No. 15-17447

In the United States Court of Appeals for the Ninth Circuit

HAWAI'I WILDLIFE FUND, A HAWAII NON-PROFIT CORPORATION; SIERRA CLUB-MAUI GROUP, A NON-PROFIT CORPORATION; SURFRIDER FOUNDATION, A NON-PROFIT CORPORATION; WEST MAUI PRESERVATION ASSOCIATION, A HAWAII NON-PROFIT CORPORATION,

Plaintiffs–Appellees,

v.

COUNTY OF MAUI,

Defendant-Appellant.

Appeal from the United States District Court
For the District of Hawaii
Case No. 1:12-cv-00198-SOM-BMK

BRIEF OF AMICI CURIAE STATES OF ARIZONA, ALABAMA, ALASKA, ARKANSAS, GEORGIA, INDIANA, KANSAS, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, NEVADA, OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, WEST VIRGINIA, AND WYOMING IN SUPPORT OF PETITION FOR REHEARING EN BANC

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STATEMENT OF AMICI CURIAE

The States of Arizona, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, Nevada, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wyoming file this brief under Circuit Rule 29-2(a) to spotlight the effect of the February 1, 2018 panel decision and speak in furtherance of their interests in (and sovereignty over) intrastate water management, in particular when the actions of state political subdivisions are at issue. The panel decision, which threatens to deny state and local governments their traditional primary authority to regulate and manage intrastate land and water uses, is bad for the Amici States, wrong for the environment, and contrary to the principles of our "compound republic." *Quoting* Federalist No. 51, reprinted in 1 Debate on the Constitution 323 (B. Bailyn ed. 1993) (J. Madison).

The Amici States have a significant interest in en banc rehearing because of their sovereign status and long history of responsible governance over intrastate lands and waters, including groundwaters. Arizona's efforts in this regard include its Aquifer Protection Permit and Aquifer Water Quality Standards programs, which protect

groundwaters and aquifers. *See, e.g.*, A.R.S. §§ 49-203(A)(4), 223, 224(B). And other Amici States have their own permitting and water quality standards programs.[1]

SUMMARY OF ARGUMENT

The petition for rehearing en banc should be granted because the panel decision wrongly extends Clean Water Act ("CWA") jurisdiction to intrastate "point sources" that are hydrologically connected only through intrastate nonpoint sources, such as groundwaters, to navigable waters. The panel's decision usurps from state and local governments their traditional regulatory and management authority in

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[1] For example, pursuant to the Nevada Water Pollution Control Law, the Nevada Division of Environmental Protection issues discharge permits that define the quality of a permitted discharge deemed necessary to protect the waters of the State. *See* NRS 445A.300-700. Nevada's definition of waters of the State is broad and includes "all waters situated wholly or partly within or bordering upon [the] State, including but not limited to: (1) [a]ll streams, lakes, ponds, impounding reservoirs, marshes, water courses, waterways, wells, springs, irrigation systems and drainage systems; and (2) [a]ll bodies or accumulations of water, surface and underground, natural or artificial." NRS 445A.415. Further, NRS 445A.465 specifically prohibits the discharge of a pollutant without a permit. The Nevada Division of Environmental Protection has a long history of successfully overseeing this program. Accordingly, the Nevada Water Pollution Control Law would address the types of discharges contemplated while being protective of all waters of the State.

the sphere of intrastate land and water uses, and thus presents an issue of exceptional importance.

CWA point source jurisdiction is limited to intrastate point sources that themselves convey a pollutant into navigable waters because the governing statutory definition of "discharge of any pollutant" omits any reference to nonpoint sources, such as groundwaters, as a conveyance of a pollutant. Properly construed under the canon "expressio unius est exclusio alterius," this omission precludes CWA point source jurisdiction when pollutants are conveyed to navigable waters solely by groundwaters or other nonpoint sources.

In reaching a contrary conclusion, the panel decision circumvents Supreme Court precedent, conflicts with opinions from other circuits, and undermines a rule of national application on a question of exceptional importance in which there is an overriding need for uniformity.

ARGUMENT

The mistaken expansion of CWA point source jurisdiction embraced by the panel decision is understandable from a certain perspective—everyone wants a clean, safe and healthy environment.

But the federal government need not usurp state authority to achieve that outcome, and Congress intended no such complete occupation of the field. State and local governments have the plenary power to protect public health, safety, and welfare; this includes protecting intrastate groundwaters from point source discharges. As compared to any federal agency, state and local governments are closer to the problem sources and more responsive to the people. The CWA even authorizes states to form interstate compacts to furnish solutions to interstate problems. 33 U.S.C. § 1253(b). As discussed below, both the environment and the rule of law are best protected by respecting the statutory text, the congressional intent, and the principles of cooperative federalism embraced by the CWA.

I. THE PANEL DECISION INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE BECAUSE IT CLASHES WITH OTHER CIRCUITS AND WOULD SWEEP AWAY TRADITIONAL STATE AND LOCAL AUTHORITY

"'It was said of the late Justice Story, that if a bucket of water were brought into his court with a corn cob floating in it, he would at once extend the admiralty jurisdiction of the United States over it.'" *Village of Oconomowoc Lake v. Dayton Hudson Corporation*, 24 F.3d 962, 965 (7th Cir. 1994). Courts should avoid adopting a similar

approach to CWA point source jurisdiction. Nevetheless, the panel held that CWA point source jurisdiction extends to a "point source" whenever a pollutant added to navigable waters in a more than de minimis amount is "fairly traceable" to a point source, regardless of how the pollutant traveled from the point source. Dkt. 65 18-19, 25.[2] The panel specifically ruled that a county-operated injection well, which was used for water reclamation and waste management, was required to secure federal National Pollutant Discharge Elimination System ("NPDES") permitting because pollutants traceable to the well reached the ocean by seeping through intermediating groundwaters. In other words, under the panel's decision, the jurisdictional element for liability under the CWA is satisfied whenever there is an indirect hydrological connection between a point source and navigable waters, regardless of intervening nonpoint sources, even if the intervening medium is groundwaters.[3]

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[2] For the sake of brevity, reference to "navigable waters" is used collectively to include both "navigable waters" and "waters of the contiguous zone or ocean." *See* 33 U.S.C. §1362(12)(A), (B).

[3] "It is basic science that ground water is widely diffused by saturation within the crevices of underground rocks and soil," and "[a]bsent exceptional proof of something akin to a mythical Styx-like subterranean river," "passive migration of pollutants" through

But neither admiralty nor CWA point source jurisdiction extends to every bucket of water (or well) that is hydrologically connected through inadvertent seepage to navigable waters, especially if that connection is through groundwaters. Contrary to the panel decision, other circuits have held that a point source must *itself* convey a pollutant into navigable waters to trigger CWA point source jurisdiction—*without* the pollutant travelling through nonpoint sources, such as groundwaters.[4] The Seventh Circuit, for example, has observed that, even if groundwaters were thought within the scope of federal

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groundwater is not a discharge from a point source. *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.,* 2017 WL 2960506, at *8 (D. Conn. July 11, 2017).

[4] *Village of Oconomowoc Lake*, 24 F.3d at 965 (CWA does not assert "authority over groundwaters, just because these may be hydrologically connected with surface waters"); *see also Rice v. Harken Exploration Co.*, 250 F.3d 264, 272 (5th Cir. 2001) ("a generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater" was outside the scope of the Oil Pollution Act in order "to respect Congress's decision to leave the regulation of groundwater to the States"); *Cape Fear River Watch v. Duke Energy Progress*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014) ("Congress did not intend for the CWA to extend federal regulatory authority over groundwater, regardless of whether that groundwater is eventually or somehow 'hydrologically connected' to navigable surface waters"); *see generally Catskill Mountains v. City of New York*, 273 F.3d 481, 493 (2d Cir. 2001) (point source "refers only to the proximate source from which the pollutant is directly introduced to the destination water body"); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165, 175-76 (D.C. Cir. 1982) (affirming reasonableness of EPA interpretation that "the point source must *introduce* the pollutant into navigable water").

regulatory authority (an unsettled question), "the Clean Water Act does not attempt to assert national power to the fullest." *Village of Oconomowoc Lake*, 24 F.3d at 965. The circuit reasoned that Congress repeatedly refused to pass proposals to add groundwaters "to the scope of the Clean Water Act." *Id.* (citing *Exxon Corp. v. Train*, 554 F.2d 1310, 1325-29 (5th Cir.1977)). The Seventh Circuit further explained that there was a clear reason for Congress's refusal: *impracticality*. As stated by the Senate Committee on Public Works in 1972, Congress rejected proposals to add jurisdiction over groundwaters "[b]ecause the jurisdiction regarding groundwaters is so complex and varied from State to State." *Id.* at 965.

Congress was right. The panel decision threatens to create an unworkable regulatory environment by extending an onerous federal regulatory structure over what has been a traditional area of state responsibility. Whether and how pollutants seep through groundwaters into navigable waters from a point source is exceedingly difficult to observe and measure, much less predict, due to numerous factors including difficulty of access, temperature changes, chemical interactions, movement of the earth, tides, transpiration, evaporation,

groundwater withdrawals, vegetative conditions, atmospheric conditions, and surrounding surface and below-ground land uses. *See* T.C. Winter, et al, Ground Water and Surface Water: A Single Resource, U.S. Geological Survey Circular 1139 (1998). And yet, under the panel's reading of the CWA, unforeseeable criminal and civil liability could arise whenever any point source is shown *in hindsight* to have caused the addition of some pollution to any navigable waters through *even the most unpredictable, improbable and multistepped causal chain*. *See, e.g.*, 33 U.S.C. §§ 1319(c), (d), 1365(a).

The civil and criminal exposure threatened by the panel decision would haunt far more than traditional waste management facilities. Section 1362(6) defines "pollutant" broadly to include much more than traditional wastes.[5] Point sources that require NPDES permitting in Arizona alone could possibly jump more than *200,000%*—from the current ~150 permitted facilities to most (if not all) of the State's 35,382

[5] Even potable water can be considered a pollutant due to the residuals of the disinfection process. *See, e.g.*, *W.R. Grace & Co. v. United States EPA*, 261 F.3d 330, 333 (3d Cir. 2001) (describing disinfection process for potable water as creating chloramines).

Class V Wells and potentially even an estimated 282,897 septic systems.[6]

If anything, a *multi-thousand percent increase* in the number of alleged mandatory NPDES permittees is a conservative estimate of the regulatory impact of the panel decision. The regulatory effort compelled by the panel decision would need to range to the entire network of ever changing, externally influenced underground capillaries and seeps that ultimately feed "navigable waters." *See* 33 U.S.C. § 1342(c)(3). It is hard to imagine *any* land or water use with any *potential* for runoff, spillage, or leakage (much less *any* water storage, transportation, recycling, or waste management activity) that would not have this *possible* or *eventual* hydrological connection to navigable waters, particularly if viewed in hindsight. Every fluid or semi-fluid discharge that is capable of seepage, runoff, spillage, leakage, or evaporation is likely hydrologically connected to navigable waters indirectly through

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[6] *Compare* "FY 2017 Non-Tribal Permits Detailed Percent Current Status," https://www.epa.gov/sites/production/files/2018-01/documents/final_fy17_eoy_non-tribal_backlog_report_card.pdf, *with* "National Underground Injection Control Inventory-Federal Fiscal Year 2016," https://www.epa.gov/sites/production/files/2017-06/documents/state_fy16_inventory_format_508.pdf, and "Septic Stats: Arizona," http://www.nesc.wvu.edu/septic_idb/arizona.htm (all last visited 3.1.2018).

nonpoint sources, such as groundwaters. And almost every land or water use is capable of generating such discharges. As quipped in *Village of Oconomowoc Lake*, even a bucket of water can be hydrologically connected to navigable waters. 24 F.3d at 965.

In short, extending CWA liability to any point source that is connected by groundwaters, or other nonpoint sources, to navigable waters threatens to force Arizona (and other Amici States that have accepted primacy) to undertake a massive expansion of NPDES permitting in areas the CWA was never intended to reach, as the far more reasonable approach of other circuits has confirmed.

II. THE PANEL REACHED ITS SWEEPING OUTCOME BY DISREGARDING A TRADITIONAL CANON OF CONSTRUCTION AND THE COOPERATIVE FEDERALISM EMBODIED IN THE CWA

En banc rehearing would allow for correction of the panel's error through a straightforward application of a basic canon of statutory interpretation with due consideration for principles of cooperative federalism.

A. The Panel Disregarded The Interpretative Canon "Expressio Unius Est Exclusio Alterius"

Under the interpretative canon "expressio unius exclusio alterius," the omission of a relevant term from a statutory provision is presumed

to exclude intentionally what has been omitted. *Lamie v. United States Trustee*, 540 U.S. 526, 537 (2004); *U.S. v. Vonn*, 535 U.S. 55, 64 (2002). This canon compels the conclusion that CWA point source jurisdiction cannot be triggered, such that a NPDES permit becomes necessary, unless a point source is *the* conveyance that adds pollution to navigable waters—to the exclusion of nonpoint sources, such as groundwaters.

The jurisdictional reach of the CWA is established by the meaning of "discharge of any pollutant" in the Act's declaration that "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). The definition of "discharge of a pollutant" (and "discharge of pollutants") is "any addition of any pollutant to navigable waters [or waters of the contiguous zone or the ocean] from any point source [other than a vessel or other floating craft]." *Id.* § 1362(12)(A), (B). However, the reference in this definition to "any point source" is emphatically *not* a reference to a mere source for a pollutant. A "point source" is expressly defined as *more* than a source; it is defined as a type of "conveyance" that is "discernible, confined, and discrete." 33 U.S.C. § 1362(14). A conveyance is a "means or way of conveying," it is *not*

merely a "source."[7] Thus, in the definition of "discharge of a pollutant," Congress chose to reference "any point source" as the *only* designated "means or way of conveying" a pollutant into navigable waters.

Congress's stark omission of any reference to nonpoint sources, such as groundwaters, as a "means or way of conveying" a pollutant in 33 U.S.C. § 1362(12) should not be ignored. Congress repeatedly rejected amendments that would have extended the CWA to groundwater. S. Rep. No. 92-414, at 3735-3739 (1971). Furthermore, whether the conveyance of a pollutant is a point or nonpoint source is highly relevant to the CWA. Numerous provisions of the CWA distinguish between point and nonpoint sources. *See, e.g.*, 33 U.S.C. §§ 1251, 1255, 1270, 1281, 1285, 1311, 1314, 1319, 1324, 1330, 1346. Congress was clearly aware that a nonpoint source, such as groundwaters, could be a relevant conveyance of pollution to navigable waters. Yet, Congress made no mention of any nonpoint source in the

[7] *Conveyance*, Webster's New International Dictionary of the English Language Unabridged (3rd ed. 1993) ("1: the action of conveying . . . b: carrying, transporting, transportation. . . 2: a means or way of conveying . . . c: a channel or passage for conduction or transmission . . . d: a means of carrying or transporting something"); *see also conveyance*, Webster's New International Dictionary of the English Language Unabridged (2nd ed. 1950).

definition of "discharge of a pollutant," which controls the reach of CWA point source jurisdiction. *Compare* 33 U.S.C. § 1311(a) *with* § 1362(12)(A), (B). This omission should be read as intentional.

Given the omission of any reference to any nonpoint source in the governing definitions, a straightforward application of the "expressio unius exclusio alterius" canon confirms that CWA point source jurisdiction (and NPDES permitting) applies only to point sources that themselves convey pollution into navigable waters, to the exclusion of any nonpoint source, such as groundwaters. *See Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius*.").

To sustain CWA point source jurisdiction, a "point source" must be *the* "conveyance" of the pollutant into navigable waters, not merely the source, because *it is the only conveyance mentioned*. This natural interpretation, which has been adopted by other circuits as discussed above, defeats the claim that CWA point source jurisdiction can be

sustained by a mere indirect hydrological connection between a point source and navigable waters through nonpoint sources, such as groundwaters. *See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 87–88 (2006) ("The existence of these carve-outs both evinces congressional sensitivity to state prerogatives in this field and makes it inappropriate for courts to create additional, implied exceptions.").

B. The Panel Disregarded The Cooperative Federalism Principles Embodied In The CWA

The CWA is a quintessential example of "cooperative federalism." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 514 (2nd Cir. 2017) ("Act largely preserves states' traditional authority over water allocation and use"). The CWA emphasizes that Congress had the intention to accommodate the traditional and "primary" role of state and local government in the field of environmental regulation. 33 U.S.C. §1251(b). The CWA also repeatedly emphasizes that federal agencies are to act in "cooperation" with the States. 33 U.S.C. §§ 1251(g), 1252(a).

When it comes to state authority to "allocate quantities of water," such as in the Arizona Recharge Program, the CWA includes a

powerfully deferential savings clause to bar federal regulation from interfering with state primacy. 33 U.S.C. § 1251(g).[8] And this savings clause is reinforced by 33 U.S.C. §1370, which states: "except as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

The panel decision's indirect hydrological connection theory of CWA point source jurisdiction is inconsistent with these manifestations of cooperative federalism in the CWA, which even the EPA recognizes. *Definition of "Waters of the United States"—Recodification of Pre-Existing Rules*, 82 FR 34899, 34900 (July 27, 2017) (identifying policy goals of CWA as "(a) To restore and maintain the nation's waters; and (b) to preserve the States' primary responsibility and right to prevent, reduce, and eliminate pollution"). It disregards the traditional

[8] As part of its Recharge Program, Arizona currently oversees and regulates a vast array of groundwater storage facilities, many, if not most, of which are not currently regarded as subject to NPDES permitting. *Underground Water Storage, Savings and Replenishment*, available at https://new.azwater.gov/recharge (last visited 2.26.2018). Planning is underway for many more such facilities on the assumption that NPDES permitting is not necessary. *USF Permit Application Online Noticing*, available at https://new.azwater.gov/recharge/permitted-facilities (last visited 2.26.2018).

management and regulatory authority of states over local land and water uses. *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (management and regulation of local lands and waters "is perhaps the quintessential state activity"). And, by threatening a nearly limitless expansion of preemptive federal jurisdiction, the panel decision wrongly circumvents the Supreme Court's efforts to moderate similarly limitless interpretations of "waters of the United States" in *Rapanos v. United States*, 547 U.S. 715, 779, 786 (2006) (Scalia, J., concurring; Kennedy, J., plurality), and *SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-74 (2001).[9] For these reasons, the panel's indirect hydrological connection theory of CWA point source jurisdiction, which lacks any clear and manifest textual support in the Act, should be rejected in

[9] The doctrine of constitutional avoidance requires courts to construe statutes, "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). A mere indirect hydrological connection between a point source and navigable waters might not be a sufficient "jurisdictional element" for Commerce Clause authority under *U.S. v. Morrison*, 529 U.S. 598 (2000), and *U.S. v. Lopez*, 514 U.S. 549 (1995). The panel's theory is also constitutionally questionable because it may effectively authorize federal permitting to supersede nearly all state authority over intrastate land and water uses. *SWANCC*, 531 U.S. at 172-74 ("significant constitutional questions" are raised by "permitting federal encroachment upon a traditional state power"); *see also Bond v. U.S.*, 564 U.S. 211, 222 (2011) (observing our system of dual sovereignty denies "any one government complete jurisdiction over all the concerns of public life").

favor of the interpretation that a point source must *itself* be the conveyance of pollutants into navigable waters.[10]

CONCLUSION

For the forgoing reasons, the undersigned Amici States request that the petition for en banc rehearing be granted.

March 12, 2018

Respectfully Submitted,

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[10] A federal statute should not be construed to preempt state laws or traditional sovereign interests unless such intent is evidenced by a clear and manifest statement from Congress. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Gonzales v. Oregon*, 546 U.S. 243, 255, 270-72 (2006). This doctrine is applicable with special force in the context of cooperative federalism. *New York State Dep't of Social Services v. Dublino*, 413 U.S. 405, 421 (1973).

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 29(b) as modified by Fed. R. App. P. 29-2(c)(2).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B)(iii) and (f), this brief is 3464 words.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century type.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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