No. 18-260

IN THE

Supreme Court of the United States

COUNTY OF MAUI,

Petitioner,

v.

HAWAI'I WILDLIFE FUND, *et al.*,

Respondents.

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

BRIEF OF TROUT UNLIMITED AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF TROUT UNLIMITED AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*[1]

Trout Unlimited ("TU") is the country's largest coldwater fishing conservation organization, representing 300,000 members and supporters nationwide. Founded in 1959, TU is dedicated to protecting and restoring North America's coldwater fisheries and their watersheds. TU's members are primarily trout and salmon anglers with an abiding interest in and commitment to the health and quality of the nation's coldwater watersheds and habitats, including rivers, streams, and lakes.

TU and its members have a significant interest in the proper interpretation of the Clean Water Act ("CWA" or the "Act"), including the robust operation of its National Pollutant Discharge Elimination System ("NPDES"). TU devotes significant resources to monitoring and restoring downstream waters that have been damaged by upstream pollution sources. Whether working with farmers to restore headwater streams in West Virginia, removing acidic pollution caused by abandoned mines in Pennsylvania, or protecting the world-famous salmon-producing, 14,000-jobs-sustaining watershed of Bristol Bay, Alaska, TU relies on the CWA's protections to

[1] No counsel for a party authored this brief, in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to this brief's preparation or submission. Petitioner and Respondents have consented to the filing.

safeguard its water quality investments and improvements. And TU's members depend on healthy downstream fishing waters to drive the $50 billion recreational fishing industry in the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

The CWA was designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act seeks to achieve water quality that "provides for the protection and propagation of fish, shellfish, and wildlife," and "for recreation in and on the water." *Id.* § 1251(a)(2). Few, if any, other federal statutes explicitly place the interests of recreational anglers at their core.

To achieve these goals, the Act categorically prohibits the "discharge of any pollutant by any person," *id.* § 1311(a), and broadly defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12)(A). A party is exempt from the prohibition on point-source pollution *only* if it first obtains an NPDES permit. *Id.* §§ 1311(a), 1342(a)(1).

The court of appeals correctly held that unpermitted discharges of treated sewage from Petitioner's wastewater treatment facility injection wells to the Pacific Ocean were unlawful under the CWA. Petitioner does not dispute that its wells constitute a "point source," or that the Pacific Ocean qualifies as "navigable waters" under the statute. Petitioner also does not dispute that treated sewage from all four of its injection wells entered the Pacific Ocean, and that it lacked a permit for those discharges.

Petitioner's sole basis for challenging the decision below is that its wells did not *directly* discharge the sewage into the ocean, but instead discharged it through groundwater to the ocean. Petitioner argues that otherwise-unlawful discharges cannot be regulated under the CWA as point-source pollution unless the pollutants are conveyed *directly* from a point source (or series of point sources) into the navigable waters. Because its treated sewage flowed through groundwater before reaching the ocean, Petitioner contends that its wells did not discharge directly to the navigable waters and are therefore outside the scope of the Act's permitting scheme.

1. Petitioner's proposed interpretation of the statute is contrary to the plain text of the CWA. The Act broadly regulates "any addition"—from any point source—of a regulated pollutant. *Id.* § 1362(12)(A). The Court should apply the ordinary meanings of the words "to" and "from" in the statute rather than adopting Petitioner's contorted constructions, and it should reject Petitioner's request to read the word "directly" into the statute where no such requirement appears. Moreover, Petitioner badly misconstrues the word "conveyance" in the Act's "point source" definition; contrary to Petitioner's claim, that word does *not* mandate adopting a means-of-delivery test.

Petitioner's proposed interpretation is also inconsistent with the structure and purpose of the Act. Although the Act does envision complementary regulatory schemes, it creates a dichotomy between regulation of point sources, on the one hand, and regulation of nonpoint sources, on the other. It does *not*, as Petitioner would have it, distinguish between regulation of point sources that directly pollute

navigable waters and those that do so indirectly. Moreover, placing Petitioner's pollution outside the scope of the statute would severely undermine the purpose and structure of the statute.

2. Adopting Petitioner's proposed interpretation would remove important, longstanding protections and cause negative consequences for downstream waters and coldwater fisheries. The ripple effect of such damage would harm the nation's multi-billion-dollar recreational fishing industry and the local economies that it supports.

3. By contrast, the harms that Petitioner and its *amici* posit would flow from the Court's adoption of Respondents' interpretation of the statute are speculative and unrealistic. Respondents' proposed reading of the statute is consistent with EPA's past guidance and decades of implementation of the NPDES permitting system. Yet Petitioner's alleged harms have not been realized, and the Act's other limiting principles demonstrate that they are unlikely ever to materialize.

ARGUMENT

I. RESPONDENTS' PROPOSED INTERPRETATION BEST COMPORTS WITH THE ACT'S TEXT, STRUCTURE, AND PURPOSE

This Court "begin[s], as always, with the language of the statute." *Duncan v. Walker*, 533 U.S. 167, 172 (2001). In this case, the relevant text consists of a prohibition, a permitting scheme to negate that prohibition in appropriate situations, and a definition. The prohibition is against "*discharge* of any pollutant by any person." 33 U.S.C. § 1311(a) (emphasis added). The permitting scheme is the NPDES. And the definition is that "discharge of a pollutant" means "*any* addition of any pollutant *to* navigable waters *from any* point source," *id.* § 1362(12)(A) (emphasis added).

"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *see also, e.g.*, *Loughrin v. United States*, 573 U.S. 351, 360 (2014). The Court's "job is to interpret the words [in a statute] consistent with their 'ordinary meaning . . . at the time Congress enacted the statute.'" *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)); *see also Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) ("In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself.").

Interpreting a few ordinary words to have their ordinary meaning suffices to resolve this case. Reading "the words of a statute . . . in their context and with a view to their place in the overall statutory scheme," *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070

(2016) (internal quotation marks omitted), only reinforces the conclusion evident from the words "any," "from," and "to." And the "history[] and purpose" of the relevant provisions, *Barber v. Thomas*, 560 U.S. 474, 488 (2010), provide more confirmation still.

Each consideration relevant in statutory interpretation points toward the same conclusion: The CWA forbids point sources from discharging, without a permit, pollutants that pass through groundwater into the navigable waters. Hook, line, and sinker: Respondents' proposed interpretation is clearly the correct one.

A. Respondents' Proposed Reading Is Supported By The Act's Plain Text

At its core, the CWA bans the discharge of harmful pollutants into the navigable waters of the United States without a permit. With limited exception, the Act renders "the discharge of any pollutant by any person . . . unlawful." 33 U.S.C. § 1311(a). The statute broadly defines the discharge of a pollutant to include "*any* addition of *any* pollutant to navigable waters from *any* point source." *Id.* § 1362(12)(A) (emphasis added). The Act in turn defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id.* § 1362(14).

The question for the Court is straightforward: For an NPDES permit to be required, must the point source convey the harmful pollutant *directly* into the navigable waters, as Petitioner contends, or does a point source "discharge" a pollutant within the meaning of the statute when it emits the pollutant and the pollutant then travels through groundwater into the navigable waters, as Respondents advocate?

To resolve that question, the Court need not look beyond the plain text of the statute. Congress chose to define "discharge of a pollutant" expansively and without specifying *how* the addition of the pollutant to the navigable waters must occur. *See* 33 U.S.C. § 1362(12)(A) (referring to "*any* addition of any pollutant") (emphasis added); *see also Rapanos v. United States*, 547 U.S. 715, 723 (2006) (plurality op.) (Scalia, J.) ("discharge of a pollutant" is "defined broadly" in the Act). As this Court has observed, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)); *accord* Webster's Ninth New Collegiate Dictionary 93 (1989). This Court has repeatedly recognized the word's expansive scope. *See, e.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220 (2008) ("any" in conjunction with "law enforcement officer" was "most naturally read to mean law enforcement officers of whatever kind"). "In ordinary language, replacing 'the Xs' with 'any X' will often make the term 'X' go from covering only paradigm instances of X to covering all cases." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1757 (2019) (Alito, J., dissenting).

Here, "any" modifies the word "addition," which itself is an inherently broad term, commonly understood to mean "the act or process of adding."

Webster's Ninth New Collegiate Dictionary 55. Congress could have chosen to regulate only certain conduct that led to a proscribed increase in the level of pollutants in the navigable waters; instead, it chose a word that encompasses all increases by all possible means. Congress's chosen means of keeping the statute from sweeping too expansively is *not* a narrow definition of "discharge" or a narrow prohibition of such discharges. It is instead a broad definition and a broad prohibition, coupled with a permitting program. This form of regulation—as familiar as "no driving without a license" or "no fishing without a permit"—is not to be undermined by engrafting artificial limitations onto the prohibition.

Petitioner focuses on the statute's requirement that the pollutant emanate "from" a point source (Pet. Br. 28-32), yet it ignores the ordinary meaning of that word as well. "From" is "used as a function word to indicate a starting point" or, alternatively, "the source, cause, agent or basis." Webster's Ninth New Collegiate Dictionary 494. Moreover, the word "to"—which Petitioner all but ignores—indicates "movement or an action or condition suggestive of movement toward a place, person, or thing reached" or "addition, attachment, connection, belonging, possession, accompaniment, or response." *Id.* at 1238-39. Taken together and applying their ordinary meanings, these two words require nothing more than some movement of the pollutant *from* a point source *to* navigable waters. Notably absent is any specification as to *how* the pollutant must reach the navigable waters, let alone a requirement that the pollutant move *directly* "from" the point source "to" the navigable waters.

This understanding is confirmed by commonplace illustrations. For example, an individual purchasing shoes from an online retailer, such as Zappos,

ordinarily would characterize the shoes as *from* Zappos, even though UPS may in fact have delivered the shoes *to* his or her home. As another example, a chef may send a special dish *to* a restaurant patron; the diner regards that dish as having come *from* the chef, even though a waiter delivers it to the table. (Indeed, after an especially good meal, diners offer their compliments to the chef, not to the waiter who delivered the dish.) Similarly, no one, upon seeing oil sitting on the surface of a lake, would dream of stating that the oil was *from* the groundwater it flowed through to reach the lake, as opposed to the leaking oil well a quarter-mile away.

Respondents' proposed interpretation is supported by the plain text of the statute and comports with the ordinary meaning of the words chosen by Congress. That Congress chose such expansive phrasing should deter this Court from ascribing atextual limitations to it.

B. Petitioner's Proposed Interpretation Does Not Comport With The CWA's Plain Text

Petitioner and its *amici* misconstrue the plain language of the relevant statutory provisions in at least three significant respects:

First, Petitioner reads the word "directly" into the statute where no such requirement exists. *Cf. Rapanos*, 547 U.S. at 743 (plurality op. of Scalia, J.). This Court has frequently cautioned against adding requirements nowhere found within the plain language of the statute. *See, e.g., Nichols v. United States*, 136 S. Ct. 1113, 1118 (2016) ("declin[ing] the Government's invitation to add an extra clause to [42 U.S.C.] § 16913(a)"); *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 417 (2005) (in construing False Claims Act's

statute of limitations, criticizing dissent for reading the word "suspected" into statute); *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004) ("Petitioner's argument stumbles on still harder ground in the face of another canon of interpretation. His interpretation of the Act—reading the word 'attorney' in § 330(a)(1)(A) to refer to 'debtors' attorneys' in § 330(a)(1)—would have us read an absent word into the statute"). So too here.

Second, Petitioner misconstrues the meaning of the word "conveyance" within the definition of "point source." "[P]oint source" is defined, in relevant part, as "any discernible, confined and discrete *conveyance* . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). Petitioner argues that the point source must be the object that "convey[s]" the pollutant into the navigable waters. Pet. Br. 29-30. But the remainder of this definition—*i.e.*, "*from which* pollutants are or may be discharged"—makes clear that the "conveyance" addressed by that provision is that which moves the pollutant *out of* the point source and into the world. In other words, a pollutant obviously must exit the point source to be regulated under the Act. Petitioner's proposed interpretation fails to read this provision in its proper context. *Cf. Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Furthermore, Petitioner again adds words to the statute that simply are not there. "[P]oint source," according to Petitioner but not Congress, means "any discernible, confined and discrete *conveyance* . . . from which pollutants are or may be discharged *directly into navigable waters*."

The impossibility of Petitioner's interpretation is confirmed by the examples of point sources identified in 33 U.S.C. § 1362(14). One ordinarily would not expect "well[s]," "container[s]," "rolling stock," and "concentrated animal feeding operation[s]" (*id.*) to

deliver pollutants directly to navigable waters, though one can concoct scenarios where they might—perhaps a train car could spring a leak just as it crosses a bridge, or a container placed on land could have an overhanging edge that leaked into a harbor. But the mere need to contrive such farfetched scenarios to prevent those examples from being read out of Section 1362(14) provides additional support for Respondents' reading of the statute.

Finally, Petitioner claims that, "[t]ime and again, the CWA describes a point source discharge—*i.e.*, a 'discharge of pollutants'—as the release of pollutants '*into*' navigable waters by point sources." Pet. Br. 36-37 (emphasis added). But "discharge of pollutants" is a defined term in the statute (33 U.S.C. § 1362(12)(A)), and the definition refers to any addition "*to* navigable waters," not "*into* navigable waters." Therefore, even if the Court agrees with Petitioner that "into" requires a direct entry point (and it should not), it is not the statute that Congress wrote. Again, it speaks volumes that Petitioner feels compelled to change the words of the statute (even if subtly) to make its argument.

C. The Structure And Purpose Of The CWA Support Respondents' Reading

Upstream without a proverbial textual paddle, Petitioner argues that its means-of-delivery test is also consistent with the structure and purpose of the Act. Pet. Br. 34-36, 41-44. It is wrong on both accounts.

1. This Court examines statutory structure when construing an individual provision within a statute, *see, e.g., Wis. Cent.*, 138 S. Ct. at 2074 (referencing "textual and structural clues"). Here, the structure of the CWA also supports Respondents' reading. As Petitioner acknowledges, *e.g.*, Pet. Br. 34-36, the CWA

sets out a clear dichotomy between point-source and nonpoint-source pollution, with point-source pollution being subject to NPDES requirements and nonpoint-source pollution being generally regulated by other federal statutes or by the states. Respondents' reading preserves that dichotomy; traceable discharges that are "from" a point source are subject to NPDES requirements, while those that are so diffuse that they cannot be traced back to a single, discrete source are outside the scope of Section 1362(12)(A).

Accepting Petitioner's interpretation, by contrast, would eliminate this clear structure. Consider, for example, a healthy, popular fishing stream with a self-sustaining population of native brook trout in the wilds of West Virginia, with a mine leaking pollutants 200 feet away. Petitioner's interpretation would have NPDES requirements apply only if the mine owner was foolish enough to dump pollutants directly into the stream. However, if the mine was instead designed to leak those same pollutants first into groundwater, which then flowed into the trout stream, an NPDES permit would not be required. (The trout, of course, would be harmed just the same in either scenario.)

Adopting Petitioner's interpretation would all but guarantee that the concerns expressed by Justice Scalia in the plurality opinion in *Rapanos*—that polluters would be free to discharge pollution through other media (such as groundwater) or into noncovered intermittent waters that lie upstream of covered waters, technically evading the permitting requirement, so long as the discharge was not directly into the covered waters—would come to fruition. *See Rapanos*, 547 U.S. at 742-43. The result that Justice Scalia feared in *Rapanos* and the result of a ruling in

favor of Petitioner in this case would be the same: harmful pollutants discharged from a point source would pollute the nation's navigable waters.

Petitioner's interpretation would eliminate the point-source/nonpoint-source dichotomy that the Act currently envisions—and that Respondents' reading maintains—for a direct-delivery/indirect-addition dichotomy that appears nowhere in the text *or* structure of the CWA.

2. If a statutory provision's meaning is clear based on an examination of its text and structure, "judges must stop," instead of continuing on to analyze legislative purpose and history. *Food Mktg. Inst.*, 139 S. Ct. at 2364; *see also, e.g., NLRB v. Sw. Gen., Inc.*, 137 S. Ct. 929, 941-42 (2017) (the Court "need not consider [] extra-textual evidence" such as purpose if "[t]he text is clear"). Text is purpose made manifest. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2012) ("The difference between textualist interpretation and so-called purposive interpretation is not that the former never considers purpose. It almost always does. . . . [T]he purpose must be derived from the text, *not from extrinsic sources such as legislative history or an assumption about the legal drafter's desires*." (emphasis added)).

Even if this Court does not stop with the plain text, it is clear that Respondents' reading—not Petitioner's—far better advances the Act's twin purposes of eliminating the discharge of harmful pollutants and achieving fishable waters. Congress could not possibly have intended to let polluters avoid permitting simply by, for example, moving their discharge pipe back a mere few feet from the water's edge so that it did not discharge *directly* into the navigable waters. Nor could Congress have intended

to carve out and exclude from the Act's protection the pollution involved in this case, *i.e.*, the discharge from a well—a point source enumerated in the statute—of over 3,000 gallons of regulated sewage per meter of coastline per day. Placing this kind of pollution outside of the scope of the NPDES requirements does not advance the Act's aims of eliminating point-source pollution and providing for the protection and propagation of fish and other wildlife; instead, it severely impairs them.

Congress was not unaware that there might be circumstances in which a discharge is justified. But its chosen means to account for that consideration, again, was to create the NPDES permitting system, not to place limitations on the key prohibition in the Act, phrased in intentionally broad terms. As Justice Scalia once wrote for a unanimous Court in a situation in which there was far more reason to doubt Congress's intentions than there is in this case, "the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

II. ADOPTING PETITIONER'S POSITION WOULD INJURE THE NATION'S STREAMS, RIVERS, AND LAKES

Petitioner and its *amici* suggest that the negative effects of excluding certain point-source pollution from NPDES permitting would be confined to groundwater and groundwater alone. *See, e.g.*, Pet. Br. 41, 44; Brief of *Amici Curiae* Nat'l Conf. of State Legis. *et al.* in Support of Petitioner at 23-24; Brief for *Amici Curiae* Kinder Morgan Energy Partners, L.P. and Plantation Pipe Line Co., Inc. in Support of Petitioner at 6-9. But this very case—in which

pollution migrated through groundwater to the Pacific Ocean—demonstrates that this position does not reflect reality. Indeed, adopting Petitioner's interpretation would directly threaten the health of the nation's fishing waters by giving polluters a clear loophole to avoid NPDES requirements. This would in turn reduce the substantial economic benefits that the nation as a whole reaps from recreational fishing activity.

1. It is commonly said that "We all live downstream." No one understands that better than the estimated 49 million recreational anglers living in the United States. *See* American Sportfishing Association, *Sportfishing in America: An Economic Force for Conservation* (2018 ed.) ("ASA 2018 Report") at 2, http://bit.ly/2G4t7xV (citing Recreational Boating and Fishing Foundation Report (2018)). Recreational fishing is the nation's second most popular outdoor activity after jogging. *Id.* at 3 (citing Outdoor Industry Association's Outdoor Participation Report (2017)). In 2016, recreational fishing generated more than **$49 billion** in retail sales (American Sportfishing Association, *Economic Contributions of Recreational Fishing* (Jan. 2019) ("ASA 2019 Report") at 1, http://bit.ly/2LmgWkj, and contributed **$125 billion** to the national economy, *id.* (citing ASA 2018 Report). From jobs tied directly to fishing—such as boat and gear manufacturers, tackle shops, and guides—to jobs that benefit indirectly from fishing—such as restaurants, shops, and tourist sites—recreational fishing activity aids our nation's economy in a major way.

Of course, all of this economic activity requires that there first be fish present in the water to catch. And that, in turn, requires that the fishing waters be healthy enough to sustain fish and other wildlife. To advance its stated goal to "protect[] and propagat[e]

. . . fish, shellfish, and wildlife" (33 U.S.C. § 1251(a)(2)), the Act must be able to control pollution at its upstream source—before it enters the watershed and flows downstream to pollute major streams, rivers, and bays.

Certain fish populations—including trout—are particularly vulnerable to point-source pollution. Trout fishing accounts for approximately 25% of all angler activity, *see* U.S. Fish & Wildlife Serv., *2011 Nat'l Survey of Fishing, Hunting, & Wildlife-Associated Recreation* (2011) at 12, http://bit.ly/2xLyv4r, and native trout need the coolest, cleanest waters to thrive. Headwaters must be clean, as they serve as the primary spawning and rearing grounds for trout, salmon, and other wild and native fish. But trout need healthy downstream waters as well; as a species, trout are highly sensitive to the warming temperatures and associated habitat degradation caused by downstream pollution. *See, e.g.*, Trout Unlimited Ltr. to EPA and Dep't of the Army re: Comments on the Revised Definition of Waters of the United States (Apr. 15, 2019) at 6, http://bit.ly/32rLo1V.

2. Two case studies demonstrate the importance of the Act's NPDES requirements in preserving the health of downstream fishing waters and sustaining fish and wildlife:

First, the Riverside Sewer and Water District ("RSWD") discharge to the East Gallatin River near Bozeman, Montana, presents a cautionary tale about the harm that can befall fishing waters when harmful pollutants are unlawfully discharged into groundwater that then flows downstream. RSWD operates a wastewater treatment facility that discharges about 20,000 gallons of sewage each day into groundwater, with additional nitrogen and phosphorus passing daily into the East Gallatin River

through that groundwater. *See* Trout Unlimited Ltr. to Bozeman City Commission re: Riverside Sewer and Water Dist. and Restoring the E. Gallatin River (Jan. 25, 2019) ("TU Bozeman Letter") at 1, http://bit.ly/2YS2X92. RSWD's discharge is unpermitted; in Montana, the EPA has delegated authority to the state Department of Environmental Quality ("DEQ") to issue NPDES permits and, to date, RSWD and DEQ have failed to properly apply the Act's requirements.

The East Gallatin River is historically a popular trout fishing stream, home to populations of rainbow and brown trout; fly fishing guides have praised the river's "very large trout." Montana Angler, East Gallatin River, http://bit.ly/2NpdozE. Recently, however, there have been reports of a persistent ammonia smell, high algal growth, and poor water quality in the river. TU Bozeman Letter at 1. During the summer, water quality has become so poor that trout downstream from the RSWD apparently have fled the affected reach. *Id.* TU and others are currently seeking to require that DEQ and RSWD comply with the Act's NPDES requirements in an attempt to eliminate or slow the negative effects of RSWD's harmful pollutant discharges on the fish and wildlife in the river. *See, e.g.*, City Comm'n of Bozeman, Mon., Comm'n Resolution No. 4972, at 1-4 (Jan. 28, 2019), http://bit.ly/2G5apGF.

By contrast, the Questa mine case study illustrates how NPDES regulation of pollution discharged into groundwater can assist in preserving downstream fishing waters. In 2006, the EPA issued an NPDES permit to the Questa mine facility near Taos, New Mexico. That permit regulates treated mill waste discharges into groundwater that subsequently flows into the Red River. *See* EPA Region 6, NPDES Permit No. NM0022306 (issued Oct. 1, 2006) at Part

II.D, http://bit.ly/2YuKmzE (recognizing "permit prohibits the discharge to the Red River of pollutants traceable to point source mine operations except in trace amounts" and requiring facility to "maintain and properly operate seepage interception systems to prevent discharges of process related ground water to the Red River").

The Red River is a designated coldwater fishery and home to a state fish hatchery. EPA Region 6, First Five-Year Review Report for Chevron Questa Mine Superfund Site Taos Cty., N.M. at 4 (June 28, 2017), http://bit.ly/2Loqlry. It is also a source of water for smaller lakes near the mine site, including popular fishing spots. *Id.* Yet constant breakage of the tailing pipeline at the Questa mine from 1966 to 1991 resulted in numerous spills of pollutants into the Red River and its floodplain. *Id.* at 5.

Following NPDES permitting and other EPA oversight, measurable improvements have been observed in the river's water quality and the health of the fish population living there. In fact, one portion of the river is designated by the State of New Mexico as a "Special Trout Water." State of New Mexico, Fishing in New Mexico, http://bit.ly/2LCJ7Lr. Indeed, where the Red River merges with the Rio Grande—downstream from where the groundwater contaminated by the mine would flow into the Red River—New Mexico has created a special "Wild and Scenic Rivers Area"; it has particularly good fishing and stunning views. *Id.*

It is no exaggeration to observe that such relatively unspoiled wilderness can exist—and bring with it all the positive economic effects described above—at least in part because the Questa mine is subject to NPDES permitting. When the Act's NPDES permitting requirements are properly enforced, downstream fishing waters are preserved. On the

other hand, a decision in favor of Petitioner in this case would likely place RSWD's pollution beyond the ambit of the CWA and allow RSWD to continue to destroy the health of the East Gallatin River and the fish that live there. And it would leave private parties like TU without any legal recourse at all.

3. The harm caused by the unregulated discharge of point-source pollution into downstream fishing waters extends beyond fish and wildlife; it also negatively affects every business and community that depends economically on a thriving recreational fishing industry. Again, recreational fishing is a multi-billion-dollar industry; without healthy fish and fishing waters, that industry will suffer, causing jobs to disappear and hurting many local communities that rely on the health of rivers, streams, and lakes.

Moreover, coldwater conservation's benefits are not confined to fishing and fishing-adjacent activities; tourists nationwide take trips to visit lakes and rivers, and thousands of campgrounds, hiking trails, and other types of outdoor recreation depend crucially upon conservation of coldwater streams, ponds, and lakes. Outdoor recreation as a whole has an enormous effect upon the American economy; in 2016, it accounted for 2.2% of the United States' GDP (a similar amount as, for example, the broadcasting and telecommunications industries), and its annual gross output was over $730 billion. Outdoor Recreation Roundtable, The Economic Impact of Outdoor Recreation at 1-2, http://bit.ly/2Xi8XX5. A ruling in favor of Petitioner in this case would allow polluters to despoil those outdoor areas, thereby further reducing the economic benefits associated with clean water.

Preserving the health and quality of the nation's rivers and lakes is not just mandated by the *textual* command of the CWA to "restore and maintain the

chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). It also makes good economic sense. For example, over the past decade, TU has worked to restore the watersheds and improve the water quality of the Driftless Area, a major fishery in the northern Midwest. *See* Brief of Trout Unlimited *et al.* as *Amici Curiae* in Support of Respondents at 19-20, *Murray Energy Corp. v. EPA*, No. 15-3751 (6th Cir. Jan. 20, 2017) ("TU *Murray* Amicus Br."). The trout fishing has improved dramatically—some streams have seen a ten-fold increase in trout populations from pre-restoration numbers. The restoration efforts also have proven a good investment: For every dollar spent on restoration, an additional $24.50 has been returned to the surrounding economy on an annual basis. *Id.* at 20. Overall, trout fishing in the Driftless Area provides a $1 billion-plus economic benefit to the region. *See* Trout Unlimited: Celebrating the Economic Impact of a Priceless Jewel: The Economic Impact of Trout Angling in the Driftless Area at 2 (2016), http://bit.ly/2XyuKdb.

III. PETITIONER AND ITS *AMICI*'S PARADE-OF-HORRIBLES ARGUMENTS ARE EXAGGERATED

Faced with no support from the statute's text, and evidence that disrupting existing CWA protections would injure the nation's waterways and related economies, Petitioner and its *amici* attempt to conjure up their own parade of horribles. But Respondents' position has been the law of the land for more than 25 years, and none of the adverse consequences Petitioner and its *amici* envision has been realized. Moreover, Petitioner and its *amici*'s own briefs betray the contingent nature of the harm they predict; many of the supposedly disastrous effects of affirming the

decision below turn out, upon closer inspection, to require additional adverse rulings or interpretations far beyond the scope of the issue currently before the Court.

A. Petitioner, Not Respondents, Seeks To Change The *Status Quo* Radically

Contrary to what Petitioner and its *amici* appear to believe, it is their proposed interpretation of the Act, and not the interpretation offered by Respondents, that would work a radical change in the CWA's enforcement. In its *amicus* brief in support of Respondents in this case before the Ninth Circuit, EPA conceded that its "longstanding position has been that point-source discharges of pollutants moving through groundwater to a jurisdictional surface water are subject to CWA permitting requirements" so long as "there is a 'direct hydrological connection' between the groundwater and the surface water." Brief for the U.S. as Amicus Curiae in Support of Plaintiffs-Appellees at 22, *Haw. Wildlife Fund v. County of Maui*, No. 15-17447 (9th Cir. May 31, 2016) ("EPA 9th Cir. Br."). EPA observed that it had "repeatedly articulated this view in multiple rulemaking preambles," citing examples from 1990, 1991, and 2001. *Id.* at 22-24.

But EPA did not stop with merely characterizing its earlier position. It also noted that "the majority of the courts that have addressed this issue . . . [have] concluded that discharges that move from a point source to jurisdictional surface waters via groundwater with a hydrological connection are subject to regulation under the CWA." *Id.* at 18 (citing *Sierra Club v. Va. Elec. & Power Co.*, 145 F. Supp. 3d 601 (E.D. Va. 2015); *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428 (M.D.N.C. 2015); *S.F. Herring Ass'n v. Pac. Gas &*

Elec. Co., 81 F. Supp. 3d 847 (N.D. Cal. 2015); *Hernandez v. Esso Std. Oil Co.*, 599 F. Supp. 2d 175 (D.P.R. 2009); *Nw. Envtl. Def. Ctr. v. Grabhorn, Inc.*, No. 08-548, 2009 WL 3672895 (D. Or. Oct. 30, 2009); *N. Cal. River Watch v. Mercer Fraser, Co.*, No. 04-4620, 2005 WL 2122052 (N.D. Cal. Sept. 1, 2005); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D. Idaho 2001)). And, as EPA also observed, courts have found that the CWA's NPDES permitting requirement extends to situations analogous to the circumstances presented here, including "discharges from mining operations that traveled to navigable waters in part through surface runoff," EPA 9th Cir. Br. 14-15 (citing *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 44-45 (5th Cir. 1980)), and a discharge of "'raw sewage [that] was running directly from the leaching field, on the surface of the ground for approximately 250 feet, into the [surface water],'" EPA 9th Cir. Br. 15 (quoting *Friends of Sakonnet v. Dutra*, 738 F. Supp. 623, 628, 630 (D.R.I. 1990)).

Indeed, existing NPDES permits reflect an understanding that the CWA does in fact regulate point-source pollution that travels indirectly to navigable waters. The Questa mine NPDES permit, discussed *supra* at 17-18, is one such example. As another example, EPA issued an NPDES permit in 2011 to the Menominee Neopit Wastewater Treatment Facility in Wisconsin, based on data showing that the groundwater beneath the site "has a direct hydrologic connection to the adjacent surface water, the navigable waters of Tourtillotte Creek." EPA Region 5, NPDES No. WI-0073059-1 Fact Sheet (Apr. 2011) at 2, http://bit.ly/2YJYe9h; *see generally* Brief of *Amici Curiae* Former EPA Staff in Support of Respondents (listing examples of existing NPDES

permits reflecting Respondents' interpretation of the Act).

Of course, EPA now contends that discharges of pollutants from a point source to groundwater fall outside the coverage of the NPDES permitting program. *See* EPA Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater, 84 Fed. Reg. 16810 (Apr. 23, 2019). That development occurred during the late stage of this litigation. But EPA's *post litem motam* conversion cannot change the facts that Respondents' interpretation was EPA's own settled interpretation for 25+ years, that this interpretation has been upheld by multiple federal courts, and that many pollutant discharges into groundwater are currently regulated by NPDES permit. Thus, contrary to Petitioner's claims, this case is about Petitioner seeking to strip away existing protections, not Respondents seeking to expand them.

Whatever may be the proper level of "deference" to either EPA's prior interpretation or lower courts' decisions upholding that interpretation (an issue this brief does not address), the heretofore-settled state of the law is significant because it proves that no "parade of horribles" has followed or will follow from rejecting Petitioner's and EPA's arguments. Furthermore, at the risk of beating a dead fish, if EPA or a State reasonably believes that particular discharges are justified and consistent with the terms and purposes of the statute, they have every tool they need to act on that belief by issuing NPDES permits in compliance with the CWA's requirements. They do not need

courts to narrow the scope of the statute artificially, arbitrarily, and atextually.

B. Petitioner And Its *Amici*'s Supposed Harms Have Not Transpired To Date

In his plurality opinion in *Harmelin v. Michigan*, Justice Scalia explained that the "strength" of the "'parade of horribles' form of argumentation . . . is in direct proportion to (1) the certitude that the provision in question was meant to exclude the very evil represented by the imagined parade, and (2) the probability that the parade will in fact materialize." 501 U.S. 957, 986 n.11 (1991) (plurality op.). Here, the Court is confronted with an unusual situation: the horribles in question have already had a chance to materialize—25+ years of chances, in fact. *Yet none of them has.* That is a weak parade-of-horribles argument indeed. *See also Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1020 (2019) (Gorsuch, J., concurring in judgment) (discounting argument because "the State's hypothetical parade of horribles has yet to take its first step in the real world").

Again, Respondents' interpretation has been the law of the land for 25+ years. Yet over that time period *not one* of the claimed horrible consequences that Petitioner and its *amici* have argued would result from just such an interpretation has been visited upon them. Rather, Petitioner's *amici* were free to build septic tanks (*see* Brief of *Amicus Curiae* National Association of Home Builders of the United States in Support of Petitioner ("NAHB Br.") at 4-15), construct green infrastructure (*see* Brief of *Amici Curiae* National Association of Clean Water Agencies *et al.* in Support of Petitioner ("NACWA Br.") at 20-29), and

use "trenchless" construction methods to install underground utility lines (*see* Brief for Energy Transfer Partners, L.P. as *Amicus Curiae* in Support of Petitioner ("ETP Br.") at 10-19)—even in the face of an EPA interpretation identical to that which Respondents advocate. The NDPES permitting requirement did not slow or delay those programs; it was business as usual.

C. Petitioner And Its *Amici*'s Speculative Harms Are Unlikely To Materialize

Moreover, Petitioner's alleged horrible consequences are unlikely ever to materialize. Many of the harms posited by Petitioner and its *amici* are contingent not only on an affirmance of the decision below, but also on the EPA (and future courts) misinterpreting or refusing to recognize other limitations to regulation in the Act. For example, many point sources remain outside the scope of the NPDES program because their discharges cannot be traced to surface waters. A generalized assertion that groundwater connects to surface water—without proof that the pollutants in fact reach the surface water—is insufficient to create liability under the Act. *See, e.g.*, *Rice v. Harken Exploration Co.*, 250 F.3d 264, 272 (5th Cir. 2001) (no liability where no "evidence of a close, direct and proximate link between [the defendant's] discharges . . . and any resulting actual, identifiable oil contamination of a . . . surface water").

This Court should resist attempts by Petitioner and its *amici* to ignore statutory requirements such as this one in an effort to exaggerate the supposed consequences of the single question before it. *Cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 195-96 (2012) (addressing

claim that permitting church to fire minister for narcolepsy would lead to generalized exemption of religious organizations from all employment laws: "[t]here will be time enough to address the applicability of the exception to other circumstances if and when they arise"); *see also Simmons v. Himmelreich,* 136 S. Ct. 1843, 1849 (2016) ("[i]f the Government is right about the other provisions of Chapter 171, the Court may hold so in the appropriate case. . . . But this case deals only with the judgment bar provision.").

An obvious example of such an attempt can be found in the Brief *Amicus Curiae* for Agricultural Business Organizations Supporting Petitioner ("Ag. Orgs. Br."). Those *amici* claim that "requiring permits for indirect additions of pollutants through groundwater would wrongly expand the reach of the CWA to ordinary and routine agricultural activities," such that "[i]rrigation" and "[a]gricultural stormwater" "could require an NPDES permit." Ag. Orgs. Br. 20, 25-26. But *amici* also acknowledge that the CWA "expressly exempt[s]" both "'return flows from irrigated agriculture'" and "'agricultural stormwater discharges'" from the definition of "point source." *Id.* at 25 (quoting 33 U.S.C. § 1362(14)). Thus, for the government to require an NPDES permit for return flows from irrigated agriculture and agricultural stormwater discharge would not merely require this Court to affirm the decision below; it also would require the government and reviewing courts to ignore the plain text of the CWA and apply NPDES permitting requirements to sources *explicitly excluded* from the Act's "point source" definition. Such a claimed harm not only is farfetched but also shows the preference of Petitioner and its *amici* for policy

arguments and scare tactics over close attention to statutory text.

Similarly, the ETP *amicus* brief supporting Petitioner predicts that accepting the position that has been the law of the land for a quarter-century would require parties undertaking trenchless methods of drilling to obtain NPDES permits. ETP Br. 16-19. According to *amici*, trenchless drilling methods require the use of "drilling mud," which is "made of water and naturally occurring non-toxic bentonite clay." *Id.* at 16 (internal quotation marks omitted). Per ETP, drilling mud "arguably" meets the CWA's definition of a pollutant, although it cannot point to such a finding having ever been made. What is more, ETP offers sheer speculation that drilling mud could even make its way to navigable waters; the brief cites occasions where drilling mud has made its way "to the surface through indiscernible, underground pathways" or has been "released into groundwater," *id.*, but it never links those releases to an addition to the navigable waters themselves.

Another example of contingent harms is presented by NACWA, which suggests that green infrastructure could unfairly be subject to NPDES permitting if the decision below is affirmed. NACWA Br. 27-29. Buried in a footnote, however, is the admission that "[w]hether any particular component of [green infrastructure] 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." *Id.* at 27 n.15 (quoting 33 U.S.C. § 1362(14)).

Petitioner itself provides a final example. Petitioner's brief is replete with concerns that

reaffirming the view that has long prevailed in the lower courts would subject "septic tanks" or "septic systems" to NPDES permitting, which it deems an overly burdensome and incorrect interpretation of the Act. Pet. Br. 47-48. It is passing strange, then, to see an *amicus* supporting Petitioner devote its entire brief to arguing that septic tanks and systems are *not* point sources and thus *not* subject to NPDES requirements. *See generally* NAHB Br. 4-17. If NAHB's experience is to be credited, there are myriad legal and practical obstacles to requiring an NPDES permit for septic tanks—even if the Court agrees with Respondents' view.

None of these supposed negative consequences will flow directly from the Court's decision in this case—if they ever come at all. Indeed, Petitioner's contingent harms pale in comparison to the very real harms that the nation's waters, fish, wildlife, and recreational fishing economy will suffer if the Court permits Petitioner's point-source pollution to proceed unregulated. Petitioner's wells are polluting the Pacific Ocean *now*. The East Gallatin River is being polluted *now*. A decision in Petitioner's favor would allow that pollution to continue and give license to others to exploit a groundwater loophole read into the statute. If the loophole existed by statutory command, this Court would have no choice but to accept it, but what Petitioner and its *amici* seek is the *creation* by this Court of an atextual loophole. That has never been this Court's job.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted.

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