

JUSTIFYING LOOPHOLES THROUGH COOPERATIVE FEDERALISM:
COUNTY OF MAUI V. HAWAII WILDLIFE FUND AND THE SCOPE OF CLEAN
WATER ACT FEDERAL JURISDICTION FOR INDIRECT GROUNDWATER
DISCHARGES

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INTRODUCTION

A. *Setting the Stage*

Our nation's waters look drastically different today from how they did in the years leading to the adoption of the 1972 amendments to the Federal Water Pollution Control Act (FWPCA). From 1868 to 1969, the Ohio River had caught fire 13 times due to industrial runoff into the river.¹ On the nation's west coast, a 3-million-gallon oil spill off the coast of Santa Barbara decimated marine life and violently disrupted ocean-related industries along California's coastline.² Public outrage led to demands for federal action to better protect our nation's waters.³

What resulted was the 1972 amendments, transforming FWPCA into the Clean Water Act (CWA) and declaring its foundational objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's

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¹*Cuyahoga River Fire*, OHIO HIST. CENT., https://ohiohistorycentral.org/w/Cuyahoga_River_Fire (last visited Feb. 8, 2020).

²Christine Mai-Duc, *The 1969 Santa Barbara oil spill that changed oil and gas exploration forever*, L.A. TIMES (May 20, 2015), <https://www.latimes.com/local/lanow/la-me-ln-santa-barbara-oil-spill-1969-20150520-htmlstory.html>.

³*How the Clean Water Act Protects Your Rivers*, AM. RIVERS, <https://www.americanrivers.org/rivers/discover-your-river/the-importance-of-the-cwa-to-protecting-your-rivers-clean-water/> (last visited Aug. 7, 2020).

waters.”⁴ These amendments turned the formerly toothless FWPCA into a sword that could be wielded by both the Environmental Protection Agency (EPA) and the US Corp of Engineers (Corps) to curtail the amount of pollution entering our waters. The CWA has been controversial, but it has led to industry-specific discharge standards that now prevent more than 700 billion pounds of toxic pollutants every year from being dumped into the nation’s waters.⁵ The rate of wetlands loss has also decreased substantially compared to the pre-CWA era.⁶

The CWA provides two different methods for protecting the Waters of the United States (WOTUS) depending on how a pollutant enters protected waters; one being much more taxing on the individual polluter than the other. If the discharge comes from a “point source,”⁷ the CWA outright prohibits the discharge unless the polluter acquires a permit issued by the EPA or Corp.⁸ If the discharge comes from a “nonpoint source,”⁹ however, the CWA leaves the regulation and control of the discharge almost entirely to the state in which the nonpoint source is located.¹⁰

Through this balancing of power, Congress manifested its intent to utilize a three-tier cooperative federalism structure, where the federal, state, and local governments interact cooperatively and collectively to solve common

⁴Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, sec. 101, § 2, 86 Stat. 816, 816 (codified as amended at 33 U.S.C. § 1251); 33 U.S.C. § 1251(a) (2018).

⁵*Effluent Guidelines Plan*, EPA, <https://www.epa.gov/eg/effluent-guidelines-plan> (Apr. 24, 2020).

⁶Jon Devine, *Clean Water Act at 45: Despite Success, It’s Under Attack*, NAT’L RES. DEF. COUNCIL (Oct. 18, 2017), <https://www.nrdc.org/experts/jon-devine/clean-water-act-45-despite-success-its-under-attack>.

⁷*NPDES Permit Basics*, EPA, <https://www.epa.gov/npdes/npdes-permit-basics> (Aug. 3, 2020) (explaining that a “point source” generally means “any discernible, confined and discrete conveyance, such as a pipe, ditch, channel, tunnel, conduit, discrete fissure, or container.”).

⁸33 U.S.C. § 1251(a) (2018).

⁹*Basic Information about Nonpoint Source (NPS) Pollution*, EPA, <https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution> (Oct. 7, 2020) (explaining that nonpoint source pollution generally comes from many diffuse sources such as land runoff, precipitation, atmospheric deposition, drainage, seepage, or hydrologic modification. As this runoff moves, it picks up pollutants and deposits them into lakes, rivers, wetlands, coastal waters, and ground waters).

¹⁰*See generally* 33 U.S.C. § 1311 (2018) (discussing federal and state regulation and control of discharge).

problems.¹¹ By incorporating this structure into the CWA, Congress hoped that it would allow “the level of government closest to the sources of the problem” to determine the best method of protecting our waters.¹² Unfortunately, challenges to state or federal authority over a certain source of pollution have invariably arisen when the language of the statute failed to clearly delineate where the balance of power lies.

B. Identifying the Circuit Split at Issue

County of Maui v. Hawaii Wildlife Fund is the Supreme Court’s first attempt at answering whether the CWA requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, here, groundwater.¹³

Traditionally, courts found that the CWA did not require a federally approved permit for discharges from point sources hydrologically connected to navigable waters via groundwater (the “traditional approach”).¹⁴ The challenging view (the “fairly-traceable approach”), championed by the Ninth and Fourth Circuits, advocates a much broader standard.¹⁵ The fairly-traceable approach would require a permit whenever “the pollutants are *fairly traceable* from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water.”¹⁶

At oral argument for *County of Maui v. Hawaii Wildlife Fund*, Mr. Malcolm Stewart, counsel for the County of Maui, described the traditional approach as such: “If at my home I pour whiskey from a bottle into a flask and then I bring the flask to a party at a different location and I pour whiskey

¹¹ See generally Damien Schiff, *Keeping the Clean Water Act Cooperatively Federal—Or, Why the Clean Water Act Does Not Directly Regulate Groundwater Pollution*, 42 WM. & MARY ENV’T. L. & POL’Y REV. 447 (2018) (discussing how, through prohibitions, proscriptions, and mandates, Congress created a clear example of cooperative federalism in the CWA).

¹² S. REP. NO. 95-370, at 9 (1997), as reprinted in 1977 U.S.C.C.A.N. 4326, 4335.

¹³ 140 S. Ct. 1462, 1468 (2020).

¹⁴ See *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994); *Umatilla Waterquality Protective Ass’n v. Smith Frozen Foods*, 962 F. Supp. 1312, 1320 (D. Or. 1997).

¹⁵ See *Haw. Wildlife Fund v. Cnty. of Maui*, 886 F.3d 737, 749 (9th Cir. 2018), *vacated*, 140 S. Ct. 1462 (2020); *Upstate Forever v. Kinder Morgan Energy Partners*, 887 F.3d 637, 651 (4th Cir. 2018), *vacated*, 140 S. Ct. 2736 (2020); *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 409 (4th Cir. 2018).

¹⁶ *Haw. Wildlife Fund*, 886 F.3d at 749 (emphasis added).

into the punch bowl there, nobody would say that I had added whiskey to the punch from the bottle.”¹⁷ Because you would not say that the whiskey (pollutant) was added (discharged) to the punch (navigable water) from the bottle (point source) rather than the flask (groundwater), Mr. Stewart reasoned that such a discharge would not be considered a “discharge of a pollutant” and, thus, not require a federal permit.¹⁸ The retort from Mr. David Henkin, counsel for Hawaii Wildlife Fund and advocating for the fairly-traceable approach, was simple: “Well, here, Congress was trying to prohibit whiskey in punch.”¹⁹ Put simply, Congress did not intend to allow whiskey getting into the punch bowl merely because the whiskey travelled through a flask.

The “whiskey” and “bottle” Mr. Stewart and Mr. Henkin were referring to were four million gallons of partially treated sewage the County of Maui pumped daily into four wells hundreds of feet deep and one-half mile inland.²⁰ The “flask” was a half-mile long aquifer, or body of groundwater, that discretely allowed over 80% of the sewage pumped in daily to end up in the “punch bowl” called the Pacific Ocean.²¹

The Supreme Court rejected both the County of Maui’s traditional approach *and* the Ninth Circuit’s fairly-traceable approach. Instead, the Court held that “the statute 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*.”²² The Court was hesitant to specify what the “functional equivalent of a direct discharge” looks like, but it did provide guidance in its application, emphasizing a plain reading of the statutory language, the time and distance between the point source and the eventual discharge into protected waters, and the CWA’s underlying statutory objectives.²³

This article considers how this circuit split arose and proposes a method for applying the Court’s “functional equivalent” standard that is rooted in that history. First, we will examine the CWA’s underlying policies and how the

¹⁷ Transcript of Oral Argument at 13, *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2019) (No. 18-260).

¹⁸ *Id.*

¹⁹ *Id.* at 40.

²⁰ *See id.*; *see also* *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1469 (2020).

²¹ *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. at 1469.

²² *Id.* at 1476.

²³ *Id.* at 1476–77.

Court has construed previously ambiguous phrases. Second, we will identify the two sides of the circuit split and how the Court reconciled these two in its opinion. Finally, we will consider the “functional equivalent” standard in the broader context of environmental regulation and use this as our suggested framework when attempting to apply this new standard in practice.

I. ANALYZING THE STATUTORY LANGUAGE OF THE CLEAN WATER ACT

A. *An Introduction to the Clean Water Act*

Made to directly combat the increasingly caustic waters of our nation, the CWA begins by declaring in § 1251(a) its objective “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”²⁴ To this end, the Act lists seven supplemental goals, which all promote the environment in a different, beneficial way.²⁵ To achieve this fundamental objective of the CWA, the federal government, in part, enforces a strong prohibition against any pollutant discharges to navigable waters, i.e., WOTUS. The only exceptions to this blanket ban are an EPA permitting program, the National Pollutant Discharge Elimination System (NPDES), and a Corps’ permitting program.²⁶ Both permitting programs allow discharges to our nation’s waters, but “[t]he permit will contain limits on what you can discharge, monitoring and reporting requirements, and other provisions to ensure that the discharge does not hurt water quality or people’s health.”²⁷

In addition to the stated objective and its supplemental goals, § 1251(b) states an additional policy for 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 . . . of land and water resources, and to consult with the Administrator in the exercise of his

²⁴ 33 U.S.C. § 1251(a) (2018).

²⁵ *Id.* (setting goals such as the elimination of all discharges of pollutants and toxins from navigable waters, the protection of aquatic wildlife, the development of waste treatment works and pollution-eliminating technology, as well as the development of programs to control nonpoint source pollution just as well as point source pollution).

²⁶ *See* 33 U.S.C. § 1311 (2018); 33 U.S.C. § 1342 (2018); *see also* 33 U.S.C. § 1344 (2018) (discussing the Corps permitting program designed to protect our nation’s waters from dredge and fill material, but this permitting system is outside the scope of this article).

²⁷ EPA, *supra* note 7.

authority under this chapter.”²⁸ Through this policy, Congress manifested its intent to utilize a three-tier cooperative federalism structure, where the federal, state and local governments interact cooperatively and collectively to solve common problems.²⁹ By incorporating this structure into the CWA, Congress hoped that it would allow “the level of government closest to the sources of the problem” to determine the best method of protecting our waters.³⁰

The CWA accomplishes its stated federalism policy through the authorization of states to administer the NPDES permitting regime and by allowing state statutes and regulations to control where the CWA prohibition and related NPDES permitting program do not reach.³¹ However, a system built on cooperative federalism necessarily requires a balancing of policy responsibilities. This balance of power between these three tiers of local, state, and federal government has continued to be a hotly debated issue since the CWA’s enactment.³²

B. Balancing the CWA’s Fundamental Objective with its Cooperative Federalism Structure

Because the CWA limits the requirements of a federally approved NPDES permit for discharges to navigable waters from point sources, any discharges not encapsulated within this statutory scope are under the authority and regulation of the states with minimal federal oversight.³³ Thus, underlying this circuit split was the rebalancing of federal and state authority

²⁸ 33 U.S.C. § 1251(b) (2018).

²⁹ See generally Schiff, *supra* note 11.

³⁰ S. REP. NO. 95-370, at 9 (1997), as reprinted in 1977 U.S.C.C.A.N. 4326, 4335.

³¹ 33 U.S.C. § 1342(b) (2018); 40 C.F.R. § 123.1 (2019).

³² See David Konisky, Editor’s Note, *Introduction to the Publius Virtual Issue: U.S. Federalism and Environmental Policy*, 1 PUBLIUS: THE J. OF FEDERALISM 1, 4 (2015), https://academic.oup.com/DocumentLibrary/Publius/EnvironmentalPolicy_Intro.pdf (citing Barry Rabe, *Contested Federalism and American Climate Policy*, 41 PUBLIUS: THE J. OF FEDERALISM 494 (2011), <https://academic.oup.com/publius/article/41/3/494/1937080>).

³³ See generally 33 U.S.C. § 1311 (2018) (discussing federal and state regulation and control of discharge); 33 U.S.C. § 1370 (2018) (discussing scope of state authority over regulating pollutants); see also 33 U.S.C. § 1344 (2018) (explaining that the Corp of Engineers, another federal agency, retains the authority to regulate the discharge of dredged or fill material to navigable waters as well with a separate permit program, but this is outside the scope of this article).

to regulate discharges into, through, and from groundwater: power historically reserved to the states.³⁴

Unfortunately, deciphering the CWA's more ambiguous terms has repeatedly given the federal circuits trouble, predominantly due to Congress's reluctance to amend the CWA to clarify federal, state, and local responsibilities. When enacting the legislation amending FWPCA in 1972, Congress openly expressed its dissatisfaction with the states' environmental protection progress and cited this as a rationale for adopting a different approach.³⁵ Despite this, for the Act to successfully and intelligently protect this nation's waters as envisioned, Congress understood that there had to be areas of water quality protection that "should not and cannot be regulated by the Federal Government."³⁶

Recognizing the fundamental need for improved protections from nonpoint-source³⁷ pollution while simultaneously comprehending the complete dearth of federal agency options for such a task at that time, a Senate Report reasoned:

[F]or the moment, it is both necessary and appropriate to make a distinction as to the kinds of activities that are to be regulated by the Federal Government and the kinds of activities which are to be subject to some measure of local control. The distinction does not necessarily need to be limited to the waters into which the discharge occurs so much as the kind of discharge which occurs, whether or not it is point source or nonpoint, whether or not it is major or minor, whether or not it is a conventional activity or a major change in the use of an area.³⁸

Thus, when Congress had amended the FWPCA in 1972, it included section 208 to place the power of nonpoint source regulation into the hands

³⁴ See generally Joseph W. Dellapenna, *A Primer on Groundwater Law*, 49 IDAHO L. REV. 265 (2013) (discussing the history of groundwater law in numerous states and on the federal level).

³⁵ Bonnie A. Malloy, Comment, *Testing Cooperative Federalism: Water Quality Standards Under the Clean Water Act*, 6 ENV'T'L & ENERGY L. & POL'Y J. 63, 89 (2011) (citing Robin Kundis Craig, *Adapting Water Federalism to Climate Change Impacts: Energy Policy, Food Security, and the Allocation of Water Resources*, 5 ENV'T'L & ENERGY L. & POL'Y J. 183, 206 (2010)).

³⁶ S. REP. NO. 95-370, at 10 (1977), as reprinted in 1977 U.S.C.C.A.N. 4326, 4336.

³⁷ EPA, *supra* note 9.

³⁸ S. REP. NO. 95-370, at 10.

of the state.³⁹ Section 208 consigned to the states the (voluntary) responsibility of developing control measures and management practices to protect wetlands and navigable waters from nonpoint source and *de minimis* pollution.⁴⁰

C. Statutory Construction of the CWA's Ambiguous Language

As discussed above, whether the CWA requires a permit for discharges into hydrologically connected groundwater is unclear due to several ambiguities found within the statutory language of the CWA.

1. "Navigable Waters"

Defining "navigable waters" as "the waters of the United States, including the territorial seas" fails to clarify whether the CWA only applies to waters traditionally identifiable as "navigable" or also encapsulates adjacent and other waters that affect the more traditional protected waters.⁴¹ Courts, the EPA, and the Corps agree that the CWA does not address the polluting of groundwater itself because groundwater is not among the "navigable waters" protected by the Act.⁴² The Supreme Court has attempted to provide further clarity, especially in the context of Corps controversies, regarding what waters the CWA protects.⁴³

In 1985, the Supreme Court concluded in *United States v. Riverside Bayview Homes* that the term "navigable . . . is of limited import" and that Congress had chosen to define the waters covered by the CWA broadly.⁴⁴

³⁹S. REP. NO. 92-500, at 839–40 (1972); *see* 33 U.S.C. § 1288 (2006).

⁴⁰Endre Szalay, Comment, *Breathing Life Into the Dead Zone: Can the Federal Common Law of Nuisance Be Used To Control Nonpoint Source Water Pollution?*, 85 TUL. L. REV. 215, 238 (2010).

⁴¹33 U.S.C. § 1362 (2018); *see also* *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion regarding the meaning of "the waters of the United States"); *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (analyzing the importance of the term "navigable waters"); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (discussing the meaning of "navigable waters").

⁴²*See Exxon Corp. v. Train*, 554 F.2d 1310, 1312 (5th Cir. 1977).

⁴³*See Rapanos*, 547 U.S. 715; *Solid Waste*, 531 U.S. at 167; *Riverside*, 474 U.S. at 133.

⁴⁴474 U.S. at 133.

Therefore, the CWA regulates at least some waters that would not be deemed “navigable” under the classical understanding of that term.⁴⁵

In 2001, the Court provided a more useful method of determining what waters the CWA protected in *Solid Waste Agency of Northern Cook County v. United States Army of Corps of Engineers (SWANCC)*.⁴⁶ The Court explained that the significant nexus between the traditionally non-navigable and the navigable water determines whether the CWA covers the traditionally non-navigable water.⁴⁷

In 2006, the Court released a plurality decision in *Rapanos v. United States*, providing the circuit courts with three different interpretations of “navigable waters.”⁴⁸ Justice Scalia, the author of the plurality opinion, interpreted WOTUS to include only relatively permanent, standing or flowing bodies of water, excluding “transitory puddles or ephemeral flows of water.”⁴⁹ Justice Scalia chose to define “navigable waters” quite narrowly, finding the CWA could cover only “those wetlands with a continuous surface connection to bodies that are [WOTUS] in their own right.”⁵⁰

Justice Kennedy authored the concurring opinion, which relied in part on the “significant nexus” language used in *SWANCC*.⁵¹ Under Justice Kennedy’s approach, to constitute “navigable waters” under the Act, “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.”⁵² If the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable,” then the requisite nexus is present.⁵³

Justice Stevens authored the dissent in *Rapanos*. In the dissent, Justice Stevens rejected both Justice Scalia’s and Justice Kennedy’s interpretations of “navigable waters.”⁵⁴ Justice Stevens argued instead that the Court should

⁴⁵ *Id.*

⁴⁶ 531 U.S. 159.

⁴⁷ *Id.* at 167–68.

⁴⁸ 547 U.S. 715.

⁴⁹ *Id.* at 733.

⁵⁰ *Id.* at 742.

⁵¹ *Id.* at 767 (Kennedy, J., concurring); *Solid Waste*, 531 U.S. at 167.

⁵² *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring).

⁵³ *Id.* at 780.

⁵⁴ *Id.* at 788 (Stevens, J., dissenting).

give deference to the Corps' broad interpretation of the term of art, which, consistent with the purpose of the Act, allowed the Corps to control water pollution properly.⁵⁵ Justice Stevens lastly noted that, from his perspective, if a traditionally non-navigable body of water satisfied either test proffered by the plurality or concurrence, then the body of water in question should be considered a WOTUS.⁵⁶

Since the Court's plurality decision in *Rapanos*, the circuit courts have similarly split regarding how they define the outer limits of "navigable waters." The majority of the circuits, including the Eleventh, Ninth, and Seventh, have either adopted or allowed Justice Kennedy's significant nexus test to prove application of the CWA through the application of the *Marks* rule.⁵⁷

2. "Discharge of a pollutant."

The statutory definition of "discharge of a pollutant"⁵⁸ does not make clear whether the statute applies only to direct, as opposed to indirect, discharges of pollutants. However, the closest analogy to the scope of the definition comes from facilities that send their wastewater to Publicly Owned Treatment Works (POTWs), which then discharge their accumulated waste into the navigable waters. Congress provided the EPA the ability to set effluent limitations for any source that introduced pollutants into a POTW under 33 U.S.C. § 1317.⁵⁹ These effluent generators are labeled "indirect dischargers" since their wastes are not sent directly to rivers or streams, but eventually reach those waters through discharges from POTWs. Section 1317 requires effluent limitations before the introduction of wastewaters to a

⁵⁵ *Id.*

⁵⁶ *Id.* at 810.

⁵⁷ *Marks v. United States*, 430 U.S. 188, 193 (1977) (explaining the *Marks* rule that states "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds"); *see also* *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (one district court in the Fifth Circuit holding that Justice Scalia's "continuous surface water connection" test is controlling).

⁵⁸ 33 U.S.C. § 1362 (2018) (defining discharge of a pollutant as "any addition of any pollutant to navigable waters from any point source").

⁵⁹ 33 U.S.C. § 1317(a)(2) (2018).

public sanitary (as opposed to storm) sewer system.⁶⁰ These limitations are equivalent to “direct discharger” limitations.⁶¹

II. UNDERSTANDING THE CIRCUIT SPLIT

With a better understanding of the particular language giving rise to this circuit split, we can now better comprehend and evaluate the traditional and fairly-traceable approaches. This split came to a head in 2018 with the Fourth, Sixth, and Ninth Circuits releasing five opinions on the subject collectively.⁶² The Sixth Circuit upheld the traditional approach recognized a decade earlier by the Fifth and Seventh Circuits. The Fourth and Ninth Circuits championed the new view. Throughout this time, the EPA has stated three times (within three different administrations) its position on this subject, changing its position each time: in 1990, where the EPA supported the traditional approach; in 2018, where the EPA supported the Ninth Circuit’s fairly-traceable approach; and, lastly, in 2019, where the EPA rejected any support for the minority view and fully endorsed the traditional approach.

A. *What was the Traditional Approach?*

The Fifth and Seventh Circuits established what would become the traditional approach in the early 2000s by refusing to find that the CWA covered discharges into hydrologically connected groundwater.⁶³ In 2018, the Sixth Circuit released two opinions reaffirming the traditional approach

⁶⁰ *Id.* at § 1317(c).

⁶¹ *Armco, Inc. v. U.S. Env’t Prot. Agency*, 869 F.2d 975, 979 (6th Cir. 1989); *Reynolds Metals Co. v. U.S. Env’t Prot. Agency*, 760 F.2d 549, 553 (4th Cir. 1985).

⁶² Compare *Haw. Wildlife Fund v. Cnty. of Maui*, 886 F.3d 737 (9th Cir. 2018), *vacated*, 140 S. Ct. 1462 (2020) (recognizing CWA authority over point sources that discharge pollutants into groundwater hydrologically connected to the waters of the United States), and *Upstate Forever v. Kinder Morgan Energy Partners*, 887 F.3d 637, 651 (4th Cir. 2018), *vacated*, 140 S. Ct. 2736 (2020) (same), and *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 409 (4th Cir. 2018) (same), with *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925 (6th Cir. 2018) (upholding the traditional approach that rejects the proposition that the CWA covers discharges into hydrologically connected groundwater), and *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436 (6th Cir. 2018) (same).

⁶³ See *Rice v. Harken Expl. Co.*, 250 F.3d 264, 271 (5th Cir. 2001); *Exxon Corp. v. Train*, 554 F.2d 1310, 1322 (5th Cir. 1977); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994).

expressed by the Fifth and Seventh Circuits.⁶⁴ In *Kentucky Waterways Alliance v. Kentucky Utilities Company* and *Tennessee Clean Water Network v. Tennessee Valley Authority*, the Sixth Circuit refused to find that the CWA granted any power to the federal government over groundwater.⁶⁵

The court in *Kentucky Waterways Alliance* read the CWA as applying only when pollution has been added directly to navigable waters “by virtue of a point-source conveyance,” rather than through some other mechanism, such as groundwater.⁶⁶ Relying on the CWA’s definition of effluent limitations as restrictions on the amount of pollutants that may be “discharged from point sources *into* navigable waters,” the Fifth and the Seventh Circuits concluded that the CWA’s effluent limitations could only apply to point sources that discharged directly into WOTUS, leaving no room for intermediary mediums to carry pollutants.⁶⁷ The *Kentucky* court bolstered its interpretation of the statutory text by asserting that the Ninth and Fourth Circuits’ adoption of the hydrological connection theory failed to take into account the CWA’s stated intent to protect the rights of states to prevent, reduce, and eliminate pollution.⁶⁸

Most recently, in April 2019, under the Trump administration, the EPA doubled down on its previous guidance on hydrologically connected groundwater. The EPA released an instructive guidance titled, “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.”⁶⁹ In this interpretive statement, the EPA concludes that the CWA “is best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage and liability under Section 301 of the CWA, regardless of a hydrologic connection between the groundwater and a jurisdictional surface water.”⁷⁰ The EPA relies on statutory silence to support its argument that Congress intended for the states, not the federal government through the CWA, to have power over releases into groundwater.⁷¹

⁶⁴ *Ky. Waterways All.*, 905 F.3d at 934; *Tenn. Clean Water Network*, 905 F.3d at 442–43.

⁶⁵ *See* 905 F.3d at 938; 905 F.3d at 446.

⁶⁶ 905 F.3d at 934.

⁶⁷ *See id.* (quoting § 1362(11)); *Tenn. Clean Water Network*, 905 F.3d at 444.

⁶⁸ *Ky. Waterways All.*, 905 F.3d at 936–37.

⁶⁹ 84 Fed. Reg. 16810-01 (proposed April 23, 2019) (to be codified at 40 C.F.R. pt. 122).

⁷⁰ *Id.* at 16811.

⁷¹ *See id.* at 16820.

B. What is the Fairly-Traceable Approach?

In 2018, the Ninth and Fourth Circuits released three decisions collectively, all recognizing CWA authority over point sources that discharge pollutants into groundwater hydrologically connected to WOTUS.⁷² These Circuits have dictated what is referred to as the “foreseeability test:” this test requires that the ultimate discharge into navigable waters be “fairly traceable” back to the point source and be more than *de minimis*.⁷³ If this can be proven, a CWA “discharge of a pollutant” may occur under the foreseeability test when a pollutant is added to navigable water via groundwater with some connection to the navigable water.⁷⁴

The Ninth and Fourth Circuits do not consider the discharge to be a two-stage process: a point source discharge into groundwater, and a groundwater discharge into navigable waters.⁷⁵ Instead, the Circuits consider the discharge to be a one-stage process where the discharge comes from a point source and has a direct connection from the point source to the navigable waters.⁷⁶ The Ninth Circuit reasoned:

[A]n indirect discharge from a point source to a navigable water suffices for Clean Water Act (CWA) liability to attach. . . . [T]he ultimate question [as to CWA liability] is whether pollutants [are] discharged from ‘discernible, confined, and discrete conveyance(s)’ either by gravitational or nongravitational means. . . . “Gravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if a party *at least initially collected or channeled the water and other materials*.” . . . That the groundwater plays a role in delivering the pollutants to the

⁷²Haw. Wildlife Fund v. Cnty. of Maui, 886 F.3d 737 (9th Cir. 2018), *vacated*, 140 S. Ct. 1462 (2020); Upstate Forever v. Kinder Morgan Energy Partners, 887 F.3d 637 (4th Cir. 2018), *vacated*, 140 S. Ct. 2736 (2020); Sierra Club v. Va. Elec. & Power Co., 903 F.3d 403, 409 (4th Cir. 2018).

⁷³See *Haw. Wildlife Fund*, 886 F.3d at 749.

⁷⁴See *id.* at 744.

⁷⁵See, e.g., *Haw. Wildlife Fund*, 886 F.3d at 749 n.3; *Upstate Forever*, 887 F.3d at 652–53. The EPA also wrote an amicus brief to the *Hawaii* case in favor of the Ninth Circuit’s “foreseeability approach.” Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellees at 12, *Haw. Wildlife Fund*, 886 F.3d 737 (9th Cir. 2018) (No. 15-17447). The EPA has since gone back on its stated opinion in that brief with its April 2019 guidance.

⁷⁶See *Haw. Wildlife Fund*, 886 F.3d at 746–47.

navigable water does not preclude liability under the statute.⁷⁷

The underlying justification for authorizing admittedly more control to the EPA under the CWA is to prevent the circumvention of the CWA's stout water quality objective and the essential no-discharge statutory provision, as well as the EPA's related NPDES permitting program.

In *Upstate Forever v. Kinder Morgan Energy Partners, LP*, the Fourth Circuit found that "if the presence of a short distance of soil and ground water were enough to defeat a claim, polluters easily could avoid liability under the CWA by ensuring that all discharges pass through soil and groundwater before reaching navigable waters."⁷⁸ The court recognized that allowing such an outcome would "greatly undermine the purpose of the [CWA]."⁷⁹ In *Hawaii Wildlife Fund*, the Ninth Circuit came to the same conclusion, arguing that "this case is about preventing the County from doing indirectly that which it cannot do directly."⁸⁰

C. What is the Functional Equivalent Approach?

When the Court reached its conclusion to reject both the Sixth Circuit's traditional approach and the Ninth Circuit's fairly-traceable approach, it did so recognizing that a successful cooperative federalism structure needed a softer touch than either approach.⁸¹ The traditional approach recognized Congress's intent to leave groundwater pollution in the hands of the States.⁸² However, it proposed such a "large and obvious loophole" in one of the CWA's key regulatory innovations in that "any amount of groundwater between the end of the pipe and the edge of the navigable water" would result in the application requirement not applying.⁸³

Conversely, the fairly-traceable approach understood that the statute's coupling of the word "from" with the word "to" was strong evidence that

⁷⁷ *Id.* at 747 (citations omitted).

⁷⁸ 887 F.3d 652, 652 (4th Cir. 2018), *vacated*, 140 S. Ct. 2736 (2020).

⁷⁹ *Id.*

⁸⁰ 886 F.3d at 752.

⁸¹ *See* *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020) ("[I]n light of the statute's language, structure, and purposes, the interpretations offered by the parties, the Government, and the dissents are too extreme.").

⁸² *Id.* at 1472.

⁸³ *Id.* at 1473.

Congress was referring to a destination (navigable waters) and an origin (point source) rather than an express means of delivery.⁸⁴ However, modern science could advance to the point where “fairly traceable” could extend to discharges that reach navigable waters many years after their release and in highly diluted forms, and the Court could not envision Congress having intended to provide the EPA with such broad authority.⁸⁵

Because the traditional approach risked serious interference with the EPA’s ability to regulate the most basic of point source discharges, and because the fairly-traceable approach risked ballooning federal authority despite countervailing congressional intent and state concerns, the Court could not accept either approach. As a result, the Court proposed its own: the functional equivalent approach.⁸⁶ The Court believes that “from any point source” encapsulates when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.⁸⁷

III. INTERPRETING AND APPLYING THE SUPREME COURT’S FUNCTIONAL EQUIVALENT APPROACH

“If Timmy is told to ‘add water to the bath from the well’ he will know just what it means—even though he will have to use a bucket to complete the task.”⁸⁸

A. *Achieving Environmental Quality versus Preserving Cooperative Federalism*

While the Court’s goal was to advance the statute’s purpose that Congress sought to achieve, the Court simultaneously recognized that the context surrounding the statute, such as the congressional intent to preserve state regulation over groundwater, imposed natural limits to the approach’s applicability.⁸⁹ Recognizing the approach’s difficulty in application, the Court provided a list of factors that could prove relevant. The Court identified

⁸⁴ *Id.*

⁸⁵ *Id.* at 1470–71.

⁸⁶ *Id.* at 1476 (“[T]he statute 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*.”).

⁸⁷ *Id.*

⁸⁸ *Id.* at 1475.

⁸⁹ *Id.* at 1476.

the time a pollutant takes and the distance it travels to be the most important factors in most, but not all, cases.⁹⁰ Similarly, looking at the statute's underlying goals, the Court cautioned that “[d]ecisions should not create serious risks either of undermining state regulation of groundwater or of creating loopholes that undermine the statute’s basic federal regulatory objectives.”⁹¹

Ultimately, the Court recognized that the functional equivalent approach would not provide a more absolute provision and understood that judges would need to exercise their discretion while being mindful of the complexities inherent in indirect discharges through groundwater.⁹²

B. Looking to NEPA to Understand How to Apply the Functional Equivalent Approach

The unstated consequence of the functional equivalent approach is that the original circuit split has been converted into policy arguments for how to apply to uniform standard. The fundamental divide continues to be whether the CWA’s explicit objective of upholding water quality in § 1251(a) or its stated policy of maintaining cooperative federalism in § 1251(b) should inform interpretations of ambiguities. Because the functional equivalent approach asks the lower courts to discern how these policies should be balanced, the statutory interpretation tool found in the National Environmental Policy Act (NEPA) can provide strong guidance for how to apply the approach.

Three years before the CWA, Congress had passed NEPA, casting it as a general mandate “requiring all federal agencies to consider values of environmental preservation in their spheres of activity, and [prescribing]

⁹⁰*Id.* at 1476–77 (Other factors include: “(1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, [or] (7) the degree to which the pollution (at that point) has maintained its specific identity.”).

⁹¹*Id.* at 1477.

⁹²*Id.*

certain procedural measures to ensure that those values are in fact fully respected.”⁹³

In 1971, one year after NEPA became effective, Circuit Judge Skelly Wright delivered the opinion for the D.C. Circuit Court of Appeals to *Calvert Cliffs*. This case became known as the “opening salvo for how courts should respond to allegations that an agency violated NEPA.”⁹⁴ Judge Wright made it clear that “Congress intended all agencies under their authority to follow the substantive and procedural mandates of NEPA.”⁹⁵ One of NEPA’s strongest, yet least judicially enforced, mandates comes from 42 USC. § 4332(1)’s statutory interpretation mandate.

Section 4332(1) requires that “to the fullest extent possible . . . the policies, regulations, and public laws of the United States *shall be interpreted* and administered in accordance with the policies set forth in [NEPA]”⁹⁶ These policies include NEPA’s § 4331 policy of “fulfill[ing] the responsibilities of each generation as trustee of the environment for succeeding generations.”⁹⁷ This provision, therefore, is a statutorily-mandated interpretive tool that strongly encourages interpreting the CWA’s statutory language in favor of the broadest interpretation possible.

Although no court has (apparently) relied on this provision in a case for interpreting a statute, the language of the statute unambiguously directs that NEPA’s interpretive mandate is a “clear congressional expression for an environmental canon of construction.”⁹⁸ Importantly, Congress expressly stated that the interpretive mandate was to apply “to the fullest extent possible.”⁹⁹ Contrasting this language with Congress’s relatively weak authorization in § 4331(b) of “all practicable means, consistent with other

⁹³ *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971); *Cf.* National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321—4370m-12 (2018)).

⁹⁴ Sam Kalen, *The Devolution of NEPA: How the APA Transformed the Nation’s Environmental Policy*, 33 WM. & MARY ENVTL. L. & POL’Y REV. 483, 503 (2009).

⁹⁵ See *Davis v. Morton*, 469 F.2d 593, 596 (10th Cir. 1972).

⁹⁶ 42 U.S.C. § 4332(1) (2018) (emphasis added).

⁹⁷ 42 U.S.C. § 4331(b)(1) (2018).

⁹⁸ Nicholas Bryner, *An Ecological Theory of Statutory Interpretation*, 54 IDAHO L. REV. 3, 24 (2018) (“[T]he environmental canon of construction I have proposed does not mandate a substantive measure of environmental quality, but rather requires legal and linguistic clarity if a statute or regulation is to be applied in a way that potentially harms environmental interests and the interests of future generations.”).

⁹⁹ 42 U.S.C. § 4332 (2018).

essential considerations of national policy,” highlights Congress’s strong intent to require the use of the interpretive mandate unless existing laws expressly prohibit or make compliance impossible.¹⁰⁰

Because NEPA’s interpretive mandate favors the interpretation that resolves the ambiguous circumstances in favor of protecting environmental interests, district courts need to weigh the CWA’s surrounding context, including the desire to protect state regulation of groundwater, very carefully against the statute’s fundamental purpose.

IV. CONCLUSION

The apparent competition to support the CWA interpretation between the primary and sole objective at the outset of the CWA in § 1251(a) and the policy stated in § 1251(b) has resulted in decades of cases and controversies between local, state, and federal actors. In *Hawaii Wildlife Fund*, the Supreme Court took a measured and nuanced approach to this decades long conflict. The Court recognized the dual needs of promoting the CWA’s fundamental objective and protecting the balance between state and federal power. By establishing the functional equivalent approach, the Court attempted to find a balance between the two competing policies. However, when the functional equivalent approach fails to clearly identify whether or not a discharge is encompassed by the CWA, that court should look to the interpretive mandate found in NEPA to reach its ultimate decision.

¹⁰⁰See *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1115 n.12 (D.C. Cir. 1971) (citing the Council on Environmental Quality that “[t]he phrase ‘to the fullest extent possible’ . . . is meant to make clear that each agency of the Federal Government shall comply with the requirement unless existing law applicable to the agency’s operations expressly prohibits or makes compliance impossible.” 36 Fed. Reg. at 7724); 42 U.S.C. § 4331(b) (2018).