

No. 18-260

In The
Supreme Court of the United States

COUNTY OF MAUI, HAWAII,

Petitioner,

v.

HAWAII WILDLIFE FUND; SIERRA CLUB-MAUI
GROUP; SURFRIDER FOUNDATION; AND
WEST MAUI PRESERVATION ASSOCIATION,

Respondents.

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

**BRIEF OF THE STATES OF MARYLAND,
CALIFORNIA, CONNECTICUT, ILLINOIS,
MAINE, MICHIGAN, NEW JERSEY, NEW MEXICO,
OREGON, RHODE ISLAND, VERMONT, AND
WASHINGTON, THE COMMONWEALTH OF
MASSACHUSETTS, AND THE DISTRICT OF
COLUMBIA AS AMICI CURIAE
SUPPORTING RESPONDENTS**

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTERESTS OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE CLEAN WATER ACT’S NPDES PROGRAM DOES NOT CATEGORICALLY EXCEPT POINT SOURCE DISCHARGES TO NAVIGABLE WATERS VIA GROUNDWATER OR OTHER CONDUITS	4
A. The Clean Water Act Broadly Prohib- its Pollutant Discharges Unless Au- thorized by NPDES Permits.....	4
B. The Prohibition on Unpermitted Point Source Discharges to Navigable Waters Contains No Exception for Discharges Through Groundwater or Other Con- duits	6
II. EXCEPTING DISCHARGES VIA GROUNDWATER OR OTHER CONDUITS WOULD UNDERMINE STATES’ ABILITY TO PROTECT THEIR NAVIGA- BLE WATERS	10
A. The Clean Water Act Promotes Feder- alism by Empowering States to Pro- tect Their Navigable Waters.....	11

TABLE OF CONTENTS—Continued

	Page
B. An Exception for Discharges Through Groundwater or Other Conduits Would Significantly Erode the National Regulatory Floor and Degrade Water Quality	13
1. Other Federal Laws Do Not Ameliorate the Consequences of Creating an Exception for Discharges Via Groundwater or Other Conduits	14
2. State Regulation Does Not Adequately Protect Against the Consequences of Reversal	18
III. REGULATING GROUNDWATER-CONDUIT DISCHARGES UNDER THE NPDES PROGRAM IS FEASIBLE WITHOUT UNDUE BURDEN	21
CONCLUSION.....	31

TABLE OF AUTHORITIES

	Page
CASES	
<i>Burlington N. and Santa Fe Ry. Co. v. United States</i> , 556 U.S. 599 (2009).....	16
<i>Christopher v. SmithKline Beecham Corp.</i> , 567 U.S. 142 (2012)	24
<i>City of Chi. v. Environmental Def. Fund</i> , 511 U.S. 328 (1994)	7
<i>Environmental Def. Ctr., Inc. v. EPA</i> , 344 F.3d 832 (9th Cir. 2003).....	28
<i>Hawai'i Wildlife Fund v. County of Maui</i> , 24 F. Supp. 3d 980 (D. Haw. 2014)	17
<i>Hawai'i Wildlife Fund v. County of Maui</i> , 886 F.3d 737 (9th Cir. 2018).....	15
<i>International Paper Co. v. Ouelette</i> , 479 U.S. 481 (1987).....	21
<i>Meghrig v. KFC W., Inc.</i> , 516 U.S. 479 (1996).....	15
<i>Natural Res. Def. Council v. Costle</i> , 568 F.2d 1369 (D.C. Cir. 1977)	28
<i>Natural Res. Def. Council, Inc. v. County of L.A.</i> , 725 F.3d 1194 (9th Cir. 2013).....	30
<i>Rapanos v. United States</i> , 547 U.S. 715 (2006)	6
<i>South Fla. Water Mgmt. Dist. v. Miccosukee Tribe</i> , 541 U.S. 95 (2004)	8, 28, 29

TABLE OF AUTHORITIES—Continued

	Page
<i>Upstate Forever v. Kinder Morgan Energy Partners, L.P.</i> , 887 F.3d 637 (4th Cir. 2018)	15
<i>Yadkin Riverkeeper v. Duke Energy Carolinas LLC</i> , 141 F. Supp. 3d 428 (M.D.N.C. 2015).....	15, 30
 STATUTES	
16 U.S.C. § 1455b(a)(1)	18
33 U.S.C. § 1251(a).....	4, 10
33 U.S.C. § 1251(b).....	11
33 U.S.C. § 1311(a).....	2, 4, 13
33 U.S.C. § 1329	14
33 U.S.C. § 1342(a)(1)	5
33 U.S.C. § 1342(b).....	5, 11, 12
33 U.S.C. § 1342(b)(1)(A)	11
33 U.S.C. § 1362(6).....	5, 16, 17
33 U.S.C. § 1362(11).....	30
33 U.S.C. § 1362(12).....	2, 4, 6, 9, 27
33 U.S.C. § 1362(14).....	5, 7, 14, 15
33 U.S.C. § 1370	12, 13
33 U.S.C. § 2702(a).....	18
42 U.S.C. § 300f(1) – (2)	17
42 U.S.C. § 300g-1(b)(1)(A) – (B)	17
42 U.S.C. §§ 300h – 300h-8.....	17
42 U.S.C. § 6903(5).....	16

TABLE OF AUTHORITIES—Continued

	Page
42 U.S.C. § 9601(14).....	16
Comprehensive Environmental Response, Com- pensation, and Liability Act of 1980, 42 U.S.C. §§ 9601 – 9675.....	16
Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901 – 6992.....	15, 16
Safe Drinking Water Act, 42 U.S.C. §§ 300f – 300j-27.....	17
Ariz. Rev. Stat. Ann. § 49-203(A)(2).....	19, 20
Kan. Stat. § 65-164(a) – (b).....	19
Ky. Rev. Stat. Ann. § 224.16-050(4).....	19, 20
Mich. Comp. Laws § 324.3109(1).....	19
Miss. Code Ann. § 49-17-34(2).....	20
W. Va. Code § 22-11-4(a)(1).....	20
 REGULATIONS	
40 C.F.R. § 122.28(a)(2).....	28
40 C.F.R. § 122.28(b)(2).....	28
40 C.F.R. § 122.28(b)(2)(v).....	28, 29
40 C.F.R. § 122.4(d).....	12
Colo. Code Regs. § 1002-43:43.7.....	29
Md. Code Regs. 26.04.02.04.....	29
25 Pa. Code § 73.13.....	29
S.C. Code Ann. Regs. 61-56.200.....	29

TABLE OF AUTHORITIES—Continued

	Page
ADMINISTRATIVE MATERIALS	
Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876 (Dec. 12, 1991)	23
EPA National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990 (Nov. 16, 1990)	23
EPA, NPDES State Program Information: State Program Authority	5
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. 16,810 (Apr. 23, 2019)	23
National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960 (Jan. 12, 2001)	22
Reissuance of NPDES General Permits for Storm Water Discharges from Construction Activities, 63 Fed. Reg. 7858 (Feb. 17, 1998)	22
Revised Definition of Waters of the United States, 84 Fed. Reg. 4154 (Feb. 14, 2019)	8
U.S. EPA, EPA-833-B-96-003, NPDES Permit Writers' Manual (1996)	22

TABLE OF AUTHORITIES—Continued

	Page
U.S. EPA, EPA-833-K-10-001, NPDES Permit Writers' Manual (2010).....	22
 OTHER AUTHORITIES	
A Legislative History of the Water Pollution Control Amendments of 1972 (1972).....	13

INTERESTS OF AMICI CURIAE

Amici curiae the States of Maryland, California, Connecticut, Illinois, Maine, Michigan, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, and the District of Columbia (“the Amici States”) have a substantial interest in the appropriate application of the Clean Water Act’s National Pollutant Discharge Elimination System (“NPDES”) permit program and the Act’s prohibition against unpermitted discharges of pollutants into navigable waters. The Amici States rely on the Clean Water Act’s cooperative federalism framework to ensure that discharges to navigable waters are monitored and comply with permits that take into account the capabilities of treatment technologies, impacts on water quality, and the Act’s overall goal of protecting the nation’s waters. More specifically, the Amici States rely on the Act to ensure a stable nationwide regulatory floor protecting their surface waters against pollution flowing downstream across state lines.

This case is not about harnessing the Clean Water Act to regulate groundwater pollution, a subject that is largely a matter of traditional state regulation. Rather, it is about regulating pollution in navigable waters, where that pollution is traceable from a defined point source—the indisputable subject of national regulation under the Clean Water Act. Reversing the court of appeals’ decision, or creating a Clean Water Act exception for point source discharges that pass through groundwater or other conduits before reaching navigable waters, would be incongruous with the Act’s text

and purposes alike.¹ Not only would such an exception threaten the quality of navigable waters that receive discharges of pollutants from point sources via groundwater, it would give polluters an incentive to skirt Clean Water Act regulation simply by relocating point source discharges of pollution to nearby groundwater. The Amici States urge the Court to affirm the court of appeals' decision and hold that, where pollutants are fairly traceable from a point source to navigable waters through groundwater or other conduits, the underlying point source discharge falls within the scope of the Clean Water Act's NPDES program.



SUMMARY OF ARGUMENT

1. The Clean Water Act bars “any addition of any pollutant to navigable waters from any point source” unless authorized by a permit and in compliance with the Act’s requirements. 33 U.S.C. §§ 1311(a), 1362(12). Nothing in the Act’s text requires that point sources discharge pollutants *directly* to navigable waters. The Act also contains no exception for discharges that pass

¹ Some of the Amici States filed comments asking the United States Environmental Protection Agency (“EPA”) to withdraw the “interpretive statement” it recently issued on this question. See Attorneys General of Maryland, California, Colorado, Connecticut, the District of Columbia, Maine, Massachusetts, Michigan, Oregon, Rhode Island, and Vermont, Comment Letter on Proposed Interpretive Statement on Application of the Clean Water Act NPDES Program to Releases of Pollutants from a Point Source to Groundwater (June 7, 2019), <https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0166-0220>.

through groundwater before reaching navigable waters. Instead, such point source discharges are subject to NPDES permitting if the pollutants are fairly traceable from the point source to navigable waters—a requirement ensuring that pollutants entering navigable waters are truly “from” the point source, as the statute requires.

2. NPDES coverage of point source discharges of pollutants to navigable waters through groundwater or other conduits protects state interests. The NPDES program promotes federalism by empowering states to protect their waters without fear that their efforts will be undercut by pollution crossing jurisdictional boundaries. Excepting discharges that travel through groundwater or other conduits before reaching navigable waters would jeopardize those waters and leave a dangerous and textually unjustified gap in the Clean Water Act’s protections. Other federal environmental statutes and purely state-law regulation would not fill that gap.

3. Continuing federal regulation of the discharges at issue is feasible without undue burden. Although Petitioner and its amici cast the lower court’s ruling as a vast expansion of the NPDES program, EPA has—until recently—long rejected the categorical exception they propose, and the sky has not fallen. Quite the contrary: agencies have issued just the sorts of permits that Petitioner and its amici claim are impracticable. Further, the only discharges covered by the court of appeals’ ruling are those that are fairly traceable from particular point sources to navigable

waters. In appropriate circumstances, general permits provide agencies with a tool to streamline and simplify the process of permitting large numbers of similar sources. Any burdens associated with affirming the court of appeals' ruling do not warrant an exception that Congress itself did not create.

◆

ARGUMENT

I. THE CLEAN WATER ACT'S NPDES PROGRAM DOES NOT CATEGORICALLY EXCEPT POINT SOURCE DISCHARGES TO NAVIGABLE WATERS VIA GROUND-WATER OR OTHER CONDUITS.

A. The Clean Water Act Broadly Prohibits Pollutant Discharges Unless Authorized by NPDES Permits.

Congress enacted the Clean Water Act with the primary objective of “restor[ing] and maintain[ing] the chemical, physical and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To help achieve that objective, Congress prohibited “the discharge of any pollutant by any person,” except in compliance with listed provisions of the Act. *Id.* § 1311(a).

Consistent with the Clean Water Act’s overall objective, Congress broadly defined the prohibited conduct. The Act defines “discharge of a pollutant” to include “*any* addition of any pollutant to navigable waters from *any* point source.” *Id.* § 1362(12) (emphasis added). “Pollutant,” too, is a broad term. Subject to exceptions inapplicable here, it includes “dredged spoil,

solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” *Id.* § 1362(6). Similarly, “point source” is defined broadly to include (again subject to exceptions inapplicable here) “*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) (emphasis added).

Despite these broad definitions, Congress did provide a mechanism for otherwise prohibited discharges to occur. Under the NPDES program, EPA may “issue a permit for the discharge of any pollutant[] or combination of pollutants” in compliance with certain conditions. *Id.* § 1342(a)(1).

States may implement the NPDES program within their respective jurisdictions in lieu of EPA. EPA must approve a state’s proposal to do so if it determines that certain mandatory components are included. *Id.* § 1342(b). To date, 47 states and the U.S. Virgin Islands have assumed at least partial responsibility for administering the NPDES program. *See* EPA, NPDES State Program Information: State Program Authority, <https://www.epa.gov/npdes/npdes-state-program-information> (last visited July 12, 2019).

B. The Prohibition on Unpermitted Point Source Discharges to Navigable Waters Contains No Exception for Discharges Through Groundwater or Other Conduits.

On its face, the Clean Water Act’s prohibition on the unauthorized “addition of any pollutant *to* navigable waters *from* any point source,” 33 U.S.C. § 1362(12) (emphasis added), encompasses both direct and indirect additions of pollutants to navigable waters. Justice Scalia’s opinion in *Rapanos v. United States* acknowledged as much:

The 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.” Thus, from 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.

547 U.S. 715, 723 (2006) (plurality op.) (emphasis in original; citations omitted). Notably, the opinion’s reference is to pollutants that pass through “conveyances,” not just through those conveyances that are also point sources.

The prohibition on unauthorized point source discharges of pollutants to navigable waters contains no

express exception for those discharges that pass through groundwater. With such an exception absent from the text, this Court should not read one in. *See, e.g., City of Chi. v. Environmental Def. Fund*, 511 U.S. 328, 334-38 (1994). Indeed, as the United States notes, Congress mentioned groundwater repeatedly in the Clean Water Act. *See* Br. for U.S. as Amicus Curiae Supporting Pet'r ("U.S. Br.") 16-19. But contrary to the conclusion that the United States draws, these repeated references confirm that the subject of groundwater was very much before Congress and that the absence of a groundwater conduit exception must therefore be treated as deliberate. Not only that, but the Act's definition of "point source" specifically includes "well," 33 U.S.C. § 1362(14), and it is unclear how a well could discharge pollutants to navigable waters in any manner *other than* via groundwater.

Equally absent from the statute is the broader exception that Petitioner proposes. According to Petitioner, point source discharges to navigable waters are subject to the Clean Water Act if they pass through conduits that are themselves point sources, yet are excepted if any of the conduits is *not* a point source. *E.g.*, Pet'r Br. 54. But the Clean Water Act does not distinguish among different kinds of conduits; the "addition of any pollutant" must only be "*to* navigable waters" and "*from* any point source." 33 U.S.C. § 1362(12) (emphasis added). And although Petitioner attempts to ground its "means of delivery" test in the phrase "from a point source," Pet'r Br. 28-30, that phrase most logically refers to the regulated point source itself, rather

than the types of conduits that carry pollutants to navigable waters.²

Regulating point source pollutants that reach navigable waters through groundwater is not the same as regulating groundwater as a “navigable water” or invading state prerogatives regarding groundwater regulation.³ The court of appeals’ decision does not define “navigable waters” to include groundwater, nor does it otherwise extend the Clean Water Act to cover discharges of pollutants into groundwater as such. Rather, the decision stands for the unremarkable proposition that a point source discharge to navigable waters (*i.e.*, jurisdictional waters) remains a point source discharge to navigable waters even if it passes through groundwater along the way. Whether or not Congress “intend[ed] for the CWA to expand federal jurisdiction to groundwater,” Br. of Amici Curiae State of W. Va., *et al.* (“W. Va. Br.”) 11, is therefore irrelevant.

Nor does the court of appeals’ decision raise the specter of unfettered liability for discharges into

² Those conduits may themselves be regulated, however, if they are point sources. See *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 104-05 (2004).

³ The precise contours of “navigable waters,” which the Clean Water Act defines by reference to “the waters of the United States,” have been the subject of considerable litigation and regulation. See, *e.g.*, *Rapanos*, 547 U.S. 715; Revised Definition of Waters of the United States, 84 Fed. Reg. 4154 (Feb. 14, 2019). This brief takes no position on the proper definition of “navigable waters” or “the waters of the United States,” and in submitting this brief, no Amicus State intends to change any position it previously has taken on those questions.

groundwater. For such discharges to be subject to the NPDES program, the fact that groundwater connects to navigable waters is not enough. Rather, such discharges are covered only if the pollutants can be fairly traced from navigable waters to the point source, for only then can it be said that the discharge to navigable waters is “*from* [the] point source.” 33 U.S.C. § 1362(12) (emphasis added). In those circumstances, it is only sensible—and consistent with the statutory text—to require the point source to comply with effluent limitations designed to protect navigable waters, as the text requires.

Practical considerations underscore the problems with the exception that Petitioner seeks. Accepting Petitioner’s position would allow savvy entities to avoid altogether the Clean Water Act’s prohibition on unpermitted discharges from point sources. Instead of discharging directly into a river, a polluter might move its discharge pipe into immediately adjacent groundwater and, if Petitioner’s position were correct, thereby evade the Clean Water Act.⁴ Petitioner and its amici do not

⁴ This sort of gamesmanship is by no means fanciful. In Colorado, the operator of a silver mine sought to terminate its discharge permit because it had moved its discharges from surface water to a nearby pipe buried in waste rock material. The state permitting agency denied the termination request because the unconsolidated nature of that material, coupled with the discharge’s proximity to the surface water at issue, created a direct hydrologic connection between the discharge and that surface water. See Colorado Department of Public Health & Environment, Permit Termination Request Denial—December 2016 Request Permit No. CO0000003 (June 1, 2017), <https://environmentalrecords.colorado.gov/HPRMWebDrawer/Record/1013777/File/Document>.

explain why Congress would have meant to give polluters a road map to evade Clean Water Act permitting requirements, threaten the integrity of the nation's waters, and jeopardize the interests of states downstream. Such a result would be antithetical to the Act's prohibition against unpermitted discharges of pollutants to navigable waters, as well as its stated goal of "restor[ing] and maintain[ing] the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

II. EXCEPTING DISCHARGES VIA GROUNDWATER OR OTHER CONDUITS WOULD UNDERMINE STATES' ABILITY TO PROTECT THEIR NAVIGABLE WATERS.

Petitioner and its amici argue that the court of appeals' decision denigrates states' interests because it encroaches on state sovereignty and leaves states with untenable regulatory burdens. *See, e.g.*, Pet'r Br. 51-52; W. Va. Br. 27-34. The Amici States disagree. An interpretation of the Clean Water Act that is consistent with the statutory text and furthers the Act's purposes—including coverage of the discharges at issue in this case—is necessary to *protect* state interests, and concerns about increased burdens are significantly overstated.

A. The Clean Water Act Promotes Federalism by Empowering States to Protect Their Navigable Waters.

The Clean Water Act gives states a central role in regulating point source discharges. “[I]t is the policy of Congress,” the Clean Water Act declares, “that the States . . . implement the permit programs under sections 1342 and 1344 of this title.” 33 U.S.C. § 1251(b); *see* 33 U.S.C. § 1342(b) (providing that, if EPA determines that certain conditions are satisfied, EPA “shall” authorize a state to administer the NPDES program). Congress’s stated desire for states to implement the NPDES permit program—the Clean Water Act’s principal means of regulating point source pollution—is one reflection of its solicitude for “the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.” 33 U.S.C. § 1251(b).

At the same time, the Act establishes minimum standards to which NPDES programs must adhere. Delegation of permitting authority depends on a state’s ability to “apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 [of Title 33].” 33 U.S.C. § 1342(b)(1)(A). And although states are free to implement water quality protections that are more stringent than the standards established under the Clean Water Act, they may not fall below those standards. *See id.* § 1370 (providing that states cannot “adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent” than

those established “under this chapter”). Thus, while some variation is allowed from state to state, the Act ensures that no state can adopt or enforce water quality controls that fall below a national regulatory floor.

States rely on this regulatory floor in two ways. First, they rely on the Clean Water Act’s minimum nationwide standards to protect their waters against upstream, out-of-state pollution that they cannot regulate directly. Although pollutants discharged in one state can travel downstream to the waters of another, states typically cannot apply their own laws to polluters outside their boundaries. *See generally International Paper Co. v. Ouelette*, 479 U.S. 481, 491-97 (1987). The Clean Water Act’s NPDES program protects downstream states by ensuring that upstream, out-of-state point source discharges are subject at least to nationwide minimum standards. *See, e.g.*, 33 U.S.C. § 1370 (state standards cannot be “less stringent” than federal standards); *id.* § 1342(b) (requirements for states to exercise delegated permitting authority, including that their NPDES programs must “insure that the public, and *any other State the waters of which may be affected*, receive notice of each application for a permit” and “provide an opportunity for public hearing before a ruling on each such application” (emphasis added)); 40 C.F.R. § 122.4(d) (NPDES permits must ensure compliance with water quality standards of downstream states). The NPDES program’s protections become meaningless, however, when a source is not subject to the program at all.

Second, states rely on the Clean Water Act's regulatory floor for assurance that protecting water quality will not cause businesses to relocate to jurisdictions with less stringent water quality protections. Indeed, these concerns hamstrung state efforts to control water pollution prior to 1972. *See, e.g.*, A Legislative History of the Water Pollution Control Amendments of 1972, at 452 (1972) (statement of Rep. Reuss, quoting Governor Wendell Anderson of Minnesota, that "[e]very governor in the country knows what is the greatest political barrier to effective pollution control," namely, "the threat of our worst polluters to move their factories out of any State that seriously tries to protect its environment" and "the practice of playing off one State against the other"). Congress responded by prohibiting all point sources from discharging pollutants to navigable waters (absent a permit) and barring states from setting standards below the national floor. *See* 33 U.S.C. §§ 1311(a), 1370. Far from encroaching upon states' rights, that national floor empowers states to protect their navigable waters without fear that other states will undermine those efforts.

B. An Exception for Discharges Through Groundwater or Other Conduits Would Significantly Erode the National Regulatory Floor and Degrade Water Quality.

A bar on unauthorized point source discharges to navigable waters via groundwater (or other conduits) is one component of the federal regulatory floor on

which the Amici States depend. Petitioner and its amici, however, suggest that excepting such discharges from the NPDES program would pose little cause for concern because they already are subject to other federal statutes, as well as state regulation not required by the Clean Water Act. *See, e.g.*, Pet'r Br. 43-44; W. Va. Br. 21-24; U.S. Br. 31-33. These contentions are incorrect.

1. Other Federal Laws Do Not Ameliorate the Consequences of Creating an Exception for Discharges Via Groundwater or Other Conduits.

Petitioner and its amici cite a host of federal laws that would remain in place even if this Court were to reverse the court of appeals' decision. None of those laws adequately mitigates the consequences of such a ruling.

First, Petitioner and its amici are wrong to suggest that the Clean Water Act's *nonpoint* source programs are relevant here. *See, e.g.*, Pet'r Br. 23-26; W. Va. Br. 15-17. Those programs provide funding and technical support to help states control the discharge of pollutants to navigable waters from diffuse sources, such as some storm water and farm field runoff.⁵ *See, e.g.*, 33 U.S.C. § 1329. This support is useful, to be sure, but it is beside the point. The discharges of pollutants in this case—as well as other discharges implicating the

⁵ Concentrated animal feeding operations, by contrast, are regulated as point sources. 33 U.S.C. § 1362(14).

question presented—are from *point* sources, such as wastewater injection wells, coal ash impoundments, and leaking pipelines. *See, e.g., Hawai‘i Wildlife Fund v. County of Maui*, 886 F.3d 737, 744-45 (9th Cir. 2018) (injection wells discharging to Pacific Ocean via groundwater); *Yadkin Riverkeeper v. Duke Energy Carolinas LLC*, 141 F. Supp. 3d 428, 436-37, 444 (M.D.N.C. 2015) (coal ash lagoons discharging to the Yadkin River via groundwater); *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 647-48 (4th Cir. 2018) (gasoline pipeline leaking via groundwater into creeks, adjacent wetlands, and lakes); *see also* 33 U.S.C. § 1362(14) (defining “point source”). The pollutants merely pass through a groundwater conduit before reaching navigable waters. And because they are traceable from a particular point source (as required by the decision below), controlling their discharge does not pose the challenges ordinarily associated with controlling nonpoint source pollution.

Nor do other federal pollution control and remediation statutes adequately fill the gap that would result from a groundwater-conduit exception, as Petitioner and its amici argue. *See, e.g.,* Pet’r Br. 43-44; U.S. Br. 31-33. The Resource Conservation and Recovery Act of 1976 (“RCRA”), 42 U.S.C. §§ 6901 – 6992, for instance, does not substitute for regulation under the Clean Water Act. The “primary purpose” of RCRA, this Court has observed, “is to reduce the generation of hazardous wastes and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated.” *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996).

The “hazardous waste” that RCRA regulates is a narrower category than the “pollutants” that the Clean Water Act regulates.⁶ And RCRA is primarily focused on the management of wastes, rather than the protection and overall health of navigable waters.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), 42 U.S.C. §§ 9601 – 9675, is an even poorer substitute. CERCLA is not designed to limit pollutant discharges or contamination in the first instance. Instead, it is primarily focused on promoting the “timely cleanup of hazardous waste sites” once they are created and “ensur[ing] that the costs of such cleanup efforts [are] borne by those responsible for the contamination.” *Burlington N. and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009) (citations omitted). Moreover, CERCLA governs “hazardous substances,” generally defined to include substances with particular characteristics or substances that have been specially designated under certain other statutes, *see* 42 U.S.C. § 9601(14), again in contrast with the Clean Water

⁶ Compare 42 U.S.C. § 6903(5) (defining “hazardous waste” for purposes of RCRA to mean certain solid waste that may “cause, or significantly contribute to[,] an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness” or “pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed”) with 33 U.S.C. § 1362(6) (defining “pollutant” under the Clean Water Act to include, among other things, “sewage, garbage, . . . biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, [and] cellar dirt”).

Act's broad definition of "pollutant," *see* 33 U.S.C. § 1362(6).

Likewise, the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f – 300j-27, would not fill the gap in Clean Water Act coverage that would result from reversal of the court of appeals' decision. *See* Pet'r Br. 43. The SDWA protects drinking water—not navigable waters—by authorizing EPA to set maximum contaminant levels to protect the public health and welfare, 42 U.S.C. § 300f(1) – (2), and by establishing standards governing the operation of underground injection wells, *id.* §§ 300h – 300h-8. Even those provisions are limited in scope. For instance, the statute does not regulate any contaminant unless EPA has made certain findings in connection with its impact on drinking water. *See, e.g., id.* § 300g-1(b)(1)(A) – (B) (directing regulation of contaminants that, among other things, have the potential to adversely affect human health and are sufficiently likely to occur in public water systems "with a frequency and at levels of public health concern"). And as the record in this case demonstrates, the SDWA in fact is insufficient to incidentally protect navigable waters. *See Hawai'i Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 980, 999, 1003-04 (D. Haw. 2014) (finding that even after compliance with a permit issued under the SDWA, "more than 50% of the effluent originating at the [facility] is finding its way into the ocean," significantly damaging nearby coral).⁷

⁷ Additionally, neither the Coastal Zone Management Act (Pet'r Br. 44) nor the Oil Pollution Act of 1990 (U.S. Br. 33)

2. State Regulation Does Not Adequately Protect Against the Consequences of Reversal.

Petitioner and its amici also insist that a Clean Water Act exception for discharges through groundwater or other conduits poses little cause for concern because, they say, state regulation is and will remain robust. *See, e.g.*, W. Va. Br. 20-27. These reassurances are mistaken. Although state regulation plays an important role in protecting water quality, overall it is too uneven to fill the gap left by Petitioner’s requested exception.

For instance, Petitioner’s amici generally emphasize the degree to which existing state law protects groundwater. *See* W. Va. Br. 21-24 (arguing that listed state laws “highlight [that the] absence of a requirement to obtain an NPDES permit is not equivalent to an unfettered license to discharge pollutants into groundwater”). Again, however, this case is not about protection of groundwater as such. It is about protection of *navigable* waters from point source discharges of pollutants that traceably travel *through* groundwater. Regulation of groundwater quality (or discharges into groundwater) may incidentally offer a measure of

provides an adequate substitute for Clean Water Act coverage. The Coastal Zone Management Act’s requirement that each participating state prepare a “Coastal Nonpoint Pollution Control Program,” 16 U.S.C. § 1455b(a)(1), does not regulate point source pollution, and the Oil Pollution Act establishes damages liability for certain oil spills, *see* 33 U.S.C. § 2702(a).

protection for navigable waters, but it is not designed to do so.

Further, the state laws that Petitioner's amici cite offer little in the way of consistency. Some provisions are drafted broadly. *See* Mich. Comp. Laws § 324.3109(1) (providing that a "person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious"). Others, however, appear to be drawn more narrowly. *See, e.g.,* Kan. Stat. § 65-164(a) – (b) (prohibiting the discharge of "sewage," defined as "any substance that contains any of the waste products or excrementitious or other discharges from the bodies of human beings or animals or chemical or other wastes from domestic, manufacturing or other forms of industry," into state waters). This inevitable lack of uniformity prevents states from relying dependably on a consistent baseline level of regulation nationwide. *See supra* at 12-13.

In some instances, moreover, the level of state regulation is tied to federal standards, so that weakening the latter can weaken the former. In certain states, state law currently *prohibits* regulation that goes beyond federal requirements (even though federal law, of course, permits it). *See, e.g.,* Ariz. Rev. Stat. Ann. § 49-203(A)(2) (instructing the director to adopt "a permit program that is consistent with but no more stringent than the requirements of the clean water act for the point source discharge of any pollutant or combination of pollutants into navigable waters"); Ky. Rev. Stat. Ann. § 224.16-050(4) (providing that "the cabinet shall not impose . . . any effluent limitation, monitoring

requirement, or other condition which is more stringent than . . . federal regulation”); Miss. Code Ann. § 49-17-34(2) (“All rules, regulations and standards relating to air quality, water quality or air emissions or water discharge standards . . . shall be consistent with and shall not exceed the requirements of federal statutes and federal regulations, standards, criteria and guidance.”). In other states, state law references or directly incorporates federal standards. *See, e.g.*, W. Va. Code § 22-11-4(a)(1) (instructing director to “perform any and all acts necessary to carry out the purposes and requirements of this article and of the [Clean Water Act] . . . relating to this state’s participation in the [NPDES]”). State regulation thus is not independent of the level of federal regulation and cannot dependably fill the gap resulting from an atextual groundwater-conduit exception. Indeed, adopting that exception might well preclude some states from regulating discharges to navigable waters via groundwater, given existing state law prohibiting or restricting regulation more stringent than federal standards. *See, e.g.*, Ariz. Rev. Stat. § 49-203(A)(2); Ky. Rev. Stat. Ann. § 224.16-050(4); Miss. Code Ann. § 49-17-34(2).

Finally, any protections currently provided by state law do not guarantee similar protections in the future, in the absence of Clean Water Act protection. Without such protection, a state that vigorously protects its waters today may, for whatever reason, decide to protect its waters less vigorously tomorrow. It would be a mistake, therefore, to treat the current landscape of state regulation as a basis for creating the exception

that Petitioner and its amici seek, and that Congress did not provide.

III. REGULATING GROUNDWATER-CONDUIT DISCHARGES UNDER THE NPDES PROGRAM IS FEASIBLE WITHOUT UNDUE BURDEN.

Alternatively, Petitioner and its amici argue that discharges to navigable waters via groundwater should be excepted from Clean Water Act coverage because (they say) the process of issuing permits for such discharges would be unduly burdensome for applicants and for state permitting authorities alike. *See, e.g.,* W. Va. Br. 27-34. Not so. Any consideration of burden is beside the point, because Congress did not include an exception for groundwater-conduit discharges. But even if it were appropriate to consider regulatory burdens, the lower court's ruling is far less onerous than Petitioner and its amici claim, and any resulting burdens are fully justified.

As an initial matter, claims about dramatically increased burdens rest on an incorrect premise, namely, that the court of appeals' decision amounts to a novel expansion of the NPDES program. *See, e.g.,* Pet'r Br. 45-48. EPA's own position—until recently—had long been that discharges to navigable waters via groundwater are not exempt from Clean Water Act regulation. For nearly twenty-five years, EPA's manual for NPDES permit writers has expressly provided that discharges via groundwater can fall within the NPDES program. In 1996, that manual recognized that

groundwater is not part of the “waters of the United States,” but that “[i]f . . . there is a discharge to groundwater that results in a ‘hydrological connection’ to a nearby surface water, the Director may require the discharger to apply for an NPDES permit.” U.S. EPA, EPA-833-B-96-003, NPDES Permit Writers’ Manual 13 (1996), <https://www3.epa.gov/npdes/pubs/owm0243.pdf>. The 2010 manual—which remains the latest version—takes a similar tack. Although that manual acknowledges that “[t]he CWA does not give EPA the authority to regulate ground water quality through NPDES permits,” it makes clear that “[i]f a discharge of pollutants to ground water reaches waters of the United States, . . . it could be a discharge to the surface water (albeit indirectly via a direct hydrological connection, i.e., the ground water) that needs an NPDES permit.” U.S. EPA, EPA-833-K-10-001, NPDES Permit Writers’ Manual 1-7 (2010), https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf. These statements in EPA’s most comprehensive guidance to agencies implementing the NPDES program are consistent with multiple EPA regulatory preambles over the years.⁸ They are also consistent with

⁸ See National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 3017 (Jan. 12, 2001) (“As a legal and factual matter, EPA has made a determination that, in general, collected or channeled pollutants conveyed to surface waters via ground water can constitute a discharge subject to the Clean Water Act.”); Reissuance of NPDES General Permits for Storm Water Discharges from Construction Activities, 63 Fed. Reg. 7858, 7881 (Feb. 17, 1998) (“EPA interprets the CWA’s NPDES permitting program to

EPA’s previous explanation of its “longstanding position” at an earlier stage of this very case.⁹ That EPA’s pronouncements have long reflected the lack of a categorical exception for discharges through a groundwater conduit confirms that the court of appeals’ decision is far from novel.

This conclusion is unaffected by the fact that EPA has reversed course and *now* believes, erroneously, that discharges to navigable waters via groundwater are exempt from NPDES permitting. *See* Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System

regulate discharges to surface water via groundwater where there is a direct and immediate hydrologic connection . . . between the groundwater and the surface water.”); Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991) (discharges to groundwater with a direct hydrological connection to surface water “are regulated because such discharges are effectively discharges to the directly connected surface waters”); EPA National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990) (stating that rulemaking addressed only “discharges to waters of the United States,” so that “discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body)”).

⁹ *See* Br. for the U.S. as Amicus Curiae Supporting Pls.-Appellees, *Hawai‘i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018) (No. 15-17447), ECF No. 40, 2016 WL 3098501, at *22 (“EPA’s longstanding position has been that point-source discharges of pollutants moving through groundwater to a jurisdictional surface water are subject to CWA permitting requirements if there is a ‘direct hydrological connection’ between the groundwater and the surface water.”).

Program to Releases of Pollutants from a Point Source to Groundwater, 84 Fed. Reg. 16,810 (Apr. 23, 2019). That EPA has reached this conclusion by way of “interpretive guidance” in 2019—in an apparent effort to influence this litigation¹⁰—cannot erase the historical fact that, for nearly three decades, the lack of a groundwater-conduit exception has been the agency’s repeatedly articulated position. There is no reason to think that the consequences of that prior “longstanding position” have been grievous or destabilizing.

In fact, it is just the opposite. Permitting agencies have issued permits for discharges reaching navigable waters via groundwater. As the following examples demonstrate, coverage of such discharges is not novel and does not create unmanageable burdens:

- The NPDES permit renewed in 2012 by the State of Colorado for the Western Sugar Company’s sugar beet factory and associated wastewater treatment facility authorizes the company to discharge effluent into groundwater via a series of unlined ponds in accordance with certain limitations and conditions, based on a hydrologic connection between the groundwater and the South Platte River. See Colorado Discharge Permit System Fact

¹⁰ EPA’s “interpretive statement” asserts that it is meant to “provide[] necessary clarity on the Agency’s interpretation of the statute” in connection with the grant of certiorari in this case. 84 Fed. Reg. at 16,812. EPA’s newfound interpretation accordingly should be treated as a “convenient litigating position,” *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012), and receive no deference here.

Sheet to Permit Number CO-0041351, <https://environmentalrecords.colorado.gov/HPRMWebDrawer/Record/237726> (last visited July 16, 2019).

- The NPDES permit issued by EPA in 2017 for the Hollywood Casino Wastewater Treatment Plant, located in Jamul, California, authorizes the plant to discharge effluent into groundwater infiltration basins in accordance with certain limitations and conditions. The infiltration basins are located within 100 feet of Willow Creek. EPA concluded that “wastewater discharged to the infiltration basins has potential to result in surface water discharges to Willow Creek and is therefore subject to regulation through an NPDES permit.” NPDES Permit No. CA0084284 Fact Sheet, at 2, https://www.epa.gov/sites/production/files/2017-08/documents/ca0084284-jamul-hollywood_casino_waste_water_treatment_plant-ndes-permit-factsheet-2017-08.pdf (last visited July 16, 2019).
- The NPDES permit issued by EPA in 2015 for the Tahola Village Wastewater Treatment Plant, located on the reservation of the Quinault Indian Nation, authorizes the plant to discharge effluent into groundwater in accordance with certain limitations and conditions. The effluent “is mixed and diluted into a groundwater plume prior to entering the Quinault River as surface water.” NPDES Permit No. WA0023434 Fact Sheet, at 9, <https://www.epa.gov/sites/production/files/2017-09/>

documents/r10-npdes-taholah-wa0023434-fact-sheet-2015.pdf (last visited July 16, 2019).

- The NPDES permit reissued by EPA in 2016 to Chevron Mining, Inc. at Questa Mine in New Mexico, authorizes various discharges that ultimately reach the Red River. The permit acknowledges that it is not regulating groundwater quality, but includes provisions specifically addressing discharges to the Red River via groundwater seeps and springs. *See* NPDES Permit No. NM0022306, at 4, 6-10, 23, 48, <https://www.env.nm.gov/swqb/NPDES/Permits/NM0022306-Chevron-Questa.pdf> (last visited July 16, 2019).
- The NPDES permit reissued by EPA in 2016 for the Neopit Wastewater Treatment Facility, located on the Menominee Indian Reservation, authorizes the tribe's wastewater treatment plant to discharge effluent "to groundwater via seepage cells to Tourtillotte Creek" in accordance with certain limitations and conditions. *See* NPDES Permit No. WI-0073059-2, at 1, https://www.epa.gov/sites/production/files/2017-02/documents/wi0073059_fnlprmt09_22_2016_0.pdf (last visited July 16, 2019).

Permits such as these confirm that regulating groundwater-conduit discharges to navigable waters is neither novel nor infeasible.

Even assuming some novelty, though, there is no merit to the argument that NPDES regulation of groundwater-conduit discharges would be unduly

burdensome. That argument is difficult to square with the suggestion that states *already* regulate discharges directly to groundwater in a manner sufficiently protective of navigable waters. *See* W. Va. Br. 20-27. If this is really true (although the Amici States dispute that it is, *see supra* at 18-20), then regulating discharges that are fairly traceable to navigable waters through a groundwater conduit should add only an incremental burden.

In all events, Petitioner and its amici drastically overstate the administrative burden of regulation. Affirming the court of appeals' decision will not mean that *every* point source discharging into groundwater must seek an NPDES permit, only those with discharges that can fairly be traced to navigable waters. That important limitation is consistent with the Clean Water Act's focus on protecting navigable waters and ensures that regulated discharges are indeed "*from* [the] point source." 33 U.S.C. § 1362(12) (emphasis added).

Besides glossing over this limitation, Petitioner and its amici ignore the availability of general permits to minimize administrative burdens. Petitioner and its amici raise the specter of massive numbers of permit applications, each requiring individualized analysis and assessment. *See, e.g.*, Pet'r Br. 45-48; W. Va. Br. 30-31. Yet permitting agencies—whether state or federal—are empowered to issue general permits that address numerous similar point sources in a streamlined

process.¹¹ EPA’s regulations provide that a general permit, written to cover a particular geographic area, may be issued for a *category* of similar sources. *See* 40 C.F.R. § 122.28(a)(2). Once an agency has issued a general permit, a discharger generally need only submit a “notice of intent,” not a full individualized application, to be authorized by the general permit and bound by its conditions. *Id.* § 122.28(b)(2). Further, even the requirement to submit a notice of intent can be forgone in certain circumstances. *Id.* § 122.28(b)(2)(v); *see Micosukee Tribe*, 541 U.S. at 108 n.* (explaining that “[g]eneral permits greatly reduce [the] administrative burden [associated with NPDES applications] by authorizing discharges from a category of point sources within a specified geographic area,” and that “[o]nce EPA or a state agency issues such a permit, covered entities, in some cases, need take no further action to achieve compliance with the NPDES besides adhering to the permit conditions”).

Thus, by way of example, it is simply not the case that affirming the court of appeals’ decision would require the submission and review of millions of individualized permit applications for residential septic tanks, as Petitioner and its amici contend. *See, e.g.,* Pet’r Br. 47; W. Va. Br. 30-32. To begin, the permitting

¹¹ Courts have upheld or approved of the use of general permits in the NPDES program. *See Environmental Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 853 (9th Cir. 2003) (explaining that “[g]eneral permitting has long been recognized as a lawful means of authorizing discharges”); *Natural Res. Def. Council v. Costle*, 568 F.2d 1369, 1380-82 (D.C. Cir. 1977) (noting that the Clean Water Act allows the use of general permits).

requirement applies only where a source's discharged pollutants are fairly traceable to navigable waters, and Petitioner and its amici provide no reason to think this is commonly the case for residential septic tanks.¹² But even setting that point aside, a state could issue a single general NPDES permit for residential septic tanks with certain characteristics within its boundaries. That general permit would specify certain conditions for permittees to satisfy, but it would not require the individualized application and review process that Petitioner and its amici portend. A septic tank owner or operator concerned about the possibility of traceable discharges to navigable waters via groundwater would simply submit a notice of intent to be bound by that general permit. Indeed, in appropriate circumstances, the state might provide that discharges complying with applicable conditions are authorized even without a notice of intent. 40 C.F.R. § 122.28(b)(2)(v); *cf. Micosukee Tribe*, 541 U.S. at 108 (noting argument that “the States or EPA could control regulatory costs by issuing general permits” to the category of point sources at issue).

Also inapt is the suggestion that discharges to navigable waters via groundwater should be exempt from the Clean Water Act because of the supposed difficulty of setting effluent limitations for such discharges. *See* W. Va. Br. 32-33. Nothing in the definition of “effluent limitation” requires that compliance be

¹² Indeed, existing state law often limits septic tanks' proximity to surface waters. *See, e.g.*, Colo. Code Regs. § 1002-43:43.7; Md. Code Regs. 26.04.02.04; 25 Pa. Code § 73.13; S.C. Code Ann. Regs. 61-56.200.

assessed where a pollutant leaves the point source, rather than where it enters or affects navigable waters. *See* 33 U.S.C. § 1362(11) (defining “effluent limitation” as “any restriction established . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters”); *Natural Res. Def. Council, Inc. v. County of L.A.*, 725 F.3d 1194, 1200, 1209 (9th Cir. 2013).

Still, to the extent that there are burdens associated with obtaining and issuing permits for groundwater-conduit discharges or complying with conditions necessary to protect the quality of navigable waters, these provisions provide no reason to create the extra-textual exception that Petitioner and its amici seek. Congress included no such exception in the Clean Water Act. Moreover, the Act’s stated purpose of “restor[ing] and maintain[ing] the chemical, physical and biological integrity of the Nation’s waters” dictates that it is fair to require polluters to bear those burdens, rather than saddling the public with the burdens of added pollution to navigable waters.¹³



¹³ Nor is a categorical groundwater-conduit exception justified by the claimed burdens associated with determining whether a discharge is subject to NPDES permitting. *See* W. Va. Br. 32-33. For many sources, the prospect of Clean Water Act liability should be clear both to the source’s owner or operator and to state regulators. Coal ash impoundments, for instance, often are located immediately adjacent to navigable waters, because of power plants’ need for cooling water. *See, e.g., Yarkin*, 141 F. Supp. 3d at 436-37. To the extent that there is doubt about whether discharges would be fairly traceable to navigable waters, Petitioner

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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and its amici provide no reason why it is sensible to require the public to tolerate the ensuing pollution, rather than require the polluting source to either take the measures necessary to forestall such discharges or apply for an NPDES permit.

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