No. 15-17447

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

v.

COUNTY OF MAUI,

Defendant-Appellant.

On Appeal from the U.S. District Court, Dist. of Hawaii
No. 12-cv-198, Hon. Susan Oki Mollway, District Judge

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

JOHN C. CRUDEN
Assistant Attorney General

OF COUNSEL:

KARYN WENDELOWSKI
U.S. Environmental
Protection Agency
Office of General Counsel
Washington, D.C.

AARON P. AVILA
R. JUSTIN SMITH
FREDERICK H. TURNER
Attorneys, U.S. Dep't of Justice
Env't & Natural Resources Div.
P.O. Box 7415
Washington, DC 20044
(202) 305-0641
frederick.turner@usdoj.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Federal Register

The United States respectfully submits this brief as amicus curiae pursuant to Federal Rule of Appellate Procedure 29(a).

INTEREST OF THE UNITED STATES

The United States Environmental Protection Agency (EPA) implements the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387, together with the states. That includes promulgating regulations regarding the CWA's National Pollutant Discharge Elimination System (NPDES). *Id.* § 1342. The United States participates as amicus curiae because it has an interest in the proper interpretation of the NPDES-permit provisions and the framework for analyzing whether discharges of pollutants to jurisdictional surface waters through groundwater are subject to those provisions.[1] The United States also has an interest because it enforces the CWA and because it is a potential defendant in actions alleging the discharge of pollutants from federal facilities through groundwater.

The United States agrees with the result the district court reached in this case and urges affirmance. In the United States' view, a NPDES

[1] We use the term "jurisdictional surface waters" throughout this brief to mean "waters of the United States."

permit is required here because the discharges from the Defendant-Appellant County of Maui's wastewater treatment facility are from a point source (*i.e.*, the injection wells) to waters of the United States (*i.e.*, the Pacific Ocean[2]). To be clear, the United States does not contend that groundwater is a point source, nor does the United States contend that groundwater is a water of the United States regulated by the Clean Water Act. Moreover, the United States does not agree with the district court's application of the "significant nexus" standard from *Rapanos v. United States*, 547 U.S. 715 (2006).

ISSUES PRESENTED

This amicus brief addresses the following issues:

1. Whether a discharge of pollutants from a point source to jurisdictional surface waters through groundwater with a direct hydrological connection to jurisdictional surface waters is regulated under the CWA.

2. Whether the site-specific facts here give rise to a "discharge of a pollutant" under the CWA.

[2] More specifically, into the Pacific Ocean that is part of the United States' territorial seas under the CWA. 33 U.S.C. § 1362(7), (8).

3. Whether the County had fair notice that it was subject to civil penalties for its discharges to jurisdictional surface waters without a NPDES permit.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

Congress enacted the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress therefore prohibited any non-excepted "discharge of any pollutant" to "navigable waters" unless it is authorized by a permit. *Id.* §§ 1311, 1342, 1344, 1362. The CWA defines "discharge of a pollutant" as "any addition of any pollutant *to* navigable waters from any point source." *Id.* § 1362(12)(A) (emphasis added). Pollutant means "dredged spoil, solid waste, incinerator, 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). The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas"; and a point source is "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(7), (14).

The CWA authorizes EPA to issue NPDES permits under Section 402(a), but EPA may authorize a state to administer its own NPDES program if EPA determines that it meets the statutory criteria. *Id.* § 1342(a), (b). When a state receives such authorization, EPA retains oversight and enforcement authorities. *Id.* §§ 1319, 1342(d). Hawaii obtained such permitting authority in 1974. *See* 39 Fed. Reg. 43,759 (Dec. 18, 1974).

The CWA is a strict-liability regime that prohibits non-excepted discharges unless they are authorized by a CWA permit. *Id.* §§ 1311, 1342, 1344. An unpermitted discharge constitutes a violation of the CWA regardless of fault and is subject to enforcement by the state or federal government or a private citizen. *Id.* §§ 1319, 1365. To establish liability for a violation of the permit requirement, a plaintiff must show there was (1) a discharge (2) of a pollutant (3) to navigable waters (4)

from a point source. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001).

The CWA includes a civil-penalty provision for those who violate the Act. 33 U.S.C. § 1319(d). When determining a civil-penalty amount, courts must consider "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." *Id.*

EPA's longstanding position is that a discharge from a point source to jurisdictional surface waters that moves through groundwater with a direct hydrological connection comes under the purview of the CWA's permitting requirements. *E.g.*, Amendments to the Water Quality Standards Regulations that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,982 (Dec. 12, 1991) ("[T]he affected ground waters are not considered 'waters of the United States' but discharges to them are regulated because such discharges are effectively discharges to the directly connected surface waters.").

II. FACTUAL BACKGROUND

The County operates the Lahaina Wastewater Reclamation Facility. *Haw. Wildlife Fund v. Cty. of Maui*, 24 F. Supp. 3d 980, 983 (D. Haw. 2014) [*Hawaii I*]. The facility receives approximately four million gallons of sewage each day. *Id.* After treating the sewage, the facility releases three to five million gallons of effluent into four on-site injection wells. *Id.* at 983-84. The effluent travels into a shallow groundwater aquifer and then flows into the Pacific Ocean through the seafloor at points known as "submarine springs." *Id.* at 984; *see also Haw. Wildlife Fund v. Cty. of Maui*, No. 12-198, 2015 WL 328227, at *1 (D. Haw. Jan. 23, 2015) [*Hawaii II*].

EPA, the Hawaii Department of Health (DOH), and others conducted a tracer-dye study that confirmed this conclusion for injection wells 3 and 4. *Hawaii I*, 24 F. Supp. 3d at 984. According to the study, it took the leading edge of the dye 84 days to go from wells 3 and 4 to the ocean and about 64% of the dye injected into these wells was discharged from the submarine springs to the Pacific Ocean. *Id.* The dye's appearance in the ocean "conclusively demonstrated that a hydrogeologic connection exists." *Id.* at 985-86.

Although tracer dye was not placed into well 1 and dye from well 2 was not detected in the study, the County "acknowledge[d] that there is a hydrogeologic connection between wells 1 and 2 and the ocean." *Hawaii II*, 2015 WL 328227, at *1-2. The tracer-dye study models indicated that, in some circumstances, treated effluent from well 2 would move along flowpaths similar to those traveled by the dye injected into wells 3 and 4 and emerge at the same springs. Supplemental Excerpts of Record (SER) 237, 240, 243. There is no dispute that given the proximity of wells 1 and 2, the modeling for well 2 predicts the flowpaths for discharges from well 1. Excerpts of Record (ER) 443; SER 189.

III. PROCEDURAL BACKGROUND

In April 2012, Plaintiffs-Appellees Hawaii Wildlife Fund, Sierra Club-Maui Group, Surfrider Foundation, and West Maui Preservation Association filed suit seeking to require the County to obtain and comply with a NPDES permit and to pay civil penalties. *Hawaii I,* 24 F. Supp. 3d at 986. The district court issued three partial summary-judgment opinions in favor of Plaintiffs. The parties then entered into a settlement agreement, in which the County stipulated to terms

contingent on a final judgment that the County violated the CWA and that the County was "not immune from" civil penalties. *Haw. Wildlife Fund v. Cty. of Maui*, No. 12-198, ECF No. 259. The court entered final judgment in accordance with its opinions and the settlement agreement.

The district court's first opinion held the County liable under the CWA for unpermitted discharges from wells 3 and 4. *Hawaii I*, 24 F. Supp. 3d at 1000. The court started its analysis with the language and purpose of the CWA, and also relied on EPA's interpretation and case law. *Id.* at 995-96. The court explained that Plaintiffs "must show that pollutants can be *directly traced* from the injection wells to the ocean such that the discharge at the LWRF is a *de facto* discharge into the ocean." *Id.* at 998 (emphasis in original). The court found that Plaintiffs had met this burden. *Id.* at 998-1000. The district court also found CWA liability under the "significant nexus" standard from Justice Kennedy's concurring opinion in *Rapanos*, 547 U.S. at 755-56, and the Ninth Circuit's application of that standard in *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007).

The district court's second opinion held the County liable for unpermitted discharges from wells 1 and 2. *Hawaii II*, 2015 WL 328227, at *6. The County "expressly conced[ed] that pollutants introduced by the County into wells 1 and 2 were making their way to the ocean," and the court rejected the County's argument that liability does not arise unless a pollutant passes through "a series of sequential point sources." *Id.* at *2-4.

The district court's third opinion rejected the County's argument that it was not subject to civil penalties for its unpermitted discharges because it lacked fair notice. *Haw. Wildlife Fund v. Cty. of Maui*, No. 12-198, 2015 WL 3903918, at *6 (D. Haw. June 25, 2015) [*Hawaii III*]. The court determined that the County had notice because the discharges "clearly implicate[d] each statutory element." *Id.* at *4. The court further held that its adjudication of the first motion for partial summary-judgment provided notice to the County. *Id.* at *6.

The parties then entered into a settlement agreement, in which the County stipulated that it would make good faith efforts to obtain and comply with a NPDES permit and that it would pay $100,000 in civil penalties and $2.5 million for a supplemental environmental

project, all contingent on a final judgment and ruling that the County violated the CWA and that the County was "not immune from" civil penalties. *Haw. Wildlife Fund v. Cty. of Maui*, No. 12-198, ECF No. 259. The district court then entered a final judgment.

SUMMARY OF ARGUMENT

The judgment should be affirmed because it is consistent with the language and purpose of the Clean Water Act and EPA's longstanding interpretation and practice of issuing NPDES permits for discharges of pollutants similar to the ones here. As Justice Scalia said in *Rapanos*, the statute's language prohibiting "any addition of any pollutant to navigable waters from any point source" does not limit liability only to discharges of pollutants *directly* to navigable waters. *See Rapanos*, 547 U.S. at 743 (plurality op.) (emphasis in original). Courts have interpreted the CWA as covering not only discharges of pollutants directly to navigable waters, but also discharges of pollutants that travel from a point source to navigable waters over the surface of the ground or through underground means. *E.g.*, *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 44-45 (5th Cir. 1980). The discharges in this case fall squarely within the statutory language.

In the United States' view, a NPDES permit is required here because the discharges at issue are from a point source (*i.e.*, the injection wells) to waters of the United States (*i.e.*, the Pacific Ocean's coastal waters). To be clear, the United States views groundwater as *neither* a point source *nor* a water of the United States regulated by the CWA. The United States therefore agrees with the district court's conclusion that a NPDES permit was required here, but only to the extent that the court's analysis is consistent with the above-stated principles regarding groundwater.

The district court's conclusions accord with the CWA's purpose. Congress enacted the CWA "to restore and maintain . . . the country's waters"; and to achieve this goal, Congress created a strict-liability regime prohibiting discharges unless they are authorized under the CWA. Recognizing Congress's goals in the CWA, courts have concluded that in certain circumstances discharges of pollutants that reach navigable waters through groundwater fall squarely within the statute's terms. *E.g.*, *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1179-80 (D. Idaho 2001).

Even if Congress's intent on this issue had been ambiguous, EPA has clearly stated for decades that pollutants that move through groundwater can constitute discharges subject to the CWA, and that interpretation is entitled to *Chevron* deference. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). It has been EPA's longstanding position that discharges 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. *See* NPDES Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 3017 (Jan. 12, 2001). This formulation recognizes that some hydrological connections are too circuitous and attenuated to come under the CWA. *Id.*

The County argues that the district court dispensed with the requirements that a discharge be "from a point source" and "to navigable water" because the effluent was discharged from a nonpoint source and because the effluent was discharged into groundwater, which is not covered by the CWA. Opening Brief (Op. Br.) at 21, 27, 30.

This attempt to bifurcate the movement of the pollutants into two separate events is inconsistent with the statute's language and purpose. It also ignores the undisputed fact that the pollutants moved *through* that groundwater to the ocean.

The County's argument that no civil penalty should have been imposed because the County lacked fair notice lacks merit. The County was on notice both as a general matter—through the CWA's language and EPA's statements in rulemakings—and specifically—through communications from EPA to the County. In any event, the question of fair notice goes to the amount of the civil penalty, an amount the County stipulated to, and is only one of many factors informing a civil-penalty amount.

ARGUMENT

I. THE DISTRICT COURT'S DECISIONS ARE CONSISTENT WITH THE LANGUAGE AND PURPOSE OF THE CWA.

The district court's judgment holding the County liable under the CWA is consistent with the text and purpose of the statute. It is also consistent with EPA's long-held position governing when the CWA requires permits for discharges of pollutants that move to jurisdictional surface waters through groundwater with a direct hydrological

connection. The County cannot recast the nature of the discharges to avoid that result.

A. Discharges of Pollutants to Jurisdictional Surface Waters Through Groundwater with a Direct Hydrological Connection Properly Require CWA Permits.

When Congress prohibited the unpermitted "discharge of any pollutant," it defined this term broadly as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1311, 1362(12)(A). As the County concedes, "a point source does not need to discharge directly into navigable waters to trigger NPDES permitting." Op. Br. at 27. Because Congress did not limit the term "discharges of pollutants" to only direct discharges to navigable waters, discharges through groundwater may fall within the purview of the CWA.

This reading of "discharge of a pollutant" has been applied in other similar contexts where discharges of pollutants have moved from a point source to navigable waters over the surface of the ground or by some other means. In *Sierra Club v. Abston Construction*, which addressed discharges from mining operations that traveled to navigable waters in part through surface runoff, the Fifth Circuit stated that "[g]ravity flow, resulting in a discharge into navigable body of water,

may be part of a point source discharge if the [discharger] at least initially collected and channeled the water and other materials."[3] 620 F.2d at 44-45; *see also Friends of Sakonnet v. Dutra*, 738 F. Supp. 623, 628, 630 (D.R.I. 1990) (defendant liable for 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]"); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 647 (E.D. Pa. 1981) ("[T]here is no requirement that the point source need be directly adjacent to the waters it pollutes.").

That Congress gave the term "discharge of a pollutant" a broad meaning finds support in cases where CWA liability attached for discharges from point sources that traveled through other means before reaching surface waters. *See Rapanos*, 547 U.S. at 743 (noting that courts have found violations of Section 301 "even if the pollutants discharged from a point source do not emit 'directly into' covered

[3] The County misconstrues the United States' position as amicus curiae in *Abston Construction*. *See* Op. Br. at 30-31. The United States took the position that discharges of pollutants that traveled indirectly from a point source to jurisdictional surface waters through surface runoff or the gravity flow of rainwater come within the scope of the CWA. Brief for the United States as *Amicus Curiae*, at 35-36, *Sierra Club v. Abston Constr. Co.*, No. 77-2530 (5th Cir. 1980).

waters, but pass 'through conveyances' in between") (citing *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137 (10th Cir. 2005) (defendant could be liable for discharges conveyed from its point-source mine shaft to jurisdictional surface water through a tunnel that defendant did not own); *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945, 946-47 (W.D. Tenn. 1976) (holding that CWA covered pollutants discharged from defendant's point source to jurisdictional surface waters conveyed through a sewer system that the defendant did not own)).

Because courts have interpreted the term "discharge of a pollutant" to cover discharges over the ground and through other means, exempting discharges through groundwater could lead to absurd results. As one court noted, "it would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater." *N. Cal. River Watch v. Mercer Fraser Co.*, No. 04-4620, 2005 WL 2122052, at *2 (N.D. Cal. Sept. 1, 2005).

The County concedes that discharges need not be direct and that a discharge through a conveyance requires a permit. Op. Br. at 27. The County argues, however, that the conveyance itself must be a point source and that because groundwater is not a point source, the district court "impermissibly 'transform[s] a nonpoint source into a point source.'" *Id.* at 27-28, 33. The County's interpretation is flawed. Contrary to the County's argument, the district court did not eliminate the requirement that a discharge be "from a point source." All it said was that pollutants from a point source need not be emitted *directly* into covered waters. The case law does not require the means by which the pollutant discharged from a point source reaches a water of the United States to be a point source.

While the County's statement that the statutory definition of "navigable waters" does not include groundwater is accurate, Op. Br. at 21, it is beside the point. There is no dispute that groundwater itself is not a "navigable water," 80 Fed. Reg. 37,054, 37,055 (June 29, 2015), but the district court's decisions hinge on the movement of pollutants to jurisdictional surface waters through groundwater with a direct

hydrological connection. Such an addition of pollutants to navigable waters falls squarely within the CWA's scope.

The County relies on the treatment of groundwater in legislative history, Op. Br. at 21-23, but this "only supports the unremarkable proposition with which all courts agree—that the CWA does not regulate 'isolated/nontributary groundwater' which has no [effect] on surface water." *Bosma*, 143 F. Supp. 2d at 1180. It does not undermine the conclusion that discharges of pollutants through groundwater to jurisdictional surface waters are subject to the NPDES program.

The County contends that case law does not support the district court's interpretation, Op. Br. at 35-37, but this argument largely ignores the majority of the courts that have addressed this issue and 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. *See, e.g.*, *Sierra Club v. Va. Elec. & Power Co.*, No. 15-112, 2015 WL 6830301 (E.D. Va. Nov. 6, 2015); *Yadkin Riverkeeper v. Duke Energy Carolinas, LLC*, No. 14-753, 2015 WL 6157706 (M.D.N.C. Oct. 20, 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*, No. 08-548, 2009 WL 3672895 (D. Or. Oct. 30, 2009); *Mercer Fraser*, 2005 WL 2122052; *Bosma*, 143 F. Supp. 2d 1169.

The County's reliance on other case law (Op. Br. at 35-36) is unavailing for three reasons. *First*, none of the cases are controlling precedent. *Second*, most of these decisions are inapposite because they do not address the issue of discharges of pollutants that move through groundwater to jurisdictional surface waters. In *Village of Oconomowoc Lake v. Dayton Hudson, Corp.*, the court examined whether groundwater itself was a navigable water, *i.e.*, a water within the meaning of the CWA. 24 F.3d 962, 965 (7th Cir. 1994). That is distinct from whether a CWA permit is required when pollutants travel to jurisdictional surface waters through groundwater with a direct hydrological connection.

Third, these cases do not foreclose application of the CWA where a direct hydrological connection to jurisdictional surface waters can be found. In *Rice v. Harken Exploration Co.*, the court concluded that a discharge of oil that might reach navigable waters by gradual, natural seepage was not the equivalent of a discharge to navigable waters. 250

F.3d 264, 271 (5th Cir. 2001). The court suggested, however, that it would be open to finding a discharge had occurred through groundwater when it underscored the plaintiffs' failure to provide any "evidence of a close, direct and proximate link between [the defendant's] discharges of oil and any resulting actual, identifiable oil contamination of a particular body of natural surface water." *Id.* at 272.

B. The District Court's Decisions Give Full Effect to Congress's Intent to Restore and Maintain the Nation's Waters.

Congress's purpose in enacting the CWA—to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"—embraced a "broad, systemic view . . . of water quality." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985). The County attempts to minimalize that goal. Adopting the County's theory would allow dischargers to avoid responsibility simply by discharging pollutants from a point source into jurisdictional surface waters through any means that was not direct.

Courts have viewed the CWA's broad purpose of protecting the quality of navigable waters as a clear congressional signal that "any pollutant which enters such waters, whether directly or through

groundwater, is subject to regulation by NPDES permit." *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994). "Stated even more simply, whether pollution is introduced by a visible, above-ground conduit or enters the surface water through the aquifer matters little to the fish, waterfowl, and recreational users which are affected by the degradation to our nation's rivers and streams." *Bosma*, 143 F. Supp. 2d at 1179-80.

The state's authority to protect groundwater is in no way impaired by subjecting point sources to NPDES-permit requirements to protect surface waters. Thus, the County's argument that it should not be liable here because "preservation of states' authority over the regulation of groundwater" is a "co-equal" goal of the CWA misses the mark. Op. Br. at 34-35. This emphatically is not a case about the regulation of groundwater. Instead it is about the regulation of discharges of pollutants to waters of the United States. To the extent the County's argument relies on the regulatory scheme governing disposal into wells, Op. Br. at 24-27, that is flawed because the regulation of wells under the Safe Drinking Water Act's (SDWA) Underground Injection Control (UIC) program does not preclude or displace regulation under the

CWA's NPDES program.[4] *See Hudson R. Fishermen's Ass'n v. City of New York*, 751 F. Supp. 1088, 1100 (S.D.N.Y. 1990), *aff'd*, 940 F.2d 649 (2d Cir. 1991) (objectives of the CWA and the SDWA are not "mutually exclusive"); *see also Bath Petrol. Storage, Inc. v. Sovas*, 309 F. Supp. 2d 357, 369 (N.D.N.Y. 2004).

C. The District Court's Finding of Liability Is Consistent with EPA's Longstanding Position.

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. EPA has repeatedly articulated this view in multiple rulemaking preambles. In 1990, EPA stated that "this rulemaking only addresses discharges to water of the United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a

[4] The County misconstrues EPA's position in *Inland Steel v. EPA*, 901 F.2d 1419 (7th Cir. 1990). EPA argued that not all disposals into injection wells are discharges of pollutants under the CWA, and that the connection between the wells and navigable waters in that case was too attenuated to bring the discharges under the purview of the CWA. *Id.* at 1422-23. That position (embraced by the Seventh Circuit) does not mean that "injection into wells is not a discharge of pollutants requiring a NPDES permit." Op. Br. at 27.

hydrological connection between the ground water and a nearby surface water body)." NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,997 (Dec. 2, 1990).

And in the preamble to its final rule addressing water quality standards on Indian lands, EPA stated:

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

56 Fed. Reg. at 64,982.

In 2001, EPA reiterated its position: "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." 66 Fed. Reg. at 3017. EPA recognized that the determination was "a factual inquiry, like all point source determinations," adding:

> The time and distance by which a point source discharge is connected to surface waters via hydrologically connected surface waters will be affected by many site specific factors, such as geology, flow, and slope. Therefore, EPA is not proposing to establish any specific criteria beyond confining

> the scope of the regulation to discharges to surface water via a "direct" hydrological connection.

Id. A general hydrological connection between all groundwater and surface waters is insufficient; there must be evidence showing a direct hydrological connection between specific groundwater and specific surface waters. *Id.*

To the extent there is statutory ambiguity about whether the CWA applies to discharges to jurisdictional surface waters through groundwater, EPA's interpretation is entitled to *Chevron* deference. *Chevron,* 467 U.S. at 842-43.

The County's contention that the direct-hydrological-connection standard is at odds with EPA's recently-stated position on whether groundwater is a jurisdictional water misinterprets EPA's statements. Op. Br. at 38-39. The Clean Water Rule, which was promulgated in June 2015 (and stayed by the Sixth Circuit pending further order of the court, *see In re EPA & Dep't of Def. Final Rule*, 803 F.3d 804, 809 (6th Cir. 2015)), expressly excludes groundwater from the definition of "waters of the United States." 80 Fed. Reg. 37,054. But, as EPA clarified, the fact that groundwater itself is not jurisdictional under the CWA does not mean that pollutants that reach waters of the United

States through groundwater do not require CWA permits. "EPA agrees that the agency has a longstanding and consistent interpretation that the Clean Water Act may cover discharges of pollutants from point sources to surface water that occur via ground water that has a direct hydrologic connection to the surface water. Nothing in this rule changes or affects that longstanding interpretation, including the exclusion of groundwater from the definition of 'waters of the United States.'" *See* EPA, *Response to Comments – Topic 10 Legal Analysis* (June 30, 2015); available at http://www.epa.gov/cleanwaterrule/response-comments-clean-water-rule-definition-waters-united-states. The County erroneously attempts to conflate the jurisdictional exclusion of groundwater with the role that groundwater can play as the pathway through which pollutants from a point source reach jurisdictional surface waters.[5]

[5] The district court stated that if the proposed Clean Water Rule was finalized, it "would likely mean that the groundwater under the [facility] could not itself be considered 'waters of the United States'" and that this would affect whether Plaintiffs could also prevail under *Healdsburg*. *Hawaii I*, 24 F. Supp. 3d at 1001. But the court erred in attempting to apply *Healdsburg* because the jurisdictional status of groundwater itself is irrelevant to whether discharges that move through groundwater to jurisdictional waters require NPDES permits.

II. THE COUNTY IS LIABLE FOR UNPERMITTED DISCHARGES DUE TO THE "DIRECT HYDROLOGICAL CONNECTION" BETWEEN THE GROUNDWATER AND THE OCEAN.

Discharges of pollutants from a point source that move through groundwater are subject to CWA permitting requirements if there is a direct hydrological connection between the groundwater and a jurisdictional surface water.[6] Ascertaining whether there is a direct hydrological connection is a fact-specific determination. 66 Fed. Reg. at 3017. To qualify as "direct," a pollutant must be able to proceed from the point of injection to the surface water without significant interruption. Relevant evidence includes the time it takes for a pollutant to move to surface waters, the distance it travels, and its traceability to the point source. These factors will be affected by the type of pollutant, geology, direction of groundwater flow, and evidence that the pollutant can or does reach jurisdictional surface waters. *Id.*

Here, the district court correctly held that the County discharged pollutants to the ocean through groundwater. In *Hawaii I*, the court

[6] Some courts refer to a "hydrological connection." The more accurate formulation, however, is a "direct hydrological connection," which recognizes that some connections are too circuitous and attenuated to be under the CWA's purview.

determined that a direct hydrological connection exists between the groundwater and the ocean. The tracer-dye study clearly established that the discharges moved from wells 3 and 4 to the ocean in relatively short order.[7] *Hawaii I*, 24 F. Supp. 3d at 984. The study concluded that after 84 days, the dye began to appear along the North Kaanapali Beach, half a mile from the facility. *Id.* The tracer-dye study also estimated that 64% of the treated effluent from wells 3 and 4 followed this route to the ocean. *Id.*

Although the court's ultimate conclusion was correct, the court's alternative explanation for the County's liability under the "significant nexus" standard from *Rapanos* and *Healdsburg* was erroneous. *Hawaii I*, 24 F. Supp. 3d at 1004. *Rapanos* and *Healdsburg* applied the "significant nexus" standard in determining whether the receiving waters were "waters of the United States." In contrast, here, there is no dispute that the Pacific Ocean (the receiving water in this case), as a "territorial sea," is a "navigable water" under the CWA. This Court

[7] Although this tracer-dye study simplified the analysis, such studies are not the only means of demonstrating a direct hydrological connection. It also is not necessary to trace the exact pathway that the pollutants take to establish that a direct hydrological connection exists.

should clarify that the "significant nexus" standard has no relevance here.

In *Hawaii II*, the district court correctly held the County discharged pollutants from wells 1 and 2 to the ocean through groundwater. But the court's opinion did not go into great detail about the movement through groundwater because the County "expressly conced[ed] that pollutants introduced by the County into wells 1 and 2 were making their way to the ocean" and "acknowledge[d] that there is a hydrogeologic connection between wells 1 and 2 and the ocean." *Hawaii II*, 2015 WL 328227, at *2.

There was additional evidence that a direct hydrological connection existed between wells 1 and 2 and the Pacific Ocean. *First*, the tracer-dye study models indicated that in some circumstances treated effluent from well 2 would move along flowpaths that were similar to those traveled by the dye injected into wells 3 and 4 and would emerge at the same submarine springs. SER 237, 240, 243. Because wells 3 and 4 are located between the springs and well 2, the flowpath for these discharges would be affected by the amount of effluent injected into each well. SER 237. When most of the effluent was

injected into wells 3 and 4, the effluent from well 2 would travel northwesterly from the wells and not toward the springs; however, when well 2 received all of the effluent, the study indicated that the discharges would emerge at the springs. SER 240, 243. There was no dispute that given the proximity of wells 1 and 2, the modeling for well 2 predicts the pathways for discharges from well 1. ER 443, SER 189.

Second, Plaintiffs' expert stated that the effluent discharged from wells 1 and 2 "will be conveyed . . . relatively quickly (*i.e.*, with first arrival at the ocean in a matter of months)" and concluded that "[s]ince the aquifer material and hydraulic gradient in the area of all four . . . wells are similar, the groundwater flow will also be similar." SER 183. Although the County's expert argued that the point of entry for pollutants into the ocean from wells 1 and 2 could not be identified, the County did not dispute that the study showed effluent emerging at the same springs where the effluent from wells 3 and 4 emerged. *Haw. Wildlife Fund v. Cty. of Maui*, No. 12-198, ECF No. 136, at 16.

Any fears about the implications of point-source discharges to jurisdictional surface waters through groundwater with a direct hydrological connection being subject to NPDES-permit requirements

are unwarranted. Op. Br. at 43-44. EPA and states have been issuing permits for this type of discharge from a number of industries, including chemical plants, concentrated animal feeding operations, mines, and oil and gas waste-treatment facilities. *See, e.g.*, NPDES Permit No. NM0022306, available at https://www.env.nm.gov/swqb/Permits/; NPDES Permit No. WA0023434, available at https://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/CurrentOR&WA821.

Further, only those discharges that move through groundwater with a direct hydrological connection to surface waters are affected. That not all discharges through groundwater are subject to NPDES-permit requirements is shown by cases where the hydrological connections were too attenuated. In *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, the court agreed with the plaintiff that discharges through groundwater may be subject to the CWA and allowed the parties to submit evidence on the issue. 707 F. Supp. 1182, 1196 (E.D. Cal. 1988). Based on evidence indicating that it would take "literally dozens, and perhaps hundreds, of years for any pollutants in the groundwater to reach surface waters," the court found that there

were no regulated discharges. *MESS v. Cheney*, 763 F. Supp. 431, 437 (E.D. Cal. 1989). And even after allowing the plaintiff an opportunity to provide more testimony at trial, the court ruled that the plaintiff had failed to meet its burden. *MESS v. Cheney*, No. 86-475, 20 Envtl. L. Rep. 20,877 (E.D. Cal. Apr. 30, 1990), *vacated on other grounds*, 47 F.3d 325, 331 (9th Cir. 1995).

Likewise, in *Greater Yellowstone Coalition v. Larson*, evidence indicated that the connection to surface waters was too attenuated. 641 F. Supp. 2d 1120 (D. Idaho 2009), *aff'd* 628 F.3d 1143, 1153 (9th Cir. 2010). In that case, federal agencies determined that a CWA Section 401 certification was not required for a mining operation. Under Section 401, "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply with the applicable provisions." 33 U.S.C. § 1341(a)(1). The agencies based their determination on evidence that before reaching surface waters, the pollutants would pass through hundreds of feet of overburden and bedrock, and then travel underground through soil and rock for one to

four miles. *Greater Yellowstone*, 641 F. Supp. 2d at 1139. Modeling predicted that the movement of peak concentrations would take between 60 and 420 years. *Id.* The court weighed competing evidence from the plaintiff and ultimately deferred to the agencies' determination that the hydrological connection was too attenuated. *Id.* at 1141.

Unlike *MESS* and *Greater Yellowstone*, in which the connection was too attenuated, the discharges here resulted from a direct hydrological connection, and thus require a permit.

III. THE DISTRICT COURT CORRECTLY HELD THAT THE COUNTY HAD FAIR NOTICE FOR PURPOSES OF CIVIL PENALTIES.

In the Argument section of its brief, the County maintains that this Court should direct the district court to set aside any civil penalties "imposed on the County regardless of the outcome of the challenge to the district court's liability rulings" because it lacked fair notice. Op. Br. at 47. As an initial matter, the County would seemingly be precluded from appealing the fair-notice issue as to civil penalties because it stipulated to their amount in the settlement agreement. To the extent that the County has reserved its right to appeal the issue, however, the County's argument lacks merit.

This Court has held that a party may not be deprived of property through civil penalties without fair notice. *See United States v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 980 (9th Cir. 2008). To provide notice, "a statute or regulation must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.'" *Id.*

This Court looks first to the language of the statute when determining whether a party had fair notice. *Id.* As discussed above, Congress used broad language in the CWA in defining the discharge of pollutants, and that expansiveness provides a reasonable opportunity for a person to know what the statute prohibits. The breadth of that language is only bolstered by the intent of the CWA.

Moreover, EPA has made multiple public statements in rulemaking preambles that consistently described its interpretation that discharges of pollutants to jurisdictional surface waters through groundwater with a direct hydrological connection are subject to NPDES permitting under the CWA. Further, with respect to specific communications with the County, EPA sent two letters to the County in early 2010. In January 2010, EPA stated that it was "investigating the

possible discharge of pollutants to the coastal waters of the Pacific Ocean along the Kaanapali coast of Maui." SER 5. This investigation was spurred in part by a 2007 study concluding that much of the nitrogen in Kaanapali coastal waters came from the County's facility and a 2009 study that found the same nitrogen signature and other "wastewater presence" in the ocean. *Hawaii I*, 24 F. Supp. 3d at 984. The letter continued: "In order to assess the impact of the [facility's] effluent on the coastal waters and determine compliance with the Act, EPA is requiring the County to sample the injected effluent, sample the coastal seeps, conduct an introduced tracer study, and submit reports on findings to EPA." SER 5. EPA required this sampling, monitoring, and reporting pursuant to CWA Section 308, under which "the [EPA] Administrator shall require the owner or operator of any point source" to provide the information. 33 U.S.C. § 1318(a)(A). The letter provided notice that there was evidence suggesting a hydrological connection.

In March 2010, EPA responded to the County's request for a UIC permit renewal under the SDWA "by informing the County that recent studies 'strongly suggest that effluent from the facility's injection wells is discharging into the near shore coastal zone of the Pacific Ocean."

Hawaii I, 24 F. Supp. 3d at 984 (quoting ER 122). As a result, EPA required the County to apply for a CWA Section 401 water-quality certification for its injection facilities as a prerequisite to EPA's issuance of a new UIC permit. ER 121-22; *see* 33 U.S.C. § 1341(a). The County's assertion that this letter did not put it on notice of potential CWA liability because the certification was related to its UIC permit rather than any obligations under the NPDES program is unavailing. Op. Br. at 56-57. A UIC permit does not preclude the need for a NPDES permit where required, and the March 2010 communication reiterated EPA's position that the discharges might be covered by the CWA, depending on the results of the ordered sampling, monitoring, and reporting.

The County was on fair notice. In any event, fair notice is only one of many factors informing a civil-penalty amount, *see* 33 U.S.C. § 1319(d), and thus the County's argument that the penalty should be set aside for lack of fair notice *alone* is flawed.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

JOHN C. CRUDEN
Assistant Attorney General

/s/ Frederick H. Turner
FREDERICK H. TURNER
AARON P. AVILA
R. JUSTIN SMITH
Attorneys, U.S. Dep't of Justice
Env't & Natural Resources Div.
P.O. Box 7415
Washington, DC 20044
(202) 305-0641
frederick.turner@usdoj.gov

OF COUNSEL:

KARYN WENDELOWSKI
U.S. Environmental
Protection Agency
Office of General Counsel
Washington, D.C.

May 31, 2016
90-12-14672

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) (for amicus briefs as provided by Fed. R. App. P. 29(d)) because it contains 6,904 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook.

/s/ Frederick H. Turner

FREDERICK H. TURNER
U.S. Department of Justice
Env't & Natural Resources Div.
P.O. Box 7415
Washington, DC 20044
(202) 305-0641
frederick.turner@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system, which will serve the brief on the other participants in this case.

/s/Frederick H. Turner
FREDERICK H. TURNER
U.S. Department of Justice
Env't & Natural Resources Div.
P.O. Box 7415
Washington, DC 20044
(202) 305-0641
frederick.turner@usdoj.gov