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THE CLEAN WATER ACT: WADING BACK INTO MUDDY INTERPRETATIONS

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I. INTRODUCTION

"Fresh water: everything that lives on land, animal or plant, depends upon it."[1] A necessity to our very livelihood, our nation's waters must be protected. As concern grows over Earth's stability, and environmental issues in particular, clean water has been at the forefront of this Gordian knot. To mitigate our nation's impact on water cleanliness, state organizations, environmental activists, and the Environmental Protection Agency have joined forces in an effort to create and enforce environmental protection.

These water quality efforts, however, have not come without struggle. The creation, enforcement, and efficiency of legislation to mitigate water pollution in certain water systems can only be described as subpar. The vague language in the Clean Water Act (CWA) and its interpretation is at the heart of these shortcomings. The CWA generally requires a federal permit known as a National Pollutant Discharge Elimination System (NPDES).[2] Those who discharge pollutants directly into navigable waters are undisputedly required to have this permit.[3] However, nonpoint sources—traditional regulatory authority governed by the states—have occasioned much dispute over the extent of these regulations.[4]

The Supreme Court's 6-3 decision in *Hawaii Wildlife Fund v. County of Maui* reinterpreted the CWA to require a NPDES permit for pollutant discharges into groundwater, a nonpoint source.[5] This new test undermines states' authorities in water quality control over nonpoint sources and creates practical problems such as defining and applying the test to regulated entities. Justice Breyer's decision to interpret the text in the broader context of the Act leads to speculation about Congressional intent that would not have occurred if the Supreme Court had adhered to the plain language in the text. Furthermore, Breyer's reading not only misinterprets the intentions of Congress by undermining traditional state authority over groundwater, but it also raises many practical issues such as a lack of guidance on how the test should be applied and to whom it applies.

Part I of this Note, as discussed above, explains how and why the Supreme Court's new test contravenes Congressional intention. Part II will discuss the facts and procedural history of *Hawaii Wildlife Fund v. County*

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[1] Our Planet, *Fresh Water*, YOUTUBE (Apr. 17, 2020), http://youtu.be/R2DU85qLfJQ.

[2] 33 U.S.C. § 1362.

[3] *Id.*

[4] *Id.* § 1251(b).

[5] 140 S. Ct. 1462, 1478 (2020).

of Maui. Part III will explore the relevant background and history of the law that governed and shaped this case and the CWA upon which it was based. Part IV will discuss the substances of the instant case. Part V will analyze the Supreme Court's conduct in misinterpreting the intentions of Congress and undermining the traditional authority of the states in groundwater regulation. Part V will also highlight the practical problems that the new test creates for courts by comparing the ruling to another Supreme Court case, *Rapanos v. United States*. Finally, Part V will show that although it reached a majority opinion, *Hawaii* could still be overturned by a change in the Court's composition. Part VI will conclude by summarizing the ways in which Justice Breyer's new test fails to reflect the intent of Congress, the other issues it causes, and its future applicability to environmental cases.

II. FACTS AND PROCEDURAL HISTORY

A. Procedural History

Hawaii Wildlife Fund, the Surfrider Foundation, the Sierra Club-Maui Group, and the West Maui Preservation Association brought action against the County of Maui alleging that the county violated the CWA by discharging effluent at four injection wells without a National Pollutant Discharge Elimination System (NPDES) permit.[6] The district court granted summary judgment in favor of Hawaii Wildlife Fund, holding that the County of Maui violated the CWA when it discharged pollutants from its wells into the Pacific Ocean.[7] The Wildlife Fund argued that the operation of their injection wells were point sources and therefore required an NPDES permit.[8] The United States District Court for the District of Hawaii held for the plaintiffs, agreeing that a permit was needed.[9]

Following this ruling, the County of Maui appealed the district court's summary judgment rulings to the Ninth Circuit Court of Appeals.[10] The Ninth Circuit affirmed the district court's findings and held that the CWA requires a permit when pollutants are "fairly traceable" to the original point source.[11] The County filed for writ of certiorari with the Supreme Court of the United States, arguing that the Ninth Circuit's test for defining

[6] *Id.* at 1466.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*

a point source conflicted with prior Supreme Court rulings.[12] The Supreme Court then granted certiorari to hear the matter, ultimately deciding the case on April 23, 2020.[13] The Court held that the CWA requires a permit when there is a direct discharge of pollutants from a point source into navigable waters or when there is the "functional equivalent" of a direct discharge.[14]

B. Facts

At the Lahaina Wastewater Reclamation Facility (LWRF), the County of Maui owned and operated four wells.[15] Operating since the 1980s, the LWRF was the principle municipal wastewater treatment plant for West Maui.[16] The LWRF received approximately four-million gallons of sewage a day from around forty-thousand people.[17] The wells were located deep underground and the primary means by which the County of Maui disposed of its sewage.[18] The County injected almost all of the "treated wastewater" into the groundwater via its wells.[19] Additionally, the County conceded that the wastewater injected into wells one and two entered the Pacific Ocean.[20] Wells three and four were also shown to have disposed of large amounts of wastewater into the Pacific Ocean via groundwater.[21]

Additionally, the County knew that the disposal into the wells discharged directly into the Pacific Ocean.[22] The County's consultant, Dr. Michael Chun, stated that the sewage, which was not used for reclamation purposes, would be injected into these wells and would then enter the ocean off the coast.[23] The County's expert went on to say that one out of every seven gallons of groundwater entering the ocean near the LWRF was comprised of sewage from the wells.[24]

In June 2013, the United States Environmental Protection Agency (EPA), the Hawaii Department of Health (HDOH), the United States Engineer Research and Development Center, and researchers at the

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[12] *Id*. at 1469.
[13] *Id*.
[14] *Id.* at 1477.
[15] *Id*. at 1483.
[16] *Id*.
[17] Hawaii Wildlife Fund v. County of Maui, 886 F.3d 737, 742 (9th Cir. 2018).
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Id*.

University of Hawaii conducted a tracer-dye study on Wells two, three, and four; the goal was to determine whether a "hydrological connection" existed between the sewage that was injected into the wells and the ocean water off the coast.[25] After placing the tracer dye into the wells, the study monitored the submarine seeps off the coast to determine if and when the tracer dye placed in the sewage would appear.[26] Eighty-four days after the tracer dye had been placed in the sewage, the tracers placed in Wells three and four began to appear.[27] The study determined that "64 percent" of the sewage injected into those wells was currently discharging at those submarine seeps off the coast.[28]

Under the CWA, a permit is required to add any pollutant from a point source to navigable waters.[29] The Lahaina water treatment facility discharged millions of gallons of recycled water into groundwater without an NPDES permit—all the while believing the conveyance of the pollution by groundwater, rather than by pipe, did not require it to obtain one.

III. BACKGROUND AND HISTORY OF THE LAW

A. The Clean Water Act

In 1972, Congress amended the Federal Water Pollution Control Act (FWPCA), commonly known as the Clean Water Act, to address concerns regarding the quality of the nation's waters and the federal government's ability to address them.[30] Before this amendment, water pollution and its control was the Army Corps of Engineers' responsibility under the Rivers and Harbors Act of 1899 (RHA).[31] This statute focused mainly on the restriction of obstructions to navigation in the United States' main waterways.[32] However, Section 13 of the RHA made it illegal to discharge pollutants "into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water."[33] Congress in 1948 also enacted the Water Pollution Control Act to address interstate water pollution, amending

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[25] *Id.* at 742-43.
[26] *Id*. at 743.
[27] *Id*.
[28] *Id*.
[29] 33 U.S.C. § 1311(a).
[30] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250, 22252 (April 21, 2020) (to be codified at 33 C.F.R. pt. 328).
[31] *Id*.
[32] *Id*.
[33] 33 U.S.C. § 407.

its provisions in 1956, 1961, and 1965.[34] These early statutes promoted "pollution abatement programs, required States to develop water quality standards, and authorized the Federal government to bring enforcement actions to abate water pollution."[35]

These early statutes, however, were largely ineffective in addressing the pollution problem in the nation's waters.[36] Therefore, in 1970, the Nixon administration established the EPA to coordinate efforts between the federal and state governments and to protect natural resources and the environment as a whole.[37] Soon after, in 1972, the CWA was enacted to "maintain the chemical, physical, and biological integrity" of the United States' waters.[38] The CWA recognized the responsibility of states in water pollution and was intended to provide funding to assist the states in creating publicly-owned water treatment works.[39] The CWA was one of the earliest and most influential environmental laws in modern times. The Act's regulations and laws are administered primarily by the EPA and the Army Corps of Engineers.[40]

Additionally, Congress provided a role for the states to exercise their own authority, preserving the traditional power of the states to regulate land and water resources within their borders.[41] That statute affirmed that Congress intended "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources."[42] Importantly, Congress noted that "[e]xcept as expressly provided in this Act, nothing in this Act, shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters of such States."[43]

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[34] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. at 22252.

[35] *Id*.

[36] *See* City of Milwaukee v. Illinois, 451 S. Ct. 304, 310 (1981).

[37] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. at 22252.

[38] 33 U.S.C. § 1251(a).

[39] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. at 22252.

[40] *Id*.

[41] *Id*.

[42] 33 U.S.C. § 1251(b).

[43] *Id*. § 1370.

B. Regulatory History

Congress created the federal regulatory permitting program to address pollutants discharged into "navigable waters"—defined by Congress as "the waters of the United States."[44] Under this provision, the "discharge of any pollutant by any person shall be unlawful."[45] A "discharge of any pollutant" is further defined to mean "any addition of any pollutant to navigable waters from any point source."[46] A "point source" is defined as "any discernible, confined and discrete conveyance."[47] Unless a discharge is in compliance with certain sections of the CWA which require obtaining a NPDES permit, discharge of pollution into navigable waters is unlawful.[48]

The CWA implemented the National Pollutant Discharge Elimination System to regulate point sources of pollution.[49] Point sources typically include industrial facilities, sewage treatment plants, and some agricultural facilities.[50] Although the CWA regulates point sources, certain types of water pollution, known as nonpoint sources, are exempt from the permitting system.[51]

Nonpoint sources are defined as any source of water pollution that is not a point source as defined by the Clean Water Act.[52] Some examples include stormwater runoff, precipitation, drainage, seepage, and other types of hydrological modification.[53] Because nonpoint-source pollution was excluded from the permit system and the CWA in general, states were authorized in the Act to regulate these types of water pollution sources.[54] Since the enactment of the CWA and implementation of the NPDES permitting system, nonpoint sources have been regulated by individual states.[55] With this permit system and state-run nonpoint-source program in place, Congress intended to address pollution of all waters by non-regulatory and federally-regulated means.[56]

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[44] *Id*. § 1362(7).
[45] *Id*. § 1311(a).
[46] *Id*. § 1362(12).
[47] *Id*. § 1362(14).
[48] *Id*. § 1311(a).
[49] *Id*.
[50] *Id*.
[51] *Id*. §§ 301, 844.
[52] *Id*. § 1251.
[53] *Id*. § 319.
[54] *Id*. § 1370.
[55] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. at 22252.
[56] *Id*. at 22253.

C. Supreme Court Decisions

Because of the vague language in the CWA, there has been a substantial amount of litigation to define the terms and overall scope of the Act.[57] "Hundreds of cases and dozens of courts have attempted to discern the intent of Congress when crafting the phrase," "waters of the United States."[58] A recent Supreme Court case, *Rapanos v. United States*, was instrumental in defining "waters of the United States" and its regulations to provide direction for agencies.[59]

Rapanos involved two consolidated cases in which the CWA applied to wetlands near man-made ditches that were connected to traditional navigable waters.[60] Without filing for a permit, John Rapanos filled in twenty-two acres of wetlands that he owned with sand in order to construct a mall.[61] Rapanos's land was located twenty miles from any navigable water.[62] However, the term "navigable water" had been broadly defined to include areas that, like his, were connected to navigable waters through tributaries or otherwise.[63]

Justice Scalia argued that this broad interpretation of "navigable waters" "stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power."[64] Furthermore, Scalia asserted that the regulation of land use through the issuance of permits is a "quintessential state and local power."[65] Scalia therefore argued that the Act should be read strictly to define "navigable waters" as relatively permanent and ought not include drainage systems or channels from rainfall.[66]

The Supreme Court reached a split decision regarding whether the federal government had the jurisdiction to regulate wetlands under the CWA.[67] The *Rapanos* Court also defined what constituted "navigable waters":

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[57] Environmental Law Institute, *Basics of the Clean Water Act* (ELI Summer School), YOUTUBE (June 27, 2018), https://youtu.be/nQpKWRP_B68.

[58] Rapanos v. United States, 547 S. Ct. 715, 739 (2006) (Scalia, J., plurality).

[59] *Id*.

[60] *Id*.

[61] *Id*. at 730.

[62] *Id*.

[63] *Id*. at 739.

[64] *Id*.

[65] *Id*. at 739.

[66] *Id*.

[67] *Id*.

> "navigable waters" includes only relatively permanent, standing or flowing bodies of water, not intermittent or ephemeral flows of water, and only those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right are adjacent to such waters and covered by the CWA.[68]

Because the *Rapanos* case was a split decision, many lower courts have also looked to Justice Kennedy's concurring opinion as an authority. Kennedy argued that wetlands and non-navigable waters should fall within the scope of the CWA if there is a "significant nexus" to a traditional navigable waterway.[69] Kennedy defined a "significant nexus" as existing where the wetlands or waterway, by itself or in connection with other waterways, significantly affects the physical, biological, and chemical integrity of the downstream navigable water.[70] Kennedy disagreed with Scalia's argument that wetlands were not covered by the Act, contending that wetlands are essential ecosystems intimately intertwined with the navigable waters the CWA sets out to protect.[71]

This debate led to a change in the EPA's Waters of the United States, or WOTUS, rule in 2019.[72] The new rule, put into place by the Trump administration, relied on Justice Scalia's plain reading of the text.[73] The Navigable Waters Protection Rule sought to clarify the definition of the term "waters of the United States."[74] This rule, according to the EPA, is for "[r]estoring the Rule of Law, Federalism, and Economic Growth."[75] Along with shrinking the scope of the CWA, the WOTUS rule rejects the idea that groundwater and other subsurface connections can be a basis for finding CWA jurisdiction.[76] Although it was enacted before the case this note analyses—*Hawaii Wildlife Fund v. County of Maui*—reached the Supreme Court, the WOTUS rule is expected to reach the Supreme Court in the future since *Rapanos*'s interpretation is highly debated.

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[68] *Id*.
[69] *Id*. at 760.
[70] *Id*.
[71] *Id*.
[72] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. at 22250.
[73] *Id*.
[74] *Id*.
[75] *Id*.
[76] *Id.* at 22313.

IV. INSTANT CASE

A. Justice Breyer's Majority Opinion

On April 23, 2020, the Supreme Court changed the standard set forth in WOTUS. In *Hawaii Wildlife Fund v. County of Maui,* the Court had to answer the following question: does the CWA prohibit the unpermitted discharge of pollutants from a point source into groundwater, or does its ban only apply to discharge directly into navigable waters?[77] The Supreme Court in *Hawaii* reached a holding that contravened Congressional intent as well as the scope and power of the CWA. The Court in this case expanded regulation by requiring permits for nonpoint sources that are the "functional equivalent" of a direct discharge, whereas nonpoint sources had previously been excluded from coverage under the CWA.

In *Hawaii,* the Lahaina Wastewater Reclamation Facility (LWRF) in the County of Maui treated wastewater from homes and business located nearby.[78] Authorized by the EPA and the Hawaii Department of Health, LWRF was allowed to inject the wastewater into wells on the island.[79] The EPA and Hawaii determined when building the facility that an NPDES permit was unnecessary since, under the CWA, the well was not a point source.[80] The Supreme Court created a new standard in holding that the CWA requires a permit when there is a "functional equivalent" of a direct discharge.[81] The reasoning behind this decision resulted from an attempt to find a middle ground between two proposed tests.[82]

The County of Maui proposed the first test, which the Court thought was too narrow.[83] Essentially, the County of Maui argued that the CWA does not apply if the pollutant must travel through any groundwater before reaching navigable waters.[84] Were the County's narrow reading adopted, the Court quipped, "then why could not the pipe's owner, seeking to avoid the permit requirement, simply move the pipe back, perhaps only a few yards, so that the pollution must travel through at least some ground water before reaching the sea?"[85] The Court went on: "consider a pipe that spews pollution directly into coastal waters. There is an addition of a pollutant to

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[77] 140 S. Ct. at 1470.
[78] *Id*. at 1466.
[79] *Id*. at 1483.
[80] *Id*.
[81] *Id*. at 1477.
[82] *Id*.
[83] *Id*. at 1473.
[84] *Id*.
[85] *Id.*

navigable waters from a point source. Hence, a permit is required."[86] The Court saw a problem in being able to circumvent the Act so easily and did not believe Congress intended to create such a loophole.

The Court found the second test, proposed by the Ninth Circuit, too broad in that it gave the EPA power that it was not intended to have.[87] The Ninth Circuit borrowed language from Justice Scalia's *Rapanos* opinion in which he suggested that permits may be required if pollutants "pass through conveyances" on their way to navigable waters.[88] The Ninth Circuit used this language and claimed that the wastewater facility must be subject to a permit when pollutants were "fairly traceable" to the original point source.[89] The Supreme Court, however, deemed this standard too broad for several reasons.[90]

All water will eventually enter navigable waters at some point. In modern times, with the evolution of tracer tests and other methods involving water and its movements, it would be easy, the Court reasoned, for the EPA to exert broad control over permitting power if the Ninth Circuit's "fairly traceable" statutory requirement were to be realized.[91] The Court also dispelled the argument from the Ninth Circuit that the standard could be narrowed by adding a "proximate cause" requirement.[92] To that end, the majority argued that a "proximate cause" requirement was rooted in tort law and based on policy considerations that would not significantly narrow the "fairly traceable" standard.[93]

First, the Court argued that interpreting the word "from" in the literal way in which the Ninth Circuit argued would be bizarre at best.[94] The scenarios that would follow, the Court held, would create results that were obviously neither intended nor comprehended in the creation of the CWA.[95] For example, the Ninth Circuit's interpretation would require the EPA to regulate pollutants carried by water on a bird's feathers.[96] According to the Court, this broad interpretation suggested by the Ninth Circuit would lead to surprising and bizarre results such as having to maintain a permit under these circumstances.[97]

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[86] *Id*.
[87] *Rapanos*, 547 S. Ct. at 757.
[88] *Hawaii*, 140 S. Ct. at 1482.
[89] *Id*. at 1466.
[90] *Id*. at 1471
[91] *Id*.
[92] *Id*. at 1470-71.
[93] *Id*.
[94] *Id*. at 1471.
[95] *Id*. at 1470.
[96] *Id.* at 1471.
[97] *Id*.

Second, the Court noted that the statute's structure did not condone the Ninth Circuit's proposed test.[98] Congress intended to leave substantial responsibility to the states in regulation and maintenance of navigable waters.[99] The Supreme Court cited to a study finding that much of the pollution that exists in water does not come from a readily identifiable source.[100] States, therefore, have developed methods for controlling nonpoint-source pollution by using water-quality control standards.[101] To that end, the CWA grants the EPA authority over point-source pollution into navigable waters but leaves out any language regarding non-point source pollution.[102] The Court concluded that granting this power would overextend the authority that the Act specifically gives to the EPA.[103]

Third, the Court looked to legislative history to determine the intent and scope of the Act.[104] When reviewing the fifty-year history and the bills that came to be encapsulated in the Act, Congress expressly rejected the EPA's authority over groundwater.[105] Instead, Congress laid out state requirements and controls to maintain "affirmative controls over the injection or placement of wells of any pollutants that may affect ground water."[106] Aware of the need to control groundwater pollution at its source, Congress vested groundwater regulatory authority in the states.[107]

In an attempt to reach a Goldilocks standard, the Supreme Court decided to require a permit for point sources or nonpoint sources if the nonpoint source is the "functional equivalent" of a direct discharge.[108] This new test imposed CWA regulations over sources that were never subject to the NPDES permitting system since the enactment of the Act in 1972. Similar to the Ninth Circuit's "fairly traceable" test, the "functional equivalent" test requires new rules to be developed that will need to be applied to the five-hundred-thousand wells similar to the Hawaii wastewater facility. The vague guidelines in the *Hawaii* decision seemingly uproot forty years of water pollution regulation. Although the goal was to increase the efficiency of federal regulation through the permit process, the Supreme Court only succeeded in making the permitting

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[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.* at 1473.
[104] *Id.*
[105] *Id.* at 1472.
[106] *Id.*
[107] *Id.*
[108] *Id.* at 1477.

process more confusing and subjecting the EPA to a flood of possible permit applications for the future.

B. Justice Kavanaugh's Concurrence

Justice Kavanaugh concurred primarily to point out that the problem with the case lay in the Congress's language—not the conclusions of the Supreme Court. Kavanaugh also argued that the majority decision was in line with the Court's previous decision in *Rapanos*.[109]

C. Justice Thomas's Dissent

Justice Thomas disagreed with the majority's opinion in several respects. Thomas took the stance that the CWA was not authorized to grant such expansive powers and only required a permit when pollution was discharged directly into navigable waters.[110] Thomas contended that the majority engaged in too much of an "open-ended inquiry into congressional intent."[111] However, Thomas agreed with the Court that the Ninth Circuit's interpretation was unsupportable in that it was "atextual and unsettle[d] the CWA's careful balance between federal regulation of point-source and state regulation of nonpoint-source pollution."[112] Thomas also agreed that the EPA's interpretation was not entitled to deference.[113]

D. Justice Alito's Dissent

Justice Alito's dissent also disagreed with the Court's holding, asserting that the CWA was not authorized to have such expansive power.[114] He also took major issue with the lack of guidance in applying the majority's test and its vagueness.[115] He was critical of the Court's creating its own test despite the CWA never stating anything about a "functional equivalent"; Alito would have read the text literally rather than create this new language.[116] He did not want courts to have to feel their way through this permitting process on a case-by-case basis.[117]

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[109] *Id*. at 1478.
[110] *Id*. at 1479.
[111] *Id*.
[112] *Id*. at 1482.
[113] *Id*.
[114] *Id*. at 1484.
[115] *Id*.
[116] *Id*.
[117] *Id*.

V. ANALYSIS

A. Congressional Intent

The CWA was one of the United States' first and most influential modern environmental laws. Congress intended the CWA to "maintain the chemical, physical, and biological integrity of the United States' waters."[118] To achieve this goal, the Act requires a federal permit for "the discharge of any pollutants by any person."[119] The Act defines "discharge" as "any addition of any pollutant to navigable waters from any point source."[120] Based upon the text and structure of the Act, a permit appears to be required only when a point source directly discharges into navigable waters.

Departing from the statutory language set out by Congress, Justice Breyer's majority opinion in *Hawaii* requires a permit when there is a "functional equivalent of a direct discharge."[121] Breyer argued that this vague new test was a great middle ground and best captured "Congress's basic aim to provide federal regulation of identifiable sources of pollutants entering navigable waters without undermining the States' longstanding regulatory authority over land and groundwater."[122] However, this unclear test fails to capture Congress's intention by expanding the Act to now cover pollution in any groundwater determined to be the "functional equivalent" of a direct discharge.

The main problem with the Court's test is that it does not capture Congress's intentions, laying down legal rules other than those enacted by Congress. By creating a "middle ground" with structural language not included in the act, the majority engaged in speculation as to "those circumstances in which Congress intended to require a federal permit."[123] As Justice Thomas noted in his dissent, the Court is not a super legislature "tasked with making good policy."[124] Rather, it is bound to follow the text to the best of the Court's ability, specifically by looking to the structure of the Act in context. The majority argued that this test was necessary to capture Congress's aim, but the Court overlooked the role of the NPDES permit program for point sources in relation to traditional state regulations.[125] The majority's decision raises federalism concerns despite its argument to the contrary. Because nonpoint sources are such a broad

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[118] 33 U.S.C. § 1251(a).
[119] *Id.* § 1311(a).
[120] *Id.* § 1362(12).
[121] *Hawaii*, 140 S. Ct. at 1477.
[122] *Id.* at 1467.
[123] *Id.* at 1476.
[124] *Id.* at 1482.
[125] *Id.* at 1477.

category of pollution, the "functional equivalent" standard could potentially apply to individuals and the use of their land. Land-use regulation is a traditional authority governed by the states. In this way, federal regulation over nonpoint source pollution necessarily raises federalism issues that the majority argued do not exist.

The need for states to interpret the Act by its text without "devising [their] own legal rules"[126] conforms to Congress's intentions. Leaving out regulatory authority over groundwater pollution was deliberate.[127] Congress was fully aware of the need to regulate groundwater pollution when the Act was enacted;[128] in fact, the majority actually made this point.[129] This broad category of pollution was left out because the general authority over groundwater pollution was left to the states.[130] Therefore, the "massive loophole" the majority argued was created by interpreting the Act as written was actually there because the area not covered was nonpoint-source regulation—an area meant to be regulated by the states rather than the federal government.[131]

To interpret the intentions of Congress, it is necessary to define the language requiring a permit in a way that makes sense without creating new law. The language that must be defined is the statutory definition of discharge. According to the CWA, discharge is defined as "any addition of any pollutant to navigable waters from any point source."[132] This language has long been a source of debate on what is meant by certain terms in the CWA's definition of discharge. There are several ways to approach interpretation of these terms. However, interpretation must adhere to the text because any other approach would require the Court to engage in speculation and create new and potentially unintended law—just like the majority did in this case.

The majority focused on the word "from" to interpret the meaning of discharge. However, the Court failed to look at other words in the statute that were more descriptive of Congress's intentions. The word "addition" and "to," taken together, confirm that the permit requirement only applies to direct discharges rather than indirect discharges. According to the dictionary definition, the word "addition" is "the action or process of adding something to something else."[133] The word "to" is defined as "expressing

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[126] *Id*. at 1482.
[127] *Id*. at 1473.
[128] *Id.*
[129] *Id*.
[130] *Id*. at 1474.
[131] *Id*. at 1476.
[132] 33 U.S.C. § 1362(12)(A).
[133] *Addition*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/addition (last visited Feb. 19, 2021).

location, typically in relation to a specified point of reference."[134] Applying these definitions to the word "from"—defined as "indicating the point in space at which a journey, motion, or action starts"[135]—indicates that a NPDES permit is required only for a *direct* discharge. The Act can essentially be read to refer to the action or process of adding a pollutant to navigable waters (the specified point) from a point source (the point in space in which the action starts). When the term "from" is read with the terms "addition" and "to," interpretation is limited to a specific location from which the action came directly as opposed to indirectly.

Not only does the "functional equivalent" test broaden the terms in the Act, but it also raises practical concerns. As stated by Justice Alito, the Court made this new test with little guidance on how to apply it.[136] The Court recognized this but explained a list of potential factors that could possibly help along with "administrative guidance" from the EPA.[137] These seven factors, though, are only suggestions based on what the Court thought would be relevant in applying the test, and they offer minimal guidance at best.

Although the Court acknowledged the administrative guidance by the EPA, the EPA has a long history of changing the interpretations and scope of the Act, creating a great deal of uncertainty where reliance on the agency is concerned. It can be argued that regardless of whether the EPA changes the scope of the test, courts will still have to defer to the agency's current definition based on general principles of deference. In fact, deferral to the EPA's interpretation could have been argued in this case. Although the Court mentioned this, it was not argued—most likely because many Supreme Court Justices, particularly those who are traditionally conservative, believed such deference unconstitutional.[138]

Since interpretations by the EPA can be changed, the vagueness of the Court's test will frustrate not only the lower courts but also regulated entities. "Regulated entities need to know beforehand whether a permit is required and where, in [the CWA], penalties for noncompliance are so severe."[139] This lack of predictability for regulated entities additionally calls for the need to interpret the Act textually rather than by speculation into Congressional intent, as here. In sum, the practical problems this test creates make the test unclear and offer little guidance to the lower courts.

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[134] *To*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/to (last visited Feb. 19, 2021).

[135] *From*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/from (last visited Feb. 19, 2021).

[136] *Hawaii*, 140 S. Ct. at 1485.

[137] *Id*. at 1477.

[138] *Id*. at 1475.

[139] *Id*. at 1490.

The practical and federalism issues with speculating on congressional intent are exemplified in the *Rapanos* case. In *Rapanos*, the Supreme Court reached a plurality decision on a claim challenging federal jurisdiction to regulate isolated wetlands under the CWA.[140] In *Rapanos*, the Court defined the term "navigable waters," which had been interpreted broadly by the Army Corps of Engineers.[141] The Supreme Court reached a split decision in which Justice Scalia wrote the plurality opinion, while Justices Roberts and Kennedy wrote concurring opinions and Justices Stevens and Breyer authored dissenting opinions. Scalia's and Kennedy's opinions both laid out different interpretations of "navigable waters."[142]

Justice Kennedy stated in his concurring opinion that a wetland or non-navigable waterbody falls within the scope of the CWA's jurisdiction if it bears a "significant nexus" to a traditional navigable waterway.[143] Justice Scalia argued in his plurality opinion that Kennedy's significant nexus test was a "gimmick" to devise "his new statute all on his own" and that his reasoning was "[t]urtles all the way down."[144] Scalia contended that Kennedy's opinion "[left] the Act's 'text' and 'structure' virtually unaddressed and rest[ed] its case upon an interpretation of the phrase 'significant nexus,' which appear[ed] in one of [the Court's] earlier opinions."[145] Kennedy's opinion would have required the Corps of Engineers to establish whether there was a significant nexus on a case-by-case basis. Instead, Scalia took a textualist approach to "waters of the United States."

Scalia stated in the plurality opinion that the CWA confers jurisdiction over non-navigable waters only if the waters exhibit "relatively permanent, standing or continuously flowing bodies of water."[146] His reasoning was based on the definition of "waters" in *Webster's Dictionary*.[147] Additionally, he believed his conclusions conformed with basic principles of federalism and quoted the Act's policy to "protect the primary responsibilities and rights of the States."[148]

Similarly, Justice Breyer created the "functional equivalent" test in *Hawaii* to determine whether the Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source. However, like Kennedy's "significant nexus" test in

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[140] *Rapanos*, 547 U.S. at 715.
[141] *Id*.
[142] *Id*.
[143] *Id*.
[144] *Id*. at 755.
[145] *Id*.
[146] *Id*. at 739.
[147] *Id.*
[148] *Id*. at 717.

Rapanos, Breyer's "functional equivalent" test leaves the Act's "text" and "structure" unaddressed. By adding this test, "the Court [has departed] from the statutory text by requiring a permit for "the functional equivalent of a direct discharge," which it defined through an open-ended inquiry into congressional intent and practical considerations.[149]

The structure of the CWA authorizes the EPA to regulate discharges from point sources through means such as the NPDES permit regime.[150] However, it reserves to the states the responsibility to regulate pollution in groundwater.[151] In his dissent, Justice Thomas correctly pointed out that "construing the EPA's power to regulate point sources to allow the agency to regulate nonpoint sources and groundwater is in serious tension with Congress's design."[152] Specifically, Congress expressly delineated in the Act its "policy . . . to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution."[153] The authority of the states in regulating groundwater pollution is perhaps the most important structure of the statute that Congress intended.[154] Although Justice Breyer's majority opinion recognized this, his new standard necessarily gave the Act power to regulate matters traditionally reserved to the states, which it expressly set out, not to control, but to "recognize, preserve, and protect."[155]

B. Future Impact On Ruling

The holding in *Hawaii* is contrary to congressional intent because it undermines state authority over regulating groundwater, creating unnecessary practical issues that could be avoided through adherence to the text. However, because of a change in the Court's composition after the appointment of Justice Amy Coney Barrett to replace Justice Ginsberg, the majority's holding could potentially be changed. Justice Barrett was appointed to the Supreme Court of the United States on October 27, 2020, by President Donald Trump.[156] Before being appointed to the Supreme Court, Barrett served as a judge on the United States Court of Appeals for

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[149] *Id*. at 715.

[150] *Id*.

[151] 33. U.S.C. § 1251.

[152] *Hawaii*, 140 U.S. at 1480.

[153] 33 U.S.C. § 1251(b).

[154] Federal Water Pollution Control Act, ch. 758, §101(b), 86 Stat. 816 (1972) (current version at 33 U.S.C. § 1251).

[155] 33. U.S.C. § 1251(b).

[156] Pamela King, *Water Case Offers a Window into Barrett's Jurisprudence*, POLOTICOPRO, https://subscriber.politicopro.com/article/eenews/1063714885 (last visited Sep. 28, 2020).

the Seventh Circuit since 2017.[157] Having clerked for Justice Scalia, Barret is recognized personally and publicly as his protégé.[158] However, while serving as a circuit judge, Barrett joined, but did not write, the court's decision in *Orchard Hill Building Company v. Army Corps of Engineers*, a case in which the circuit court applied Kennedy's "significant nexus" test rather than Scalia's.[159]

This 2018 case ruled on the issue of whether wetlands owned by Orchard were under the jurisdiction of the CWA.[160] In applying Kennedy's test from *Rapanos*, the Seventh Circuit found that the Corps of Engineers had not provided substantial evidence that the wetlands had a "significant nexus" with the Little Calumet River.[161] In joining that opinion, Barrett not only ruled against a more expansive reading of the CWA, but she also dismissed her mentor Scalia's opinion from the *Rapanos* case.[162] The dismissal of Scalia's opinion from *Rapanos* leaves open the possibility of interesting outcomes for future environmental cases that will reach the Supreme Court—cases like those involving President Trump's WOTUS rule.[163]

Trump's new WOTUS rule, which went into effect June 22, 2020, applies Justice Scalia's interpretation of "navigable waters" instead of Justice Kennedy's "significant nexus" test.[164] This clarification expressly restricts federal regulation over groundwater and the federal government from using groundwater as an indirect source of CWA jurisdiction.[165] As the rule states:

> "The agencies believe that implementation of subsurface connections as a basis for CWA jurisdiction would be over-inclusive and would encroach on State and tribal authority over land and water resources . . . . A groundwater or subsurface connection could also be confusing and difficult to implement, including in the determination of whether a subsurface connection exists and to what extent."[166]

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[157] *Id*.
[158] *Id*.
[159] *Id*.
[160] *Id*.
[161] *Id*.
[162] *Id*.
[163] *Id*.
[164] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250 (April 21, 2020) (to be codified at 33 C.F.R. pt. 328).
[165] *See id.*
[166] *Id*. at 22313.

Litigation of this new rule has already begun and is expected to potentially reach the Supreme Court. One such case, *Chesapeake Bay Foundation v. Wheeler*, alleges the new rule creates illegal regulatory efforts and is in conflict with the purpose and mandates of the CWA.[167] To that end, the new ruling also directly conflicts with the holding in *Hawaii* that laid out the ability to find regulation under the CWA through groundwater if the discharge was "functionally equivalent" to a direct discharge. It is likely that the Supreme Court's interpretation will be used as an argument against the implementation of the rule.

The addition of Justice Barrett to the Supreme Court creates the perfect storm not only to solve the *Rapanos* split on the interpretation of "navigable waters," but also to invalidate the holding in *Hawaii*. If the new WOTUS rule reaches the Supreme Court and Barrett decides to follow her holding from *Orchard*, *Hawaii* could very well be washed out.

VI. CONCLUSION

The Clean Water Act's objective is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters."[168] To achieve this goal, the Supreme Court should have adhered to the plain language in the Act rather than interpreting through context. The expansion of the EPA into state authority by subjecting nonpoint sources like groundwater to an expensive and lengthy permitting process only further complicates mitigation efforts. Although the Supreme Court in *Hawaii* attempted to stop evasive techniques and assist in the CWA's objective, the Court added little to the clarification and implementation of its core principles. However, there is a possibility the decision could be invalidated by a change in the Court's composition with the addition of Justice Barrett—assuming, that is, the new WOTUS rule makes its way to the Supreme Court in the near future. One thing is certain: interpretations of the CWA have never been muddier.

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[167] Julie Michalski et al., *US Supreme Court Wades into Groundwater with* County of Maui v. Hawaii Wildlife Fund, *Leaves Muddy Path Forward*, STEPTOE, https://www.steptoe.com/en/news-publications/us-supreme-court-wades-into-groundwater-with-county-of-maui-v-hawaii-wildlife-fund-leaves-muddy-path-forward.html (last visited Apr 27, 2020).

[168] 33. U.S.C. § 1251(a).