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## PREVIEW—County of Maui, Hawaii v. Hawaii Wildlife Fund: Clean Water Act Regulation of Point Source Pollution Conveyed through Groundwater

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**PREVIEW—County of Maui, Hawaii v. Hawaii Wildlife Fund:  
Clean Water Act Regulation of Point Source Pollution Conveyed  
through Groundwater**

**Connlan William Whyte\***

The Supreme Court of the United States will hear oral arguments in this matter on Wednesday, November 6, 2019, at 10:00 a.m. at the Supreme Court Building in Washington, D.C. Elbert Lin will likely appear for the Petitioner. David Lane Henkin will likely appear for the Respondents. Solicitor General, Noel Francisco, will argue on behalf of the United States.

**I. INTRODUCTION**

*County of Maui, Hawaii v. Hawaii Wildlife Fund* asks whether the Clean Water Act (“CWA”) requires a polluter to acquire a permit when pollutants originate from within a point source but are conveyed to navigable waters through a nonpoint source, such as sediment erosion or groundwater.<sup>1</sup> The petitioner, the County of Maui (“County”), owns and operates four wells with the Lahaina Wastewater Reclamation Facility (“LWRF”) that discharge wastewater into the groundwater and, eventually, into the Pacific Ocean.<sup>2</sup> Wastewater marked with dye was deposited in three of the four wells and later found in the Pacific Ocean after seeping through groundwater.<sup>3</sup> The Hawai’i Wildlife Fund, Sierra Club, Surfrider Foundation, and West Maui Preservation Association (collectively here “Respondents”) sued, alleging that the County’s four sewage injection wells require permits under the National Pollutant Discharge Elimination System (“NPDES”) for the transfer of wastewater through groundwater to navigable waters.<sup>4</sup>

**II. FACTUAL AND PROCEDURAL BACKGROUND**

Since 1985, the County has operated four injection wells at the LWRF and injects three to five million gallons of treated sewage into the

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1. *Hawai’i Wildlife Fund v. County of Maui*, 886 F.3d 737, 742 (9th Cir. 2018) [hereinafter *Maui II*].

2. *Id.*

3. *Id.* at 743.

4. *Id.*; A party “violates the CWA when it does not obtain [a NPDES] permit and (1) discharges (2) a pollutant (3) to navigable waters (4) from a point source; however, under 33 U.S.C. §§ 1311(a) and 1342(a)(1), a party “who obtains a NPDES permit is exempt from the general prohibition on point source pollution. *Id.* at 744 (internal quotations omitted) (citing *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001); see *infra* Section III, Subsection A.

groundwater per day.<sup>5</sup> Seeking to better understand the hydrological connections between the injected wastewater and the coastal waters, the Environmental Protection Agency (“EPA”), the Hawaii Department of Health (“HDOH”), and others commissioned a tracer dye study (“Study”) to track the treated effluent travels.<sup>6</sup>

In June 2013, those groups, with assistance from the University of Hawaii, dyed the effluent being injected into three of the four County wells, and eighty-four days later, researchers documented the presence of dyed wastewater in the nearby Pacific Ocean.<sup>7</sup> Approximately sixty-four percent of the sewage effluent was found to have made its way to the Pacific Ocean. The Study also suggested, and the County conceded, that all four wells transferred sewage to the ocean in the same manner.<sup>8</sup> Accordingly, the Study showed that the County’s wells were connected to navigable waters via groundwater.<sup>9</sup>

In 2014, the Respondents sued the County in the United States District Court for the District of Hawaii, alleging that the CWA required the County to have NPDES permits for its wells because they transferred effluent from four point sources—through the groundwater—to navigable waters.<sup>10</sup> The County moved to dismiss, claiming that the pollutants were not covered by the CWA because they passed through a nonpoint source before entering navigable waters. The district court granted summary judgment in favor of the Respondents.<sup>11</sup>

The County appealed to the United States Court of Appeals for the Ninth Circuit, claiming that the LWRP’s wells do not fall under NPDES jurisdiction and that the County was not given fair notice of any CWA violations.<sup>12</sup> On appeal, the Ninth Circuit affirmed, holding that: (1) the County was liable under the CWA for the unpermitted discharge of effluent, which was fairly traceable, into navigable waters in more than a de minimis amount; and (2) the County had fair notice, consistent with due process requirements, that the CWA prohibited these discharges without a permit.<sup>13</sup> The Court based its opinion on the traceable nature of the pollutants and the isolation and identification of the wells as sources.<sup>14</sup> Suggesting that any other ruling would be a mockery of the intent of the CWA, the Court stated the case was “about preventing the County from

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5. *Id.* at 742.

6. *Id.*

7. *Id.* at 742–43.

8. *Id.* at 743.

9. *Id.*

10. *Hawai’i Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 980, 983 (D. Haw. 2014) [hereinafter *Maui I*].

11. *Id.* at 1005.

12. *Maui II*, 886 F.3d at 742.

13. *Id.* at 752.

14. *Id.* at 749, 752; *cf.* *Ecological Rights Found. v. Pacific Gas & Elec. Co.*, 713 F.3d 502, 508 (9th Cir. 2013) (deeming the pollution in question not easily trackable to one source, where the sources in question were not easily regulated by nature).

doing indirectly that which it cannot do directly.”<sup>15</sup> The County petitioned for certiorari with the Supreme Court of the United States, which agreed on February 19, 2019, to hear the case.<sup>16</sup>

### III. SUMMARY OF THE ARGUMENTS

#### A. Background

In 1972, Congress passed the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters”<sup>17</sup> and to encourage that “waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State.”<sup>18</sup> The CWA stipulates that pollution from a point source into navigable waters must have an NPDES permit to monitor its levels of pollution.<sup>19</sup> A point source is “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, [or] well . . . .”<sup>20</sup> Navigable waters are defined as “the waters of the United States, including the territorial seas.”<sup>21</sup> Most wells that discharge sewage directly into groundwater do not require NPDES permits because the effluent is not going into navigable water but instead into the groundwater.<sup>22</sup> For example, in *League of Wilderness Defenders v. Forsgren*, the Ninth Circuit held that a nonpoint source of pollution is “the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source.”<sup>23</sup> Further, the Sixth Circuit in *Kentucky Waterways Alliance v. Kentucky Utilities Company*, held that groundwater is not a point source because it is “neither confined nor discrete” and one cannot “discern its precise contours as can be done with traditional point sources like pipes, ditches, or tunnels.”<sup>24</sup>

In 2001, the Environmental Protection Agency (“EPA”) released a report on proposed rule changes for concentrated animal feeding operations (“CAFO”).<sup>25</sup> Within the report, the EPA stated that the pollution caused by CAFOs was to be regulated as point source pollution under the CWA even though the pollution was transferred through

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15. *Maui II*, 886 F.3d at 752.

16. *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 139 S. Ct. 1164 (2019).

17. 33 U.S.C. § 1251(a)(5) (2012).

18. *Id.*

19. *Id.* §§ 407, 1342.

20. *Id.* § 1362(14).

21. *Id.* § 1362(7).

22. *Id.* § 407.

23. 309 F.3d 1181, 1184 (9th Cir. 2002).

24. 905 F.3d 925, 933 (6th Cir. 2018).

25. National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2,960 (Jan. 12, 2001).

groundwater before it entered navigable waters.<sup>26</sup> The EPA’s NPDES report stated that “about 40 percent of the average annual stream flow is from groundwater”; therefore groundwater that has a direct hydrological connection to navigable waters can be regulated under the CWA.<sup>27</sup> Further, the Fourth Circuit in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.* held that the CWA’s “from a point source”<sup>28</sup> language refers to a starting point of pollution, and thus point source pollution that passes through groundwater and into navigable waters should be regulated.<sup>29</sup> Lastly, the Ninth Circuit held that an “indirect” transfer of pollutants from a point source to navigable waters would require an NPDES permit.<sup>30</sup>

### B. Petitioner’s Arguments

The County argues that the Respondents have misinterpreted the CWA’s longstanding treatment of point source pollution.<sup>31</sup> The County asserts that the CWA does not have a regulatory scheme that requires coverage of nonpoint source pollution, which would be an “enormous and transformative expansion” of the CWA.<sup>32</sup> Moreover, the County argues that the CWA clearly sets up a “means-of-delivery test” and the phrase “from . . . any point source” refers to a direct connection between the point source and navigable waters, not a starting point of pollution.<sup>33</sup> The County claims: (1) CWA’s statutory language unequivocally sets out a “means-of-delivery”<sup>34</sup> test through the statute’s definition of “discharge of pollutants”;<sup>35</sup> (2) the “means-of-delivery” test conforms with the structure of the CWA; and (3) the test requires point sources to be the “means-of-delivery” of the pollution into navigable waters, not the “proximate cause.”<sup>36</sup>

Additionally, the County argues that “[t]he CWA’s ‘substantial’ penalties also call for the predictability provided by the means-of-delivery test.”<sup>37</sup> Accordingly, a pollutant transferred through groundwater lacks the

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26. *Id.* at 2,964.

27. *Id.* at 3,016.

28. 33 U.S.C. § 1362(12)(A).

29. 887 F.3d 637, 650 (4th Cir. 2018).

30. *Maui II*, 886 F.3d at 768.

31. Pet’r’s Reply Br. at 1, Aug. 19, 2019, No. 18-260.

32. *Id.* (quoting *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

33. *Id.* at 3; 33 U.S.C. § 1362(12); *see also* *Sierra Club v. Virginia Electric & Power Co.*, 903 F.3d 403, 409 (4th Cir. 2018) (holding that if a plaintiff shows a direct hydrological connection between a point source and groundwater, the transfer of the pollution through the groundwater must be regulated by NPDES permits).

34. Pet’r’s Reply Br. at 3.

35. 33 U.S.C. § 1362(12).

36. Pet’r’s Reply Br. at 11–12.

37. *Id.* at 12 (quoting *United States Army Corps of Eng’rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1812 (2016)).

predictability of point source pollution found within the CWA’s definition of “point source.”<sup>38</sup> Further, the County contends that the legislative history of the CWA supports the means-of-delivery test through Congress’ refusal to recognize groundwater specific proposals<sup>39</sup> and that Congress specifically “entrusted nonpoint source pollution, like releases from the County’s wells, to the States.”<sup>40</sup>

The County argues that the Court has confirmed its interpretation of the means-of-delivery test through both *Utility Air Regulatory Group v. EPA* and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*.<sup>41</sup> The *UARG* Court held that the EPA’s interpretation of the Clean Air Act (“CAA”) placed “plainly excessive demands on limited governmental resources[,]” which “alone was a good reason for rejecting it.”<sup>42</sup> The County asserts that the Court’s holding of an “excessive” interpretation of a statute applies to the Respondents’ “excessive” interpretation of the CWA.<sup>43</sup> Secondly, the *SWANCC* Court held that “Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.”<sup>44</sup> Therefore, the Court should not look at the EPA’s interpretation of the CWA but instead look for Congress’ clear intent.<sup>45</sup>

The County further contends that nonpoint source pollution is left for state regulation because additional federal oversight would upset the “balance between federally mandated permits and state-led nonpoint source management programs.”<sup>46</sup> Finally, the County argues that its wells are not polluting into navigable waters, under the CWA, because the “path between the point source and jurisdictional surface waters is too attenuated . . . .”<sup>47</sup> The County maintains that ground water cannot be considered a point source because it is neither “confined [n]or discrete.”<sup>48</sup>

### C. Respondents’ Arguments

Initially, the Respondents argue that a black-letter interpretation of the “CWA’s core prohibition . . . bars the County’s unpermitted ‘addition of [a] pollutant’—the Facility’s effluent—to navigable waters’—the Pacific Ocean—‘from [a] point source’—the wells.”<sup>49</sup> The

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38. *Id.* at 13–14; 33 U.S.C. § 1362(14).

39. Pet’r’s Reply Br. at 16.

40. *Id.* at 17.

41. *Id.* at 18; 573 U.S. at 324; 531 U.S. 159, 171 (2001).

42. 573 U.S. at 324.

43. Pet’r’s Reply Br. at 20 (quoting *Utility Air Regulatory Grp.*, 573 U.S. at 324).

44. 531 U.S. at 172–73.

45. Pet’r’s Reply Br. at 21.

46. *Id.*

47. *Id.* at 23 (internal quotations omitted).

48. *Id.* at 22 (quoting 33 U.S.C. § 1362(14)).

49. Br. for Resp’ts at 1, July 12, 2019, No. 18-260 (quoting 33 U.S.C. § 1362).

Respondents contend that the CWA's provisions not only apply to point source pollutants "directly" transferred into navigable waters but also to any pollutants transferred into closely associated navigable waters from point sources.<sup>50</sup> Moreover, they maintain that indirect transfers of pollutants are covered by the CWA under Justice Scalia's opinion in *Rapanos v. United States*, where he stated "the [CWA] does not forbid the addition of any pollutant *directly* to navigable waters from any point source, but rather the addition of any pollutant *to* navigable waters."<sup>51</sup>

The Respondents assert that Justice Scalia's phrasing avoided writing "directly" into the CWA and instead clarified that the CWA covered more pollutants than just those transferred "directly" into navigable waters.<sup>52</sup> This argument does not distinguish Scalia's definition of "waters of the United States" but instead allows for point source pollution into those "waters" not directly from point sources but rather generally "from" point sources.<sup>53</sup> The Respondents further assert that the CWA's "inclusion of 'well[s]'" in its definition of "point source"<sup>54</sup> directly alludes to groundwater conveyance as a form of pollutant transfer subject to NPDES permits.<sup>55</sup> The Respondents contend that wells almost exclusively operate within groundwater rather than in direct contact with navigable waters.<sup>56</sup> Similarly, they state that "[t]he County seeks to rewrite the [CWA] to apply only when a point source or series of point sources conveys pollutants directly to navigable waters[.]" which is in direct conflict with both the Court's ruling in *Rapanos* and the CWA's plain language.<sup>57</sup>

Further, the Respondents argue that any "addition of pollutants to a waterbody has taken place whenever the waterbody contains more pollutants than it did before"<sup>58</sup>; therefore the County is responsible for the addition of pollutants to the Pacific Ocean off the west coast of Maui.<sup>59</sup> The Respondents also maintain that the LWRF wells are subject to NPDES regulation because the sewage effluent could "traceably and foreseeably reach navigable waters."<sup>60</sup> Furthermore, they contend that the County's

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50. *Id.* at 12.

51. *Id.* at 2–3 (quoting 547 U.S. 715, 743 (2006) (plurality) (internal quotations omitted) (emphasis in original)).

52. *Id.*

53. *Id.* at 739, 743.

54. Br. for Resp'ts at 13 (quoting 33 U.S.C. § 1362(14)).

55. *Id.*

56. *Id.*

57. *Id.* at 13–14.

58. *Id.* at 17 (citing *South Florida Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 109–112 (2004) (holding that the transfer of polluted water through a point source was subject to NPDES regulation even if the point source did not pollute the water being transferred into navigable waters)).

59. *Id.*

60. *Id.* at 19 (citing *Rapanos*, 547 U.S. at 743 (holding that pollutants discharged into intermittent channels that naturally wash downstream into navigable waters could be regulated by NPDES permits)).

interpretation of indirect discharges conflicts with Congress' intended use of NPDES permits.<sup>61</sup> NPDES regulation replaced the prior Refuse Act,<sup>62</sup> and federal circuit courts had interpreted the Refuse Act broadly to include indirect deposits of refuse.<sup>63</sup> Lastly, the Respondents argue that groundwater protection under the CWA would complement other water protection statutes such as the Safe Drinking Water Act ("SDWA"),<sup>64</sup> thus supporting the Court's consideration in uniting statutes within the same field of concern.<sup>65</sup>

#### IV. ANALYSIS

##### A. *The Clean Water Act's Plain Language*

The Court must address the directness required for point source transfer of pollution to navigable waters. In deciding this case, the Court will have to grapple with some of the questions left unanswered in *Rapanos*.<sup>66</sup> Interpretation of the CWA's plain language will be central to this analysis. The County contends that the CWA regulates point source pollution when it directly enters navigable waters.<sup>67</sup> The Respondents disagree and state that a point source must be the origin of the pollution, and the conveyance of the pollution must directly connect to the point source.<sup>68</sup> As in *Rapanos*, the question here concerns whether the plain language of the CWA applies to pollution conveyance through groundwater, a nonpoint source. There, the Court held, in a plurality opinion authored by Justice Scalia, that the filling of ditches next to wetlands did not violate the CWA because the Plaintiffs could not prove a "significant nexus" between the ditches and wetlands.<sup>69</sup>

The Court currently consists of five justices from the *Rapanos* opinion, three of whom were in the majority and two in the dissent. Those members of the Court will likely approach the issue of interpretation of the CWA as they did in *Rapanos*.<sup>70</sup> In *Rapanos*, Chief Justice Roberts wrote a separate concurrence expressing frustration that none of the

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61. *Id.* at 25.

62. 33 U.S.C. § 407 (1899).

63. Br. for Resp'ts at 25 (citing *United States v. Esso Standard Oil Co. of P.R.*, 375 F.2d 621, 623 (3rd Cir. 1967) (holding that an oil discharge with close proximity to the sea was not a direct deposit of refuse into the sea but was covered by the Refuse Act because the refuse was deposited in close proximity to the sea and its indirect transfer to the sea was easily foreseeable)).

64. 42 U.S.C. § 300f.

65. Br. for Resp'ts at 49 (citing *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 115 (2014) (holding that statutes with complimentary purpose are read as to give effect to each other rather than to displace each other)).

66. *Rapanos*, 547 U.S. at 743.

67. Pet'r's Reply Br. at 12.

68. Br. for Resp'ts at 2–3.

69. *Rapanos*, 547 U.S. at 742.

70. *Id.* at 715.

opinions commanded a majority and that the Army Corps of Engineers and EPA were unable to promulgate regulations in response to *SWANCC*, which would have “merit[ed] deference under [the Court’s] generous standards . . . .”<sup>71</sup> Justice Thomas joined Justice Scalia’s plurality, which concluded the CWA does not regulate non-surface waters that transfer pollution, or, as Justice Scalia put it, the “plain language of the [CWA] simply does not authorize . . . [a] ‘Land Is Waters’ approach to federal jurisdiction.”<sup>72</sup>

Nonetheless, both Justices Ginsburg and Breyer joined in Justice Steven’s dissent asserting that the wetlands in question were interconnected with the filled-in channels, and therefore the CWA applied.<sup>73</sup> With Justices Kagan, Sotomayor, Gorsuch, and Kavanaugh having joined the Court since it decided *Rapanos*, it is uncertain how those members Court will interpret the language of the CWA. However, both Justices Gorsuch and Kavanaugh clerked for Justice Kennedy in 1993.<sup>74</sup> Justice Kennedy’s concurring opinion in *Rapanos* came to the same conclusion as Justice Scalia’s plurality, but Justice Kennedy proposed that cases like *Rapanos* still need to analyze nonpoint sources like groundwater.<sup>75</sup> Kennedy believed that if a “significant nexus” could be found between the groundwater—that conveyed the pollutants—and the polluted navigable waters then the point source of pollution should be regulated under the CWA.<sup>76</sup> Justice Kennedy, through cases like *SWANCC* and *Rapanos*, has shown a pragmatic approach in interpreting the CWA<sup>77</sup> and his former clerks, Justices Gorsuch and Kavanaugh, may share that approach and find that the groundwater at issue has a “significant nexus” with the Pacific Ocean.<sup>78</sup>

The Court will likely look at the definition of point source within the CWA and interpret the phrase, “from which pollutants are or may be discharged.”<sup>79</sup> The Court will likely analyze whether “from” merely denotes a starting place for the pollution or the prior source of the pollution before it entered navigable waters.<sup>80</sup> If the Court holds that “from” denotes

71. *Id.* at 757–58 (Roberts, C.J., concurring).

72. *Id.* at 734, 755.

73. *Id.* at 787–88 (Stevens, J., with Souter, J., Breyer, J., Ginsburg, J., dissenting).

74. Richard Wolf, *Basketball, Popeyes, 2 Live Crew: The year Neil Gorsuch and Brett Kavanaugh clerked for Anthony Kennedy*, USA TODAY (Aug. 30, 2018), <https://www.usatoday.com/story/news/politics/2018/08/30/brett-kavanaugh-neil-gorsuch-learned-supreme-court-ropes-together/1050836002/>.

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

76. *Id.* (quoting *SWANCC*, 531 U.S. at 167).

77. Norman A. Dupont, *Justice Kennedy and Environmental Water Cases: A Pragmatic Approach To Water from a Western Perspective*, AMERICAN BAR ASS’N (Sept. 10, 2018), [https://www.americanbar.org/groups/environment\\_energy\\_resources/publications/trends/2018-2019/september-october-2018/justice-kennedy-and-environmental/](https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2018-2019/september-october-2018/justice-kennedy-and-environmental/).

78. *Rapanos*, 547 U.S. at 759 (quoting *SWANCC*, 531 U.S. at 167).

79. 33 U.S.C. § 1362(14).

80. See Pet’r’s Reply Br. at 12.; Br. for Resp’ts at 2–3.

the need for direct connection between the LWRF wells and the Pacific Ocean, then the analysis of the plain language will end. However, if the Court finds that “from” merely denotes a starting point for the pollution, it will most likely apply the “significant nexus” test.<sup>81</sup> Because the undisputed facts show a traceable hydrologic connection between the LWRF wells, the groundwater, and the Pacific Ocean, the Court may hold that a significant nexus exists.<sup>82</sup> If the Court chooses not to apply the “significant nexus” test, then it may find that the LWRF wells are not polluting directly into the Ocean but instead into a nonpoint source that could be regulated by the State of Hawaii.<sup>83</sup>

Further, to address point source pollution transfer, the Court may examine Justice Scalia’s opinion in *Rapanos*.<sup>84</sup> Justice Scalia chose not to write “directly” into the language of point source transfer under the CWA, suggesting the Court may regard his comments as dicta.<sup>85</sup> However, lower courts have interpreted his comments differently, so the Court may wish to set a standard with this case. In *Kentucky*, the Sixth Circuit held that groundwater was not discernible and could not be covered under the CWA.<sup>86</sup> Meanwhile, the Fourth Circuit in *Kinder* held that “from . . . a point source” denoted a starting point, not the actual conveyance, of a pollutant and thus groundwater could be regulated under the CWA.<sup>87</sup> Considering this circuit split on groundwater and the CWA, the parties may push the Court to clarify—once and for all—whether the CWA covers pollution conveyances through entities like groundwater.

Lastly, the EPA has sought an alternative solution to the issue and has stated that the Court should add a groundwater exception within the definition of “point source.”<sup>88</sup> The Court may consider the EPA’s input on the issue because “[a]gencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer.”<sup>89</sup> However, the EPA has not refined its position on the ambiguous nature of groundwater under the CWA, and has left [l]ower courts and regulated entities . . . to feel their way on a case-by-case basis” as they interpret the

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81. 33 U.S.C. § 1362(14); *Rapanos*, 547 U.S. at 715.

82. *Maui II*, 886 F.3d at 743.

83. See Pet’r’s Reply Br. at 21 (arguing that applying federal jurisdiction to nonpoint source regulation is an overstep that violates the CWA).

84. *Rapanos*, 547 U.S. at 755.

85. *Id.*

86. *Kentucky Waterways All.*, 905 F.3d at 933.

87. *Upstate Forever*, 887 F.3d at 650 (quoting § 1362(12)(A)).

88. Norman A. Dupont, *County of Maui v. Hawai’i Wildlife Fund: A Preview of the Supreme Court’s Review of Clean Water Act Jurisdiction over Groundwater*, AMERICAN BAR ASS’N (May 10, 2019), [https://www.americanbar.org/groups/environment\\_energy\\_resources/publications/trends/2018-2019/may-june-2019/county-of-maui/](https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2018-2019/may-june-2019/county-of-maui/).

89. *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (citing *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842–845 (1984)).

CWA and its inclusion of groundwater-connected pollution.<sup>90</sup> Therefore, the Court will likely attempt to create a clear interpretation of the CWA—before it gives deference to the EPA—since the EPA has yet to clarify groundwater’s ambiguity under the CWA.<sup>91</sup> Further, the EPA’s interpretation derives from Justice Scalia’s language in *Rapanos*, which is also responsible for the overly ambiguous treatment of the CWA. Therefore, the Court will likely seek to remedy the confusion around *Rapanos* rather than defer authority to the EPA.<sup>92</sup>

### B. Congress’ Intent Behind the Clean Water Act

In correcting the ambiguity of the CWA, the Court will likely look at Congress’ intent behind the “point source” definition and the CWA as a whole.<sup>93</sup> First, Respondents assert that the CWA’s inclusion of wells as specific point sources must mean that the CWA was intended to regulate groundwater,<sup>94</sup> whereas the County contends that the regulation of groundwater would be so excessive that if Congress had intended to regulate it, it would have explicitly said so in the CWA.<sup>95</sup> If the Court finds that the CWA’s intent was to regulate the transfer of pollutants via groundwater, then the Court will likely expand upon the “significant nexus” test in order to create a more concise structure for determining groundwater regulation.<sup>96</sup> However, if the Court does not accept that Congress intended to regulate pollutants conveyed through groundwater, then it will find for the County and settle the interpretation of point source pollution within the CWA.

The Court may consider Respondents’ argument that the prior Refuse Act reflects congressional intent to regulate broadly using the CWA.<sup>97</sup> The Refuse Act argument may slightly persuade the Court, but its interpretation did not present the same large-scale effect as the CWA.<sup>98</sup> Ultimately, the Court is more likely to look at similar water protection legislation and how that legislation treats groundwater. Respondents contend that the SDWA aims to “prevent underground injection from endangering drinking water sources”;<sup>99</sup> therefore the Court may consider a pro-groundwater-regulation standpoint to create uniformity within the broad field of regulating water protection.<sup>100</sup>

Lastly, the Court will look at Congress’ intent in executing the CWA. On its face, the CWA seeks to “restore and maintain the chemical,

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90. *Id.*

91. *Id.*

92. *Id.* at 755, 758.

93. 33 U.S.C. 1362(14).

94. Br. for Resp’ts at 13.

95. Pet’r’s Reply Br. at 21.

96. *Rapanos*, 547 U.S. at 715.

97. Br. for Resp’ts at 25.

98. *Id.*

99. *Id.* at 49.

100. See *POM Wonderful LLC*, 573 U.S. at 115.

physical, and biological integrity of the Nation's waters."<sup>101</sup> The Court may choose to interpret CWA's facial intent more broadly to meet the mission of the statute rather than to delineate the black-letter meaning of every phrase. However, if the Court continues to look at the mission of the CWA, it will find that states have an interest in regulating nonpoint source pollution, so the Court may give deference to states to regulate groundwater pollution as a nonpoint source.<sup>102</sup>

## V. CONCLUSION

The Court has yet to directly address the CWA ambiguity left by the *Rapanos* decision and this case offers an excellent opportunity for the Court to set a standard for interpreting the CWA with respect to groundwater conveyance of pollutants into navigable waters. As hydrological sciences progress further—and the science community consistently identifies the intertwinement of groundwater and water pollution—the laws that govern its regulation are likely to become more complex and all encompassing. Ultimately, the Court has a great opportunity to recognize the connection between groundwaters and navigable waters to better protect water from both indirect and direct pollution.

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101. 33 U.S.C. 1362 § 1251(a).

102. *Id.* § 1251(g); *see* Pet'r's Reply Br. at 22.