HYPERTEXTUALISM AND THE CLEAN WATER ACT: REJECTING RIGID INTERPRETATIONS OF ENVIRONMENTAL STATUTES

BY

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Can a polluter evade Clean Water Act regulation by moving their discharge pipe a few feet from the riverbank? In 2018 three circuit courts addressed this question in cases involving point source discharges of pollutants that moved through hydrologically connected groundwater before reaching navigable waters. The Ninth Circuit, in Hawai'i Wildlife Fund v. County of Maui*, and the Fourth Circuit, in* Upstate Forever v. Kinder Morgan Energy Partners*, found such discharges were covered under the Clean Water Act, while the Sixth Circuit, in* Tennessee Clean Water Network v. Tennessee Valley Authority *and* Kentucky Waterways Alliance v. Kentucky Utilities Co.*, found they were not. This Chapter examines two approaches to interpreting the Clean Water Act, comparing the Ninth and Fourth Circuits' practical-textual approach with the Sixth Circuit's hypertextual approach. In comparing these two forms of textualism, this Chapter aims to exemplify why rigid, hypertextual approaches to interpreting environmental statutes can have disastrous practical impacts and lead to absurd results.*

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I. INTRODUCTION

Imagine there is a waste treatment facility that injects upwards of 2.8 million gallons of wastewater into the Pacific Ocean per day by way of its wastewater injection wells. Or, imagine there is a ruptured gasoline pipeline from which gasoline toxins seep through the groundwater into nearby rivers, creeks, and wetlands. Or perhaps, there

are coal ash waste ponds at a coal-fired power plant so structurally deficient that the ponds release chemicals that travel through the groundwater, eventually reaching nearby rivers. If these hypothetical discharges occurred directly into a stream or ocean, they would undoubtedly require a permit, mandated by the Federal Water Pollution Control Act,[1] more commonly known as the Clean Water Act (CWA). Yet, in the Sixth Circuit, the conveyance of the pollution through groundwater would exempt the discharges from the CWA's requirements. Although the CWA prohibits the "addition of any pollutant to navigable waters from any point source" unless it is regulated by a proper permit,[2] under the Sixth Circuit's interpretation of the CWA, a polluter can be unpermitted in any of these three hypothetical scenarios.[3] Taking this interpretation to its logical conclusion, a polluter can escape CWA liability simply by moving its drainage pipe a few feet from the riverbank, thereby circumventing the purpose of the CWA.[4]

Congress passed the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[5] Central to this purpose is the Act's prohibition of "any addition of any pollutant to navigable waters from any point source," unless the discharge is regulated by a proper permit.[6] A point source is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."[7] Navigable waters is defined as "waters of the United States," which clearly includes surface waters such as rivers, streams, and lakes.[8] The CWA does not explicitly address groundwater and it is not clear whether the CWA's jurisdictional terms encompass groundwater. In particular, the meaning of "waters of the United States" has been subject to much debate and litigation, especially in the wake of three successive Supreme Court cases addressing the scope of the term.[9] Most recently, in *Rapanos v. United States*,[10] the Court split 4–4–1 on the question of when wetlands adjacent to tributaries are within the CWA's jurisdiction. Lower courts are divided on which test to follow: Justice Scalia's (plurality) test that would include wetlands that are adjacent to a navigable water and have a continuous surface connection with that water, or Justice Kennedy's (concurring)

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1 33 U.S.C. §§ 1251–1387 (2012).

2 *Id.* §§ 1311(a), 1362(12)(A).

3 Ky. Waterways All. v. Ky. Utils. Co., 905 F.3d 925, 933–36 (2018); *see also id.* at 940 (Clay, J., dissenting).

4 *Id.* at 940.

5 33 U.S.C. § 1251(a).

6 *Id.* §§ 1311(a), 1362(12)(A).

7 *Id.* § 1362(14).

8 *Id.* § 1362(7).

9 *See* Anna Makowski, *Beneath the Surface of the Clean Water Act: Exploring the Depth of the Act's Jurisdictional Scope of Groundwater Pollution*, 91 OR. L. REV. 495, 500–03 (2012).

10 547 U.S. 715 (2006).

"significant nexus" test that would regulate waters that "significantly affect the chemical, physical, and biological integrity of other covered waters."[11] In response to the resulting confusion over which waters are jurisdictional, the United States Environmental Protection Agency (EPA) promulgated the Clean Water Rule in 2015 (2015 Clean Water Rule or 2015 Rule) re-defining "waters of the United States."[12] But as a result of multiple court challenges, the 2015 Rule was enjoined in twenty-eight states.[13] And most recently, in September 2019, the Trump Administration repealed the 2015 Clean Water Rule and has proposed to replace it with a revised definition of "waters of the United States"[14] (2019 Proposed Revised Rule). Both the 2015 Clean Water Rule and the 2019 Proposed Revised Rule categorically exclude groundwater as a water of the United States.[15]

Many scholars have argued that the CWA's jurisdiction extends to groundwater, proposing three different theories of potential regulation: the point source theory, the tributary or significant nexus theory, and the hydrological connection or conduit theory.[16] The point source theory treats groundwater itself as the point source discharging pollutants into navigable waters.[17] The tributary theory includes groundwater that has a "significant nexus" to navigable-in-fact-waters as a water of the United States.[18] Lastly, the hydrological connection theory covers indirect discharges where groundwater conveys pollutants from a point source to navigable waters.[19] But the EPA and lower courts have not supported all of these theories. For instance, because the 2015 Clean

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[11] *Id.* at 717, 780; *see also* Kayla A. Currie, *Clear Waters Ahead? The Clean Water Rule Attempts to Bring Clarity to the Scope of the Clean Water Act*, 47 CUMB. L. REV. 191, 210 (2017).

[12] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015).

[13] LAURA GATZ, CONG. RESEARCH SERV., R45424, "WATERS OF THE UNITED STATES" (WOTUS): CURRENT STATUS OF THE 2015 CLEAN WATER RULE 6 (2018), https://perma.cc/CU4A-VYDK.

[14] Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328); *see also Definition of "Waters of the United States" – Recodification of Pre-Existing Rules (Pre-Publication Version)*, U.S. ENVTL. PROTECTION AGENCY, https://perma.cc/522P-R65E (last visited Nov. 2, 2019).

[15] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. at 37,054; Revised Definition of "Waters of the United States," 84 Fed. Reg. at 4154.

[16] Allison L. Kvien, *Is Groundwater That Is Hydrologically Connected to Navigable Waters Covered Under the CWA?: Three Theories of Coverage & Alternative Remedies for Groundwater Pollution*, 16 MINN. J.L. SCI. & TECH. 957, 960–61 (2015); *see also* Mary Christina Wood, *Regulating Discharges into Groundwater: The Crucial Link in Pollution Control under the Clean Water Act*, 12 HARV. ENVTL. L. REV. 569, 575–87 (1988) (discussing the point source theory and tributary theory to regulating groundwater under the CWA).

[17] Kvien, *supra* note 16, at 960–61; Wood, *supra* note 16, at 575.

[18] Kvien, *supra* note 16, at 961; *see also Rapanos*, 547 U.S. 715, 767 (2006) (Kennedy, J., concurring) (proposing a "significant nexus" test to determine when the connection between a non-navigable water and a navigable water is so close as to warrant jurisdiction under the CWA).

[19] Kvien, *supra* note 16, at 961.

Water Rule and the 2019 Proposed Revised Rule categorically exclude groundwater as a water of the United States, the tributary theory may be potentially foreclosed for the time being.[20] The EPA and courts appear to be in agreement that isolated groundwaters do not fall within the jurisdiction of the CWA.[21] The point source theory has not had much success in the lower courts and does not appear to be supported by the EPA.[22] The EPA has been inconsistent in its stance on whether groundwater with a direct hydrological connection to navigable waters may, on a case-by-case basis, be within the jurisdiction of the CWA.[23] On November 6, 2019, the Supreme Court heard oral arguments for the 2018 case from the Ninth Circuit and will likely decide the issue by next summer.[24]

In 2018, three circuit courts addressed the hydrological connection theory, weighing in on the question of whether the jurisdiction of the CWA extends to pollution that travels through groundwater prior to making its way to navigable waters. The Ninth and Fourth Circuits both said pollution that travels from a point source through groundwater before reaching navigable waters falls within the jurisdiction of the CWA on a case-by-case basis.[25] But the Sixth Circuit rejected the hydrological connection theory, holding that the addition of a pollutant must occur *directly* from the point source to the navigable water.[26] In reaching this conclusion, the Sixth Circuit took a hypertextualist approach to interpreting the relevant provisions of the CWA, defining words in the statute as narrowly as possible to fit its

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[20] *Id. But see* Michael C. Blumm & Steven M. Thiel, *(Ground)waters of the United States: Unlawfully Excluding Tributary Groundwater from Clean Water Act Jurisdiction*, 46 ENVTL. L. 333, 333 (2016) (arguing that the categorical exclusion of groundwater as a water of the United States is unlawful under the CWA and Supreme Court precedent).

[21] Kvien, *supra* note 16, at 958–59.

[22] *Id.* at 963.

[23] *Compare* U.S. Envtl. Prot. Agency, Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater, Interpretative Statement (Apr. 12, 2019) (concluding that the CWA is "best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage and liability under Section 301 of the CWA, regardless of a hydrologic connection between the groundwater and a jurisdictional surface water."), *with* National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 3015 (proposed Jan. 12, 2001) (stating "that the Agency interprets the Clean Water Act to apply to discharges of pollutants from a point source via ground water that has a direct hydrologic connection to surface water").

[24] *See Hawai'i Wildlife Fund v. Cty. of Maui (County of Maui),* 886 F.3d 737, 749 (9th Cir. 2018), cert. granted, 139 S. Ct. 1164 (2019); Pamela King & Ariel Wittenberg, *'Whiskey in Punch?' Justices Probe Clean Water Act's Limits,* E&E NEWS (Nov. 6, 2019), https://perma.cc/NHA7-CMPN.

[25] *Cty. of Maui*, 886 F.3d at 749; Upstate Forever v. Kinder Morgan Energy Partners, L.P., 887 F.3d 637, 650 (4th Cir. 2018).

[26] *Ky. Utils. Co.*, 905 F.3d 925, 938 (6th Cir. 2018); Tenn. Clean Water Network v. Tenn. Valley Auth. (*TVA*), 905 F.3d 436, 445 (6th Cir. 2018).

desired result, manipulating context, disregarding precedent, and largely ignoring the statute's purpose and practical considerations.[27]

A hypertextualist reading of the CWA that excludes hydrologically connected groundwater has severe implications for the health of aquatic systems. Pollution into groundwater directly impacts pollution levels of surface waters, implicating human health, drinking water, recreation, fisheries, and more. Furthermore, excluding pollution discharged through hydrologically connected groundwater from the CWA opens up a loophole through which polluters can escape regulation, likely necessitating reactive regulation later on.[28] The Sixth Circuit's rigid, hypertextualist approach is emblematic of a troubling trend in statutory interpretation.

Textualism has been on the rise since the late Justice Scalia joined the Supreme Court in 1986.[29] Textualism is a method of statutory interpretation that relies on dictionary definitions, rules of grammar, and canons of construction to derive the objective meaning of a word or phrase.[30] Hypertextualism goes even further. Professor Pierce defined hypertextualism as "finding linguistic precision where it does not exist, and relying exclusively on the abstract meaning of a particular word or phrase even when other evidence suggests strongly that Congress intended a result inconsistent with that usage."[31] This approach differs substantially from the traditional approach to statutory interpretation, most notably in its lack of reliance on legislative history, statutory purpose, and statutory intent.[32] A hypertextualist approach also affects whether courts will defer to an administrative agency's interpretation of ambiguous statutory language.[33] In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[34] the Supreme Court held that if a statute is silent or ambiguous with respect to an issue, courts should defer to the reasonable interpretation made by the agency administrator. However, with hypertextualist courts, there is less deference to agency expertise.[35] Because hypertextualism aims to parse the dictionary definitions of individual words without reliance on statutory intent, purpose, or history, this method of interpretation

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27 *See* discussion *infra* Part V(B)(2).

28 For example, if surface waters are allowed to be degraded without proper regulatory oversight, regulatory agencies will likely have to retroactively address the degradation through the CWA's water quality standards and Total Maximum Daily Load (TMDL) program. CWA, 33 U.S.C. § 1313 (2012); *see* discussion *infra* Part V.

29 Meredith Abernathy, *Running on Empty: Will Exxon Mobil Cause a Breakdown for* Chevron *and the Administrative State?*, 64 WASH. & LEE L. REV. 583, 601 (2007).

30 Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750 (1995).

31 *Id.* at 752.

32 Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 351 (1994).

33 Abernathy, *supra* note 29, at 584.

34 467 U.S. 837, 842–45 (1984).

35 Abernathy, *supra* note 29, at 610.

discourages findings of ambiguity.[36] The result is that courts, who have remarkably less expertise in these often highly technical areas, are the ones calling more of the shots.[37]

A number of scholars have discussed how hypertextualism will lead to a breakdown of the administrative state.[38] But in the environmental context, the bigger looming issue is the practical consequences of rigid statutory interpretation. Courts are losing the forest for the trees and parsing individual words to the point of absurdity. This Chapter will look at the implications of two forms of textualism by analyzing and comparing the Sixth Circuit's hypertextualist approach to interpreting the CWA with the Ninth and Fourth Circuits' more practical-textualist approach. While there are of course limitations to categorizing in this way, the hope of this Chapter is to utilize this schematic to thoughtfully critique statutory interpretation where important environmental consequences are at stake.

Part II discusses groundwater and its important role in the aquatic system. Part III gives an overview of the CWA, discussing the key statutory language and framework and how groundwater does and does not fit into the CWA's regulatory scheme. Part IV explains the basic methods of statutory interpretation, noting the trend towards a more rigid form of textualism. Part V analyzes the split in the circuits with respect to CWA jurisdiction over point source discharges through hydrologically connected groundwater by contrasting the Ninth and Fourth Circuits' practical-textualist approach with the Sixth Circuit's hypertextualist approach. Part VI explains how hypertextualism is dangerous for environmental laws, using the Sixth Circuit's analysis of the CWA as a model. Part VII concludes that courts should refrain from interpreting environmental statutes rigidly and without consideration of statutory purpose and practical consequences.

II. GROUNDWATER IS A KEY COMPONENT OF SURFACE WATERS, NOT SEPARATE FROM

Groundwater is the water that flows beneath the Earth's surfaces.[39] Although not in plain sight, groundwater plays an essential role in aquatic systems. Groundwater itself is an important public resource. It is a source of drinking water for 51% of the total United States population and 99% of the rural population.[40] It also provides water for agricultural uses, and is used in many industrial processes.[41] But

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[36] *Id.* at 585.

[37] *Id.* at 610–12.

[38] *See, e.g.*, *id.* at 610; Merrill, *supra* note 32, at 366.

[39] *What is Groundwater?*, U.S. GEOLOGICAL SURVEY, https://perma.cc/Y4F7-ZXY5 (last visited Nov. 2, 2019).

[40] *What is Groundwater?*, GROUNDWATER FOUND., https://perma.cc/JM9S-UDBU (last visited Nov. 2, 2019).

[41] *Id.*

groundwater's importance is not limited to the activities that directly rely on the groundwater supply. Groundwater is also intimately connected to surface waters. Groundwater supplies many lakes, rivers, and wetlands.[42] The type of substance beneath the surface (sand, gravel, rock, karst,[43] etc.) affects how readily groundwater flows.[44] Most groundwater flows such that it travels directly into surface waters.[45] That is, most groundwater is hydrologically connected to surface waters.[46] Given this connection, the health of groundwater directly affects the health of surface waters.[47]

Surface waters cannot be properly protected without protecting groundwater.[48] This implicates the larger issue of the impact of human pollution on aquatic resources as a whole. There is a safe operating space in which humans can use resources, develop, and grow on Earth. But these safe zones are not ever-expanding. Rather, there are tipping points, which if crossed will trigger disastrous transformations of Earth as we experience it today.[49] These so called "planetary boundaries" exist for nine different processes[50] and unsurprisingly, human pollution is a major force pushing us closer towards multiple of these lines.[51] By not properly regulating inputs of pollution, we are at risk of going past the planet's threshold and into a state of likely irreversible loss of key ecosystem functions.[52] Water pollution is thus one of the critical areas requiring regulation in order to avoid severe ecological transformations and negative feedback loops within our aquatic ecosystems.

III. THE CLEAN WATER ACT DOES NOT OVERTLY ADDRESS GROUNDWATER

Despite the importance of groundwater to aquatic systems, no federal law affords it comprehensive protection and the few laws that do address groundwater provide only piecemeal regulatory safeguards. The

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[42] *Id.*

[43] Karst is an aquifer formed by the degradation of soluble rock (like limestone), creating fissures through which groundwater easily flows. *Karst Topography – Teachers Guide and Paper Model*, U.S. GEOLOGICAL SURVEY, https://perma.cc/38UC-C42U (last modified Apr. 21, 2017).

[44] *What is Groundwater?*, U.S. GEOLOGICAL SURVEY, *supra* note 39.

[45] Wood, *supra* note 16, at 570.

[46] T.C. Winter et al., *Ground Water and Surface Water A Single Resource*, U.S. GEOLOGICAL SURVEY, https://perma.cc/C77B-QR4N (last modified Jan. 11, 2013).

[47] *Id.*

[48] *Id.*

[49] *See* JOHAN ROCKSTRÖM & MATTIAS KLUM, BIG WORLD, SMALL PLANET: ABUNDANCE WITHIN PLANETARY BOUNDARIES 60–77 (2015).

[50] The nine are: climate change, stratospheric ozone depletion, rate of biodiversity loss, chemical pollution, ocean acidification, freshwater consumption, land-use change, nitrogen and phosphorus pollution, and air pollution. *Id.*

[51] Robin Kundis Craig, *Zero Sum Games in Pollution Control: The Games We Create Versus the Games We Discover* (Univ. of Utah Coll. of Law, Research Paper No. 200 Feb. 2, 2017) https://perma.cc/PV8B-AQK5.

[52] *Id.*

Safe Drinking Water Act[53] (SDWA) affords some protections to groundwater, but is limited to groundwater that is used for public water resources, like drinking water.[54] The Resource Conservation and Recovery Act[55] (RCRA) addresses the generation, transportation, treatment, storage, and disposal of hazardous solid waste.[56] RCRA aims to prevent groundwater contamination as part of its regulatory program, but its ability to do so is limited.[57] Although RCRA's regulatory program requires groundwater monitoring and action if contamination is detected, it functions more reactively and is otherwise limited in that it only applies when hazardous waste is involved.[58] The Comprehensive Environmental Response Compensation and Liability Act[59] (CERCLA) focuses retroactively on hazardous waste disposal sites.[60] Finally, a minority of states regulate groundwater through administration of the CWA's National Pollutant Discharge Elimination System program (NPDES).[61] The CWA, the focus of this paper, has the potential to federally regulate groundwater that is not covered by these other statutes or mechanisms.

A. The CWA Aims to Protect Water Bodies by Regulating Pollution, but to What Extent?

1. The CWA's Broad Purpose

Congress enacted the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[62] The CWA aimed to address a growing concern of the impacts of pollution on the Nation's waters.[63] To this end, its goal is broad and aspirational.[64]

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53 The Safe Drinking Water Act, 42 U.S.C. § 300f-300j-26 (2012).

54 See id. §§ 300h-7(a), 300h-6, 300h(b)(1).

55 Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992k (2012) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965)).

56 *See id.* §§ 300h-7(a), 300h-6, 300h(b)(1).

57 *Id.*

58 *Id.*; s*ee also* Kvien, *supra* note 16, at 996–97 (discussing RCRA's limitations in protecting groundwater).

59 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2012).

60 *Id.* §§ 9601–9691(i).

61 While states can regulate groundwater under the NPDES program, the majority of states apply the NPDES program only to waters included in the definition of "waters of the United States." *See* Blumm & Thiel, *supra* note 20, at 340–42. As discussed in detail later, this definition is contentious with respect to inclusion of groundwater. *See* discussion *infra* Part III(C)(3).

62 CWA, 33 U.S.C. § 1251(a) (2012). The Act came as an overhaul of the 1948 Federal Water Pollution Control Act and the Water Quality Act of 1965.

63 *History of the Clean Water Act,* U.S. ENVTL. PROTECTION AGENCY, https://perma.cc/4QNN-66JE (last visited Nov. 2, 2019).

64 33 U.S.C. § 1251(a); *see also* Courtney Covington, Rapanos v. United States*: Evaluating the Efficacy of Textualism in Interpreting Environmental Laws*, 34 ECOLOGY L.Q. 801, 805 (2007).

Congress intended to achieve the CWA's goal through the NPDES program and implementation of water quality standards.[65]

2. The National Pollutant Discharge Elimination Program

Central to its goal to restore and maintain waters, the CWA prohibits any "discharge of a pollutant."[66] A facility can get around this prohibition only by obtaining a proper permit under the NPDES program, issued under Section 402 of the CWA.[67] NPDES permits are administered by either the EPA or, more frequently, by an authorized state agency.[68] Permits last for five years, after which they must be reviewed for renewal.[69] The meat of NPDES permits are their technology-based effluent limitations, set by the EPA, which dictate how much of a particular pollutant a permitted facility may discharge.[70] These limits are prescribed on an industry-by-industry basis.[71] Additionally, the CWA requires states (or potentially the EPA) to set water quality standards to protect a waterway's designated uses.[72] Although water quality standards transcend the NPDES Program, if a facility cannot ensure compliance with water quality standards, EPA regulations disallow issuance of a permit.[73] NPDES permits are thus a key way in which pollution is controlled under the CWA.

A facility violates the CWA when it does not have a NPDES permit and it discharges pollutants to navigable waters from a point source, or when it violates the terms of its permit. The EPA may bring enforcement actions for violations of the NPDES program in the form of compliance orders, civil actions, and criminal prosecutions.[74] And under the CWA's Section 505(a)(1) citizen-suit provision, citizens may also bring civil actions against a party "who is alleged to be in violation of . . . an effluent standard or limitation."[75]

3. CWA Jurisdiction Over Pollution

"Discharge of a pollutant" is defined in the CWA as "any addition of any pollutant to navigable waters from any point source."[76] Thus, the NPDES program is only triggered when four elements are present: 1) an

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[65] *Summary of the Clean Water Act*, U.S. ENVTL. PROTECTION AGENCY, https://perma.cc/VC59-HNY5 (last visited Nov. 2, 2019).

[66] 33 U.S.C. § 1311(a); *see also id.* § 1362(12)(A).

[67] *Id.* § 1342.

[68] *Id.* Once states obtain authority to administer the NPDES permits, there is still continuing federal oversight. *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* §§ 1362(11), 1314(b).

[72] *Id.* § 1313.

[73] 40 C.F.R. § 122.4(d) (2017).

[74] 33 U.S.C. § 1319 (2012).

[75] *Id.* § 1365.

[76] *Id.* §§ 1311(a), 1362(12)(A).

addition of 2) any pollutant to 3) navigable waters 4) from any point source. While the NPDES program has the potential to include discharges of pollutants into and through groundwater, groundwater is not expressly encompassed in any of the key jurisdictional terms.

The CWA defines "pollutant" broadly as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."[77]

"Navigable waters" is ambiguously defined in the statute as "waters of the United States."[78] "Waters of the United States" is not further defined in the statute, but is defined in the EPA and the Army Corps of Engineers (Corps)[79] regulations. Even still, the meaning of "waters of the United States" has been the subject of much litigation and debate over the years, especially as a result of a sequence of three Supreme Court cases.[80] First, in *United States v. Riverside Bayview Homes, Inc.*,[81] the Court upheld an expansive view of navigable waters, upholding the Corps' regulations that included adjacent wetlands in the definition of waters of the United States. Then, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*[82] (*SWANCC*) limited the scope of CWA jurisdiction, holding that the Corps could not assert jurisdiction over isolated wetlands without a significant ecological nexus to traditional navigable waters. Finally, *Rapanos* addressed the CWA's jurisdiction over wetlands adjacent to tributaries.[83] *Rapanos* was a 4–4–1 decision.[84] Justice Scalia, writing for the four member plurality, stated that for wetlands to be covered by the CWA they must 1) be adjacent to a navigable water, and 2) have a continuous surface connection with that water.[85] Justice Kennedy, concurring and writing for himself, proposed an ecologically based test, arguing for a case-by-case "significant nexus" test.[86] Under Justice Kennedy's test, a water would be jurisdictional when it "significantly affect[s] the chemical, physical, and biological integrity of other covered waters . . . ."[87] And Justice Stevens, writing for the four member dissent, argued that all wetlands

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77 *Id.* § 1362(6).

78 *Id.* § 1362(7).

79 The Corps and the EPA share authority under the CWA. The Corps primarily administers the CWA's other key permit program, the Section 404 program, which regulates the discharge of dredged or fill material into waters of the United States. *Id.* § 1344.

80 *See, e.g.*, Makowski, *supra* note 9, at 500–03 (discussing the debate over the meaning of "waters of the United States").

81 474 U.S. 121, 135 (1985).

82 531 U.S. 159, 167 (2001). The court in *SWANCC* was thus the first to mention a "significant nexus" requirement in determining whether waters are jurisdictional. *Id.*

83 *Rapanos*, 547 U.S. 715 (2006).

84 *Id.*

85 *Id.* at 717.

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

87 *Id.*

that are adjacent to tributaries of navigable waters are jurisdictional.[88] Post-*Rapanos*, courts are split on which test to apply.[89] Some courts have held there is CWA jurisdiction if either Justice Kennedy's test or the plurality's test is satisfied, while other courts have relied exclusively on Justice Kennedy's test.[90] In response to the confusion that these cases created, in 2015 the EPA promulgated the Clean Water Rule further clarifying the definition of "waters of the United States."[91] But as a result of challenges by industry groups, states, and environmental groups, the 2015 Rule was enjoined in twenty-eight states and remained in effect in only twenty-two states.[92] In February 2019, the Trump Administration proposed to repeal and replace the 2015 Rule with a revised definition of the "waters of the United States" rule, and the repeal was finalized in September 2019.[93] Both the 2015 Rule and the 2019 Proposed Revised Rule categorically exclude groundwater as a waters of the United States.

Finally, "point source" is defined non-inclusively as "*any* discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."[94] The CWA distinguishes between point source and diffuse non-point source pollution.[95] While point source pollution is subject to federal regulation under the NPDES program, non-point source pollution is primarily regulated by the states.[96]

B. Some Legislative History Addresses Groundwater, but it is Inconclusive

Congress's intent to regulate groundwater is also relatively unclear, because the legislative history is inconclusive.[97] Parties on both sides of the groundwater debate have attempted to use aspects of the legislative history to support their side.[98] For example, those who argue that Congress did not intend to include groundwater in the CWA frequently cite the proposed "Aspin Amendment."[99] The Aspin Amendment proposed, among other things, including any addition of pollutant "to

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88 *Id.* at 797 (Stevens, J., dissenting).

89 *See* Currie, *supra* note 11, at 210.

90 *Id.*

91 Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015).

92 LAURA GATTZ, CONG. RESEARCH SERV., *supra* note 13, at 6. The states where the 2015 rule is enjoined still have the prior rule in place. *Id.*

93 Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328); *see also Definition of "Waters of the United States" – Recodification of Pre-Existing Rules (Pre-Publication Version)*, U.S. ENVTL. PROTECTION AGENCY, https://perma.cc/C8PH-EMF2 (last visited Nov. 2, 2019).

94 CWA, 33 U.S.C. § 1362(14) (2012) (emphasis added).

95 *Id.* § 1362(12), (14).

96 *Id.* §§ 1314(f), 1362(12).

97 *See* Kvien, *supra* note 16, at 964.

98 *See id.* at 965–66.

99 *See* Wood, *supra* note 16, at 613.

ground waters from any point source" into the definition of "discharge of a pollutant."[100] However, the Aspin Amendment aimed to include even isolated groundwater within the jurisdiction of the CWA, and did not explicitly address the issue of point source discharges that merely travel through groundwater before reaching a jurisdictional surface water.[101] Thus, rejection of the amendment was not necessarily a rejection of hydrologically-connected groundwater. But others cite the Senate Public Works Committee Report to argue that, in fact, Congress did not intend to foreclose regulation of *all* groundwater.[102] Furthermore, legislative history from the SDWA indicates that hydrologically connected groundwater is meant to be included in the CWA's jurisdiction.[103] Courts have relied on the CWA's legislative history relating to groundwater to varying degrees, but overall it does not resolve the question of whether Congress intended to include groundwater in the scope of the NPDES program.

C. Theories for Regulating Groundwater Under the CWA

Despite the CWA's ambiguity with respect to groundwater, scholars, advocates, and courts have advanced three main theories for regulating groundwater under the CWA's NPDES program: the point source theory, the tributary theory, and the hydrological connection theory. While there are good arguments for all of these theories being valid, the hydrological connection theory has garnered the most support from courts. This paper will introduce the other theories for background purposes, but its focus is on the hydrological connection theory.

1. The Point Source Theory

The point source theory treats groundwater as a point source.[104] Proponents of this theory argue that groundwater itself fits within both the CWA's general definition of a point source as well as some of the specific listed examples in the definition.[105] Key to the viability of this theory is being able to distinguish pollution into groundwater from non-point source pollution. The point source–non-point source distinction is largely about being able to trace the pollution back to an identifiable

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100 118 CONG. REC. 10,666 (1972), *reprinted in* LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 589 (1973).

101 Kvien, *supra* note 16, at 965.

102 *Id.* at 965–66; *see also* S. REP. NO. 92-414, at 73 (1971) (stating "[b]ecause the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation [to add groundwater to the NPDES permitting program].").

103 Kvien, *supra* note 16, at 966.

104 Wood, *supra* note 16, at 575.

105 For example, groundwater could be considered a "channel," "tunnel," "conduit," or "discrete fissure." *Id.* at 575–76 (quoting 33 U.S.C. § 1362(14) (2012)).

polluter.[106] Proponents of the point source theory argue that so long as it is possible to trace the pollutants underground back to an identifiable origin point, groundwater should be considered a point source.[107] At least one lower court has upheld the point source theory.[108]

2. The Tributary Theory

The tributary theory includes groundwater that has a "significant nexus" to navigable-in-fact-waters as a "water of the United States."[109] This theory relies on the "significant nexus" test proposed by Justice Kennedy's concurrence in *Rapanos*[110] and argues that the test applies to groundwater.[111] While this theory is potentially viable as a result of the aforementioned Supreme Court precedent, the current 2015 Rule and the 2019 Proposed Revised Rule categorically exclude groundwater as a waters of the United States.[112] However, that does not mean states that administer the NDPES program cannot choose to regulate groundwater as a waters of the United States.[113]

3. The Hydrological Connection Theory

The hydrological connection (or conduit) theory includes groundwaters which convey pollutants from a point source to navigable waters.[114] This theory is distinct from the other two in that it does not attempt to fit groundwater into the specific CWA-jurisdictional terminology—point source and navigable waters—but rather reads the jurisdictional language as a whole to include discharges through groundwater. That is, the CWA's prohibition of discharges of "any pollutant to navigable waters from any point source" does not exclude discharges which travel *indirectly* to the navigable water from the point source.[115] The idea that point source discharges can be indirect has been upheld by courts since at least 1993.[116]

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106 *Id.* at 576–77.

107 *See, e.g.*, *id.*

108 Raritan Baykeeper, Inc. v. NL Indus., Inc., No. 09-4117, 2013 WL 103880 (D.N.J. Jan. 8, 2013).

109 Kvien, *supra* note 16, at 961.

110 *Rapanos*, 547 U.S. 715, 780 (Kennedy, J., concurring).

111 Kvien, *supra* note 16, at 961.

112 Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015); Revised Definition of "Waters of the United States," 84 Fed. Reg. 4154 (proposed Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328). *But see* Blumm & Theil, *supra* note 20, at 333 (arguing that the 2015 Clean Water Rule is arbitrary and capricious and against Supreme Court precedent interpreting the scope of navigable waters).

113 Federal regulation is the floor; state regulation can be more stringent. *See* Blumm & Thiel, *supra* note 20, at 340–42.

114 Kvien, *supra* note 16, at 961.

115 33 U.S.C. § 1362(12)(A).

116 *See* Sierra Club v. Colo. Ref. Co., 838 F. Supp. 1428, 1434 (D. Colo. 1993); *see also* United States v. Earth Sci., Inc., 599 F.2d 368, 373 (10th Cir. 1979) (stating that "the [CWA] was designed to regulate to the fullest extent possible those sources emitting

IV. STATUTORY INTERPRETATION AND THE RISE OF HYPERTEXTUALISM

Despite efforts to draft statutes with clear language, Congress regularly writes statutes that require further interpretation. So, statutory interpretation is a frequent aspect of litigation, and courts are often tasked with deriving the meaning of statutory language to resolve a legal issue. However, not all judges use the same tools to interpret statutes and in fact, there is a lot of disagreement about what tools are appropriate to use. Throughout the past century, the predominant ways in which judges interpret statutes has shifted such that it is now more common for courts to rely solely on textual interpretation, without consulting or adequately considering statutory intent and purpose.

A. Overview of the Methods of Statutory Interpretation

The aim of statutory interpretation as a whole is to interpret statutes pursuant to Congress's intended meaning.[117] While the text is universally the starting point for interpretation, judges diverge in the extent to which they will consider statutory purpose, congressional intent, and legislative history when discerning the meaning of a statute.[118] And the outcome of a case will often differ dramatically depending on the degree to which judges consider these other resources.[119] The major approaches to statutory interpretation fall into three main categories: intentionalism, purposivism, and textualism.[120]

1. The Traditional Approaches: Intentionalism and Purposivism

Traditionally, courts focused on discerning the original intent or purpose of a statute, and nearly every Justice considered legislative history to do so.[121] Intentionalism aims to discern Congress's intent in choosing words in a statute.[122] Intentionalists typically look both at a statute's text and the legislative history to determine what Congress intended the language to mean.[123] Closely related to intentionalism is

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pollution into rivers, streams, and lakes."); Kvien, *supra* note 16, at app. A (cataloging the decisions that have been made on the CWA's jurisdiction over hydrologically connected groundwater).

117 Emily Alexander, *The Americans with Disabilities Act and State Prisons: A Question of Statutory Interpretation*, 66 FORDHAM L. REV. 2233, 2246 (1998).

118 Abernathy, *supra* note 29, at 599.

119 Alexander, *supra* note 117, at 2246.

120 Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking is Better Than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1235 (1996).

121 Abernathy, *supra* note 29, at 609; *see also* William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990) (defining the "traditional" approach as interpreting a statute by its plain meaning unless the legislative history indicates a different result).

122 Alexander, *supra* note 117, at 2245.

123 *Id.*

purposivism. Purposivism looks at the purpose or spirit of the legislation.[124] And, if a statute's plain text is contradicted by its purpose, purposivists may even rely on purpose over text.[125]

2. The Modern Approach: Textualism

Textualism, the third primary method of statutory interpretation, is largely a reaction to the "judicial activism" arguably inherent in the other two methods.[126] Textualists aim to constrain judicial discretion by attempting to derive the objective or plain meaning of the enacted text.[127] To do this, textualists typically rely on dictionary definitions, rules of grammar, and canons of construction.[128] Textualists may also consider context and structure of the text as well as language used in other statutes,[129] but typically will only consider statutory purpose when the text is ambiguous.[130] And notoriously, strict textualists will reject the use of legislative history to discern purpose or intent, believing that only that which went through the bicameralism enactment process is a faithful interpretive aid.[131] Proponents of textualism view the doctrine as one of judicial restraint.[132]

B. The Rise of Rigid Statutory Interpretation

The judiciary's approach to statutory interpretation has changed over the past century, moving farther away from the approaches which give great weight to statutory purpose and legislative intent, and closer to a rigid, textual approach. The landmark decision of *Chevron* is a useful temporal frame of reference from which to view this shift in the court.[133]

Chevron was decided in 1984, during the traditional era of statutory interpretation.[134] In *Chevron*, the Supreme Court decided that Congress had implicitly delegated authority to the relevant administrative agency to interpret statutory ambiguity.[135] This decision marked an important shift in statutory interpretation of administrative

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124 Mank, *supra* note 120, at 1235–36.

125 *See* Anton Metlitsky, *The Roberts Court and the New Textualism*, 38 CARDOZO L. REV. 671, 674 (2016) (referencing *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), as a frequently cited example of when the Supreme Court relied on a statute's "spirit" over the plain text).

126 David M. Diresen, *Purposeless Construction*, 48 WAKE FOREST L. REV. 97, 122 (2013).

127 Mank, *supra* note 120, at 1237–38; *see also* Pierce, *supra* note 30, at 750.

128 Mank, *supra* note 120, at 1237–38; *see also* Pierce, *supra* note 30, at 750.

129 Covington, *supra* note 64, at 816.

130 Metlitsky, *supra* note 125, at 676.

131 John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 114 (2011).

132 *See* Merrill, *supra* note 32, at 366.

133 *Chevron*, 467 U.S. 837, 842–44 (1984).

134 *Id.*

135 *See* Alexander, *supra* note 117, at 2260.

statutes, creating a standard that is highly deferential to agency expertise.[136] The so-called *Chevron* doctrine is a two-step approach to determine whether a court should defer to the reasonable interpretation of an agency on a particular issue.[137] Step one asks whether Congress has spoken to the "precise question at issue."[138] If yes, the "court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[139] But if a statute is silent or ambiguous with respect to the question at issue, the court proceeds to step two.[140] Under step two, the court defers to the agency's interpretation of the statute, so long as it is reasonable.[141] When a court reaches step two of the *Chevron* analysis, it typically finds the agency's interpretation is reasonable.[142] In the late 1980s, courts began to move away from the "traditional tools of statutory construction" that were prevalent at the time *Chevron* was decided.[143]

Justice Scalia's appointment to the Supreme Court in 1986 marked an important shift in statutory interpretation.[144] Justice Scalia, along with Judge Easterbrook, is often credited with the "new textualism" movement that took shape in this era.[145] The rise of textualism was largely a campaign in reaction to judges' abuse of legislative history as an interpretative aid, promulgated by fear that judges were overstepping their roles.[146] As a result, courts began to consider legislative history less frequently.[147] In fact, the popularization of textualist principles impacted even the Justices on the Supreme Court who do not self-identify as textualists.[148] The Supreme Court's transition to textualism initially increased the frequency in which it would defer to agencies under *Chevron* step two, because courts were not consulting outside sources to clarify potential silence or ambiguity.[149] But with the shift towards a more rigid form of textualism, that is no longer the case.[150]

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136 *See* Abernathy, *supra* note 29, at 584.

137 *Chevron*, 467 U.S. at 842–44.

138 *Id.* at 842.

139 *Id.* at 842–43.

140 *Id.*

141 *Id.* at 843–44.

142 Merrill, *supra* note 32, at 359–60.

143 *See* Pierce, *supra* note 30, at 750 (quoting *Chevron*, 467 U.S. at 843 n.9).

144 *See, e.g.*, Eskridge, *supra* note 121, at 623.

145 *Id.*

146 Abernathy, *supra* note 29, at 601–02; *Mank*, *supra* note 120, at 1237.

147 *See* Merrill, *supra* note 32, at 356 (citing 1992 Supreme Court Term data regarding the use of legislative history in majority opinions).

148 *See, e.g.*, Manning, *supra* note 131, at 129–31 (discussing how the non-textualist Justices have embraced the textualist approach).

149 Pierce, *supra* note 30, at 751 (citing Judge Patricia Wald's review of the Supreme Court's use of legislative history in the 1988–1989 term (Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–1989 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990)).

150 Pierce, *supra* note 30, at 752.

Today, textualism has transformed into what some scholars have characterized as "hypertextualism," "untethered textualism," and "purposeless construction."[151] According to Professor Richard Pierce, hypertextualism is finding "linguistic precision where it does not exist . . . relying exclusively on the abstract meaning of a particular word or phrase even when other evidence suggests strongly that Congress intended a result inconsistent with that usage."[152] Regardless of the label, this era of textualism finds the meaning of a word or phrase from a dictionary definition alone, while ignoring the practical consequences, statutory purpose, and legislative intent. This results in courts that are more likely to find there is a plain meaning and are less likely to invoke *Chevron* deference.[153] With the 2018 appointment of Justice Kavanaugh to the Supreme Court, this trend is not likely to change anytime soon.[154]

V. JURISDICTION OVER HYDROLOGICALLY CONNECTED GROUNDWATER: THE CIRCUIT SPLIT

The recent debate amongst three of the circuit courts involving the hydrological connection theory to groundwater regulation exemplifies the potential effects of hypertextualism. The central statutory language at issue in these cases is the CWA's prohibition of the addition of "any pollutant *to* navigable waters *from* any point source."[155] In all four relevant circuit court cases, there were point sources at the beginning and traditional navigable waters at the end. The debate is whether the CWA covers discharges from a point source that travel through groundwater before reaching a navigable water, or whether the pollutants must be discharged *directly* from the point source to the navigable water. The Ninth and Fourth Circuits took a practical-textual approach to analyzing the relevant statutory language, while the Sixth Circuit took a hypertextual approach.[156]

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151 *See* Abernathy, *supra* note 29, at 599; Samuel Estreicher, *Untethered Textualism in the Seventh Circuit's* Kleber *Ruling on Age Bias in Hiring*, JUSTIA VERDICT (Mar. 21 2019), https://perma.cc/93CM-U4EZ; Diresen, *supra* note 126, at 97.

152 Pierce, *supra* note 30, at 750.

153 *Id.* at 752.

154 *See* Edith Roberts, *Potential Nominee Profile: Brett Kavanaugh*, SUP. CT. U.S. BLOG (June 28, 2018, 5:48 PM), https://perma.cc/WG8K-G8P6.

155 CWA, 33 U.S.C. § 1362(12)(A) (2012) (emphasis added).

156 The author acknowledges that these courts' opinions are more nuanced than these two textualist categories. Nonetheless, categorizing the opinions this way provides a useful framework for discussing the divergence in the circuits on this issue and for critiquing statutory interpretation that is overly textual.

A. A Practical-Textual Approach: The Ninth and Fourth Circuits

1. County of Maui

Hawaii Wildlife Fund v. County of Maui[157] involved a wastewater treatment plant owned by the County of Maui. Four injection wells at the plant discharged approximately three to five million gallons of the treated sewage wastewater into the groundwater per day, with as much as 2.8 million gallons of it traveling through the groundwater and reaching the Pacific Ocean per day.[158] A tracer dye study[159] was conducted to determine the extent of the hydrological connection between the groundwater and the ocean.[160] The results of the study made it clear that pollutants from the wells entered the ocean through the groundwater.[161] The County did not have a NPDES permit for these discharges at the time the lawsuit was filed, despite having been aware that pollutants from the wells would reach the ocean and having even considered building an ocean outfall to dispose of the pollutants directly into the ocean.[162] The District Court for the District of Hawaii found the County liable for its unpermitted discharges and the County appealed.[163]

First, the Ninth Circuit held that the wells were point sources.[164] Then, it turned to the County's contention that the point sources must convey the pollutants *directly* to the navigable waters.[165] The court held that discharges from point sources to navigable waters through groundwater are subject to the NPDES program as a matter of the plain language of the CWA.[166] To reach this conclusion, the court looked to relevant case law addressing point source discharges that did not reach navigable waters immediately or directly, finding that those cases support CWA liability for indirect discharges through groundwater.[167]

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157 886 F.3d 737, 742 (9th Cir. 2018).

158 *Id.*

159 Tracer dye studies are used to determine the degree to which there is a hydrological connection between groundwater and surface waters. *Id.* at 742–43.

160 *Id.* at 742.

161 *Id.* 744.

162 *Id.* at 743. The County has since applied for a NPDES permit. Haw. Wildlife Fund v. Cty. of Maui (*Cty. of Maui I*), 24 F. Supp. 3d 980, 985 (D. Haw. 2014).

163 *Cty. of Maui I*, 24 F. Supp. 3d at 1005. The District Court made its ruling pursuant to three independent theories: 1) indirect point source discharge through the groundwater, 2) the groundwater itself as a point source, and 3) the groundwater as a "navigable water." *Id.* at 993, 999, 1005.

164 *Cty. of Maui*, 886 F.3d 737, 745 (9th Cir. 2018).

165 *Id.*

166 *Id.* at 749.

167 For example, in *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1152–53 (9th Cir. 2010), the Ninth Circuit focused on whether there was a point source from which the pollutants were discharged, and were not concerned with the fact that the pollutants traveled through the ground before reaching surface waters. *Id.* at 745–49. And in *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 119 (2nd Cir. 1994),

Additionally, the court garnered support from Justice Scalia's plurality opinion in *Rapanos*.[168] In response to respondents' concerns that polluters will be able to escape CWA jurisdiction by discharging pollutants into a non-jurisdictional waterbody upstream of a "navigable water," Justice Scalia noted that the CWA does not prohibit the "'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'"[169] Here too, the County's argument relied on reading the word *directly* into the statute where it does not exist.[170] The court did not decide whether the connection between a point source and a navigable water could ever be too tenuous to preclude jurisdiction under the CWA, but indicated that pollutants must be "fairly traceable" from the point source to the navigable water and that the pollution must be "more than *de minimis*."[171] Finally, the Ninth Circuit concluded its opinion with a practical consideration: "[t]he County could not under the CWA . . . dispose of pollutants directly into the Pacific Ocean without an NPDES permit. It cannot do so indirectly either . . . To hold otherwise would make a mockery of the CWA's prohibitions."[172]

2. Kinder Morgan Energy Partners

The Fourth Circuit case, *Upstate Forever v. Kinder Morgan Energy Partners*,[173] involved a ruptured gasoline pipeline. Hundreds of thousands of gallons of gasoline were spilled from the ruptured pipeline near Belton, South Carolina.[174] The pollution seeped into the groundwater reaching nearby navigable waters, including the Savannah River and adjacent wetlands.[175] Contaminants resulting from the leak continued to be discovered in these waterways years later.[176] Plaintiffs brought suit alleging that the defendants violated the CWA by discharging pollutants without a NPDES permit.[177] The District Court for the District of South Carolina dismissed Plaintiff's complaint for, among other things, lack of CWA jurisdiction and Plaintiffs appealed.[178]

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the Second Circuit held that there was a point source discharge when pollutants were discharged from point sources over fields before entering navigable waters. *Id.* at 747.

168 *Rapanos*, 547 U.S. 715, 743 (2006) (plurality opinion).

169 *Id.* (quoting §§ 1311(a), (1362(12)(A)).

170 *Cty. of Maui*, 886 F.3d at 749.

171 *Id.*

172 *Id.* at 752.

173 887 F.3d 637, 641 (4th Cir. 2018). As a threshold matter, the Fourth Circuit concluded that the fact that the pipeline had been repaired at the time of the suit did not defeat CWA jurisdiction. *Id.* at 648 (citing Gwaltney v. Chesapeake Bay Found., 484 U.S. 49, 64 (1987)).

174 *Id.* at 641.

175 *Id.*

176 *Id.* at 644.

177 *Id.*

178 Upstate Forever v. Kinder Morgan Energy Partners, L.P., 252 F. Supp. 3d 488, 496, 498 (D.S.C. 2017).

Turning to the issue of whether the CWA covers indirect discharges, the Fourth Circuit first noted that the pipelines are unambiguously point sources.[179] Then, it held that the CWA does not require that pollutants be discharged directly from a point source to a navigable water.[180] According to the Fourth Circuit, that indirect discharges are included in the NPDES program is a matter of plain language and is also supported by the statutory purpose.[181] The CWA's prohibition of a discharge of a pollutant requires that the discharge come "from" a "point source."[182] The definition of "from" indicates a starting point—the point source—but does not mean that that starting point must also convey the pollutants *directly* to the navigable waters.[183] The text is clear. Like the Ninth Circuit, the Fourth Circuit found additional support for this reading from Justice Scalia's plurality in *Rapanos*.[184]

Also, like the Ninth Circuit, the Fourth Circuit acknowledged that not all discharges through groundwater would be covered by the CWA.[185] Adopting language from EPA regulations, the court held that there must be a "direct hydrological connection" in order for CWA jurisdiction to attach.[186] In this case, the pollutants were seeping into navigable waters roughly 1000 feet from the pipeline, an "extremely short distance" for purposes of coverage under the CWA.[187] And finally, the court said the CWA's purpose would be greatly undermined if polluters could avoid liability by discharging to navigable waters through groundwater.[188]

3. The Ninth and Fourth Circuits' Practical Textualism

The Ninth and Fourth Circuits both held that the indirect discharges through groundwater were included in the jurisdiction of the CWA as a matter of plain meaning. The Ninth Circuit primarily relied on relevant case law to reach its conclusion. The Fourth Circuit, on the other hand, started with the text and pointed to dictionary definitions of "from" to support its reading of the CWA. Then, it also looked to other circuit court decisions addressing indirect discharges. Additionally, both courts relied upon Justice Scalia's opinion in *Rapanos* to support their

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179 *Kinder Morgan Energy Partners*, 887 F.3d at 647.

180 *Id.* at 649.

181 *Id.* at 649, 653.

182 *Id.* at 650 (quoting 33 U.S.C. § 1362(12)(A)).

183 *Id.*

184 *Id.*

185 *Id.* at 651.

186 *Id.*; *see also* National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 3015 (proposed Jan. 12, 2001) (CAFOs Standards); Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991).

187 *Kinder Morgan Energy Partners*, 887 F.3d at 652.

188 *Id.*

conclusions that the CWA's jurisdictional language does not require the point source to discharge pollutants directly to navigable waters.

The Ninth and Fourth Circuits took a textualist approach to interpreting the CWA, deciding the issue as a matter of plain meaning. Neither court cited legislative history or explicitly raised the question of congressional intent. But even though the Ninth and Fourth Circuits applied textualist principles to interpreting the CWA, both courts embodied the statutory purpose and goals in their analyses, and acknowledged the practical implications of the dispute. Both courts expressly acknowledged how the outcome of the dispute implicated the efficacy of the CWA's goals. The Ninth Circuit said, "this case is about preventing the County from doing indirectly that which it could not do directly."[189] On a similar note, the Fourth Circuit noted that the alternative outcome "would greatly undermine the purposes of the Act."[190] This stands in sharp contrast to the Sixth Circuit's approach to the issue.

B. Hypertextualist Approach: The Sixth Circuit

1. TVA *and* Kentucky Utilities Co.

The Sixth Circuit addressed the issue of groundwater regulation under the CWA in two successive cases in 2018: *Tennessee Clean Water Network v. Tennessee Valley Authority*[191] (*TVA*) and *Kentucky Waterways Alliance v. Kentucky Utilities Co.*[192] Both cases involved pollution from coal ash ponds into nearby navigable waters. Because the court's analyses in both cases are nearly identical, this discussion will focus on *Kentucky Utilities Co*.

Kentucky Utilities Company operates a coal-fired power plant located in Kentucky, adjacent to Herrington Lake and near Dix River.[193] One of the byproducts of burning coal is coal ash or coal combustion residuals (also known as CCRs).[194] Coal ash can contain various chemicals including arsenic, lead, calcium, boron, and selenium.[195] Kentucky Utilities disposed of its coal ash waste by using a "sluice" system,[196] disposing of the resulting wastewater into two man-made ponds (coal ash ponds).[197] The ponds were intended to contain the waste permanently, but in this case the chemicals stored in the ponds seeped into surrounding groundwater, eventually reaching and contaminating

189 *Cty. of Maui*, 886 F.3d 737, 753 (9th Cir. 2018).
190 *Kinder Morgan Energy Partners*, 887 F.3d at 653.
191 905 F.3d 436, 436 (6th Cir. 2018).
192 *Ky. Utils. Co.*, 905 F.3d 925, 925 (6th Cir. 2018).
193 *Id.* at 930.
194 *Id.*
195 *Id.* at 931.
196 The "sluice" system involves combining ash with water and disposing of the resulting wastewater. *Id.*
197 *Id.*

the nearby lake.[198] The groundwater flow into the lake was exacerbated by the fact that the ponds lie on top of an aquifer composed of karst terrain.[199] After discovering elevated selenium levels (which cause serious issues for aquatic wildlife) in the groundwater and nearby lake, Plaintiffs sued Kentucky Utilities for unpermitted discharges in violation of the CWA.[200] The District Court for the Eastern District of Kentucky dismissed Plaintiff's claim, holding that the CWA did not cover the discharges through groundwater, and Plaintiffs appealed.[201]

Unlike the other circuits to hear this issue, the Sixth Circuit addressed both the point source and the hydrological connection theory. According to the Sixth Circuit, the CWA's text foreclosed both theories.[202] The court first addressed whether the groundwater or the karst is a point source under the CWA. Consulting dictionary definitions, the court held that, while the groundwater may be a "conveyance," it is not "discernible," "confined," or "discrete" because it is a diffuse medium by its nature.[203] The court refuted the contention that tracer dye studies, which can trace the flow of groundwater, can make groundwater "discernible."[204] Furthermore, the court held that the karst through which the groundwater flows is also not a point source because it also not "discernible," "confined," or "discrete;" the karst only has the effect of making the groundwater flow more readily.[205]

Turning to the hydrological connection theory, the court again started with the text and dictionary definitions. First, the court looked to the definition of "effluent limitations," which are the CWA's prescriptions regarding the quantities of a particular pollutant that may be "discharged from point sources into navigable waters."[206] Focusing on the word "into" in this definition, the court concluded that "into" denotes directness.[207] Then, the court turned to the overarching jurisdictional language, which prohibits the addition of pollutants "to navigable waters from any point source."[208] Parsing these words for literal

198 *Id.*

199 *Id.* Karst is formed when limestone (or another similar rock) erodes, creating sinkholes, fissures, and other pathways. *Id.*

200 Ky. Waterways All. v. Ky Utils. Co. (*Ky. Utils. I*), 303 F. Supp. 3d 530, 533 (E.D. Ky. 2017). Prior to this suit, Kentucky Utilities had submitted an application to convert its main ash pond into a dry landfill. *Ky. Utils. Co.*, 905 F.3d at 931. As part of this process, Kentucky Utilities was required to describe actions it would take to treat the contaminated groundwater and prevent further contamination. *Id.* at 932. Plaintiffs also sued for posing imminent and substantial endangerment to human health and the environment in violation of RCRA. *Id.* at 931.

201 *Ky. Utils. I*, 303 F. Supp. 3d at 545.

202 *Ky. Utils. Co.*, 905 F.3d at 933–34.

203 *Id.* at 933.

204 *Id.*

205 *Id.*

206 CWA, 33 U.S.C. §§ 1362(11), 1314(b) (2012).

207 *Ky. Utils. Co.*, 905 F.3d at 935.

208 *Id.*; 33 U.S.C. § 1362(12)(A).

meaning, the court read "from" narrowly to mean directly from.[209] Without even consulting a dictionary definition, the court concluded as a matter of plain meaning that if pollutants go through groundwater before reaching a navigable water, "they are not coming *from* a point source."[210]

Next, the court refuted the Plaintiffs' reliance on Justice Scalia's plurality in *Rapanos*, which was also referenced in the Ninth and Fourth Circuit decisions.[211] Here, Plaintiffs also relied on Justice Scalia's statement that "[t]he Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'"[212] In rejecting this argument, the Sixth Circuit stated that 1) Justice Scalia's plurality opinion is not binding, and 2) the quote is actually referring to situations when pollutants pass through multiple point sources, and thus is taken out of context in this case.[213]

The court found additional support for its conclusions from statutory context.[214] The court confirmed its reading of the statutory text by rejecting other courts' "outsized reliance" on the CWA's stated purpose to protect the Nation's waters for two main reasons.[215] First, the court pointed to the fact that the CWA leaves non-point source pollution to the states to regulate.[216] This, according to the court, is evidence of the CWA's other purpose to foster cooperative federalism.[217] According to the Sixth Circuit, courts that rely on the CWA's purpose to protect the Nation's waters do not give proper weight to the CWA's federalism goals. Second, the court noted that the statutory purpose is a "last resort"[218] consideration because Congress does not "pursue[] its purpose at all costs."[219]

Finally, the Sixth Circuit looked at the CWA in light of RCRA's framework.[220] RCRA and the CWA, the court reasoned, are mutually exclusive and so if the CWA were to cover discharges from the coal ash ponds, those coal ash storage practices would be exempt from RCRA.[221]

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209 *Ky. Utils. Co.*, 905 F.3d at 934.

210 *Id.* at 934.

211 *Id.* at 936.

212 *Rapanos*, 547 U.S. 715, 743 (2006) (quoting 33 U.S.C. §§ 1362(12)(A), 1311(a) (emphasis added)).

213 *Ky. Utils. Co.*, 905 F.3d at 936.

214 *Id.* at 937.

215 *Id.* at 936 (citing the CWA's purpose to "restore and maintain . . . the Nation's waters." 33 U.S.C. § 1251(a)).

216 *Id.* at 937 (citing the CWA's aim to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [a]nd to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b)).

217 *Id.*

218 *Id.* (quoting *Rapanos*, 547 U.S. 715, 752 (2006)).

219 *Id.* (quoting S. REP. NO. 92-414 (19721), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3672).

220 *Id.*

221 *Id.* at 937–38.

Furthermore, the EPA's Coal Combustion Residuals Rule (CCR Rule) specifically addresses coal ash storage and treatment under RCRA.[222] According to the Sixth Circuit, "reading the CWA to cover coal ash ponds would gut the rule" and remove coal ash ponds from RCRA's coverage because the two statutes should be read to be mutually exclusive.[223]

2. The Sixth Circuit's Hypertextualism

The Sixth Circuit's interpretation of the CWA can be properly characterized as hypertextualist, especially when compared to the Ninth and Fourth Circuit's interpretations. The Sixth Circuit found "linguistic precision" even though alternative explanations, precedent, and Congressional intent indicated "a result inconsistent with that usage."[224] The Sixth Circuit reached its conclusions as a matter of plain meaning, but is the statute truly clear? The Fourth and Ninth Circuits reached the opposite conclusion, also as a matter of plain meaning. The Sixth Circuit's approach is disingenuous in how it over-simplified definitions, misused context, and selectively relied on statutory purpose, all the while ignoring other plausible interpretations, relevant precedent, Congress's broad intent, and the EPA's position.[225]

First, the Sixth Circuit misused context in analyzing the plain meaning of the statute. The thrust of the court's argument involved the use of the word "into" in the definition of "effluent limitation."[226] However, as the dissent points out, the definition of effluent limitations is not even relevant to the issue of whether indirect discharges fall within the purview of the CWA.[227] Effluent limitations are the restrictions on point source discharges within a NPDES permit.[228] The term does not shed light on *when* the NPDES permit is applicable in the first place. And while a similar term also appears in the CWA citizen suit provision (which plaintiffs sued pursuant to), the exact language in the citizen suit provision is "effluent standard *or limitation*."[229] "Effluent standard or limitation" as stated in the citizen suit is a term of art with

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222 *Id.* at 938; *see also* Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015)

223 *Ky. Utils. Co.*, 905 F.3d at 938.

224 *See* Pierce, *supra* note 30, at 750 (defining hypertextualism as "finding linguistic precision where it does not exist, and relying exclusively on the abstract meaning of a particular word or phrase even when other evidence suggests strongly that Congress intended a result inconsistent with that usage.").

225 Although importantly, the EPA's position has since changed and the agency now asserts that groundwater is categorically excluded from the NPDES program. *See* U.S. Envtl. Prot. Agency, Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater, Interpretative Statement (Apr. 12, 2019).

226 *Ky. Utils. Co.*, 905 F.3d at 934.

227 *Id.* at 943 (Clay, J., dissenting).

228 CWA, 33 U.S.C. § 1362(11) (2012).

229 *Id.* § 1365(f) (emphasis added).

a distinct meaning from that of "effluent limitation."[230] Thus, the court incorrectly used an irrelevant statutory definition to support its conclusion that point source discharges must be direct.

Second, the court's approach to interpreting the text is flawed because it relied on over-simplified definitions, ignored other plausible interpretations, and read words into the statute. In interpreting the jurisdictional phrase "*to* navigable waters *from* any point source,"[231] the court concluded that discharges through groundwater do not come *from* a point source, and thus are not included. But this interpretation assumes that "from" can only mean *directly* from. The plain statutory text does not dictate that result, nor does basic logic. If a person flies from Seattle to New York with a layover in Philadelphia, are they no longer coming from Seattle because of their brief stop in Philadelphia? According to the Sixth Circuit's logic, that would be correct. The court touted its whole analysis as a matter of plain meaning, but at best read language as narrowly as possible, and at worst read words into the text that are not there.

Third, the court ignored other plausible interpretations in its "plain meaning" analysis. Perhaps most importantly, it rejected the words of Justice Scalia writing for the plurality in *Rapanos*.[232] Both the Ninth and Fourth Circuits relied upon (fellow textualist) Justice Scalia's take on the issue in *Rapanos*. And the Ninth Circuit spent a considerable amount of analysis focused on other contexts where courts have upheld indirect discharges. The Sixth Circuit did its best to distinguish *Rapanos*, and did not even mention any of the lower court decisions that addressed indirect discharges. Contrary to the Sixth Circuit's reading, Justice Scalia's words stating that the CWA does not require that point source discharges be direct, were not in response to hypotheticals regarding pollutants passing through multiple point sources. Rather, Justice Scalia was addressing Respondents' fear of discharges through "intermittent watercourses."[233] Justia Scalia did not assume that such intermittent watercourses would also be point sources.

Fourth, the court selectively acknowledged statutory purpose under the textualist guise of "context."[234] It nodded to the broad statutory purpose to "protect the Nation's waters" only then to attempt to garner support from the statute's federalism goal. Essentially, the court cherry picked the parts of the statute's purpose that it liked, while brushing off the other (more integral) purpose as "last resort." What the Sixth Circuit did here is not unlike other "textualists" who rely on non-textualist interpretive aids selectively, and only to achieve a desired

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230 *See Ky. Utils. Co.*, 905 F.3d at 943 (Clay, J., dissenting).
231 *Id.* (emphasis added).
232 *Id.* at 936; *see also Rapanos*, 547 U.S. 715, 743 (2006).
233 *Id.* at 742–43.
234 *Ky. Utils. Co.*, 905 F.3d at 936–37.

result.[235] The Sixth Circuit's approach, in contrast to the Ninth and Fourth Circuits' textual approach, entirely ignores the practical consequences of the dispute and the effect of undermining the purpose of the CWA.[236]

Fifth, the Sixth Circuit's reliance on RCRA was misplaced. Specifically, reading the CWA to cover coal ash ponds would *not* gut the CCR rule.[237] As Judge Clay pointed out in dissent, the EPA has already addressed the concern of RCRA and CWA overlap with respect to coal ash ponds by interpreting the statutes to mean that CCR would potentially be subject to regulation under *both* RCRA and the CWA.[238] According to the EPA, holding a party liable under the CWA for coal ash point source discharges does not preclude RCRA liability for the storage and treatment of the coal ash.[239] Yet the Sixth Circuit argued that the opposite interpretation is true, without even referencing the EPA's interpretation or bringing up the possibility of deference.

Overall, the Sixth Circuit zeroed in on a narrow reading of individual words in the text, while ignoring pertinent context, purpose, and practical consequences. The Sixth Circuit's strategic reliance on only what supported its opinion is a disingenuous distortment of the CWA for the sake of its desired outcome—an exceptionally narrow interpretation of the CWA—rather than an intellectually honest and careful analysis to determine Congress's intended meaning. And it also goes against the entire basis of textualism in the first place, which is to constrain judicial discretion. The Sixth Circuit's approach exemplifies the larger problems with hypertextualist statutory interpretation.

VI. REJECTING RIGID INTERPRETATIONS OF ENVIRONMENTAL STATUTES: A CWA CASE STUDY

Given the trends discussed above as well as the recent changes in the Supreme Court's composition, it is likely that hypertextualism, or textualism that otherwise ignores purpose and practical consequences, will continue to be present in statutory interpretation. The implications of this are disastrous both for the CWA as well as environmental laws generally.

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235 *See, e.g.*, Covington, *supra* note 64, at 827 (discussing Justice Scalia's analysis in *Rapanos*).

236 *See Kinder Morgan Energy Partners*, 887 F.3d 637, 653 (4th Cir. 2018) (stating that the alternative outcome "would greatly undermine the purposes of the Act."); *see also Cty. of Maui*, 886 F.3d 737, 753 (9th Cir. 2018) ("this case is about preventing the County from doing indirectly that which it could not do directly.").

237 *Ky. Utils. Co.*, 905 F.3d at 938.

238 *See id.* at 945 (Clay, J., dissenting) (referencing 45 Fed. Reg. 33,098).

239 *Id.*

A. Erosion of the Administrative State and Enlargement of Judicial Power

None of the circuit courts that addressed the hydrological connection theory posed the question of whether the statute was ambiguous and deference could be relevant. Yet there was an agency interpretation that the courts could have ostensibly deferred to at the time—EPA's CAFO regulations.[240] The three circuit courts all reached their result as a matter of plain meaning of the statutory language—but is the meaning really "plain" if reasonable minds can differ? And the Sixth Circuit also did not raise the possibility of deference when determining that RCRA's coverage of coal ash ponds precluded CWA regulation.[241] Not even posing the question of whether a statute is ambiguous is emblematic of the trend that courts are actually giving themselves more power, despite relevant doctrines that could potentially lead to reliance on agency interpretations.

Chevron itself was decided in a time when legislative history was frequently used as an interpretative aid, but when courts adhere to strict textualism, *Chevron*'s framework will not work in the way the *Chevron* Court initially thought it would. Specifically, textualists' objection to the use of legislative history in *Chevron* step one distorts potential findings of ambiguity. Hypertextualists in particular are more likely to assume there is one "right" answer.[242] And in reality, textualists are more frequently finding that a statute has a plain meaning, where one arguably does not exist.[243] The obvious result of more courts finding statutes are unambiguous is that they are less likely to defer to agency interpretations, and the benefits of agency expertise will not be recognized in statutory interpretation.[244]

There are numerous consequences of courts interpreting statutes in a way that results in less deference to agencies. For one, it results in a lack of regulatory flexibility.[245] While courts are bound by precedent, agencies can modify their interpretations in response to changes in the environment and new information.[246] Next, courts do not have the

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[240] However, given that the EPA's stance on the hydrological connection theory has frequently changed and contradicted itself, it is unclear whether a court would have afforded the agency even *Skidmore* deference. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1994); *see also* United States v. Mead Corp., 533 U.S. 218, 229 (2001). In fact, the EPA's stance on hydrologically connected groundwater has already changed since these cases were decided. *See* U.S. Envtl. Prot. Agency, Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater, Interpretative Statement (Apr. 12, 2019).

[241] *See Ky. Utils. Co.*, 905 F.3d at 945 (Clay, J., dissenting) (referencing Hazardous Waste Management System: Identification and Listing of Hazardous Waste, 45 Fed. Reg. 33,098 (May 19, 1980).

[242] Abernathy, *supra* note 29, at 605.

[243] *Id.*

[244] *Id.* at 610; *see also* Mank, *supra* note 120, at 1248–50.

[245] Abernathy, *supra* note 29, at 592.

[246] *Id.*

technical expertise that most agencies have. Agency interpretations are informed by their unique expertise, especially in environmental areas that are influenced by complex scientific understandings. And finally, hypertextualism enlarges judicial power. Despite the concerns that led to the rise of textualism in the courts to begin with, textualism today suffers from the exact manipulations and arrogation of judicial power that Justice Scalia and other proponents of textualism were initially concerned about.[247] As a result of finding more statutes unambiguous and deferring to agency interpretations less, courts are retaining more decision making power for themselves. Because textualism was initially touted as a doctrine of judicial restraint, this result alone should cause judges to rethink rigid statutory interpretation.

B. Seeking Plain Meaning Where it Does Not Exist

A hypertextualist approach is centered on "finding linguistic precision" despite conflicting interpretations or inconsistencies.[248] But pollution dynamics are inherently complex and cannot always be readily discerned through grammar rules, canons of construction, and dictionary definitions.[249] Furthermore, environmental statutes are directed towards regulators, industries subject to regulation, and lawyers, rather than the ordinary reader that textualists view as a statute's crucial audience.[250] In fact, "[t]he Supreme Court has emphasized that water pollution laws in particular must be construed in light of the evils they are intended to address."[251] Thus, the objective ordinary meaning that textualists are searching for may not exist.[252] This reasons against a hypertextual approach to interpreting the CWA.

C. Ignoring Statutory Purpose

Many environmental statutes are adopted with broad aspirational purposes, and the CWA is no exception.[253] But the Sixth Circuit's interpretation of the CWA erodes the fundamental purpose of the CWA—to protect the Nation's waters—and ignores a primary mechanism of achieving that purpose—the NPDES program—which is achieved through regulating pollution at the point source. While the Sixth Circuit does mention this purpose of the CWA (as well as its cooperative federalism goals), it does not adequately consider it as part of its statutory analysis.[254] A hypertextualist approach to environmental

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247 *See id.* at 602–03; Pierce, *supra* note 30, at 752.
248 Pierce, *supra* note 30, at 750.
249 *See* Covington, *supra* note 64, at 817.
250 *Id.* at 818 (citing Mank, *supra* note 120, at 1280–81).
251 Wood, *supra* note 16, at 579–80.
252 Covington, *supra* note 64, at 818.
253 *Id.* at 805.
254 *See* discussion *supra* Part V(B)(2).

statutes does not work because it fails to give proper weight to the environmental goals Congress was trying to achieve. Furthermore, by failing to adequately consider the CWA's broad purpose the courts are, again, retaining more power for the judiciary by ignoring Congress's wishes for the sake of a narrow interpretation.[255]

D. Disregarding Practical Consequences

Reading the CWA to exclude point source discharges through hydrologically connected groundwater allows facilities to do indirectly what they cannot do directly. It effectively creates a giant regulatory loophole. If the Supreme Court takes the Sixth Circuit approach to interpreting the CWA, the logical conclusion is that polluters will be able to escape CWA liability "by moving [their] drainage pipes a few feet from the riverbank."[256] The result of such a loophole would be catastrophic in terms of the CWA's regulatory thrust and would be illogical on Congress's behalf. Congress "does not . . . hide elephants in [statutory] mouseholes."[257]

And more broadly, not including discharges through groundwater as part of the NPDES regulatory scheme will result in more degradation to surface waters. This in turn will implicate other provisions of the CWA that transcend the NPDES program, and apply to both point and non-point sources of pollution. Of particular relevance are the programs that address degraded waters. Section 303 of the CWA allows states to set water quality standards to protect the uses of a water source and to prevent degradation.[258] If water quality standards are not met for a body of water, the Total Maximum Daily Load Program (TMDL) may kick in and place specific numeric limits on discharges of pollution. Specifically, the CWA requires states to establish TMDLs for pollutants "at a level necessary to implement the applicable water quality standards."[259] If more polluters are able to discharge pollutants indirectly without regulatory oversight, waters will likely become more degraded, necessitating retroactive regulation through water quality standards and the TMDL program.

E. Failing to Acknowledge Known Science

A hypertextualist approach to interpreting the CWA also ignores the scientific realities of the hydrologic system. Environmental statutes

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255 *See* Diresen, *supra* note 126, at 122 (arguing for "purposeful construction" in statutory interpretation).

256 *Ky. Utils. Co.*, 905 F.3d 925, 940 (6th Cir. 2018) (Clay, J., dissenting).

257 *Id.* at 943 (Clay, J., dissenting) (quoting Whitman v. Am. Trucking Assns., Inc., 531 U.S. 457, 468 (2001)).

258 For example, water quality standards may protect fishing and swimming uses. CWA, 33 U.S.C. § 1312 (2012).

259 *Id.* § 1313(d)(1)(C).

often address complex scientific and ecological interactions, and were passed by Congress with that knowledge.[260] It is illogical to construe such a statute in a way that turns a blind eye to the scientific realities behind its adoption. In this case, Congress explicitly intended to protect surface waters by regulating point source pollution through the NPDES program. And the science is clear that groundwater is intimately connected to surface waters. A hypertextualist approach to the issue of CWA jurisdiction over groundwater is thus at odds with Congress's explicit intent to protect the Nation's waters by targeting point source pollution.

VII. CONCLUSION

The health of the Nation's surface waters cannot be properly protected without adequate protection of groundwater. While the CWA has the potential to regulate pollution into groundwater, there is disagreement on if and how it can do so. Even the most conservative theory for regulating groundwater under the CWA—the hydrological connection theory—was shut down by the Sixth Circuit. The Sixth Circuit's interpretation of the CWA in *Kentucky Utilities Co.* is an example of how a rigid, hypertextual interpretative approach can lead to absurd results that thwart the purpose of the CWA. The implications of such an approach extend beyond the CWA, and are dangerous for environmental law as a whole. Rather than relying solely on textualist principles to the point of absurdity, courts should instead read environmental statutes with consideration of the practical implications and broad statutory purpose. Otherwise, there is risk of more decisions that create giant regulatory loopholes with disastrous implications for the environment.

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[260] Covington, *supra* note 64, at 81.