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## MUDDYING THE WATERS: THE NEED FOR MORE CLARITY UNDER THE CLEAN WATER ACT

Georgia D. Reid<sup>†</sup>

*“Men of science, like men of state have a duty imposed by ethics. The Earth is living: it can and will avenge itself: already there are portents. The Earth has no time left for man’s ignorance, arrogance, sophistry and madness.” — Jean Malaurie*

### INTRODUCTION

Imagine it is your honeymoon, and you are spending it in Hawaii, by all accounts a veritable paradise on Earth, replete with tropical flora, exotic wildlife, and warm beaches. You decide to spend a day at a Kahekili Beach on Maui, swimming, snorkeling, and looking at beautiful fish and coral reefs. Now, imagine if a few miles away, a county-run sewage processing plant in Maui discharges three to five million gallons of treated sewage into four on-site injection wells every day. The effluent then travels into a shallow groundwater aquifer and ends up in the Pacific Ocean. In fact, it is polluting the very beach where you are swimming and enjoying your vacation. The sewage plant does not have a permit to do this, the consequence of no regulation by the Environmental Protection Agency (EPA) of the effluent entering the ocean.

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<sup>†</sup> J.D., May 2021, Touro Law Center.

This is not an imaginary scenario.<sup>1</sup> In 2012, four non-profit environmental and wildlife groups sued the County of Maui, which operates the sewage treatment plant.<sup>2</sup> The District Court in *Hawaii Wildlife Fund v. County of Maui* agreed with the plaintiffs that the County required a National Pollutant Discharge Elimination System (NPDES) permit when it discharged pollutants from a point source<sup>3</sup> which ended up in navigable waters, in this case, the Pacific Ocean.<sup>4</sup> The United States Court of Appeals for the Ninth Circuit affirmed,<sup>5</sup> and the County of Maui petitioned an appeal to the Supreme Court.<sup>6</sup>

NPDES permits issued pursuant to the Clean Water Act (CWA or the Act) impose limitations on the discharge of pollutants and establish related monitoring and reporting requirements, in order

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<sup>1</sup> See *Haw. Wildlife Fund v. County of Maui (Haw. Wildlife Fund I)*, 24 F. Supp. 3d 980, 983-84 (D. Haw. 2014), *aff'd* 881 F.3d 754 (9th Cir. 2018), *aff'd* 886 F.3d 737 (9th Cir. 2018), *vacated*, 140 S. Ct. 1462 (2020) (The County of Maui operates the LWRF, a wastewater treatment facility approximately three miles north of the town of Lahaina on the island of Maui. The injection wells are long pipes into which effluent is pumped. The effluent then travels approximately 200 feet underground into a shallow groundwater aquifer beneath the facility. While “the precise depth of this aquifer fluctuates somewhat, depending on water inputs and other conditions,” it contains “a sufficient quantity of groundwater to supply a public water system.” The LWRF typically discharges three to five million gallons of effluent into the four injection wells on a daily basis.).

<sup>2</sup> Plaintiffs are: Hawaii Wildlife Fund, a Hawaii non-profit corporation; Sierra Club-Maui Group, a non-profit corporation; Surfrider Foundation, a non-profit corporation; and West Maui Preservation Association, a Hawaii non-profit corporation. *Id.* at 983.

<sup>3</sup> *Id.* The Clean Water Act defines a “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container.” 33 U.S.C. § 1362(14).

<sup>4</sup> Environmental organizations brought action against county, alleging that county violated the Clean Water Act (CWA) by discharging effluent, without a National Pollutant Discharge Elimination System (NPDES) permit, at four injection wells. *Hawaii Wildlife Fund*, 24 F. Supp. 3d at 980.

<sup>5</sup> *Haw. Wildlife Fund v. County of Maui (Haw. Wildlife Fund III)*, 886 F.3d 737, 742 (9th Cir. 2018).

<sup>6</sup> *Petition for Writ of Certiorari, County of Maui v. Haw. Wildlife Fund (Haw. Wildlife Fund V)*, 140 S. Ct. 1462 (2020) (No. 18-260), 2018 WL 4205010.

to improve the cleanliness and safety of the nation's waters.<sup>7</sup> The issue in the *Hawaii Wildlife Fund* case, and the many cases decided before it, was whether liability is defeated—and no permit is required—when the pollutants make a short trip through groundwater, which is not water currently under the purview of the CWA.<sup>8</sup>

The scope of the CWA is limited to “Waters of the United States” (WOTUS), a term that has been redefined by many administrations, which causes confusion in the lower courts when determining the definition of WOTUS. The Obama Administration defined WOTUS to include wetlands, ephemeral streams, and all navigable surface waters.<sup>9</sup> The Trump Administration eliminated wetlands (unless the wetland in question has a “significant nexus”<sup>10</sup> to navigable waters), and also removed groundwater, many ditches, prior converted cropland, and waste treatment systems from the scope of the Act.<sup>11</sup>

There is a circuit split among lower courts about how to interpret the issue of liability when pollutants travel through groundwater and whether the CWA's jurisdiction can reach hydrologically

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<sup>7</sup> 33 U.S.C. § 1342(a)–(b).

<sup>8</sup> It is not disputed that the effluent being discharged at the LWRF constitutes a pollutant that is being discharged from a point source. The only area of dispute between the parties is whether the discharge into the aquifer beneath the facility constitutes a discharge into “navigable waters.” *Haw. Wildlife Fund I*, 24 F. Supp. 3d at 989.

<sup>9</sup> The Obama Era “Clean Water Rule” regulation defined the scope of federal water protection in a more consistent manner, particularly over streams and wetlands which have a significant hydrological and ecological connection to traditional navigable waters, interstate waters, and territorial seas. Clean Water Rule: Definition of “Waters of the United States, 80 Fed. Reg. 37,054 (June 29, 2015) (codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

<sup>10</sup> See *infra* note 22.

<sup>11</sup> See *The Navigable Waters Protection Rule (Step Two) – Revise*, EPA, <https://www.epa.gov/nwpr/navigable-waters-protection-rule-step-two-revise> [<https://web.archive.org/web/20200429032203/https://www.epa.gov/nwpr/navigable-waters-protection-rule-step-two-revise>] (last visited May 15, 2020).

connected groundwater.<sup>12</sup> It is the Sixth Circuit's stance that liability is avoided and no permit is required.<sup>13</sup> However, the Second, Fourth and Ninth Circuits have held that a trip through groundwater should not allow a discharger of a pollutant to avoid CWA liability.<sup>14</sup> The Sixth Circuit's position that a trip through groundwater defeats liability under the CWA is an illogical loophole that allows polluters to avoid liability and to avoid obtaining NPDES permits.

The circuit split and the constant redefining of "WOTUS" by different administrations is a problem that has confused courts for decades.<sup>15</sup> When defendants in *County of Maui, Hawaii v. Hawaii Wildlife Fund* petitioned for appeal, the Supreme Court granted certiorari in February of 2019, and environmentalists hoped the Court would rule that a trip through groundwater does not defeat CWA liability.<sup>16</sup> The stakes were very high for the future of environmental health for America's waters.

On April 23, 2020, in a 6-3 decision, the Supreme Court decided in favor of the environmental groups, but the confusion that

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<sup>12</sup> Compare, e.g., *Waterkeeper Alliance, Inc. v. U.S. Env'tl. Prot. Agency*, 399 F.3d 486, 514–15, 520 (2d Cir. 2005) (finding that CWA jurisdiction exists over discharges of pollutants to groundwater that is hydrologically connected to navigable waters), and *Haw. Wildlife Fund I*, 24 F. Supp. 3d at 996 (same), with *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014) (concluding regulatory authority under CWA does not extend to groundwater regardless of whether groundwater is eventually or somehow hydrologically connected to navigable surface water).

<sup>13</sup> See, e.g., *Tenn. Clean Water Network v. Tenn. Valley Auth. (Tenn. Clean Water Network II)*, 905 F.3d 436, 448 (6th Cir. 2018).

<sup>14</sup> See *infra* text accompanying note 20.

<sup>15</sup> In his dissent in *Tennessee Clean Water Network II*, Judge Clay questioned the issue when we wrote, "can a polluter escape liability under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251–1387, by moving its drainage pipes a few feet from the riverbank? The Fourth and Ninth Circuits have said no. In two cases today, the majority says yes." *Tenn. Clean Water Network II*, 905 F.3d at 448 (Clay, J., dissenting) (footnote omitted).

<sup>16</sup> *County of Maui v. Haw. Wildlife Fund (Haw. Wildlife Fund IV)*, 139 S. Ct. 1164 (2019).

has resulted in the circuit split may still remain.<sup>17</sup> The *Hawaii* decision is not comprehensive enough and does not offer enough guidance to lower courts, and it will allow lower courts to apply faulty logic and poor environmental policies as they see fit. The door is still wide open to countless more lawsuits from environmental groups, as well as certain environmentally friendly states.<sup>18</sup> This Article argues the CWA needs to be amended in favor of environmentalism and clarity to minimize litigation and ensure healthy waters for the nation.

Part I briefly overviews the legislative history of the CWA to show the intent of Congress when they wrote the CWA. Part II examines the historic, 2006, *Rapanos v. United States* case; the last time the Supreme Court interpreted the intent of the CWA, adding a “significant nexus test” to determine what kind of wetlands fall under the purview of the Act.<sup>19</sup> Part III analyzes the circuit split between the Sixth Circuit (holding that a trip through groundwater defeats CWA liability) and the Fourth and Ninth Circuits (which hold that a trip through groundwater does not defeat liability).<sup>20</sup> Part IV argues that the best way to guide the courts, and the best way to

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<sup>17</sup> The Court’s decision was based on a “functional equivalent” theory, which states: “[T]he statutory provisions at issue require a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters.” *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020).

<sup>18</sup> The CWA’s citizen-suit provision provides that “any citizen may commence a civil action . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter.” 33 U.S.C. § 1365(a).

<sup>19</sup> *Rapanos v. United States*, 547 U.S. 715, 742 (2006) (plurality opinion) (Holding that only those wetlands with a continuous surface connection to bodies that are waters of the United States, pursuant to the Clean Water Act, in their own right, so that there is no clear demarcation between “waters” and wetlands, are adjacent to such waters and covered by the Act; wetlands with only an intermittent, physically remote hydrologic connection to waters of the United States lack the necessary connection to covered waters to establish the significant nexus required for coverage under the Act.)

<sup>20</sup> Both the Fourth and Ninth circuits determined that a short journey through groundwater does not defeat CWA liability; the Sixth circuit held that a trip through groundwater does defeat CWA liability.

protect the nation's waters, is by applying the hydrological connection theory and amending the CWA to cover more waters. Part V examines the recent Supreme Court decision in *Hawaii Wildlife Fund* that uses a functional equivalent theory and discusses the repercussions of the decision. Part VI concludes that, for the sake of our waters and planet, the CWA should be amended to include a bright line rule in favor of a more environmentally sound, clear guide, to deter pollution and minimize future litigation.

### I. LEGISLATIVE HISTORY

Today, the CWA governs pollutants that enter navigable waters from a point source.<sup>21</sup> When pollution comes “from” a point source and goes “into” navigable waters, the discharger of the pollution must, under the Act, obtain a NPDES permit.<sup>22</sup> If the discharger eliminates pollutants into navigable waters without the NPDES permit, then the discharger is strictly liable under CWA.<sup>23</sup> The CWA imposes criminal liability, as well as steep civil fines, on a broad range of industrial and commercial activities.<sup>24</sup>

Under the CWA as it currently stands, while navigable waters fall under the purview of the EPA, groundwater remains the jurisdiction of the states.<sup>25</sup> An unpermitted discharge into the groundwater, therefore, does not constitute a violation of the

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<sup>21</sup> The term “discharge of a pollutant” and the term “discharge of pollutants” each means “(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.” 33 U.S.C. § 1362(12).

<sup>22</sup> 33 U.S.C. § 1342(a)–(b).

<sup>23</sup> The Clean Water Act (CWA) creates a strict liability scheme that categorically prohibits any discharge of a pollutant from a point source without a permit, irrespective of whether that discharge affects the receiving water. 33 U.S.C. § 1311(a).

<sup>24</sup> See, e.g., *Rapanos*, 547 U.S. 715.

<sup>25</sup> “It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .” 33 U.S.C. § 1251(b).

CWA.<sup>26</sup> Groundwater is generally defined as water “in any form in the ground, including water seeping in soil and rock formations and naturally occurring subsurface bodies of water.”<sup>27</sup> Because groundwater is hydrologically connected to navigable waters, when a pollutant travels through groundwater, jurisdictional lines are blurred.<sup>28</sup> This blurriness and lack of clear aquatic boundaries confuses lower courts when interpreting CWA liability, because it is often unclear where pollution in water begins and ends.<sup>29</sup> Courts often look to legislative intent for guidance, but this currently is leading to a circuit split.

The legislative history of the CWA is one that shows a steady progression to allow increased federal jurisdiction over the protection of the nation’s waters.<sup>30</sup> The CWA, enacted in 1972, was designed to protect navigable waters<sup>31</sup> from the discharge of pollution. It gave the newly formed EPA the authority to regulate pollution. Prior to the enactment of the CWA, regulation of water pollution sat squarely

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<sup>26</sup> 33 U.S.C. § 1311(a).

<sup>27</sup> *Groundwater*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Stephen Michael Sheppard ed., Desk ed. 2012).

<sup>28</sup> “Hydrological connectivity defines the spatial and temporal pattern of the links among surface or subsurface water networks flowing across a landscape, and hence, it determines the ease with which water may move across a landscape or through a river system.” S.M. Reaney, *Hydrological Connectivity*, in ENCYCLOPEDIA OF GEOGRAPHY 1512, 1512 (Barney Warf ed., 2010).

<sup>29</sup> “Surface water and groundwater systems are connected in most landscapes. . . . The movement of water between groundwater and surface-water systems leads to the mixing of their water qualities. High quantities of nutrients or other dissolved chemicals in surface water can be transferred to the connected groundwater system.” *How Do Groundwater and Surface Water Interact?*, AGI, <https://www.americangeosciences.org/critical-issues/faq/how-do-groundwater-and-surface-water-interact> (last visited May 15, 2020).

<sup>30</sup> The Federal Water Pollution Control Act was enacted in 1948, but was reorganized and expanded in 1972 to become the “Clean Water Act.” *Summary of the Clean Water Act*, EPA, <https://www.epa.gov/laws-regulations/summary-clean-water-act> (last visited May 15, 2020).

<sup>31</sup> *Id.*

with the states.<sup>32</sup> In 1971, Senate Report 414 examined the history of regulating water pollution in the nation.<sup>33</sup> It reads:

For more than two decades, Federal legislation in the field of water pollution control has been keyed primarily to an important principle of public policy: The States shall lead the national effort to prevent, control and abate water pollution. As a corollary, the Federal role has been limited to support of, and assistance to, the States.<sup>34</sup>

As time progressed and industry started to expand, legislation called for “increased cooperation between the Federal government and the States,” and in 1956 Congress approved the “first major legislative changes in the water pollution control program” by giving federal grants to the states, but the funding “fell short.”<sup>35</sup> In 1965, Congress added another layer of federal regulation:

Each State was required by the 1965 Act to develop standards for water quality within its boundaries. These standards were to be applied to all interstate navigable waters flowing through the State; intrastate waters were not included. The State standards were to be submitted to the new Federal agency by July 1, 1967, for approval.<sup>36</sup>

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<sup>32</sup> S. REP. No. 92-414 (1971), as reprinted in 1972 U.S.C.C.A.N. 3668, 3669.

<sup>33</sup> *Id.*

<sup>34</sup> This report references legislation from 1948, 1956, and 1965. Historically, the states governed the prevention of water pollution, and the federal government acted to assist them when needed. As history progressed, the need for federal assistance increased. The 1948 legislation “assigned powers for enforcement in water pollution control to Governors of the States.” *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

The federal agency at the time was the Federal Water Pollution Control Administration, located in the Department of Health, Education, and Welfare. In 1970, the authority was transferred to the Administrator of the Environmental Protection Agency.<sup>37</sup> Managing water pollution was getting complicated, and the need for a centralized, federal enforcement of protecting the nation's waters was required.<sup>38</sup> The 1971 Senate Report mentions many problems in water pollution control at the time, including cleaning up oil discharges, discharge of hazardous substances, discharge of sewage, cleaning up pollution in the Great Lakes, acid mine drainage, regulation of federal activities affecting water quality, and manpower training for water pollution control.<sup>39</sup>

At hearings held in 1971, the Committee on Air and Water Pollution concluded that “the national effort to abate and control water pollution has been inadequate in every vital aspect.”<sup>40</sup> The Committee proposed “a major change in the enforcement mechanism of the federal water pollution control program from water quality standards to effluent limits.”<sup>41</sup>

The pollution in America was extreme at the time the CWA was finally implemented; for example, fires were nothing out of the ordinary on Cleveland's Cuyahoga River.<sup>42</sup> Industry spilled chemicals, oil, solvents, and industrial products wherever was convenient; municipalities used local rivers to dump waste.<sup>43</sup> “The dawning of environmental consciousness in the United States during the 1960s led to a national commitment to clean air and water with the creation, in 1970, of the Environmental Protection Agency,” writes

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 3670.

<sup>40</sup> *Id.* at 3674.

<sup>41</sup> *Id.* at 3675.

<sup>42</sup> Erin Blakemore, *The Shocking River Fire That Fueled the Creation of the EPA*, HISTORY, <https://www.history.com/news/epa-earth-day-cleveland-cuyahoga-river-fire-clean-water-act> (Dec. 1, 2020).

<sup>43</sup> *Id.*

journalist Jim Dwyer.<sup>44</sup> The pollution levels were catastrophic, and attracted media attention. The 1969 Cuyahoga River fire awed the nation.<sup>45</sup> This disaster was followed by the massive Santa Barbara oil spill in 1969, which dumped 100,000 barrels of crude oil into the ocean, killing wildlife and washing ashore, destroying beaches.<sup>46</sup> The American public realized the critical need for change, and they made their voices heard with a new environmental movement.<sup>47</sup>

The intent of the CWA was to find a solution to address the extreme levels of water pollution at the time.<sup>48</sup> The Congressional declaration of goals and policy section of the Act states, “the objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>49</sup> This

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<sup>44</sup> Jim Dwyer, *Remembering a City Where the Smog Could Kill*, N.Y. TIMES, Feb. 28, 2017, <https://www.nytimes.com/2017/02/28/nyregion/new-york-city-smog.html>.

<sup>45</sup> “On June 22, 1969, around 12pm, floating pieces of oil slicked debris were ignited on the river by sparks caused by a passing train. . . . The Cuyahoga River was once one of the most polluted rivers in the United States as represented by the multitude of times it has caught fire, a recorded number of thirteen starting in 1868.” *Cuyahoga River Fire*, OHIO HIST. CONNECTION, [https://www.ohiohistorycentral.org/w/Cuyahoga\\_River\\_Fire](https://www.ohiohistorycentral.org/w/Cuyahoga_River_Fire) (last visited May 15, 2020).

<sup>46</sup> Michigan in the World and the Environmental Justice History Lab, “*Environmental Crisis*” in the Late 1960s, GIVE EARTH A CHANCE: ENV’T ACTIVISM IN MICH., [http://www.michiganintheworld.history.lsa.umich.edu/environmentalism/exhibits/show/main\\_exhibit/origins/-environmental-crisis--in-the-](http://www.michiganintheworld.history.lsa.umich.edu/environmentalism/exhibits/show/main_exhibit/origins/-environmental-crisis--in-the-) (last visited May 15, 2020).

<sup>47</sup> “During the 1960s, environmentalism became a mass social movement. Drawing on a culture of political activism inspired in part by the civil rights and antiwar movements, thousands of citizens, particularly young middle-class white men and women, became involved with environmental politics.” *Environmental Movement*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/earth-and-environment/ecology-and-environmentalism/environmental-studies/environmental-movement> (May 18, 2020).

<sup>48</sup> The CWA defines “pollutant” as “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.” 33 U.S.C. §§ 1251(a), 1362(6).

<sup>49</sup> 33 U.S.C. § 1251.

included requiring a permit for the “discharge of a pollutant,” defined broadly to include any addition of any pollutant to navigable waters from any point source.<sup>50</sup> The Act gives the Administrator of the EPA (the “Administrator”) the power to administer Congress’ goals and policy.<sup>51</sup>

The CWA states “it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.”<sup>52</sup> The independence and authority of the states regarding land use pertaining to groundwater and wetlands remained intact.<sup>53</sup> The attempt to balance both the federal and state powers to monitor water resources has led to confusion, especially since water is connected and flows between navigable water and groundwater, and between states.<sup>54</sup> Both the Obama Administration and the Trump Administration recently attempted to re-define WOTUS and to address the question of whether groundwater ever falls under the purview of the CWA.

In 2015, in an attempt to expand protection and provide a uniform interpretation of the CWA, EPA and the U.S. Army Corps of Engineers finalized the Clean Water Rule (CWR).<sup>55</sup> The purpose of the CWR was to protect all streams and all wetlands, including effluent streams, in order to ensure the health and safety of all of the nation’s water resources.<sup>56</sup> In a press release about the CWR,

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<sup>50</sup> 33 U.S.C. § 1362(12).

<sup>51</sup> 33 U.S.C. § 1251.

<sup>52</sup> *Id.*

<sup>53</sup> “It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies . . . .” 33 U.S.C. § 1251.

<sup>54</sup> See *supra* text accompanying note 11.

<sup>55</sup> *Definition of “Waters of the United States” – Recodification of Pre-Existing Rules*, EPA, <https://www.epa.gov/nwpr/definition-waters-united-states-recodification-pre-existing-rules> (last visited May 15, 2020).

<sup>56</sup> *What the Clean Water Rule Does*, EPA, <https://www.epa.gov/cleanwater/rule/what-clean-water-rule-does/> [<http://web.archive.org/web/20170329224512/>

President Obama announced his executive order in support of the rule.<sup>57</sup> Obama notably stated that one in three Americans obtained their drinking water from streams lacking “clear protection,” and “businesses and industries that depend on clean water face uncertainty and delay.”<sup>58</sup> In finalizing the rule, the EPA and the Army Corps of Engineers “utilized the latest science . . . which showed that small streams and wetlands play an integral role in the health of larger downstream water bodies.”<sup>59</sup> The Obama administration was attempting to clarify the federal jurisdiction of the CWA under the “Clean Water Rule” in a way that took a “better safe than sorry” approach.<sup>60</sup> This change in regulation came in 2015, months after the Flint Water Crisis of 2014 that devastated so many human lives.<sup>61</sup> There was no doubt that pollution was seeping into the public’s drinking water, and something had to change.<sup>62</sup>

With his own executive order in 2017, Trump rolled back the Obama-era CWR.<sup>63</sup> The Trump administration replaced the

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<https://www.epa.gov/cleanwaterrule/what-clean-water-rule-does/>] (last visited May 15, 2020).

<sup>57</sup> Coral Davenport, *Obama Announces New Rule Limiting Water Pollution*, N.Y. TIMES, May 27, 2015, <https://www.nytimes.com/2015/05/28/us/obama-epa-clean-water-pollution.html>.

<sup>58</sup> *Id.*

<sup>59</sup> See *Definition of “Waters of the United States” – Recodification of Pre-Existing Rules*, *supra* note 57.

<sup>60</sup> “Obama’s EPA first completed a comprehensive study on watershed health and connectivity and checked its work with panels of the most significant experts in all fields related to water from biology to geology to hydrology. . . . Environmentalists generally received the Clean Water Rule as a step in the right direction.” Rebecca Bowe, *What the Trump Administration Is Doing to Your Water* (Apr. 21, 2020), <https://earthjustice.org/blog/2019-october/what-the-trump-administration-is-doing-to-your-water>.

<sup>61</sup> Merrit Kennedy, *Lead-Laced Water in Flint: A Step-By-Step Look at the Makings of a Crisis*, NPR (Apr. 20, 2016, 6:39 PM), [www.npr.org/sections/thetwo-way/2016/04/20/465545378/lead-laced-water-in-flint-a-step-by-step-look-at-the-makings-of-a-crisis](http://www.npr.org/sections/thetwo-way/2016/04/20/465545378/lead-laced-water-in-flint-a-step-by-step-look-at-the-makings-of-a-crisis).

<sup>62</sup> *Id.*

<sup>63</sup> A press release from the Trump Administration reads: “[On January 23, 2020], at an event at the National Association of Home Builders International Builders’ Show in Las Vegas, EPA Administrator Andrew Wheeler and Assistant Secretary

CWR with what many environmentalists call the “Dirty Water Rule.”<sup>64</sup> In April of 2019, Trump’s EPA issued an “Interpretative Statement” addressing whether liability under the CWA is defeated if pollutants travel through groundwater.<sup>65</sup> The Agency declared that the CWA does not require a discharger to obtain an NPDES permit if pollutants make a trip through groundwater before reaching navigable waters.<sup>66</sup> This interpretation might support industry under deregulation, but it ravages the environment.<sup>67</sup>

To assume that discharges of pollutants that go into groundwater will not somehow reach navigable water is illogical.<sup>68</sup> Groundwater

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of the Army for Civil Works R.D. James announced a new, clear definition for ‘waters of the United States.’ With the *Navigable Waters Protection Rule*, the U.S. Environmental Protection Agency (EPA) and the Department of the Army (Army) are delivering on President Trump’s promise to finalize a revised definition for ‘waters of the United States’ that protects the nation’s navigable waters from pollution and will result in economic growth across the country.” *EPA and Army Deliver on President Trump’s Promise to Issue the Navigable Waters Protection Rule—A New Definition of WOTUS*, EPA (Jan. 23, 2020), [www.epa.gov/news-releases/epa-and-army-deliver-president-trumps-promise-issue-navigable-waters-protection-rule-0](http://www.epa.gov/news-releases/epa-and-army-deliver-president-trumps-promise-issue-navigable-waters-protection-rule-0).

<sup>64</sup> See Kennedy, *supra* note 64.

<sup>65</sup> Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater, 84 Fed. Reg. 16,810 (Apr. 23, 2019) (codified at 40 C.F.R. pt. 122).

<sup>66</sup> See *Definition of “Waters of the United States” – Recodification of Pre-Existing Rules*, *supra* note 57.

<sup>67</sup> “Repealing the Clean Water Rule without any valid scientific or legal support moves this country away from a commonsense safeguard that helps state and federal agencies protect our rivers, streams, and wetlands under the Clean Water Act. Everyone is downstream from someone, and this move will ensure that we can no longer count on U.S. Environmental Protection Agency to protect water flowing into our neighborhoods, communities, and states from polluters.” Charles O’Rear, *What the Trump Administration Is Doing to Your Water*, LAPTRINHX (Apr. 21, 2020), <https://www.laptrinhx.com/what-the-trump-administration-is-doing-to-your-water-1708679476>.

<sup>68</sup> Groundwater is often a source of surface water, and the hydrological connections between these types of waterbodies allow pollution to migrate from groundwater to surface water. Kathrine Klaus, Note, *The Conduit Theory: Protecting*

is present in virtually all landscapes, and connects hydrologically to streams, wetlands, and navigable waters.<sup>69</sup> Courts have been divided on the issue of how to interpret the jurisdiction of pollutants that make a trip through groundwater and end up in navigable waters, resulting in a circuit split among federal district courts.

## II. A SUMMARY OF THE PLURALITY DECISION IN *RAPANOS* THAT EXPANDED THE INTERPRETATION OF THE SCOPE OF THE CLEAN WATER ACT

Until *Hawaii Wildlife Fund* was decided in 2020, the last time the Supreme Court took up a case that considered what kind of waters are under the purview of the CWA was in 2006, in *Rapanos v. United States*.<sup>70</sup> The question before the court, specifically, was whether wetlands near ditches or man-made drains that eventually emptied into traditional navigable waters are under the jurisdiction of the CWA.<sup>71</sup> While the case differs factually from *Hawaii Wildlife Fund*, it is important to look at how the court interpreted the intent of Congress when drafting the CWA. *Rapanos* also introduced the “significant nexus test,” which is similar in some regards to the hydrological connection theory, because it states that waters are connected.<sup>72</sup>

In *Rapanos*, the Supreme Court considered the kinds of connected waters covered by the CWA.<sup>73</sup> *Rapanos* involved two

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*Navigable Waters from Discharges to Tributary Groundwater*, 43 VT. L. REV. 871, 872 (2019).

<sup>69</sup> “The interaction of groundwater with surface water depends on the physiographic and climatic setting of the landscape. For example, a stream in a wet climate might receive groundwater inflow, but a stream in an identical physiographic setting in an arid climate might lose water to groundwater.” *Natural Processes of Ground-Water and Surface-Water Interaction*, USGS, [https://pubs.usgs.gov/circ/circ1139/htdocs/natural\\_processes\\_of\\_ground.htm](https://pubs.usgs.gov/circ/circ1139/htdocs/natural_processes_of_ground.htm) (Nov. 23, 2016, 12:02:53 PM).

<sup>70</sup> *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion).

<sup>71</sup> *Id.* at 719–21.

<sup>72</sup> *Id.* at 726.

<sup>73</sup> *Id.* at 729.

Michigan cases which questioned the CWA's scope."<sup>74</sup> In the first case, a federal district court found that the wetlands were within federal jurisdiction because the wetlands were adjacent to navigable waters; and held the defendants (John A. Rapanos, and others, who had deposited fill material without a permit into the wetlands) liable for violations of the CWA.<sup>75</sup> On appeal, the district court also ruled that there was federal jurisdiction, on the basis that the wetland was adjacent to neighboring tributaries of navigable waters, and had a "significant nexus" to waters of the United States.<sup>76</sup>

The United States Supreme Court Justices vacated the Court of Appeals' judgments, remanding the cases for further proceeding.<sup>77</sup> Justice Scalia announced the plurality judgment of the court, holding that the term "navigable waters," under CWA, includes only "relatively permanent, standing or flowing bodies of water," not intermittent or ephemeral flows of water, and that only "those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right are 'adjacent to' such waters and covered by the [CWA]."<sup>78</sup> However, Scalia also noted that "the Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters."<sup>79</sup> Accordingly, he observed that federal courts consistently have held that a discharge of a pollutant "*that naturally washes downstream* likely violates § 1311(a)."<sup>80</sup>

Justices Scalia, Roberts, Thomas, and Alito were of the view that the § 1362(7) phrase, "the waters of the United States" (WOTUS), could not "bear the expansive meaning that the Corps would give [the phrase]."<sup>81</sup> These four Justices wrote that WOTUS

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 721.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 757.

<sup>78</sup> *Id.* at 732–33, 742.

<sup>79</sup> *Id.* at 743 (quoting 33 U.S.C. § 1362(12)).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 731–32.

only includes “relatively permanent, standing or flowing bodies of water,” and does not include channels through which water flows intermittently or ephemerally.<sup>82</sup> This does not explicitly reject the theory that pollution flowing from a point source and then through groundwater defeats CWA liability.

Justice Scalia made a statement in *Rapanos* that supported a hydrological connection theory when he examines the language of the Act itself.<sup>83</sup> Scalia is well known for relying on the plain meaning of a statute.<sup>84</sup> Scalia wrote “the CWA does not forbid the ‘addition of any pollutant *directly* to navigable waters from any point source,’ but rather the addition of any pollutant *to* navigable waters’.”<sup>85</sup> Scalia showed here that the statute did not include the word “directly” for a reason, and that it forbids the addition of a pollutant to navigable waters in general. This interpretation supports liability for discharging a pollutant that goes *to* navigable waters. Scalia also wrote that the “CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from ‘navigable waters,’ by including them in the definition of ‘point sources.’”<sup>86</sup> However, Scalia failed to write about whether a trip from a point source, through groundwater, and then to navigable waters defeats liability. There is no guidance in the CWA about this. It must be interpreted, and without guidance from the Supreme Court, lower courts are still grappling with this issue today.

Justice Kennedy, joining Scalia in the plurality, added a “significant nexus” test to the opinion. This means that in order to

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<sup>82</sup> *Id.* at 732–33.

<sup>83</sup> *See id.* at 743.

<sup>84</sup> “Since his elevation to the Supreme Court . . . Scalia has aggressively challenged the Court’s approach to statutory interpretation. Justice Scalia has harshly criticized the Court’s reliance on legislative history as an aid in interpreting statutes. He Argues that the Court should rely instead in most cases on a statute’s ‘plain meaning,’ derived from an ordinary understanding of the words and structure of statutory text.” Bradley C. Karkkainen, *Plain Meaning: Justice Scalia’s Jurisprudence of Strict Statutory Construction*, 17 HARV. J. L. & PUB. POL’Y 401, 401 (1994).

<sup>85</sup> *Rapanos*, 547 U.S. at 743.

<sup>86</sup> *Id.* at 735.

fall under the CWA, a water or wetland must possess a “‘significant nexus’ to waters that are or were navigable in fact or that could reasonably be so made.”<sup>87</sup> The significant nexus test is important, as it also supports a hydrological connection theory.

Dissenting were Justices Souter, Ginsberg, Stevens, and Breyer, who took a more holistic approach to the problem.

[T]he Corps has concluded that such wetlands play important roles in maintaining the quality of their adjacent waters . . . and consequently in the waters downstream. Among other things, wetlands can offer “nesting, spawning, rearing and resting sites for aquatic or land species”; “serve as valuable storage areas for storm and flood waters”; and provide “significant water purification functions.” . . . [C]oncerns about the appropriateness of the Corps’ 30-year implementation of the Clean Water Act should be addressed to Congress or the Corps rather than to the Judiciary. Whether the benefits of particular conservation measures outweigh their costs is a classic question of public policy that should not be answered by appointed judges.<sup>88</sup>

Here, the Justices first assert that, according to the Corps, a hydrological connection theory is valid because the health of wetlands determines the health of all WOTUS.<sup>89</sup> They approach the situation by considering the environment as falling squarely within WOTUS under the Act. The health of aquatic animals, keeping pollutants out of adjacent waters via a hydrological connection, and factors that change water levels are all taken into account. They argue for reducing downstream flows of pollutants. And finally, they argue that the Executive Branch has the power to reasonably interpret the

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<sup>87</sup> *Id.* at 759 (Kennedy, J., concurring in judgment).

<sup>88</sup> *Id.* at 796, 799 (Stevens, J., dissenting).

<sup>89</sup> *See id.* at 788.

CWA to make it clear to the courts what WOTUS means, so as to clear up the confusion that not only district courts, but the Supreme Court, had at the time about this.

### III. THE CIRCUIT SPLIT

In CWA citizen suits against regulated entities, courts have grappled with the question of whether or not groundwater defeats CWA liability.<sup>90</sup> The Fourth and Ninth Circuits hold that polluters should be held liable and that a NPDES permit is required.<sup>91</sup> These Circuits apply the hydrological connection theory, a logical and scientific approach. In contrast, the Sixth Circuit rejects the hydrological connection theory, opening up a loophole for polluters to abuse.<sup>92</sup> Passage of a pollutant through groundwater should not allow dischargers to escape liability, because water is hydrologically connected. And, as shown by the interpretations of the CWA by the Fourth and Ninth Circuits, excluding pollution to surface waters that passes through groundwater is not explicitly excluded by the Act.

#### *A. The Fourth and Ninth Circuits: Holding That a Trip Through Groundwater Does Not Defeat CWA Liability*

The Fourth Circuit and the Ninth Circuit hold that a trip through groundwater does not defeat liability under the CWA. To reach this holding, these circuits focus their analyses on the language of 33 U.S.C. § 1362(12), which defines the “discharge of a pollutant” as “any addition of any pollutant to navigable waters from

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<sup>90</sup> Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. 7,126, 7,127-28 (Feb. 20, 2018) (to be codified at 40 C.F.R. pt. 122).

<sup>91</sup> See, e.g., *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 641 (4th Cir. 2018); *Haw. Wildlife Fund v. County of Maui (Haw. Wildlife Fund II)*, 881 F.3d 754 (9th Cir. 2018).

<sup>92</sup> See, e.g., *Tenn. Clean Water Network v. Tenn. Valley Auth. (Tenn. Clean Water Network I)*, 273 F. Supp. 3d 775, 836, 842 (M.D. Tenn. 2017).

any point source.”<sup>93</sup> There is nothing in this language to specify that if a pollutant travels through groundwater first, but ends up in navigable waters, liability is defeated. While these circuits interpret this language broadly, the language of this part of the statute has been a point of controversy for decades among the lower courts. This paper argues that this interpretation is proper due to the hydrological connectivity of water bodies.

In *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, the Fourth Circuit in 2018 held that a trip through groundwater does not defeat liability under the CWA.<sup>94</sup> In late 2014, “several hundred thousand gallons of gasoline spilled from a rupture in a pipeline owned by . . . Kinder Morgan Energy Partners, LP . . . near Belton, South Carolina.”<sup>95</sup> The gasoline seeped into nearby waterways, and the plaintiffs<sup>96</sup> alleged “that the gasoline has continued to travel a distance of 1000 feet or less from the pipeline to those navigable waters.”<sup>97</sup> This case required the court to analyze CWA liability when the source of the pollution, a pipeline, “is no longer releasing the pollutant, but the pollutant allegedly is passing a short distance through the earth via ground water and is being discharged into surface waterways.”<sup>98</sup>

The court noted that citizens can bring suit under the CWA for discharges of pollutants that derive from a point source and continued to be added to navigable waters.<sup>99</sup> The *Upstate Forever* court concluded that the plaintiffs stated a valid claim for a discharge of a pollutant that passed through groundwater under the

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<sup>93</sup> See 33 U.S.C. § 1362(12); Joseph Manning, *Running Clean: Discharges to Groundwater Hydrologically Connected to Navigable Waters as a Means for Asserting Clean Water Act Jurisdiction*, 61 B.C. L. REV. II.-1, II.-11 to II.13 (2020).

<sup>94</sup> *Upstate Forever*, 887 F.3d at 647–48.

<sup>95</sup> *Id.* at 641.

<sup>96</sup> Two non-profit environmental conservation groups: Upstate Forever and Savannah Riverkeeper.

<sup>97</sup> *Upstate Forever*, 887 F.3d at 641.

<sup>98</sup> *Id.*

<sup>99</sup> 33 U.S.C. § 1365(a).

CWA.<sup>100</sup> Judge Keenan wrote that “CWA’s language does not require that the point source continue to release a pollutant for a violation to be ongoing. The CWA requires only that there be an ongoing ‘addition . . . to navigable waters,’ regardless whether a defendant’s conduct causing the violation is ongoing.”<sup>101</sup> In reaching this conclusion, the court noted that the Act clearly defines “discharge of a pollutant” and “point source” but is vague in its definition of “navigable waters.”<sup>102</sup> Therefore, for clarity, the court refers to the Supreme Court interpretation of “navigable waters” from *Rapanos v. United States*, which added a broader scope to what waters are included under “navigable waters.”<sup>103</sup>

By using the language of the CWA, the court found that “Kinder Morgan’s gasoline pipeline unambiguously qualifie[d] as a point source.”<sup>104</sup> In analyzing if the defendant was liable for discharging the pollutant from a point source into navigable waters, the court found that the CWA is not limited to discharges of pollutants “directly” from the point source to navigable waters, as long as pollutants continue to be “added” to navigable waters.<sup>105</sup> In keeping with the holding in *Rapanos* that broadened the scope of navigable waters, the court found that the defendants were liable under the CWA because the pollutants reached navigable waters.<sup>106</sup> The defendants cited Fifth Circuit cases in which the polluters were found not liable, including *Hamker v. Diamond Shamrock Chemical Co.*<sup>107</sup> However, the court differentiated the facts between *Hamker* and the current case, noting that in *Hamker*, the complaint only held allegations of a discharge of oil into groundwater from the defen-

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<sup>100</sup> *Upstate Forever*, 887 F.3d at 652–53 (citing 33 U.S.C. § 1311(a)).

<sup>101</sup> *Id.* at 648.

<sup>102</sup> *See id.*; 33 U.S.C. § 1362(14).

<sup>103</sup> *See generally* *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion) (observing that navigable waters include more than traditionally navigable waters and may include certain wetlands).

<sup>104</sup> *Upstate Forever*, 887 F.3d at 647.

<sup>105</sup> *Id.* at 647–48 (citing 33 U.S.C. § 1362(12)).

<sup>106</sup> *Id.* at 652.

<sup>107</sup> *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392 (5th Cir. 1985).

dant's pipe, and the pollutants never reached navigable waters.<sup>108</sup> Applying Justice Scalia's writings in *Rapanos*, the court concluded that liability was not defeated in this case.<sup>109</sup>

In 2018, in the *Hawaii Wildlife Fund* case, the Ninth Circuit affirmed the district court's decision holding the County of Maui liable under the CWA.<sup>110</sup> The County of Maui appealed the district court's summary judgment rulings finding liability under the CWA when it discharged pollutants from its wells into the Pacific Ocean.<sup>111</sup> The county did not deny that the effluent reaches the ocean, but it argued that it did not require a NPDES because the point source of the pollution does not directly touch the ocean.<sup>112</sup> The court did not agree with the county, because a party violates the CWA when it does not obtain such a permit and "(1) discharge[s] (2) a pollutant (3) to navigable waters (4) from a point source."<sup>113</sup>

In determining if a trip through groundwater defeated liability, the court noted "we assume without deciding the groundwater here is neither a point source nor a navigable water under the CWA."<sup>114</sup> However, "in fidelity to the statute," the court wanted to reinforce that the Act "regulates point source discharges to a

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<sup>108</sup> *Upstate Forever*, 887 F.3d at 649; *Hamker*, 756 F.2d at 397.

<sup>109</sup> *Upstate Forever*, 887 F.3d at 649–50.

<sup>110</sup> *Haw. Wildlife Fund III*, 886 F.3d 737, 742 (9th Cir. 2018).

<sup>111</sup> *Id.* at 741–42.

<sup>112</sup> "The County contends . . . that under the CWA, it is not sufficient to focus exclusively on the original pollutant source to determine whether an NPDES permit is needed and that how pollutants travel from the original point source to navigable waters matters. More specifically, the County contends the point source itself must convey the pollutants *directly* into the navigable water under the CWA. As the wells here discharge into groundwater, and then *indirectly* into the Pacific Ocean, the County asserts they do not come within the ambit of the statute." *Id.* at 745–46.

<sup>113</sup> *Id.* at 744 (citing *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001)).

<sup>114</sup> *Id.* at 746 n.2.

navigable water, and that liability may attach when a point source discharge is conveyed to a navigable water through groundwater.”<sup>115</sup>

Thus, according to the Fourth and Ninth Circuits, as long as there is evidence connecting the pollution from the point source to the navigable waters, a trip through groundwater did not defeat liability.<sup>116</sup> These circuits applied a logical analysis of the language of the CWA to reach this conclusion. This interpretation supports a hydrological connection theory, because a pollutant might reach navigable waters through groundwater.<sup>117</sup>

*B. The Sixth Circuit: Holding That a Point Source Must Connect Directly to Navigable Waters Under the CWA*

The Sixth Circuit differs in its interpretation of the CWA,<sup>118</sup> and holds that the addition of any pollutant “to” navigable waters “from” any point source means that there must be a direct connection between the point source and the navigable waters. It rejects the hydrological connection theory, and therefore mistakenly rejects the holding in *Rapanos*.<sup>119</sup> Now that *Hawaii Wildlife Fund* has been decided, it will be interesting to see if the Sixth Circuit applies the functional equivalent test in future cases.

In 2018 in *Tennessee Clean Water Network v. Tennessee Valley Authority*, the Sixth Circuit reversed the decision of the

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<sup>115</sup> *Id.*; “If the point of emission is readily identified, and the transmission path to the ocean is clearly ascertainable, the discharge is functionally one into navigable water.” *Haw. Wildlife Fund I*, 24 F. Supp. 3d 980, 998 (D. Haw. 2014).

<sup>116</sup> *See, e.g.,* *Rice v. Harken Exploration Co.*, 250 F.3d 264, 272 (5th Cir. 2001) (where the Fifth Circuit required some evidence of a link between discharges and contamination of navigable waters).

<sup>117</sup> *See generally* *Rapanos v. United States*, 547 U.S. 743 (2006) (plurality opinion) (the “hydrological connection theory” is premised on the holding that the CWA’s definition of a discharge of a pollutant does not require a discharge directly into navigable waters).

<sup>118</sup> 33 U.S.C. § 1362(12).

<sup>119</sup> *See supra* text accompanying notes 85–88.

district court.<sup>120</sup> The court held that CWA jurisdiction requires pollutants to be discharged directly from a point source into a navigable body of water, thus allowing dischargers of pollutants to escape liability under the Act if the pollutants first travel through some amount of groundwater.<sup>121</sup> The court referenced another Sixth Circuit decision, *Kentucky Waterways All. v. Kentucky Utilities Co.*, which also held that groundwater was not a “point source” subject to CWA regulation.<sup>122</sup>

The Sixth Circuit interprets the CWA to mean that the Act requires “two things in order for pollution to qualify as a ‘discharge of a pollutant’: (1) the pollutant must make its way to a navigable water (2) by virtue of a point-source conveyance.”<sup>123</sup> It argues that groundwater is not a point source, so “when the pollutants are discharged” to navigable waters (in this case, a river), “they are not coming *from* a point source; they are coming from groundwater which is a nonpoint-source conveyance.”<sup>124</sup>

The Sixth Circuit’s position is the very definition of finding a loophole in a statute and exploiting it. In his dissent, Judge Clay poses the question, “can a polluter escape liability under the CWA . . . by moving its drainage pipes a few feet from the riverbank?”<sup>125</sup> It would seem that in some parts of America, yes, they can. Clay states this is “contrary to the plain text and history of the CWA.”<sup>126</sup>

Until the Sixth Circuit’s decision in *Tennessee Clean Water Network*, no other circuit had interpreted the CWA to mean a trip through groundwater defeats CWA liability.<sup>127</sup> The pollutant that

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<sup>120</sup> “The district court had found that TVA had violated the CWA because its coal ash ponds at the Gallatin plant leaks pollutants through groundwater that is ‘hydrologically connected’ to the Cumberland River without a permit.” *Tenn. Clean Water Network II*, 273 F.3d 436, 438 (6th Cir. 2018).

<sup>121</sup> *Id.* at 444.

<sup>122</sup> *Id.* at 438 (citing *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925 (6th Cir. 2018)).

<sup>123</sup> *Id.* at 444 (quoting *Ky. Waterways All.*, 905 F.3d at 934).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 447–48 (Clay, J., dissenting).

<sup>126</sup> *Id.* at 448.

<sup>127</sup> *Id.*

was the subject of *Tennessee Clean Water Network* was coal combustion residual (CCR), the various types of ash produced during the burning of coal.<sup>128</sup> CCR contains heavy metals, some of which are carcinogenic, including mercury, cadmium, and arsenic.<sup>129</sup> Under the Sixth Circuit's interpretation, a discharger doesn't need an NPDES permit to dump this toxic waste into water. The decision came after the Trump EPA set forth its guidelines in 2017.

#### IV. THE HYDROLOGICAL CONNECTION THEORY

Water is one connected resource.<sup>130</sup> The hydrological connection theory argues that water is all connected and a pollutant that enters one body of water, such as a wetland, could very well seep into groundwater before it reaches WOTUS.

[T]he importance of considering groundwater and surface water as a single resource has become increasingly evident. Issues related to water supply, water quality, and degradation of aquatic environments are reported on frequently. The interaction of groundwater and surface water has been shown to be a significant concern in many of these issues. For example, contaminated aquifers that discharge to streams can result in long-term contamination of surface water; conversely, streams can be a major source of contamination to aquifers. Surface water commonly is hydraulically connected to groundwater, but the interactions are difficult to observe and

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<sup>128</sup> "In 2015, EPA finalized national regulations to provide a comprehensive set of requirements for the safe disposal of CCRs, commonly known as coal ash, from coal-fired power plants." *Frequent Questions About the 2015 Coal Ash Disposal Rule*, EPA, <https://www.epa.gov/coalash/frequent-questions-about-2015-coal-ash-disposal-rule> (last visited May 15, 2020).

<sup>129</sup> *Id.*

<sup>130</sup> *Water as One Resource: How Interactions Between Groundwater and Surface Water Impact Water Availability*, AGI (July 13, 2015), <https://www.american-geosciences.org/webinars/water-as-one-resource>.

measure and commonly have been ignored in water-management considerations and policies. Many natural processes and human activities affect the interactions of groundwater and surface water.<sup>131</sup>

According to a United States Geological Survey, groundwater and surface water are hydrologically connected and are one natural resource.<sup>132</sup> The health of humans, animals, birds, and fish, as well as plants, are at risk if pollutants enter any water in a level that violates safety levels. Therefore, it is prudent and logical to require any company, developer, industry, or individual who is dumping pollutants to require an EPA permit.

Requiring an NPDES permit for a broader definition of WOTUS does not over-criminalize polluters, nor does it step on State authority. This Section examines the arguments set forth by the Ninth, Fourth, and Sixth Circuits, argues that the interpretation of the CWA by the Ninth and Fourth Circuits are valid, and that the interpretation by the Sixth Circuit is highly flawed. This section also looks more closely at the plurality decision in *Rapanos*, showing similarities and differences to the *Hawaii Wildlife Fund* case, and concludes that the courts should apply the science-based hydrological connection theory in these cases.

The *Hawaii Wildlife Fund* case was decided in a time when the EPA was under the guidance of an oil industry lobbyist.<sup>133</sup> The

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<sup>131</sup> T.C. WINTER ET AL., GROUND WATER AND SURFACE WATER A SINGLE RESOURCE 1 (1998), <https://pubs.usgs.gov/circ/circ1139/pdf/circ1139.pdf>.

<sup>132</sup> *Id.*

<sup>133</sup> The Trump EPA rolled back the CWR under the direction of President Trump's first EPA administrator, Scott Pruitt, former Oklahoma Attorney General, where he founded the "first federalism unit to combat unwarranted regulation and overreach by the federal government." *Administrator Scott Pruitt*, EPA, <https://archive.epa.gov/epa/aboutepa/administrator-scott-pruitt.html> (last visited May 15, 2020). "Pruitt has collected at least \$345,246 in campaign contributions from the oil and gas industry since 2002. . . . Pruitt raised \$282,111 from oil and gas interests over four state campaigns." *Scott Pruitt*, DESMOG, <https://www.desmog.com/scott-pruitt> (last visited May 15, 2020). Pruitt resigned in July 2018, amid a series of scandals. *Id.* As of the date *Hawaii Wildlife Fund* was decided, the

Supreme Court will usually look to the current EPA for guidance if there is an unclear meaning under a Congressional statute. Under *Chevron*, courts are told to determine if the Administration's interpretation is permissible under the statute:

If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>134</sup>

The "agency" referenced here is the EPA, and its most current answer to questions about what constitutes WOTUS is the interpretation under the Trump administration. In rolling back the 2015 Obama-era rule in an executive order, the current administration claimed it was "simplifying" things, and eliminating the "regulatory patchwork" that has confused the country for decades.<sup>135</sup>

Under the final "Step 2" rule, four clear categories of waters are currently federally regulated:

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current Administrator of the EPA is former coal lobbyist, Andrew Wheeler. Sophie Tatum, *A Former Coal Lobbyist is the New Leader of the EPA*, CNN (July 5, 2018, 7:00 PM), [www.cnn.com/2018/07/05/politics/andrew-wheeler-epa/index.html](http://www.cnn.com/2018/07/05/politics/andrew-wheeler-epa/index.html).

<sup>134</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (footnotes omitted).

<sup>135</sup> EPA, *U.S. Army Repeal 2015 Rule Defining "Waters of the United States" Ending Regulatory Patchwork*, EPA (Sept. 12, 2019), <https://www.epa.gov/newsreleases/epa-us-army-repeal-2015-rule-defining-waters-united-states-ending-regulatory-patchwork>.

- The territorial seas and traditional navigable waters,
- Perennial and intermittent tributaries to those waters,
- Certain lakes, ponds, and impoundments, and
- Wetlands adjacent to jurisdictional waters

The final rule also details twelve categories of exclusions, features that are not “waters of the United States,” such as features that only contain water in direct response to rainfall (e.g., ephemeral features); groundwater; many ditches; prior converted cropland; and waste treatment systems.<sup>136</sup>

This is the Executive Agency interpretation of the CWA that the current Supreme Court may have looked to when deciding *Hawaii Wildlife Fund* in 2020.

Currently, waters are more vulnerable than ever. The EPA limits the scope of federal jurisdiction. The *Hawaii Wildlife Fund* decision sided with environmentalists but leaves lower courts with a new question, namely, what kind of “functional equivalent” test will be satisfied to require a discharger of pollution to require a permit?<sup>137</sup>

Looking at the reasoning of Fourth and Ninth Circuits, there is a clear, logical answer: the hydrological connection theory. According to the Fourth and Ninth Circuits, as long as there is evidence connecting the pollution from the point source to the navigable waters, a trip through groundwater did not defeat liabil-

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<sup>136</sup> *Supra The Navigable Waters Protection Rule (Step Two) – Revise*, note 13.

<sup>137</sup> Under the “functional equivalent” test, the Clean Water Act prohibits unpermitted discharge of pollution “into navigable waters, or when the discharge reaches the same result through roughly similar means.” *The Clean Water Case of the Century*, EARTHJUSTICE, <https://www.earthjustice.org/features/supreme-court-maui-clean-water-case> (Apr. 23, 2020).

ity.<sup>138</sup> By applying this to the plain language of the statute, the intent of the CWA, which is to protect the nation's waters, is intact. The Second Circuit has reached a similar conclusion, reasoning that when pollutants traveled briefly through fields or air before reaching navigable waters, dischargers were still liable under the CWA.<sup>139</sup>

Applying the plain meaning interpretation by Justice Scalia in *Rapanos* to the *Hawaii Wildlife Fund* case raises some interesting points favoring of the hydrological connection theory. Scalia wrote "the CWA does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the addition of any pollutant *to* navigable waters."<sup>140</sup> Technically, under a plain meaning interpretation of the CWA (including under the Trump EPA interpretation), it is correct that the specific discharge "point source" is separate from "groundwater." Water, however, has a hard time separating itself between a point source, groundwater, and navigable waters, because water is hydrologically connected.

It is illogical to not hold a discharger accountable if the pollution ends up in groundwater and then federally regulated waters, such as a river or the ocean, where people boat, fish, and swim, and various flora and fauna exist in a delicate ecosystem. Water flows, and it is all connected. Scalia, in interpreting the statute, agreed with a hydrological connection theory.<sup>141</sup> The *Hawaii Wildlife Fund* case is no different—there is a hydrological connection between the point source of the pollution (the effluent storage), the groundwater, and the Pacific Ocean.

The Sixth Circuit in *Tennessee Clean Water Network* disregarded Scalia's plain meaning interpretation of the CWA in

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<sup>138</sup> See, e.g., *Rice v. Harken Exploration Co.*, 250 F.3d 264, 272 (5th Cir. 2001) (where the Fifth Circuit required some evidence of a link between discharges and contamination of navigable waters).

<sup>139</sup> See, e.g., *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 118–19 (2d Cir. 1994) (fields); *Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180, 188–89 (2d Cir. 2010) (air).

<sup>140</sup> *Rapanos v. United States*, 547 U.S. 715, 743 (2006) (plurality opinion).

<sup>141</sup> See *id.*

*Rapanos* and opened a gaping loophole for polluters.<sup>142</sup> Recall Judge Clay’s dissent in *Tennessee Clean Water Network*, when he expressed concern that the majority’s conclusion is contrary to the plain text and history of the CWA, allowing polluters to escape CWA liability by reducing the length of their outflow pipe so that pollution travels a few feet through soil before entering a navigable body of water.<sup>143</sup> The Sixth Circuit interpreted “any addition of any pollutant to navigable waters from any point source” too literally, requiring that the discharge be directly connected to the navigable waterway.<sup>144</sup>

#### V. THE *HAWAII WILDLIFE FUND* DECISION AND THE FUNCTIONAL EQUIVALENT TEST

The Supreme Court has the authority to reject an agency interpretation of a Congressional Statute if the agency interpretation modifies what Congress made mandatory.<sup>145</sup> In *County of Maui v. Hawaii Wildlife Fund*,<sup>146</sup> the Supreme Court did not completely reject the Trump Administration’s EPA interpretation of the CWA, but it did side with environmentalists. The Court uses a “functional equivalent” theory test to determine liability in *Hawaii Wildlife Fund*.<sup>147</sup> This is not a bright-line rule but instead allows for interpretation on a case-by-case basis.

Groundwater connects hydrologically to jurisdictional surface waters, and it is, therefore, difficult to determine if pollutants traveled a few miles in groundwater, a few feet, or not at all.<sup>148</sup> This is a proximity issue, which the Supreme Court attempted to resolve in *Hawaii Wildlife Fund* with a “functional equivalent” test.<sup>149</sup> The

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<sup>142</sup> *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 449 (6th Cir. 2018) (Clay, J., dissenting).

<sup>143</sup> *Id.* at 447–48 (Clay, J., dissenting).

<sup>144</sup> *Id.* at 444 (citing 33 U.S.C. § 1362(12)).

<sup>145</sup> *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 223 (1994).

<sup>146</sup> *Haw. Wildlife Fund V*, 140 S. Ct. 1462 (2020).

<sup>147</sup> *Id.* at 1476.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

case looks at Congress's intent when, in the CWA, Congress defined "discharge of a pollutant" as "any addition of any pollutant *to* navigable waters *from* any point source."<sup>150</sup>

Justice Breyer delivered the opinion of the Court, which held that the CWA requires a permit when there is a direct discharge from a point source into navigable waters, or when there is the *functional equivalent* of a direct discharge.<sup>151</sup> Justice Kavanaugh filed a concurring opinion. Justice Thomas filed dissenting opinion, in which Justice Gorsuch joined. Justice Alito filed a dissenting opinion.

The "functional equivalent" theory is a vague interpretation and sets no specific guidelines:

Many factors may be relevant to determining whether a particular discharge is the functional equivalent of one directly into navigable waters. Time and distance will be the most important factors in most cases, but other relevant factors may include, *e.g.*, the nature of the material through which the pollutant travels and the extent to which the pollutant is diluted or chemically changed as it travels. Courts will provide additional guidance through decisions in individual cases. The underlying statutory objectives can also provide guidance, and EPA can provide administrative guidance. Although this interpretation does not present as clear a line as the other interpretations proffered, the EPA has applied the permitting provision to some discharges through groundwater for over 30 years, with no evidence of inadministrability or an unmanageable expansion in the statute's scope.<sup>152</sup>

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<sup>150</sup> 33 U.S.C. § 1362(12).

<sup>151</sup> *Haw. Wildlife Fund V*, 140 S. Ct. at 1476.

<sup>152</sup> *Id.* at 1467–68.

Factors include time, distance, the nature of the material, and perhaps others as well. This provides almost no guidance whatsoever. A “functional equivalent” test will mean that lower courts will continue to have to analyze facts on a case-by-case basis.

However, the Court did have some strong words about the Solicitor General’s argument and the recent EPA’s interpretation of the CWA,<sup>153</sup> which is that “*all* releases of pollutants to groundwater are excluded from the scope of the [permitting] program, even where pollutants are conveyed to jurisdictional surface waters via groundwater.”<sup>154</sup> The Court held that this reading of the EPA’s recent Interpretive Statement would “open a loophole allowing easy evasion of the statutory provision’s basic purposes” and is “neither persuasive nor reasonable.”<sup>155</sup> The Court struggles with completely rejecting the recent EPA interpretation because the intent of Congress in writing the CWA was to “provide federal regulation of identifiable sources of pollutants entering navigable waters without undermining the States’ longstanding regulatory authority over land and groundwater.”<sup>156</sup> Therefore, the majority reaches a place of a happy medium with the functional equivalent theory.

A ruling for the County of Maui would have been devastating to the nation’s waters, to human health, and to an already fragile ecosystem. However, without a bright-line rule for courts to follow, more litigation will ensue.<sup>157</sup> Since it is beyond the scope of the judicial branch to rewrite the CWA, it is clear that Congress needs to expand the scope of the Act to better match the Obama-era CWR.

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<sup>153</sup> *Id.* at 1474. The United States supports Maui, at least in respect to groundwater. See Brief for the United States as Amicus Curiae Supporting Petitioner, *Haw. Wildlife Fund V*, 140 S.Ct. 1462 (2020) (No.18-260), 2019 WL 2153160.

<sup>154</sup> Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 155, at 7.

<sup>155</sup> *Wildlife Fund V*, 140 S. Ct. at 1474.

<sup>156</sup> *Id.* at 1476.

<sup>157</sup> The Court admits “[t]he difficulty with this approach [recognizing] that it does not, on its own, clearly explain how to deal with middle instances. But there are too many potentially relevant factors applicable to factually different cases for this Court now to use more specific language.” *Id.*

VI. WHAT COMES AFTER *HAWAII*

Jean Malaurie writes, “Men of science, like men of state have a duty imposed by ethics. The Earth is living: it can and will avenge itself: already there are portents. The Earth has no time left for man’s ignorance, arrogance, sophistry and madness.”<sup>158</sup> Surely the portents before us can no longer be ignored for the sake of coal and oil lobbyists on Capitol Hill. Perhaps not as obvious as a river on fire, the signs are here. Recall that beach in Hawaii where you were spending your imaginary honeymoon, it is a real beach, and it is being flooded with pollution from a sewage treatment plant every day.

Not only will courts have to determine what constitutes a hydrological connection or a significant nexus on a case-by-case basis, but states are also confused as to how to regulate water interconnectivity. Within one week of the Supreme Court decision in *Hawaii Wildlife Fund*, a coalition of 17 states sued the Trump administration for rolling back Obama-era protections for waterways, arguing the move ignores science on the interconnectivity of water.<sup>159</sup>

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<sup>158</sup> Cyril Christo, *Coronavirus Should Be a Wake-Up Call to Our Treatment of the Animal World*, CHANGING AM. (Mar. 19, 2020), <https://www.thehill.com/changing-america/opinion/488295-coronavirus-should-be-a-wake-up-call-to-our-treatment-of-the-animal> (quoting Jean Malaurie). “Professor Jean Malaurie was designated UNESCO Goodwill Ambassador in July 2007, in recognition of his commitment to environmental issues, as well as safeguarding the cultures and knowledge of the peoples of the Far North” *Jean Malaurie*, UNESCO, <http://www.unesco.org/new/en/goodwill-ambassadors/jean-malaurie/> [http://web.archive.org/web/20200703105052/http://www.unesco.org/new/en/goodwill-ambassadors/jean-malaurie/] (last visited July 3, 2020).

<sup>159</sup> Rebecca Beitsch, *States Sue Trump Administration Over Rollback of Obama Era Water Protections*, THE HILL (May 1, 2020, 3:12 PM), <https://www.thehill.com/policy/energy-environment/495699-states-sue-trump-administration-over-rollback-of-obama-era-water>.

An estimated 300,000 federal regulations are now subject to criminal enforcement.<sup>160</sup> However, something as simple as requiring that companies get an NPDES permit to pollute our groundwater that connects to surface waters is a controversial subject that has changed drastically between the Obama and Trump administrations. The hydrological connection theory is the most simple and logical way to regulate water pollution. This is not an overcriminalization of polluters. This is not Federal overreach. It is a simple, accurate, interpretation of the language and intent of the CWA that ensures the safety of our nation's waters.

By making it a federal crime to dump pollutants into groundwater that ends up in navigable waters, many companies and industries will be feeling the pressure. Federal crimes are highly visible, and environmental crimes generally threaten not only waters and the environment but human beings and the public. Undoubtedly, companies want to avoid any kind of stigma that goes along with a criminal conviction for a federal environmental crime.<sup>161</sup> However, there are oil and coal lobbyists working in the EPA, continually rolling back rules that protect the nation's water.<sup>162</sup>

Whether Congress will amend the CWA to incorporate the hydrological connection theory is unknown. What is clear is that we must urge a uniform interpretation in the courts to protect our country's waters and hold polluters accountable, the *Hawaii Wildlife Fund* decision did not offer enough guidance to resolve the circuit split. Administrations come and go. However, as the saying goes, "there is only one planet Earth," and it is our duty to fight for justice

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<sup>160</sup> John Malcom & Michael B. Mukasey, *The Importance of Meaningful Mens Rea Reform*, HERITAGE FOUND. (Feb. 17, 2016), <https://www.heritage.org/crime-and-justice/commentary/the-importance-meaningful-mens-rea-reform>.

<sup>161</sup> See generally Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2441–45 (1995) (discussing the "aims and identifying features of criminal law").

<sup>162</sup> See Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015) (codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

for all of its inhabitants, as well as its environment. It is time to stop muddying the waters and create more clarity for our courts and the nation.