No. 18-3644

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PRAIRIE RIVERS NETWORK,
Plaintiff-Appellant,

v.

DYNEGY MIDWEST GENERATION, LLC,
Defendant-Appellee

On Appeal from the United States District Court for
the Central District of Illinois (Civ. No. 2:18-cv-02148)
The Honorable Colin S. Bruce

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H Street N.W.
Washington, D.C. 20062
Telephone: (202) 463-5948

David Y. Chung
Amanda Shafer Berman
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
dchung@crowell.com
Telephone: (202) 624-2500
Fax: (202) 628-5116

Counsel for Amicus Curiae *the Chamber of Commerce of the United States of America*

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-3644

Short Caption: Prairie Rivers Network v. Dynegy Midwest Generation, LLC

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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The Chamber of Commerce of the United States of America

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

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Attorney's Signature: s/ David Y. Chung Date: September 8, 2020

Attorney's Printed Name: David Y. Chung

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☐

Address: Crowell & Moring LLP, 1001 Pennsylvania Ave., N.W. Washington, DC 20004

Phone Number: 202-624-2587 Fax Number: 202-628-5116

E-Mail Address: dchung@crowell.com

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N/A

Attorney's Signature: s/ Michael B. Schon Date: 09/08/2020

Attorney's Printed Name: Michael B. Schon

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: U.S. Chamber Litigation Center, 1615 H Street, N.W., Washington, DC 20062

Phone Number: 202-463-5337 Fax Number: N/A

E-Mail Address: mschon@USChamber.com

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ Amanda Shafer Berman Date: September 8, 2020

Attorney's Printed Name: Amanda Shafer Berman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☐

Address: Crowell & Moring LLP, 1001 Pennsylvania Ave., N.W. Washington, DC 20004

Phone Number: 202-688-3451 Fax Number: 202-628-5116

E-Mail Address: aberman@crowell.com

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America ("Chamber") is a non-profit corporation organized under the laws of the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every economic sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.[1]

Some of the Chamber's members own and operate power plants and other facilities that generate, transmit, and distribute electricity, and all of its members benefit from such activities. Some electricity generators use surface impoundments for the disposal of coal combustion residuals ("CCR" or "coal ash") and other solid wastes at coal-fired electricity generation plants. Groundwater discharges from those impoundments are subject to extensive state and federal

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

permitting requirements, including under the Resource Conservation and Recovery Act ("RCRA"). Discharges from coal ash impoundments to groundwater have not historically been subject to the Clean Water Act's ("CWA") National Pollutant Discharge Elimination System ("NPDES") regardless of whether they may eventually reach navigable waters.

The Chamber is concerned that the CWA's NPDES program is ill-suited to address discharges from coal ash impoundments, and other discharges that might be viewed as similar. The Chamber is also concerned that applying that program would not only result in the imposition of additional regulatory burdens for the Chamber's members. The application of CWA permit requirements, which are a fundamental misfit for discharges to groundwater from these and similar facilities, also threatens to undermine or displace state groundwater programs and RCRA regulations that extensively—and more comprehensively—regulate such discharges.

SUMMARY OF ARGUMENT

In *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020), the Supreme Court articulated a new test for determining whether a discharge from a point source to groundwater that ultimately

reaches navigable waters is subject to CWA permitting requirements: the "functional equivalen[ce]" test. But the Court also made clear that NPDES permitting for groundwater discharges would *not* be required in many cases. This is one of those cases.

The district court's dismissal of Plaintiff-Appellant Prairie River Network's ("PRN") CWA claims can and should be upheld not despite—but indeed because of—the Supreme Court's decision in *County of Maui*. The State of Illinois extensively regulates discharges to groundwater such as those at issue. Applying CWA NPDES permit requirements would therefore "undermin[e] state regulation of groundwater" contrary to Congress's intent. *Id.* at 1477. Indeed, the factual allegations the court below cited as supporting its decision make it quite clear that, under *County of Maui*, discharges from the Vermilion coal ash impoundments are not "roughly similar" to direct deposits into the Vermilion River, and therefore cannot be found to be functionally equivalent to direct discharges. *Id.* at 1476.

Furthermore, not only would applying CWA permit requirements to the groundwater discharges at issue here interfere with regulation of such discharges under state law, it would also preclude the application

of federal statutory and regulatory requirements under RCRA. Those requirements are specifically tailored to address—and a far better fit for—discharges to groundwater from coal ash impoundments that may reach surface waters. A decision to that end would thus likely result in poorer control of those discharges.

Requiring a CWA permit for the discharges at issue here is manifestly not what the Supreme Court intended when it explained in *County of Maui* that most discharges to groundwater would continue to be addressed through regulatory regimes other than the NPDES program. That is precisely the case for the sorts of discharges at issue here. State and other federal regulatory programs specifically designed to address discharges of pollutants to groundwater, including those that may reach surface waters, comprehensively cover discharges from coal ash impoundments.

ARGUMENT

I. *County of Maui* Makes Clear that CWA Permitting Requirements Do Not Apply to the Discharges at Issue.

PRN argues that the decision below must be reversed and remanded to the district court because of the Supreme Court's intervening decision in *County of Maui*. The Chamber respectfully

submits that doing so is unnecessary because *County of Maui* in fact made clear that, while some discharges to groundwater that may reach waters of the United States might be subject to the CWA's permitting requirements, most such discharges will continue to lie outside the scope of the CWA—including discharges like those alleged here.

In *County of Maui*, the Supreme Court addressed "whether the Act requires a permit when pollutants . . . are conveyed to navigable waters by . . . groundwater.'" *See* 140 S. Ct. at 1468 (citation omitted). Reviewing the history and purpose of the CWA, among other things, the Supreme Court *rejected* the Ninth Circuit's holding that the Act's permitting requirement applies so long as pollutants are "fairly traceable" to a point source, even if they must travel long and far through groundwater before reaching navigable waters. The Court also rejected the "proximate cause" test proposed by the citizen group respondents. *Id*. at 1470-71. It explained that "Congress did not intend the point source-permitting requirement to provide EPA with such broad authority," but rather "intended to leave substantial responsibility and autonomy to the States" in dealing with groundwater pollution. *Id.* at 1471. And the Court further explained that the Act's

legislative history "strongly supports our conclusion that the permitting provision does not extend so far," given that Congress considered—but rejected—proposals to explicitly grant EPA authority over groundwater. *Id*. at 1471-72.

The Court instead held that the Act requires an NPDES permit only "when there is [either] a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*." 140 S. Ct. at 1476 (emphasis in original). In an attempt to elucidate what it meant by "functional equivalent," the Court stated:

> [A]n addition falls within the statutory requirement that it be 'from any point source' when a point source *directly deposits pollutants into navigable waters*, or when the discharge reaches the same result *through roughly similar means*.

Id. (emphasis added). Thus, a discharge must be "roughly similar" to a "direct deposit" into navigable waters for NPDES permitting requirements to apply. *Id*.

The Supreme Court explained that this "middle ground" approach "best captures, in broad terms, those circumstances in which Congress intended to require a federal permit." 140 S. Ct. at 1476. The Court's intent was to plug an "obvious loophole" that could allow a discharger to evade CWA permitting requirements by "simply mov[ing] the pipe back,

perhaps only a few yards, so that the pollution must travel through at least some groundwater" before reaching navigable waters. *Id.* at 1473. At the same time, the Court sought to preserve the application of other regulatory programs that best address most groundwater discharges, seeking for example to "preserve state regulation of groundwater and other nonpoint sources of pollution." *Id.* at 1476. The Court explained: "The object in a given scenario will be to advance, in a manner consistent with the statute's language, the statutory purposes that Congress sought to achieve." *Id.*

In light of the Supreme Court's explanation of what it meant by "functional equivalent" in *County of Maui* and the limitations it imposed on that test, the CWA cannot be construed to require a federal NPDES discharge permit for the coal ash discharges at issue. Accordingly, the decision below should be affirmed.

That result follows, first, from the Court's admonition in *County of Maui* that, to ensure consistency with Congress's clear intent, its decision should not be applied to "undermin[e] state regulation of groundwater," but instead to "preserve state regulation of groundwater and other nonpoint sources of pollution." *Id.* at 1476-77. The Court's

intent to preserve state regulation was clear: it accompanied the Court's announcement of the "functional equivalent" test for groundwater discharges. Applying NPDES requirements to the discharges at issue here *would* undermine state regulation of groundwater and discharges to groundwater.

As Defendant-Appellee Dynegy has explained at length, Illinois extensively regulates and actively remediates discharges to groundwater, including from coal ash impoundments. *See* Dynegy Br. at 17-21. Were a court to superimpose NPDES regulation of discharges from the Vermilion impoundment upon the State's regulatory program, that would seriously interfere with Illinois' authority to regulate groundwater according to specified standards and strip the State of its ability to determine how best to protect its waters. *See id*. It would also give EPA "broad authority" that "Congress did not intend the point source-permitting requirement to provide," preferring instead "to leave substantial responsibility and autonomy to the States" in dealing with groundwater pollution. *County of Maui*, 140 S. Ct. at 1471.

Certain of the allegations on which the court below relied in dismissing this case confirm that the discharges at issue here lie well

beyond those that the Supreme Court indicated might be subject to CWA permitting requirements in *County of Maui*. The district court relied on Appellant's allegations that discharges from the Vermilion impoundments enter the river "from numerous, discrete, unpermitted seeps on the riverbank[,]" and after "groundwater flows laterally through the ash, picking up contaminants in the process, while precipitation leaching down through the top of the coal ash mixes with the groundwater and further adds to the pollutant load contained within the discharge[.]" *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 350 F. Supp. 3d 697, 701 (C.D. Ill. 2018). Appellant repeated those assertions in its brief here. *See* Pl.-App. Br. at 4 & 8 (pollutants discharged from the Vermilion impoundments enter the Vermilion River through "numerous, discrete . . . seeps" along the riverbank, "pick[] up contaminants in the process, and mix[] with precipitation" on the way).

Discharges that do not flow directly to the river but rather "seep" into it at "numerous" points, and that mix extensively with other contaminants from other sources along the way, cannot possibly be considered "roughly similar" to a "direct[] deposit[] [of] pollutants into

navigable waters[.]" *County of Maui*, 140 S. Ct. at 1476. Thus, the district court's dismissal of PRN's claims squares with the Supreme Court's goal of preserving state regulation of groundwater consistent with the statute. This Court should affirm that dismissal.

While the district court may have reached its decision based on pre- *Maui* decisions, this Court need not conclude that (or even consider whether) those precedents still stand. Rather, when applied to PRN's own allegations, which the district court assumed to be true when dismissing, *County of Maui* itself makes clear that the discharges at issue here are not the "functional equivalent" of direct discharges.

II. Applying CWA Permitting Requirements Here Would Displace the Federal Regulatory Scheme Best Suited to Address the Discharges at Issue.

Application of CWA NPDES permitting requirements to discharges from coal ash impoundments would displace a comprehensive and protective federal regulatory program that is best suited to address discharges from those unique sources: RCRA. It was under RCRA that EPA specifically developed technical regulatory standards and procedures for identifying groundwater impacts, assessing the severity of groundwater impacts, and implementing

remedial approaches to address impacted groundwater. *See generally* Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities ("CCR" Rule"), 80 Fed. Reg. 21,302 (Apr. 17, 2015) (final rule governing the disposal of coal ash in surface impoundments and landfills).

RCRA is a "comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996). Unlike the CWA, RCRA defines the "disposal" of a pollutant as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any . . . water so that [] waste . . . may enter the environment or be . . . discharged into any waters, *including ground waters*." 42 U.S.C. § 6903(3) (emphasis added). EPA has therefore adopted a RCRA program specifically to address the "[m]igration of [c]ontaminated groundwater" into surface waters. *See* U.S. EPA, *Memorandum, Interim-Final Guidance for RCRA Corrective Action Environmental Indicators*, at 1 (Feb. 5, 1999), *available at* https://archive.epa.gov/epawaste/hazard/web/pdf/ei_memo.pdf (last visited Sept. 8, 2020). Under this program, the Agency has successfully

controlled the migration of pollutants through groundwater at over 3,100 facilities. *See* U.S. EPA, *Baselines for Resource Conservation and Recovery Act (RCRA) Corrective Action Sites*, *available at* https://www.epa.gov/hw/baselines-resource-conservation-and-recovery-act-rcra-corrective-action-sites (last visited Sept. 8, 2020).

Critically, RCRA defines the "solid waste" within its purview to *exclude* "industrial discharges which are point sources subject to permits under [the NPDES program]." 42 U.S.C. § 6903(27). Thus, if discharges from coal ash impoundments that traverse groundwater and enter navigable waters are subject to NPDES permit requirements under the CWA, they cannot be regulated under RCRA. Indeed, numerous courts have interpreted the statutory exclusion from RCRA regulation, often referred to as the "industrial wastewater" exclusion,[2] to preclude simultaneous regulation of point source discharges under RCRA and the CWA. *E.g., Coldani v. Hamm*, No. Civ. S-07-660, 2007 WL 2345016, at *10 (E.D. Cal. Aug. 16, 2007) (dismissing RCRA claim after concluding that groundwater discharges were subject to the

[2] *See* 45 Fed. Reg. 33,084, 33,098 (May 19, 1980).

NPDES program); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1328-29 (S.D. Iowa 1997) (same).

PRN points to another, more general provision of RCRA which provides that its requirements do not apply to any "activity or substance which is subject to the [CWA]" or certain other environmental statutes—unless applying RCRA's requirements is "not inconsistent" with the requirements of those acts. Pl.-App. Br. at 27 (quoting 42 U.S.C. § 6905(a)). PRN describes this as an "anti-duplication provision that addresses the potential for overlapping regulation by the Clean Water Act," and then suggests that there would be no "conflict" in applying both RCRA and CWA requirements to coal ash impoundments. *Id.* at 27-28. But that misses the critical point that there is no potential for duplicative or conflicting regulation of coal ash impoundments under RCRA and the CWA because of how RCRA defines "solid waste." That is, if discharges from coal ash impoundments require NPDES permits, then they are—by definition—not "solid waste" subject to RCRA requirements. 42 U.S.C. § 6903.

PRN also points to EPA regulations and cases stating that both RCRA and the CWA can apply *to a source*. *See* Pl.-App. Br. at 29. But

while a source *as a whole* may be subject to both RCRA and CWA regulations, its discharges to navigable waters are carved out from RCRA regulations. *See, e.g.*, 40 C.F.R. § 261.4(a)(2) cmt (RCRA excludes "only . . . the actual point source discharge" subject to CWA permitting, while "industrial wastewaters while they are being collected, stored or treated before discharge" and "sludges that are generated by industrial wastewater treatment" remain subject to RCRA requirements); *Inland Steel Co. v. EPA*, 901 F.2d 1419, 1422 (7th Cir. 1990) (RCRA applies to "disposals that are *not* [CWA] discharges") (emphasis added).

Thus, if this Court accepts PRN's view, pollutant discharges from coal ash storage facilities that reach navigable waters are beyond the purview of RCRA—the very statute that addresses groundwater conditions involving coal ash. *See* 42 U.S.C. § 6903(27). This would almost certainly result in poorer control of groundwater conditions from those facilities.

EPA's CCR Rule under RCRA specifically addresses groundwater conditions resulting from the disposal of coal ash in surface impoundments, requiring extensive monitoring and remediation. Those regulations require (inter alia) detection monitoring and sampling for

coal ash constituents in groundwater at least semi-annually (*see* 40 C.F.R. §§ 257.94-95 & Appendix III); assessment monitoring where contaminants are found in groundwater at above background levels (*see* 40 C.F.R. § 257.95(a) & Appendix IV); and corrective action to remediate groundwater until contaminant levels are below certain standards (*id*. §§ 257.96(a) & 257.98(c)).

Where groundwater impacts are detected, the CCR Rule also requires owners and operators of such facilities to implement remedies that attain groundwater protection standards, control releases of coal ash constituents at the source "to the maximum extent feasible," and "[r]emove from the environment as much of the contaminated material that was released from the CCR unit as is feasible, taking into account factors such as avoiding inappropriate disturbance of sensitive ecosystems[.]" 40 C.F.R. § 257.97(b). EPA prescribed a long list of factors that must be carefully considered when selecting the appropriate remedy for groundwater conditions from CCR units, and required that owners and operators of such facilities specify a reasonable schedule for implementing and completing remedial activities based on considerations including the extent and nature of the

contamination, the potential risks to human health and the environment, and the "hydrogeologic characteristic" of the surrounding area. 40 C.F.R. §§ 257.97(c)-(d). All of these regulatory requirements—written specifically to address discharges of coal ash contaminants to groundwater from CCR units—would be rendered inapplicable if the CWA's NPDES permitting scheme applies instead.

Put simply, the CCR Rule was carefully designed to address potential adverse effects on human health and the environment from the disposal of coal combustion residuals, including as a result of discharges from surface impoundments that affect both groundwater and surface water. 80 Fed. Reg. at 21,303-05. In addition to establishing some of the groundwater monitoring and corrective action requirements discussed above, that Rule also requires unlined CCR impoundments discharging to groundwater in excess of groundwater protection standards to retrofit or close. *Id.* at 21,304-05. The rule was thus specifically designed to identify, control, and (where necessary due to

the exceedance of groundwater standards) eliminate the specific type of discharges from the specific type of facility at issue here.[3]

In contrast to these RCRA regulatory requirements specifically tailored to address discharges from CCR units and impoundments, NPDES requirements are broadly aimed at "end-of-pipe" discharges into navigable waters from a wide variety of sources. *See* U.S. EPA, *Supplemental Module: NPDES Permit Program*, *available at* https://www.epa.gov/wqs-tech/supplemental-module-npdes-permit-program (last visited Sept. 8, 2020); *see also* 40 C.F.R. § 122.45 (requiring that effluent limitations and standards be established "for each outfall or discharge point of the permitted facility"). Thus, as a practical matter, the NPDES program would be a poor fit to control diffuse discharges of coal ash contaminants through groundwater.

[3] Certain aspects of the CCR rule were vacated, and others remanded, in *Utility Solid Waste Activities Group v. EPA*, 901 F.3d 414 (D.C. Cir. 2018). But the Court generally affirmed EPA's regulation of discharges from CCR impoundments under RCRA; indeed, it held that the Rule was *too narrow* in certain respects, including in regard to the impoundments to which it applies and what it requires of them. *See id.* at 427-34. Thus, like EPA, the D.C. Circuit views RCRA as applicable to discharges of the type alleged here, which could not be the case were PRN correct that the CWA's NPDES permitting requirement applies—thereby triggering the industrial wastewater exclusion.

To illustrate, NPDES permits must include technology-based effluent limitations and, if necessary, effluent limitations necessary to ensure that a permitted discharge does not cause or contribute to the violation of an applicable water quality standard of the receiving navigable water, *i.e.*, water quality-based effluent limitations. *See* 40 C.F.R. § 122.44. CWA water quality standards consist of designated uses (*e.g.*, primary contact recreation, propagation of aquatic life) for navigable waters and water quality criteria necessary to achieve those uses. *See* 33 U.S.C. §§ 1313, 1314; 40 C.F.R. § 122.44(a), (d). Because CWA water quality standards are developed for *navigable* waters, they are not designed to protect groundwater. As such, water quality-based effluent limitations in NPDES permits may be *less stringent* than the RCRA regulatory protections that they would displace if PRN were to ultimately prevail in this litigation.

Additionally, if NPDES requirements apply, it would be difficult to determine appropriate effluent limitations for Dynegy's facilities given that—as PRN admits—groundwater carrying discharges from those facilities picks up pollutants from other sources as it travels. Pl.-App. Br. at 4 ("[G]roundwater flows through the coal ash in the pits,

picking up contaminants in the process, and mixes with precipitation draining down through the top of the coal ash before discharging coal ash pollutants into the adjacent Middle Fork [of the Vermilion River].”). When and to what extent other pollutants mix in would be well beyond the permitted facility’s control, but the permittee could nevertheless be held liable for exceeding the effluent limitations in its permit.

Apart from the practical challenges permit writers would face in calculating appropriate effluent limitations if NPDES requirements apply to discharges through groundwater, permit writers would likewise struggle to determine the precise effluent measurement and monitoring requirements that permittees must comply with. *See generally* U.S. EPA, *NPDES Permit Writers’ Manual,* EPA-833-K-10-001 (Sept. 2010), *available at* https://www.epa.gov/npdes/npdes-permit-writers-manual (last visited Sept. 8, 2020). Requirements such as having to measure the “mass . . . specified for each pollutant limited in the permit” and the “volume of effluent discharged from each outfall” are infeasible or perhaps impossible for permittees to satisfy in the context of discharges that migrate through groundwater before reaching navigable waters, as compared to discharges from the end of a pipe into

navigable waters. *See* 40 C.F.R. § 122.44(i); *see also NPDES Permit Writer's Manual* § 8.1.2 (providing guidance to permit writers for selecting monitoring locations). Consequently, the sampling and monitoring framework that permit writers are accustomed to does not fit the sorts of discharges at issue here.

For these reasons, the potential perverse result of applying NPDES requirements intended for discrete discharges directly into navigable waters to indirect and diffuse discharges to groundwater from coal ash facilities—instead of RCRA requirements tailored to control exactly those types of discharges in the CCR Rule—would be poorer control of groundwater conditions from those facilities, and potentially more pollution of navigable waters.

CONCLUSION

Because (i) diffuse discharges from coal ash impoundments to groundwater that reach navigable waters only after mixing with many other pollutants are not the type of discharges that the Supreme Court indicated might possibly be subject to NPDES permitting in *County of Maui* and (ii) imposing NPDES requirements on such discharges would

exclude them from coverage under RCRA and the CCR Rule, this Court should affirm the district court's dismissal of PRN's claims.

September 8, 2020

Respectfully submitted,

/s/ David Y. Chung

Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H Street N.W.
Washington, D.C. 20062
Telephone: (202) 463-5948

David Y. Chung
Amanda Shafer Berman
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
dchung@crowell.com
Telephone: (202) 624-2500
Fax: (202) 628-5116

Counsel for Amicus Curiae *the Chamber of Commerce of the United States of America*

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. Rule 29(a)(5) and 7th Cir. R. 32(c) because it contains 3,752 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in Century Schoolbook 14-point font using Microsoft Word 2010.

September 8, 2020

/s/ David Y. Chung
David Y. Chung

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I hereby certify that on September 8, 2020, the foregoing was filed with the Clerk of the United States Court of Appeals for the Seventh Circuit by using the Court's CM/ECF system, which sends a notice of filing to all registered CM/ECF users.

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