

# Interpretations of the Clean Water Act are as Muddy and Polluted as the Water the Act Seeks to Protect

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## INTRODUCTION

The Clean Water Act (CWA) was passed in 1972 with the worthy purpose of eliminating the discharge of pollutants into the navigable waters of the United States.<sup>1</sup> To achieve this objective, the CWA expressly forbids pollution in navigable waters without a permit.<sup>2</sup> The permits referred to in the CWA are issued under the National Pollutant Discharge Elimination System (NPDES).<sup>3</sup> This discharge of a pollutant is further defined as the addition of any pollutant to navigable waters, explicitly from a “point source.”<sup>4</sup> While the Environmental Protection Agency (EPA) enforces this Act,<sup>5</sup> the states are responsible for carrying out the purposes of the CWA because the Act recognizes each state’s ultimate authority over the waters within its jurisdiction.<sup>6</sup>

Congress has drawn a line between federal and state regulation in its delineation between point-source pollution and nonpoint-source pollution,<sup>7</sup> as well as its distinctions between navigable and non-navigable waters.<sup>8</sup> Confusingly, this means that the CWA’s authority can end either after it determines that the source of pollution is nonpoint-source, or after the pollution is of non-navigable waters.<sup>9</sup> The vague definitions of “point-source pollution” and “navigable waters” have left jurisdictions without a

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<sup>1</sup> 33 U.S.C. § 1251 (2018).

<sup>2</sup> 33 U.S.C. § 1311(a) (2018); *see also* 33 U.S.C.S. 1342(a)(1) (2018).

<sup>3</sup> *See* U.S.C. § 1342 (2018).

<sup>4</sup> 33 U.S.C. § 1362(12) (2018).

<sup>5</sup> 33 U.S.C. § 1251(d) (2018).

<sup>6</sup> 33 U.S.C. § 1251(g) (2018).

<sup>7</sup> 33 U.S.C. § 1362(12), (14) (2018); *see also* Ky. Waterways All. v. Ky. Utils. Co., 905 F.3d 925, 929 (6th Cir. 2018) (stating that “Point-source pollution is subject to the NPDES requirements, and thus, to federal regulation under the CWA. But all other forms of pollution are considered nonpoint-source pollution and are within the regulatory ambit of the states.”).

<sup>8</sup> *See* 33 U.S.C. § 1362(12) (highlighting a distinction between “navigable water”, “waters of contiguous zone” and “the ocean”).

<sup>9</sup> *Id.*

clear answer as to where Congress intended the line to be drawn.<sup>10</sup> The EPA acknowledged the abundance of conflicting case law in this area and emphasized the effects that clarification of this issue could have on those trying to follow the CWA's guidelines.<sup>11</sup> Furthermore, the CWA does not address whether its authority extends to cover groundwater—a common conduit for pollution across the United States—sparking considerable litigation in response to the Act's lack of clarity on the issue.<sup>12</sup>

Private citizens are empowered under the Act to file civil actions against those who violate the CWA.<sup>13</sup> The United States Court of Appeals for the Sixth Circuit rendered decisions on September 24, 2018, in two separate cases involving allegations of CWA violations.<sup>14</sup> In both *Kentucky Waterways Alliance v. Kentucky Utilities Company* and *Tennessee Clean Water Network v. Tennessee Valley Authority*, the Sixth Circuit rejected prior decisions from the Ninth and Fourth Circuits (in *Upstate Forever v. Kinder Morgan Energy Partners LP* and *Hawai'i Wildlife Fund v. County of Maui*) creating a circuit split.<sup>15</sup> These cases have left the question of whether groundwater is a point source under the Act unresolved, therefore requiring a company or individual to obtain an NPDES permit to legally discharge pollutants into

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<sup>10</sup> See Rachel Jacobson, H. David Gold & Sarah C. Judkins, *Sixth Circuit Holds Clean Water Act Does Not Require Permits for Discharges to Groundwater*, WILMERHALE (Oct. 1, 2018), <https://www.wilmerhale.com/en/insights/client-alerts/20181001-sixth-circuit-holds-clean-water-act-does-not-require-permits-for-discharges-to-groundwater> [<https://perma.cc/R5KR-53Z9>]; see also Henry R. Pollard V, *Debate Over Groundwater Pathway for Clean Water Act Jurisdiction Continues, But States Could Step In*, WILLIAMS MULLEN (Dec. 27, 2018), <https://www.williamsmullen.com/news/debate-over-groundwater-pathway-clean-water-act-jurisdiction-continues-states-could-step> [<https://perma.cc/7QAA-55Z3>].

<sup>11</sup> Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water, 83 Fed. Reg. 34,7126 (Feb. 20, 2018) [hereinafter Clean Water Act Coverage] (to be codified at 40 C.F.R. pt. 122), <https://www.govinfo.gov/content/pkg/FR-2018-02-20/pdf/2018-03407.pdf> [<http://perma.cc/UZ3N-6T9Q>]; see also R. Timothy Weston, Cliff L. Rothenstein, Marie E. Quasius, *What's The Point (Source)? New Developments in the Ongoing Debate Concerning Clean Water Act Jurisdiction over Indirect Discharges via Groundwater*, K&L GATES (Mar. 4, 2018), <http://www.klgates.com/whats-the-point-source-03-04-2018/> [<https://perma.cc/X5YR-27SB>].

<sup>12</sup> Clean Water Act Coverage, *supra* note 11, at 7127-28.

<sup>13</sup> 33 U.S.C.S. § 1365(a)–(b) (2018).

<sup>14</sup> See *Ky. Waterways All.*, 905 F.3d at 928; see also *Tenn. Clean Water Network v. TVA*, 905 F.3d 436, 438 (6th Cir. 2018).

<sup>15</sup> See *Ky. Waterways All.*, 905 F.3d at 941; see also *Tenn. Clean Water Network*, 905 F.3d at 448.

groundwater that eventually reaches navigable waters.<sup>16</sup> More specifically, there is a question as to when the CWA authorizes the imposition of liability when a pollutant is discharged from a point source to groundwater, and then through groundwater to surface water.<sup>17</sup>

The Sixth Circuit held firm in its interpretation of the CWA, determining that groundwater is a nonpoint-source, and therefore, that the CWA has no authority to prescribe liability for pollution that flows from it.<sup>18</sup> Alternatively, the Fourth and Ninth Circuit courts have interpreted that the discharge of a pollutant that passes through groundwater is under the jurisdiction of the CWA as an enforceable violation.<sup>19</sup> The major point of convergence in these cases is found in each circuit court's interpretation of the "hydrological connection theory."<sup>20</sup> While the Fourth and Ninth Circuits upheld the theory, the Sixth Circuit expressly rejected it.<sup>21</sup> Consequently, localized jurisdictions continue to proffer varying interpretations.<sup>22</sup> This Note argues that the United States Supreme Court should accept the hydrological connection theory in line with the Fourth and Ninth Circuits. The Supreme Court should do so because (1) the purposes of the CWA will have a greater likelihood of coming to fruition,<sup>23</sup> (2) pollution from a point source that is "fairly traceable" from said point source when it ends up in navigable waters of the United States is essentially the same type of pollution the CWA aims to federally regulate,<sup>24</sup> and (3) to

<sup>16</sup> See Jacobson, Gold & Judkins *supra* note 10.

<sup>17</sup> Joel C. Beauvais & Stacey L. VanBelleghem, *Courts Block Coal Ash Suits, Setting up US Supreme Court Showdown*, LATHAM & WATKINS LLP (Sep. 27, 2018), <https://www.globalelr.com/2018/09/courts-block-coal-ash-suits-setting-up-us-supreme-court-showdown/> [https://perma.cc/RP7T-9VB8].

<sup>18</sup> *Ky. Waterways All.*, 905 F.3d at 934.

<sup>19</sup> *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 (4th Cir. 2018); *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737, 747–49 (9th Cir. 2018).

<sup>20</sup> Saul Ewing Arnstein & Lehr LLP, *Supreme Court to Decide Soon on Whether to Wade Further Into the "Waters of the United States" Fray*, JDSUPRA (Nov. 2, 2018), <https://www.jdsupra.com/legalnews/supreme-court-to-decide-soon-on-whether-76879/> [https://perma.cc/F34S-3WFT].

<sup>21</sup> *Id.*

<sup>22</sup> See Jacobson, Gold & Judkins, *supra* note 10.

<sup>23</sup> See Allison L. Kvien, *Is Groundwater that is Hydrologically Connected to Navigable Waters Covered Under the CWA?: Three Theories of Coverage & Alternative Remedies for Groundwater Pollution*, 16.2 MINN. J. OF L, SCI. & TECH. 957, 1000 (2015).

<sup>24</sup> See *Hawai'i Wildlife Fund*, 886 F.3d at 744.

hold otherwise would allow polluters to escape liability on a pure technicality.

This Note explores the different interpretations of the discharge permit requirement that has led to the current circuit split, discusses the United States Supreme Court's grant of certiorari for petitions filed in the Ninth and Fourth Circuit cases, and argues in favor of adoption of the Fourth and Ninth Circuits' rulings. Part I of this Note discusses the purposes and goals of the CWA, as well as the previous applications of CWA liability for groundwater pollution. Part I also covers the Resource Conservation and Recovery Act (RCRA) and how it coincides with the enforcement of the CWA. Furthermore, Part I addresses the "Waters of the United States" rule established by the EPA and the United States Army Corps of Engineers, which aimed to define exactly what "waters" the CWA protects, and how this definition interacts with CWA interpretation. Part II analyzes the split among the Sixth, Fourth, and Ninth Circuits and considers arguments for and against each Circuit's proposition. Part II further examines the current landscape of this issue and how leaving this question to each jurisdiction without clarity will impact the CWA's enforcement going forward. Finally, Part III discusses the challenge the Supreme Court faces in deciding this issue and argues for the adoption of the Fourth and Ninth Circuit's interpretations.

#### I. THE CLEAN WATER ACT IS A COMPLICATED ACT OF CONGRESS, AND ITS INTERPRETATION OFTEN DIFFERS BY ADMINISTRATION

##### *A. Text and History of the CWA*

Codified in 33 U.S.C. § 1251 et seq.,<sup>25</sup> the CWA operates with the goal of regulating not only pollution into the waters of the United States, but also regulates water quality standards for surface waters.<sup>26</sup> The pollutants the CWA aims to regulate, though defined broadly, include "industrial, municipal, and agricultural

<sup>25</sup> 33 U.S.C. § 1251, et seq. (2018).

<sup>26</sup> SUMMARY OF THE CLEAN WATER ACT, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-clean-water-act> [https://perma.cc/LRJ7-XQFN].

waste” discharged in water.<sup>27</sup> In its text, the CWA provides that “the discharge of any pollutant by any person shall be unlawful,” unless said person has a permit authorized under the NPDES.<sup>28</sup> The terms “discharge” and “point source,” though defined by the Act,<sup>29</sup> have continued to create conflicts in interpretation.<sup>30</sup> A “discharge” is “any addition of any pollutant to navigable waters from any point source.”<sup>31</sup> Furthermore, a “point source” is “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.”<sup>32</sup> This means that any form of pollution that is considered non-point source pollution falls outside the control of the CWA and within the discretion of individual states.<sup>33</sup> Examples of what qualifies as a point source under the CWA definition includes “discernible, confined and discrete conveyance[s], such as a pipe, ditch, channel, tunnel, conduit, discrete fissure, or container,” but this is still a heavily litigated area of environmental law.<sup>34</sup>

While there are varying interpretations of the meaning of words like “discharge,” and “point source,”<sup>35</sup> courts have consistently interpreted the CWA to require five elements be met for a CWA violation claim to go forward.<sup>36</sup> Those five elements are: “(1) discharg[ing] (2) a pollutant (3) into navigable waters (4) from a point source (5) without a [NPDES] permit.”<sup>37</sup> NPDES permits are the mechanism through which the CWA is monitored and

<sup>27</sup> See NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT BASICS, U.S. ENVTL. PROT. AGENCY [hereinafter NPDES PERMIT BASICS], <https://www.epa.gov/npdes/npdes-permit-basics> [<https://perma.cc/BU67-Y7NN>].

<sup>28</sup> 33 U.S.C. § 1311(a) (2018); see also Joseph DeQuarto, *Latest Interpretation of the Clean Water Act Creates Circuit Split*, THE REGULATORY R. (Dec. 20, 2018), <https://www.theregreview.org/2018/12/20/dequarto-latest-interpretation-clean-water-act-circuit-split/> [<https://perma.cc/8DR4-FZJ8>].

<sup>29</sup> 33 U.S.C. § 1362 (2018).

<sup>30</sup> See Jacobson, Gold & Judkins, *supra* note 10.

<sup>31</sup> 33 U.S.C. § 1362.

<sup>32</sup> *Id.*

<sup>33</sup> *Ky. Waterways All.*, 905 F.3d at 929.

<sup>34</sup> 33 U.S.C. § 1362; See *e.g.*, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135, 139 (1985); *Solid Waste Agency v. United States Army Corps of Eng’rs*, 531 U.S. 159, 167–68 (2001); *Rapanos v. United States*, 547 U.S. 715, 732–33 (2006).

<sup>35</sup> See *e.g.*, *Riverside Bayview*, 474 U.S. at 135, 139; *Solid Waste Agency*, 531 U.S. at 167–68; *Rapanos*, 547 U.S. at 732–33.

<sup>36</sup> See *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1142 (10th Cir. 2005).

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

enforced.<sup>38</sup> These permits ensure that the discharge of pollutants will be limited, monitored, and reported based on the limitations and requirements each permit prescribes, and each one is specifically tailored to each operation and person involved in discharging pollutants.<sup>39</sup> In theory, this system should be straightforward to implement because only those who discharge from a point source into the waters of the United States are required to have an NPDES permit.<sup>40</sup> The process becomes complicated when differing interpretations of what qualifies as a “discharge” or a “point source” under the Act creates inconsistency in the system’s administration.<sup>41</sup>

Further complicating litigation in this area is the understanding of the term “waters of the United States.”<sup>42</sup> According to EPA guidelines, this term is broadly defined as “navigable waters, tributaries, oceans out to 200 miles from shore, and intrastate waters which are used by interstate travelers for recreation or other purposes, as a source of fish or shellfish sold in interstate commerce, or for industrial purposes by industries engaged in interstate commerce.”<sup>43</sup> With this broad definition in mind, we can turn to the different ways that the United States Supreme Court has previously interpreted this term and how cumulative interpretations may have led to the current split.

### *B. Previous Interpretations of Key CWA Terms*

In *United States v. Riverside Bayview Homes*, the United States Supreme Court held that a wetland “adjacent” to a lake qualified as a “navigable water” under the CWA, and gave the Army Corps of Engineers the authority to issue permits for the discharge of pollutants into such waters.<sup>44</sup> In the case, the Corps filed suit against Riverside Bayview Homes, Inc. for placing fill materials on a construction property without a permit that was

<sup>38</sup> See NPDES PERMIT BASICS, *supra* note 27.

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

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

<sup>41</sup> See *e.g.*, *Riverside Bayview*, 474 U.S. at 135, 139; *Solid Waste Agency*, 531 U.S. at 167–68; *Rapanos*, 547 U.S. at 732–33.

<sup>42</sup> 33 U.S.C. § 1251 (2018).

<sup>43</sup> NPDES PERMIT BASICS, *supra* note 27.

<sup>44</sup> *Riverside Bayview*, 474 U.S. at 135, 139.

believed to be a covered wetland.<sup>45</sup> As a result, the court needed to decide whether the Army Corps of Engineers was correct in its interpretation of the CWA when it construed the Act to cover all freshwater wetlands that were adjacent to other covered waters.<sup>46</sup>

*Riverside Bayview* turned on whether the operative phrase “waters of the United States” as used in the Act includes wetlands, which naturally fall into an ill-defined category of areas that are not necessarily “waters” or “lands.”<sup>47</sup> The Court found that Congress’ goal—to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” as stated by the CWA<sup>48</sup>—supports the reading that wetlands adjacent to navigable waters should be included because of their impact on water quality.<sup>49</sup> This is based on the argument that in order to truly regulate activities that cause water pollution, the focus should be on the “aquatic system” as a whole.<sup>50</sup>

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, however, the Court limited the scope of the CWA by holding that it does not have jurisdiction over ponds.<sup>51</sup> The Court distinguished this case from *Riverside Bayview*, stating that *Riverside Bayview* was decided based on the significant nexus between the wetlands at issue and the “navigable waters” they were adjacent to, whereas the pond at issue in this case was not adjacent to any navigable water, and therefore outside the ambit of the CWA.<sup>52</sup> The Court further held that to include isolated ponds, or similar waters, would render the term “navigable waters” essentially meaningless, and to read that term out of the statute would go too far.<sup>53</sup>

Finally, *Rapanos v. United States* further limited “waters of the United States” under the CWA to include only “relatively permanent, standing, or flowing bodies of water” such as “streams,’ ‘oceans,’ ‘rivers,’ and ‘bodies’ of water” which form

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<sup>45</sup> *Id.* at 124.

<sup>46</sup> *Id.* at 123–24.

<sup>47</sup> *Id.* at 126.

<sup>48</sup> 33 U.S.C. §1251.

<sup>49</sup> *Riverside Bayview*, 474 U.S. at 132–34.

<sup>50</sup> *Id.* at 133–34.

<sup>51</sup> *Solid Waste Agency*, 531 U.S. at 167–68.

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

<sup>53</sup> *Id.* at 171–72.



geographical features.<sup>54</sup> Under *Rapanos*, the federal government's ability to regulate waters of the United States must be based on something more than a "mere hydrological connection to a traditional navigable waterway."<sup>55</sup> *Rapanos* addressed whether Michigan wetlands lying near ditches and man-made drains that eventually reached "traditional navigable waters" qualified as "waters of the United States" under the CWA.<sup>56</sup> *Rapanos* answered that question in the negative, holding that only wetlands with a "continuous surface connection to bodies that are 'waters of the United States'" are adjacent, and therefore, covered by the Act.<sup>57</sup>

Perhaps the most important takeaway from *Rapanos* is the Supreme Court's holding that the CWA forbids the "addition of any pollutant to navigable waters," but not the "addition of any pollutant directly to navigable waters from any point source."<sup>58</sup> Therefore, some scholars argue that the court in *Rapanos* was less concerned with how pollutants end up in navigable waters, but rather that they end up there at all.<sup>59</sup> This is ultimately one of the arguments that the Fourth and Ninth Circuits adopted,<sup>60</sup> and that the Sixth Circuit rejected.<sup>61</sup> Furthermore, as this circuit split makes evident, courts have had a difficult time applying *Rapanos*, choosing instead to resolve disputes on an ad hoc basis.<sup>62</sup>

<sup>54</sup> *Rapanos*, 547 U.S. at 732–33.

<sup>55</sup> M. Reed Hopper, *Running Down the Controlling Opinion in Rapanos v. United States*, PACIFIC LEGAL FOUND. (June 12, 2017), <https://pacificlegal.org/running-controlling-opinion-rapanos-v-united-states/> [<https://perma.cc/Q6JA-QY3Q>]; see also, *Rapanos*, 547 U.S. 715 (finding that a mere hydrological connection is not enough in all cases);

<sup>56</sup> *Rapanos*, 547 U.S. at 729.

<sup>57</sup> *Id.* at 742.

<sup>58</sup> *Id.* at 743; see also DeQuarto, *supra* note 28.

<sup>59</sup> DeQuarto, *supra* note 28.

<sup>60</sup> See, e.g., *Upstate Forever*, 887 F.3d at 648; *Hawai'i Wildlife Fund*, 881 F.3d at 760–61.

<sup>61</sup> See, e.g., *Ky. Waterways All.*, 905 F.3d at 932–33; *Tenn. Clean Water Network*, 905 F.3d at 443–44.

<sup>62</sup> Brad Plumer & Umair Irfan, *Why Trump Wants to Repeal an Obama-Era Clean Water Rule*, VOX (Dec. 11, 2018), <https://www.vox.com/energy-and-environment/2017/2/28/14761236/wotus-waters-united-states-rule-trump> [<https://perma.cc/7G32-JT9J>].



*C. Resource Conservation and Recovery Act*

While the CWA is concerned specifically with water pollution,<sup>63</sup> the RCRA is concerned with the management of solid waste.<sup>64</sup> RCRA focuses on providing solid waste management criteria to states, with the federal government providing “technical and financial assistance to state and local governments.”<sup>65</sup> Both the RCRA and the CWA have the similar goal of protecting public health and the environment.<sup>66</sup> However, the RCRA affects the CWA because it requires the EPA to enforce guidelines for solid waste disposal facilities to protect groundwater and surface waters from pollutants in solid waste.<sup>67</sup> The RCRA’s interaction with the CWA is problematic because although these statutes may be read to be complementary, they are also mutually exclusive when the conduct at issue requires an NPDES permit and is found to be under the CWA’s coverage, as the RCRA does not apply.<sup>68</sup>

This interpretation played a crucial role in the Sixth Circuit cases of *Kentucky Waterways Alliance v. Kentucky Utilities Company* and *Tennessee Clean Water Network v. Tennessee Valley Authority*, where the majority held that a RCRA claim could be brought by the plaintiffs, but a CWA claim could not.<sup>69</sup> The court held that extending CWA liability to groundwater pollution in a RCRA context would not be the “best” interpretation of either statute.<sup>70</sup> In contrast, the dissent in *Kentucky Waterways* advocated for a “side-by-side” application of the CWA and RCRA, urging that enforcing CWA liability in this instance would not preclude RCRA liability, and that imposing both would be within the authority of the EPA.<sup>71</sup> The dissent’s viewpoint from that case is the same that the majority in *Upstate Forever v. Kinder Morgan*

<sup>63</sup> SUMMARY OF THE CLEAN WATER ACT, *supra* note 26.

<sup>64</sup> 42 U.S.C. § 6907 (2018).

<sup>65</sup> 42 U.S.C. § 6902(a) (2018); *see also* *Ky. Waterways All.*, 905 F.3d at 929.

<sup>66</sup> 42 U.S.C. § 6907(a)(1); *see* 33 U.S.C. § 1251(a) (2018).

<sup>67</sup> 42 U.S.C.S. § 6907(a)(2).

<sup>68</sup> 42 U.S.C. § 6903(27); *Ky. Waterways All.*, 905 F.3d at 937–38.

<sup>69</sup> *Ky. Waterways All.*, 905 F.3d at 939–40; *see Tenn. Clean Water Network*, 905 F.3d at 445–47; *see also* Kevin Koeninger, *Sixth Circuit Clears Utilities in Ash Pond Leak Cases*, COURTHOUSE NEWS SERVICE (Sep. 24, 2018), <https://www.courthouse-news.com/sixth-circuit-holds-power-plants-not-liable-in-ash-pond-case/> [<https://perma.cc/W88U-L5Nj>].

<sup>70</sup> *Ky. Waterways All.*, 905 F.3d at 938.

<sup>71</sup> *Ky. Waterways All.*, 905 F.3d at 945; Koeninger, *supra* note 69.

*Energy Partners LP* and *Hawai'i Wildlife Fund v. County of Maui* asserted, and this difference in interpretation of these two acts' coexistence is one of the key issues causing the circuit split we have today.<sup>72</sup>

#### D. "WOTUS" Rule

In 2015, pursuant to a court order, the Clean Water Rule came into effect and attempted to define "waters of the United States," ("WOTUS") as it is used in the CWA.<sup>73</sup> While the Act makes it clear that there are regulations and NPDES requirements should people or entities discharge pollution into these waters, Congress neglected to strictly define what WOTUS means, instead leaving it to the EPA and the Army Corps of Engineers to determine.<sup>74</sup> The rule is enforced in twenty-two states, the District of Columbia, and United States territories.<sup>75</sup> It is based on 1,200 scientific papers on aquatic ecosystems and types of bodies of water, and tries to limit the specific types of bodies of water that would need to be dealt with on a case-by-case basis while outlining which water sources would be automatically covered under the CWA.<sup>76</sup> One of the many tenets promulgated by the rule states that under the CWA, WOTUS is not interpreted to include groundwater.<sup>77</sup> However, the rule confirms a case-specific "nexus" rule established by cases like *Riverside Bayview*, *Solid Waste Agency*, and *Rapanos* that would allow groundwater to be included.<sup>78</sup>

Despite its attempt to elucidate language that the CWA left unclear, this rule has been on hold since February 28, 2017, when President Donald Trump signed an executive order for the rule to be reviewed and either rescinded or revised by the EPA and the

<sup>72</sup> See *Upstate Forever*, 887 F.3d at 652–53; *Hawai'i Wildlife Fund*, 886 F.3d at 752.

<sup>73</sup> 80 Fed. Reg. 37054 (2015).

<sup>74</sup> Plumer & Irfan, *supra* note 62.

<sup>75</sup> DEFINITION OF "WATERS OF THE UNITED STATES" UNDER THE CLEAN WATER ACT, SECTION 404 OF THE CLEAN WATER ACT, U.S. ENVTL. PROT. AGENCY [hereinafter DEFINITION OF WOTUS] (Sep. 18, 2018), <https://www.epa.gov/cwa-404/definition-waters-united-states-under-clean-water-act> [<https://perma.cc/C4B2-GFCB>].

<sup>76</sup> Plumer & Irfan, *supra* note 62.

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

<sup>78</sup> 80 Fed. Reg. 37054-01 (2015).

Department of the Army.<sup>79</sup> On December 11, 2018, the EPA and Army released a signed proposal which would revise the definition of WOTUS.<sup>80</sup> While it has not taken effect yet, the “EPA and Army Corps had estimated . . . that 18 percent of streams and 51 percent of wetlands would not receive federal protections under the revisions.”<sup>81</sup> Furthermore, President Trump explicitly asked the EPA to review the holding in *Rapanos*—specifically in regard to the extended protection given to wetlands with “continuous surface connection” to navigable waterways and “relatively permanent” streams.<sup>82</sup> Regardless, while the new Clean Water rule—as ordered by President Trump—is pending, there is little clarity in the interpretation of the term “waters of the United States.” Adding to this, the wait is nowhere near complete because of the EPA’s comment period on the rule requested by President Trump and his projected defense of the final rule in court. All of this has contributed to the disparity between the Sixth, Fourth, and Ninth Circuits that we are faced with today.

## II. THE CIRCUIT SPLIT AS IT STANDS TODAY

On September 24, 2018, the Sixth Circuit issued a ruling in a pair of opinions: *Kentucky Waterways Alliance v. Kentucky Utilities Company* and *Tennessee Clean Water Network v. Tennessee Valley Authority*, which involved power plants in Kentucky and Tennessee.<sup>83</sup> The Sixth Circuit held that the utility companies in these two cases did not violate the CWA when contaminants made their way from coal ash ponds at the facilities into local groundwater based on the court’s interpretation of the phrase “to navigable waters” as it is stated in the CWA, and that coal ash ponds do not qualify as a “point source.”<sup>84</sup> However, the Fourth Circuit in *Upstate Forever v. Kinder Morgan Energy*

<sup>79</sup> DEFINITION OF WOTUS, *supra* note 75.

<sup>80</sup> STEP TWO – REVISE, WATERS OF THE UNITED STATES (WOTUS) RULEMAKING, U.S. ENVTL. PROT. AGENCY (Dec. 28, 2018), <https://www.epa.gov/wotus-rule/step-two-revise>. [<https://perma.cc/FZM9-6NFG>].

<sup>81</sup> Plumer & Irfan, *supra* note 62.

<sup>82</sup> *Id.*; see also *Rapanos*, 547 U.S. at 717.

<sup>83</sup> Koeninger, *supra* note 69; see *Ky. Waterways All.*, 905 F.3d at 930; see also *Tenn. Clean Water Network*, 905 F.3d at 438.

<sup>84</sup> DeQuarto, *supra* note 28; see also, *Ky. Waterways All.*, 905 F.3d at 931–34; *Tenn. Clean Water*, 905 F.3d at 442–44.

*Partners*, and the Ninth Circuit in *Hawai'i Wildlife Fund v. County of Maui*, previously announced rules that did not align with the Sixth Circuit's.<sup>85</sup> These Fourth and Ninth Circuit rulings reached an interpretation contrary to the one the Sixth Circuit came to, due in significant part to different interpretations of the broadly defined terms "waters of the United States" and "point source" as they are written in the CWA.<sup>86</sup>

#### A. *The Sixth Circuit's Interpretations*

##### i. *Kentucky Waterways Alliance v. Kentucky Utilities Company*

*Kentucky Waterways Alliance* was decided most recently, creating the circuit split. In *Kentucky Waterways Alliance*, two environmental conservation groups alleged that Kentucky Utilities Company (KU), which burns coal in order to produce energy, contaminated the groundwater surrounding man-made ponds where the company stored leftover coal ash.<sup>87</sup> As with most coal-burning power plants, KU is situated near bodies of water because water is necessary not only to generate power, but also to cool and condense steam, and to treat the coal waste created in the coal-burning process.<sup>88</sup> The Sierra Club and Kentucky Waterways Alliance contend that when KU disposed of coal ash generated by burning coal, it released pollutants into nearby Herrington Lake through the groundwater.<sup>89</sup> Coal ash is made up of different chemicals that can pollute water including "arsenic, lead, calcium, and boron."<sup>90</sup> Sierra Club and Kentucky Waterways Alliance also discovered that selenium, which is healthy in small amounts, was accumulating in excess in Herrington Lake and could potentially harm aquatic wildlife.<sup>91</sup> The environmental groups eventually filed both CWA and RCRA claims against KU.<sup>92</sup>

<sup>85</sup> *Upstate Forever*, 887 F.3d at 652–53; *Hawai'i Wildlife Fund*, 881 F.3d at 745–47.

<sup>86</sup> *See Upstate Forever*, 887 F.3d at 643, 647–49, 652–53; *Hawai'i Wildlife Fund*, 881 F.3d at 745–47.

<sup>87</sup> *Id.* at 931.

<sup>88</sup> *Id.* at 930.

<sup>89</sup> *Id.* at 930–31.

<sup>90</sup> *Id.* at 931.

<sup>91</sup> *Ky. Waterways All.*, 905 F. 3d at 931.

<sup>92</sup> *Id.* at 932.

The plaintiffs provided two theories to support their argument that a CWA claim was appropriate in this situation.<sup>93</sup> Under the first theory, the plaintiffs argued “that groundwater is a point source that deposits pollutants into Herrington Lake.”<sup>94</sup> The plaintiffs’ argued next that even if it is not a point source under the terms of the CWA, the hydrological connection theory should still apply, under which “groundwater is not considered a point source, but rather a medium through which pollutants pass before being discharged into navigable waters.”<sup>95</sup> In explicit disagreement with *Upstate Forever* and *Hawai’i Wildlife Fund*, the Sixth Circuit rejected both theories by holding that the CWA does not extend to the form of pollution that occurred here.<sup>96</sup> Rejecting the first argument, the Court pointed to the language of the CWA, requiring that pollution come from a “point source” that is a “discernable, confined and discrete conveyance” and concluded that groundwater by definition is “not ‘discernable,’ ‘confined,’ or ‘discrete.’”<sup>97</sup>

The court also rejected the plaintiffs’ second argument—the hydrological connection theory—based on its reading of the CWA, holding that the CWA excludes the theory.<sup>98</sup> The theory, in the plaintiffs’ view, focuses on the absence of the word “directly” in the relevant CWA provision.<sup>99</sup> The theory is that because the CWA only prohibits pollution discharged “to navigable waters from any point source,” the CWA allows pollutants to travel from a point source through a nonpoint source and into navigable waters.<sup>100</sup> This contention was unequivocally rejected by the Sixth Circuit, which explained instead that even though the word “directly” is missing, the phrase “discharged from point sources into navigable waters” indicates directness and leaves no room for anything but the pollution that comes from a point source.<sup>101</sup> Furthermore, the court rejected the plaintiffs’ use of the language in *Rapanos* in

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 932–33.

<sup>96</sup> *Ky. Waterways All.*, 905 F. 3d at 933.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 934.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* (quoting 33 U.S.C. § 1362(12)(A)).

<sup>101</sup> *Ky. Waterways All.*, 905 F. 3d at 934 (quoting § 1362(11)).

support of the theory.<sup>102</sup> Though not binding precedent as a four-justice plurality opinion, the plaintiffs took the lead from other courts and litigants in relying on *Rapanos*, which stated that “[t]he [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>103</sup>

This holding also provides sharp insight into an issue that has made interpreting the CWA so divisive—the battle between government control and states’ rights under cooperative federalism.<sup>104</sup> In doing so, the court explained that while the plaintiffs rely on the CWA’s goal of “restor[ing] and maintain[ing] . . . the Nation’s waters” to show that rejecting the “hydrological connection” theory would undermine said purpose, this is only one of many expressly stated purposes.<sup>105</sup> Another purpose is the CWA’s goal to “recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution . . .”<sup>106</sup> The court acknowledged the importance of protecting navigable waters, but also emphasized the role that states play, regulating nonpoint-source pollution on their own, under the CWA.<sup>107</sup> State regulation, in the court’s view, allows the focus of federal water pollution laws to be on the polluters, rather than the pollution itself, with the states handling the rest.<sup>108</sup>

The way the CWA and RCRA interconnect was also an important consideration in this case. The court took the approach that the CWA and RCRA are mutually exclusive statutes, and since coal ash is a solid waste and therefore under the RCRA’s coverage, to read the CWA to cover the pollution at issue would exempt RCRA coverage—going against the stated purposes of both statutes.<sup>109</sup> Perhaps the most problematic issue that the court brought up as support for its holding is the Coal Combustion Residuals rule (CCR), which was issued by the EPA to specifically

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<sup>102</sup> *Id.* at 935.

<sup>103</sup> *Id.* (quoting *Rapanos*, 547 U.S. at 743 (plurality opinion)).

<sup>104</sup> *Id.* at 937 (citing § 1251(b)).

<sup>105</sup> *Id.* at 936 (citing § 1251(a)).

<sup>106</sup> *Ky. Waterways All.*, 905 F. 3d at 936–37 (citing § 1251(b)).

<sup>107</sup> *Id.* at 936–37 (citing § 1342(b); § 1311(a); § 1362(12)).

<sup>108</sup> *Id.* at 937.

<sup>109</sup> *Id.* at 937–38.

cover coal ash storage and treatment.<sup>110</sup> The court correctly asserted that reading the CWA to cover coal ash ponds—like the ones KU was using in their coal burning process—would make the rule under the RCRA moot.<sup>111</sup> With almost all coal ash ponds sitting near navigable waterways, the court declined to adopt the plaintiff’s reading of the CWA because it would leave “the CCR Rule virtually useless” and “effectively nullify the CCR Rule and large portions of the RCRA.”<sup>112</sup> Therefore, the court allowed the plaintiff’s RCRA claim to proceed, but declined to impose liability on KU for its groundwater pollution under the CWA.<sup>113</sup>

*ii. Tennessee Clean Water Network v. Tennessee Valley Authority*

A companion decision to *Kentucky Waterways* was *Tennessee Clean Water Network*.<sup>114</sup> In *Tennessee Clean Water Network*, the Tennessee Valley Authority (TVA) operated the Gallatin Fossil Plant, a coal-fired electric plant on the Cumberland River.<sup>115</sup> As part of its operations, the Gallatin Plant would dispose of its coal ash into “unlined man-made coal ash ponds adjacent to the river.”<sup>116</sup> Then, with an NPDES permit, the Gallatin Plant would discharge some of its coal combustion wastewater into the Cumberland River.<sup>117</sup> However, two Tennessee conservation groups alleged that wastewater outside of what was allowed by the NPDES was leaking from the ponds through the groundwater into the Cumberland River.<sup>118</sup> Consequently, the plaintiff conservation groups brought a CWA citizen suit claiming that TVA violated the CWA with this unpermitted discharge.<sup>119</sup> Because the Cumberland River is a waterway protected by the CWA, a dispute

<sup>110</sup> *Id.* at 938 (citing Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015) (to be codified at 40 C.F.R. pt. 257 & 261)).

<sup>111</sup> *Ky. Waterways All.*, 905 F.3d at 938.

<sup>112</sup> *Id.* (“Adopting Plaintiffs’ reading of the CWA would mean that any coal ash pond with a hydrological connection to a navigable water would require an NPDES permit, thus removing it from RCRA’s coverage and, with it, the CCR Rule.”).

<sup>113</sup> *Id.*

<sup>114</sup> *Tenn. Clean Water Network*, 905 F.3d 436.

<sup>115</sup> *Id.* at 438.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 438, 440.

<sup>118</sup> *Id.* at 438, 441.

<sup>119</sup> *Tenn. Clean Water Network*, 905 F.3d at 441.



arose as to whether the alleged unpermitted discharge fell within the CWA.<sup>120</sup>

Plaintiffs alleged that both of the ponds at the Gallatin Plant—the Nonregistered Site and the Ash Pond Complex—were leaking wastewater into the Cumberland River.<sup>121</sup> According to the district court, historical evidence established that significant amounts of wastewater entered the Cumberland River from the Ash Pond Complex, where approximately 11.5 million cubic yards of coal ash is stored today.<sup>122</sup> More specifically, the Ash Pond Complex leaked “approximately 27 billion gallons of coal ash wastewater” between 1970 and 1978 into the Cumberland River through groundwater pollution.<sup>123</sup> Although the Nonregistered Site closed in 1998, approximately 2.3 million cubic yards of TVA’s coal ash continues to be stored there today.<sup>124</sup> The district court concluded that there was evidence that the Nonregistered Site leaked into the Cumberland River and there was “no evidence to suggest that the ‘closure’ of the site . . . wholly stopped the leaking.”<sup>125</sup>

The plaintiffs alleged that TVA violated the CWA because containments from the two sites flowed through hydrologically connected groundwater into the Cumberland River without a permit.<sup>126</sup> While the district court ruled in the plaintiffs’ favor,<sup>127</sup> the Sixth Circuit reversed its holding for several reasons.<sup>128</sup> First, the court rejected the hydrological connection theory by concluding that groundwater is a nonpoint-source; therefore, TVA’s alleged discharge of pollutants into the groundwater is not subject to the CWA and is not a CWA violation.<sup>129</sup> Second, consistent with *Kentucky Waterways*, the Court held that “the CCR Rule, not the CWA, is the framework envisioned by Congress . . . to address the

<sup>120</sup> *Id.* at 438.

<sup>121</sup> *Id.* at 439, 441.

<sup>122</sup> *Id.* at 440.

<sup>123</sup> *Id.*

<sup>124</sup> *Tenn. Clean Water Network*, 905 F.3d at 439.

<sup>125</sup> *Id.* at 440.

<sup>126</sup> *Id.* at 441.

<sup>127</sup> *Id.* at 441-42 (ruling “that a cause of action based on an unauthorized point source discharge may be brought under the CWA based on discharges through groundwater, if the hydrologic connection between the source of the pollutants and navigable waters is direct, immediate, and can generally be traced”).

<sup>128</sup> *Id.* at 438.

<sup>129</sup> *Tenn. Clean Water Network*, 905 F.3d at 444 (quoting *Ky. Waterways All.*, 905 F.3d at 934).

problem of groundwater contamination caused by coal ash impoundments.”<sup>130</sup> As one can see, the Sixth Circuit stands firm in its reading of the CWA—holding that the hydrological connection theory would directly conflict with the RCRA and the CCR Rule.<sup>131</sup>

### *B. The Fourth and Ninth Circuits’ Interpretations*

#### *i. Hawai’i Wildlife Fund v. County of Maui*

Prior to *Kentucky Waterways* and *Tennessee Clean Water Network*, the Ninth Circuit came down with *Hawai’i Wildlife Fund v. County of Maui*,<sup>132</sup> a decision the Sixth Circuit would later staunchly oppose.<sup>133</sup> The arguments made in *Hawai’i Wildlife Fund* are more compelling than the Sixth Circuit’s arguments made in *Kentucky Waterways* and *Tennessee Clean Water Network*. When the Supreme Court resolves the split among the circuits, it should resolve it in favor of the Ninth Circuit’s interpretation.<sup>134</sup>

In this case, Hawai’i Wildlife Fund, Sierra Club–Maui Group, Surfrider Foundation, and the West Maui Preservation Association alleged that the County of Maui violated the CWA when it discharged pollutants from four of its wells into the Pacific Ocean.<sup>135</sup> These wells, which release approximately three to five million gallons of treated sewage-turned-wastewater a day, are the primary means of wastewater disposal for the county.<sup>136</sup> All four of the wells used by the County of Maui ultimately dispose of this collected wastewater into the Pacific Ocean via groundwater.<sup>137</sup> The pollution in this case occurred without an NPDES permit,

<sup>130</sup> *Id.* at 445–46.

<sup>131</sup> *Id.*; *Ky. Waterways All.*, 905 F.3d at 937-38; see also *Appeals Court Denies Rehearing in Tennessee Coal Ash Case*, NEWSCHANNEL5 (Jan. 17, 2019), <https://www.newschannel5.com/news/appeals-court-denies-rehearing-in-tennessee-coal-ash-case> [<https://perma.cc/LU3G-Z2N3>] (“The full 6th U.S. Circuit Court of Appeals . . . rejected environmental groups’ request [for a rehearing] in the coal ash case at Tennessee Valley Authority’s Gallatin plant.”).

<sup>132</sup> *Hawai’i Wildlife Fund*, 881 F.3d 754.

<sup>133</sup> See, e.g., *Tenn. Clean Water Network*, 905 F.3d 436; *Ky. Waterways All.*, 905 F.3d at 925.

<sup>134</sup> See generally, *Hawai’i Wildlife Fund*, 881 F.3d 754.

<sup>135</sup> *Id.* at 758.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

opening the door to the issue of CWA liability that is pervasive in all of the aforementioned cases.<sup>138</sup>

The Ninth Circuit conducted its analysis under the instructions of the CWA, which state in pertinent part that a party violates the CWA when it “(1) discharge[s] (2) a pollutant (3) to navigable waters (4) from a point source” without a permit.<sup>139</sup> While the parties did not dispute that the four wells at issue were point sources, the county and the plaintiff conservation groups did dispute whether the CWA requires that point source pollution be conveyed directly into the navigable water, which the plaintiffs asserted the CWA does not require.<sup>140</sup> Central to the county’s argument was the claim that the pollutants reached the Pacific Ocean “through” groundwater—a nonpoint source—and therefore the fourth element of a CWA violation claim was not satisfied.<sup>141</sup>

In support of its conclusion, the Ninth Circuit cited the Second Circuit’s holding in *Concerned Area Residents for Environment v. Southview Farm*, a case that involved discharges of liquid manure from tankers into fields, which then flowed into navigable waters.<sup>142</sup> There, the Second Circuit held that the discharge from the tankers constituted a point-source discharge because the pollutant itself was released from a point source and because a direct connection existed between the field and the navigable water, regardless of whether the field was a point source under the CWA.<sup>143</sup> Ultimately, the Ninth Circuit followed the Second Circuit’s lead by reading the text of the CWA in a way that imposed liability on the county.<sup>144</sup> The Ninth Circuit did so by focusing on the plain language of the Act and pointed to the absence of the word “directly” as evidence that even though the pollutants were not conveyed explicitly from the point source into the Pacific Ocean, said pollution could be traced back from the

<sup>138</sup> *Id.* at 759–60.

<sup>139</sup> *Hawai’i Wildlife Fund*, 881 F.3d at 760 (citing *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001)).

<sup>140</sup> *Id.* at 760–2.

<sup>141</sup> *Id.* at 762 (citing *Trustees for Alaska v. E.P.A.*, 749 F.2d 549, 558 (9th Cir. 1984)).

<sup>142</sup> *Id.* at 763 (quoting *Concerned Area Residents for Env’t v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994)).

<sup>143</sup> *Concerned Area Residents for Env’t*, 34 F.3d at 119; see also *Hawai’i Wildlife Fund*, 881 F.3d at 763.

<sup>144</sup> *Hawai’i Wildlife Fund*, 881 F.3d at 765.

navigable water to the point source wells.<sup>145</sup> This is the hydrological connection theory in practice.

*ii. Upstate Forever v. Kinder Morgan Energy Partners*

Shortly after the Ninth Circuit ruled in *Hawai'i Wildlife Fund*, the Fourth Circuit decided *Upstate Forever v. Kinder Morgan Energy Partners* in April 2018, after a pipeline in South Carolina, owned by a subsidiary of Kinder Morgan Energy Partners, LP, ruptured and spilled several hundred thousand gallons of gasoline.<sup>146</sup> Two conservation groups—Upstate Forever and the Savannah Riverkeeper—sued Kinder Morgan under the CWA when that gasoline made its way into nearby navigable waters via groundwater.<sup>147</sup> In their complaint, the plaintiff conservation groups alleged that contaminants from the gasoline seeped from a point source into the soil and groundwater, which then continued to travel to nearby offshoots of the Savannah River, Browns Creek, Cupboard Creek, their adjacent wetlands, and three nearby lakes (Broadway Lake, Lake Secession, and Lake Russell).<sup>148</sup> Plaintiffs further alleged that this pollution was conducted through a “direct hydrological connection.”<sup>149</sup>

Kinder Morgan agreed that these waters and their adjacent wetlands met the CWA’s definition of “navigable waters,” and they similarly agreed with the plaintiffs that the gasoline and other contaminants expelled from their pipeline constituted “pollutants” under the CWA.<sup>150</sup> However, Kinder Morgan moved to dismiss based on the hydrological connection theory and the district court held that plaintiffs failed to state a claim on the grounds that Kinder Morgan repaired the burst pipeline, and therefore, no point source existed from which pollutants could be discharged “directly” into navigable waters.<sup>151</sup> In refusing to recognize the hydrological connection theory, the district court found they had no subject matter jurisdiction because the CWA does not cover pollutants

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<sup>145</sup> *Id.*

<sup>146</sup> *Upstate Forever*, 887 F.3d at 641.

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

<sup>148</sup> *Id.* at 643-44.

<sup>149</sup> *Id.* at 644-45.

<sup>150</sup> *Id.* at 645 n.3-4.

<sup>151</sup> *Upstate Forever*, 887 F.3d at 645.

that move through groundwater “hydrologically connected” to navigable waters.<sup>152</sup>

As the Fourth Circuit pointed out, the violation at issue hinges on whether “an indirect discharge of a pollutant through ground water, which has a direct hydrological connection to navigable waters, can support a theory of liability under the CWA.”<sup>153</sup> The court unequivocally stated that Kinder Morgan’s gasoline pipeline was a point source.<sup>154</sup> According to the Fourth Circuit, temporal conditions are not placed on the discharge of a pollutant from a point source, so Kinder Morgan’s repair of the pipeline had no effect on the court’s analysis.<sup>155</sup> However, the dissent in *Upstate Forever* took issue with the court’s reasoning, arguing that pollutants must be transferred into navigable waters in an ongoing process for there to be CWA liability.<sup>156</sup> At the heart of the issue, the Court found that the CWA “is not limited to discharges of pollutants ‘directly’ from the point source to navigable waters.”<sup>157</sup> Their interpretation is rooted in *Rapanos*, where Justice Scalia noted that “[t]he 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>158</sup> This notion is in direct contention with the Sixth Circuit’s later holding that even though “directly” is absent from the statutory text, the language of the CWA implies directness.<sup>159</sup>

The Fourth Circuit stated that since the CWA requires only a discharge from a point source, it is not required under the CWA that the starting point source itself convey the discharge directly into navigable waters.<sup>160</sup> Following *Hawai’i Wildlife Fund*, the court recognized that a discharge “that passes from a point source through ground water to navigable waters may support a claim under the CWA”<sup>161</sup> so long as there is a connection between the

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 646.

<sup>154</sup> *Id.* at 647.

<sup>155</sup> *Id.* at 648.

<sup>156</sup> *Upstate Forever*, 887 F.3d at 653 (citing 33 U.S.C. § 1362(12) (2019)).

<sup>157</sup> *Id.* at 648.

<sup>158</sup> *Id.*; see also *Rapanos*, 547 U.S. 715, 743 (2006) (quoting 33 U.S.C. § 1362(12)(A)).

<sup>159</sup> *Ky. Waterways All.*, 905 F.3d at 934.

<sup>160</sup> *Upstate Forever*, 887 F.3d at 650.

<sup>161</sup> *Id.* at 651 (citing *Hawai’i Wildlife Fund*, 881 F.3d at 747).

point source and the allegedly polluted navigable waters.<sup>162</sup> Finally, the court concluded by considering the CWA's stated purpose of zero tolerance for unpermitted discharges of pollutants.<sup>163</sup> In so doing, the court said it would undermine the goals of the Act if all that was needed to defeat a claim was "the presence of a short distance of soil and ground water" to avoid CWA liability.<sup>164</sup> In hindsight, this case, as well as the case of *Hawai'i Wildlife Fund*, seem to foreshadow the litigation that sprung up in the Sixth Circuit shortly thereafter.

### III. THE SUPREME COURT'S DILEMMA: ADOPTING THE FOURTH AND NINTH CIRCUITS' INTERPRETATION OF THE CWA

The Supreme Court has yet to rule on whether the hydrological connection theory is valid, or if the CWA covers connected groundwater. If parties truly hope to achieve the CWA's stated goal of promoting the restoration and integrity of our Nation's waters, accepting the hydrological connection theory provides the best prospect of achieving the CWA's purpose.<sup>165</sup> In January 2019, President Trump's administration sought the Supreme Court's review of the CWA debate explained in this Note.<sup>166</sup> Acknowledging the lack of consensus in this area, the Supreme Court has granted certiorari to resolve the groundwater issue once and for all.<sup>167</sup> Not only could the Supreme Court answer the question this split focuses on—whether a pollutant discharged from a point source that passes through groundwater into navigable waters without an NPDES permit is a CWA violation—it could also create some clarity in the interpretation of *Rapanos*, a case that each side used in their arguments.<sup>168</sup>

<sup>162</sup> *Id.* at 651.

<sup>163</sup> *Id.* at 652 (citing 33 U.S.C.A. § 1311(a) (1995)).

<sup>164</sup> *Upstate Forever*, 887 F.3d at 652.

<sup>165</sup> 33 U.S.C.A. § 1251(a)(1) (1987).

<sup>166</sup> Ellen M. Gilmer, *Trump asks Supreme Court to Resolve Groundwater Fight*, E&E NEWS (Jan. 4, 2019), <https://www.eenews.net/stories/1060110985>. [<https://perma.cc/J74U-3XH7>].

<sup>167</sup> Richard E. Morton, *SCOTUS Will Review a Portion of the County of Maui Case Involving a Clean Water Act Citizen Suit*, NATIONAL L. REV. (Feb. 19, 2019), <https://www.natlawreview.com/article/scotus-will-review-portion-county-maui-case-involving-clean-water-act-citizen-suit> [<https://perma.cc/KZP2-YGFY>].

<sup>168</sup> *See Upstate Forever*, 887 F.3d at 643; *see also Rapanos*, 547 U.S. 715.

A point source is defined as a “discernible, confined and discrete conveyance.”<sup>169</sup> One of the positions proposed by plaintiffs in *Kentucky Waterways* in favor of a finding CWA coverage for pollution discharge which migrates from groundwater to navigable waters was the hydrological connection theory, which should be accepted by the Supreme Court.<sup>170</sup> As explained earlier in this Note, this theory posits that even though groundwater is not a point source, it is a means through which pollutants are discharged into navigable waters from a traceable point source, and polluters should not be able to evade liability because of this tenuous difference when the pollution’s source is still a point source.<sup>171</sup>

At the time *Hawai’i Wildlife Fund* was argued, President Barack Obama’s EPA supported the hydrological connection theory through an amicus brief proposing a CWA liability rule that would require a “direct hydrological connection” between the point source and the navigable water being polluted.<sup>172</sup> Under the proposed regulations of the Trump administration, the hydrological connection theory would be outside of the CWA’s jurisdiction, substantially reducing the ability to federally regulate waters and would in effect give more power to the states.<sup>173</sup> Specifically, the definition of WOTUS would go out of its way to explicitly exclude groundwater, rendering the conclusions of the Fourth and Ninth Circuits moot.<sup>174</sup> Affirming the Fourth and Ninth Circuits’ holdings by agreeing that the CWA’s coverage of pollution conveyed through groundwater into navigable waters would fulfill the purposes of the CWA, would give states a clearer understanding of what the CWA regulates, and allows the EPA to enforce the CWA to the best of its ability.<sup>175</sup>

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<sup>169</sup> 33 U.S.C. § 1362(14) (2018).

<sup>170</sup> *Ky. Waterways All.*, 905 F.3d at 932–33.

<sup>171</sup> *Id.*

<sup>172</sup> *Hawai’i Wildlife Fund*, 881 F.3d at 766 n.3.

<sup>173</sup> Joshua A. Bloom, ‘Waters of the US’ Would Alter Environmental Reg as we Know It, THE HILL (Jan. 1, 2019), <https://thehill.com/opinion/energy-environment/423340-waters-of-the-us-would-alter-environmental-reg-as-we-know-it> [<https://perma.cc/YA9Q-9TKX>].

<sup>174</sup> Thompson Coburn LLP, ‘Waters of the United States’ Rule from EPA, Corps May Make Real Estate Development More Easily Achievable and Less Costly, JDSUPRA (Jan. 15, 2019), <https://www.jdsupra.com/legalnews/waters-of-the-united-states-rule-from-12918/> [<https://perma.cc/28ZU-NJLK>].

<sup>175</sup> See Kvien, *supra* note 23.



Solicitor General of the United States Noel Francisco filed a brief in January 2019 strongly advising the Supreme Court to grant certiorari in *Hawai'i Wildlife Fund v. County of Maui* to resolve the issue that left the Fourth, Ninth, and Sixth Circuits in conflict.<sup>176</sup> Francisco's brief argues that review is warranted not only to resolve the circuit split but also because it is an issue that many district courts face.<sup>177</sup> In his brief, Francisco stated:

[T]he question presented “has the potential to affect federal, state, and tribal regulatory efforts in innumerable circumstances nationwide” and has “significant” implications for regulated parties, “including because [Clean Water Act] violators may face serious civil penalties and, in certain cases, criminal punishment.”<sup>178</sup>

This is no small decision for the Supreme Court, but it is in the Nation's best interest for the Fourth and Ninth Circuits' rulings to be upheld, if we are to give effect to the true intent of the CWA's language and eliminate the discharge of pollutants into navigable waters altogether.<sup>179</sup>

#### CONCLUSION

In conclusion, the United States Supreme Court has recognized the problems that discrepancies in CWA interpretations has created and is poised to resolve the split.<sup>180</sup> As history has shown, allowing jurisdictions to decide for themselves whether to interpret the CWA narrowly or broadly, without much guidance from the EPA, has created the split between the Sixth, Fourth, and Ninth Circuits that presently exists. This split punishes some actors, but allows others to evade punishment for the same activities, reinforcing the idea that what matters is the jurisdiction pollution occurs in. Pollution via groundwater is the

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<sup>176</sup> Burr & Forman, *Solicitor General Urges SCOTUS to Resolve Groundwater Circuit Split*, JDSUPRA (Jan. 11, 2019), <https://www.jdsupra.com/legalnews/solicitor-general-urges-scotus-to-68388/> [<https://perma.cc/N9JC-2BUN>].

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> See 33 U.S.C. § 1251(a)(1) (2018).

<sup>180</sup> Morton, *supra* note 167.

common thread that ties these circuit cases together, but whether the CWA covers this type of pollution has created a divergence in interpretation that the Supreme Court has recognized as worthy of resolution.<sup>181</sup>

Accepting the Fourth and Ninth Circuits' rulings— though much broader interpretations than the Sixth Circuit's reading of the CWA—most closely honors the language and intent of the Act. To follow the Sixth Circuit's holdings would be to ignore the goals of the CWA in favor of a narrow and more restrictive reading of the statute. The hydrological connection theory should be adopted by the Supreme Court in CWA cases if the statute is to stand in its full effect. Despite changes in EPA policy that come as a result of the fluctuation in ideals of each executive administration, the Supreme Court's guidance in this area will provide much-needed clarity and create a standard that is easier to follow in a highly controversial area of environmental law.

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<sup>181</sup> *Id.*