No. 15-17447

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAWAII WILDLIFE FUND; SIERRA CLUB – MAUI GROUP; SURFRIDER FOUNDATION; and WEST MAUI PRESERVATION ASSOCIATION,
Plaintiffs-Appellees,

v.

COUNTY OF MAUI,
Defendant-Appellant,

On Appeal from the United States District Court for the District of Hawai'i

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN RAILROADS; AMERICAN FARM BUREAU FEDERATION; AMERICAN IRON AND STEEL INSTITUTE; AMERICAN PETROLEUM INSTITUTE; NATIONAL ASSOCIATION OF MANUFACTURERS; NATIONAL MINING ASSOCIATION; THE FERTILIZER INSTITUTE; AND UTILITY WATER ACT GROUP IN SUPPORT OF DEFENDANT-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

INTEREST OF THE *AMICI CURIAE*

Amici curiae are a coalition of trade associations whose members represent a broad spectrum of the Nation's agricultural, commercial, industrial, and transportation operations. They are the Association of American Railroads; American Farm Bureau Federation; American Iron and Steel Institute; American Petroleum Institute; National Association of Manufacturers; National Mining Association; The Fertilizer Institute; and Utility Water Act Group.[1]

If the district court's novel and overreaching "conduit theory" of Clean Water Act ("CWA") liability stands, *amici*'s members could suddenly be required to obtain CWA Section 402 permits, known as National Pollutant Discharge Elimination System ("NPDES") permits, for activities that have never before been subject to such permitting. Under that theory, an NPDES permit could be mandated any time pollutants are released from any structure that falls within the CWA's definition of "point source" (*e.g.*, pipes, containers, wells, channels, rolling

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[1] This brief is submitted with an accompanying motion for leave under Federal Rule of Appellate Procedure 29(b). No party's counsel authored this brief in whole or in part. No party, party's counsel, or other person, other than *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

stock, etc.) and eventually reach a navigable water, irrespective of mode or duration of migration. Such an interpretation flies in the face of the CWA. As written, amended, implemented, and enforced in the decades since its inception, the CWA imposes liability only when point sources are the means by which pollutants reach navigable waters. Pollutants that reach navigable waters as the result of diffuse migration are left for states to address under nonpoint source control programs.

The "conduit theory" exposes *amici*'s members to a new threat of federal CWA liability and could unjustifiably impose significant new permitting burdens. Without warning, *amici*'s members may be both civilly and criminally liable for any pollutants released from the innumerable "point sources" under their control that might eventually find their way to navigable waters, whether by groundwater, air, surface runoff, or other means. Because even detailed technical studies may not provide a definitive answer as to whether a pollutant ultimately reaches a navigable water, *amici*'s members might apply for unnecessary NPDES permits simply to avoid potential, severe CWA penalties, thereby incurring significant expense, delay, and operational restrictions. By threatening to impose unprecedented liability to a wide swath of previously unpermitted sources, the

"conduit theory" could also cause the NPDES permitting program to balloon to an impracticable scale.

The district court's ruling pointedly ignored the fact that the manner in which pollutants reach navigable waters is critical to—and is indeed the crux of—the fundamental distinction Congress drew between point and nonpoint sources throughout the CWA. As such, *amici* seek its reversal as contrary to the Act's text, structure, and history.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the district court's "conduit theory," the CWA's NPDES requirements apply whenever two conditions are satisfied: (1) pollutants are released from some "point source," and (2) those pollutants eventually make their way to navigable waters, "regardless of *how* they get there." *Hawai'i Wildlife Fund v. County of Maui* ("*COM I*"), 24 F. Supp. 3d 980, 1000 (D. Haw. 2014); *see also Hawai'i Wildlife Fund v. County of Maui* ("*COM II*"), 2015 WL 328227, at *4-6 (D. Haw. Jan. 23, 2015). Ignoring the language of the statute, the district court determined that the conduit—groundwater—between the point sources (the County's injection wells) and the navigable waters (the Pacific Ocean) "need not [] be 'confined and discrete.'" *COM I*, 24 F. Supp. 3d at 999; *COM II*, 2015 WL 328227, at *4-5. It also found that the distance the pollutants had to migrate

through groundwater, as well as the "location and expanse of the pollutant's entry into the ocean," were irrelevant. *COM II*, 2015 WL 328227, at *6. The "conduit theory" marks an unprecedented expansion of the NPDES program, which has until now been understood to apply only to discharges for which the *point source itself* is the direct means by which a pollutant is added to navigable waters.[2]

The "conduit theory" cannot be reconciled with the text, structure, or history of the CWA. Throughout the Act, Congress purposefully distinguished between point sources and nonpoint sources of pollutants. Point sources are "discernible, confined, and discrete conveyance[s]" such as pipes that discharge channeled or collected fluids to navigable waters. 33 U.S.C. § 1362(14). Nonpoint sources, by contrast, release pollutants in a diffuse way (*e.g.*, wind dispersion, groundwater migration, or overland runoff) to a regulated water body.

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[2] The "conduit theory" is separate from a narrower question that courts nationwide are split over: whether the CWA regulates discharges to groundwater that has a direct and immediate hydrological connection to navigable waters. *See* Appellant Br. at 35-37. Liability under the "conduit theory" would extend well beyond point source discharges to such groundwater. Moreover, the "conduit theory," as formulated by the district court, could encompass not just pollutants migrating through groundwater, but also windblown pollutants and pollutants in surface runoff.

NPDES requirements apply only to discharges of pollutants from point sources. *See id.* §§ 1311(a), 1342(a). The Act defines "discharge of a pollutant" as the "*addition* of any pollutant *to* navigable waters *from* any *point source*." *Id.* § 1362(12) (emphasis added). Those provisions are central to this case because, when read together, they make clear that NPDES requirements apply only where a "point source" is the means by which pollutants are added to navigable waters. When pollutants eventually reach navigable waters (as here) by means other than a discernible, confined, and discrete conveyance, there is no "discharge of a pollutant." Instead, there is only nonpoint source pollution.

Numerous cases from this Court and other circuits confirm that what differentiates point sources from nonpoint sources is the way in which pollutants reach navigable waters. *See, e.g.*, *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1153 (9th Cir. 2010). Both types of pollution ultimately reach navigable waters, so "*how* they get there" does matter. *See COM I*, 24 F. Supp. 3d at 1000. By ignoring this key distinction, the district court's "conduit theory" eviscerates the "clear and precise distinction" that Congress made between point sources that are subject to NPDES regulation and nonpoint sources that are subject to state and local nonpoint source management programs. S. Rep. No. 95-370, at 8 (1977).

Other provisions of the CWA likewise confirm that the "conduit theory" improperly expands the scope of the NPDES program to cover what Congress considered to be nonpoint sources of pollutants. Sections 304(f)(2) and 208(b)(2) refer specifically to the disposal of pollutants in wells and subsurface excavations as one of several specified nonpoint sources. *See* 33 U.S.C. §§ 1314(f)(2), 1288(b)(2). The legislative history for Section 304(f)(2), in particular, reflects that Congress was well aware of the potential for leaching and groundwater contamination from such wells and excavations. But rather than require NPDES permits for such disposals, the CWA vested authority in states and local governments to control any eventual pollution of navigable waters from such sources through nonpoint source management programs.

The district court could not "point to controlling appellate law or statutory text expressly allowing this theory in the present context." *COM I*, 24 F. Supp. 3d at 996. And no wonder—the CWA unambiguously forbids it. But even if this Court finds the Act ambiguous, it must, under the rule of lenity, construe that ambiguity in the County's favor. *See United States v. Granderson*, 511 U.S. 39, 54 (1994).

Beyond the legal infirmities, the practical consequences of the "conduit theory" are especially troubling. Under the "conduit theory," the NPDES program

could grow to unworkable proportions, with no meaningful limit on the number of sources it covers. Although this case involves diffuse migration of pollutants through groundwater, the "conduit theory" potentially implicates other means of diffuse migration, such as sheet runoff over land following rainfall or snowmelt, or windblown pollutants. Almost all pollutants that reach navigable waters through one of these diffuse methods can be traced back to some identifiable "point source," such as raw materials piles at an industrial facility, smokestacks, septic tanks, or stormwater infiltration and retention infrastructure. All are quintessential examples of nonpoint source pollution, long recognized by both the courts and EPA. But under the "conduit theory," they could require NPDES permits.

As further evidence of the preposterous nature of the "conduit theory," it is unlikely that NPDES requirements could even be applied to the types of "discharges" that may now become subject to permitting. Even assuming one were able to identify the various discharge points from which migrating pollutants reach navigable waters, access to conduct treatment, sampling, or monitoring would likely be impossible. The NPDES program's purpose was to address "end of pipe" discharges into navigable waters—it simply was not designed to regulate the type of seepage and diffuse migration implicated by the "conduit theory."

For all these reasons and those outlined below, this Court should reject the district court's invented and untenable "conduit theory."

ARGUMENT

I. The District Court's "Conduit Theory" Impermissibly Extends NPDES Requirements to Nonpoint Sources of Pollutants.

To determine the scope of the NPDES program, this Court applies the "traditional tools of statutory construction . . . begin[ning] with the text and the history of the statute." *Blandino-Medina v. Holder*, 712 F.3d 1338, 1343 (9th Cir. 2013). As explained below, Congress intended to subject only direct point source discharges to federal regulation and oversight under the NPDES program—that is, pollutants added to navigable waters from a discernible, confined, and discrete conveyance. In contrast, Congress specifically gave states the authority to address under their own programs nonpoint source abatement, including the control of pollutants that migrate through groundwater and other diffuse means.

Under the district court's novel "conduit theory," an NPDES permit could be required any time pollutants released from a point source migrate through groundwater or other media, and eventually "find their way to" navigable waters. *COM I*, 24 F. Supp. 3d at 996. NPDES requirements could apply no matter how far those pollutants must migrate, no matter how diffuse that migration is, and no matter how many days, weeks, months, or even years that migration takes. Such a

broad theory of liability impermissibly expands the scope of the NPDES program to nonpoint sources.

A. Congress Plainly Distinguished Between Point Source Discharges Subject to the NPDES Program and Nonpoint Sources of Pollutants that are Addressed Under Other Programs.

CWA Section 301 states that the "discharge of any pollutant [to a navigable water] by any person shall be unlawful." 33 U.S.C. § 1311(a). Section 402 provides an important exception to this broad prohibition: EPA or a delegated state may "issue a permit for the discharge of any pollutant" from a point source "notwithstanding section 1311(a) of this title." *Id.* §§ 1342(a)(1), 1362(12) (defining "discharge of any pollutant" to mean "any addition of any pollutant to navigable waters from any point source"). A "point source" is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Sections 301 and 402, read along with the pertinent statutory definitions,[3] demonstrate that NPDES permits are required only

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[3] Although Congress did not define "nonpoint source," that term generally refers to "pollution that does not result from the 'discharge' or 'addition' of pollutants from a point source." *See Or. Natural Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 849 n.9 (9th Cir. 1987).

for point source discharges. Nonpoint source pollution is not regulated under the CWA, but is instead addressed by other environmental programs.

The CWA thus draws a "clear and precise distinction between point sources, which [are] subject to direct Federal regulation, and nonpoint sources, control of which was specifically reserved to State and local governments through the section 208 process," S. Rep. No. 95-370, at 8 (1977), and section 319 nonpoint source management programs. *See* 33 U.S.C. §§ 1288, 1329; *see also Or. Natural Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 785 (9th Cir. 2008) (explaining that nonpoint sources are "generally excluded from CWA regulations, except to the extent that states are encouraged to promote their own methods of tracking and targeting nonpoint source pollution."). The statute does not provide a "direct mechanism to control nonpoint source pollution but rather uses the 'threat and promise' of federal grants to the states to accomplish this task." *Or. Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998). The statute further directs EPA to provide information to the states to aid in the control of nonpoint source pollution. *See* 33 U.S.C. § 1314(f).

Congress' "disparate treatment" of point source discharges and nonpoint source pollution is an "organizational paradigm of the Act." *Or. Natural Desert*

Ass'n v. U.S. Forest Serv., 550 F.3d at 780. The reasons for Congress' distinction are straightforward:

First, national uniformity in nonpoint source pollution control is "virtually impossible" given variations in climate and geography. *Id.* at 785.

Second, because nonpoint source pollution abatement typically involves land use controls, Congress believed it best to leave such control "to the level of government closest to the sources of the problem," rather than authorizing federal regulatory authority. S. Rep. No. 95-370, at 9.

Third, and related to the previous point, Congress recognized that "many nonpoint sources of pollution are beyond present technology of control." S. Rep. No. 92-414, at 39 (1972); *see also* 117 Cong. Rec. 38,722, 38,825 (Nov. 2, 1971) (statement of Sen. Muskie) ("There is no effective way as yet, other than land use control, by which you can intercept [nonpoint] runoff and control it in the way that you do a point source. We have not yet developed technology to deal with that kind of a problem").[4]

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[4] Senator Muskie further observed that nonpoint source pollution, as distinguished from point source discharges, is "runoff into water that occurs perhaps miles away from the land that adjoins it." 117 Cong. Rec. at 38,825.

Congress knew that both point source discharges and nonpoint source pollution could impact water quality, but it nevertheless decided to address those different sources differently, requiring NPDES permits only for point source discharges to navigable waters.

B. The CWA Only Requires an NPDES Permit When Pollutants Reach Navigable Waters by Means of a Discernible, Confined, and Discrete Conveyance.

The "conduit theory" cannot be reconciled with the CWA's text, which subjects to NPDES regulation only a "discharge of a pollutant" that is itself the "*addition* of any pollutant *to* navigable waters *from* any *point source*." 33 U.S.C. § 1362(12) (emphasis added). Diffuse migration of a pollutant to a navigable water—whether through groundwater or air, or over land—does not constitute an addition of a pollutant to a navigable water *from a point source*. The mere fact that a pollutant was released from a "point source" sometime in the past and eventually finds its way to a navigable water is insufficient to constitute a covered discharge, because the term "discharge of a pollutant" requires that the "point source" itself be the actual or direct conveyance from which the pollutant is added to navigable waters. Any other reading of the CWA's text would eliminate all meaningful differentiation between the terms "point source" and "nonpoint source," as nearly all nonpoint source pollution can be traced back to some conveyance, structure, or

area meeting the definition of "point source." The method of addition to a navigable water is the key distinction between the two.

Numerous circuits have recognized that the diffuse migration of pollutants does not constitute a "discharge of a pollutant" subject to NPDES permitting, even when some of the pollutants could be traced back to an identifiable structure or facility that fits the definition of "point source." Thus, for instance, this Court previously held that when precipitation "seeps . . . into [mining] pits containing waste rock" and "eventually enter[s] [a] surface water," it is nonpoint source pollution. *See Greater Yellowstone*, 628 F.3d at 1153. There, the seepage had to "filter[] through 200 feet of overburden and 250 to 750 feet of undisturbed material beneath the overburden [before] eventually entering the surface water." *Id.* Because that seepage made its way to surface waters in a natural and unimpeded manner, the Court held that it was not a point source discharge. *See id.*

Likewise, in *Sierra Club v. Abston Const. Co., Inc.*, 620 F.2d 41, 44 (5th Cir. 1980), the Fifth Circuit rejected a theory of CWA liability that is nearly indistinguishable from the district court's "conduit theory." There, the plaintiff's theory would merely have required "a showing of the original sources of the pollution to find a statutory point source, *regardless of how the pollutant found its way from that original source to the waterway*." *Id.* (emphasis added). Concerned

that such a theory could expand the scope of the NPDES program to encompass "the broad drainage of rainwater carrying oily pollutants from a road paralleling the waterway, or animal pollutants from a grazing field contiguous to the waterway," the Fifth Circuit rejected it, holding that "[t]he focus of this Act is on the 'discernible, confined and discrete' conveyance of the pollutant, which would exclude natural rainfall drainage over a broad area." *Id.*

Several other circuits have also recognized that a "discharge of a pollutant" only occurs when a point source directly adds a pollutant to navigable waters. The Second Circuit clarified that the term "'point source' [] does not necessarily refer to the place where the pollutant was created but rather refers only to the proximate source from which the pollutant is directly introduced to the destination water body." *Catskill Mountains v. City of New York*, 273 F.3d 481, 493 (2d Cir. 2001). The District of Columbia and Sixth Circuits similarly held that NPDES requirements apply only when a point source is the site at which a pollutant is first introduced into navigable waters. *See Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165, 175 (D.C. Cir. 1982). Thus, whether pollution is point or nonpoint source is determined at the point "when the pollutant first enters navigable water." *See Gorsuch*, 693 F.2d at 175. The D.C. Circuit further observed that Congress

could easily have chosen language that would have imposed NPDES requirements more broadly on "all pollution released through a point source." *See Gorsuch*, 693 F.2d at 176. Instead, Congress directed that "the NPDES system was limited to 'addition' of 'pollutants' 'from' a point source." *Id.* It is not enough to merely trace pollutants back to some release from a point source.

Together these cases expose the incurable flaw in the district court's "conduit theory." NPDES requirements do not apply merely because pollutants that ultimately reach navigable waters were at some point released from something that fits the definition of "point source"—a term that courts have interpreted expansively. *See United States v. Plaza Health Labs, Inc.*, 3 F.3d 643, 651 (2d Cir. 1993) (Oakes, J., dissenting) (listing examples illustrating how "courts have deemed a broad range of means of depositing pollutants in the country's navigable waters to be point sources"). Nearly all pollution that eventually reaches navigable waters likely could be traced back to something that might fairly be characterized as a "point source." But that cannot mean that all such pollution meets the statutory definition of "discharge of a pollutant." 33 U.S.C. § 1362(12). For there to be such a discharge, the "point source" must be the actual and direct means by which the pollutant is added to a navigable water. Otherwise, Congress' "clear and precise" distinction between point source discharges and nonpoint source pollution

would be rendered meaningless. *See* S. Rep. No. 95-370, at 8. Contrary to the district court's belief, under the CWA it *does* matter how pollutants arrive at navigable waters. *See COM I*, 24 F. Supp. 3d at 1000.

By ignoring the means by which a pollutant enters a navigable water, the "conduit theory" could result in the imposition of NPDES requirements not only on diffuse migration of pollutants through groundwater, but also on "paradigmatic examples of nonpoint source pollution" such as "runoff or windblown pollutants from any identifiable source, whether channeled or not." *Cordiano v. Metacon Gun Club*, 575 F.3d 199, 224 (2d Cir. 2009). This Court, however, has clarified that "point sources and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a confined, discrete conveyance." *Trs. for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984). In other words, an interpretation of the Act that turns solely on whether the release of pollutants from a point source eventually reaches a navigable water "would eviscerate the point source requirement and undo Congress' choice" to exclude things like diffuse runoff and atmospheric deposition from the NPDES program. *Cordiano*, 575 F.3d at 224; *see also Alaska Cmty. Action on Toxics v. Aurora Energy Servs.*, 940 F. Supp. 2d 1005, 1026 (D. Alaska 2013) ("a plaintiff seeking to establish a point

source discharge, even in the context of airborne pollution, must prove more than that the pollutant originated from an identifiable source"; it must also "prove that the pollutant reached the water through a confined, discrete conveyance"), *rev'd on other grounds*, 765 F.3d 1169 (9th Cir. 2014).

In both *Cordiano* and *Aurora Energy*, windblown pollutants that ended up in jurisdictional waters could be traced back to nearby structures that might in some cases meet the definition of "point source,"[5] but the courts properly held that "wind is the polar opposite of a 'discernible, confined and discrete conveyance.'" *Aurora Energy*, 940 F. Supp. 2d at 1026-27. Under the "conduit theory," however, NPDES permits could conceivably be required for windblown pollutants because wind (like groundwater) serves as a conduit, and according to the district court, conduits "need not also be 'confined and discrete.'" *COM I*, 24 F. Supp. 3d at 999.

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[5] *Cordiano* involved an engineered earthen berm at the back of a shooting range used for bullet containment, located "in close proximity" to wetlands. *See* 575 F.3d at 202, 223-24. *Aurora Energy* involved a coal loading facility's coal piles, railcar unloader, and a stacker-reclaimer used to stack coal onto stockpiles and reclaim coal from those piles to place it on a conveyer belt that carried the coal over open water (Resurrection Bay in Seward, Alaska) to a ship loader. *See* 940 F. Supp. 2d at 1024-25.

Such an expansive interpretation of the Act is contrary to Congress' intent and the text of the CWA.

EPA's prior interpretations of the statutory distinction between point and nonpoint sources provide additional evidence that diffuse migration of pollutants is not subject to the NPDES program. *See* U.S. EPA, "What is Nonpoint Source?"[6] ("Nonpoint source pollution generally results from land runoff, precipitation, *atmospheric deposition*, drainage, *seepage* or hydrologic modification.") (emphasis added); *accord Cordiano*, 575 F.3d at 220-21 (quoting comparable descriptions of nonpoint source pollution from 1987, 1994, and 2003 EPA guidance documents and emphasizing EPA's view that such pollution can be "caused by rainfall or snowmelt moving over *and through the ground* and carrying natural and human-made pollutants," eventually depositing them in navigable waters) (emphasis added). These passages reflect EPA's recognition that *how* pollutants reach navigable waters is the critical distinction between point source discharges and nonpoint source pollutants.

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[6] *Available at* http://www.epa.gov/polluted-runoff-nonpoint-source-pollution/what-nonpoint-source.

The district court here even acknowledged the absence of "controlling appellate law or statutory text expressly allowing" its novel "conduit theory." *COM I*, 24 F. Supp. 3d at 996. Rather, as shown, the statutory text and controlling appellate law demonstrate the "conduit theory" rests on a flawed interpretation of the CWA. The district court nevertheless adopted it because, in its view, it "makes sense to regulate groundwater." *Id.* The district court cannot override Congress' choice in this manner, no matter how reasonable the alternative may seem to it, and this Court must reverse. "However sensible (or not) the [lower court's] position, a reviewing court's task is to apply the text of the statute, not to improve upon it." *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600 (2014); *see also FDA v. Brown & Williamson*, 529 U.S. 120, 161 (2000) ("In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.").

C. Other Provisions of the CWA Confirm the NPDES Program Does Not Cover Diffuse Migration of Pollutants through Groundwater.

The statutory text shows Congress believed the types of pollution at issue here—pollutants that migrate to navigable waters following disposal in wells or subsurface excavations—are most appropriately addressed under the CWA's nonpoint source programs. *See* 33 U.S.C. §§ 1288, 1314. CWA Section 304(f),

which "concerns nonpoint sources of pollution," *see S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 106 (2004), requires EPA to provide technical information for states to use in their nonpoint source control programs, including "processes, procedures, and methods to control pollution resulting from . . . the disposal of pollutants in wells or in subsurface excavations." 33 U.S.C. § 1314(f)(2)(D).

The information EPA must provide under Section 304(f) "may range from provisions for evaluating geological characteristics of disposal sites to the costs and benefits of alternative methods of disposal." S. Rep. 92-414, at 53. Congress was well aware of the potential for "groundwater contamination" at "shallower disposal sites," which is why it called upon EPA to outline provisions "to control leaching of materials from such sites, which include land-fill sites as well as abandoned mines." *Id.*

Congress characterized "section [304(f)] and the information on such nonpoint sources [as] among the most important in the 1972 Amendments." H.R. Rep. No. 92-911, at 109 (1972). The various nonpoint sources identified in Section 304(f), including the disposal of pollutants in wells and subsurface excavations, also appear in Section 208(b)(2). *Compare* 33 U.S.C. § 1314(f) *with id.* § 1288(b)(2). Section 208, and later Section 319, "were designated by

Congress as methods to keep states accountable for identifying and tracking nonpoint sources of pollution, as well as identifying 'the best management practices and measures' to reduce such pollution." *Or. Natural Desert Ass'n*, 550 F.3d at 785.

When Congress left nonpoint source pollution control to the states, it acknowledged that "Section 208, the 1972 act's laboratory for new institutional control mechanisms for vexing nonpoint source problems . . . may not be adequate." S. Rep. No. 95-370, at 10. Congress understood that states might resist developing protective control measures, speculating that it "may be that sometime in the future a Federal presence can be justified and afforded." *Id.* Congress nevertheless concluded that "it is both necessary and appropriate to make a distinction as to the kinds of activities that are to be regulated by the Federal Government and the kinds of activities which are to be subject to some measure of local control" under Section 208. *Id.*

That important distinction has remained in place for more than four decades. And states, including Hawai'i, are indeed addressing various nonpoint sources of

pollutants under nonpoint source management plans.[7] By vesting authority in the states to address nonpoint source pollution that eventually results from the disposal of pollutants into wells and subsurface excavations, Sections 304(f) and 208(b)(2) confirm that NPDES requirements were never intended to address such disposals. The district court erred by overriding the distinction that Congress intentionally drew between point and nonpoint source pollution and the disparate approaches Congress designated for addressing those types of pollution.

II. The CWA's Penalty Scheme Requires Rejection of the "Conduit Theory"

The CWA clearly forecloses the district court's "conduit theory." But even if this Court finds ambiguity in the statute, it must construe that ambiguity in accordance with the rule of lenity and reject the "conduit theory."

The CWA imposes substantial criminal and civil penalties for violations. "Knowing" criminal violations are punishable by up to $100,000 per violation per day and six years' imprisonment, while negligent criminal violations carry fines of up to $50,000 per violation per day and two years' imprisonment. 33 U.S.C. §

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[7] *See* Hawai'i's Nonpoint Source Management Plan, 2015 to 2020, *available at* http://health.hawaii.gov/cwb/files/2013/05/2015-Hawaii-NPS-Management-Plan.pdf.

1319(c). Even first time criminal violations are punishable by fines of up to $50,000 per violation per day and three years' imprisonment (for knowing violations) or up to $25,000 per violation per day and one year in prison (for negligent violations). *See id.* The CWA also provides for civil penalties in enforcement actions by EPA or private citizens, which can be up to $37,500 per violation. *See* 33 U.S.C. §§ 1319(d), 1365(a).

Criminal statutes like the CWA are subject to the rule of lenity and must be narrowly construed. *See McNally v. United States*, 482 U.S. 350, 359-60 (1987) ("[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language."); *see also United States v. Bass*, 404 U.S. 336, 348 (1971) (noting that "legislatures and not courts should define criminal activity"); *Plaza Health Labs*, 3 F.3d at 649 (construing the term "point source" in accordance with the rule of lenity and dismissing criminal prosecutions).

The rule of lenity serves three fundamental purposes: "to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts." *United States v. Kozminski*, 487 U.S. 931, 952 (1988). This venerable rule of statutory construction also applies in civil cases where a statutory provision,

such as CWA Section 402, has both criminal and civil applications. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011) ("[T]he rule of lenity can apply when a statute with criminal sanctions is applied in a noncriminal context.").

Here, the district court's "conduit theory" leaves citizens uncertain about whether their operations and activities are punishable by harsh criminal and civil penalties because some amounts of pollutants may eventually reach navigable waters. There is no way every landowner, business owner, operator, or independent contractor can ascertain whether its conduct might result in pollutants being carried from point sources under its control eventually to navigable waters via groundwater migration, wind dispersion, rainwater runoff, or other diffuse means outside of its control. Such migration could occur over long periods of time and across vast geographic areas, and even detailed technical studies may not disclose whether their conduct might be considered a criminal discharge into a navigable water. The rule of lenity exists to protect landowners against this very sort of uncertainty.

The district court's "conduit theory" exposes *amici*'s members and many other landowners and operators to potentially severe penalties based on an interpretation of the CWA that, by the court's admission, lacks any support in

controlling appellate law or the statute's text. If there is any ambiguity as to whether the Act's text, structure, or history establishes that the "conduit theory" rests on an "unambiguously correct" statutory interpretation, the rule of lenity requires its rejection. *See Granderson*, 511 U.S. at 54.

III. The Practical Implications of the District Court's "Conduit Theory" Could Be Staggering.

This Court should also reject the district court's "conduit theory" because it may lead to impracticable results that Congress could not have intended when it structured the CWA to make a clear distinction between point and nonpoint sources of pollution. *See Ariz. State Bd. for Charter Schools v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006) ("[W]ell-accepted rules of statutory construction caution us that statutory interpretations which would produce absurd results are to be avoided."); *United States v. Fejes*, 232 F.3d 696, 701 (9th Cir. 2000) (same).

A. Under the "Conduit Theory," the NPDES Program Could Grow to an Unworkable Scale.

The "conduit theory" rests on an interpretation that effectively eliminates Congress' distinction between point and nonpoint sources of pollution (*see supra* Part I). Application of that theory risks triggering exactly the sort of administrative permitting nightmare that Congress has averted by amending the CWA in the past,

even with respect to otherwise covered point source discharges. For instance, when Congress amended the Act in 1977 to expressly exempt from the NPDES program return flows from irrigated agriculture, it recognized that "[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." *See* 123 Cong. Rec. 38,924, 38,956 (Dec. 15, 1977).

Likewise, when Congress amended the Act in 1987 to fundamentally change how stormwater discharges are regulated, it emphasized that permitting authorities must not be overwhelmed by having to permit every conceivable discharge of stormwater from a point source. *See, e.g.*, 131 Cong. Rec. 15,616, 15,657 (June 13, 1985) (declaring it "absurd" to "require everyone who has a device to divert, gather, or collect stormwater runoff and snowmelt to get a permit from EPA as a point source" and warning that such a permitting program "would be an administrative nightmare" and "would also be prohibitively expensive to administer"); 133 Cong. Rec. Daily H168, H170 (daily ed. Jan. 8, 1987) (explaining how the 1987 CWA amendments would "properly reduce the universe of permits required for storm water from millions to thousands" and how "local, State, and Federal officials would be inundated with an enormous permitting workload" without the amendments).

Both amendments were reactive. Congress felt compelled to intervene when it saw how broadly courts and regulators were interpreting the NPDES provisions of the CWA. Yet the administrative burdens Congress sought to avoid when it enacted those amendments pale in comparison to the burdens that could result from adoption of the district court's "conduit theory." Much of what EPA and the courts have long considered to be nonpoint source pollution may suddenly be included in the NPDES program. Indeed, there appears to be no meaningful limit to the number of sources that could require permits under the district court's impermissibly broad interpretation of the statute.

In particular, many treatment and pollution control measures (*e.g.*, green infrastructure) that landowners currently implement without NPDES permits could require such permits under the "conduit theory." Runoff infiltration structures such as sumps, lagoons, and ponds that "are designed to capture a treatment volume of runoff and percolate it through surface soils into the ground water system" may require NPDES permits under the "conduit theory" if the pollutants ultimately migrate to navigable waters, which it should be noted, most groundwater does. *See* U.S. EPA, *National Management Measures to Control*

Nonpoint Source Pollution from Urban Areas, at 5-9 (2005).[8] Imposing NPDES requirements on such facilities makes no sense given that EPA promotes their use specifically to control *nonpoint* source pollution. *See id.* at 5-9 to 5-10 (noting that infiltration reduces runoff volumes and hence, peak flows in storm sewers and downstream waters; filters out pollutants; and facilitates aquifer recharge, which is vital to maintaining stream and wetland hydrology and ensuring survival of biota in wetlands and streams).

Other structures and facilities that treat pollutants via soil percolation—such as septic systems, which are ubiquitous in this country,[9] and spray irrigation (*i.e.*, the disposal of treated municipal wastewater by application to fields, which allows it to percolate through soil and recharge ground water)—might likewise become subject to NPDES permitting under the "conduit theory."

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[8] *Available at* https://www.epa.gov/polluted-runoff-nonpoint-source-pollution/urban-runoff-national-management-measures.

[9] There are over 21,000 septic tanks and 88,000 cesspools used for onsite disposal in Hawai'i alone, all of which have been considered nonpoint source pollution. *See* Hawai'i's Nonpoint Source Management Plan, 2015 to 2020, at 11-12, *available at* http://health.hawaii.gov/cwb/files/2013/05/2015-Hawaii-NPS-Management-Plan.pdf.

A broad range of storage structures and facilities are also at risk of being added to the NPDES program under the "conduit theory" to the extent any pollutants from those structures and facilities eventually migrate to navigable waters. For instance, aquifer recharge and aquifer storage and recovery projects involve the underground injection or infiltration of water via surface spreading, infiltration pits and basins, and injection wells. This can help prevent salt water intrusion into freshwater aquifers[10] and allow water to be stored and later recovered for uses such as drinking water supply, irrigation, or ecosystem restoration projects. Some of these projects are subject to Safe Drinking Water Act requirements for Class V wells, but not to NPDES requirements. Yet the "conduit theory" threatens to add duplicative or even inconsistent requirements.

State regulations with respect to pumping and recharging in the arid West often focus on preserving groundwater balances. As such, water originating below the surface is intentionally reinjected or reinfiltrated. By way of example, rapid

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[10] In coastal areas underlain by freshwater aquifers used for drinking water supply, freshwater is injected into the subsurface to create a barrier between saltwater and freshwater. The injected water creates a mixing zone of lower water quality which impedes the flow of saltwater into portions of the aquifer where freshwater well fields exist.

infiltration basins involve pumping water into a surface excavation and infiltrating it back into the groundwater, if necessary after pre-treatment to ensure compliance with drinking water and other water quality standards. These structures, designed to maintain balanced groundwater resources, should not be subject to new and potentially conflicting regulatory requirements under the NPDES program.

Unlined impoundments are also used in numerous industries. Examples include stormwater ponds, farm ponds, surface impoundments, cooling ponds, and water supply reservoirs. Many of these structures do not currently require NPDES permits. For those that do, the NPDES permits only address discharges of pollutants *directly* to surface waters, not the diffuse migration of pollutants from the unlined bottoms of those structures to navigable waters via soil and groundwater. Owners and operators of those impoundments may need to seek new or modified permits and identify additional NPDES discharge points following the district court's opinion. Likewise, pooling at the bottom of pits, such as gravel pits for highway repairs and road construction and mine pits, may newly face NPDES permitting requirements under the "conduit theory."

Because all that is required under the district court's "conduit theory" to trigger NPDES liability is the release of a pollutant from a "point source" and the eventual migration of that pollutant to a navigable water, hundreds of thousands (or

possibly millions) of additional NPDES permits could potentially be required nationwide. Congress could not have intended such an absurd result when it drew sharp and meaningful distinctions between point and nonpoint source pollution control throughout the CWA and preserved primary authority over land use for state and local governments.

B. NPDES Requirements Cannot Be Applied to the Sorts of Features that Would Require Permits Under the "Conduit Theory."

It is far from clear whether NPDES permitting requirements can even be applied intelligibly to the litany of pollutant sources that the "conduit theory" might bring into the NPDES program. NPDES requirements were not designed with diffuse pollutant migration in mind, much less methods to remove pollutants through infiltration and percolation. Rather, NPDES requirements were aimed at "end-of-pipe" discharges directly into surface waters. *See* U.S. EPA, *Overview of the National Pollutant Discharge Elimination System (NPDES) Program*, at 16, 17, 23;[11] *see also* 40 C.F.R. § 122.45(a) (requiring that effluent limitations,

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[11] *Available at* http://www.epa.gov/sites/ production/files/2014-12/documents/ module-npdes.pdf.

standards and prohibitions be established "for each outfall or discharge point of the permitted facility").

For pollutants that migrate diffusely from a particular structure, facility, or land area via groundwater, it may not be possible to determine where the groundwater ultimately connects to a navigable water. Thus, there are no readily identifiable, defined outfalls or discharge points that can be used for purposes of calculating effluent limitations and conducting the required sampling and monitoring. *See* 40 C.F.R. Part 122 Subpart C. Nor would it make sense to simply declare that some aspect of a particular structure or facility (*e.g.*, the bottom of an unlined impoundment) is the discharge point. EPA's permitting guidance directs permit writers to require monitoring to determine compliance with applicable effluent limitations "after all treatment processes." U.S. EPA, *NPDES Permit Writer's Manual* § 8.1.2.3 (Sept. 2010).[12] Again, many infiltration structures and facilities are designed so that pollutant removal occurs during the movement through soil *after* the pollutants are released from the so-called discharge point.

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[12] *Available at* https://www.epa.gov/npdes/npdes-permit-writers-manual.

Even assuming NPDES permit writers could somehow identify outfalls or discharge points, it may not be possible for the owner or operator of the "point source" to conduct the required sampling and monitoring because those locations may be miles away and beyond the owner or operator's control. To add to the uncertainty, at the point where groundwater containing pollutants that were released from a "point source" ultimately connects with a navigable water, that groundwater will likely contain pollutants from a host of other sources as well. Variable aspects of groundwater seepage such as flow rates and chemistry could further make applying NPDES regulations impracticable. For instance, unlike traditional "end of pipe" discharges, at various times of year flows can change and surface water can instead flow back into groundwater—a contingency that NPDES regulations do not account for.

In short, it would be impracticable, if not impossible, to apply NPDES requirements to the types of pollution that the "conduit theory" may reach. The permitting process would become even more burdensome and expensive for permit writers and applicants than it already is.

CONCLUSION

The district court's "conduit theory" finds no support in the statute or law, and its application could make the NPDES permitting program unworkable. Accordingly, the district court's decisions should be reversed.

DATED this 28th day of March, 2016.

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) that this brief contains 6,912 words and has been prepared in 14-point Times New Roman proportionally spaced typeface.

/s/ David Y. Chung
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CERTIFICATE OF SERVICE

I certify that on March 28, 2016, I electronically filed a copy of the foregoing brief with the Clerk of Court for the U.S. Court of Appeals for the Ninth Circuit via the appellate CM/ECF system, which will send electronic notification of to all registered CM/ECF users in this case.

/s/ David Y .Chung
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