
3 the Clean Water Act of groundwater qua
4 groundwater.

5 And as I mentioned, in 1972, there was
6 no --

7 JUSTICE KAVANAUGH: So your point --
8 your point is that's a separate topic from the
9 issue today?

10 MR. HENKIN: Absolutely. And the same
11 debates --

12 JUSTICE KAVANAUGH: Okay.

13 MR. HENKIN: -- they said we recognize
14 the essential link between ground and surface
15 waters and the artificial nature of any
16 distinction.

17 If Congress had wanted to say point
18 source discharge that reaches the navigable
19 waters through groundwater is exempt, because we
20 want to leave that completely to the states,
21 they would have said that in the language of the
22 Act. They didn't. In the same way that they
23 said we don't want point source -- point source
24 discharges that could be characterized as
25 agricultural stormwater or irrigation return

1 flows. That usually happens in the form of a
2 ditch.

3 And they said we do not want to
4 regulate that under the point source program.
5 But, here, what you have is paradigmatic point
6 source pollution that just happens to pass
7 through --

8 JUSTICE KAVANAUGH: Why -- why are the
9 --

10 MR. HENKIN: -- particularly for --

11 JUSTICE KAVANAUGH: I'm sorry. Why
12 are the states inadequate to do this, and are
13 they inadequately regulating in substantial
14 numbers of states in your view?

15 MR. HENKIN: Well, I think the
16 question, Justice Kavanaugh, is whether Congress
17 intended to establish uniform --

18 JUSTICE KAVANAUGH: No, I -- I
19 understand your legal argument. Just as a
20 practical question, what's happening on the
21 ground in the states, are they doing an
22 inadequate job in substantial numbers in your
23 view of regulating this substantial source of
24 pollution?

25 CHIEF JUSTICE ROBERTS: Please.

1 MR. HENKIN: Well, there are examples
2 in the EPA official's brief in which delegated
3 states are regulating those sources of pollution
4 by using the NPDES permit program. And -- and,
5 as mentioned, Colorado pushed back against the
6 mine owner that wanted to stop getting a permit
7 by using the groundwater as a sewer to get
8 pollutants into -- into the waters.

9 But, ultimately, what we have is a --
10 is a statement by Congress that you need to have
11 uniform regulation to protect our national
12 waters, which are a national concern.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Lin, three minutes.

16 REBUTTAL ARGUMENT OF ELBERT LIN ON
17 BEHALF OF THE PETITIONER

18 MR. LIN: Thank you, Mr. Chief
19 Justice.

20 I'd just like to pick up where my
21 friend left off, which is with the example of
22 the Colorado DEQ and the footnote in Maryland's
23 brief. I think that is as, I thought I heard
24 him say at the very end there, precisely an
25 example of how the comprehensive regime works.

1 The Colorado DEQ prohibited that mine
2 from changing the way it was discharging
3 pollutants in order to -- to use Justice
4 Breyer's word -- evade its NPDES permit. 33 USC
5 1370, the Clean Water Act, allows states to
6 impose stricter requirements on NPDES permits.
7 And, of course, there --

8 JUSTICE SOTOMAYOR: Why are you doing
9 what you're doing? This is fairly traceable to
10 you in large quantities. The state didn't
11 control you. What regulations are there in
12 place that do?

13 MR. LIN: Your Honor, there are a
14 number, starting with the --

15 JUSTICE SOTOMAYOR: No, no, you're
16 doing it, what's stopping you from? This is
17 not. So how did you get away with it, and how
18 do you continue without taking remedial steps?

19 MR. LIN: Your Honor, I don't think
20 this is a question of --

21 JUSTICE SOTOMAYOR: Not you, but I
22 mean the --

23 MR. LIN: Of course, Your Honor. I
24 understand.

25 JUSTICE SOTOMAYOR: -- I mean the --

1 the polluters. What are they -- what is being
2 done to stop them?

3 MR. LIN: Well, Your Honor, I -- I --
4 I think, if I can take issue with the -- the --
5 the premise there, which is that there's
6 something that's being gotten away with here,
7 the --

8 JUSTICE SOTOMAYOR: If they followed
9 --

10 MR. LIN: -- these wells were --

11 JUSTICE SOTOMAYOR: -- all the laws,
12 and they still are polluting, they're getting
13 away with it. So something failed.

14 MR. LIN: Your --

15 JUSTICE SOTOMAYOR: The preventive
16 measures of this law were not followed and
17 something failed.

18 MR. LIN: Your Honor, the -- the whole
19 -- even under NPDES permits, point source
20 discharges can include pollutants that are below
21 effluent limits.

22 So I think the -- the mere fact that
23 there are -- are nutrients that are getting into
24 the ocean doesn't mean that the system has
25 failed.

1 And I think it comes back to the fact
2 that, in this particular circumstance, these
3 wells were constructed with encouragement and
4 funding from EPA as a more environmentally
5 protective solution than simply constructing an
6 outfall pipe to the ocean.

7 If I can come back to the traceability
8 point, I think it's also important to note, my
9 friend runs very far away from the septic tank
10 examples, and, Justice Kagan, to answer your
11 question about traceability, there are 7,000
12 cesspools within 750 feet of the ocean in
13 Hawaii, and we cite to a study in our reply
14 brief that showed that through a tracer, dye
15 tracer study, not dissimilar from what was used
16 here, it was established that pollutants from
17 individual septic tanks were getting to the
18 ocean within three hours to five days.

19 So traceability can be done. Septic
20 tanks are constructed near the ocean. And I
21 don't think that there is a limiting principle
22 that would give those landowners any certainty,
23 which comes back to the point which I think is
24 the most important about predictability.

25 And -- and, Justice Breyer, you had --

1 CHIEF JUSTICE ROBERTS: Why don't you
2 finish your thought.

3 MR. LIN: -- you -- you had suggested
4 functional equivalents. I think it's important
5 to remember the context that we're talking about
6 here. This is a -- a permitting program that
7 applies to ordinary lay people and would --
8 would require \$50,000 a day in fines.

9 We -- we are looking at a statute and
10 trying to figure out what Congress intended to
11 write to give people that kind of
12 predictability.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel. The case is submitted.

15 (Whereupon, at 11:06 a.m., the case
16 was submitted.)

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