SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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COUNTY OF MAUI, HAWAII,   )

         Petitioner,   )

           v.   ) No. 18-260

HAWAII WILDLIFE FUND, ET AL.,   )

         Respondents.   )

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Pages: 1 through 73

Place: Washington, D.C.

Date: November 6, 2019

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9   Washington, D.C.

10   Wednesday, November 6, 2019

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12   The above-entitled matter came on

13   for oral argument before the Supreme Court of the

14   United States at 10:04 a.m.

15

16   APPEARANCES:

17   ELBERT LIN, ESQ., Richmond, Virginia;

18   on behalf of the Petitioner.

19   MALCOLM L. STEWART, Deputy Solicitor General,

20   Department of Justice, Washington, D.C.; for the

21   United States, as amicus curiae, supporting

22   the Petitioner.

23   DAVID L. HENKIN, ESQ., Honolulu, Hawaii;

24   for the Respondents.

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1   P R O C E E D I N G S

2   (10:04 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear

4   argument first this morning in Case 18-260, the

5   County of Maui versus the Hawaii Wildlife Fund.

6   Mr. Lin.

7   ORAL ARGUMENT OF ELBERT LIN

8   ON BEHALF OF THE PETITIONER

9   MR. LIN: Mr. Chief Justice, and may

10 it please the Court:

11   This case is not about whether the

12 releases from Maui's underground injection wells

13 should be regulated at all but how. They are

14 already regulated under several existing state

15 and federal environmental programs, including

16 the Clean Water Act's nonpoint source program.

17 But is a Clean Water Act point source permit

18 also required? The question is where the line

19 falls between the Clean Water Act's federal

20 point source program and its state law nonpoint

21 source program.

22   And the answer is in the text. The

23 text defines a point source as a discernible,

24 confined, and discrete conveyance, and it

25 thereby makes clear that the trigger for point

1   source permitting is not where a pollutant comes

2   from but how it reaches navigable waters.

3   An NPDES permit is thus required only

4   when a point source or series of point sources

5   is the means of delivering pollutants to

6   navigable waters. This understanding is

7   confirmed by the fact that it offers the

8   predictability one would expect in a permitting

9   regime, where regulated entities need to know

10   beforehand whether a permit is required and

11   where, in this particular statute, penalties for

12   noncompliance are so severe.

13   It also maintains an important role

14   for state nonpoint source programs under the

15   Clean Water Act.

16   Respondents, however, would rewrite

17   the statute to all but eviscerate the line

18   between point and nonpoint source pollution and

19   radically change the status quo. In this case,

20   they would impose a new federal permit on wells

21   that have operated the same way for 40 years,

22   during which time EPA expressly rejected calls

23   for NPDES permitting. There are more than

24   500,000 similar underground injection wells in

25   the country and nearly 6,000 in Hawaii alone.

1   This expansion of the nonpoint source

2   program and diminution of the -- excuse me, this

3   expansion of the point source program and

4   diminution of the nonpoint source program is not

5   warranted by the text, as is underscored by the

6   fact that Respondents now offer the fourth

7   different reading of the statute to support

8   liability in this case.

9   CHIEF JUSTICE ROBERTS: Counsel, I --

10   I want to make sure I understand what your test

11   is. You say that the -- it has to be the means

12   -- I guess the point source has to be the means

13   of conveyance to the jurisdictional water?

14   MR. LIN: Yes, Your Honor.

15   CHIEF JUSTICE ROBERTS: What does that

16   mean, that if it ever runs into groundwater, it

17   is not the means of conveyance but the

18   groundwater is?

19   MR. LIN: That's correct, Your Honor.

20   The -- what we mean by "means of conveyance" is

21   at the point source. The discernible, confined,

22   and discrete conveyance must carry and deliver

23   the pollutant to the navigable waters.

24   CHIEF JUSTICE ROBERTS: So the -- so

25   any intervention of groundwater removes the

1   jurisdiction of the point source program?

2   MR. LIN: That's right, because

3   groundwater is a nonpoint source. And if the

4   groundwater is -- in this case is diffusely

5   flowing through the ground and that's what

6   carries the pollutants to the navigable

7   waters --

8   JUSTICE GINSBURG: But the well -- the

9   well is the source of the pollution, so it would

10   seem that that should be the object of

11   regulation. And it is a conveyance. It is one

12   of two conveyances in this case. But it is a

13   means of delivery, although the groundwater is

14   also a means of delivery.

15   MR. LIN: Yes, Your Honor, the wells

16   are a point source, and we don't dispute that it

17   is a discernible, confined, and discrete

18   conveyance, but not all point sources require

19   point source permits.

20   If that were the case, as Respondents

21   suggest, there would be very, very little, if

22   anything, left for nonpoint source regulation.

23   And so our contention, Your Honor, is that if

24   you're reading the statutory text and

25   considering the words "addition from any point

1   source," that that contemplates that the point

2   source must be the thing or point sources must

3   together -- as one functional point source must

4   be what actually delivers the pollutants to

5   the --

6   CHIEF JUSTICE ROBERTS: So if --

7   JUSTICE KAGAN: I guess I --

8   CHIEF JUSTICE ROBERTS: So, if you

9   have a point source under pressure that, you

10   know, just -- that doesn't seep up, kind of

11   shoots the pollutants out, and there, you know,

12   that motion gets to the jurisdictional water,

13   would that be covered? Would that be pollution

14   of the jurisdictional water by that point

15   source?

16   MR. LIN: It --

17   CHIEF JUSTICE ROBERTS: I'm

18   envisioning two different things, one where it's

19   -- the pollutant is put in the groundwater and

20   then gradually, you know, seeps into the -- into

21   the ocean, and one where it's sort of forcefully

22   expelled, although it goes through the

23   groundwater.

24   MR. LIN: Your Honor, I think if it

25   still goes through the groundwater, the -- the

1   question under the statute is what is the --

2   what is the conveyance, what is the thing that

3   carries and delivers the pollutants. I think

4   even if it's forcefully put into the

5   groundwater, the groundwater is what's carrying

6   it.

7   Now I can imagine, Your Honor,

8   scenarios as we discuss in our brief where

9   you've got, say, a point source, a pipe that's

10   very close to the water's edge and -- and expels

11   the pollutants into the water. The thing that's

12   carrying it, the last conveyance in that factual

13   scenario, would be the pipe. The pipe is a

14   discernible, confined, and discrete --

15   JUSTICE BREYER: So what happens if

16   you just take the pipe and you decide what we'll

17   do is we're going to end the pipe 35 feet from

18   the river or from the ocean or something? Now

19   you know perfectly well that it'll drip down

20   into the ground and it'll be carried out into

21   the navigable water.

22   In your theory, that isn't covered?

23   MR. LIN: In that scenario, Your

24   Honor, the land is the conveyance and that

25   pollution would be regulated under the nonpoint

1   source --

2   JUSTICE BREYER: Well, no, the

3   conveyance is the groundwater that is underneath

4   the land into which the pipe drips the

5   pollutant.

6   MR. LIN: Yes, Your Honor. If it

7   seeps into the ground --

8   JUSTICE BREYER: Yeah.

9   MR. LIN: -- then the groundwater is

10   what's carrying and delivering the pollutants --

11   JUSTICE BREYER: Yeah.

12   MR. LIN: -- and that scenario would

13   be regulated under the nonpoint source program.

14   The Congress --

15   JUSTICE BREYER: All right, but then

16   what we have is, I take it, an absolute road map

17   for people who want to avoid the point source

18   regulation. All we do is we just cut off the --

19   cut off the -- the pipes or whatever, five feet

20   from the ocean or five feet from the navigable

21   stream or five feet from -- you see? You

22   understand the problem.

23   What I'm looking for in this case is

24   what's a standard that will prevent evasion,

25   which I'm not -- I don't see how yours prevents

1   evasion.

2   MR. LIN: Your Honor --

3   JUSTICE BREYER: And at the same time

4   doesn't turn everything into -- undercut the

5   groundwater program.

6   MR. LIN: If I may, I would quarrel

7   with your use of the word "evasion," because I

8   think what's important to remember is it's a

9   comprehensive scheme. Congress didn't design a

10   -- it didn't just put the point source program

11   out into the world on a hope and a prayer that

12   there would be some other regulatory program

13   that would cover the other scenarios, including

14   the one that you're talking about, Justice

15   Breyer.

16   There -- there is a nonpoint source

17   program. There are laws, including in Hawaii,

18   that would explicitly prohibit the scenario that

19   you're talking about. Hawaii Code 354D -- three

20   -- 354D-50, it says that you can't alter the way

21   your -- your -- your discharge system is

22   structured without permission from the director

23   of the Hawaii --

24   JUSTICE KAGAN: But Congress -- excuse

25   me, Mr. Lin. Congress wanted the point source

     1   program to do something. The Congress wanted

     2   point sources that were discharging pollutants

     3   to receive a permit before they did so. And I

     4   think what Justice Breyer is saying is that

     5   nobody would ever have to go through that

     6   process of getting a permit if they knew that

     7   they could do something like what Justice Breyer

     8   was suggesting, just stop the pipe five feet

     9   before the ocean.

    10   MR. LIN: And I think, Your Honor, the

    11   key there is that they knew they could. And

    12   "could" -- "could" is the operative word because

    13   the state law regulations that are in place are

    14   significant. And so it's a -- it's a -- yes,

    15   Your Honor, there's a clear choice that our

    16   reading of the statute offers, which is, do you

    17   want to be subject to permitting or subject to

    18   state law regulation?

    19   And state law regulation in many, many

    20   states, including Hawaii, doesn't allow the

    21   scenario that --

    22   JUSTICE SOTOMAYOR: But that's the

    23   problem --

    24   MR. LIN: -- Justice Breyer is talking

    25   about.

1   JUSTICE SOTOMAYOR: -- but that's the

2   problem, isn't it? Because it presumes the

3   state will regulate, and some states don't. So

4   what you're doing is cutting off permitting

5   because you're limiting the word "to" -- or --

6   or morphing the word "to navigable waters" and

7   changing it into -- "into navigable waters."

8   And that's what Justice Scalia looked

9   at was the plain text and said "to" is different

10   than "into." And so, for us, the question, I

11   believe, is, do you read the plain language and

12   does it say from a point source, it's the well,

13   to the ocean? It can be traced, yes. I think

14   the words are pretty clear.

15   MR. LIN: A few --

16   JUSTICE SOTOMAYOR: To accept yours,

17   you have to put in the words "into."

18   MR. LIN: A few answers to that, Your

19   Honor.

20   JUSTICE SOTOMAYOR: To -- to -- to

21   accept your meaning, we have to transform "in"

22   into "into."

23   MR. LIN: If I may, let me turn first

24   to the question of states and whether states

25   would regulate.

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 1              So I think the answer to your question

 2    is, could there -- could there be states that

 3    would simply allow this to be a wild west, where

 4    there's no regulation of nonpoint source

 5    pollution?  And the answer to that is absolutely

 6    not.

 7              There's a couple reasons why that's

 8    not true.  First, 1329 of the Clean Water Act

 9    requires every state to have a nonpoint source

10    management program.

11              Second, there are grants and

12    incentives in place, hundreds of millions of

13    dollars a year, to encourage states to regulate.

14              And, third, there are water -- there's

15    a water quality back-stop in the Clean Water

16    Act, so any water, states are required every two

17    years to identify waters that are impaired, that

18    are not meeting water quality standards --

19              JUSTICE KAGAN:  But, Mr. Lin --

20              MR. LIN:  -- that have --

21              JUSTICE KAGAN:  -- the question is

22    what this statute means.  The question is not

23    whether there's a possible state back-stop.  The

24    question is what Congress was doing in this

25    statute.
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1   And Justice Sotomayor indicated to you

2   that this statute reads pretty firmly. It

3   requires a permit when there's any addition of

4   any pollutants to navigable waters from any

5   point source.

6   So, here, it's from a point source,

7   which is the well, and it's to navigable waters,

8   which is the ocean, and it's an addition. How

9   does this statute not apply?

10   MR. LIN: Your Honor, I think it comes

11   down to what -- what work is "from" doing in the

12   statute. And "from" is a preposition, as this

13   Court has recognized, for other prepositions,

14   like "under." It -- it takes its meaning from

15   the words that are around it. And the words

16   here that "from" is indicating the relationship

17   between are "addition" and "point source."

18   Now, if "point source" were not a

19   defined term, which is what my friends here

20   urge, and you looked at simply the ordinary

21   meaning of the word "source," I think we would

22   have -- be having a very different discussion,

23   but "point source" is defined as a conveyance.

24   JUSTICE KAGAN: Well, it's defined as

25   more than a conveyance. Conveyance is the

1   umbrella term. But then, actually, they go

2   further and they say that there are particular

3   things that are point sources, some of which

4   sound like conveyances and some of which, quite

5   frankly, don't.

6   Nobody ever thought that a container

7   sounded like a conveyance. Nobody ever thought

8   that a concentrated animal feeding operation

9   sounded like a conveyance. And, most

10   importantly here, nobody really thinks that a

11   well sounds much like a conveyance.

12   But well is specifically defined to be

13   a point source. This is a well. So you can

14   read this -- this provision that I just read

15   you, and the addition of any pollutant to

16   navigable waters from any well. That's what we

17   have here.

18   MR. LIN: Your Honor, if I could start

19   with the statutory language, I think the wells

20   as an example is important to address, but if

21   you -- I think if you look at the words

22   "addition from any point source," and you

23   substitute in, for point source, pipe, which is

24   in the statute and nobody disagrees is a -- is a

25   point source, addition to a lake, to an ocean,

1   to a river, a navigable water, an addition to a

2   lake of pollutants from a pipe, addition to a

3   lake of sewage water from a pipe.

4   I think, I submit, Your Honor, that

5   the ordinary understanding of that, what one

6   pictures in one's mind is a pipe that is next to

7   the water, not a pipe that is a mile away. And

8   I think that's because you're talking about in

9   addition, which is a verb that just has --

10   JUSTICE KAVANAUGH: That --

11   MR. LIN: -- delivery -- yes, Your

12   Honor?

13   JUSTICE KAVANAUGH: Keep going.

14   Sorry.

15   MR. LIN: -- that has delivery in it

16   and it's -- it's being associated with

17   conveyance, which is the thing that transports,

18   carries, and delivers.

19   JUSTICE KAVANAUGH: That sounds like

20   the directly argument that Justice Scalia's

21   opinion rejected.

22   MR. LIN: Yes, Your Honor. I -- the

23   Rapanos plurality that Justice Scalia wrote, we

24   think it's factually consistent with our

25   reading. We think he was concerned about point

1   source to point source pollution. But as to the

2   textual argument --

3   JUSTICE KAVANAUGH: Well, why -- why

4   is point source to point source to navigable

5   water covered and point source to nonpoint

6   source to navigable water not covered?

7   MR. LIN: Textually, we think that

8   point source to point source is covered because

9   it is the phrase "any point source," not the

10   phrase "a point source," that must be the means.

11   And because "any" includes one or more, you

12   could have more than one point source.

13   And the only way more than one point

14   source can -- where all of the point sources are

15   carrying, delivering, is where they are

16   integrated and operating as one point source.

17   JUSTICE KAVANAUGH: If -- if the word

18   "from" -- suppose I think you have a strong

19   argument on the word "from," and so, too, does

20   the opposing side have a strong argument on the

21   ordinary meaning of the word "from."

22   What then should we look at to help us

23   decide how to interpret it?

24   MR. LIN: Your Honor, as this Court

25   has said many times recently, you have to look

1   at all the other tools of statutory --

2   JUSTICE KAVANAUGH: And what --

3   MR. LIN: -- interpretation.

4   JUSTICE KAVANAUGH: -- and what --

5   what are the best ones for you?

6   MR. LIN: A couple of them.

7   JUSTICE KAVANAUGH: Give me one or two

8   that -- that you think are best for you.

9   MR. LIN: If I had to go with two, I

10   would start with structure, the fact that nobody

11   disputes that there should be a point source

12   program and a nonpoint source program, and that

13   their reading renders the nonpoint source

14   program, by their own admission, into a

15   residuum, whereas ours leaves a meaningful role

16   for the nonpoint source program.

17   The second tool of statutory

18   interpretation, Your Honor, is to look at the

19   context and the other provisions, including the

20   punitive provisions, which, as this Court has

21   recognized, impose civil penalties of more -- of

22   more than $50,000 a day.

23   We're talking about a permitting

24   regime. And what would we have expected

25   Congress to have written? Something that

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 1    requires an after-the-fact analysis of

 2    traceability or something that could be

 3    determined ahead of time by mere observation,

 4    that there is here a discernible and confined,

 5    discrete conveyance that is delivering the

 6    pollutants to the water.  I need to go get a

 7    permit.

 8            JUSTICE ALITO:  The term "from" could

 9    be read very broadly to mean that a discharge

10    requires a permit if the pollutant emerges at

11    some point from a point source and by some

12    means, no matter how remote, some quantity of

13    the pollutant eventually makes its way into the

14    waters of the United States.

15            Now I take it that interpretation

16    which Respondents once advocated is no longer

17    their position.  So what concerns me is whether

18    there is any limiting principle that can be

19    found in the text and is workable and does not

20    lead to absurd results.

21            MR. LIN:  Your Honor, I think the

22    limiting principle is the means of delivery

23    test, which is that you -- that -- that what

24    Congress wanted regulated entities and

25    regulators and courts to look at is, how is the
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 1   pollutant reaching the navigable water? Is it a

 2   discernible, confined, and discrete conveyance?

 3   Now that is a case-by-case factual

 4   determination and there are lines that need to

 5   be drawn, but we think in the overwhelming

 6   majority of cases it's going to be clear.

 7   Your Honor, in terms of whether "from"

 8   could be more broadly read, I think, yes, if the

 9   statute were written differently, if it said,

10   for example, emitted from a point source, that

11   might be a different case.

12   JUSTICE ALITO: What about the

13   limiting principle that the Respondents now

14   propose, which is that it has to be fairly

15   traceable and there has to be proximate

16   causation and, therefore, foreseeability, is --

17   can that be found in the text and is it

18   workable?

19   MR. LIN: Your Honor, we don't think

20   it can be found in the text because we don't

21   read "from" -- we don't think Congress intended

22   "from" to mean causation. So, one, we don't

23   think it can be found in the text. Two --

24   JUSTICE KAGAN: But that would be a

25   normal way of reading the word, "from," wouldn't

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 1      it; in other words, to say, to decide whether

 2      something is from something else, you have to

 3      look as to whether it's from something else?

 4              (Laughter.)

 5              MR. LIN:  Your Honor, if I may.

 6              CHIEF JUSTICE ROBERTS:  Yes.

 7              MR. LIN:  Your Honor, with respect, I

 8      think it -- it -- that assumes that a certain

 9      kind of word is following from.  If you said,

10      for example, Your Honor, this arrived from

11      Miami, Miami is a place of origin, and so, yes,

12      "from" is indicating the source, the place where

13      that started.

14              But, if you said this arrived today

15      from a truck, I posit, Your Honor, I submit that

16      truck is being used as a conveyance there.  It's

17      not necessarily the point of origin.

18              Thank you.

19              CHIEF JUSTICE ROBERTS:  Thank you,

20      counsel.

21              Mr. Stewart.

22              ORAL ARGUMENT OF MALCOLM L. STEWART

23           FOR THE UNITED STATES, AS AMICUS CURIAE,

24               SUPPORTING THE PETITIONER

25              MR. STEWART:  Mr. Chief Justice, and
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 1   may it please the Court:

 2   The first point I'd like to make about

 3   the -- the definition of discharge of a

 4   pollutant is that the combination of the words

 5   "to" and "from" import more than either term in

 6   isolation; that the statute defines the term

 7   "discharge of a pollutant" to mean any addition

 8   of a pollutant to navigable waters or to the

 9   ocean from a point source.

10   And, for example, if at my home I pour

11   whiskey from a bottle into a flask and then I

12   bring the flask to a party at a different

13   location and I pour whiskey into the punch bowl

14   there, nobody would say that I had added whiskey

15   to the punch from the bottle.

16   It would be true that the punch --

17   that the whiskey originated in the bottle, its

18   route was fairly traceable from the bottle to

19   the punch bowl, and it wound up in the punch

20   bowl, but you wouldn't say it was added to the

21   punch from the bottle.

22   Now, at the other extreme, if I

23   brought the bottle to the party and I poured it,

24   the whiskey from a few inches above the surface

25   of the punch and so it traveled through air or

1   if it traveled through a funnel so it passed

2   over a solid surface, in ordinary parlance, we

3   wouldn't say that simply because there was some

4   spatial gap between the bottle and the punch,

5   therefore, I didn't add it from the -- the

6   bottle to -- to the punch.

7   In between those two extremes, I don't

8   think that the "to" and "from" will get you all

9   the way home. I think the Court needs to look

10   at other provisions of the Clean Water Act to

11   determine what sort of break in the chain will

12   cause the -- the -- the release no longer to be

13   a discharge from the point source to the

14   navigable waters.

15   But the fairly traceable test that the

16   Ninth Circuit adopted just can't be right. It

17   would encompass -- you know, if transmuted over

18   to the whiskey example, it would encompass

19   situations where I poured the whiskey from the

20   bottle into the flask. Nobody would treat that

21   as addition of the whiskey to the punch from the

22   bottle.

23   Now, with respect to groundwater in

24   particular, the reason that EPA has concluded

25   that groundwater in particular will break the

1   causal chain so that it will no longer be an

2   addition from the point source to the navigable

3   water, groundwater is really treated in the

4   Clean Water Act as its own thing, and in large

5   part, that's because of its distinct physical

6   characteristics, but there's a body of both

7   state and federal law that regulates groundwater

8   specifically, in part to protect the drinking

9   water supply because groundwater is obviously

10   important for that, in part because of potential

11   downstream effects on the quality of navigable

12   waters.

13   CHIEF JUSTICE ROBERTS: In -- in your

14   test, any little bit of groundwater is enough to

15   break the chain?

16   MR. STEWART: Yes. Now -- now the

17   hypothetical --

18   CHIEF JUSTICE ROBERTS: Yes. I mean

19   -- okay. So two inches?

20   MR. STEWART: Two inches. But the --

21   the hypothetical in which somehow the pollutant

22   will be released from a pipe and will travel

23   through two inches of groundwater but won't

24   travel over land doesn't seem realistic. That

25   is, if you imagine a pipe releasing pollutants

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1    five feet from the shore and some of --
2             JUSTICE SOTOMAYOR:   What's the
3    difference between the groundwater and the land?
4             MR. STEWART:   The big difference is
5    that groundwater --
6             JUSTICE SOTOMAYOR:   The land is not a
7    conveyance.
8             MR. STEWART:   The -- the -- the big --
9    the big difference for purposes of applying the
10   statute is that the land is not -- the land
11   right next to the bank is not subject to its own
12   body of distinct federal and state regulation in
13   the way that groundwater is.
14            JUSTICE KAVANAUGH:   Why --
15            JUSTICE KAGAN:   Sorry, Mr. Stewart, I
16   didn't get the idea of your -- what -- what do
17   you say to the hypothetical, which is the pipe
18   goes five feet to the shore?
19            MR. STEWART:   If it goes five feet to
20   the shore and the pollutant travels onto the
21   land, travels across the land and into the
22   water, you know, through its own force, it spews
23   out of the pipe or simply through the force of
24   gravity because you're on an incline, we would
25   say that's covered.
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1   JUSTICE KAGAN: So, if the pipe is on

2   the -- is on the land and spews onto the land,

3   it's regulated and you need a permit; but, if

4   the pipe is underground, it's not and you don't

5   need a permit?

6   MR. STEWART: You would not need a --

7   you would not need a NPDES permit because you

8   would not be discharging onto -- you would not

9   be discharging to the navigable water --

10   JUSTICE BREYER: It's the same

11   problem.

12   JUSTICE KAGAN: But just to follow up

13   with Justice Breyer's -- Justice Breyer said

14   that this was a road map. I guess you said the

15   hypothetical is -- is -- is not realistic. But

16   why isn't it realistic? You've just provided a

17   road map. You know, put your pipe underground.

18   MR. STEWART: Well, I think if you

19   were going to -- to do it in the form of a well

20   or do it in the form of a contraption that had

21   the physical consequences of a well, that is,

22   you were injecting pollutants into the

23   groundwater from the surface, you would be

24   subject to this distinct body of regulation.

25   The Clean Water Act requires states

1   that want to implement their own -- to

2   administer their own NPDES programs to regulate

3   disposals into wells. The Safe Drinking Water

4   Act regulates disposals into wells that will

5   affect drinking water quality.

6   So I don't think that the potential

7   for evasion is --

8   JUSTICE SOTOMAYOR: The problem I see

9   is that all those other statutes have different

10   focuses. So you look at CERCLA or OPA, they're

11   remedial. They're after the fact. This statute

12   is preventative. We want to avoid having to

13   clean it up. That's why we give a permit.

14   And I don't see many of the other

15   statutes you cited in your brief as really

16   addressing that significant problem, which is

17   the preventive issue. And so there is a purpose

18   to the permit.

19   MR. STEWART: The --

20   JUSTICE SOTOMAYOR: It's the only one

21   that serves that permit -- that purpose.

22   MR. STEWART: I guess I'd say a couple

23   of things. And the first point I would make is

24   to -- to refer to what Mr. Lin was saying during

25   the -- the earlier part of the argument about

1   nonpoint source pollution and the fact that the

2   Clean Water Act has a robust body of law that

3   encourages states to develop effective programs

4   for combating nonpoint source solution.

5   JUSTICE SOTOMAYOR: But that's --

6   that's --

7   MR. STEWART: It --

8   JUSTICE SOTOMAYOR: -- one manner of

9   curing the problem. The other is to not exempt

10   groundwater. They exempted a whole series of

11   other means of delivery, but they chose not to

12   exempt groundwater.

13   MR. STEWART: It's -- it's simply

14   illustrative of the fact that the NPDES program

15   is not intended as a cure-all. It's not

16   intended to deal with every form of activity

17   that might ultimately result in --

18   JUSTICE KAGAN: Well, that's true,

19   Mr. Stewart, and -- and nobody's saying that the

20   federal government can go in and start

21   regulating groundwater as groundwater. And,

22   likewise, nobody's saying that it can go in and

23   start regulating nonpoint sources as nonpoint

24   sources.

25   But, here, the question is the

1   pollution is coming from a point source, an

2   undisputed point source, and going into the

3   navigable water, and the only question is

4   whether the fact that there's some kind of

5   intermediary between the two, even, you know --

6   and Mr. Lin says some kind of intermediary; you

7   say ground, underground -- whether that makes a

8   difference.

9   The -- the -- the point of this

10   regulation is to go at the source, and the

11   source is still -- is a point source regulated

12   -- emitting pollutants.

13   MR. STEWART: Yeah --

14   JUSTICE KAGAN: It leaves -- I guess

15   what I'm saying is this leaves a very large

16   sphere of activity that the federal government

17   is still not touching. All it's doing is

18   insisting that when the federal government

19   permitting program applies to point sources, it

20   applies to those point sources regardless of

21   whether it goes two inches underground.

22   MR. STEWART: I -- I guess the other

23   thing I would say is when -- when we're

24   distinguishing between nonpoint source and point

25   source pollution, we are at least in general

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1     looking at the means by which the pollutants are

2     conveyed into -- to the waters.

3               And so, for example, if you apply

4     fertilizer to your lawn and a rainstorm comes

5     and the fertilizer is washed into a nearby

6     river, the -- the contraption that you use to

7     apply the fertilizer might fit the statutory

8     definition of a point source, but that would

9     still be treated as nonpoint source pollution.

10    It would be what they refer to sometimes as --

11    as sheet flow, unchannelized rainwater that

12    washes into a navigable water.  So --

13              CHIEF JUSTICE ROBERTS:  Mr. Stewart,

14    Justice Breyer has been trying gamely --

15              MR. STEWART:  I'm sorry.

16              CHIEF JUSTICE ROBERTS:  -- to question

17    you.

18              MR. STEWART:  I'm sorry.

19              JUSTICE BREYER:  Just if you have a

20    reaction to this.  If I don't accept -- I'm not

21    saying -- if I don't accept because I think

22    these two programs are quite different, ground

23    source and point source, different purposes, et

24    cetera, and I'm worried about the evasion or

25    area, you see, that we talked about first.
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1   So it seems to me this case, in my

2   mind at the moment, is what's the standard for

3   separating the sheep from the goats? And you're

4   basically saying the Ninth Circuit's way too

5   broad and so are they, so we come up with zero,

6   okay? Close to zero.

7   Now the best -- I want to try out one

8   thing, if you think -- have any reaction to it.

9   If it's -- it's regulated or under this, if it's

10   the functional equivalent of a direct discharge.

11   Now the reason that I put that is because that

12   leaves a lot of room for the EPA to write

13   regulations, to decide what is the functional

14   equivalent of a direct discharge. And it's

15   narrower than the Ninth Circuit. You want to --

16   if you have to have a reaction to that, have it.

17   MR. STEWART: I mean, I -- I guess the

18   reason I'm skeptical of that from our point of

19   view is I think the people -- without further

20   guidance from the Court, I think the people on

21   the other side of the case and their amici would

22   say, if it can be shown that the pollutants that

23   were released from the point source ultimately

24   wound up in the navigable waters, then it is the

25   functional equivalent.

1   JUSTICE BREYER: Then what we do is we

2 -- basically, it would be up to the EPA, policed

3 by the courts, to see that they've come up with

4 a -- a reasonable decision, consistent with the

5 basic objectives of the statute, dah-dah-dah,

6 okay?

7   So we don't know exactly what the --

8 you see the point.

9   MR. STEWART: Yes. May I?

10   I guess part of -- obviously, if we

11 had rule-making authority and could -- could

12 flesh that out, it would be helpful. I still

13 have concerns about any approach that could be

14 interpreted as saying if the pollutants make it

15 to the navigable water, then it's covered.

16   CHIEF JUSTICE ROBERTS: Thank you,

17 counsel.

18   Mr. Henkin.

19   ORAL ARGUMENT OF DAVID L. HENKIN

20   ON BEHALF OF THE RESPONDENTS

21   MR. HENKIN: Mr. Chief Justice, and

22 may it please the Court:

23   The Clean Water Act prohibits

24 unpermitted additions of pollutants to navigable

25 waters from any point source. This prohibition

1   is not limited to pollutants that flow directly

2   from a point source to navigable waters. The

3   word "directly" is nowhere in the text.

4   Rather, all that's required is that

5   the pollutants be from a point source. The Act

6   expressly defines "point source" to include

7   wells, and the common use of "from" is to

8   indicate the starting point, cause, or source of

9   something. When you buy groceries, you say they

10   came from the store, not from your car, even

11   though that's the last place they were before

12   they entered your house.

13   Likewise, the millions of gallons of

14   treated sewage entering the Pacific Ocean off

15   West Maui every day come from Petitioner's wells

16   under any understanding of the term.

17   For three decades, EPA interpreted the

18   Clean Water Act prohibition this way. In all

19   that time, the parade of horribles Petitioner

20   imagines never happened because applying the

21   prohibition isn't nearly as complicated as

22   Petitioner suggests.

23   Consider three scenarios. First, in

24   cases like this one, large quantities of

25   pollutants in navigable waters are easily traced

1   upstream to the point source discharger who

2   should have gotten a permit.

3   Second, it generally is impossible to

4   trace small amounts of pollutants to an

5   individual point source, so the prohibition

6   doesn't apply.

7   Third, when small amounts of pollution

8   are traceable to an individual source, EPA and

9   states can adopt general permits to reduce the

10   regulatory burden. General permits cover entire

11   classes of discharges, like stormwater from

12   construction sites and spraying pesticides, and

13   allow the discharges as long as you meet the

14   permit's requirements.

15   Applying the Clean Water Act as

16   written protects our nation's waters and does

17   not impose a significant burden on small

18   dischargers.

19   By contrast, as this panel -- as this

20   Court has noted, Petitioner's test would enable

21   large-scale polluters to evade the law just by

22   pulling their pipes back a few feet to the

23   water's edge, whereas EPA now agrees by pointing

24   them underground, as Petitioner did here, using

25   the groundwater as a sewer to pollute navigable

1   waters.

2   There's no question that polluters

3   would do exactly that. As discussed in the

4   brief of the State of Maryland, recently a

5   silver mine in Colorado tried to cancel its

6   NPDES permit simply by pulling its pipe out of

7   the neighboring creek and sticking it into the

8   groundwater.

9   CHIEF JUSTICE ROBERTS: Well, that's

10   the extreme problem on the other side. But, to

11   the extreme issue on your side, what is the

12   limiting principle?

13   As far as I understand, once you get

14   the pollutant into groundwater, I mean,

15   groundwater goes into the ocean, so if you get

16   it into groundwater, it's -- it's covered by the

17   permit?

18   MR. HENKIN: Mr. Chief Justice, the

19   limiting principles would be traceability and

20   proximate cause.

21   CHIEF JUSTICE ROBERTS: All right.

22   Now traceability is a technological issue

23   because we know that the water, including the

24   pollutants, has gotten to whatever it is, the

25   ocean or something, whatever the jurisdictional

1   water is. It's just a question of how

2   sophisticated the instruments are that can trace

3   it. And I don't know. I don't know exactly how

4   far, how fast the groundwater is going. So --

5   so that doesn't seem to me to be a -- a

6   significant limitation.

7   And what was the other one that you

8   mentioned?

9   MR. HENKIN: Proximate cause, which

10   comes from the notion of -- of this is -- this

11   is -- this statute regulates behavior that

12   causes something. It's the addition of

13   pollutants to navigable waters from a point

14   source, and "from" has the meaning of a cause.

15   So --

16   CHIEF JUSTICE ROBERTS: Well,

17   proximate cause is notoriously manipulable.

18   What -- give me an example where you think there

19   would be an intervening cause, where you have,

20   in addition to the groundwater, the groundwater

21   eventually makes it to the ocean, but there's an

22   intervening cause.

23   MR. HENKIN: Well, for example, if

24   someone is discharging into an injection well,

25   they've got a Safe Drinking Water Act permit and

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 1      that permit told them that this groundwater

 2      doesn't go anywhere.  It's isolated.  It's --

 3                  CHIEF JUSTICE ROBERTS:  No, I'm

 4      looking for a limited principle when the

 5      groundwater does go to jurisdictional waters.

 6                  MR. HENKIN:  Well, proximate cause

 7      cuts off factual causation when it's -- it's too

 8      attenuated.  And so the case -- there was a

 9      case, Greater Yellowstone Coalition, in which

10      EPA made a finding that, where there was

11      evidence that discharges from a mine would enter

12      groundwater, and it would take 60 to, I believe,

13      400 years to get to a navigable water, and the

14      time that it did that, it would be de minimis,

15      the amounts, and EPA determined that that was --

16      that cut off the causal chain.

17                  Now we're not suggesting --

18                  JUSTICE GINSBURG:  What --

19                  MR. HENKIN:  -- it needs to go --

20                  JUSTICE GINSBURG:  -- what about --

21                  MR. HENKIN:  -- as far as that --

22                  JUSTICE GINSBURG:  -- what about the

23      Fourth Circuit test?  I take it you are

24      advancing the Ninth Circuit fairly traceable

25      test.  But the Fourth Circuit test, which I'm
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 1    not sure I comprehend it, is direct hydrological
 2    connection.  What's the difference between those
 3    two?
 4              MR. HENKIN:  Justice Ginsburg, in our
 5    view, our test is narrower.  Direct hydrologic
 6    connection is the test that EPA and -- and --
 7    and states had applied for three decades until
 8    EPA changed its position in April.
 9              And that looks mainly at the -- the --
10    the facts on the ground, the factual hydrologic
11    connections.  And so that would be the
12    traceability I was discussing with -- with the
13    Chief Justice.
14              We bound that factual causation, so
15    even if there is causation in fact, the law when
16    you're looking at holding people responsible for
17    what they caused, will -- will not always hold
18    them legally responsible if it's -- if it's not
19    foreseeable, if it's too attenuated, if it's too
20    remote.
21              JUSTICE KAVANAUGH:  Is there an
22    example --
23              JUSTICE ALITO:  I'm not sure I really
24    see much of a distinction between the direct
25    hydrological connection or a hydrological
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1   connection and what you're -- and what you're

2   advocating.

3   Let's take the example of a wastewater

4   treatment facility. Can you think of any

5   situation in which there is traceability -- and

6   I don't know what the difference is between

7   fairly traceable and unfairly traceable, but put

8   that aside -- when -- when it's traceable, but

9   it wouldn't be foreseeable?

10   MR. HENKIN: No, Justice Alito. I

11   think with the wastewater treatment plant, I

12   would find it hard to think of a situation in

13   which a wastewater treatment plant, which is

14   designed to dispose of, not to store, but to

15   dispose in this case of millions of gallons of

16   treated sewage every day, when they designed

17   this facility back in 1973, a decade before

18   putting it into operation, they knew what they

19   were doing.

20   They drilled -- this is not a case in

21   which we have percolation down through the soil

22   eventually getting into groundwater. They

23   drilled these injection wells directly into the

24   groundwater, expressly for the purpose of

25   conveying it to the ocean --

1   JUSTICE ALITO: Okay. So that's this

2   facility. Let's take an example of the ordinary

3   family out in the country that has a septic

4   tank, and they buy it from somebody who installs

5   them and they get the building permit that's

6   required by that rural municipality.

7   And then it turns out that some of --

8   some things are leaching out of the septic tank

9   10 years later and making its way into waters of

10   the United States.

11   So they would be violating -- they

12   would be violating the Clean Water Act for lack

13   of a permit and would be subject to all the

14   penalties that go with that for every day of the

15   violation?

16   MR. HENKIN: Well, Justice Alito, if I

17   understand your hypothetical correctly, at the

18   time that they purchased the house, they had no

19   reason to believe that any pollutants would be

20   getting to the ocean.

21   And that would be a reasonable

22   assumption for a homeowner because septic tanks,

23   as both, I think, the homeowners brief -- or the

24   National Home Builders brief, as well as

25   Anderson County brief point out, the reason that

            1   we have these types of regulations locally has

            2   nothing to do with the Clean Water Act.

            3   It's so that a septic tank is properly

            4   installed and it's going to use the ground as a

            5   treatment system, but it doesn't even pollute

            6   groundwater, much less any down --

            7   JUSTICE ALITO: Well, what -- I mean,

            8   what if they buy it from -- and they don't have

            9   a lot of money and so they shop around and they

           10   buy it from the lowest cost provider and the

           11   lowest cost installer -- and then, if it turns

           12   out, well, it should have been foreseeable that

           13   because you bought this from this cheap outfit

           14   that there was going to be a problem, that would

           15   be a violation?

           16   MR. HENKIN: Well -- well,

           17   fortunately, Justice Alito, it's -- it's a --

           18   it's a highly regulated thing, a septic tank.

           19   And so they not only need to get a purveyor, but

           20   they're going to have to follow the rules of the

           21   locality in the state.

           22   So I have personal --

           23   JUSTICE GORSUCH: But -- but --

           24   MR. HENKIN: -- experience with this

           25   because I built a house --

1   JUSTICE GORSUCH: -- but, counsel --

2   MR. HENKIN: -- and I had to put in a

3   septic tank.

4   JUSTICE GORSUCH: -- could you just

5   answer Justice Alito's question? I'd be

6   grateful if you would. I mean, there are other

7   regulations for nonpoint sources as well and for

8   -- for septic tanks, but under the

9   foreseeability test or traceability test that

10   you're proposing, why wouldn't the septic tank

11   that foreseeably, objectively, it's not their

12   personal, right, you don't want a subjective

13   test, you want an objective test.

14   MR. HENKIN: Correct, Your Honor.

15   JUSTICE GORSUCH: So all that talk

16   about what they personally think is irrelevant.

17   Why -- why aren't they liable under your test?

18   MR. HENKIN: Well, Justice Gorsuch, if

19   -- if -- if a reasonable person in the position

20   of the homeowner would have no reason to believe

21   the septic tank is going to get to navigable

22   waters, the pollutants from the septic tank,

23   they wouldn't be held liable. And in addition,

24   the reason --

25   JUSTICE GORSUCH: Well, again, we're

1   positing -- I think you're fighting the

2   hypothetical, and one -- you know, I'll give it

3   one more shot.

4   MR. HENKIN: Oh --

5   JUSTICE GORSUCH: You know, that --

6   that -- that you've got great proof because

7   water runs downhill, and gravity tends to work

8   its wonders with water, and that the snow in the

9   Rockies tends to wind up in the Mississippi

10   River, and that this septic tank happens to be

11   built pretty close to a navigable river, and it

12   was put in by a shoddy installer, or whatever

13   facts you have that are objective. Forget about

14   the homeowner's subjective intentions.

15   You're going to have a pretty good

16   case, let's posit, hypothetically, that it was

17   foreseeable that this septic tank -- and we

18   might put in San Francisco's green water

19   treatment plants and a whole lot else -- are

20   foreseeable and they're going to wind up in the

21   waters of the United States.

22   What -- what limiting principle do you

23   have to offer the Court?

24   MR. HENKIN: Well, you also have the

25   concept of traceability. So usually, when you

1   have one septic tank, you have more, and so just

2   because you find pollutants in the water doesn't

3   mean you know which one it's from.

4   The definition of "point source"

5   includes, as its first term, discernible. And

6   so that's why the point source program focuses

7   on whether you have a discernible point source.

8   JUSTICE BREYER: You're trying with

9   this. You're trying with this. But, look, I

10   learned in the eighth grade, and it may be

11   wrong, that water does run downhill --

12   (Laughter.)

13   JUSTICE BREYER: -- and that virtually

14   every little drop of rain that falls finds its

15   way to the sea. And -- and that's an

16   overstatement but not too much. So it's not

17   just the septic tank; the miner gets up and

18   every morning he throws his shaving water

19   outside the house at Mount -- at Pikes Peak,

20   okay?

21   Now, there's a very good chance that

22   that will end up in a river, and with your

23   brief, the brief on the -- of the scientists,

24   really convinced me they're geniuses and they

25   can trace all kinds of things.

1   So the problem that I saw, that I

2   think we're all saying with the traceability

3   test is I've overstated it but not by too much.

4   And, therefore, it puts all kinds of people in

5   the position of having to get a permit. Have

6   you ever tried to do that? That's a big

7   complicated thing. Okay?

8   So we're looking, at least I am, for

9   something not quite as broad as traceability,

10   but something that doesn't run into the problems

11   that you properly point out.

12   So all kinds of things -- I mean,

13   that's why I put this functional equivalent of a

14   direct discharge which imposes some kind of

15   limit on the EPA. They can write -- this is for

16   them. They should write rules, okay? But

17   traceability and causation. There we are, every

18   little drop of rain. I mean, you know.

19   MR. HENKIN: Well, Justice Breyer, we

20   believe that the way the statute is written,

21   that traceability and proximate cause was a fair

22   reading of the plain language of the statute.

23   But the question presented to the Court is

24   simply whether the mere fact that discharges

25   that, concededly, are from a point source reach

1   a navigable water through some distance of

2   groundwater, whether that cuts off Clean Water

3   Act liability.

4   The answer to that is clearly no,

5   because --

6   JUSTICE BREYER: All right. Clearly

7   no.

8   MR. HENKIN: And --

9   JUSTICE BREYER: But you have to write

10   an opinion. And in writing the opinion --

11   MR. HENKIN: Yes.

12   JUSTICE BREYER: -- I think we're

13   going to have to have a standard. And I don't

14   just look at the language. That's very

15   important, the language.

16   MR. HENKIN: Yes.

17   JUSTICE BREYER: But I am worried

18   about 500 million people or something suddenly

19   discovering that they have to go apply for a

20   permit for the EPA.

21   MR. HENKIN: And -- and --

22   JUSTICE BREYER: Now, traceability and

23   causation don't quite seem to do it. So I

24   wonder if you have any sort of fall-back

25   position there that -- that would cure my worry

 1   without getting into the evasion problems.

 2   MR. HENKIN: Well, Justice Breyer, we

 3   could certainly embrace functional equivalent,

 4   because there's no question that Congress

 5   intended to regulate discharges whether it goes

 6   through the air. Now, everyone -- everyone here

 7   agrees that the air is not a point source, but

 8   everyone also agrees if the point source

 9   discharges into the river, through the air, it's

10   covered.

11   We in the United States agree that if

12   it also flows over the land, which is also not

13   covered by the Clean Water Act, it's covered.

14   And I would -- I would -- I would submit that

15   there's nothing in the language of the statute

16   that exempts point source discharge just because

17   it touches a little bit of groundwater.

18   Congress could have done that. There

19   are a number -- as Justice Sotomayor mentioned,

20   there are a number of enumerated exemptions in

21   the Clean Water Act for things that would

22   otherwise be point source discharges. So

23   directly in the definition of point source, you

24   exclude things like agricultural return --

25   irrigation return flows and agricultural

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1    stormwater.

2              CHIEF JUSTICE ROBERTS:  When you -- I

3    --

4              MR. HENKIN:  Then you try --

5              CHIEF JUSTICE ROBERTS:  -- don't -- I

6    don't mean to be critical of the author of the

7    phrase, but what does "functional equivalent"

8    mean?

9              (Laughter.)

10             CHIEF JUSTICE ROBERTS:  What do you

11   understand it to mean?  I mean, the -- what

12   we're looking for -- as for an equivalent, it's

13   an equivalent to a point source, right?  Which

14   is --

15             MR. HENKIN:  Right.

16             CHIEF JUSTICE ROBERTS:  Okay.  I -- I

17   think of a pipe.

18             MR. HENKIN:  Yes.

19             CHIEF JUSTICE ROBERTS:  Well, what's

20   the functional equivalent of a pipe when you're

21   talking about groundwater?

22             MR. HENKIN:  Well, Mr. Chief Justice,

23   in this case when Petitioner was designing their

24   wastewater treatment plant, and I should mention

25   in Miccosukee, this Court emphasized that
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1   applying NPDES permits to -- to wastewater --

2   municipal wastewater treatment plants is really

3   what Congress was all about in enacting the law

4   in 1972, when, I also might add, there was no

5   Safe Drinking Water Act --

6   CHIEF JUSTICE ROBERTS: Well, but

7   that's --

8   MR. HENKIN: -- in 1972.

9   CHIEF JUSTICE ROBERTS: -- that's a

10   big wind-up.

11   MR. HENKIN: Yes.

12   CHIEF JUSTICE ROBERTS: The question

13   is what's the functional -- what's a functional

14   equivalent?

15   MR. HENKIN: The -- when they were

16   planning this, they thought about doing ocean

17   outfall and they said no, we can dispose of it

18   just as well through injection wells. That's

19   the functional equivalent from the -- the

20   question is do you have an identifiable point

21   source and it's the same to the receiving body,

22   water body, if you do it through the

23   groundwater, over the ground, through the air,

24   or directly into it.

25   If the pollutants are getting into it,

50

1   if there's an addition of pollutants, any

2   addition of pollutants to the navigable water

3   from an identifiable point source -- now, these

4   very remote --

5   CHIEF JUSTICE ROBERTS: I know it's --

6   I understand it's not your -- it sounds an awful

7   lot like as vague as fairly traceable. If all

8   of those things are functional -- it seems to me

9   that your answer to me is that the functional

10   equivalent is anything that gets to a

11   jurisdictional water.

12   MR. HENKIN: It -- our -- that -- that

13   -- I mean, that's why we suggest it as the test,

14   that it would be traceable and so you would have

15   causation in fact, and you would use principles

16   of proximate cause, which this Court has

17   embraced in other situations, like in the

18   Endangered Species Act.

19   It prohibits -- it prohibits take of

20   of endangered species through inhabit

21   modification.

22   JUSTICE BREYER: Don't worry, he'll

23   have an opportunity because you didn't make this

24   phrase up.

25   (Laughter.)

1   JUSTICE BREYER: And -- and it's a

2   little bit -- and we do have -- we do discuss

3   these things. So -- so we will discuss them.

4   (Laughter.)

5   JUSTICE BREYER: I -- I was looking

6   for something, which I'm not wedded to the one I

7   said, but I'm looking for something that does

8   give the EPA some leeway on this but doesn't go

9   as far as what traceability and causation do,

10   which seem to say the sky's the limit.

11   And -- and that -- that's -- that's

12   what I'm looking for. Now, I think functional

13   equivalent might or might not, but that's for --

14   a matter for us to discuss, I think. Your

15   initial reaction was a little narrower, not too

16   bad. I don't know what theirs is, but -- but

17   I'm not wedded to it.

18   MR. HENKIN: Well, Justice Breyer, I

19   think ultimately the question before the Court,

20   the question presented, is whether or not mere

21   passage through a little bit of groundwater cuts

22   off Clean Water Act liability.

23   JUSTICE KAGAN: Mr. Henkin, could --

24   maybe I don't understand the science of this and

25   perhaps like scientists can do everything. But

1   wouldn't the question for these sort of septic

2   tank examples be that your traceability

3   requirement has to be that you look at the ocean

4   and you find these pollutants in the ocean, and

5   you have to say these pollutants came from a

6   particular place --

7   MR. HENKIN: Yeah.

8   JUSTICE KAGAN: -- could you say that

9   as to a septic tank?

10   MR. HENKIN: No, in -- in our view,

11   Justice Kagan, you -- you normally could not. I

12   mean, if there's only one septic tank -- if

13   you're in an area where there's just one septic

14   tank and you found fecal coliform or something

15   that's indicative of a septic tank, you might be

16   able to do that. But, normally, when I built my

17   house, everyone was on septic tanks because the

18   sewer didn't go out to where we live --

19   JUSTICE KAGAN: So you couldn't say --

20   MR. HENKIN: -- and that's normally

21   the situation.

22   JUSTICE KAGAN: -- whether it's from

23   your house or your house or your house or your

24   house. Now, I suppose somebody could say, well,

25   then you all have to get permits. Is that

1   right? Is that the way you understand the

2   traceability requirement?

3   MR. HENKIN: Not at all. Not at all.

4   CHIEF JUSTICE ROBERTS: Not at all?

5   So all you have to do is get a bunch of

6   neighbors and all put the septic tanks in, and

7   then you're scot free?

8   MR. HENKIN: If you -- if you cannot

9   determine which point source, if it's not an

10   identifiable point source to control, so you

11   don't know -- you don't who's doing it, then

12   that is -- that is archetypal non-point source

13   pollution. So if --

14   CHIEF JUSTICE ROBERTS: Okay. So

15   you're saying if it's one house, one septic

16   tank, that person will need a permit. If it's a

17   residential development and you have a hundred

18   septic tanks, which would seem to me to be a

19   hundred times worse, they don't need a permit.

20   MR. HENKIN: If you don't know which

21   house might have a septic tank that has -- that

22   was poorly installed that didn't follow -- you

23   know, they didn't follow the rules or had some

24   aberration of geology such that it would be

25   polluting the ocean, you --

1   JUSTICE KAGAN: I mean, I would think

2   that that's --

3   MR. HENKIN: -- didn't know which one

4   it was.

5   JUSTICE KAGAN: -- a usual thing in

6   law, right? Like you can't hold somebody

7   responsible for somebody --

8   MR. HENKIN: Yeah.

9   JUSTICE KAGAN: -- for something

10   unless you knew that they were responsible for

11   that thing.

12   MR. HENKIN: Absolutely correct.

13   JUSTICE KAGAN: And -- and if there

14   are 20 other people who could be responsible for

15   that thing, then you can't hold them responsible

16   for that thing, can you?

17   MR. HENKIN: That's absolutely

18   correct.

19   JUSTICE KAGAN: So here we don't --

20   CHIEF JUSTICE ROBERTS: So if you have

21   20 people --

22   JUSTICE KAGAN: Here we don't have

23   that problem.

24   CHIEF JUSTICE ROBERTS: It's an Agatha

25   Christie novel. You have 20 people and they

1   shoot the gun at the guy at the same time.

2   (Laughter.)

3   CHIEF JUSTICE ROBERTS: They're all --

4   no one's guilty?

5   JUSTICE KAGAN: But that's tort law,

6   right?

7   JUSTICE GINSBURG: Maybe we can --

8   (Laughter.)

9   JUSTICE GORSUCH: I would be curious

10   what counsel thinks about that.

11   JUSTICE GINSBURG: Mr. Henkin, you

12   have been asked in various forms the question

13   that was put in the reply brief on page 11, and

14   it is: Would you require permits for a toilet,

15   an identifiable point source, that originates

16   wastewater and foreseeably sends it to the

17   county's wells? So how do you answer that?

18   MR. HENKIN: Justice Ginsburg, we

19   would not hold them responsible for a different

20   reason. I think that Petitioner would hold them

21   responsible because a toilet could be a point

22   source that goes into a pipe and it goes into

23   waste treatment plant that goes into a pipe and

24   then goes into ocean outfall. That's point

25   source to point source to point source. And

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1     eventually they would hold the toilet flusher
2     liable, perhaps, under their theory.
3               But, fortunately, Congress, in
4     promulgating the Clean Water Act, provides
5     specifically for people flushing their toilet,
6     that if it goes to a wastewater treatment plant
7     and it's not a hazardous waste that you're
8     flushing down the toilet, there's no
9     pretreatment standard and you don't need to get
10    a permit.  So that specific example, Congress
11    dealt with.
12              And that -- that's an important part
13    of the statute, which is Congress, when it
14    wanted to exempt things from point source
15    control, it carved out --
16              JUSTICE KAVANAUGH:  On your --
17              MR. HENKIN:  -- specific exceptions.
18              JUSTICE KAVANAUGH:  -- On your -- can
19    I go back to your colloquy with the Chief
20    Justice and Justice Kagan?  Because it seems to
21    me that's one of the contextual points that the
22    other side points up here.
23              You make a good argument about the
24    word "from" and the text.  The other side has
25    its responses.  And to figure out how to
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1   interpret that, one of the things they say we

2   should look at is structure, and another thing

3   is context.

4   And on the context, the things they

5   point out -- and I want you to give you -- have

6   a chance to respond -- are this would be a

7   massive increase in the permitting program, they

8   say; the costs of permitting are high, they say,

9   and I think you agree with that when you have to

10   get a permit.

11   And the uncertainty about when and

12   whether you would need to get a permit, which I

13   think is the colloquy you had with the Chief

14   Justice and Justice Kagan, as well as

15   transforming the federal/state balance. So

16   those are the contextual points that they raise

17   to help us figure out this interesting and

18   difficult question about the text.

19   And I'll give you a chance to respond

20   to those contextual points because that's what's

21   bothering me.

22   MR. HENKIN: Okay. Justice Kavanaugh,

23   with respect to the issue of whether it would be

24   a massive expansion, we -- the Court has

25   benefits here from 30 years of experience. This

     1   is not a new test that was articulated by the

     2   court below.

     3   But EPA for 30 years consistently

     4   said, and implementing states consistently

     5   followed, that discharges that reach navigable

     6   water via groundwater require a permit. And

     7   everyone under the sun has not required a

     8   permit.

     9   With respect to, I mean, they mention

    10   something like half a million injection wells.

    11   Well, injection wells, to get -- they're on that

    12   list from the EPA because they got a UIC permit,

    13   an injection control permit.

    14   And in doing that they had to look at

    15   the hydrology of -- of the situation. And you'd

    16   know a lot about whether or not you were likely

    17   to pollute a navigable water.

    18   And -- and -- and cited particularly

    19   in the EPA official's brief there is just a

    20   wealth of information there on permits that have

    21   been issued by EPA and states over these past 30

    22   years for concentrated animal feeding

    23   operations, for wastewater treatment plants,

    24   that similar to theirs --

    25   JUSTICE KAVANAUGH: Suppose I agree

1   with you on this, just hypothetically, that EPA

2   has been doing something like this and so it

3   wouldn't be a massive increase. So say -- say I

4   agree with you on that.

5   Then I -- I do think the uncertainty

6   point's a big point for you to deal with because

7   you have to know in advance whether to get the

8   permit or else you're going to be paying a huge

9   amount at the back end.

10   And so some clear line for the

11   property owner, I think, is -- is really

12   important here.

13   MR. HENKIN: Well, in -- in our

14   perspective, specifically with individual

15   homeowners and septic tanks, if your -- if

16   you've installed your septic -- septic tank

17   according to local ordinances and state

18   regulation, which are intended to protect

19   groundwater, you know, much less navigable

20   waters, if it's not polluting the groundwater,

21   it's certainly not polluting the navigable

22   waters.

23   If you complied with that, if you --

24   if you maintain it properly, you have --

25   objectively, you have no reason to believe that

1   it's polluting the ocean, and so you would not

2   have any foreseeability, any obligation to get a

3   permit.

4   In addition, if there was some

5   aberrant situation --

6   JUSTICE KAVANAUGH: You also don't

7   want to be the subject of citizen suits, and so

8   you would like that line not to be something

9   that's objectively clear after a lot of

10   litigation but objectively clear on the front

11   end.

12   MR. HENKIN: Understood. But Congress

13   enacted the citizen suit provision at the same

14   time as the Clean Water Act in 1972. And I --

15   I'm not aware of any lawsuit against an

16   individual septic tank owner for the violation,

17   notwithstanding, again, a consistent

18   interpretation up until April of this year by

19   the Environmental Protection Agency that

20   discharges via groundwater are covered.

21   And the reason for that is, in order

22   to establish traceability and foreseeability and

23   all that, you need a big discharger like the

24   Petitioner here. You -- you've got millions of

25   gallons per day in an intentionally designed

1   facility.

2   Congress did not intend to create a

3   loophole. I want to briefly address the United

4   States' argument there's something about the

5   structure of the Act, something special about

6   groundwater.

7   Well, nearly every provision that they

8   cite that talks about these programs for

9   groundwater in the same breath say and surface

10   waters and navigable waters. Congress treated

11   them the same.

12   And so, in the same way that those

13   provisions don't exempt surface waters, waters

14   of the United States, they don't exempt

15   groundwater.

16   JUSTICE ALITO: Well, the Court has

17   spoken about hiding elephants in mouse holes.

18   Was groundwater an elephant at the time when the

19   Clean Water Act was enacted? And, if it was,

20   how do you account for the fact that there isn't

21   any direct reference to it in the definition of

22   a conveyance or any of the other provisions that

23   are directly relevant here?

24   MR. HENKIN: Well, Justice Alito,

25   there's no reference in any of the NPDES

    1   permitting program or the definition of a point

    2   source to regulating discharges via air, yet

    3   Petitioner concedes if the pipe is hanging over

    4   the water's edge, it can pass through air.

    5   The United States concedes --

    6   JUSTICE ALITO: I mean, do you think

    7   that that's really comparable, where you have a

    8   pipe that's over the river and the pollutant is

    9   coming out of the river and going through the

   10   air, that anybody's going to seriously argue

   11   that, well, because it went through the air, it

   12   wasn't covered?

   13   Do you really think that's comparable

   14   to groundwater that can travel a long distance?

   15   MR. HENKIN: Well, Justice Alito, I

   16   could imagine a situation in which you have a

   17   pipe hanging out over the water and it's

   18   trickling into the water, and there's a strong

   19   wind, and every once in a while the trickle gets

   20   batted upon the shore.

   21   So that's not covered because it's now

   22   on the shore. And then it's -- then the wind

   23   dies down and it goes into the water. So

   24   there's really, you know, there's no difference

   25   in this situation.

 1   The same thing with respect to land.

 2   There's no reference to land in the NPDES

 3   permitting. And -- and yet we can all conceive

 4   how it would create a -- a road map for evasion

 5   if you can cut your pipe five feet short of the

 6   shore line.

 7   JUSTICE ALITO: Well, I don't know

 8   about that. If you have a pipe that stops short

 9   of the water and you do that because you know

10   that the pollutant, when it comes out of the

11   pipe, is going to flow downhill into the river,

12   I -- I don't know that you're going to be able

13   to avoid the conclusion that whatever it is that

14   takes it down that slope is a conveyance.

15   MR. HENKIN: Well, a conveyance has to

16   be confined in some way. So, for example, this

17   wastewater treatment plant comes out at Kahekili

18   Beach Park, which belongs to the county.

19   So let's say instead they ran their

20   discharge pipe to the beach park, they paved the

21   land so it wouldn't create any furrow, any

22   ditch, any -- any sheet flow that ran into the

23   ocean. But they would say it's nonpoint source

24   pollution because it stops short of the water's

25   edge.

           1   Now the United States would concede

           2   that that is covered, but if instead of doing

           3   that they went to the beach park and they put a

           4   lot of gravel down and they knew that it would

           5   run into the gravel and then, you know, go into

           6   the groundwater for like three inches before

           7   getting to the ocean itself, because the ocean,

           8   if you -- if you've been to the beach, you dig

           9   in the sand, you get down to water pretty

          10   quickly.

          11   Well, that's groundwater, unless and

          12   until it's on the surface, and then it's the

          13   ocean.

          14   So, under the United States' theory,

          15   this -- this pipe that then goes into the sand

          16   and then goes through a very small stretch of

          17   groundwater, that's all of a sudden exempted.

          18   So, to use, you know, Mr. -- Mr.

          19   Stewart's example about the whiskey and the

          20   punch and the flask, and he said you would never

          21   say the whiskey that's in the punch came from

          22   the bottle, you'd say it came from the flask,

          23   well, here, Congress was trying to prohibit

          24   whiskey in punch.

          25   So if all of a sudden --

1   (Laughter.)

2   MR. HENKIN: -- you tasted the punch

3   and you said this tastes like whiskey, you'd

4   say, where did that come from? You wouldn't

5   point to -- you'd say it came from the whiskey

6   bottle. That's how we know it's whiskey.

7   And, here, we know we have whiskey,

8   whiskey in the form of a injection well that is

9   discharging 3 to 5 million gallons per day into

10   the ocean.

11   And there's nothing about the Clean

12   Water Act that would allow a polluter to evade

13   it by -- by -- by -- by pouring the whiskey via

14   the groundwater.

15   JUSTICE ALITO: Well, I didn't know

16   Mr. Stewart was spiking punch.

17   (Laughter.)

18   JUSTICE ALITO: But would you say in

19   his extent -- extend his example, that it came

20   from a barrel in Scotland?

21   MR. HENKIN: Well, let's say the

22   whiskey was spoiled in some way. And I'm not a

23   whiskey drinker and I don't mean to offend any

24   whiskey drinkers. But, if the whiskey were

25   spoiled in some way, you might ask, where did

1   this whiskey come from? And you might trace it

2   back to the barrel in Scotland, particularly if

3   it's poisoned or harmful in some way. So it all

4   depends on the context.

5   What Congress wanted to do here was

6   regulate pollution at the source when we can.

7   And the source here clearly is their injection

8   well.

9   JUSTICE KAVANAUGH: But -- but

10   Congress knew about the ground -- groundwater

11   issue and there were debates about this precise

12   groundwater issue, maybe not this precise, but

13   the groundwater issue, and there were proposals,

14   as you're well aware, and some of the amicus

15   briefs go through this at great length, to put

16   in regulation of groundwater. And Congress

17   rejected those.

18   So how do we assess that in thinking

19   about this?

20   MR. HENKIN: Well -- well, Justice

21   Kavanaugh, those debates quite clearly resulted

22   in a vote that said we are not going to enact

23   national standards to control the quality of

24   groundwater. So there is no regulation under

25   the Clean Water Act of groundwater qua

1   groundwater.

2   And as I mentioned, in 1972, there was

3   no --

4   JUSTICE KAVANAUGH: So your point --

5   your point is that's a separate topic from the

6   issue today?

7   MR. HENKIN: Absolutely. And the same

8   debates --

9   JUSTICE KAVANAUGH: Okay.

10   MR. HENKIN: -- they said we recognize

11   the essential link between ground and surface

12   waters and the artificial nature of any

13   distinction.

14   If Congress had wanted to say point

15   source discharge that reaches the navigable

16   waters through groundwater is exempt, because we

17   want to leave that completely to the states,

18   they would have said that in the language of the

19   Act. They didn't. In the same way that they

20   said we don't want point source -- point source

21   discharges that could be characterized as

22   agricultural stormwater or irrigation return

23   flows. That usually happens in the form of a

24   ditch.

25   And they said we do not want to

1   regulate that under the point source program.

2   But, here, what you have is paradigmatic point

3   source pollution that just happens to pass

4   through --

5   JUSTICE KAVANAUGH: Why -- why are the

6   --

7   MR. HENKIN: -- particularly for --

8   JUSTICE KAVANAUGH: I'm sorry. Why

9   are the states inadequate to do this, and are

10   they inadequately regulating in substantial

11   numbers of states in your view?

12   MR. HENKIN: Well, I think the

13   question, Justice Kavanaugh, is whether Congress

14   intended to establish uniform --

15   JUSTICE KAVANAUGH: No, I -- I

16   understand your legal argument. Just as a

17   practical question, what's happening on the

18   ground in the states, are they doing an

19   inadequate job in substantial numbers in your

20   view of regulating this substantial source of

21   pollution?

22   CHIEF JUSTICE ROBERTS: Please.

23   MR. HENKIN: Well, there are examples

24   in the EPA official's brief in which delegated

25   states are regulating those sources of pollution

1   by using the NPDES permit program. And -- and

2   as mentioned, Colorado pushed back against the

3   mine owner that wanted to stop getting a permit

4   by using the groundwater as a sewer to get

5   pollutants into -- into the waters.

6   But ultimately what we have is a -- is

7   a statement by Congress that you need to have

8   uniform regulation to protect our national

9   waters, which are a national concern.

10   CHIEF JUSTICE ROBERTS: Thank you,

11   counsel.

12   Mr. Lin, three minutes.

13   REBUTTAL ARGUMENT OF ELBERT LIN ON

14   BEHALF OF THE PETITIONER

15   MR. LIN: Thank you, Mr. Chief

16   Justice.

17   I'd just like to pick up where my

18   friend left off, which is with the example of

19   the Colorado DEQ and the footnote in Maryland's

20   brief. I think that is as, I thought I heard

21   him say at the very end there, precisely an

22   example of how the comprehensive regime works.

23   The Colorado DEQ prohibited that mine

24   from changing the way it was discharging

25   pollutants in order to -- to use Justice

1   Breyer's word -- evade its NPDES permit. 33 USC

2   1370, the Clean Water Act, allows the states to

3   impose stricter requirements on NPDES permits.

4   And of course --

5   JUSTICE SOTOMAYOR: Why are you doing

6   what you're doing? This is fairly traceable to

7   you in large quantities. The state didn't

8   control you. What regulations are there in

9   place that do?

10   MR. LIN: Your Honor, there are a

11   number, starting with the --

12   JUSTICE SOTOMAYOR: No, no, you're

13   doing it, what's stopping you from? This is

14   not. So how did you get away with it, and how

15   do you continue without taking remedial steps?

16   MR. LIN: Your Honor, I don't think

17   this is a question of --

18   JUSTICE SOTOMAYOR: Not you, but, I

19   mean --

20   MR. LIN: Of course, Your Honor. I

21   understand.

22   JUSTICE SOTOMAYOR: I mean the

23   polluters. What are they -- what is being done

24   to stop them?

25   MR. LIN: Well, Your Honor, I -- I --

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 1        I think, if I can take issue with the -- the --

 2        the premise there, which is that there is

 3        something that's being gotten away with here,

 4        these --

 5                  JUSTICE SOTOMAYOR:  If they followed

 6        --

 7                  MR. LIN:  -- these wells were --

 8                  JUSTICE SOTOMAYOR:  -- all the laws,

 9        and they still are polluting, they're getting

10        away with it.  So something failed.

11                  MR. LIN:  The --

12                  JUSTICE SOTOMAYOR:  The preventive

13        measures of this law were not followed and

14        something failed.

15                  MR. LIN:  Your Honor, the -- the whole

16        -- even under NPDES permits, point source

17        discharges can include pollutants that are below

18        effluent limits.

19                  So I think the -- the mere fact that

20        there are -- are nutrients that are getting into

21        the ocean, doesn't mean that the system has

22        failed.

23                  And I think it comes back to the fact

24        that, in this particular circumstance, these

25        wells were constructed with encouragement and
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1        funding from EPA as a more environmentally

2        protective solution than simply constructing an

3        outfall pipe to the ocean.

4                    If I can come back to the traceability

5        point, I think it's also important to note, my

6        friend runs very far away from the septic tank

7        examples, and, Justice Kagan, to answer your

8        question about traceability, there are 7,000

9        cesspools within 750 feet of the ocean in

10       Hawaii.  And we cite to a study in our reply

11       brief that showed that through a tracer, dye

12       tracer study, not dissimilar from what was used

13       here, it was established that pollutants from

14       individual septic tanks were getting to the

15       ocean within three hours to five days.

16                   So traceability can be done.  Septic

17       tanks are constructed near the ocean.  And I

18       don't think that there is a limiting principle

19       that would give those landowners any certainty,

20       which comes back to the point which I think is

21       the most important about predictability.

22                   And -- and, Justice Breyer, you had --

23                   CHIEF JUSTICE ROBERTS:  Why don't you

24       finish your thought.

25                   MR. LIN:  -- you -- you had suggested
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1   functional equivalents. I think it's important

2   to remember the context that we're talking about

3   here. This is a -- a permitting program that

4   applies to ordinary lay people and would require

5    $50,000 a day in fines.

6   We -- we are looking at a statute and

7   trying to figure out what Congress intended to

8   write to give people that kind of

9   predictability.

10   CHIEF JUSTICE ROBERTS: Thank you,

11   counsel. The case is submitted.

12   (Whereupon, at 11:06 a.m. the case was

13   submitted.)

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