No. 18-260

IN THE
Supreme Court of the United States

COUNTY OF MAUI,

Petitioner,

v.

HAWAI'I WILDLIFE FUND; SIERRA CLUB – MAUI GROUP; SURFRIDER FOUNDATION; MAUI WEST PRESERVATION ASSOCIATION,

Respondents.

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

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, CITY OF NEW YORK, CITY AND COUNTY OF SAN FRANCISCO, AND METRO WASTEWATER RECLAMATION DISTRICT IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici represent public entities from across the United States that provide water supply, water conservation, flood and stormwater management, and wastewater treatment services to the public. They or their members own, operate, or manage infrastructure that may face additional regulatory burdens and uncertainty if the Clean Water Act's permitting requirements expand to cover releases conveyed to navigable waters as nonpoint source pollution.

The National Association of Clean Water Agencies ("NACWA") is a nonprofit trade association representing the interests of publicly-owned wastewater and stormwater utilities across the country. NACWA's members include more than 320 municipal clean water agencies that own, operate, and manage publicly-owned treatment works, wastewater sewer systems, stormwater sewer systems, water reclamation districts, and all aspects of wastewater collection, treatment, and disposal.

The City of New York, a political subdivision of the State of New York, is the country's largest municipal water and wastewater utility. The City's Department of Environmental Protection ("DEP") treats roughly

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, nor has such counsel or any party made a monetary contribution intended to fund the preparation and submission of this brief. No person other than *amici curiae* and their members have made a monetary contribution to the preparation and submission of this brief. Petitioner's Department of Environmental Management is a member of *amicus* National Association of Clean Water Agencies, but Petitioner has made no monetary contribution for the purpose of preparing this brief.

1.3 billion gallons of wastewater per day and, as a public water utility, supplies and distributes more than one billion gallons of drinking water each day to over nine million people. To meet these demands and ensure compliance with the Clean Water Act and other regulatory requirements, DEP's nearly 6,000 employees operate and maintain an extensive source water protection program; a world-renowned water supply system; and a wastewater system comprised of 7,400 miles of sewers, 96 pump stations, four combined sewer overflow detention facilities, and fourteen in-City wastewater treatment plants.

The City and County of San Francisco is a consolidated charter city and county organized under the laws of the State of California. Acting by and through its Public Utilities Commission, the City treats approximately 75 million gallons of wastewater each dry weather day, and well over 400 million gallons per day of combined stormwater and wastewater during rainstorms. The City also supplies and distributes more than 300 million gallons of drinking water each day to over 2.5 million people, and provides energy to substantial large scale users in San Francisco. The City operates and maintains extensive source water storage and treatment facilities and watershed protection programs; power generation and distribution systems; and a wastewater system consisting of approximately 1,000 miles of sewers, three wastewater treatment plants, and appurtenant pumping and discharge facilities.

Metro Wastewater Reclamation District ("MWRD"), a political subdivision of the State of Colorado, provides wastewater services to approximately 2 million people across a 715-square mile service area that spans much of the metropolitan

Denver area. MWRD owns and operates two wastewater treatment plants and treats on average 135 million gallons of wastewater per day, with the capacity to treat up to 248 million gallons each day. MWRD's mission is to protect the region's health and environment by cleaning water and recovering resources. It executes this mission through resource stewardship, infrastructure management, process optimization, and regulatory engagement and compliance.

SUMMARY OF ARGUMENT

Amici represent public wastewater and stormwater utilities across the country that provide vital public health and environmental services. Through the operation of sewage and stormwater collection systems, publicly-owned treatment works ("POTWs"), and other water management infrastructure, *amici* play a critical role in protecting the nation's waters and our communities' health.

Amici and their members have for decades operated under and complied with National Pollution Discharge Elimination System ("NPDES") permits issued under the Clean Water Act, ("CWA" or the "Act"), 33 U.S.C. §§ 1251-1387. The 1972 Act includes numerous provisions specifically addressing POTWs, and a POTW was among the first sources issued an NPDES permit.[2] Understanding the CWA's requirements and structure has been critical to *amici*'s operations.

The Ninth Circuit's decision threatens to upend the Act's structure and impose unnecessary regulatory burdens on a number of *amici*'s beneficial water management practices. The court departed from the CWA's plain language to hold that the statute requires an NPDES permit for releases of pollutants from a putative "point source" that subsequently are conveyed to surface waters as nonpoint source pollution. Congress foreclosed the possibility that these mediated "discharges" would require NPDES permits by specifying that a discharge

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[2] *See* U.S. Environmental Protection Agency ("EPA"), *Press Release: EPA Issues First Municipal Wastewater Discharge Permit in the Nation* (July 30, 1973), http://tinyurl.com/y3y3cg2c.

occurs only when a *point source* conveys pollutants to navigable waters.

Requiring permits for releases mediated by a nonpoint source risks upsetting the CWA's basic organizing principle—the distinction between point and nonpoint source pollution. The Ninth Circuit failed to recognize that nonpoint source pollution—like surface runoff—originates in many, if not most, instances from discrete locations that it would characterize as point sources. Nonpoint source pollution may frequently be "fairly traceable" to a discrete source. As a result, the two classes of pollution would in many cases cease to be distinct, to the detriment of the Act's regulatory programs.

The NPDES program will not function as Congress intended if this distinction becomes meaningless. Mediated releases may prove difficult to identify because pathways between a putative point source and surface waters can be difficult to discern. Congress did not intend the determination of whether a source requires an NPDES permit to be so difficult or fact-intensive for regulators or potentially-regulated entities. Changes in quality and pollutant content as effluent traverses a nonpoint source may also test the limits of regulators' ability to establish the effluent limitations and monitoring requirements that are hallmarks of NPDES permits.

These regulatory challenges would fall on innovative water management practices that could be sources of mediated releases. Utilities are making substantial investments in green infrastructure, water reuse, and groundwater recharge technologies to preserve resources and reduce environmental impacts. These methods have the potential to add, however minutely, to nonpoint source pollution and

could require NPDES permits if the Ninth Circuit's decision is affirmed. Additional regulatory uncertainty and burdens potentially associated with this permitting requirement would chill utilities' investment in these management techniques.

Conversely, reversal of the decision below would not imperil groundwater resources. As Congress intended, states have enacted groundwater regulations tailored to local circumstances. Multiple federal programs also protect this resource by regulating drinking water quality and operations likely to pose risks of groundwater contamination. The robust scheme of state and federal groundwater regulation in place today leaves no regulatory "gap" that could justify expanding the NPDES program beyond its statutory limits.

ARGUMENT

I. The Ninth Circuit's Departure from the CWA's Text Threatens the Act's Distinction Between Point and Nonpoint Source Pollution.

The decision below creates regulatory uncertainty for a variety of *amici*'s water management practices by ignoring the CWA's text, structure, and history. The Ninth Circuit deviated from the statute's language to decree that releases from a discrete source conveyed to navigable waters by a nonpoint source may require an NPDES permit. *See* Petition Appendix ("Pet. App.") 14-25. The Ninth Circuit would require permits for these "discharges," which have been diffused during conveyance by a nonpoint source, so long as pollutants in surface waters are "fairly traceable" to a point source. *Id.* at 24.

The conclusion that such mediated releases require permits—as well as the novel "fairly traceable" test—cannot be reconciled with the Act. Congress required permits for only point source pollution, which occurs when a discrete source is the mechanism that actually transports pollutants into navigable waters. The CWA places nonpoint source pollution under other programs, including state regulation. *See* 33 U.S.C. § 1329. Imposing the NPDES program on mediated releases undermines the distinction between point and nonpoint source pollution and muddles a regulatory scheme that Congress designed to provide fixed, identifiable parameters.

A. The CWA Requires Permits Only for Discharges Actually Transported to Navigable Waters by a Confined, Discrete Source.

The CWA's plain language cannot be stretched to require permits for pollutants conveyed to waters by nonpoint sources. Rather than demand permits for all sources of water pollution, the Act mandates that only a "discharge of any pollutant" requires an NPDES permit. 33 U.S.C. §§ 1311(a), 1342(a). This text and related statutory definitions dictate the breadth of this permitting requirement. *See, e.g.*, *Dean v. United States*, 556 U.S. 568, 572 (2009) ("We start, as always, with the language of the statute" in questions of statutory interpretation (quoting *Williams v. Taylor*, 529 U.S. 420, 431 (2000))).

Congress cabined the requirement to obtain a permit by carefully defining discharges regulated by the Act. As defined, a "discharge of a pollutant" occurs when there is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). A "point source" is "any discernible, confined, and discrete conveyance." *Id.* § 1362(14).

That a point source is first and foremost a "conveyance" forecloses reading the CWA to require permits for releases delivered to navigable waters by nonpoint sources. The word "conveyance," which the Act does not define, should be afforded its ordinary, common meaning.[3] Thus, the Act demands that a

[3] *See, e.g.*, *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 634 (2012) ("it is normal usage that, in the absence of contrary indication, governs our interpretation of [statutory] texts"); *see also* 2A *Sutherland Statutes & Statutory Construction* § 47:28 (7th ed.) ("unless otherwise defined, words are interpreted to

point source function as "means of transport" for pollutants. *Merriam-Webster's Collegiate Dictionary* 273 (11th ed. 2003); *Webster's Third New Int'l Dictionary* 499 (1961) ("a serving as a means of transportation").

Point sources must further transport pollutants *to* a particular place: navigable waters. The Act's use of the term "conveyance" to define point sources must be read in the context of the entire CWA. *E.g.*, *Torres v. Lynch*, 136 S. Ct. 1619, 1226 (2016) (courts interpret statutes "'with reference to the statutory context." (quoting *Abramski v. United States*, 573 U.S. 169, 179 (2014))). A point source must transport pollutants specifically "to navigable waters." 33 U.S.C. § 1362(12)(A). This Court has confirmed this reading: a point source's defining characteristic is being the vehicle that "convey[s] the pollutant to 'navigable waters.'" *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004); *see also United States v. Plaza Health Labs.*, 3 F.3d 643, 646 (2d Cir. 1993), *cert. denied sub nom United States v. Villegas*, 512 U.S. 1245 (1994) (point sources "act as a means of conveying pollutants … to navigable waterways.").

A discrete source of pollution cannot be a point source when groundwater or another intervening nonpoint source diffuses pollutants and carries them to navigable waters. When that occurs, the *nonpoint source*, not the pollutants' original source, serves as the conveyance. The original source transports pollutants to navigable waters only in the remote sense that a taxicab to the airport serves as a conveyance from the United States to Europe. *Accord*

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take their ordinary, contemporary, common meaning in the absence of persuasive reasons to the contrary").

Plaza Health Labs, 3 F.3d at 653 n.6 (sources "may be point sources when they deposit waste directly into water … [not] when they … deposit oil in a driveway, leaving it to be washed into nearby rivers"). Consequently, when pollutants reach navigable waters via a nonpoint source, the original source of the pollutants is not a point source capable of making a regulated "discharge." These pollutants are nonpoint source pollution.

B. Extending the Act's Permitting Requirement to Mediated Releases Contravenes How Congress Defined Point Sources.

The Ninth Circuit expanded the CWA's permitting requirement without acknowledging how a point source must convey pollutants to navigable waters. The panel instead created a novel standard, under which a point source need only be pollutants' starting point. So long as the pollutants are "fairly traceable" to a discrete location, the Ninth Circuit would require an NPDES permit. Pet. App. 24. This standard requires a permit even when the original source is far removed from navigable waters and a nonpoint source—like groundwater—conveys dispersed pollutants to surface waters.

This failure to honor the Act's language risks erasing its fundamental distinction between point and nonpoint source pollution. Congress intended these two types of pollution to be distinct and subject to different regulatory schemes. Congress established the NPDES program to regulate point source pollution. *See* 33 U.S.C. §§ 1311(a), 1342(a). By contrast, the Act contemplated that nonpoint source pollution—like runoff—would be regulated primarily at the state level under a different set of pollution

control programs.[4] The CWA's definition of a point source, which the Ninth Circuit ignored, serves as the dividing line between these two types of pollution and their different programs. *See* S. Rep. No. 92-414, at 78 (1971) (Congress intended the definition of point source "to distinguish between control requirements [for] confined conveyances … and control requirements which are imposed to control runoff").

Pollution conveyed by nonpoint sources can often be traced to some confined, discrete source. Pollutants found in the air can be deposited in surface waters, and chemicals found on a playing field or lawn may be washed into a river. This nonpoint source pollution has to come from somewhere—often a confined, discrete conveyance like a smokestack, pipe, or nozzle. Eliminating the requirement that a point source serve as the conveyance of pollution to navigable waters makes it such that nonpoint sources of pollution will "invariably be reformulated as point-source [sic] pollution by going up the causal chain to identify the initial point sources of the pollutants …." *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, 2017 WL 2960506, at *8 (D. Conn. July 11, 2017). The effect of the Ninth Circuit's decision—or any holding that a point source need not act as a conveyance to navigable waters—is to require NPDES permits for nonpoint source

[4] *See Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) ("Congress consciously distinguished between point and nonpoint source discharges, giving EPA authority under the Act to regulate only the former."); 33 U.S.C. § 1251(a)(7) ("it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner"); *id.* § 1329(b)(1) (states must develop programs to manage nonpoint source pollution).

pollution, which Congress explicitly sought to preclude.

II. Requiring Permits for Mediated Releases May Generate Uncertainty and Burdens for Regulators and Dischargers.

NPDES permits are ill-suited for regulating the nonpoint source pollution that results from mediated releases. When Congress enacted the CWA in 1972,[5] it sought to create a permitting scheme in which regulated activities could be clearly and readily identified. *Accord* Cong. Research Serv., *A Legislative History of the Water Pollution Control Act Amendments of 1972* at 162 ("*CWA Leg. History*") (Comm. Print 1973) ("Uniformity, finality, and enforceability" are the "three essential elements" of the CWA's scheme (floor statement of Sen. Muskie supporting the conference report)). Congress also designed the NPDES program to impose clear, readily enforceable end-of-pipe discharge limits and monitoring requirements. The CWA's disparate treatment of point and nonpoint source pollution—requiring NPDES permits only for the former—is fundamental to allowing the NPDES program to function as intended.

The CWA cannot properly serve these objectives if the decision below is affirmed and mediated releases require permits. Determining which sources require

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[5] Congress styled the 1972 statute as amendments to the Federal Water Pollution Control Act of 1948. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972). The statute was popularly known as the Clean Water Act, which Congress recognized when it passed amendments in 1977. *See* Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977). Unless otherwise noted, references to enactment of the CWA or the Act describe the 1972 statute.

permits would become more difficult for permit-issuing agencies,[6] as well as *amici* and other regulated entities. This category of discharges would pose for both regulators and the regulated community novel, complex regulatory challenges that would resemble the defects in federal water pollution laws that Congress sought to correct in 1972.

A. Requiring NPDES Permits for Mediated Releases Will Make Identifying Regulated Activities More Difficult.

1. Congress Intended Activities Requiring NPDES Permits to Be Readily Identifiable.

Requiring NPDES permits for mediated releases will make identifying activities and infrastructure subject to the CWA more difficult and reintroduce a critical problem that Congress intended the CWA to rectify. Before the CWA's passage, the Water Quality Act of 1965 set the framework for federal water quality regulation. Pub. L. 89-234, 79 Stat. 903 (1965). That statute relied solely on states setting "ambient water quality standards specifying the acceptable levels of pollution in a state's interstate navigable waters" without specifying end-of-pipe compliance requirements for individual sources. *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202 ["*SWRCB*"] (1976).

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[6] The CWA allows states to apply to EPA for authorization to administer the NPDES program. 33 U.S.C. § 1342(b). Once a state receives authorization, EPA ceases to be the agency issuing NPDES permits in that state. *Id.* § 1342(c). By July 2019, all but three (Massachusetts, New Hampshire, and New Mexico) states will administer the NPDES program. EPA, *NPDES State Program Information: State Program Authority*, https://tinyurl.com/y5eq64ag (last visited May 10, 2019).

This regime, with water quality standards as its only tool, proved ineffective primarily because both regulators and dischargers found it difficult to identify which sources could be subject to enforcement.[7] The 1965 statute allowed enforcement actions to be brought only "if the wastes discharged by polluters reduce water quality below the standards." S. Rep. No. 92-414, at 4. This enforcement mechanism required regulators "to work backward from an overpolluted body of water" to the "entities [who] were responsible" for the pollution. *NRDC v. EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990); *SWRCB*, 426 U.S. at 204 (Congress intended the 1972 amendments to address the problem of having to trace pollutants back to their original source). The complexity of determining who could be subject to liability resulted in "an almost total lack of enforcement." S. Rep. No. 92-414, at 5.

Congress's solution to this problem was to create the CWA's basic "organizational paradigm": the "disparate treatment of discharges from point and nonpoint sources." *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008). Congress subjected the former, but not the latter, to the requirement to obtain a permit.[8] 33 U.S.C. § 1311(a). Congress thereby limited the universe of activities requiring permits to point sources because they "could

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[7] Implementation of the 1965 law also suffered because nearly half of the states failed to submit their water quality standards for federal review. *See* S. Rep. No. 92-414, at 4.

[8] The House and Senate had some differences over how to structure the CWA, but both chambers were committed throughout the Act's consideration to limit the statute's permitting requirement to point sources. *See* H.R. 11896 §§ 301(a), 502(13), (15), 92d Cong. (2d Sess. 1972); S. 2770 §§ 301(a), 502(n), (p), 92d Cong. (2d Sess. 1971).

be identified and regulated more easily than nonpoint source polluters." *NRDC v. EPA*, 915 F.2d at 1316.

2. Identifying Sources of Mediated Releases Will Prove Difficult.

Requiring NPDES permits for mediated releases would once again make it difficult for regulators and operators to know what activities are regulated. If mediated releases require NPDES permits, entities would need to assess whether a facility's releases have the potential to reach surface waters after being dispersed as nonpoint source pollution. These diffuse pathways to surface water—by runoff or through groundwater—can be difficult to discern and may become clear only after a release has commenced. In order to avoid CWA liability, plant owners and operators—even those far from navigable waters—would need to investigate whether pathways between their facilities and surface waters exist, and reach definitive determinations *prior* to commencing operations.

These diffuse, hard-to-identify pathways to navigable waters will require regulators and the regulated public once again to work backwards from pollutants in a waterbody to establish a link to a source. This very exercise hindered implementation of pre-1972 water pollution control laws. *See supra* Section II.A.1. The Ninth Circuit's "fairly traceable" test only underscores how regulating these releases turns back the clock. One would again need to assess whether pollutants in water are linked to a source. Congress already found—over 45 years ago—that basing the applicability of water pollution regulations on such an analysis is unworkable.

B. Developing Discharge Limits and Monitoring Requirements for Mediated Releases Could Pose Unique Difficulties.

Even where a mediated release has an identifiable source, permitting agencies may have trouble developing workable permit conditions. The quality of a source's effluent can change—due to additions of new pollutants and chemical reactions—while a pollutant travels through a nonpoint source. This phenomenon could make setting discharge limits protective of water quality substantially more complex, requiring regulators to choose among problematic alternatives when setting permit conditions.

1. NPDES Permits Contain Precise Effluent Limits and Monitoring Requirements.

Congress designed the NPDES program to provide clear benchmarks for assessing compliance. In addition to making regulated activities hard to identify, the Water Quality Act of 1965 failed to provide specific "standards to govern the conduct of individual polluters." *SWRCB*, 426 U.S. at 202. The statute—and federal regulation of water pollution generally—further suffered from "a lack of information concerning discharges, amounts and kinds of pollution, abatement measures taken, and compliance." S. Rep. No. 92-414, at 6.

The NPDES program addressed this lack of standards by generally requiring permits to impose clear, single-number effluent limitations—restrictions "on quantities, rates, and concentrations of … constituents … discharged from point sources." 33 U.S.C. § 1362(11). Congress intended these limits

to provide "'clear and identifiable' discharge standards." *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987) (quoting S. Rep. No. 92-414, at 81); S. Rep. No. 92-414, at 81 (Congress sought clarity so that effluent limitations "[w]ould provide manageable and precise benchmarks for enforcement."). EPA's experience in implementing the CWA confirmed that effluent limitations needed to be precise to afford both "the discharger and the regulatory agency … an identifiable standard upon which to determine … compliance." *NRDC v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977).

NPDES permits generally achieve this required precision by containing numeric effluent limits unless a numeric standard cannot feasibly be developed.[9] *See* 40 C.F.R. § 122.44(k)(3); EPA, *NPDES Permit Writer's Manual* at 5-22 (Sep. 2010). For instance, NPDES permits require water quality-based effluent limitations ("WQBELs") when permit limits based on available pollution control technologies are insufficient to achieve applicable state-established water quality standards. 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1). Even when a water quality standard uses narrative criteria (*e.g.,* protective of fish populations), permit writers need to develop a numeric basis for calculating a permit limit to protect these criteria. *See* 40 C.F.R. § 122.44(d)(1)(vi).

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[9] EPA has long interpreted the CWA to authorize NPDES permits to impose non-numeric "best management practices" to control pollution only when "[n]umeric effluent limitations are infeasible" or where specifically authorized by the Act. 40 C.F.R. § 122.44(k). For example, the CWA allows the use of "management practices, control techniques" and other non-numeric standards in permits for discharges of stormwater from municipal separate storm sewer systems. 33 U.S.C. § 1342(p)(3)(B)(iii).

Congress also required NPDES permits to provide a basis for monitoring compliance with these numeric limitations. 33 U.S.C. §§ 1318, 1342(a)(2); 40 C.F.R. § 122.44(i). A permit's monitoring provisions require a discharger to measure its effluent's characteristics, including its volume and pollutant content. 40 C.F.R. § 122.44(i). The discharger must report its monitoring results to the permitting authority on a regular basis. *Id.* § 122.44(i)(2). Congress found these requirements would serve as a "necessary adjunct to the establishment of effective water pollution requirements and enforcement of such requirements." S. Rep. No. 92-414, at 62. Experience has further confirmed that the NPDES program's effectiveness "is heavily dependent on permit holder compliance with the CWA's monitoring and reporting requirements." *Piney Run Preservation Ass'n v. Cty. Comm'rs of Carroll Cty.*, 268 F.3d 255, 266 (4th Cir. 2001).

2. Setting Water Quality-Based Effluent Limits and Monitoring Requirements for Mediated Releases May Pose Novel Problems.

Setting precise WQBELs and associated monitoring requirements for mediated releases could require EPA and state agencies to confront new permit-writing challenges. When a point source itself conveys pollutants to surface waters, the quality of effluent leaving the point source is generally the same as or very close to its quality upon entering the water. The effluent's potential impact on water quality—and how a regulator must set a WQBEL—therefore can be readily ascertained. The discharging outfall also provides a single, identifiable location for assessing compliance with the limit.

By contrast, the quality of effluent entering surface waters after being conveyed by a nonpoint source often may not have a clear relationship to end-of-pipe effluent quality. This disconnect arises because effluent traveling through a nonpoint source can change both physically and chemically owing to circumstances beyond the discharger's control. Due to nonpoint source pollution's diffuse nature, the changes to the effluent also may not be uniform across an entire area. Effluent may also enter navigable waters in multiple locations, sometimes far from the original source. These very phenomena occurred in this case, with over 90% of the County of Maui's treated wastewater entering the ocean as "diffuse flow" and the effluent's nutrient content being "significantly transformed" as it traveled through groundwater. Ninth Circuit Excerpts of Record ("ER") 553 ¶ 15, 556 ¶ 19.

These unique characteristics of mediated releases will require EPA and states setting WQBELs to choose from problematic alternatives. A permit could set a WQBEL that applies—and requires monitoring—at a source's outfall. The permitting agency would need to develop methods—likely various forms of modeling—to account for how effluent changes physically and chemically between the point source and navigable waters. This complicated exercise would need to demonstrate that the permit limit achieves the relevant water quality standard. *See* 33 U.S.C. § 1311(b)(1)(C).

Alternatively, the permit could set a limit and require monitoring at the points that effluent enters navigable waters. The permitting agency would not have to account for changes in effluent quality, but *permittees* would face two problems. First, the

permittee may not be able to locate and access every location where it would need to monitor for compliance due to nonpoint source pollution's diffuse nature. Second, the permitted facility may have trouble complying with its permit limit because it cannot control changes to its effluent quality between the outfall and entry into surface water. EPA recognized this latter problem over 40 years ago, concluding that NPDES permits were ill-suited to regulate releases conveyed as diffuse runoff because a point source's owner "has no control over the quantity of the flow or the nature and amounts of the pollutants picked up by the runoff." *Costle*, 568 F.2d at 1377.

III. Requiring NPDES Permits for Mediated Releases Will Burden Environmentally-Beneficial Water Management Practices.

Affirming the decision below risks foisting the regulatory burdens and uncertainty outlined above on *amici's* innovative and beneficial infrastructure and practices. Utilities across the country have deployed green infrastructure ("GI"), water reuse, and groundwater recharge programs to address water pollution and resource scarcity. These approaches have demonstrated benefits that have led to the creation of government programs encouraging their use. Recognizing these benefits and consistent with these mandates, *amici* have made substantial investments in GI, water reuse, and groundwater recharge systems.

These valuable practices have the potential to create mediated releases that would require NPDES permits under the Ninth Circuit's holding. Public utilities would encounter the range of difficulties outlined in the preceding section both in operating existing facilities and in planning for the development

of new ones. The resulting costs and complications would create disincentives for continued investment in these environmentally beneficial water practices.

A. Green Infrastructure, Water Reuse, and Groundwater Recharge Provide Environmentally Sound Solutions to Water Management Challenges.

1. Green Infrastructure Offers a Beneficial Alternative To Traditional Stormwater Management.

GI has emerged as an innovative and widely-used approach for managing and treating stormwater. Unlike traditional "gray infrastructure" (*i.e.*, pipes, storage basins, and treatment systems), GI covers a "range of measures that use plant or soil systems, permeable pavement or other permeable surfaces or substrates," as well as reuse practices, intended to reduce the flow of stormwater pollution to surface waters and sewers. 33 U.S.C. § 1362(27). GI is typically designed to capture and manage stormwater near where it falls in structures, like rain gardens, that allow stormwater to seep into and percolate through the ground. *See* EPA, *Tools, Strategies and Lessons Learned from EPA Green Infrastructure Technical Assistance Projects* (2015) ("EPA Green Infrastructure"), https://tinyurl.com/y4cs6yxu. GI is implemented on scales ranging from large public projects serving entire cities to small projects on private property. Josh Foster *et al.*, The Center for Clear Air Policy, *The Value of Green Infrastructure for Urban Climate Adaptation* 3 (2011), https://tinyurl.com/yxgpapjz.

GI has proven beneficial in multiple respects. GI improves water quality and conserves water by

slowing down and filtering stormwater before it reaches waterways or sewers. EPA Green Infrastructure, at 3. Impeding stormwater's flow further reduces the discharge of untreated sewage to surface waters from combined sewer overflows.[10] *Ibid.* Constructing GI also benefits local economies by creating jobs, reducing costs of storm sewer infrastructure, and reducing the risk of property damage caused by flooding. *Ibid.*

Recognizing these benefits,[11] Congress earlier this year enacted the Water Infrastructure Improvement Act ("WIIA"), Pub. L. No. 115-436, 132 Stat. 5558, 5561 (2019). WIIA directed EPA, *inter alia*, to (a) "promote the use of green infrastructure" in the implementation of the CWA, (b) direct EPA's regional offices "to promote and integrate the use of green infrastructure within [each] region," and (c) promote GI information-sharing through a website and technical assistance programs. *See id.* § 5(b) (enacting 33 U.S.C. § 1377a).

WIIA builds on EPA's prior efforts to integrate GI into its regulatory and enforcement programs. Prior to WIIA's enactment, EPA promoted GI in the

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[10] Combined sewers collect and convey stormwater, domestic sewage, and industrial wastewater in a single pipe. EPA, *Combined Sewer Overflows ("CSOs")* (Aug. 30, 2018), https://tinyurl.com/y4qwad5n. When wastewater volume exceeds the capacity of the sewer or treatment plant, a discharge of untreated wastewater to nearby waters—a "combined sewer overflow"—results. *Ibid.*

[11] Environmental activist groups across the country have also recognized GI's benefits and encouraged its adoption. *See, e.g.*, NRDC, *Encourage Green Infrastructure,* https://tinyurl.com/y2gky5ne (last visited Apr. 17, 2019); Riverkeeper, Inc., *Riverkeeper Supports NYC Green Infrastructure* (Oct. 4, 2010), https://tinyurl.com/y2dqlypp.

development of integrated plans to address storm and wastewater management.[12] EPA has also required *amici*'s members to invest in GI through consent decrees resolving CWA enforcement actions.[13]

State and local governments have also promoted the adoption of GI. Massachusetts, for example, provides assistance to public entities and regional planning agencies that plan for the use of green infrastructure. Mass. Gen. Laws ch. 21, § 31). At the local level, New York City has mandated that GI be incorporated into certain municipal capital projects and has established a grant program to fund the design and construction of GI. N.Y. City Charter § 224.1(l)(2)(iv); 15 R. City of N.Y. §§ 48-01 to -09. Seattle has also mandated that certain single-family residential developments employ GI like rain gardens and infiltration trenches. Seattle, Wash. Mun. Code § 22.805.070.D.2.

2. Water Reuse Allows Municipalities to Preserve and Extend Water Supplies.

Public water managers are increasingly treating and reusing stormwater and wastewater. EPA, *2017 Potable Reuse Compendium at* p. 1-1 (2017)

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[12] EPA, *Achieving Water Quality Through Integrated Municipal Stormwater and Wastewater Plans* (Oct. 27, 2011), https://tinyurl.com/y2wttllb; EPA, *Using Green Infrastructure to Protect Water Quality in Stormwater, CSO, Nonpoint Source and other Water Programs* (Mar. 5, 2007), https://tinyurl.com/y4tkzfah.

[13] *See, e.g.*, Consent Decree ¶ 26, *United States v. City of Chattanooga*, No. 1:12-cv-00245 (E.D. Tenn. Apr. 24, 2013); 1st Am. to Consent Decree ¶¶ 25, 26, *Anacostia Watershed Soc'y, v. Dist. of Columbia Water & Sewer Auth.*, No. 1:00-CV-00183 (D.D.C. 2015); Consent Decree ¶ 18, *United States v. Lexington-Fayette Urban Cnty. Gov't*, No. 5:06-cv-386 (E.D. Ky. Jan. 3, 2011).

https://tinyurl.com/y3vu5cae. Water reuse, also known as water reclamation or recycling, involves the beneficial use of treated storm- and wastewater for a number of applications, including agriculture, landscape irrigation, industrial uses, drinking water, and ecosystem protection. *Id.* at i.; Nat'l Research Council, *Understanding Water Reuse: Potential for Expanding the Nation's Water Supply Through Reuse of Municipal Wastewater* (2012), https://tinyurl.com/y48rmdfo. Water is most prominently reused for agricultural and landscape irrigation, including for residential areas, golf courses, and recreational facilities. *See* EPA, *2012 Guidelines for Water Reuse* at pp. 3-2, -4, -5, -7 (2012) https://tinyurl.com/y5ejxdd9; Nat'l Research Council, *supra* at 3.[14]

Several states have enacted laws to promote and regulate water reuse to safely manage water supplies. Arizona encourages renewable water supplies. *See* Ariz. Rev. Stat. Ann. § 45-801.01. Its Department of Environmental Quality oversees a permitting system for the beneficial use of recycled water, as well as water quality standards for water reuse. Ariz. Admin. Code R18-9-A701-A707; *id.* at R18-11-301-309 and Table A. California's Recycled Water Policy requires state and regional water control boards to use their authority to encourage water reuse. Cal. Water Code § 13560(a). The Policy mandates an increase in the use of recycled water in California "by 200,000 afy [acre-feet per year] by 2020 and by an additional 300,000 afy by 2030" as part of a strategy to address

[14] Respondents obtained from Petitioner a commitment to invest $2.5 million in the reuse of treated wastewater that would have otherwise been disposed of through underground injection as part of a remedies settlement in this case. ER 106-07, ¶ 9.

the state's water supply issues. Cal. State Water Resources Control Bd., *Policy for Water Quality Control for Recycled Water* 3 (2013) https://tinyurl.com/y4zl5njf. Florida has similarly mandated increasing water reuse and has established standards for the treatment of reclaimed water. *See* Fla. Stat. Ann. § 403.086; Fla. Admin. Code r. 62-610.00-.890; *see also* 30 Tex. Admin. Code § 210.1-.85 (establishing standards for the beneficial use of reclaimed water).

3. Groundwater Recharge Is An Important Tool for Managing Water Supplies.

Groundwater recharge systems reuse water to replenish and preserve usable groundwater resources. These systems use a variety of methods to facilitate the movement of water from the surface back into aquifers. Herman Bouwer, *Artificial recharge of groundwater: hydrogeology and engineering*, 10 Hydrogeol. J. 121, 122 (2002). Groundwater recharge systems may rely on surface infiltration, in which water is spread or placed in basins, furrows, or ditches, and allowed to filter back into groundwater through soil. EPA, *2012 Guidelines for Water Reuse*, *supra* at p. 2-16. Other systems may employ vertical infiltration methods, which use trenches, shafts, and wells to inject water directly back into the aquifer. Bouwer, *supra* at 122. These systems can help offset water shortages and stave off saltwater intrusion by putting water back into aquifers. *2017 Potable Reuse Compendium*, *supra* at p. 3-11.

Local California agencies have successfully used groundwater recharge facilities for decades. Los Angeles County's Forebay Groundwater Recharge Project has, for over fifty years, been recharging

groundwater through the surface spreading and direct injection of reused water. *2012 Guidelines for Water Reuse*, *supra* at D-42 to -45. The Orange County Groundwater Replenishment System ("GWRS"), a joint venture between the Orange County Water and Sanitation Districts, currently recycles approximately 100 million gallons per day ("MGD") back into groundwater through injection wells and percolation. Orange Cnty. Water Dist., *GWRS –The Process*, https://tinyurl.com/y2ebhcfa (last accessed April 11, 2019). Over the next four years, the Orange County Water District plans to invest over $292 million to expand the GWRS's groundwater recharge capacity by an additional 30 MGD. Orange Cnty. Water Dist., *GWRS final expansion*, https://tinyurl.com/y5v9y4q5 (last accessed May 2, 2019). Recognizing the benefits of these and other projects, the State of California has enacted a policy to provide financial assistance for groundwater recharge. *See* Cal. Water Code § 12926.

California is not alone in encouraging these systems. Florida requires that local comprehensive plans identify the need for groundwater recharge infrastructure associated with future land uses. Fla. Stat. Ann. § 163.3177(6)(c). Similarly, Washington requires local watershed plans to contain strategies, including the use of aquifer recharge, to increase water supplies. Wash. Stat. Ann. § 90.82.070(2). Arizona has also declared a state policy to use renewable water supplies, including through underground storage, savings and replenishment, and several cities have committed to balance annual groundwater withdrawal with natural and artificial recharge no later than 2025. Ariz. Rev. Stat. Ann. §§ 45-801.01, 45-561(12), 45-562(A).

B. Affirming the Ninth Circuit Would Likely Subject These Beneficial Practices to the Complications Associated with Permitting of Mediated Releases.

Requiring NPDES permits for mediated releases would burden GI, as well as groundwater recharge and water reuse infrastructure, with a new, ill-fitting layer of regulatory obligations. None of this infrastructure directly discharges pollutants to surface waters. Water captured and used in these systems, however, has the potential to reach navigable waters after being conveyed by groundwater or as nonpoint source surface runoff. For instance, both GI and groundwater recharge systems deliver stormwater or reclaimed water to groundwater—the former through percolation and the latter through a variety of methods.[15] This very case illustrates how an aquifer may convey these waters—and constituents in them—to surface waters.

Although the water used and managed in these practices has been naturally or artificially treated, it may nonetheless contain pollutants regulated by the Act. The statute's broad definition of "pollutant" has

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[15] Whether any particular component of GI or a groundwater recharge system is sufficiently "confined" and "discrete" to be a point source would need to be determined on a case-by-case basis. *See* 33 U.S.C. § 1362(14). Some bioswales—vegetated or mulched channels that retain and treat stormwater—might possess the requisite characteristics to be classified as point sources. *See* EPA, *What is Green Infrastructure?*, http://tinyurl.com/y6m37tb3 (last accessed April 11, 2019). By contrast, some groundwater recharge basins may provide such diffuse transport of water that they cannot be considered point sources. *See Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 410 (4th Cir. 2018) (landfills and settling ponds facilitating "diffuse seepage" of pollutants are not point sources).

the potential to sweep in trace treatment byproducts and even water to which no chemicals have been added.[16] Consequently, water managed or used in GI, groundwater recharge, or water reuse has the potential to result in mediated releases that may require NPDES permits if the Court affirms the Ninth Circuit.

Jurisdictions using or seeking to deploy these practices would then confront the regulatory problems described in Section II *supra*. Owners and operators of existing and planned facilities would need to assess potential pathways to surface waters to know whether they require permits. Sponsors of GI, reuse, and recharge projects that require NPDES permits may then need to develop and furnish additional data for use in modeling to establish water quality-based permit conditions. Facilities may also face permit conditions that pose substantial compliance obstacles. *See supra* Section II.B.2.

These burdens and uncertainties could make GI, reuse, and recharge projects more expensive and take longer to implement. Utilities choosing to invest in these practices would also need to account for the risk of future CWA liability arising from mediated releases that may only be discovered months or years after a facility is completed. With only limited public funds to spend on infrastructure, *amici* and their members

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[16] *See* 33 U.S.C. § 1362(6) (defining "pollutant"); *N. Plains Res. Council v. Fid. Expl. & Dev. Co.*, 325 F.3d 1155, 1161-62 (9th Cir. 2003) (discharge of groundwater naturally contained substances considered to be pollutants); EPA Region 10, *Authorization to Discharge Under the NPDES for Wastewater Discharges from Idaho Drinking Water Treatment Facilities* at Part I.A (Aug. 16, 2016), https://tinyurl.com/yyzdz56k (general permit for discharges of, among other things, potable water).

would have to incur greater costs to pursue these environmentally beneficial projects—to the detriment of spending on other public needs—or forego them entirely.

IV. State and Federal Laws Protect Groundwater Resources More Effectively Than NPDES Permitting.

Holding that the CWA does not require NPDES permits for mediated releases will not leave groundwater resources unprotected. State legislatures and regulators across the country have crafted permitting regimes and regulations specifically designed to protect groundwater quality. Multiple federal environmental statutes also impose obligations and set standards that protect subterranean waters.

Even if the CWA's text did not already foreclose requiring NPDES permits for pollution conveyed by groundwater (or other nonpoint sources), the Court would find no regulatory "gap" crying out for a departure from the CWA's text. These state and federal laws provide an intricate, comprehensive scheme that protects groundwater quality. Requiring NPDES permits would only interfere with these laws by superimposing regulatory requirements designed for surface waters.

A. States Enforce Robust Groundwater Protection Programs.

The CWA reserves to the states authority to protect groundwater resources, with EPA providing only support for state programs. *See Vill. of Oconomowoc Lake v. Dayton Hudson Corp.* 24 F.3d 962, 965 (7th Cir. 1994) (Congress intended, under the CWA, to leave groundwater regulation to states).

During consideration of the CWA, both houses of Congress specifically declined to set federal groundwater pollution control standards. *See* S. Rep. No. 92-414, at 73 (Senate Committee on Public Works declined to adopt recommendations that the CWA "provide[] authority to establish Federally approved standards for groundwaters"); *CWA Leg. History* at 1491 (voting down a House amendment to require permits for discharges to groundwater). Instead, the Act charges states to develop programs to manage nonpoint source pollution, which must include practices to reduce pollutant loadings that "tak[e] into account the impact of the practice on ground water quality." 33 U.S.C. § 1329(b)(1), (2)(A). Congress further authorized EPA to provide grants to states for groundwater protection activities. *Id.* § 1329(i).

States have fulfilled this role by implementing an array of groundwater protection programs. Washington, for example, has enacted groundwater quality standards. Wash. Admin. Code § 173-200-100. These standards include criteria that "establish maximum contaminant concentrations for the protection of a variety of beneficial uses," including drinking water supplies. *Id.* at 173-200-040(1). Washington prohibits "any activity that violates or causes the violation of" these standards, and requires that any permit issued under regulatory programs administered by the state's Department of Ecology contain conditions needed to prevent violations the groundwater quality standards. *Id.* at 173-200-100(2), (4).

North Carolina has similarly created a groundwater quality program that sets maximum allowable concentrations of contaminants in groundwater to protect human health and preserve

groundwater "for its intended best use." *See* 15A N.C. Admin. Code 02L .0202(a). These standards apply to any activity that degrades water quality.[17] *Id.* at 02L .0101(a). The state further prohibits the issuance of any state wastewater discharge permit that will significantly degrade groundwater quality or cause a violation of applicable groundwater quality standards. *Id.* at 02L .0103(b). North Carolina has also created a corrective action program requiring responsible parties to remedy exceedances of applicable standards. *Id.* at 02L .0106.[18]

B. A Multifaceted Federal Regulatory Scheme Protects Groundwater.

Congress has supplemented states' groundwater protections by creating multiple regulatory programs that protect groundwater from those activities and facilities that are most likely to impact this resource. Federal statutes governing waste disposal and underground storage tanks dictate measures to protect groundwater quality and remediate it in the event of contamination. Federal drinking water laws provide an additional layer of protection to ensure that groundwater remains suitable for human consumption. Congress has further provided a means

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[17] The regulations further make it a violation to engage in "any activity which causes the concentration of any substance to exceed" the applicable groundwater quality standard. 15A N.C. Admin. Code 02L .0103(d).

[18] Many states have also included in their groundwater quality standards protections against releases to groundwater adversely impacting surface water quality. *E.g.*, Ariz. Admin. Code R18-11-405.B (releases to groundwater may not "cause or contribute to a violation of a water quality standard established for a navigable water"); Fla. Admin. Code r. 62-520.-310(2) (any release to groundwater "shall not impair the designated use of contiguous surface waters").

for cleaning up groundwater when contamination occurs.

1. The Safe Drinking Water Act Protects Groundwater for Potable Use.

The Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f-300j-27, underground injection control ("UIC") program provides protection for groundwater that may serve as a source of public drinking water. SDWA required EPA to establish regulations to safeguard groundwater that supplies or may supply a public water system from the underground injection of fluids, particularly wastes. *See* 42 U.S.C. § 300h(b)(1), (d)(2). These rules are designed to protect water supplies from contaminants found at levels that would (a) adversely affect human health or (b) cause a violation of national primary drinking water regulations.[19] *Ibid.*; *see also* 40 C.F.R. § 144.12(a) (prohibiting the owner of any underground injection activity from causing the violation of a national primary drinking water regulation or adversely affecting human health). States may take on primary enforcement responsibility for the federal UIC program if they enact regulations at least as strict as EPA's. *See* 42 U.S.C. § 300h-1(b).

Under the UIC program, an injection well may operate only pursuant to a permit or a rule authorizing its operation. *Id.* § 300h(b)(1)(A). The program groups wells into six "classes" "based principally on the potential for the type of injection to"

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[19] Among other things, national primary drinking water regulations "specif[y] for [any] contaminant with an adverse effect on human health either" a maximum level of that contaminant that may be present in drinking water or a required treatment technology. 42 U.S.C. § 300f(1); *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1269 (D.C. Cir. 1994).

endanger underground drinking water.[20] Thomas Richichi, Safe Drinking Water Act, *Environmental Law Handbook* 555 (23d ed. 2017); 40 C.F.R. § 146.5. Based on the risks they each pose, each class of well may be subject to a range of construction and operational standards designed to prevent groundwater contamination. *See generally* 40 C.F.R. Part 146.

If groundwater contamination occurs, EPA possesses broad authority to protect the public from potentially unsafe drinking water. EPA may issue orders and seek injunctions necessary to protect public health if (1) a contaminant in an underground source of drinking water "present[s] an imminent and substantial endangerment" to human health, and (2) state and local authorities have not already taken action. 42 U.S.C. § 300i(a).

2. The Resource Conservation and Recovery Act Protects Groundwater from Waste Disposal Activities.

Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, regulations also safeguard groundwater resources from waste disposal and treatment operations. Under RCRA, owners and operators of certain facilities that treat, store, or dispose of hazardous waste must ensure that groundwater concentrations of certain contaminants do not exceed specified levels.[21] 40 C.F.R. §§ 264.92,

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[20] The County of Maui's wells at issue here are regulated as Class V wells, which are wells used to inject non-hazardous fluids underground. *See* 40 C.F.R. §§ 144.80(e), 146.51(a).

[21] RCRA also sets minimum standards for municipal solid waste landfills that require, among other things, use of a landfill liner or other design features that prevent landfill leachate from causing groundwater to exceed specified contaminant levels. 40

264.93. These facilities must also maintain groundwater monitoring systems for assessing groundwater contaminant levels. *See id.* §§ 264.91(a), 264.97-.99. If contaminant concentrations exceed allowable levels, the owner or operator must implement a corrective action program to achieve compliance.[22] *Id.* § 264.100.

Groundwater protections do not cease when a hazardous waste facility closes. As part of the closure process, a facility owner or operator must take steps, spelled out in the facility's closure plan, to prevent hazardous constituents and leachate from reaching ground and surface waters. *Id.* §§ 264.111(b), 264.112(b)(5).

Even if these requirements do not apply, waste handling and disposal activities that pose threats to groundwater may be subject to civil actions to protect this resource. RCRA authorizes both EPA and private citizens to bring actions against responsible parties to abate any "imminent and substantial endangerment to health or the environment" resulting from the "handling, storage, treatment, transportation, or

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C.F.R. § 258.40(a). Owners and operators of these landfills must also monitor groundwater and take corrective action to address exceedances of specified contaminant levels in groundwater. 40 C.F.R. Part 258, Subpart E. EPA has also used RCRA to impose groundwater monitoring and remediation requirements on facilities managing coal combustion residuals. 40 C.F.R. §§ 257.90-.98.

[22] This corrective action requirement supplements RCRA's general requirement for any permitted treatment, storage, and disposal facility to "institute corrective action as necessary to protect human health and the environment for all releases of hazardous wastes or constituents from any solid waste management unit at the facility." 40 C.F.R. § 264.101(a); 42 U.S.C. § 6924(u).

disposal of any solid waste or hazardous waste." 42 U.S.C. § 6972(a)(1)(B) (citizen suits); *id.* § 6973(a) (authorizing EPA). Groundwater contamination or the threat of such contamination can be the basis for one of these abatement actions. *See, e.g.*, *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 261-62 (3d Cir. 2005) (soil and groundwater contamination among conditions establishing an "imminent and substantial endangerment" claim).

3. The Federal Underground Storage Tank Program Establishes Standards for Preventing and Remedying Groundwater Contamination.

RCRA also addresses risks posed to groundwater by underground storage tank systems ("USTs") containing oil and hazardous substances.[23] 42 U.S.C. §§ 6991-6991m. EPA regulations require new UST systems to meet performance standards designed to prevent, among other things, structural failure and corrosion that could lead to releases to groundwater. 40 C.F.R. § 280.20. EPA has also required owners and operators to upgrade existing USTs to improve structural integrity and prevent corrosion. *Id.* § 280.21. EPA further requires the operation and maintenance of corrosion protection systems, and mandates that owners and operators of USTs inspect and test certain equipment. 40 C.F.R. Part 280, Subpart C.

UST owners and operators must also prevent and remedy releases of oil or hazardous substances that

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[23] States may administer this program if they enact regulations that are at least as stringent as EPA's. *See* 42 U.S.C. § 6991c(b)(1). EPA has authorized twenty-nine states and Puerto Rico to implement the program. 40 C.F.R. §§ 282.50-.102.

may threaten groundwater. EPA requires USTs to have systems that can detect releases of stored substances from tanks or associated piping. *See* 40 C.F.R. § 280.40(a). If a release occurs, an owner or operator must first "prevent further migration of the released substance into surrounding soils and groundwater." *Id.* § 280.62(a)(2). If evidence suggests that the release may have reached groundwater, the owner or operator must then investigate the release site and surrounding area to ascertain the extent of groundwater contamination. *Id.* § 280.65(a). If necessary, the owner or operator will develop and implement a corrective action plan to address the contamination. *Id.* § 280.66(a).

4. EPA May Use the Superfund Program to Require Groundwater Remediation.

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),[24] 42 U.S.C. §§ 9601-9675, gives EPA another tool to address threats to groundwater quality. CERCLA confers on EPA "broad power to command government agencies and private parties to clean up" contamination caused by hazardous substances. *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994). This statute authorizes EPA to take preventative or remedial actions whenever a hazardous substance is "released or there is a substantial threat of such a release into the environment."[25] 42 U.S.C. § 9604(a). CERCLA

[24] CERCLA is commonly referred to as the "Superfund" statute. EPA, *Superfund: CERCLA Overview* (June 4, 2018), http://tinyurl.com/jzugaqk.

[25] The statute confers authority on the President, which has been delegated, in most instances, to the Administrator of EPA.

further authorizes the federal government to issue orders or seek injunctive relief to address contamination. *See* 42 U.S.C. § 9606(a). CERCLA's broad definition of the "environment" authorizes EPA to take these actions to address groundwater contamination. *See id.* § 9601(8)(B) (defining the "environment" to include groundwater); *Matter of Bell Petroleum Servs., Inc.*, 3 F.3d 889, 892-93 (5th Cir. 1993) (describing EPA response to chromium-contaminated groundwater under CERCLA).

EPA requires that contaminated site cleanups address threats to groundwater quality. EPA expects that remedial actions will "return usable ground waters to their beneficial uses wherever practicable." 40 C.F.R. § 300.430(a)(iii)(F). When such restoration is not practicable, EPA demands that cleanup measures prevent the spread groundwater contamination, including its migration into surface water. *Ibid.*; EPA, *Summary of Key Existing CERCLA Policies for Groundwater Restoration* 3 (June 26, 2009), https://www.tinyurl.com/yysynmff. EPA further strives for remedial actions to clean up groundwater that is a current or potential source of drinking water so that it attains federal drinking water standards under SDWA. *See* 40 C.F.R. § 300.430(e)(2)(i)(B), (C). These CERCLA cleanup requirements provide a backstop for the robust body of state and federal law protecting groundwater.

Superfund Implementation, Exec. Order No. 12580, §§ 2(g), 4(d)(1), 52 Fed. Reg. 2923 (Jan. 23, 1987).

CONCLUSION

The distinction between point and nonpoint source pollution is critical to maintaining the CWA's structure and the proper functioning of the NPDES permitting program. Requiring NPDES permits for mediated releases—releases from discrete sources that are conveyed by nonpoint sources—is inconsistent with the Act's language and would eviscerate this critical distinction. Such a requirement would also create disincentives for public investment in cutting-edge water management practices needed to address the water supply and quality problems of the 21st century. The Court should adhere to the limitations that Congress imposed on the scope of the NPDES program and reverse the Ninth Circuit.

Respectfully submitted,

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