

The Clean Water Act's Illusion of Uniformity: A Siren's Song

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INTRODUCTION

“[N]ow pay attention to what I am about to tell you . . . First you will come to the Sirens who enchant all who come near them. If anyone unwarily draws in too close and hears the singing of the Sirens, his wife and children will never welcome him home again, for they sit in a green field and warble him to death with the sweetness of their song.”¹ A siren's song is a temptation—an alluring utterance that is seductive and deceptive.² The phrase is employed to describe something that may seem attractive at first glance, but later is revealed to be dangerous or destructive.

While the United States' environmental agenda may seem effective, it is arguably a seductive mirage due to the confusion it creates in judicial applicability—a siren's song. Although *The Odyssey* was written in the eighth century B.C.E., before modern law, many of its allegories remain true today.³ Unlike the times of barbarianism in which the epic was authored, contemporary law exists to shroud the citizenry from abuses and to promote its safety.⁴ Currently, the United States has over 1,550 federal laws.⁵ States have individual laws, and all but one of them follow the

* Notes Editor, Vol. 15 of the KY. J. EQUINE, AGRIC. & NAT. RES. L.; B.A. International Studies, 2020, Centre College; J.D. expected May 2023, University of Kentucky J. David Rosenberg College of Law.

¹ HOMER, *THE ODYSSEY* loc. Book XII (Samuel Butler trans., 2nd ed. 1921) (ebook).

² *Siren's Song*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/siren%20song><https://www.merriam-webster.com/dictionary/siren%20song> (last viewed Nov. 3, 2021) [<https://perma.cc/W8CK-XYR>].

³ Mark Cartwright, *Odyssey*, WORLD HISTORY ENCYCLOPEDIA, <https://www.worldhistory.org/Odyssey/> (last viewed Nov. 3, 2021) [<https://perma.cc/5WUU-W69F>].

⁴ *Law and the Rule of Law*, JUD. LEARNING CTR., <https://judiciallearningcenter.org/law-and-the-rule-of-law/> (last viewed Nov. 3, 2021) [<https://perma.cc/D9NQ-X976>].

⁵ *Law Database Coverage Details*, GLOBAL-REGULATION, <https://www.global-regulation.com/coverage.php> (last viewed Nov. 3, 2021) [<https://perma.cc/L5Q4-WKDM-SM3Z-APV80>].

common law.⁶ Almost every aspect of modern society is regulated; however, the United States did not seriously focus on regulating the environment until the 1960s.⁷ The federal government's goal in environmental regulation is to protect the environment for future generations while limiting interference with the efficiency of commerce and individual liberty, and to limit inequality related to environmental costs.⁸

However, the United States faces sharp criticism related to the federal government's management of the environment in the wake of global warming. Approximately two-thirds of United States citizens believe the government is failing to address the malignant effects of climate change.⁹ Similarly, two-thirds of Americans believe global climate change should be a top priority for the President and Congress.¹⁰ Most Americans argue that stricter environmental regulations and enforcement are worth the cost to jobs and the economy.¹¹ Six-in-ten Americans report witnessing local effects of climate change in the United States.¹² From such statistics, it is evident that a majority of American citizens do not feel that the environment has been regulated in a sustainable or reasonable manner throughout the United States.

Yet, federal and state laws do exist, *inter alia*, to protect our nation's land, water, soil, and biodiversity.¹³ However, the mere existence of a law does not protect the environment. Such laws need to be applied and enforced to be effective. Without application and enforcement, the United States' regulatory scheme resembles the dangers faced by Odysseus and his crew—the sirens' songs.

⁶ *Common Law*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/common_law (last viewed Nov. 3, 2021) [<https://perma.cc/W8HE-9LZ6>].

⁷ *EPA and a Brief History of Environmental Law in the United States*, ENV'T PROT. AGENCY (Nov. 3, 2021), https://cfpub.epa.gov/si/si_public_record_report.cfm?Lab=NERL&dirEntryId=319430 [<https://perma.cc/E7PL-K6LS>].

⁸ *Id.*

⁹ Cary Funk & Brian Kennedy, *How Americans See Climate Change and the Environment in 7 Charts*, PEW RSCH. CTR. (Apr. 21, 2020), <https://www.pewresearch.org/fact-tank/2020/04/21/how-americans-see-climate-change-and-the-environment-in-7-charts/> [<https://perma.cc/Q4E9-K95F>].

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Laws & Regulations*, ENV'T PROT. AGENCY (Aug. 16, 2021), <https://www.epa.gov/laws-regulations/laws-and-executive-orders> (Primarily, the Clean Air Act, Clean Water Act, Endangered Species Act, and National Environmental Policy Act) [<https://perma.cc/57TN-3XLK>].

The regulatory scheme seems beneficial facially, as its goal, generally, is to promote sustainable environmental practices.¹⁴ However, a more exacting analysis reveals dangerous flaws, specifically in the application of federal environmental water laws.

In 1970, the federal government, under the helm of President Nixon, formed the Environmental Protection Agency (“EPA”). The organization now acts as a watchdog—enforcing environmental regulatory water laws.¹⁵ For example, the EPA monitors wastewater management, water pretreatment, stormwater pollution, animal waste from concentrated animal feeding operations, spill management, and the protection of wetlands under the Clean Water Act.¹⁶ In the United States, environmental civil liability is a strict liability offense, arising through the mere existence of a violation of an environmental regulation.¹⁷ Criminal sanctions can be imposed upon culpable individuals who intentionally violate environmental regulations.¹⁸ The EPA is a powerful enforcement mechanism, boasting success stories from New York to Florida.¹⁹

Unfortunately, the judicial application of federal environmental law in the United States is less effective. This Note addresses the application of the Clean Water Act (“the Act”) by the third branch. Part I discusses the history of water-related federal environmental statutes in the United States, culminating in the Act. Part II addresses the application of the Act in the federal circuits, specifically, why the Sixth Circuit has imposed liability under the Act in a different manner than all the other Circuits. Part III proposes solutions to the circuit split under the recently amended Act, and advocates for a goal of uniformity in the application of the Act throughout the country.

¹⁴ *See id.*

¹⁵ *Enforcement*, ENV'T PROT. AGENCY (Oct. 1, 2021), <https://www.epa.gov/enforcement> [https://perma.cc/8XMN-4XVP].

¹⁶ *Water Enforcement*, ENV'T PROT. AGENCY (July 13, 2021), <https://www.epa.gov/enforcement/water-enforcement> [https://perma.cc/948F-KXM2].

¹⁷ *Basic Information on Enforcement*, ENV'T PROT. AGENCY (Jan. 13, 2021), <https://www.epa.gov/enforcement/basic-information-enforcement> [https://perma.cc/85BT-CWS7].

¹⁸ *Id.*

¹⁹ *Cleanup and Reuse Success Stories: Cleanup Enforcement Benefits Communities*, ENV'T PROT. AGENCY (June 15, 2021), <https://www.epa.gov/enforcement/cleanup-and-reuse-success-stories-cleanup-enforcement-benefits-communities> [https://perma.cc/7TJP-5MVV].

I. THE HISTORICAL PURVIEW OF THE CLEAN WATER ACT

The United States' water quality program found its origin in the 1899 Refuse Act, which prevented dumping “refuse” in navigable waters.²⁰ The Refuse Act was executed to prevent the impediment of navigable waters or the construction of public works—preservation of water quality was clearly *not* the objective.²¹ The impetus for better national water quality standards materialized half a century later, under the Federal Water Pollution Control Act (“FWPCA”) of 1948.²² In that age, water pollution was primarily viewed as a state problem; the FWPCA provided state and local governments with subsidies to address the protection and research of water quality.²³ The FWPCA was amended four times throughout the 1950s and 1960s, to promote federal assistance to municipal refuse dischargers.²⁴ This era witnessed a growing expansion of federal regulatory programs applied to interstate and intrastate waters.²⁵

An amendment to the FWPCA in 1965 set the federal government’s sights on national water quality standards.²⁶ The amendment required the states to set standards for interstate waters to determine pollution levels and control requirements.²⁷ While the amendment promised to uphold the health of our nation’s aquatic ecosystems, its goal of maintaining beneficial water quality proved to be an mere façade.²⁸ The amended FWPCA continuously faced criticisms for its time-consuming process and the difficulties inherent in linking particular pollutive dischargers with violations of water quality standards.²⁹ Further, pollution cleanup efforts under the FWPCA were slow-paced and control technologies were never applied in a uniform manner among the

²⁰ 33 U.S.C. § 407 (1899).

²¹ *Id.*; See also Charles W. Howe, *The U.S. Environmental Policy Experience: A Critique with Suggestions for the European Community*, THE OFF. J. OF THE EUR. ASS’N OF ENV’T & RES. ECON. 366 (1993) (arguing early united states water regulations failed to address water quality).

²² CLAUDIA COPELAND, CONG. RSCH. SERV., RL30030, CLEAN WATER ACT: A SUMMARY OF THE LAW 2 (2016).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ CLAUDIA COPELAND, CONG. RSCH. SERV., RL30030, CLEAN WATER ACT: A SUMMARY OF THE LAW 2 (2016).

²⁹ *Id.*

states.³⁰

Frustrated public sentiment and perception led to the FWCPA again being amended in 1972 and renamed the Clean Water Act.³¹ The Act had an ambitious goals: culling the basic components of the old statutes, and replacing them with hefty new laws.³² Broadly, the Act required *all* municipal and industrial wastewater to be treated before it was discharged into navigable waters, increased federal aid for municipal treatment plants, gave teeth to enforcement mechanisms, and expanded the federal role while preserving state responsibility for the implementation of the law's regulations.³³ The Act's principal goal was, and is, the "*restoration and maintenance of the chemical, physical, and biological integrity of the nation's waters*" (emphasis added).³⁴ The Act does not define its restoration initiative.³⁵ Importantly, however, the Act imposed a deadline for the cessation of pollutive discharges into navigable waters by 1985.³⁶ Though that objective still has not been obtained, the goal remains in place.³⁷

While the Act proscribes a total ban of pollutive discharges into navigable waterways, the Act includes a permit program granting individuals and corporations limited authority to pollute into navigable waters.³⁸ Municipal corporations can request permits from the Administrator of the EPA under the National Pollutant Discharge Elimination System ("NPDES").³⁹ The permits authorize individuals and corporations to discharge pollutants through a point source⁴⁰ into navigable waters, conditioned on the limitation of certain pollutants, monitoring and reporting requirements, and other provisions ensuring the

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*; See also 33 U.S.C. § 1251 (1972).

³⁴ CLAUDIA COPELAND, CONG. RSCH. SERV., RL30030, CLEAN WATER ACT: A SUMMARY OF THE LAW 2 (2016).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ 33 U.S.C. §§ 1341–1346 (1972).

³⁹ COPELAND, *supra* note 22 (authorized in Section 402 of the Act).

⁴⁰ See 33 U.S.C. § 1362(14) (2021) (a) (A point source is "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling rock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.").

discharges do not harm water quality or individual health.⁴¹ The conditions imposed upon NPDES permits are subject to the EPA Administrator's discretion.⁴² Under state law, governors can similarly request NPDES permits by submitting descriptions of proposed programs to the EPA Administrator.⁴³

The permit enforcement mechanism is strict. Should a permit be violated, the EPA Administrator may commence an enforcement action in a court of competent jurisdiction to restrict or prohibit the introduction of additional pollutants.⁴⁴ The penalty for violating an NPDES permit can inflict twenty-five thousand dollars in damages per day the infraction continues.⁴⁵ Criminal violations may incur fifty thousand dollars of damages payments per day, a three-year imprisonment sentence, or both.⁴⁶ NPDES permits are one of the Act's primary enforcement mechanisms.

Additionally, the Secretary of the Army, acting through the Chief of Engineers, may issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites.⁴⁷ Exceptions exist for normal farming activities, silviculture, ranching activities, minor drainage, harvesting to produce food, fiber, and forest products, and for maintenance purposes.⁴⁸ Similarly, at the state level, governors may request a permit to discharge dredging or fill material by submitting an application to the Administrator of the EPA.⁴⁹ If the Secretary of the Army discovers a violation has occurred, the EPA Administrator may enforce the permit through the judicial mechanism, under the same procedure for the enforcement of permits for discharging pollutants under the NPDES.⁵⁰ Thus, the Act is enforced in tandem by the EPA and the United States Army Corps of Engineers ("the Corps").⁵¹

⁴¹ *NPDES Permit Basics*, ENV'T PROT. AGENCY (Sept. 28, 2021), <https://www.epa.gov/npdes/npdes-permit-basics> [https://perma.cc/2UCP-LP9]. *See also* 33 U.S.C. § 1342 (1972).

⁴² 33 U.S.C. § 1342(a)(2) (1972).

⁴³ 33 U.S.C. § 1342(b) (1972).

⁴⁴ 33 U.S.C. § 1342(h) (1972).

⁴⁵ COPELAND, *supra* note 22, at 6.

⁴⁶ *Id.*

⁴⁷ 33 U.S.C. § 1344(a) (1972).

⁴⁸ 33 U.S.C. § 1344(f) (1972).

⁴⁹ 33 U.S.C. § 1344(g) (1972).

⁵⁰ 33 U.S.C. § 1344(n) (1972).

⁵¹ A.S. Ward & R. Walsh, *New Clean Water Act Rule Leaves U.S. Waters Vulnerable*, EARTH OBSERVING SYS. (Feb. 11, 2020), <https://eos.org/opinions/new-clean-water-act-rule-leaves-u-s-waters-vulnerable> [https://perma.cc/54N9-2S4A].

While the Act primarily addresses federal enforcement mechanisms, most enforcement actions occur at the state level.⁵² The reasoning is simple: states issue a majority of NPDES, dredge, or fill material permits, and the federal government lacks the requisite resources for day-to-day monitoring and enforcement.⁵³ Similar to the FWCPA, the Act imposes the bulk of enforcement responsibility upon the states, but the EPA, acting as a watchdog, is capable of criminal prosecution assistance.⁵⁴ The EPA retains oversight of state enforcement and preserves the right to bring enforcement actions where a state or local government agency requests assistance.⁵⁵ Finally, United States citizens may sue individuals or corporations for violations of the Act, and may sue the EPA Administrator for failure to carry out a nondiscretionary duty under the Act.⁵⁶

Though the Act allows for enforcement through its permit programs, the text of the Act is extremely broad, and leads to problems in judicial application. The Act makes the discharge of *any* pollutant into *any* navigable waters by *any* person unlawful.⁵⁷ Further, the Act's definition of "navigable waters" is vague, defined as "waters of the United States, including the territorial seas."⁵⁸ In an attempt to clarify the statutory ambiguity and expand the Act's jurisdiction, then-President Barack Obama directed the EPA to issue the Waters of the United States ("WOTUS") rule in 2015.⁵⁹ Under the WOTUS rule, approximately 60 percent of previously unregulated bodies of water fall under the purview of the Act, including water on private lands.⁶⁰ Specifically, the WOTUS rule added tributaries showing physical features of flowing water; waters adjacent to rivers and lakes that substantially affect the chemical, physical, or biological integrity of waters downstream; specific regional waters; and ditches constructed out of streams or that function as streams to the regulatory scheme of the Act.⁶¹ The EPA's goal in establishing the WOTUS rule focused on increasing

⁵² COPELAND, *supra*, note 22, at 7.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* See also 33 U.S.C. § 1365(a)(1–2) (1972).

⁵⁷ 33 U.S.C. § 1311 (1972).

⁵⁸ 33 U.S.C. §§ 1311(a), 1362(7) (1972).

⁵⁹ *Waters of the United States Rule*, BALLOTPEDIA,

https://ballotpedia.org/Waters_of_the_United_States_rule (last viewed Nov. 6, 2021)

[<https://perma.cc/L3VQ-S8LR>].

⁶⁰ *Id.*

⁶¹ *Id.*

the Act's predictability and consistency.⁶²

However, the WOTUS rule was heavily criticized by agricultural, manufacturing, and real estate agencies, and, after facing several challenges in the federal courts, was repealed in 2019.⁶³ The EPA and Corps of Engineers attributed the failure of the rule to four issues: (1) the rule did not implement legal limits on the scope of the agencies' authority under the Act as intended by Congress; (2) the rule failed to accord due weight to the congressional policy of recognizing, preserving, and protecting primary responsibilities and rights of the states in pollution reduction; (3) the agencies wished to avoid interpretations of the Act which encroached upon traditional state land-use planning authority; and (4) the rule suffered from procedural errors and a lack of support.⁶⁴

The rule was amended and reinstated in 2020 as the Navigable Waters Protection Rule ("NWPR").⁶⁵ Under the NWPR, the following categories of waters are defined as waters of the United States and subject to regulation under the Act: territorial seas and traditional navigable waters (e.g., oceans, rivers, and streams); perennial and intermittent tributaries that contribute surface water flow to traditional navigable waters (including ditches and channels that relocate into or are constructed in tributaries); certain lakes, ponds, and impoundments of jurisdictional waters (including lakes and ponds that are traditional navigable waters, and contribute surface water flow to or are flooded by traditional navigable waters annually); and wetlands adjacent to jurisdictional waters.⁶⁶ Jurisdictional waters are the waters which require either an NPDES permit or a permit for dredging and filling for limited pollutive discharges under the Act.⁶⁷

Importantly, the NWPR includes significant categories that

⁶² *Id.*

⁶³ Sara Chamberlain & Paul Sonderegger, *2020 'Waters of the United States' Rule Narrows Federal Authority and May Open Opportunity for Development*, JDSUPRA (Oct. 16, 2020), <https://www.jdsupra.com/legalnews/2020-waters-of-the-united-states-rule-62626/> [<https://perma.cc/77GE-E6TL>].

⁶⁴ Definition of "Waters of the United States" – Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626, 56,628 (Oct. 22, 2019) (to be codified at 33 C.F.R. pt. 328).

⁶⁵ Chamberlain & Sonderegger, *supra* note 63.

⁶⁶ *Id.*

⁶⁷ Megan Boain, *Jurisdictional Waters Under the Clean Water Act*, AM. RIVERS FOUND. (Aug. 28, 2015), <https://www.americanrivers.org/2015/08/jurisdictional-waters-under-the-clean-water-act/> [<https://perma.cc/PL47-SKUG>].

are *exempt* from the definition of navigable waters: groundwater; ephemeral features flowing only in direct response to precipitation; diffuse stormwater runoff; ditches that are not traditional navigable waters; prior converted cropland; artificially irrigated areas; artificial lakes and ponds constructed upon non-jurisdictional waters; water-filled depressions and outs constructed or excavated in non-jurisdictional waters; stormwater control features constructed or excavated in non-jurisdictional waters; groundwater recharge; and waste treatment systems.⁶⁸ Many of the exclusions were new additions, not originally mentioned under the WOTUS rule.⁶⁹ Similar to the old WOTUS rule, however, the NWPR has generated a new bout of controversy throughout the United States.⁷⁰ The confusion inherent in determining whether a certain body of water is exempt from regulation plagued the applicability of the Act in the federal circuit courts. The NWPR became effective in all states on June 22, 2020, except for Colorado, where its implementation is pending litigation.⁷¹

II. VARIATION REGARDING THE IMPOSITION OF LIABILITY BETWEEN THE FEDERAL CIRCUITS

The split among the Sixth Circuit and all other federal circuits stems from before and during the implementation of the WOTUS rule.⁷² However, the implementation of the NWPR has not yet resolved the variance among the circuits, due to its 2020 novelty. Therefore, it is important to address the WOTUS split before addressing potential solutions, if any, under the NWPR.

A. *SCOTUS Addresses WOTUS: The Supreme Court Defines “Waters of the United States” under the Clean Water Act.*

In 2006, faced with increasing expansion of federal land regulation under the Act, the Supreme Court (“SCOTUS”) granted

⁶⁸ Chamberlain & Sonderegger, *supra* note 63.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*; See Colorado v. EPA, 989 F.3d 874 (10th Cir. 2021).

⁷² See Rapanos v. United States, 547 U.S. 715 (2006); Tenn. Clean Water Network v. TVA, 913 F.3d 592 (6th Cir. 2019); Haw. Wildlife Fund v. Cnty. of Maui, 886 F.3d 737 (9th Cir. 2018); Waterkeeper All. Inc. v. EPA, 399 F.3d 486 (2nd Cir. 2005) (applying pre-NWPR regime).

certiorari to hear a challenge to the Act's jurisdiction.⁷³ Specifically, the plaintiffs, two Michiganders, challenged the Act's authority over four wetlands, which laid near ditches and man-made drains and eventually emptied into traditional, navigable waters.⁷⁴ Plaintiffs alleged that the wetlands did not fall under the Act's scope or its definition of "navigable waters."⁷⁵ The United States and the Corps—which issued the relevant permits for the wetlands in question—argued that the Act made it unlawful to discharge dredged or fill materials into navigable waters without a permit, and construed the definition of "navigable waters" to include territorial seas, tributaries of such waters, and wetlands adjacent to such waters and tributaries, even when separated from "[such] waters . . . by mad-made dikes . . . and the like."⁷⁶ Thus, the Court was tasked with determining whether the Michiganders' wetlands fell under the Act's broad definition of "navigable waters" as "waters of the United States, including the territorial seas," and if so, whether the Act was constitutional.⁷⁷

Justice Scalia, writing for the plurality, opined that the definition put forth by the United States and the Corps sought to extend the definition of "navigable waters" to the outer limits of Congress's commerce power.⁷⁸ The United States and the Corps' definition, under Justice Scalia's view, extended "waters of the United States" to "virtually any land feature over which rainwater or drainage passes and leaves a visible mark—even if only the presence of litter and debris."⁷⁹ Justice Scalia similarly disagreed with the plaintiffs' definition, that "navigable waters" required that the waters be "navigable in fact, or susceptible of being rendered so."⁸⁰ Following his theory of textual jurisprudence,

⁷³ Rapanos, 547 U.S. 715 (2006).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* See also 33 U.S.C. § 1362(7); 33 C.F.R. §§ 328.3(a)(1–3), 328.3(a)(5), 328.3(a)(7), 328.3(c).

⁷⁷ *Id.* at 729–30 (citing 33 U.S.C. § 1362(7)).

⁷⁸ *Id.* at 723 ("For a century prior to the [Act], [SCOTUS] had interpreted the phrase 'navigable waters of the *United States*' in the Act's predecessor statutes to refer to interstate waters that are 'navigable in fact' or readily susceptible of being rendered so. *The Daniel Ball*, 77 U.S. 557, 563 (1871). See 40 Fed. Reg. 31324–31325; 42 Fed. Reg. 37144 (1977) (The Corp's new regulations deliberately sought to extend the definition of 'waters of the United States' to the limits of Congress's commerce power. See *Id.*, at 37144, n. 2."). See also *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 (1940) (After passage of the [Act], the Corps initially adopted this traditional judicial definition for the Act's term 'navigable waters.' [T]he Corps [later] adopted a far broader definition).

⁷⁹ Rapanos, 547 U.S. 715; *Id.* at 725 (2006) (citing 33 C.F.R. § 238.3(3)).

⁸⁰ *Id.* at 730 (citing *The Daniel Ball*, 77 U.S. at 557).

Justice Scalia noted the Act's definition of "navigable waters" lacked the crucial qualifier—*navigable*.⁸¹ Instead, the Act defined navigable waters as solely the "*waters* of the United States" (emphasis added).⁸² Under this view, Justice Scalia thought the Corp's definition of "navigable waters" was "beyond parody."⁸³

Following his textualist approach, Justice Scalia analyzed the Act's use of the traditional phrase "navigable waters" and the Court's subsequent interpretation of the term.⁸⁴ The traditional use of "navigable waters" referred "only to relatively *permanent* bodies of water" (emphasis in original).⁸⁵ Further, the traditional term included only "discrete *bodies* of water" (emphasis in original).⁸⁶ Citing the Court's subsequent interpretation of the term in *United States v. Riverside Bayview Homes, Inc.*, Justice Scalia noted the Act's definition "referred primarily to rivers, streams, and other *hydrographic features more conventionally identifiable as 'waters'* (emphasis in original).⁸⁷ Additionally, Justice Scalia referred to both *Riverside Bayview Homes, Inc.* and *Solid Waste Agency v. United States Army Corps. of Engineers* ("the *SWANCC* case") in determining the "navigable waters" described by the Act covered "open water" and "open waters."⁸⁸

Justice Scalia and the plurality concluded by stating that "the only plausible interpretation [of] the phrase 'waters of the United States' (i.e., navigable waters) includes only those relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features' that are described in ordinary

⁸¹ *Id.*

⁸² *Id.* at 732–33 ("Whatever the scope of these qualifiers, the [Act] authorizes federal jurisdiction only over "waters . . . The use of the definite article ('the') and the plural number ('waters') shows plainly that § 1362(7) does not refer to water in general. In this form, 'the waters' refers more narrowly to water '[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,' or 'the flowing or moving masses, as of waves or floods, making up such streams or bodies.' Webster's New INT'L International Dictionary 2882 (2nd ed. 1954) . . . All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows . . . None of these terms encompasses transitory puddles or ephemeral flows of water.").

⁸³ *Id.* at 734.

⁸⁴ *Id.*

⁸⁵ Rapanos, 547 U.S. 715, 734 (2006); *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* (citing *United States v. Riverside Bayview Homes, Inc.*, 532 U.S. 159, 172 (1985)).

⁸⁸ *Id.* at 735; *see also* *Riverside Bayview Homes, Inc.*, 532 U.S. at 132; *and* *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001) (limiting the scope of the Act's jurisdiction).

parlance as ‘streams[,] . . . oceans, rivers, [and] lakes.’”⁸⁹ Therefore, the Court surmised, “only those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands, are ‘adjacent to’ such waters and covered by the Act.”⁹⁰ Thus, under the *Rapanos* Court’s reasoning, navigable waters, defined as “waters of the United States,” do not include occasional, intermittent, or ephemeral flows.⁹¹ Hence, the “continuous surface water connection test,” a two-pronged analysis employed by a variety of the federal courts, was born. Under such a test, lower courts must first determine “whether the ditches or drains near each wetland are ‘waters’ in the ordinary sense of containing a relatively permanent flow; and, if they are, whether the wetlands in question are ‘adjacent’ to these ‘waters’ in the sense of possessing a continuous surface connection” that creates a boundary line between water and land.⁹²

However, the continuous surface water connection test was a result of a non-binding, plurality opinion. In *Marks v. United States*, the Court stated “when a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by the Members who concurred in the judgment on the narrowest grounds[.]”⁹³ Under the *Rapanos* plurality opinion, Justice Kennedy proffered his concurrence on the narrowest grounds.⁹⁴

Underscoring Justice Scalia’s textualist approach, Justice Kennedy extracted a test separate from the plurality’s continuous surface water connection analysis.⁹⁵ Justice Kennedy argued that both *Riverside Bayview Homes, Inc.* and *SWANCC* set forth reasonable boundaries for the Act’s jurisdiction, and that the Court had overlooked such precedential considerations due to its Commerce Clause and federalism concerns.⁹⁶ In *Riverside Bayview Homes, Inc.*, the Court upheld the Corps’ authority to regulate

⁸⁹ *Rapanos*, 547 U.S. 715; *Rapanos*, 547 U.S. 715 at 739.

⁹⁰ *Id.* at 742-41.

⁹¹ *Id.* at 742.

⁹² *Id.* at 757.

⁹³ *Marks v. United States*, 430 U.S. 188, 193 (1977); citing *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976).

⁹⁴ *Rapanos*, 547 U.S. at 757-58 (Kennedy, J., concurring).

⁹⁵ *Id.* at 778 (Kennedy, J., concurring).

⁹⁶ *Id.* at 776 (Kennedy, J., concurring).

wetlands adjacent to other bodies of water over which the Corps already had jurisdiction.⁹⁷ In *SWANCC*, the Court rejected the Corps' jurisdiction over isolated ponds as “non-navigable, isolated, intrastate waters,” distinguishable from the wetlands at issue in *Riverside Bayview Homes, Inc.*⁹⁸ Then, Justice Kennedy enunciated his test. “Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term ‘navigable’ some meaning, the Corps’ jurisdiction over wetlands depends upon the existence of a *significant nexus* between the wetlands in question and navigable waters in the traditional sense.” (emphasis added).⁹⁹

Hence was born Justice Kennedy’s “significant nexus test,” employed by some federal courts, in contrast to Justice Scalia’s “continuous surface water connection test,” employed by the other federal courts. However, Justice Kennedy failed to specifically define what constituted a “significant nexus.” To determine whether a nexus is sufficient to impose jurisdiction, under Justice Kennedy’s analysis, the nexus must be “assessed in the terms of [the Act’s] goals and purposes.”¹⁰⁰ Specifically, in the context of wetlands, Justice Kennedy argued they possessed the requisite nexus, and fall under the umbrella of the Act’s definition of “navigable waters,” if “the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’”¹⁰¹ In contrast, if the wetlands’ effects on water quality are *de minimis*, they fall outside the zone fairly encompassed by the Act’s term, “navigable waters.”¹⁰²

Thus, said Justice Kennedy, “[w]hen the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries.”¹⁰³ Justice Kennedy concluded his concurrence by arguing that such a significant nexus

⁹⁷ *Id.* at 722 (Kennedy, J., concurring) (citing *Riverside Bayview Homes, Inc.*, 474 U.S. at 135).

⁹⁸ *Id.* at 774 (Kennedy, J., concurring) (citing *SWANCC*, 531 U.S. at 167, 170-171).

⁹⁹ *Id.* at 779 (Kennedy, J., concurring).

¹⁰⁰ *Id.* at 780 (Kennedy, J., concurring).

¹⁰¹ *Id.* (Kennedy, J., concurring).

¹⁰² *Id.* (Kennedy, J., concurring).

¹⁰³ *Id.* at 782 (Kennedy, J., concurring).

test is necessary to avoid unreasonable application of the Act.¹⁰⁴

Yet, the fractured nature of the *Rapanos* plurality caused the very split application which the Justices feared. A few circuits, including the Ninth Circuit, apply Justice Kennedy's significant nexus test in determining whether a certain body of water falls under the Act's jurisdiction.¹⁰⁵ Other circuits, including the Sixth Circuit, use Justice Scalia's continuous surface water connection test.¹⁰⁶ Finally, due to the non-binding nature of the *Rapanos* plurality, some circuits devised their own tests to assign liability under the Act.¹⁰⁷ Regardless of the Act's splintered application, the Six Circuit is the sole judicial organ which imposes no liability upon actors who release their pollutants into groundwaters, which empty into traditional, navigable waters.¹⁰⁸

B. The Implications of the Rapanos Decision in the Federal Circuit

In 2019, the Sixth Circuit denied a petition for rehearing *en banc* in a case presenting a novel question: whether an actor could escape liability under the Act by allowing pollutants to briefly travel through groundwater before reaching navigable waters.¹⁰⁹ Previously, the majority held the Act did not apply to discharges of pollutants from coal ash ponds that reached navigable waters after travelling through groundwater.¹¹⁰ This seminal dispute was *Tennessee Clean Water Network v. TVA*.¹¹¹ Circuit Judges Clay and Stranch vigorously dissented the decision to deny rehearing *en banc*.

Though a novel question for the Sixth Circuit, Judge Clay began his dissent by correctly noting the Fourth and Ninth Circuits had previously decided the matter, and each determined

¹⁰⁴ *Id.*

¹⁰⁵ *See generally* *United States v. Robertson*, 875 F.3d 1281 (9th Cir. 2017).

¹⁰⁶ *See, e.g.*, *Tenn. Clean Water Network v. TVA*, 913 F.3d 592, 597 (6th Cir. 2019) (Clay, J., dissenting). ("The Supreme Court addressed this precise issue in *Rapanos v. United States*[.] There, Justice Scalia's plurality opinion was explicit[.] True, Justice Scalia's plurality is not binding. But no Justice challenged this aspect of the opinion, and for good reason: the statutory text unambiguously supports it.")

¹⁰⁷ *See, e.g.*, *Upstate Forever v. Kinder Morgan Energy Partners, LP*, 887 F.3d 637 (4th Cir. 2018) (The Fourth Circuit's test asked whether the pollutive discharge had a "direct hydrological connection" to navigable waters).

¹⁰⁸ *Tenn. Clean Water Network*, 913 F.3d at 596 (Clay, J., dissenting).

¹⁰⁹ *Id.* (Clay, J., dissenting).

¹¹⁰ *Id.* at 593. (Stranch, J., dissenting).

¹¹¹ *Id.* at 592.

that a “short journey” through groundwater did not defeat liability under the Act.¹¹² He further noted that the Second Circuit found liability where pollutants briefly traveled through fields and into the air.¹¹³ For Judge Clay, the reasoning behind the sister circuits’ decisions was simple: “the [Act] does not require a plaintiff to show that a defendant discharged a pollutant from a point source *directly* into navigable waters; a plaintiff must simply show that the defendant ‘add[ed] . . . any pollutant *to* navigable waters *from* any point source” (emphasis in original).¹¹⁴ Though Judge Clay quoted a significant portion of Justice Scalia’s plurality opinion, his reasoning was more in line with Justice Kennedy’s significant nexus test. Indeed, the term “surface”—a requisite term for Judge Scalia and the plurality’s continuous surface water connection test—does not appear once in Judge Clay’s dissent.

Recall *Rapanos* set forth a two-pronged analysis: (1) the lower courts must determine whether the body of water may be classified as a “water of the United States,” and, if so, (2) whether those waters are “adjacent” to waters covered by the Act in the sense of possessing a continuous *surface connection* that creates a boundary-drawing problem between water and land.¹¹⁵ Groundwater does not impose the requisite surface connection required under Justice Scalia’s test. To the contrary, groundwater is stored *underground* in the cracks and spaces between soil, sand, and rock.¹¹⁶ Therefore, pollutants seeping through groundwater before emptying into navigable waters lack the surface connection required to impose liability under the Act according to the *Rapanos* plurality. Though the *Rapanos* decision applies to indirect pollution, that pollution must still come from “contaminant-laden” waters into protected waters via a continuous surface connection.¹¹⁷

¹¹² *Id.* at 596. (Clay, J., dissenting).

¹¹³ *Id.* (Clay, J., dissenting) (citing *Concerned Area Residents for Env’t v. Southview Farm*, 34 F.3d 114, 118-19 (2nd Cir. 1994)).

¹¹⁴ *Id.* (Clay, J., dissenting) (citing 33 U.S.C. §§ 1362(12)(A), 1365(a), 1311(a); *Upstate Forever*, 887 F.3d at 650; *Haw. Wildlife Fund v. Cnty. of Maui*, 866 F.3d 737, 749 (9th Cir. 2018)); *see also Rapanos*, 547 U.S. at 743. (“We have held that the Act ‘makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to “navigable waters.””).

¹¹⁵ *Rapanos*, 547 U.S. at 757.

¹¹⁶ *What is Groundwater?*, GROUNDWATER FOUND., <https://www.groundwater.org/get-informed/basics/groundwater.html>, (last viewed Dec. 29, 2021) [<https://perma.cc/TM72-RJEP>].

¹¹⁷ *Tenn. Clean Water Network*, 913 F.3d at 600 (Clay, J., dissenting); *Compare with Rapanos*, 547 U.S. at 757.

However, Justice Kennedy's significant nexus test is applicable in this context. Judge Clay correctly expressed a concern that, due to the denial of the petition to rehear *en banc*, polluters have become free to add contaminants to navigable waters if the pollutants travel through any medium.¹¹⁸ For example, assume the United States outlaws cigarette smoking in public air. Therefore, civilians are restricted to smoking cigarettes in their private residences. However, assume the individual smoking cigarettes decides to leave his or her kitchen window open, and smoke emanates from the open aperture. Under the Sixth Circuit's analysis, the smoking individual would face no liability. The individual did not smoke in public air; rather, the cigarette smoke entered public air through a medium, the open window. Replace the cigarette smoke with contaminated water and the window with groundwater, and the facts become analogous with the facts discussed in Judge Clay's dissent in *Tennessee Clean Water Network*.

Now assume the United States bans cigarette smoking in regions that effect the chemical, physical, and biological integrity of public areas. The careless window smoker may face liability depending on the test employed. This fact pattern still fits the *Tennessee Clean Water Network* framework. The smoker may not face liability if there is no continuous surface connection between the smoke he or she emits and the public air. However, the smoker would face liability under Justice Kennedy's significant nexus test. Surely second-hand cigarette smoke has a significant nexus with a region's chemical, physical, and biological integrity—it causes a negative impact upon the public area. After all, cigarettes are known to cause cancer.¹¹⁹ Thus, under the facts in *Tennessee Clean Water Network*, a polluter might face liability under Justice Kennedy's significant nexus test but is able to escape liability under Justice Scalia's continuous surface water connection test.

Split “reasoning-hairs” aside, Judge Clay's conclusion poses a substantial concern. He was correct to believe that a polluter may escape liability in the Sixth Circuit if contaminants travel through a medium to reach navigable waters. Similarly concerning were the facts in Judge Stranch's dissent. She reached the same

¹¹⁸ *Id.* at 597.

¹¹⁹ *What is Cancer?*, CENT. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/tobacco/campaign/tips/diseases/cancer.html>, (last viewed Dec. 29, 2021) [<https://perma.cc/HCT5-5JDY>].

conclusion as Judge Clay and stressed that denial of *en banc* review would cause substantial harm and danger to aquatic environments and the communities which depend on them.¹²⁰ The lower court's opinion, Judge Stranch wrote, "deprive[s] regulators and affected citizens of a critical tool – in some circumstances, the only tool – to combat [] various types of seeping pollution."¹²¹ She cited several opinions from sister circuits that found liability in similar scenarios.¹²² As with Judge Clay, Judge Stranch's fears and reasoning are in line with the concerns expressed by Justice Kennedy in *Rapanos*. His significant nexus test may also be described as an effects test—whether the contaminants negatively affect an area's chemical, physical, and biological integrity. Here, Judge Stranch's dissent focuses on the adverse impact—the negative effect—of the lower court's decision to permit individuals to dump waste into groundwater without facing liability under the Act.¹²³

In sum, both dissenting judges reached the same conclusion: the denial of rehearing *en banc* allows polluters to escape liability by "moving [their] drainage pipes a few feet from [a] riverbank."¹²⁴ Though culminating in the same correct conclusion, Judge Clay's opinion focused more on the issue of indirect pollution, whereas Judge Stranch expressed fear over the already present, negative effects on aquatic ecosystems' health. Both judges' invocations of *Rapanos* was accurate. There, the plurality concluded that indirect pollution still leads to liability under the Act.¹²⁵ However, the devil is in the details. Before the decision to deny rehearing *en banc*, the majority in *Tennessee*

¹²⁰ Tenn. Clean Water Network, 913 F.3d at 593 (Stranch, J., dissenting) (noting that the lower court did not dispute the detrimental effects to the environment; see Tenn. Clean Water Network v. TVA, 905 F.3d 436, 447 (6th Cir. 2018)).

¹²¹ *Id.*

¹²² *Id.* (citing *Adkisson v. Jacobs Eng'g Grp., Inc.*, No. 3:13-CV-00505, D.E. 408, 2016 U.S. Dist. LEXIS 99350 (E.D. Tenn. 2016) (30 cleanup workers deceased and 250 sick or dying); *Upstate Forever*, 887 F.3d at 650 ("[A] point source is the starting point or cause of a discharge under the [Act], but that starting point need not also convey the discharge directly to navigable waters."); *Haw. Wildlife Fund*, 886 F.3d at 746 ("This case is no different – the effluent comes 'from' the four wells and travels 'through' them before entering navigable waters. It just also travels through groundwater before entering the Pacific Ocean."); *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 510-11 (2nd Cir. 2005) (holding manure spread across fields is a point source); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (holding "gravity flow" from miners' spoil piles is a point source)).

¹²³ *Id.*

¹²⁴ *Id.* at 595 (Clay, J., dissenting).

¹²⁵ *Rapanos*, 547 U.S. at 743.

Clean Water Network concluded that “surface water pollution via hydrologically connected groundwater” was not actionable under the Act.¹²⁶ This was correct. Surface water pollution caused by a *groundwater* connection does not amount to the *surface water* connection required by Justice Scalia’s test. However, had the majority applied Justice Kennedy’s significant nexus test, the case may have been resolved the other way.

Tennessee Clean Water Network evidences the fractured application of the Act that the *Rapanos* plurality’s decision caused in the federal circuits. Different circuits apply different tests, or devise their own, and the very judges within those circuits cannot agree on a specific test to use.¹²⁷ In 2020, a year after *Tennessee Clean Water Network* was decided, SCOTUS granted certiorari in *County of Maui v. Hawai’i Wildlife Fund*, a case originally from the Ninth Circuit and cited in *Tennessee Clean Water Network*, to decide whether the Act required a permit when pollutants were conveyed to navigable waters via groundwater.¹²⁸

The Court answered the foregoing issue in the affirmative, but its vague interpretation of the Act still left room for confusion.¹²⁹ Justice Breyer’s majority opinion held that the Act requires a permit to discharge pollutants that travel through groundwater to reach navigable waters, if that discharge comes directly from a point source or its “functional equivalent.”¹³⁰ Of course, defining a direct discharge is simple: “[c]onsider a pipe that spews pollution directly into coastal waters. There is an ‘addition of a ‘pollutant to navigable waters from [a] point source.’ Hence, a permit is required.”¹³¹ But what is the *functional equivalent* of a direct discharge? The Court failed to define the term.¹³² Instead, the Court laid forth several factors necessary for evaluating whether a discharge is the functional equivalent of a direct discharge.¹³³ The seven factors enunciated by the Court include transit time, distance travelled, the nature of the material through which the pollutant travels, the extent to which the pollutant is

¹²⁶ *Tenn. Clean Water Network v. TVA*, 905 F.3d 436, at 442-43 (6th Cir. 2018).

¹²⁷ *See Rapanos*, 547 U.S. at 781, 782 (Kennedy, J., concurring); *Supra* note 101.

¹²⁸ *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020); *Tenn. Clean Water Network*, 905 F.3d at 448.

¹²⁹ *Haw. Wildlife Fund*, 140 S. Ct. at 1477.

¹³⁰ *Id.*

¹³¹ *Id.* at 1473.

¹³² *Id.* at 1476 (“But there are too many potentially relevant factors applicable to factually different cases for this Court now to use more specific language.”).

¹³³ *Id.*

diluted or chemically changed as it travels, the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, the manner by or area in which the pollutant enters navigable waters, and the degree to which the pollution had maintained its “specific identity.”¹³⁴ The Court declined to mention whether its list of factors was inclusive or exclusive.¹³⁵

The Court also declined to express why it believed the above factors were relevant to the analysis. Time and distance, argued Justice Breyer, will be the most important factors “in most cases, but not necessarily every case.”¹³⁶ The Court appears to have pulled its factors from thin air. The type of pollutant should matter in the analysis. Surely, arsenic is more detrimental to aquatic ecosystems than mere fertilizer runoff. Additionally, the physical location of the pollutive discharge should be a factor subject to intense scrutiny. Cities in the United States, in vastly different geographic regions, experience different levels of land, air, and water pollution.¹³⁷ If an infringer were to dump harmful pollutants into Topy Creek in Louisiana, the watershed with the most annual pollutive discharges, the Court should include that factor in its analysis.¹³⁸ In sum, the Court was poised to answer—and potentially overrule the decision of—*Tennessee Clean Water Network*, and to end the confusion surrounding the vagueness of the Act’s definitions, but declined to do so.

Additionally, Justice Breyer rejected two potential solutions, one argued by the defendant, the County of Maui, and the other by the plaintiff, the Hawai’i Wildlife Fund.¹³⁹ Defendants argued for a bright-line rule, arguing that a point source must be “the *means of delivering* pollutants to navigable waters.”¹⁴⁰ (emphasis in original). Plaintiffs argued for the permit

¹³⁴ *Id.* at 1476-77.

¹³⁵ Haw. Wildlife Fund, 140 S. Ct. at 1476-77.

¹³⁶ *Id.* at 1477.

¹³⁷ See generally Nick Kirkpatrick, *The 10 Most Polluted Cities in the U.S.*, WASH. POST (Apr. 30, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/04/30/the-10-most-polluted-cities-in-the-u-s/>, (Apr., 30, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/04/30/the-10-most-polluted-cities-in-the-u-s/>, (Apr., 30, 2015) [<https://perma.cc/3HZ2-L5T5E8NS-ZB3B>].

¹³⁸ *Water Pollution Search Results*, ENV’T PROT. AGENCY, <https://echo.epa.gov/trends/loading-tool/water-pollution-search/results?s=d5001a90c22ce97465348480f7e15efce6509b50> (last viewed Apr. 27, 2022) [<https://perma.cc/L7UW-N2559Q68-DTN2>].

¹³⁹ *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. at 1471, 1473.

¹⁴⁰ *Id.* at 1470 (emphasis in original).

requirement to attach so long as the pollutant was “fairly traceable” to the point source.¹⁴¹ Justice Breyer rejected both arguments, opining that defendants’ argument was too limited, and that plaintiffs’ argument was too broad.¹⁴²

In opining that defendants’ argument was too limited, Justice Breyer expressed concern that such an interpretation of the Act would “risk serious interference with [the] EPA’s ability to regulate ordinary point source discharges.”¹⁴³ Further, he argued that such interpretation would create an unreasonable, “serious loophole” in the permitting regime.¹⁴⁴ If the defendants’ interpretation of the Act garnered support from the Majority, a “pipe’s owner, seeking to avoid the permit requirement, [could] simply move the pipe back, perhaps only a few yards, so that the pollution [traveled] though . . . groundwater before reaching the sea,” and escape all liability.¹⁴⁵ Under defendants’ view, a permit would only be required where a point source *itself* delivered the pollutant to navigable waters.¹⁴⁶ Thus, if the pollutants flowed through *any* groundwater, which is not a point source, and reached navigable waters, the polluter could escape liability.¹⁴⁷ This is exactly what occurred in *Tennessee Clean Water Network*, and again illuminates Judge Clay’s concern.¹⁴⁸ Thankfully, Justice Breyer rejected the defendants’ argument, due to the loophole it would create under the Act’s permit regime.¹⁴⁹

However, Justice Breyer also rejected the plaintiffs’ interpretation as being too broad.¹⁵⁰ “Given the power of modern science,” opined Justice Breyer, “the [plaintiffs’ argument to find liability where the pollutants are ‘fairly traceable’ to navigable waters], may well allow [the] EPA to assert permitting authority over the release of pollutants that reach navigable waters many

¹⁴¹ *Id.* (Plaintiffs adopted the 9th Circuit’s view from *Haw. Wildlife Fund v. Cnty. of Maui*, 866 F.3d 737 (9th Cir. 2018)).

¹⁴² *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. at 1470, 1474; *see also supra* note 136.

¹⁴³ *Id.* at 1473.

¹⁴⁴ *Id.* at 1474.

¹⁴⁵ *Id.* at 1473.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1473-1474.

¹⁴⁸ *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. at 1473-74; *see also* *Tenn. Clean Water Network*, 905 F.3d at 595. (“Can a polluter escape liability under the Clean Water Act . . . by moving its drainage pipes a few feet from the riverbank? [T]he majority says yes.”).

¹⁴⁹ *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. at 1474.

¹⁵⁰ *Id.* at 1470.

years after their release . . . and in highly diluted forms.”¹⁵¹ Justice Breyer looked to the legislative history of the Act and concluded that “Congress intended to leave substantial responsibility and autonomy to the States.”¹⁵² Congress had provided a “set of groundwater-related measures” requiring the States to maintain “affirmative controls over the injection or placement in wells” of “*any pollutants that may affect ground water*”¹⁵³ (emphasis added). Indeed, “these *specific* state-related programs were, in the words of the Senate Public Works Committee, ‘designated to protect ground waters’”¹⁵⁴ (emphasis in original). From the legislative history of the Act, Justice Breyer concluded, “Congress left general groundwater regulatory authority to the States; its failure to include groundwater in the general EPA permitting provision was deliberate.”¹⁵⁵

By rejecting both the plaintiffs’ and defendants’ interpretation of the Act, Justice Breyer took the middle ground. “The hottest places in Hell are reserved for those who in a time of moral crisis preserve their neutrality.”¹⁵⁶ Yet, Justice Breyer did not have much of a decision; an adoption of either plaintiffs’ or defendants’ interpretation of the Act would have either extended the EPA’s regulatory authority into the groundwater-domain traditionally reserved to the states or would have created a massive loophole in the Act’s permitting regime.¹⁵⁷ Faced with two extreme interpretations of the Act from opposite ends of the spectrum, Justice Breyer arguably made the safest choice.

Yet, Justice Breyer should have provided much more guidance to the lower courts. He could have defined the concept of a “functional equivalent” of a direct discharge.¹⁵⁸ Additionally, Justice Breyer should have specified why he chose certain, specific

¹⁵¹ *Id.*

¹⁵² *Id.* at 1471.

¹⁵³ *Id.* at 1472.

¹⁵⁴ *Id.* (citing *Water Pollution Control Legislation-1971: Hearings before the House Committee on Public Works on H.R. 11896 and H.R. 11895*, 92d Cong., 1st Sess., 727 (1972); and S. REP. NO. 92-414, atp. 73 (1971)).

¹⁵⁵ *Id.*

¹⁵⁶ This quote is often mistakenly attributed to Dante Alighieri, the author of the *Inferno*. The quote was commonly used by President John F. Kennedy and based on a specific, incorrect interpretation of the *Inferno*. See *John F. Kennedy's Favorite Quotations: Dante's Inferno*, JOHN F. KENNEDY PRESIDENTIAL LIBR. AND MUSEUM, <https://www.jfklibrary.org/learn/about-jfk/life-of-john-f-kennedy/fast-facts-john-f-kennedy/john-f-kennedys-favorite-quotations-dantes-inferno> (last viewed Feb. 8, 2022) [<https://perma.cc/UCS7-UG9G>].

¹⁵⁷ Haw. Wildlife Fund, 140 S. Ct. at 1476-77; *Supra* note 136.

¹⁵⁸ *Id.* at 1476; *Supra* note 129.

factors for determining whether the functional equivalent of a direct discharge exists. Certainly, other factors may become relevant in the analysis depending on the type of pollutant involved, the population of individuals the pollution affects, and the location of the pollution, but Justice Breyer paid no mind to such scenarios.¹⁵⁹ *County of Maui* presented the Court with a chance to remedy the *Rapanos* plurality and the resulting circuit split in the federal courts.¹⁶⁰ Instead, it complicated the matter further. Now, under the Court's analysis, to impose liability on a polluter, one must determine whether the body of water involved falls under the Act's jurisdiction, by employing either Justice Scalia's continuous surface water connection test or Justice Kennedy's significant nexus test. Then, one must determine whether there was a direct discharge of pollutive material into the protected water, or its "functional equivalent."

County of Maui was decided on April 23, 2020.¹⁶¹ At the time, the WOTUS rule was still in effect; however, President Trump rolled back WOTUS and the NWPR was officially implemented two months later, on June 22, 2020.¹⁶² The NWPR faced immediate backlash and multiple lawsuits from several cities, states, environmental groups, and agricultural groups.¹⁶³ In light of such heavy criticism, the EPA and Corps announced that they would halt implementation of the NWPR nationwide and interpret "waters of the United States" consistent with the pre-2015 regulatory regime (i.e., pre-WOTUS rule and pre-NWPR).¹⁶⁴

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1469.

¹⁶¹ *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020).

¹⁶² The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (June 22, 2020).

¹⁶³ Brigit Rollins, *WOTUS Update: Navigable Waters Rule Faces Backlash*, THE NAT'L AGRIC. LAW CTR., <https://nationalaglawcenter.org/wotus-update-navigable-waters-rule-faces-backlash/> (last viewed Feb. 8, 2022) [<https://perma.cc/2G7T-ZWJB>]; *see also* *California v. Wheeler*, 467 F. Supp.3d 864 (N.D. Cal. 2020); *Chesapeake Bay Found. v. Wheeler*, Case No.: 1:20-cv-01063-RBD (N.D. Md. 2020); *Conservation Law Found., Inc. v. U.S. ENV'T. PROT. AGENCY*, Case No. 1:20-cv-10820-DPW (Mass. Dist. Ct. 2020); *South Carolina S.C. Coastal Conservation League v. Wheeler*, Case No.: 2:17-cv-3412, 2021 U.S. Dist. LEXIS 166994* (D. S.C. 2021); *New Mexico N.M. Cattle Growers' Ass'n v. U.S. ENV'T PROT. AGENCY*, Case No.: 1:19-cv-00988-JHR-SCY (D. N.M. 2020); *Oregon Cattlemen's Ass'n v. U.S. ENV'T PROT. AGENCY*, Case No.: 3:19-cv-00564-AC (D. Or. 2020); *Washington Cattlemen's Ass'n v. U.S. ENV'T PROT. AGENCY*, Case No.: 2:19-cv-00569-JCC (W.D. Wash. 2020). Each case sought to have the NWPR overturned.

¹⁶⁴ *Current Implementation of Waters of the United States*, ENV'T PROT. AGENCY, <https://www.epa.gov/wotus/current-implementation-waters-united-states> (last updated Dec. 20, 2021) [<https://perma.cc/L6Z9-G44D>]; *see generally* *Pasqua Yanqui Tribe v. ENV'T PROT. AGENCY*, Case No. 21-16791, 2022 U.S. App. LEXIS 3122* (9th Cir. 2022).

Each of the cases were filed to overturn the NWPR and have the potential to affect the definition of “waters of the United States” and the Act’s jurisdiction.¹⁶⁵ Since the cases have been filed in several different jurisdictions, they may lead to more conflicting court opinions.¹⁶⁶ In sum, the Act remains a siren’s song—an illusion of uniformity—as it is applied unevenly and ineffectively among the states.

III. THE BEESWAX SOLUTION

To survive the seductive Sirens’ calls, Odysseus ordered his crew to plug their ears with beeswax.¹⁶⁷ Odysseus longed to hear the Sirens’ enchanting songs and left his ears unplugged.¹⁶⁸ For protection, Odysseus bound himself to the mast of his ship, and sailed into the Sirens’ waters.¹⁶⁹ Odysseus heeded the advice of the enchantress Circe, and his ship and crew passed through the Siren’s territory to safety.¹⁷⁰

Of course, mere beeswax will not provide a solution to the Act. Each plaintiff who challenged the implementation of the NWPR alleged the rule was either federal overreach or that the NWPR did not do enough to protect our nation’s waters from pollution.¹⁷¹ Similar to the plaintiffs’ and defendants’ arguments in *County of Maui*, the plaintiffs’ interpretations of the NWPR lie at the extreme ends on either side of the spectrum—some challengers wish for water oversight to remain solely under the states’ regulatory authority, while others want to see more federal guidance.¹⁷²

Considering there are such strong opinions regarding the appropriate interpretation of the Act, a cautious approach is necessary. Overzealous federal supervision will lead to a challenge to the Act as exceeding Congress’s regulatory power under the Commerce Clause. On the other hand, a lack of robust federal oversight may lead to less protection for our nation’s waters. Due to the complexity of the Act, a bright-line rule is impracticable.

¹⁶⁵ Rollins, *supra* note 163.

¹⁶⁶ *Id.*

¹⁶⁷ HOMER, THE ODYSSEY loc. Book XII (Samuel Butler trans., 2nd ed. 1921) (ebook).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Rollins, *supra* note 163.

¹⁷² *Id.*

Indeed, a bright-line rule was explicitly rejected by the Court in *County of Maui*.¹⁷³ Instead, courts should first employ Justice Kennedy's significant nexus test to determine whether the body of water falls under the Act's jurisdiction. Then, a court should engage in a multi-factor balancing test to determine whether the pollutant's discharge or its functional equivalent violates the Act.

A. *The Significant Nexus Test*

Justice Scalia's continuous surface water connection test, elicited in the *Rapanos* plurality, is not binding.¹⁷⁴ Under *Marks*, "the holding of the Court may be viewed as the position taken by the Members who concurred in the judgement on the narrowest grounds[.]"¹⁷⁵ Justice Kennedy's concurrence was issued on the narrowest grounds.¹⁷⁶ To hold that water falls under the Act's jurisdiction if it has a significant nexus to navigable waters is a narrower conclusion than to hold that *all water* with a continuous surface connection to navigable waters falls under the Act. Further, even Justice Scalia noted that the Act forbids *the discharge of any pollutant to any navigable water from any point source*.¹⁷⁷ Whether a continuous surface water connection exists between the contaminated water and navigable waters does not matter to the analysis. The Act's broad language forbids the discharge of any pollutant into any navigable waters from any point source.¹⁷⁸ It does not exempt waters lacking a surface connection to navigable waters from its jurisdiction.¹⁷⁹

As the goal of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"¹⁸⁰ it makes sense that any contaminated water with a significant nexus—a significant effect upon chemical, physical, and biological integrity of covered waters—should be subject to the Act's jurisdiction.¹⁸¹ Any body of water with a significant nexus to navigable waters is an "integral part of the aquatic environment,"

¹⁷³ *Cnty. of Maui*, 140 S. Ct. at 1470.

¹⁷⁴ *Rapanos*, 547 U.S. at 742.

¹⁷⁵ *Marks*, 430 U.S. at 193.

¹⁷⁶ *See generally, Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring).

¹⁷⁷ *Rapanos*, 547 U.S. at 737; *see also* 33 U.S.C. § 1362(12)(a) (2021).

¹⁷⁸ 33 U.S.C. § 1362(12)(a) (2021).

¹⁷⁹ *Id.*

¹⁸⁰ 33 U.S.C. § 1251 (1972).

¹⁸¹ *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring).

and should be monitored for compliance under the Act.¹⁸² Additionally, use of Justice Kennedy's significant nexus test avoids the complicated issue that occurs when contaminated waters pass through a medium (such as groundwater) and enter waters covered by the Act. No matter what the contaminated water passes through, be it groundwater, a hole in a leaking underground pipe, or an aquifer, liability will still be imposed if that contaminated water has a significant effect upon a protected area. Finally, by employing Justice Kennedy's significant nexus test, the lower courts will be unified in their analyses when determining whether to hold an individual or corporation liable for violating the Act. The significant nexus test provides a simple and useful guide for determining whether a certain body of water falls under the Act's jurisdiction. The EPA and Corps' monitoring tools will provide guidance into whether contaminated water has a significant effect upon the chemical, physical, and biological integrity of protected waters, thus providing jurisdiction under the Act.¹⁸³

B. The Multi-Factor Balancing Test

To be performed legally, a direct discharge of pollutants into protected waters, or its functional equivalent, requires a permit.¹⁸⁴ The undefined "functional equivalent" of a direct discharge poses problems for determining whether one can be held liable for violating the Act, due to its vague nature.¹⁸⁵ Justice Breyer elicited several factors in *County of Maui* to determine whether a discharge of pollutants is the functional equivalent of a direct discharge.¹⁸⁶ Justice Breyer believed the time the pollutants took to travel to protected waters and the distance the pollutants traveled would be the most important factors in the analysis.¹⁸⁷ Time and distance are undoubtedly two important factors to consider, but in such a fact-intensive inquiry, a holistic review of all relevant factors is necessary to ensure an accurate evaluation. Justice Breyer also noted other factors in determining whether the functional equivalent of a direct discharge occurred, including the

¹⁸² *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring).

¹⁸³ *Clean Water Act (CWA) Compliance Monitoring*, ENV'T PROT. AGENCY, <https://www.epa.gov/compliance/clean-water-act-cwa-compliance-monitoring> (July 13, 2021) [<https://perma.cc/4MPL-4GSJ>].

¹⁸⁴ *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. at 1473.

¹⁸⁵ See *Haw. Wildlife Fund*, 140 S. Ct. at 1476-77.

¹⁸⁶ *Id.* at 1476-77; *Supra* note 129.

¹⁸⁷ *Id.*

material through which the pollutant travels, the extent to which the pollutant is diluted or chemically changed as it travels, the amount of pollutant entering the navigable waters relative to the amount of the pollutant that left the point source, the manner by or area in which the pollutant enters navigable waters, and the degree to which the pollution had maintained its “specific identity.”¹⁸⁸

However, the EPA monitors compliance with the Act on a case-by-case basis and takes several additional factors into consideration.¹⁸⁹ Proximity to other bodies of water that may be impacted, storm surges, sea level rise, capacity of the collection or treatment system to handle more frequent or intense precipitation, and possible downstream impacts are evaluated as relevant considerations.¹⁹⁰ Additionally, the EPA may require the regulated entity to implement resilience and adaptation measures to ensure future compliance and to undergo a vulnerability assessment.¹⁹¹ The vulnerability assessment considers sea level rise and storm surges (if geographically relevant), precipitation timing, amounts, and intensity, the frequency and magnitude of storm events, the location of floodplains, potential fluctuation of freshwater levels, the frequency and magnitude of droughts and the resulting changes in stream flow, and changes in water temperature.¹⁹²

This Note argues that the specific type of pollutant, the amount of pollutant discharged, the history of the alleged infringer’s past violations, and the pollution’s proximity to communities should be considered when determining whether a discharge is the “functional equivalent” of a direct discharge. Whether the community affected is particularly vulnerable from historic pollution is likewise important to consider. In sum, all of these factors are imperative when making the fact-intensive “functional equivalent” analysis, as different types of discharges spew different types of pollutants into different aquatic ecosystems, each with different levels of marine health.¹⁹³ As

¹⁸⁸ *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. at 1476.

¹⁸⁹ U.S. ENV’T. PROT. AGENCY, FRAMEWORK FOR PROTECTING PUBLIC AND PRIVATE INVESTMENT IN CLEAN WATER ACT ENFORCEMENT REMEDIES (2021), <https://www.epa.gov/sites/default/files/2016-12/documents/frameworkforprotectingpublicandprivateinvestment.pdf>. [<https://perma.cc/H4AW-YWCL>].

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See Kirkpatrick, *supra* note 137.

Justice Breyer realized, a bright-line rule is impossible in such a situation,¹⁹⁴ and all the foregoing factors should be analyzed on a case-by-case inquiry to determine whether the “functional equivalent” of a direct discharge occurred.

CONCLUSION

The Act still defines a “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.”¹⁹⁵ A point source is “any discernible, confined and discrete conveyance[.]”¹⁹⁶ The Act lays forth a non-exclusive list of conveyances that count as point sources, including pipes, ditches, channels, tunnels, conduits, wells, discrete fissures, containers, rolling stocks, concentrated animal feeding operations, and vessels and other floating crafts.¹⁹⁷ Agricultural stormwater runoff and return flows from irrigated agriculture are specifically exempted from the definition of point sources.¹⁹⁸

By using Justice Kennedy’s significant nexus test, courts may avoid the complicated issue of whether an infringer may be liable if the discharge of pollutants comes from a point source, such as a pipe, flows through a medium, such as groundwater, and empties into navigable waters.¹⁹⁹ In such a scenario, the polluter will be found liable for their conduct.²⁰⁰ The issue still arises, however, in determining whether a conveyance, not specifically defined as a point source under the Act, constitutes a direct discharge or its “functional equivalent.” In assessing whether a conveyance is the “functional equivalent” of a direct discharge, courts should employ the foregoing multi-factor balancing test. By doing so, courts may appropriately practice prudence before declaring a conveyance as the functional equivalent of a direct discharge. This way, some conveyances will remain under state regulatory authority, if not defined as the “functional equivalent” of a direct discharge, whereas others will be regulated under the Act, if they meet the criteria for being a “functional equivalent” of a direct discharge.

¹⁹⁴ *Cnty. of Maui*, 140 S. Ct. at 1470.

¹⁹⁵ 33 U.S.C. § 1362(12) (2021).

¹⁹⁶ 33 U.S.C. § 1362(14) (2021).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Rapanos*, 547 U.S. at 779-80 (Kennedy, J., concurring).

²⁰⁰ *Id.*

Although this is a time of intense concern over the disastrous effects of climate change, the middle ground remains the correct choice of action. To grant heavy federal regulatory authority under the Act will lead to challenges from polluters who believe the Act surpasses the limits of its jurisdiction under the Commerce Clause. On the other hand, little federal oversight may lead to increased degradation of our Nation's waters. Under the solution articulated in this Note, states remain free to challenge the Act's authority in the courts if they believe it oversteps the EPA's regulatory authority. Additionally, those who wish to see more federal regulation may petition the courts to define specific conveyances as "functional equivalents" of a direct discharge, thus bringing them under the Act's jurisdiction.

Finally, the Supreme Court and Congress may work to further decipher vague portions of the Act, to provide greater clarity to the Act's interpretation. SCOTUS should define what constitutes a "functional equivalent" of a direct discharge with sufficient precision to guide the lower courts in their analyses. Additionally, Congress should amend the definition of point sources under the Act to articulate which specific conveyances need to remain under federal oversight, and to exclude conveyances it wishes to see remain under state authority. Currently, the Biden Administration is planning to reinstate a revised WOTUS rule, which will amend the definition of "waters of the United States."²⁰¹ While legislative amendments are outside the scope of this Note, it is worth observing that redefining waters of the United States is a good start. Still, other areas of the Act, specifically the definition of point sources, need to be amended with the requisite specificity to avoid confusion under the Act's vague definitions.

The Act has been a seductive mirage for too long. Currently, the Act is comparable to the sirens' songs which posed a significant danger to Odysseus and his crew. If the Act continues to face interpretation issues, it will never be successful in fighting the malignant effects of water pollution. Polluters will continue to escape liability, to the detriment of our Nation's aquatic

²⁰¹ Hannah Northey, *EPA: New WOTUS Definition Coming Later This Year*, ESSENTIAL ENV'T & ENERGY PUBL'G (Jan. 3, 2022), <https://www.eenews.net/articles/epa-new-wotus-definition-coming-later-this-year/>. [<https://perma.cc/K6PY-ZT6T>]. [<https://perma.cc/Y48V-HQBB>].

ecosystems. The Act poses a potentially beautiful solution to many of the issues surrounding water pollution in the United States, but due to its current, broad definitions of points sources and waters of the United States, the Act remains rife with interpretive complications. Until those complications are fixed, the Act will continue to pose a danger to our Nation's waters while operating under the guise of a solution for aquatic health.

