No. 18-260

IN THE

Supreme Court of the United States

COUNTY OF MAUI,

Petitioner,

v.

HAWAIʻI WILDLIFE FUND, *ET AL.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* EDISON ELECTRIC INSTITUTE, AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, AMERICAN IRON AND STEEL INSTITUTE, AMERICAN PETROLEUM INSTITUTE, AMERICAN PUBLIC POWER ASSOCIATION, ASSOCIATION OF AMERICAN RAILROADS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL MINING ASSOCIATION, NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, PORTLAND CEMENT ASSOCIATION, AND UTILITY WATER ACT GROUP IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*

Amici curiae, listed below, are industry groups representing a broad cross-section of the Nation's energy, manufacturing, mining, and transportation sectors.[1] Their members are often subject to the requirements of the Clean Water Act (CWA), 33 U.S.C. §§ 1251 *et seq*.

Edison Electric Institute (EEI) is the national association of all U.S. shareholder-owned electric utilities. Its members provide electricity in 50 states and the District of Columbia for 220 million Americans. As a whole, the electric power industry supports over seven million jobs in communities nationwide. EEI members take environmental stewardship seriously and advocate for clear, reasonable regulatory programs.

American Fuel & Petrochemical Manufacturers (AFPM) is a national trade association whose members comprise mostly all United States refining and petrochemical manufacturing capacity. AFPM's members supply customers with a wide variety of products that Americans use daily in their homes and businesses. AFPM's members meet the Nation's fuel and petrochemical needs, strengthen economic and national security, and support nearly three million American jobs.

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[1] No part of this brief was authored by counsel for any party, and no person or entity has made any monetary contribution to the preparation or submission of the brief other than *amici curiae* and their counsel. Pursuant to Rule 37.3(a), *amici* state that counsel of record for Petitioners and Respondents have consented to the filing of this brief.

American Iron and Steel Institute (AISI) is the voice of the steel industry before policymakers and the courts, supporting a strong, sustainable industry that manufactures products to meet society's needs. AISI is comprised of 19 member companies, including integrated and electric furnace steelmakers, and approximately 120 associate members who are suppliers to or customers of the steel industry.

American Petroleum Institute (API) is a nationwide, non-profit trade association that represents more than 600 companies involved in all aspects of the natural gas and oil industry and sets standards for that industry applicable worldwide. API's members are producers, refiners, suppliers, pipeline operators, and transporters, as well as service and supply companies.

American Public Power Association is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. It represents public power before the federal government to protect the interests of over 49 million people that its members serve, and the 93,000 people they employ.

Association of American Railroads (AAR) includes large and small freight railroads, as well as Amtrak and commuter authorities. AAR appears before Congress, agencies, and courts to advocate for its members, in addition to establishing operating standards for the industry. AAR's members support the energy, agriculture, and chemicals industries (among others), transporting products including oil, coal, fertilizer, and other chemical compounds.

International Brotherhood of Electrical Workers is an unincorporated international labor organization representing approximately 750,000 active members and retirees working in a variety of fields, including utilities, construction, telecommunications, broadcasting, manufacturing, railroads, and government.

National Association of Manufacturers is the largest manufacturing association in the United States, representing manufacturers in every industrial sector and all 50 states. Manufacturing employs more than 12 million people, contributes $2.25 trillion to the economy annually, has the largest impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation.

National Mining Association is a not-for-profit association consisting of over 300 entities involved in mining, including the producers of most of the nation's coal, metals, and minerals, as well as the manufacturers of mining and processing machinery, equipment, and supplies, engineer and consulting firms, financial institutions, and other firms serving the mining industry.

National Rural Electric Cooperative Association (NRECA) is the association of not-for-profit energy cooperatives supplying central station service through generation, transmission, and distribution of electricity to member-owners, especially those in rural areas of the United States. NRECA participates in administrative and judicial proceedings involving or affecting its members' interests.

Portland Cement Association (PCA) is the premier policy, research, education, and market intelligence organization serving America's cement manufacturers. PCA members represent 93% of U.S. cement production capacity with facilities in all 50 states. PCA promotes safety, sustainability, and innovation in all aspects of construction, fosters continuous improvement in cement manufacturing and distribution, and generally promotes economic growth and sound infrastructure investment.

Utility Water Act Group (UWAG) is a voluntary, non-profit, unincorporated group of over 130 energy companies and three national trade associations of energy companies. The individual companies own and operate power plants and other facilities that generate electricity for residential, commercial, industrial, and institutional customers nationwide. UWAG participates on behalf of its members in CWA proceedings, including litigation, that affect the interests of electric generators.

Amici have a strong interest in the outcome of this case because their members engage in activities that, under the Ninth Circuit's decision, might now be considered subject to the CWA's National Pollutant Discharge Elimination System (NPDES) permitting program. The Ninth Circuit's decision dramatically expands the NPDES permitting program to encompass what has consistently been considered nonpoint source pollution, such as releases of pollutants to groundwater that eventually migrate to navigable waters. This expansion upends the careful balance that Congress struck and maintained between point and nonpoint source pollution control—and between federal and state authority—at the

time it enacted the CWA and in later amendments. Given the potentially crippling criminal and civil penalties and the threat of third-party citizen suit litigation, *amici*'s members could be exposed to unprecedented CWA liability under the Ninth Circuit's ruling.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1972, Congress carefully limited the scope of the CWA's NPDES permit program to cover only discharges of pollutants *from* discernible, confined, discrete conveyances, or "point sources," *into* "navigable waters." *See* 33 U.S.C. §§ 1311(a), 1362(14). Correspondingly, Congress deliberately excluded from NPDES coverage the pollution of "navigable waters" caused by contaminated groundwater and other diffuse mechanisms. Congress reaffirmed that limitation several times thereafter, repeatedly choosing not to extend NPDES permitting requirements to a broader range of water pollution despite fully recognizing the myriad connections that exist between groundwater and surface waters. Instead, Congress repeatedly reiterated its intent that contaminated groundwater and other diffuse sources of pollution be addressed through state programs regulating pollution from nonpoint sources and through other federal environmental statutes. This is because such programs are far better suited than the NPDES program to control potential sources of pollutants that may migrate to navigable waters via diffuse mechanisms like groundwater.

The Ninth Circuit's decision upends Congress's carefully crafted focus on how pollutants enter navi-

gable waters. By extending the NPDES program to virtually all pollution that ultimately reaches navigable waters, the Ninth Circuit has eviscerated Congress's deliberate delineation of federal and state authorities and responsibilities, and displaced regulatory programs far better suited than the NPDES program to address the migration of pollutants to surface waters via diffuse media like groundwater.

I. The Ninth Circuit's extension of the NPDES permitting requirements to *any* release of pollutants traceable to a point source that eventually reaches a navigable water runs roughshod over Congress's careful design. It ignores Congress's intent to limit the NPDES program to circumstances in which a point source conveys pollutants into navigable waters, and to leave other kinds of water pollution—including releases to groundwater that ultimately reach "navigable waters"—to be controlled under state programs and other federal pollution control statutes such as the Resource Conservation and Recovery Act (RCRA).

II. The Ninth Circuit's broad application of NPDES permit requirements to releases to groundwater is at odds with most of EPA's statements and actions over the past forty-seven years, which have largely respected Congress's careful balance between federal regulation of a limited set of point source discharges into navigable waters and the states' broader authority to address water pollution from groundwater and other nonpoint sources.

III. The Ninth Circuit's decision has major implications for the scope and application of other water pollution programs. By expanding the NPDES

program to cover any pollutant found in a navigable water that can be fairly traced back to some point source that released pollutants to groundwater (or some other similarly diffuse mechanism) at some point in the past, the Ninth Circuit's ruling diminishes the coverage of RCRA as well as the CWA Section 319 nonpoint source program. Yet those regulatory regimes are far better suited to address the pollution of navigable waters by contaminated groundwater than the NPDES program, which imposes requirements that are difficult, if not impossible, to apply to such pollution. In short, the Ninth Circuit's decision is not only legally unsound and practicably problematic, but perversely may result in *less* effective overall protection of water quality.

To require that every landowner or facility operator obtain a federally enforceable NPDES permit simply because pollutants in groundwater eventually migrate to navigable water from some discrete source on their property or at their facility is beyond the sensible reach of the CWA. Congress has long recognized as much, as has EPA for much of the time since the CWA's inception. Because the decision below conflicts with Congress's intent and risks displacing other federal and state programs far better tailored than NPDES to address the pollution of surface waters by contaminated groundwater or other similarly diffuse sources, the Court should reverse.

ARGUMENT

I. BY IGNORING HOW POLLUTANTS REACH NAVIGABLE WATERS, THE NINTH CIRCUIT HAS UPSET THE CAREFUL BALANCE CONGRESS STRUCK IN THE CLEAN WATER ACT.

Petitioners ably explain that the statutory definitions of "point source" and "discharge of a pollutant," 33 U.S.C. § 1362(12) & (14), read in conjunction with other relevant provisions such as CWA Section 402, 33 U.S.C. § 1342, do not bring groundwater pollution within the scope of the NPDES program, even if the pollutants in that groundwater eventually reach navigable waters. The Act's history confirms this reading of the statute and Congress's intent.[2] *Amici* will therefore focus on the many ways in which the Ninth Circuit's decision is irreconcilable with Congress's intent in enacting the CWA in 1972 and amending it in 1977 and 1987.

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[2] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147 (2000) (noting that, while the Court is governed by the "provisions of our laws, rather than the principle concerns of our legislators," Congress's "intent is certainly relevant" in assessing the former and exhaustively analyzing the history of the Food, Drug, and Cosmetic Act as well as decades of tobacco legislation); *Loving v. IRS*, 742 F.3d 1013, 1016 (D.C. Cir. 2014) (court "must employ all tools of statutory interpretation, including . . . structure, purpose, and legislative history").

A. Congress Struck and Maintained a Careful Balance Between Federal Regulation of Certain Point Source Discharges Into Navigable Waters and States' Broader Authority to Address Water Pollution.

The CWA was not written on a blank slate. Rather, it reflected a careful balance between two historical lines of thought regarding how best to attack the problem of water pollution and divide authority for addressing that problem between states and the federal government.

The first approach was drawn from the 1899 Refuse Act, 33 U.S.C. § 407 *et seq.*, which prohibited discharges into navigable waters except pursuant to a permit issued by the Army Corps of Engineers. Shortly before passage of the 1972 Act, this Court dramatically expanded the scope of the Refuse Act permit program. *See United States v. Standard Oil*, 384 U.S. 224, 228-30 (1966) (interpreting Refuse Act to require permits for *all* discharges into navigable waters, even if they did not impede navigation). In the wake of *Standard Oil*, the federal government launched the "Refuse Act Permit Program," under which all discharges to navigable waters were to be subject to federal permits. *See* Exec. Order No. 11574 (Dec. 23, 1970). Not surprisingly, that program quickly proved unmanageable. Within a year, over 19,000 applications had been submitted but only 17 permits had issued. *See* Andrew W. McThenia, Jr., *An Examination of the Federal Water Pollution Control Act Amendments of 1972*, 30 Wash. & Lee L. Rev. 195, 196 n.4 (1973). Although the NPDES program was "patterned after" the Refuse Act's permit

requirement, *id.* at 204, it was with that cautionary lesson fresh in mind that Congress determined to set a far narrower scope for the CWA's NPDES program.

The second historical approach to controlling water pollution on which Congress drew centered on state- and locality-led assessment and remediation of water pollution. This approach had been the centerpiece of the 1948 Federal Water Pollution Control Act and the 1965 Water Quality Act, both of which incentivized the individual states to establish and enforce water quality standards. *See* Pub. L. No. 80-845, 62 Stat. 1155 (1948) & Pub. L. No. 89-234 (1965).[3] By the early 1970s, Congress recognized that this state-led approach alone was "inadequate in every vital respect" and insufficient to restore the integrity of the nation's waters. *See Milwaukee v. Illinois*, 451 U.S. 304, 310-11 (1981) (quoting S. Rep. No. 92-414 (1971)). The state-led approach nonetheless remained a key component of Congress's subsequent actions to address water pollution. *See* 33 U.S.C. § 1313.

In the 1972 Act, Congress struck a delicate and revolutionary balance between those two historical approaches—one focused on regulating through federal permits specific classes of discharges into navigable waters, and the other on addressing water quality holistically through state standards and implementation plans. *See* N. William Hines, *History of*

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[3] The 1966 Clean Water Restoration Act reinforced this approach, authorizing federal expenditures to assist localities in financing sewage treatment facilities. *See* Pub. L. No. 89-753, 80 Stat. 1247 § 205 (1966).

the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reforms, 4 Geo. Wash. J. Energy & Envtl. L. 80, 99 (2013) ("Under the CWA, Congress intended for both forms of regulation to be utilized and interconnected."). Each approach had its advocates. Senator Muskie was the main champion of the federally-mandated, technology-based effluent limitation approach. EPA Director William Ruckelshaus and New York Governor Nelson Rockefeller expressed serious concerns about the goals, means, and costs of that approach; they favored a state-centered solution. *See id.* at 94-97.

Generally, the Senate bill tilted in favor of technology-based effluent limitations applied via federal discharge permits, while the House favored a smaller federal role and more state programming. *Id.* at 95-97. The final result was a landmark Act that, for the first time, incorporated and balanced both approaches in one law. *See* Mark J. Miars, *The Clean Water Act of 1977: Great Expectations Unrealized*, 47 U. Cin. L. Rev. 259 (1978) ("The 1972 amendments were a unique change in direction for the water pollution control policy of this country. The focus split to examine particular effluent discharges as well as ambient water quality."). Congress showed its overwhelming support for that balance by overriding President Nixon's veto by strikingly wide margins in both chambers. *See* 118 Cong. Rec. H10272 (daily ed. Oct. 18, 1972) (247 to 23 votes); 118 Cong. Rec. S18554 (daily ed. Oct. 17, 1972) (52 to 12 votes).

The NPDES permit program was undoubtedly a core piece of the 1972 Act. But it was Section 208 that was proclaimed by the House Committee on

Public Works as "the most important aspect of [the Act's] water pollution control strategy." H.R. Rep. No. 92-911 (1972). Section 208 instructed states to identify areas having serious water pollution problems; develop plans to address those problems; and manage wastewater treatment for each area—all through extensive consultation between EPA, state, and local officials. *See* 33 U.S.C. § 1288.[4]

The Act's demands on the states were a tall order.[5] To aid them in their task, Congress enacted Section 304(f), requiring EPA to provide "guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollution," as well as "processes, procedures, and methods to control" such pollution—including pollution "resulting from . . . disposal . . . in wells or in subsurface excavations." 33 U.S.C. § 1314(f)(2)(D). Again emphasizing the importance of that piece of the pollution control puzzle, the House Report declared Section 304(f) "and the information on such nonpoint sources . . . among the most im-

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[4] *See also* Lawrence P. Wilkins, *The Implementation of Water Pollution Control Measures – Section 208 of the Water Pollution Control Act Amendments*, 15 Land & Water L. Rev. 479, 484-86 (1980) (describing 33 U.S.C. § 1288(b)).

[5] EPA soon recognized the difficulty of the states' task: "Regulation of nonpoint sources . . . are traditionally local prerogatives. Displacing or even sharing these with regional or state governments engenders opposition." EPA, *Legal and Institutional Approaches to Water Quality Management, Planning, and Implementation*, Tech. Mem. 35 at I-9 (1977), https://nepis.epa.gov/Exe/ZyPDF.cgi/2000YXCY.PDF?Dockey=2000YXCY.PDF.

portant [provisions] in the [1972 Act]." H.R. Rep. No. 92-911, at 109.

By 1977, Congress grew concerned that the CWA's nonpoint source programs might not be sufficient to achieve their lofty goals. *See* S. Rep. 95-370 (1977) at 9-10 (discussing the Committee on Environment and Public Works' concerns with progress under Section 208 and noting that "the committee examined a variety of ways to strengthen the implementation of the 208 program"). Notably, however, Congress's response was *not* to expand the scope of the NPDES program at the expense of state authority. *See id.* at 9 ("[b]etween requiring regulatory authority for nonpoint sources, or continuing the section 208 experiment, the committee chose the latter course"). Instead, Congress strengthened Section 208, offering financial incentives to rural landowners to implement "best management practices to control nonpoint source pollution." 33 U.S.C. § 1288(j); *see also* Robert D. Fentress, *Nonpoint Source Pollution, Groundwater, and the 1987 Water Quality Act: Section 208 Revisited*, 19 Envtl. L. 807, 817 (1989) (discussing 1977 amendments to the Section 208 nonpoint source program).

Congress explained at the time that it still believed it best to leave the task of addressing "vexing nonpoint source problems" to "the level of government closest to the sources of the problem." S. Rep. No. 95-370 (1977), at 9-10. Congress speculated that it "may be that sometime in the future a Federal presence can be justified," but reiterated 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 activ-

ities which are to be subject to some measure of local control." *Id*.

Congress further amended the Act in 1987. Concerns were raised that Section 208 was inadequate to mitigate nonpoint source pollution. *See* S. Rep. No. 99-50, at 7-8 (1985) ("nonpoint pollution looms as a larger and larger problem").[6] But again, Congress did not elect to expand the NPDES permit program. Instead, it added yet another nonpoint program: Section 319. *See* Water Quality Act of 1987, § 316, 33 U.S.C. § 1329 (1987). During debate on this provision, Senator Baucus explained that it "represent[s] a renewed commitment to the cleanup of nonpoint sources of pollution and establish[es] a national policy that programs for the control of nonpoint sources of pollution be implemented." 133 Cong. Rec. 1250, 1271 (1987).

Among other things, Section 319 requires states to identify "best management practices" and measures to reduce pollutant loadings from "categories and subcategories of nonpoint sources" and even "particular nonpoint sources which add significant pollution" and to account for the impact of those practices on groundwater quality. 33 U.S.C. §§ 1329(b)(1)(B), (b)(2)(A). States also must monitor and report their progress to EPA. *Id*. § 1329(h). Of

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[6] The year prior, the states had ranked nonpoint sources as the major cause of water pollution. *See* Ass'n of State and Interstate Water Pollution Control Administrators, *America's Clean Waters: The States' Evaluation of Progress* 1972-82 (1984), https://nepis.epa.gov/Exe/ZyPDF.cgi/940005BE.PDF?Dockey=940005BE.PDF.

particular note, Section 319 made substantial grant funding available to states for implementing nonpoint source pollution management plans, as well as lesser grants specifically for protecting groundwater. *Id*. § 1329 (h-j). Thus, in 1987 Congress reaffirmed its commitment to addressing diffuse sources of pollution—such as pollution from groundwater and runoff—through the CWA's nonpoint source programs, not the NPDES program.

In fact, when Congress reaffirmed and strengthened the Act's nonpoint source programs in 1977 and 1987, it simultaneously *limited* the scope of the NPDES program. In 1977, Congress recognized that permitting "every discrete source" discharging into navigable waters was already "too burdensome" and a strain on EPA's resources; Congress therefore chose to exempt from the NPDES program return flows from irrigated agriculture. *See* 123 Cong. Rec. 38,924, 38,956 (1977) (statement of Rep. Roberts). Similarly, when enacting an amendment in 1987 exempting from NPDES requirements most discharges composed entirely of stormwater, Congress opined that requiring every point source discharger of stormwater (such as parking lots and mom-and-pop stores) to obtain a federal NPDES permit would be "absurd," "prohibitively expensive," and an "administrative nightmare" that would leave regulators "literally swamped under a mountain of paperwork." 131 Cong. Rec. 15,616, 15,657 (1987) (statements of Senators Mattingly and Wallop); *see also Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 602-03 (2013) (describing EPA's difficulties in processing permit applications and the consequent 1987 stormwater amendments).

The decision below is not only at odds with Congress's repeated efforts to strengthen nonpoint source programs, but also with Congress's simultaneous actions to narrow the scope of the NPDES program to a manageable subset of point source discharges into navigable waters. Left in place, the Ninth Circuit's decision would transform the carefully constructed and purposefully limited NPDES program into an unworkable behemoth far beyond EPA's capacity to administer—to the detriment of the tens of thousands, if not millions, of entities who would potentially be subject to that grossly expanded regime. The administrative nightmare that would ensue if the Ninth Circuit's decision were left standing would dwarf that which Congress specifically intervened to stave off through the 1987 amendments.

B. Congress Effectuated the Balance Struck in the 1972 Act by Drawing a "Clear and Precise" Line Between Point and Nonpoint Source Pollution.

At the heart of the balance struck in the 1972 Act between federally-mandated NPDES permitting and broader state efforts to abate water pollution was Congress's distinction between point and nonpoint sources of pollution. Congress defined "point source" as "any discernable, defined, and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The definition thus was not intended to be all-encompassing; it left an expansive universe of water pollution to be addressed through state-run nonpoint source pro-

grams.[7] Indeed, Section 208 explicitly required state plans to address water pollution from agricultural runoff, surface and underground mine runoff, and residual waste disposal. *See* 33 U.S.C. § 1288(b)(2)(F-J). These are exactly the types of pollution the Ninth Circuit's decision could unreasonably drag into the NPDES permit program by requiring federal regulation of any pollutant found in a navigable water traceable back to its origin.[8]

Prior to 1972, where to draw the line between the two categories of water pollution and their associated programs was the subject of intense debate. Congress specifically considered, but ultimately rejected, extending NPDES requirements to pollutants released to groundwater that connects to navigable waters. EPA Administrator Ruckelshaus argued before the House Committee on Public Works that pol-

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[7] Scholarship assessing the Act shortly after its passage reflects this understanding of Congress's intent and the breadth of the nonpoint source pollution category. *See* McThenia, 30 Wash. & Lee Rev. at 212 (noting that estimates put "wastes which enter watercourses through runoff from land or other diffuse means (non-point sources)" at between "30% to 75% of the total pollution load of the nation's waters").

[8] The important point is not where the pollution originated in the first instance, but how it enters navigable waters. Indeed, the question presented does not ask whether particular instrumentalities at issue qualify as "point sources," but rather "[w]hether the CWA requires a permit when pollutants *originate from a point source* but are conveyed to navigable waters *by a nonpoint source, such as groundwater*." Pet. Br. i (emphasis added). The answer is "no." As the history discussed herein makes clear, *how* pollutants enter or are added into navigable waters is critical; it determines which regulatory programs and sovereigns are best suited to regulate.

luted groundwater should be wrapped into the NPDES program because it can reach navigable waters "through the ground water table." Water Pollution Control Legislation—1971 (Proposed Amendments to Existing Legislation): Hearings Before the H. Comm. on Public Works, 92nd Cong., at 230 (1971) (statement of Hon. William Ruckelshaus, Administrator, EPA).

Representative Aspin similarly proposed extending NPDES permitting to releases to groundwater—including by adding the term "ground waters" to the definition of "discharge of a pollutant," because: "If we do not stop pollution of ground waters through seepage and other means, ground water gets into navigable waters[.]" 118 Cong. Rec. 10,666 (1972).

Congress nonetheless declined to extend the NPDES program to cover releases to groundwater. Rising to oppose Representative Aspin's proposed amendment, Representative Clausen explained that "in the early deliberations within the committee . . . a provision for ground waters, similar to that suggested [by Rep. Aspin,] was thoroughly reviewed and it was determined by the committee that there was not sufficient information on ground waters to justify the types of controls that are required for navigable waters."[9] *See* S. Rep. No. 92-414, at 73 (1971) ("Sev-

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[9] Other Congressmen expressed similar views. *See, e.g.,* 118 Cong. Rec. at 10669 (statement of Rep. Sisk of California) ("I recognize the possibility of the pollution of ground water, but this whole matter at this point in time, with little more knowledge than we have, bringing this ground water under this type of control, is improper, and I think a very dangerous thing (continued...)

eral bills pending before the Committee provided authority to establish Federally approved standards for groundwaters. . . . Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.").

Congress plainly recognized the connection between groundwater pollution and surface water contamination but again chose to leave to the states the matter of addressing groundwater pollution. *See* Andrew W. McThenia, Jr., *An Examination of the Federal Water Pollution Control Act Amendments of 1972*, 30 Wash. & Lee L. Rev. 195, 196 n.4 (1973) ("the protection of groundwater is generally left to the states"). Now, the Ninth Circuit seeks to accomplish through judicial fiat that which Congress explicitly decided *not* to do in 1972.

As additional support for its decision not to extend federal NPDES requirements more broadly, Congress also explained that "many nonpoint sources of pollution are beyond present technology of control" and therefore decided to focus EPA's efforts on those discharges more easily addressed by technological controls. *See* S. Rep. No. 92-414, at 39 (1971). This reflected concerns articulated by the Act's drafters. Senator Muskie, for instance, noted that "[t]here is no effective way, as of yet, other than land control, by which you can intercept runoff and control it in the way that you do a point source."

(continued...)
to do. I would certainly hope that the House would not adopt the amendment.")

117 Cong. Rec. 38,722, 38,825 (1971). Congress therefore chose to draw a line between easier-to-regulate point source discharges into navigable waters, and indirect sources of pollution through hard-to-regulate media such as groundwater. Federally-mandated permitting efforts were directed toward the former, leaving the latter to the states.

Five years after enacting the CWA, Congress explained that in the 1972 Act it had drawn 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." S. Rep. No. 95-370, at 8 (1977). In 2008, the Ninth Circuit correctly described that distinction as an "organizational paradigm of the [CWA]." *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008). Yet now, it has taken a wrecking ball to that paradigm.

The legislative history discussed above makes clear that, where pollutants reach navigable waters via groundwater or a similarly diffuse medium, Congress intended such pollution to be addressed by other state or federal programs. The Ninth Circuit's application of NPDES permitting requirements wherever pollution in a navigable water can fairly be traced to some discernible, confined, and discrete origin, no matter how the pollutants reached and entered the navigable water, would render the Act's distinction between point and nonpoint source pollution a practical nullity, leaving a near-empty set on the other side of Congress's "clear and precise" line. *See* S. Rep. No. 95-370, at 8. EPA would be faced with the prospect of permitting a potentially limit-

less universe of discharges under the NPDES program—something Congress has taken great pains to avoid. Indeed, the Ninth Circuit all but acknowledged this when it left "for another day the task of determining when, *if ever*, the connection between a point source and a navigable water is too tenuous to support liability under the CWA." Pet. App. 25 (emphasis added).

The Court should reverse the Ninth Circuit's decision and restore the careful balance Congress has continuously maintained between the differing approaches to abate water pollution.

II. RESPECTING CONGRESS'S INTENT, EPA HAS MOSTLY DECLINED TO REGULATE RELEASES TO GROUNDWATER UNDER THE NPDES PROGRAM.

Since the inception of the NPDES program, EPA has made statements and undertaken permitting actions demonstrating that, consistent with Congress's intent, releases to groundwater are nonpoint source pollution for which no NPDES permit is required—even if such pollution may reach navigable waters. While EPA has not been perfectly consistent, the weight of the Agency's actions over the past forty-seven years falls heavily against regulating releases to groundwater under the NPDES program.

A. For Decades, EPA Has Indicated That Releases to Groundwater Are Beyond the Scope of the NPDES Program.

Soon after Congress passed the 1972 Act, EPA began interpreting the NPDES program as excluding releases to groundwater, even where pollutants

might reach navigable waters. In a 1973 memorandum, EPA addressed the applicability of the NPDES program to disposals of pollutants into wells at facilities that had existing surface water discharges. EPA, Office of General Counsel, *Memorandum Re: Applicability of NPDES to Disposal of Pollutants in Wells* at 194-96 (Dec. 13, 1973).[10] The Agency confirmed that the term "discharge of a pollutant . . . include[s] only discharges to navigable waters," and that "[d]ischarges into ground waters are not included." *Id.* at 3 (emphasis added). The same year, EPA's "Non-Point Source Control Division" published guidelines addressing groundwater pollution from excavated features such as landfills, basins, and pits, but did not point to the NPDES program as controlling such pollution despite recognizing that polluted groundwater from these sources causes surface water pollution. EPA, *Ground Water Pollution from Subsurface Excavations*, EPA-430/9-73-2-012 at 1, 123-35, 151-77 (1973).[11] EPA instead recommended that *states* employ control measures. *See id.*

In 1977, an EPA technical manual discussing releases from injection wells to groundwater noted: "Although NPDES permits are required for discharges of pollutants into 'waters of the United States,' that language has not been broadly interpreted to include groundwaters." EPA explained that it therefore exercised jurisdiction only over well dis-

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[10] https://nepis.epa.gov/Exe/ZyPDF.cgi/91008WE5.PDF?Dockey=91008WE5.PDF.

[11] https://nepis.epa.gov/Exe/ZyPDF.cgi/2000Z6YZ.PDF?Dockey=2000Z6YZ.PDF.

posal systems "when they are part of an activity requiring an NPDES permit[.]" EPA, *Legal and Institutional Approaches to Water Quality Management, Planning, and Implementation*, EPA Tech. Mem. 35, at XI-3 (1977).[12]

In EPA's first attempt to comprehensively address groundwater pollution in 1984, the Agency identified various sources of such pollution such as "landfills/lagoons," "septic tanks," "chemical oil and brine spills," and "well injection[s]." EPA, *A Ground-Water Protection Strategy for the EPA*, EPA Dkt. No. 813R84101 at 13.[13] EPA conspicuously identified Section 208's planning provisions, but not the NPDES program, as the CWA tools available to address releases to groundwater from such sources. *Id.* at 31 and Attach. II (pp. 2, 4 & 6).

In a 1986 water quality inventory, EPA likewise identified nonpoint sources of pollution as including runoff from mining areas and other sources, septic tanks, and "landfill leachate." EPA, Office of Water, *National Water Quality Inventory, 1986 Report to Congress*, at 80 (1987) ("1986 Inventory").[14] Some of those pollution problems occurred through ground-

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[12] https://nepis.epa.gov/Exe/ZyPDF.cgi/2000YXCY.PDF?Dockey=2000YXCY.PDF.

[13] https://nepis.epa.gov/Exe/ZyPDF.cgi/20016KK1.PDF?Dockey=20016KK1.PDF.

[14] https://nepis.epa.gov/Exe/ZyPDF.cgi/2000LMJF.PDF?Dockey=2000LMJF.PDF.

water migration.[15] EPA also noted that septic systems, landfills, pits, and impoundments were significant contributors to groundwater pollution. 1986 Inventory at 60-61. EPA thus understood the link between seepage from underground and surface structures, groundwater contamination, and surface water pollution. But EPA respected Congress's intent and did not suggest that the link brought those types of releases within the scope of the NPDES program.

In the 1990s, EPA's messaging regarding the scope of the NPDES program admittedly grew somewhat more mixed. For example, in February 1994, EPA proposed a "Clean Water Initiative" at the behest of President Clinton that contemplated requiring NPDES permits for some "discharges" to groundwater with a "direct hydrological connection" to surface waters. *See* EPA 800-R-94-001 at p. 104.[16] But EPA seemingly recognized that the NPDES program as enacted likely did not cover such "discharges," and so suggested that Congress *amend the Act* to bring them within the program's scope. *See id.* at 104-05. EPA also recognized that fact in a 1992 guidance document addressing groundwater protection, noting that EPA "and the states regulate facili-

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[15] During this time period, EPA did not often explicitly reference "groundwater" (whereas it often mentioned "runoff"), as "not much [was] known about the overall quality of groundwater in the United States because of groundwater's relative inaccessibility." Robert D. Fentress, *Nonpoint Source Pollution, Groundwater, and the 1987 Water Quality Act: Section 208 Revisited*, 19 Envtl. L. 807, 815 (1989).

[16] https://nepis.epa.gov/Exe/ZyPDF.cgi/20001Q6J.PDF?Dockey=20001Q6J.PDF.

ties that either discharge directly to surface waters or discharge to municipal wastewater treatment systems" (as opposed to indirectly via groundwater or other diffuse mediums). EPA, *Final Comprehensive State Groundwater Protection Guidance*, EPA 100-R-93-001, at 1-27 (Dec. 1992).[17]

In 2000, EPA sent a questionnaire to facilities using large quantities of cooling water, instructing facilities that discharge 100 percent of their effluent to groundwater injection wells to categorically answer "no" to the question of whether "the facility ha[s] or is . . . in the process of obtaining a . . . NPDES . . . permit," regardless of any potential for eventual migration to navigable waters. EPA, Office of Wastewater Management, Case Study Short Questionnaire at 3 (Jan. 2000).[18] In 2004, EPA reiterated in a report on effluent guidelines that "National [NPDES] regulations apply to . . . [e]xisting facilities that discharge [pollutants] directly to surface waters," not to those that release pollutants that reach navigable waters only indirectly via groundwater. EPA, *Effectiveness of Effluent Guidelines Program for Reducing Pollutant Discharges Uncertain*, No. 2004-P-00025, Chapter 1, p.2 (Aug. 24, 2004).[19]

In the 2010 Total Maximum Daily Load for the Chesapeake Bay, EPA again evinced its view that

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[17] https://nepis.epa.gov/Exe/ZyPDF.cgi/100048T6.PDF?Dockey=100048T6.PDF.

[18] https://www3.epa.gov/npdes/pubs/casestudy.pdf.

[19] https://www.epa.gov/sites/production/files/2015-12/documents/20040824-2004-p-00025.pdf.

nonpoint source pollution includes releases from septic systems, wells, and similar structures to groundwater that later reach navigable waters such as the Chesapeake Bay: "Nonpoint source pollution generally results from . . . drainage and seepage." EPA, Chesapeake Bay Total Maximum Daily Load, at 4-28, 4-37 to 4-38 (Dec. 29, 2010).[20] Similarly, in EPA's 2010 Guidance for Federal Land Management in the Chesapeake Bay Watershed, the Agency identified large *nonpoint* contributors of nutrients to the Bay as including "septic systems," as well as "atmospheric deposition, wastewater, and urban/suburban lands," the last two of which would reach the Bay through a combination of groundwater migration and stormwater runoff. EPA 841-R-10-02 at 4-2 (May 12, 2010).[21]

In 2016, EPA described the successes of state nonpoint source management projects receiving federal funding under CWA Section 319, including 177 projects addressing waste disposal facilities such as malfunctioning septic systems and leaking storage tanks. *See* EPA, *National Nonpoint Source Program: A Catalyst for Water Quality Improvements*, EPA 841-R-16-009, at 8 (Oct. 2016).[22] The Agency thus again recognized that releases of pollutants to groundwater—the problem being addressed by those

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[20] https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document.

[21] https://www.epa.gov/sites/production/files/2015-10/documents/chesbay_guidance-all.pdf.

[22] https://www.epa.gov/sites/production/files/2016-10/documents/nps_program_highlights_report-508.pdf.

federally-funded Section 319 projects—are subject to state regulation and programming, not federal NPDES permitting.

As late as January 2017, EPA's website answered the question "What is a Nonpoint Source?" by pointing to pollution from "land runoff, precipitation, atmospheric deposition, drainage, seepage, or hydrological modification." EPA, *What is a Nonpoint Source?* (historical view of EPA website).[23] Several of those mechanisms encompass releases from structures like septic tanks that might be subject to NPDES requirements *if they empty into navigable waters*, but that have historically been viewed by EPA as excluded from NPDES coverage when they empty into groundwater.

Most recently, the Agency reiterated its original view of the scope of the NPDES program in an April 12, 2019, interpretative statement. EPA informed the public that, after reviewing the CWA, judicial decisions, and its own past actions, it concluded:

> [T]he Act is best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage and liability under Section 301 of the CWA, regardless of a hydrologic connection between the groundwater and jurisdictional surface water.

EPA, Interpretative Statement on Application of the Clean Water Act [NPDES] Program to Releases from

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[23] https://19january2017snapshot.epa.gov/nps/what-nonpoint-source_.html.

a Point Source to Groundwater, 84 Fed. Reg. 16,810, 16,811 (Apr. 23, 2019). EPA explained that the statute's text, structure, and legislative history showed that Congress "purposely structured the CWA to give states the responsibility to regulate" releases to groundwater. *Id.* In stark contrast, other federal statutes "contain explicit provisions that regulate the release of pollutants into groundwater." *Id.*

In short, since enactment of the CWA, EPA has largely agreed with Petitioners and *amici* that surface water pollution that results from releases to groundwater from structures like wells constitutes nonpoint source pollution and is beyond the scope of the NPDES program.

B. EPA's Permitting Decisions Reflect Congress's Intent Not to Extend the NPDES Program to Releases to Groundwater.

While again not perfectly uniform, EPA's implementation of the NPDES permit program reflects its longtime understanding that releases to groundwater do not require NPDES permits, even where pollutants may ultimately reach navigable waters.

Amici are aware of limited instances in which EPA has directly regulated releases to groundwater under the NPDES program because of a hydrological connection with navigable water.[24] For instance,

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[24] Parties favoring application of NPDES requirements to groundwater pollution have pointed to a few other permits mentioning groundwater. But in none of those did EPA assert (continued...)

EPA issued NPDES permits for a wastewater treatment facility operated by the Menominee Indian Tribe of Wisconsin to address releases to groundwater that connected to nearby Tourtillotte Creek. *See* EPA, Permit No. WI-0073059-1, Statement of Basis Briefing Memorandum (Apr. 2011); Permit No. WI-0073059-2 (Sept. 2016 Reissuance).[25] EPA admitted that "NPDES permits are generally not needed for facilities that do not have a direct discharge to surface waters[.]" EPA, Permit WI-0073059 at 2. But EPA attempted to distinguish the Menominee facility by arguing that a report assessing leakage into the creek "makes it clear that . . . groundwater beneath the site has a direct hydrological connection to the adjacent surface water," and that "the existing discharge plume is already reaching Tourtillotte Creek." *Id.* While EPA's issuance of NPDES permits to the Menominee facility was improper, it is telling that EPA itself emphasized that permits are not typically required for discharges that are not made into surface waters.

(continued...)
its authority to issue the permit based on releases to groundwater. *See, e.g.*, EPA, Permit No. WA0023434 at 5, 12 (permitting the discharge of pollutants from "outfalls . . . to the Quinault River," but also requiring emergency planning to protect the public from any overflow of wastewater that might infiltrate the water supply). While one might debate whether it is appropriate to use an NDPES permit to impose requirements on a permittee not directly linked to a permitted discharge, these types of ancillary requirements do not constitute an EPA exercise of NPDES jurisdiction over releases to groundwater as such.

[25] https://www.epa.gov/sites/production/files/2017-02/documents/wi0073059fnlprmt09_22_2016_0.pdf.

Conversely, EPA has frequently declined to regulate releases to groundwater through NPDES permits even where there was an apparent connection between those releases and pollutants found in navigable waters. For example, in 2005, EPA responded to comments on a draft NPDES permit for a gas and electric facility on the banks of a tributary to the Connecticut River. Discussing the circumstances under which the facility might require an NPDES permit, EPA counseled that, if the facility redirected its discharges "to a non-surface water discharge location, such as a ground injection," then "[NPDES] permit requirements would not apply, because there would be no direct discharge to a surface water of the United States." EPA, Holyoke Gas & Electric Department Cabot Street Station; Response to Comments on Draft Permit No. MA0001520 at 20.[26] EPA thereby confirmed that releases of pollutants into groundwater do not require an NPDES permit.

Similarly, in 2011 EPA removed from a draft NPDES permit for the Public Service of New Hampshire's Merrimack Station provisions covering discharges from the facility's roof drains. In a fact sheet accompanying the draft permit, EPA explained that discharges from roof drains were not covered precisely because "the roof drains convey rain water . . . and drain it into the ground," and so "do not constitute a point source with a direct discharge to the [nearby] Merrimack River." EPA, Fact Sheet, Draft NPDES Permit to Discharge to Waters of the United States

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[26] https://www3.epa.gov/region1/npdes/permits/2005/finalma0001520rtc.pdf.

Pursuant to the CWA, Merrimack Station, Permit No. NH0001465, at 17 (Sept. 30, 2011).[27]

EPA's discussions of various NPDES general permits likewise confirm the Agency's general view that NPDES permitting requirements do not apply to releases to groundwater, regardless of whether pollutants in that groundwater eventually reach navigable waters. In 2011, EPA responded to a comment suggesting that an NPDES general permit for pesticides address groundwater contamination by categorically stating: "discharges to groundwater are not regulated under the NPDES program." EPA, Response to Public Comments, NPDES Pesticide General Permit, EPA-HQ-OW-2010-0257 (Oct. 31, 2011) at xxii.[28] And in a 2014 fact sheet addressing general permits for stormwater discharges from municipal sewer systems, EPA stated that "discharges to groundwater are not addressed in the NPDES permit program and as such are not addressed by this permit." EPA, Fact Sheet, Draft General Permits for Stormwater Discharges Systems from Small Municipal Separate Sewer Systems in Massachusetts at 18 (Sept. 30, 2014).[29]

EPA continued to take this approach even while the present case was pending before the Ninth Cir-

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[27] https://www3.epa.gov/region1/npdes/merrimackstation/pdfs/MerrimackStationFactSheet.pdf.

[28]https://www.regulations.gov/document?D=EPA-HQ-OW-2010-0257-1277.

[29] https://www3.epa.gov/region1/npdes/stormwater/ma/2014FactSheet.pdf.

cuit. In its 2017 responses to comments on draft permits authorizing certain discharges in Massachusetts and New Hampshire, EPA again explained that "discharges to groundwater are not regulated by the NPDES permit program," but instead "are generally regulated under [the Safe Drinking Water Act]" or "similar programs, such as State groundwater discharge permit programs." EPA, Response to Public Comments, Permit Nos. MAG910000 and NHG910000, at 7 (Mar. 9, 2017).[30]

EPA's general practice of addressing under the NPDES program only discharges of pollutants into navigable waters bolsters *amici*'s contention that Congress intended the program to apply only to such discharges and left groundwater pollution to be addressed under other state and federal programs.

III. THE NINTH CIRCUIT'S DECISION DISPLACES OTHER PROGRAMS THAT BETTER ADDRESS GROUNDWATER POLLUTION.

Petitioners and state *amici* have explained how applying NPDES permit requirements to sources that release pollutants to groundwater superimpose that program on top of other regulatory regimes, including the Safe Drinking Water Act's program regulating underground injection wells like the one at issue here, *see* 42 U.S.C. §§ 300h *et seq*.; the Coastal Zone Act's requirement that states develop "Coastal

[30] https://www3.epa.gov/region1/npdes/remediation/ResponsetoComments.pdf.

Nonpoint Pollution Control Programs" implementing management measures to restore and protect coastal waters, *see* 16 U.S.C. § 1455b; and the CWA's "Total Maximum Daily Load" program, which requires states to address pollution that enters navigable waters via groundwater migration, overland runoff, and similar diffuse sources. *See* 33 U.S.C. § 1313(d)(1).

Amici agree that such duplicative regulation is unnecessary. But an even more serious problem attends the Ninth's Circuit's "fairly traceable" standard: it risks *entirely displacing* programs better suited than the NPDES program to remedy groundwater contamination, thereby depriving EPA and the states of valuable tools to comprehensively control and remediate groundwater pollution.

First, under the Ninth Circuit's view of the scope of NPDES permitting, that program would *supplant* regulations promulgated under RCRA that are specifically tailored to address groundwater contamination that reaches surface waters. RCRA is a "comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996). Among other things, RCRA enables EPA to address pollution that "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6973. And RCRA directs EPA to issue guidelines for state plans to protect "the quality of the ground and surface waters from leachate contamination" from waste. *Id.* § 6942(c)(1), 6943(a).

Unlike the CWA, RCRA defines the "disposal" of a pollutant as "the discharge, deposit, injection,

dumping, spilling, leaking, or placing or any solid waste or hazardous waste into or on any . . . water so that the [waste] may enter the environment or be . . . discharged into any waters, *including groundwater*." 42 U.S.C. § 6903(3) (emphasis added). EPA has therefore adopted and implemented a RCRA program specifically designed to address the "[m]igration of [c]ontaminated groundwater" to surface waters. *See* EPA, *Memorandum, Interim-Final Guidance for RCRA Corrective Action Environmental Indicators*, at 1 (Feb. 5, 1999).[31] Under this program, by 2008 the Agency had controlled the migration of pollutants via groundwater at more than 1,600 facilities and has since continued to make progress toward its goal of implementing remedies at over 3,500 facilities by 2020. *See* EPA, *Baselines for Resource Conservation and Recovery Act Corrective Action Sites*.[32]

Critically, RCRA defines the wastes within its purview to *exclude* "industrial discharges which are point sources subject to permits under [the NPDES program]." 42 U.S.C. § 6903.[33] In other words, where

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[31] https://archive.epa.gov/epawaste/hazard/web/pdf/ei_memo.pdf.

[32] https://www.epa.gov/hw/baselines-resource-conservation-and-recovery-act-rcra-corrective-action-sites.

[33] This is known as the "industrial wastewater exclusion," and EPA has long acknowledged that it is designed to avoid duplicative regulation under the CWA and RCRA. *See* 45 Fed. Reg. 33,084, 33,098 (May 19, 1980). But the problem is not that sources of wastewater would be subject to "duplicative" regulation if subject to NPDES permits, it is that, due to RCRA's text, they would be regulated *only* under the NPDES program, (continued...)

discharges are subject to the NPDES regime, they *cannot* be regulated under RCRA. *See Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1328-29 (S.D. Iowa 1997) (dismissing RCRA claim after concluding that groundwater discharges were subject to the NPDES program); *Coldani v. Hamm*, 2007 WL 2345016, at *10 (E.D. Cal. Aug. 16, 2017) (same).[34] The courts have applied this exclusion to any point source that they conclude should have an NPDES permit—whether it actually does or not. *See, e.g.*, *State v. PVS Chemicals, Inc.*, 50 F. Supp. 2d 171,177-78 (W.D.N.Y. 1998). Thus, if the decision below stands, large categories of sources discharging to groundwater would be beyond the purview of RCRA.

The expansion of the NPDES regime to include any releases to groundwater that can be linked to navigable waters—and the consequent withdrawal of such pollution from the scope of RCRA—would almost certainly undermine control of groundwater contamination. For example, EPA has promulgated regulations under RCRA addressing groundwater contamination from the disposal of coal ash in surface impoundments, which require extensive monitoring and remediation actions. *See* 40 C.F.R. Part 257, Appendices III & IV (requiring monitoring for

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(continued...)
which is far less suited to prevent and redress groundwater contamination.

[34] While *amici* believe that, as here, those courts were incorrect in concluding that releases to groundwater at issue were covered by the NPDES program, they correctly understood that—if that is the case—then the releases must be excluded from the RCRA regime.

coal ash constituents); 40 C.F.R. § 257.95(a) (requiring additional monitoring where contaminants are above background levels); *id*. § 257.96(a) & 257.98(c) (requiring corrective action to remediate groundwater until contaminant levels are below certain standards); and 40 C.F.R. § 257.97(b) (requiring facilities to implement remedies that attain groundwater protection standards; control releases of coal ash constituents at the source; and remove contaminated material from the environment to the extent possible). EPA has also promulgated regulations requiring monitoring and remediation of releases to groundwater from municipal solid waste landfills, *see* 40 C.F.R. §§ 258.50-258.58, and hazardous waste facilities. *See id.* §§ 264.90-264.101. If the Ninth Circuit is correct about the scope of the NPDES program, releases to groundwater from these facilities that reach navigable waters are not, nor should they ever have been, subject to RCRA's comprehensive regulations.

Moreover, the NPDES requirements that, under the Ninth Circuit's view, would replace regulation of releases to groundwater under RCRA are particularly ill-suited to address diffuse, migrating contamination. NPDES requirements are "effluent" limitations, aimed at "end-of-pipe" discharges into surface waters. *See* 40 C.F.R. § 122.45 (requiring that effluent limitations and standards be established "for each outfall or discharge point of the permitted facility"). NPDES monitoring requirements therefore generally apply at the end of the contamination pathway. They look to the quantities, rates, and concentrations of

pollutants released to protect the water quality of the receiving surface water.[35] But it may be difficult, if not impossible, to determine what those are in the context of discharges via groundwater or runoff. In the present case, for example, contaminated groundwater entered the ocean along as much as two miles of coastline. In such situations, there are no identifiable outfalls or discharge points that can be used for sampling and monitoring, or to calculate effluent limitations protective of the receiving surface water.

It would also be difficult to determine appropriate effluent limits for any individual source given that groundwater picks up contamination from multiple sources as it travels. Furthermore, NPDES permit limits may be less stringent than the RCRA regulations that under the Ninth Circuit's decision they would displace, depending on the applicable standards for the receiving water that are determined by the water's designated use(s).

Such practical difficulties are exacerbated where, as in many instances, discharges are deliberate, occurring as part of a system designed to allow waste to infiltrate soil or groundwater *as a method of treating that waste through filtration*. EPA's NPDES permitting guidance directs permit writers to require monitoring "after all treatment processes." EPA, *NPDES Permit Writer's Manual* § 8.1.2.3 (Sept. 2010).[36] That approach is impracticable where

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[35] *See* 33 U.S.C. §§ 1313, 1314; 40 C.F.R. § 122.44(a), (d).

[36] https://www.epa.gov/npdes/npdes-permit-writers-manual.

the discharge—and its subsequent migration through groundwater—*is* the treatment process. Nor can permit writers solve this problem by moving the monitoring location to the places where pollutants enters a navigable water. Not only might that occur at myriad points along miles of shoreline remote from a permittee's operation, it also might require permittees to monitor and sample on third-parties' land that they have no right to access or use.

Second, the Ninth Circuit's expansive interpretation of the NPDES program would displace states' efforts to address surface water pollution resulting from groundwater contamination under CWA Section 319. As discussed above, Congress's vision for the CWA included strong nonpoint source programs that enable states to holistically address surface water pollution from diverse sources. Under the Section 319 program, states are given the authority and responsibility to identify waters that, due to nonpoint source pollution, will not attain water quality standards; identify the nonpoint sources that add pollution to those waters; and implement best management practices and other measures to address that pollution. *See* 33 U.S.C. § 1329(a)(1). Federal funding is available to assist states in addressing such pollution under CWA section 319, and many states have successfully leveraged such funding to improve water quality, often by upgrading septic systems. *See, e.g.,* EPA, *Nonpoint Source Program Success Story, Tennessee, Septic Tank Effluent Pumping Project Improves King Branch*, EPA-841-F-16-001R

(Aug. 2016);[37] EPA, *Nonpoint Source Program Success Story, Kentucky, Upgrading Septic Systems and Removing Straight Pipes as Part of Watershed Plan Reduces Bacteria in Eagle Creek*, EPA-841-F-15-007UU (Oct. 2015).[38]

Several states have used Section 319 funding to abate groundwater contamination from identifiable sources. For example, Vermont used the Section 319 program to address stream pollution resulting from the migration of contaminated groundwater from an underground storage tank. EPA, *Section 319 Nonpoint Source Program Success Story: Vermont*, 841-F-06-0031 (Aug. 2006).[39] Alaska similarly leveraged Section 319 funding to address groundwater contamination from leaking storage tanks that was creating visible sheens on nearby surface waters. EPA, *Section 319 Nonpoint Source Program Success Story: Alaska*, 841-F-09-001G (June 2009).[40]

Because CWA Section 319 addresses only nonpoint source pollution, states would lose their ability to address such pollution under Section 319—as well as the attendant funding—if, by virtue of the Ninth Circuit's reasoning, that pollution was deemed point

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[37] https://www.epa.gov/sites/production/files/2016-09/documents/tn_king_branch_508.pdf.

[38] https://www.epa.gov/sites/production/files/2015-12/documents/ky_eagle.pdf.

[39] https://www.epa.gov/sites/production/files/2015-12/documents/vt_whet.pdf.

[40] https://www.epa.gov/sites/production/files/2015-11/documents/ak_naknek.pdf.

source discharges subject to the NPDES program. An affirmation of the decision below would thus effectively delete entire longstanding categories of water pollution from the scope of states' Section 319 programs, along with the concomitant Section 319 tools available to states to address the impacts of that pollution on surface waters.

Simply put, applying NPDES requirements designed for discrete and measurable discharges into navigable waters to diffuse groundwater movement would undermine environmental protection. It would replace RCRA requirements tailored to address those types of discharges, as well as CWA nonpoint source management programs that allow states comprehensively to address surface water pollution from various sources, with an ill-fitting effluent-regulation regime. The result would be poorer control of groundwater contamination, and thus more pollution of navigable waters.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment entered below.

Respectfully submitted,

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