No. 18-260

In The
Supreme Court of the United States

COUNTY OF MAUI,

Petitioner,

v.

HAWAIʻI WILDLIFE FUND; SIERRA CLUB – MAUI GROUP; SURFRIDER FOUNDATION; WEST MAUI PRESERVATION ASSOCIATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented are:

1. Whether the Ninth Circuit correctly held that Clean Water Act (CWA) liability may attach when a point source discharges pollutants to navigable water via a groundwater pathway that is the functional equivalent of a direct discharge to navigable waters.

2. Whether Petitioner County of Maui had fair notice that unpermitted discharges from its Lahaina injection wells violate the CWA where the statute's plain language prohibits the "addition of any pollutant to navigable waters" from any point source without a National Pollutant Discharge Elimination System permit, 33 U.S.C. § 1362(12)(A), and the Environmental Protection Agency consistently stated for decades that point source discharges to groundwater that are "effectively" discharges to navigable waters require such permits. 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991).

RULE 29.6 STATEMENT

Respondents Hawai'i Wildlife Fund, Surfrider Foundation and West Maui Preservation Association are nonprofit organizations that have no parent corporations, and no publicly-held company has any ownership interest in them.

Respondent Sierra Club – Maui Group is part of the Sierra Club, which is a nonprofit organization that has no parent corporation, and no publicly-held company has any ownership interest in it.

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INTRODUCTION

Petitioner County of Maui seeks review of a decision of the United States Court of Appeals for the Ninth Circuit that the discharge of millions of gallons of treated sewage each day from Petitioner's injection wells, which reaches the Pacific Ocean via groundwater, requires a permit under the Clean Water Act's (CWA's) National Pollutant Discharge Elimination System (NPDES) program. Petitioner offers no genuine reason for intervention by this Court. The Ninth Circuit's unanimous decision does not conflict with any decision of this Court and follows the construction of the CWA adopted by Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) (Scalia, J., joined by Roberts, C.J., and Thomas and Alito, JJ.). Not a single Ninth Circuit judge voted to grant Petitioner's request for en banc review, and the only other court of appeals with settled law regarding this issue agrees with the result of the challenged decision. *See Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018), *petition for cert. filed*, 87 U.S.L.W. 3069 (U.S. Aug. 28, 2018) (No. 18-268).

Although two very recent decisions of the Sixth Circuit rejected Justice Scalia's statement in *Rapanos* that the relevant CWA provision is not limited to point sources that discharge directly into navigable waters, 547 U.S. at 743, rehearing petitions are pending in both cases, and the issue thus has not been definitively resolved in that court. *Ky. Waterways All. v. Ky. Utils. Co.*, No. 18-5115, 2018 WL 4559315 (6th Cir. Sept. 24,

2018), *petition for rhrg. en banc filed* (Oct. 9, 2018); *Tenn. Clean Water Network v. Tenn. Valley Auth.*, No. 17-6155, 2018 WL 4559103 (6th Cir. Sept. 24, 2018) ("*TCWN*"), *petition for rhrg. en banc filed* (Oct. 22, 2018). At least one other circuit has a pending case involving point source discharges via groundwater, presenting later opportunities for this Court to consider taking review in the event that one or more circuits ultimately settle on a conflicting view. *See 26 Crown St. Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, No. 17-2426 (2d Cir. filed Aug. 4, 2017). The Environmental Protection Agency's (EPA's) recent announcement that it may provide additional guidance on the circumstances under which point source discharges via groundwater require NPDES permits further militates against granting certiorari. *See* 83 Fed. Reg. 7,126, 7,128 (Feb. 20, 2018).

Far from being a "radical expansion of point source permitting," Pet. 3, the Ninth Circuit's decision follows the *Rapanos* plurality's recognition that the CWA's plain language broadly forbids all unpermitted point source discharges "*to* navigable waters," not just discharges that are "*directly* to navigable waters." *Id.* at 743 (quoting 33 U.S.C. § 1362(12)(A); citing 33 U.S.C. § 1311(a)). The challenged ruling also accords with decades of lower court decisions and EPA practice affirming that the NPDES program regulates point source discharges to navigable waters via groundwater. As EPA explained nearly thirty years ago, "the affected groundwaters are not considered 'waters of the United States' but discharges to them are regulated because such discharges are effectively discharges to the directly

connected surface waters." 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991). In the decades since, EPA and states administering the NPDES program have routinely issued permits for indirect discharges via groundwater.

There is no basis for Petitioner's alarmist claim the Ninth Circuit's decision sweeps millions of new sources into the NPDES program. Nothing has changed from the decades-old practice of considering the specific facts of each case to determine if a point source discharge via groundwater "is the functional equivalent of a discharge into the navigable water." Pet. App. 24.

Here, Petitioner intentionally designed its Lahaina Wastewater Reclamation Facility to dispose of treated sewage into the Pacific Ocean via the groundwater underlying the facility. EPA's tracer dye study established conclusively that, each day, Petitioner's four injection wells (undisputedly point sources) discharge millions of gallons of treated sewage (undisputedly pollutants) into the Pacific Ocean (undisputedly navigable waters) via the groundwater into which the wells directly inject. As the Ninth Circuit correctly stated:

> At bottom, this case is about preventing the County from doing indirectly that which it cannot do directly. The County could not under the CWA build an ocean outfall to dispose of pollutants directly into the Pacific Ocean without an NPDES permit. It cannot do so indirectly either to avoid CWA liability. To hold

> otherwise would make a mockery of the CWA's prohibitions.

Pet. App. 31.

Petitioner also challenges the Ninth Circuit's conclusion that Petitioner had fair notice its unpermitted discharges violate the CWA. Petitioner's fact bound—and factually and legally erroneous—claim that the Ninth Circuit misapplied settled law in this regard does not warrant this Court's review.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). "Congress' intent in enacting the [CWA] was clearly to establish an all-encompassing program of water pollution regulation." *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981).

A. NPDES Permit Requirement for Point Sources

To further Congress' central goal, CWA section 301(a) mandates that "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). The Act broadly defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). "The term 'point source' means any discernible, confined

and discrete conveyance . . . from which pollutants are or may be discharged," including any "well." *Id.* § 1362(14). "The term 'navigable waters' means the waters of the United States, including the territorial seas." *Id.* § 1362(7); *see also id.* § 1362(8).

CWA section 402 provides an exception to section 301(a)'s general prohibition through the issuance of an NPDES permit "for the discharge of any pollutant or combination of pollutants." *Id.* § 1342(a)(1). This Court has emphasized that "[*e*]*very* point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals." *Milwaukee*, 451 U.S. at 318 (footnote omitted).

NPDES permitting is key to achieving Congress' goal to "abate and control water pollution." *Envt'l Prot. Agency v. Cal. ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 204 (1976); *see also Am. Iron & Steel Inst. v. Envt'l Prot. Agency*, 115 F.3d 979, 990 (D.C. Cir. 1997) (NPDES permitting is CWA's "centerpiece"). "An NPDES permit serves to transform generally applicable effluent limitations and other standards including those based on water quality into the obligations . . . of the individual discharger" and makes those obligations enforceable. *Envt'l Prot. Agency*, 426 U.S. at 205.

B. Point Source vs. Nonpoint Source

When Congress amended the CWA in 1987 to address nonpoint source pollution, it reaffirmed the

importance of NPDES permitting, emphasizing the nonpoint source program was neither "a substitute for the point source programs already in place under the act" nor "an excuse to reduce the effort or relax the requirements on the point source side." 133 Cong. Rec. 1,279 (1987).

While the Act does not define the term "nonpoint source pollution," courts generally agree it "arises from many dispersed activities over large areas," "is not traceable to any single discrete source," and, due to its "diffuse" nature, "is very difficult to regulate through individual permits." *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002); *see also United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979). "The most common example of nonpoint source pollution is the residue left on roadways by automobiles," which rainwater "wash[es] off . . . the streets and . . . carrie[s] along by runoff in a polluted soup [to] creeks, rivers, bays, and the ocean." *League of Wilderness Defenders*, 309 F.3d at 1184.

Point and nonpoint sources are not distinguished by the types of pollution they create or by the activities causing the pollution, but, rather, by whether or not they discharge pollutants from "an identifiable conveyance" or "point." *Earth Sciences*, 599 F.2d at 373. If activities otherwise associated with nonpoint source pollution "release pollutants from a discernible conveyance, they are subject to NPDES regulation, as are all point sources." *Trs. for Alaska v. Envt'l Prot. Agency*, 749 F.2d 549, 558 (9th Cir. 1984); *see also S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 106 (2004)

(33 U.S.C. § 1314(f)(2)(F), "which concerns nonpoint sources, . . . does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition"); *Earth Sciences*, 599 F.2d at 373 (activities "listed in § 1314(f)(2) may involve discharges from both point and nonpoint sources, and those from point sources are subject to [NPDES] regulation"); *Sierra Club v. Abston Construction Co.*, 620 F.2d 41, 44 (5th Cir. 1980) (same).

C. Discharges Via Groundwater

In enacting the CWA, Congress did not, as Petitioner claims, ignore EPA's testimony that harm to surface waters can occur when "sources of pollution" are "discharged . . . through the ground water table" and that the CWA must "insure that . . . authority over interstate and navigable streams cannot be circumvented" if polluters dispose of "toxic wastes in deep wells" that, "through the ground water table, might contaminate existing water supplies." Water Pollution Control Legislation–1971 (Proposed Amendments to Existing Legislation): Hearings Before the H. Comm. On Public Works, 92nd Cong., at 230 (1971). Rather, "Congress expressed an understanding of the hydrologic cycle and an intent to place liability on those responsible for discharges which entered the 'navigable waters.'" 66 Fed. Reg. 2,960, 3,016 (Jan. 12, 2001). Accordingly, Congress drafted the CWA's prohibition broadly, prohibiting all unpermitted discharges "*to* navigable waters," not just those "*directly* to navigable waters." *Rapanos*, 547 U.S. at 743 (citations omitted).

Given "Congress' broad concern for the integrity of the Nation's waters," interpreting the CWA to "exclude[] regulation of point source discharges to the waters of the U.S. which occur via ground water would . . . be inconsistent with the overall Congressional goals expressed in the statute." 66 Fed. Reg. at 3,015-16. Thus, EPA decades ago recognized that the Act cannot be read to exclude point source discharges that reach surface waters through groundwater where the "discharges are effectively discharges to the directly connected surface waters." 56 Fed. Reg. at 64,892

II. FACTUAL BACKGROUND

A. Petitioner's Injection Wells

When Petitioner designed the Lahaina Wastewater Reclamation Facility (LWRF), it made a conscious choice to dispose of treated sewage via injection wells rather than a deep-ocean outfall. Pet. App. 8. The LWRF's four injection wells are long pipes that discharge treated sewage—typically, three to five million gallons each day—directly into the groundwater below the facility. Pet. App. 7-8, 33-34.[1] It is undisputed that the injection wells are "point sources." Pet. App. 13 (quoting 33 U.S.C. § 1362(14)).

There is likewise no question that treated sewage discharged from the LWRF wells enters the Pacific Ocean, a "navigable water." 33 U.S.C. § 1362(7), (8).

[1] Contrary to the claims of amici West Virginia, et al., this case does not involve discharges into "soil that eventually migrate to jurisdictional waters." W. Va. Amicus Br. at i.

Since the LWRF's inception, Petitioner has known treated sewage discharged from the injection wells would reach the ocean. Pet. App. 8. In 2013, an EPA-funded tracer dye study confirmed conclusively that the LWRF's treated sewage enters the Pacific Ocean just offshore of Kahekili Beach in west Maui, with over half of the injected wastewater—millions of gallons daily—discharging into the ocean from two submarine spring areas only several meters wide. Pet. App. 7-10, 34-35, 67.[2] The massive influx of treated sewage from Petitioner's wells makes up "[a]bout one out of every seven gallons of groundwater entering the ocean near the LWRF." Pet. App. 9. Discharges from the LWRF injection wells remain ongoing.

There is no dispute that "the discharge at the LWRF significantly affects the physical, chemical, and biological integrity" of the receiving ocean water. Pet. App. 80; *see also* Pet. App. 78-79. In the decades following the LWRF's opening, nutrients and other pollutants from injected sewage have devastated the once-pristine coral reef at Kahekili. Appellees' Supp. Excerpts of Record (SER) 281-84. Hawai'i's Division of Aquatic Resources reported a 40% decline in coral cover at Kahekili from 1994 to 2006. SER 273.

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[2] The record does not support Petitioner's claim that over 90% of the injected wastewater has "no identifiable ocean entry point." Pet. at 10.

B. Petitioner Had Ample Notice Its Unpermitted Discharges Could Subject It to CWA Liability and Penalties.

Both the CWA's plain language and the EPA's longstanding statutory interpretation provided Petitioner with ample notice that unpermitted discharges from the LWRF injection wells could subject it to CWA liability and civil penalties. Petitioner cannot claim ignorance of its potential legal exposure. Beginning in 2008, Respondents and other Maui citizens repeatedly warned Petitioner its discharges were illegal and risked subjecting Petitioner to civil penalties. Pet. App. 110-112; SER 43-105. These warnings, culminating in Respondents' notice letter, detailed many of the same authorities on which the district court subsequently relied to find Petitioner liable.

EPA also put Petitioner on notice that indirect discharges via groundwater violate the CWA. In January 2010, the agency issued an order for Petitioner to conduct sampling, monitoring and reporting necessary to determine whether it was violating the CWA in connection with LWRF effluent entering the ocean from submarine springs at Kahekili. Pet. App. 112. EPA issued its order pursuant to CWA section 308(a), which applies to only "the owner or operator of [a] point source." 33 U.S.C. § 1318(a)(A).

Two months later, EPA followed up with an order requiring Petitioner to secure a State of Hawai'i water quality certification pursuant to CWA section 401, based on EPA's determination that "operation of the

[LWRF] may result in a discharge into navigable waters." Pet. App. 113. EPA specified that Petitioner would need certification that continued use of the LWRF injection wells would not violate the CWA's prohibition on unpermitted point source discharges. *Id.*

Neither Hawai'i Department of Health (HDOH) nor EPA ever expressed a formal agency position that Petitioner's injection wells do not need an NPDES permit.[3] HDOH equivocated, stating in an April 2014 letter it was still "in the process of determining if an NPDES permit is applicable." Pet. App. 30. In January 2015, EPA expressly stated the injection wells' continuing discharges require an NPDES permit. ER 357-358.

While Petitioner places great weight on underground injection control (UIC) permits issued under the Safe Drinking Water Act, every Hawai'i permit expressly noted Petitioner's obligation to comply with

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[3] Petitioner cites only informal staff comments and internal agency correspondence, neither of which establishes "the official view of any agency." *Nat'l Wildlife Fed'n v. U.S. Army Corps of Engineers*, 384 F.3d 1163, 1174 (9th Cir. 2004).

Moreover, Petitioner improperly attaches and cites two emails (Pet. App. 150 and Pet. App. 152) the district court refused to admit into evidence. Pet. App. 106-107. Petitioner failed to appeal those evidentiary rulings to the Ninth Circuit.

Finally, another EPA email Petitioner excerpts and quotes does not say EPA preferred "to watch from the 'sideline' " regarding whether NPDES permitting applies. Pet. at 14 (quoting Pet. App. 149). The "Plan A" the email discusses is Petitioner's proposal to irrigate biofuels with LWRF wastewater; it has nothing to do with permitting. *See* Appellant's Excerpts of Record (ER) 233-234.

NPDES permit requirements. *See, e.g.*, SER 20-22, 40-42. EPA's UIC permits similarly stated that compliance with them was not a defense to any action brought under any other law. *See, e.g.*, SER 15.

III. PROCEEDINGS BELOW

Respondents will not repeat the description of the proceedings below, which, editorial comments aside, are generally described in the petition and are set forth in full in the opinions in the appendix.

Respondents note that, after the district court denied Petitioner's summary judgment motion regarding "fair notice," the parties reached a settlement regarding the appropriate penalty for Petitioner's CWA violations. The parties agreed Petitioner would pay a modest fine ($100,000) and would invest in infrastructure to divert wastewater from the LWRF injection wells for reuse. Pet. App. 124-126 (¶¶ 9-13). The parties agreed these commitments would be triggered by entry of a final judgment Petitioner violated the CWA and "is not immune from civil penalties because of a lack of fair notice." Pet. App. 122-123 (¶ 4); *see also* Pet. App. 122 (¶¶ 2-3).

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT FAITHFULLY APPLIED THIS COURT'S PRECEDENTS, AND PETITIONER'S CLAIMS OF INTERCIRCUIT CONFLICT ARE PREMATURE AT BEST

A. There Is No Conflict With This Court's Decisions.

The Ninth Circuit's decision accords fully with this Court's decisions. Petitioner focuses on *Miccosukee*, but that case did not address whether a discharge of pollutants from a point source to navigable waters though groundwater requires an NPDES permit. Rather, in rejecting an argument that the NPDES program does not apply "when pollutants originating elsewhere merely pass through the point source," 541 U.S. at 104, *Miccosukee* held that a point source that is not "the original source of the pollutant" triggers the NPDES requirement if the point source "convey[s] the pollutant *to* 'navigable waters.'" *Id.* at 105 (emphasis added). *Miccosukee* did not consider or address whether the point source must convey the pollutant *directly to* the navigable waters.[4]

It was not until *Rapanos* that the Court discussed whether the NPDES permit requirement extends to point sources that discharge into navigable waters

[4] While Petitioner faults the Ninth Circuit for failing to discuss *Miccosukee*'s "straightforward textual analysis," Petitioner cited the case only once, in passing, in its briefs to the panel. Pet. at 21. *Miccosukee* was far from the centerpiece of Petitioner's argument below.

through an intermediate pathway. Writing for the plurality, Justice Scalia espoused a narrower view of the "scope of 'navigable waters'" than did the other five Justices, but vigorously denied that his interpretation would allow polluters "to evade the permitting requirement . . . simply by discharging their pollutants into noncovered intermittent watercourses that lie upstream of covered waters." 547 U.S. at 742-43. Focusing on the CWA's plain language, the plurality emphasized that "[t]he Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" *Id.* at 743 (quoting 33 U.S.C. § 1362(12)(A); citing 33 U.S.C. § 1311(a). It noted:

> [F]rom the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between.

Id. (citation omitted).

The *Rapanos* plurality's observation that "many courts have held" that the conveyances of pollutants from a point source to covered waters "themselves constitute 'point sources' under the Act" reflects the plurality's understanding that other courts have not so held and that such a showing is not essential for CWA liability. *Id.* The plurality cited with approval *Concerned Area Residents for Environment v. Southview*

Farm, 34 F.3d 114 (2d Cir. 1994) ("*CARE*"), as illustrating that liability attaches regardless of whether the conveyance between a point source and a covered water is confined and discrete enough to qualify as a point source. *Id.* at 744.[5]

In *CARE*, citizens challenged a dairy farm's liquid manure spreading operations. The Second Circuit held that "[t]he collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point source discharges." 34 F.3d at 119. Regardless of whether the fields themselves were point sources, the court held it was sufficient for CWA liability that (1) the pollutants were released from "point sources" (defendant's manure spreading vehicles) onto fields and (2) the pollutants flowed off the fields into navigable waters. *Id.*

While the Court in *Rapanos* splintered on other issues, no Justice disagreed with the plurality opinion that the CWA holds liable polluters who discharge pollutants from a point source to navigable waters, even if the discharge is not directly from the point source into the navigable waters. The Ninth Circuit firmly grounded its decision in the reasoning of the *Rapanos*

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[5] Here, the district court concluded the groundwater underneath the LWRF is a point source because it constitutes a discernible, confined and discrete conveyance. *See* Pet. App. 69-72; *cf.* Ass'n of Cal. Water Agencies Amicus Br. at 16 n.5 (noting "unique geology of Maui"). The court of appeals did not reach that issue, Pet. App. 16 n.2, but it provides an independent basis for holding Petitioner liable, even under Petitioner's interpretation of the CWA. That the same result could be reached on alternative grounds is another reason for this Court not to take up this case.

plurality. The harmony between the Ninth Circuit's decision and this Court's opinions weighs strongly in favor of denying review. Sup. Ct. R. 10(c).

B. The Court Should Allow the Law in the Circuits to Develop Further Before Deciding Whether Review Is Appropriate.

Petitioner's allegation of a circuit split is premature. Only two courts of appeals have issued final decisions addressing whether the CWA prohibits point source discharges to navigable waters via groundwater, unless authorized and controlled by an NPDES permit, and both answered in the affirmative, based on the Act's plain language. The Ninth Circuit was the first to so rule, in the unanimous opinion at issue in this petition, with not a single one of the Circuit's judges requesting a vote on whether to rehear the matter en banc. Pet. App. 6. The Fourth Circuit followed suit in *Upstate Forever*, holding that "a discharge of a pollutant that moves through ground water before reaching navigable waters may constitute a discharge of a pollutant, within the meaning of the CWA." 887 F.3d at 649.[6]

While there was a dissent in *Upstate Forever*, all judges on the panel agreed that point source

[6] That the two courts used different words to articulate the legal standard does not warrant this Court's review. The Fourth Circuit, which had the Ninth Circuit's decision before it when it ruled, concluded there is "no functional difference," and Petitioners fail to give any reason for this Court to find otherwise. *Id.* at 651 n.12.

discharges that reach navigable waters via groundwater require an NPDES permit. *Upstate Forever* involves claims that discharges of petroleum from a leaking pipeline (unquestionably a point source) reach navigable waters via groundwater. *Id.* at 643-44. Because the pipeline was repaired before the plaintiffs filed suit, the dissent concluded the unpermitted discharges constitute "a wholly past violation" of the CWA, against which only EPA or a state agency can take enforcement action, rather than "an ongoing CWA violation," susceptible to citizen suit. *Id.* at 659-60 (Floyd, J., dissenting). All three judges agreed, however, on the relevant issue here: an unpermitted point source discharge to navigable waters via groundwater can violate the CWA.

A few weeks ago, a divided panel of the Sixth Circuit issued decisions in two cases involving discharges from coal ash ponds, with two of the panel's three judges concluding the CWA does not regulate discharges from point sources to navigable waters via groundwater. *TCWN*, 2018 WL 4559103, at *1; *Ky. Waterways*, 2018 WL 4559315, at *1. Petitions for rehearing en banc are now pending in both cases, which, if granted, would automatically vacate the panel decisions. *See* 6th Cir. R. 35(b). Moreover, a grant of rehearing in either case could lead to the Sixth Circuit's conforming its view to that of the Fourth and Ninth Circuits. Given that proceedings are ongoing before the Sixth Circuit and the panel's holdings regarding CWA liability remain subject to change, it is premature to

conclude that the Sixth Circuit has settled on a position conflicting with the Ninth Circuit's.

Even if the Sixth Circuit ultimately were to adhere to the rulings of the panel, review by this Court at this time would not be warranted. In both Sixth Circuit cases, the majority strongly suggested that the coal ash ponds were not point sources to begin with. *See Ky. Waterways All.*, 2018 WL 4559315, at *7 n.8; *TCWN*, 2018 WL 4559103, at *5 n.6. The absence of any point source is an independent ground for concluding no CWA liability exists, in the Ninth and Fourth Circuits, as well as in the Sixth Circuit. *See* Pet. App. 13-16, 24; *Upstate Forever*, 887 F.3d at 649-51. As the outcomes would be identical in all three circuits under the specific facts as found in the Sixth Circuit cases, there is currently no need for this Court's intervention.

Equally importantly, any possible, future conflict between these circuits would be of such recent vintage that prudence dictates allowing the issue to develop further in the lower courts before deciding whether this Court's review is appropriate. Allowing the issue to percolate may permit the courts of appeals to reach consensus, after more careful consideration of the issue. This year alone, at least one other circuit has a pending case involving point source discharges via groundwater, providing an additional opportunity for development of the case law. *See 26 Crown St. Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, No. 17-2426 (2d Cir. filed Aug. 4, 2017).

None of the other court of appeals decisions Petitioner cites establishes a circuit split. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009), the only post-*Rapanos* decision Petitioner discusses, is easily distinguished.[7] The Second Circuit declined to find a point source discharge in *Cordiano* because "there is no evidence that the surface water runoff from the berm containing lead is in anyway channeled or collected" or that "airborne lead moves by any 'discernible, confined and discrete conveyance.' " 575 F.3d at 224 (quoting 33 U.S.C. § 1362(14)). Accordingly, the court concluded that, "[e]ven assuming the berm is an identifiable source" of lead pollution, it does not meet the definition of a "point source." *Id.* In contrast, here, it is undisputed the LWRF injection wells are point sources that channel and collect treated sewage before discharging it into groundwater that conveys pollutants to the ocean.

Far from conflicting with the Ninth Circuit, *Cordiano* expressly reaffirms the Second Circuit's holding in *CARE* that discharges from point sources that reach navigable waters through an intervening pathway require NPDES permits, whether or not the intervening pathway is itself a point source. *Id.* at 223. The Second Circuit again endorsed that principle in *Peconic Baykeeper, Inc. v. Suffolk Cnty.*, 600 F.3d 180 (2d Cir.

[7] Petitioner also cites a pre-*Rapanos* Second Circuit decision—*Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001), but that decision did not address whether the NPDES program covers indirect discharges. Rather, "the crux of th[e] appeal" in *Catskill Mountains* involved what constitutes an "addition" of pollutant. *Id.* at 486.

2010), where the court held that an "indirect" discharge of pesticides from spray applicators attached to trucks and helicopters through the air and thence into navigable waters could violate the CWA, even though the intervening air is not a point source. *Id.* at 188.

The Fifth Circuit's *Abston Construction* decision likewise is entirely in line with the Ninth Circuit's decision, affirming that the conveyances of pollutants intervening between a point source and the receiving navigable waters need not themselves be point sources. In that case, the Fifth Circuit concluded that the key to CWA liability is whether the defendant "*initially collected or channeled* the water and other materials" that subsequently reach navigable waters. 620 F.2d at 45 (emphasis added). If the defendant made such efforts, the discharge "constitutes a point source discharge," not unregulated "natural rainfall drainage." *Id.* at 44; *see also id.* at 45 ("Examples of point source pollution" include "the collection, and subsequent percolation, of surface waters in the [mine] pits themselves"), 47 (rainwater trapped in mine pits "eventually percolated through the banks and flowed toward the creek, carrying with it acid and chemicals from the pit").

The Ninth Circuit relied on *Abston Construction*, noting the undisputed facts established that Petitioner "'initially collected [and] channeled' the pollutants in its wells and injected them into the ground, where they were 'carried away from the [wells] by the gravity flow of [ground]water.'" Pet. App. 20 (quoting *Abston Construction*, 620 F.2d at 45). The Ninth Circuit further concluded, "based on the overwhelming evidence in

this case establishing a connection between the wells and the Pacific Ocean," that "it cannot be disputed the wells are 'reasonably likely to be the means by which [the] [effluent] [is] ultimately deposited into a navigable body of water.'" *Id.* (quoting *Abston Construction*, 620 F.2d at 45).

Contrary to Petitioner's claims, neither *Rice v. Harken Expl. Co.*, 250 F.3d 264 (5th Cir. 2001), nor *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994), addressed the issue in this case. Those decisions held only that "'navigable waters' do not include groundwater." *Rice*, 250 F.3d at 271; *see also Oconomowoc*, 24 F.3d at 965. That is an entirely distinct issue from whether CWA liability may attach when a point source discharge is conveyed through groundwater to a navigable water. *See* Pet. App. 16 n.2 (Ninth Circuit assumed, without deciding, "the groundwater here is [not] a navigable water").

Unlike this case, neither *Rice* nor *Oconomowoc* involved undisputed evidence the groundwater into which point sources directly discharge actually conveys pollutants to navigable waters. *Rice*—a case brought under the Oil Pollution Act (OPA)—involved "spills of oil onto dry land that occurred hundreds of miles from any coast or shoreline." 250 F.3d at 266. The Fifth Circuit emphasized the lack of any "evidence of a close, direct and proximate link between [the defendant's] discharges of oil and any resulting actual, identifiable oil contamination of a particular body of natural surface water that satisfies the jurisdictional requirements of the OPA." *Id.* at 272. In *Oconomowoc*,

the Seventh Circuit considered allegations of only a "potential"—not an actual—"connection between ground waters and surface waters." 24 F.3d at 965.

Such decisions have no bearing on the proper outcome when a discharge to groundwater is functionally equivalent to a direct discharge to navigable waters. As EPA has explained, given the CWA's "purpose of protecting surface waters and their uses":

> [T]he Act requires NPDES permits for discharges to groundwater where there is a direct hydrological connection between groundwaters and surface waters. In these situations, *the affected groundwaters are not considered "waters of the United States" but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters*.

56 Fed. Reg. at 64,892 (emphasis added).[8]

That some district courts have reached conclusions that differ from the Ninth Circuit's does not warrant *certiorari*.[9] This Court focuses discretionary

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[8] The legislative history Petitioner cites, *see* Pet. at 9-10, relates only to whether Congress intended that "discharges to isolated groundwater be subject to permit requirements," and, thus, is not relevant. *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 989 (E.D. Wash. 1994); *see also id.* at 989-90.

[9] The overwhelming majority of district courts have agreed with the Ninth Circuit that the CWA regulates point source "discharges into hydrologically connected groundwater which adversely affect surface water." *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Idaho 2001); *see, e.g.*, *Hernandez v. Esso Standard Oil Co.*, 599 F. Supp. 2d 175, 180 (D. P.R. 2009);

review on decisions of the courts of appeals, not district court decisions, precisely because appellate review often eliminates inconsistencies. Sup. Ct. R. 10(a), (c). For example, the Fourth Circuit's reversal of the district court opinion in *Upstate Forever* resolved the potential conflict with the Ninth Circuit. 887 F.3d at 641-42.

Given the absence of conflict between the Ninth and Fourth Circuits, the fact that "[s]everal other appeals courts are currently considering a variety of factual applications to which the Ninth Circuit's test might apply" counsels in favor of allowing further development of the case law, not granting *certiorari* prematurely. Pet. at 34. Since this petition was filed, the Fourth Circuit issued a decision in one of the appeals Petitioner cited, *Sierra Club v. Va. Elec. & Power Co.*, No. 17-1895, 2018 WL 4343513 (4th Cir. Sept. 12, 2018), reaffirming *Upstate Forever*'s holding that "the addition of a pollutant into navigable waters *via groundwater* can violate § 1311(a)." *Id.* at *4. This Court will have ample opportunity to decide if review is needed after the other courts of appeals resolve the appeals currently pending before them.

Wash. Wilderness Coal., 870 F. Supp. at 990; *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319-20 (S.D. Iowa 1997); *Sierra Club v. Colorado Ref. Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993); 66 Fed. Reg. at 3,017 n.1 (listing cases).

II. THE PENDENCY OF EPA REVIEW COUNSELS AGAINST GRANTING THE WRIT

EPA's recent Federal Register notice seeking comment on CWA regulation of point source discharges via groundwater provides another compelling reason to deny the writ.[10] The notice indicates that agency clarification may soon be forthcoming on a broad range of topics, including "the applicability of the CWA to groundwater with a direct hydrologic connection to jurisdictional water" and proposed definitions of "what activities would be regulated if not a discharge to a jurisdictional surface water (*i.e.*, placement on the land), or which connections are considered 'direct' in order to reduce regulatory uncertainties associated with that term." 83 Fed. Reg. at 7,128. As the agency charged with administering the CWA, EPA's views regarding the scope of the NPDES permitting program warrant careful consideration by this Court and, if appropriate, deference. *See Chevron U.S.A., Inc. v. Natural Resources Def. Council*, 467 U.S. 837, 842-45 (1984). The fact that EPA may soon offer additional perspectives strongly favors waiting to hear from the agency, rather than rushing to grant review.

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[10] The notice did not, as Petitioner claims, "document[ ] a lack of clarity in [EPA's] previous statements on this issue." Pet. at 23. On the contrary, EPA catalogued its many prior, consistent statements that such discharges "may be subject to CWA permitting requirements." 83 Fed. Reg. at 7,127.

III. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THE CWA'S STATUTORY LANGUAGE AND POLICIES

Nearly four decades ago, this Court noted that, to achieve its "all-encompassing program of water pollution regulation," the CWA prohibits "[*e*]*very* point source discharge . . . unless covered by a permit." *Milwaukee*, 451 U.S. at 318 (footnote omitted). The issuance of an NPDES permit "directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals," *id.*, which are to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

Far from restricting the scope of NPDES permitting, as Petitioner argues, this Court's decision in *Miccosukee* reaffirmed that the requirement to secure an NPDES permit extends broadly to all point sources, even ones that are not "the original source of the pollutant." 541 U.S. at 105. As the Ninth Circuit correctly observed, Petitioner's attempt to narrow the class of point sources requiring NPDES permits "read[s] into the statute at least one critical term that does not appear on its face—that the pollutants must be discharged 'directly' to navigable waters from a point source." Pet. App. 23. There is no way to square Petitioner's position with the CWA's plain language, which "does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'"

Rapanos, 547 U.S. at 743 (quoting 33 U.S.C. § 1362(12)(A); emphasis in *Rapanos*).[11]

In faithfully following *Rapanos*'s guidance, the Ninth Circuit did not eliminate the distinction between point source and nonpoint source pollution, as Petitioner asserts. As the Ninth Circuit explained, its case law "distinguishes between point source and nonpoint source pollution based on whether pollutants can be 'traced' or are 'traceable' back to a point source," the same test other circuits and EPA apply. Pet. App. 24 n.3 (citing cases); *see also Earth Sciences*, 599 F.2d at 373; *Upstate Forever*, 887 F.3d at 652; 66 Fed. Reg. at 3,017. Where pollutants can be traced to an identifiable point source, that point source discharge requires an NPDES permit to "achiev[e] and enforc[e] the effluent limitations" established to protect water quality. *Envt'l Prot. Agency*, 426 U.S. at 205. Where pollution "is not traceable to any single discrete source," it is nonpoint source pollution. *League of Wilderness Defenders*, 309 F.3d at 1184; *see also Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1140 n.4 (10th Cir. 2005) (nonpoint source pollution "not traceable to a single, identifiable source or conveyance").

Miccosukee refutes Petitioner's claim the CWA's reference to "ground waters" in provisions discussing

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[11] Petitioner's citations to CWA provisions referencing discharges "into navigable waters" do not compel a different conclusion. Pet. at 27 (citing 33 U.S.C. §§ 1342(b), 1362(11)). Like section 1362(12)(A), none of these provisions specifies that point sources must discharge *directly* into navigable waters to trigger NPDES permitting.

nonpoint source pollution means that all discharges involving groundwater are necessarily nonpoint.[12] The Court rejected an identical argument that CWA section 1314(f)(2)(F), which identifies various sources of nonpoint pollution, including pollution resulting from changes in the flow of "'ground waters,'" establishes Congress' intent that "such pollution . . . would be addressed through local nonpoint source pollution programs." 541 U.S. at 106 (quoting 33 U.S.C. § 1314(f)(2)(F)). The Court held instead that "§ 1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition." *Id.* Here, the LWRF injection wells are indisputably point sources that discharge pollutants indirectly into navigable waters, and, thus, the Ninth Circuit correctly concluded they "fall within the 'point source' definition."

Congress determined that, to achieve its goal to protect our nation's waters, it is vital to impose "direct restrictions" on all point sources of pollution through NPDES permitting. *Envt'l Prot. Agency*, 426 U.S. at 204. That other laws may also regulate discharges to groundwater does not justify "ignoring the [CWA's] express and unambiguous directive." *Hudson River Fishermen's Ass'n v. City of New York*, 751 F. Supp. 1088, 1100 (S.D.N.Y. 1990) (discussing Safe Drinking Water

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[12] Petitioner fails to explain why the CWA's provisions concerning monitoring of "navigable waters and ground waters" have any bearing on whether discharges to navigable waters via groundwater require NPDES permits. 33 U.S.C. § 1252(a); *see also* Pet. at 27 (citing 33 U.S.C. §§ 1252(a), 1254(a)(5), 1256(e)(1)).

Act (SDWA)); *see also* 67 Fed. Reg. 39,584, 39,587 (June 7, 2002) (noting EPA's authority to regulate injection wells under CWA); 16 U.S.C. § 1456(f) (Coastal Zone Management Act does not "in any way affect any [CWA] requirement"); 42 U.S.C. § 6905(a) (CWA controls over Resource Conservation and Recovery Act); 42 U.S.C. § 9652(d) (Comprehensive Environmental Response, Compensation, and Liability Act does not modify CWA "obligations or liabilities").

This case vividly illustrates the critical role NPDES permitting plays in protecting our Nation's waters. For decades, Petitioner received UIC permit coverage for its injection wells under the SDWA, during which time the coral reefs at Kahekili were devastated by the pollutants the UIC permits—which seek to protect drinking water, not the marine environment—allow. Moreover, while Hawai'i's Nonpoint Source Management Plan lists West Maui among its priority watersheds, the plan lacks any meaningful, enforceable measures to protect Kahekili's reefs. *See* HDOH, Hawai'i's Nonpoint Source Management Plan (2015-2020).[13] These other programs are no substitute for the protections an NPDES permit would ensure.

Contrary to Petitioner's claims, this case does not present concerns of upsetting "the federal-state balance." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) ("*SWANCC*"). Unlike *SWANCC*, where the Court

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[13] http://health.hawaii.gov/cwb/files/2013/05/2015-Hawaii-NPS-Management-Plan.pdf (last visited Oct. 15, 2018).

concluded the Army Corps' interpretation of CWA jurisdiction read key language "out of the statute," the Ninth Circuit's decision is firmly rooted in the CWA's plain language, which broadly defines point source pollution. *Id.* at 172. Moreover, as this Court noted in *Envt'l Prot. Agency*, the CWA provision authorizing a State to "issue NPDES permits for discharges into navigable waters within its jurisdiction" furthers Congress' "policy 'to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.' " 426 U.S. at 207-08 (quoting 33 U.S.C. § 1251(b)); *see also* 33 U.S.C. § 1342(b). Because Hawai'i has an approved NPDES permit program, the Ninth Circuit's decision in no way supplants the state's primary authority over the LWRF's discharges. *See* 39 Fed. Reg. 43,759 (Dec. 18, 1974).

Petitioner's musings about the supposed difficulties of crafting NPDES permits for point source discharges that reach navigable waters via groundwater, Pet. at 30-31, ignore the fact that EPA and delegated states have, for decades, exercised their CWA authority to do just that. EPA, Clean Water Rule Response to Comments—Topic 10: Legal Analysis, at 386 & n.742 (June 30, 2015);[14] *see, e.g.*, EPA Region 6, NPDES Permit No. NMG010000, pt. III, at 3-4 (July 14, 2016)[15] (prohibiting pollutant discharges "to surface waters of

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[14] https://www.epa.gov/sites/production/files/2015-06/documents/cwr_response_to_comments_10_legal.pdf (last visited Oct. 15, 2018).

[15] https://www.env.nm.gov/wp-content/uploads/2017/07/NMG010000-CAFO-NM-20160901.pdf (last visited Oct. 15, 2018).

the United States through groundwater" from retention or control structures at concentrated animal feeding operations (CAFOs)); Colo. Dep't of Pub. Health and Env't, Fact Sheet for CDPS Permit No. CO-0041351 at 2-6 (Jan. 26, 2012)[16] (regulating discharges via groundwater to river from unlined waste ponds at sugar beet processing plant). EPA has specifically issued permits for wastewater treatment facilities like the LWRF that discharge to navigable waters via groundwater. *See, e.g.*, EPA Region 10, NPDES Permit No. WA0023434 (June 4, 2015)[17] (permit for discharge from Taholah wastewater facility's rapid infiltration basins through groundwater to river); EPA Region 10, NPDES Permit No. WA0023434 Fact Sheet at 8 (Apr. 21, 2015)[18] (prior permit for Taholah facility issued in 2000); EPA Region 5, NPDES Permit No. WI-0073059-2 (Sept. 22, 2016)[19] (permit for discharge from Neopit wastewater facility's seepage cells through groundwater to creek); EPA, Clean Water Rule Response to Comments—Topic 10: Legal Analysis, at 386 (prior permit for Neopit facility issued in 2011). Petitioner's assertion that over 90% of the LWRF's flow enters the ocean

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[16] https://environmentalrecords.colorado.gov/HPRMWebDrawer/Record/237726/File/Document (last visited Oct. 15, 2018).

[17] https://www.epa.gov/sites/production/files/2017-09/documents/r10-npdes-taholah-wa0023434-final-permit-2015.pdf (last visited Oct. 15, 2018).

[18] https://www.epa.gov/sites/production/files/2017-09/documents/r10-npdes-taholah-wa0023434-fact-sheet-2015.pdf (last visited Oct. 15, 2018).

[19] https://www.epa.gov/sites/production/files/2017-02/documents/wi0073059fnlprmt09_22_2016_0.pdf (last visited Oct. 15, 2018).

at "unknown" points of entry—allegedly complicating NPDES permitting—has no basis in the record. Pet. at 31. The tracer dye study conclusively established that over half of the LWRF wastewater—millions of gallons of pollutants per day—discharges into the ocean from two small submarine spring areas off Kahekili Beach, and HDOH monitored those springs for years, documenting pollutant exceedances. Pet. App. 7-10, 34-35, 67; *see also* Pet. App. 24 (evidence "conclusively establish[es] that pollutants discharged from all four wells emerged at discrete points in the Pacific Ocean"); SER 126-142.

IV. THE NINTH CIRCUIT'S DECISION DOES NOT EXPAND THE CWA'S REGULATORY REGIME

This case bears no resemblance to *Util. Air Regulatory Grp. v. Envtl. Prot. Agency*, 134 S. Ct. 2427 (2014) ("*UARG*"). In that case, "EPA itself . . . repeatedly acknowledged that applying the PSD and Title V permitting requirements to greenhouse gases would be inconsistent with—in fact, would overthrow—the [Clean Air] Act's structure and design." *Id.* at 2442. EPA did not promulgate the challenged regulations because it deemed them consistent with Congress' intent, but, rather, because it had reached the unusual conclusion that the statute's language compelled a reading at odds with that intent. *Id.* at 2437. Thus, in *UARG*, this Court "confront[ed] *a singular situation*: an agency laying claim to extravagant statutory power over the national economy while at the same time strenuously

asserting that the authority claimed would render the statute 'unrecognizable to the Congress that designed' it." *Id.* at 2444 (citation omitted; emphasis added).

Here, in contrast, EPA "has a *longstanding and consistent interpretation* that the Clean Water Act may cover discharges of pollutants from point sources to surface water that occur via ground water." EPA, Clean Water Rule Response to Comments—Topic 10: Legal Analysis, at 383, 386, 387, 390 (emphasis added).[20] For nearly three decades, EPA has consistently taken this position because regulating discharges via groundwater is necessary to carry out the statutory "purpose of protecting surface waters and their uses." 56 Fed. Reg. at 64,892; *see also* 62 Fed. Reg. 20,177, 20,178 (Apr. 25, 1997); 63 Fed. Reg. 7,858, 7,878 (Feb. 17, 1998); 66 Fed. Reg. at 3,015-18.[21] Unlike *UARG*, where EPA deemed its regulations in conflict with congressional intent, here, EPA concluded that, given "Congress' broad concern for the integrity of the Nation's waters,"

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[20] EPA does not assert authority to regulate all groundwater. Rather, "for the purpose of protecting surface waters and their uses," EPA concludes it "may exercise authorities that may affect underground waters." 56 Fed. Reg. at 64,892.

[21] Because "[p]ollutant discharges from CAFOs to surface water via a groundwater pathway are highly dependent on site-specific variables," EPA did not include "national requirements" addressing such discharges in its final CAFO rule. 68 Fed. Reg. 7,176, 7,216 (Feb. 12, 2003). That did not reflect a change in EPA's position. EPA affirmed its authority to "impose [NPDES] permit terms and conditions" to "control [CAFO] discharges to ground water with a direct hydrologic connection to surface water . . . on a case-by-case basis," an authority EPA exercises. *Id.* at 7,229; *see, e.g.*, NPDES Permit No. NMG010000.

interpreting the CWA to "exclude[] regulation of point source discharges to the waters of the U.S. which occur via ground water would . . . be inconsistent with the overall Congressional goals expressed in the statute." 66 Fed. Reg. at 3,015-16.

In *UARG*, the Court emphasized "the 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" 134 S. Ct. at 2441 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). The Ninth Circuit faithfully applied that canon here, grounding its decision in the statutory language and paying heed to Congress' intent to protect the nation's waters. As EPA has correctly noted, in declining to extend the "NPDES program to all ground water," Congress did not "intend[] to create a ground water loophole through which the discharges of pollutants could flow, unregulated, to surface water." 66 Fed. Reg. at 3,016.

Far from a "novel reading of the CWA," Pet. at 31, the Ninth Circuit's decision is consistent with EPA's longstanding interpretation, as well as with decisions of the overwhelming majority of district courts, which, for decades, have held the CWA regulates point source "discharges into hydrologically connected groundwater which adversely affect surface water." *Idaho Rural Council*, 143 F. Supp. 2d at 1180; *see supra* note 9. Requiring NPDES permits for indirect discharges via groundwater is not a new development. EPA and delegated states have long issued NPDES permits for such discharges, including permits regulating indirect

discharges from wastewater treatment facilities. *See, e.g.*, NPDES Permit No. WA0023434; NPDES Permit No. WI-0073059-2; Fact Sheet for CDPS Permit No. CO-0041351.[22]

Petitioner gives this Court no reason to believe the Ninth Circuit's ruling will increase the number of facilities requiring NPDES permits "by several orders of magnitude." Pet. at 35. The determination whether an indirect discharge "is the functional equivalent of a discharge into the navigable water" is fact-specific, so one cannot simply catalog the number of facilities potentially discharging to groundwater and assume they all need permits. Pet. App. 24; *see also* Ass'n of Cal. Water Agencies Amicus Br. at 16 n.5 (noting "unique geology of Maui"). Moreover, given that EPA, delegated states and the courts have, for decades, interpreted the CWA to require NPDES permits for indirect discharges via groundwater, it is unclear why the number of facilities requiring permits would expand radically now.

Even should the number of facilities requiring permits increase, this Court has noted that the CWA provides for "the States or EPA [to] control regulatory costs by issuing general permits." *Miccosukee*, 541 U.S. at 108. Petitioner notes that 137,455 facilities nationwide operate under NPDES permits (other than tribal permits and stormwater general permits). Pet. 35. Of

[22] There is no inconsistency between promoting green infrastructure projects and also ensuring that discharges from those projects via groundwater do not harm navigable waters.

those, over two-thirds (92,815 facilities) operate under general permits, which "greatly reduce th[e] administrative burden." *Miccosukee*, 541 U.S. at 108 n*; *see* EPA, NPDES Permit Status Reports, FY 2017 Non-Tribal Permits Detailed Percent Current Status.[23]

V. IN CONCLUDING PETITIONER HAD FAIR NOTICE, THE NINTH CIRCUIT APPLIED THE CORRECT LEGAL STANDARD

Petitioner does not claim the Ninth Circuit applied the wrong legal standard in resolving the fair notice issue. While the Ninth Circuit did not specifically cite *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012), neither did Petitioner mention it in its briefs. The court applied the same standard *Fox* articulates, and Petitioner does not claim otherwise. Pet. App. 28-29. Rather, Petitioner argues the Ninth Circuit misapplied a properly stated rule of law and made erroneous factual findings, neither of which, even if correct, would merit this Court's review. *See* Sup. Ct. R. 10.

Petitioner initially challenges the court's conclusion that the CWA's plain language provided adequate notice. Unlike *Fox*, in which the FCC applied a "new policy" prohibiting "fleeting expletives and fleeting nudity" to broadcasts that aired when an earlier policy allowing such material was in place, the CWA's prohibition on unpermitted point source discharges has not changed. 567 U.S. at 249. The Ninth Circuit correctly

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[23] https://www.epa.gov/npdes/npdes-permit-status-reports (last visited Oct. 15, 2018).

concluded the plain language of that prohibition—which has always prohibited unpermitted discharges "*to* navigable waters," not just those "*directly* to navigable waters"—provided fair notice. *Rapanos*, 547 U.S. at 743 (citations omitted).

Petitioner's quibbling with the Ninth Circuit's weighing of evidence related to HDOH's position on the need for an NPDES permit does not warrant this Court's review. The Ninth Circuit understandably privileged HDOH's only official communication—that HDOH had not yet "determin[ed] if an NPDES permit is applicable"—over the informal staff comments Petitioner highlights. Pet. App. 30 (quoting April 2014 HDOH letter). The Ninth Circuit also properly disregarded Petitioner's citations to internal agency emails, which clearly had no bearing on Petitioner's understanding of the CWA's requirements.

In any event, the specific facts of this case render irrelevant Petitioner's fair notice arguments because the modest remedies to which Petitioner stipulated—a $100,000 fine and $2.5 million investment in increased reuse of LWRF wastewater to decrease injection—do not actually attach any penalties to Petitioner's actions prior to the district court's rulings on liability. *See* Pet. App. 124-126 (¶¶ 9-13). As the district court correctly held, "[a]t the very latest, [Petitioner] had fair notice that it was violating the [CWA] once this court issued its first summary judgment order on May 30, 2014," finding Petitioner liable for unpermitted discharges from two LWRF wells. Pet. App. 113. The court's ruling eliminated any possible claim Petitioner lacked notice

of what the CWA required, removing any arguable constitutional impediment to penalties for the ongoing, illegal discharges occurring after the liability decision.

During the period from the first summary judgment order to entry of the parties' stipulated remedy on September 24, 2015, the CWA provided for penalties of up to $37,500 per day for each violation, with "a discharge of pollutants from one well on one day count[ing] as one violation." Pet. App. 118; *see also* 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4, tbl. 1 (2017). Given that each LWRF well discharges on a near-continuous basis, the potential penalties for Petitioner's discharges from only the two wells that were the subjects of the initial liability ruling—over $35 million by the time the remedy stipulation was entered—dwarf by over an order of magnitude the penalty to which Petitioner voluntarily agreed. *See* SER 1-4. The unpermitted daily discharges from the remaining two LWRF wells, which the district court held illegal in its January 23, 2015 order, further add to the potential penalties Petitioner faced for conduct occurring after the district court ruled. Pet. App. 98-99.

To uphold the district court's ruling on fair notice, the Ninth Circuit needed to conclude only that, at some point, Petitioner knew "what was required of [it]," such that assessing a civil penalty for its continuing violations was permissible. *Fox*, 567 U.S. at 253. Petitioner cannot credibly claim to have lacked fair notice that it could be subject to penalties for the hundreds of days

of unpermitted discharges that occurred *after* the district court issued its liability rulings.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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