

# Oil and Gas, Natural Resources, and Energy Journal

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Volume 7 | Number 3

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March 2022

## ***County of Maui v. Hawaii Wildlife Fund* and Its Impact on Clean Water Act Jurisprudence**

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### **Recommended Citation**

Sydney Bale, *County of Maui v. Hawaii Wildlife Fund and Its Impact on Clean Water Act Jurisprudence*, 7 OIL & GAS, NAT. RESOURCES & ENERGY J. 551 (2022), <https://digitalcommons.law.ou.edu/onej/vol7/iss3/4>

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# ONE J

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VOLUME 7

NUMBER 3

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## *COUNTY OF MAUI v. HAWAII WILDLIFE FUND*<sup>\*</sup> AND ITS IMPACT ON CLEAN WATER ACT JURISPRUDENCE

SYDNEY BALE<sup>\*\*</sup>

### *Introduction*

The Clean Water Act (“CWA”), originally the Federal Water Pollution Control Act of 1948, is the principal law governing water pollution into the United States’s waterways.<sup>1</sup> The Federal Water Pollution Control Act of 1948 was the first statute to address water pollution.<sup>2</sup> In 1972, this act was amended and renamed the “Clean Water Act.”<sup>3</sup> The CWA “forbids ‘any addition’ of any pollutant from ‘any point source’ to ‘navigable waters’ without an appropriate permit from the [EPA].”<sup>4</sup> Congress’s goal in enacting such legislation, reflected in the CWA’s language, is to “‘restore and maintain . . . the integrity of the Nation’s waters.’”<sup>5</sup> Congress established conditions and created a permit system for persons wishing to “discharge . . . pollutants into the waterways of the United States under the

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\* 140 S.Ct. 1462 (2020).

\*\* University of Oklahoma College of Law J.D. Candidate 2022. I would like to thank my faculty advisor, Professor M. Alexander Pearl, for not only his expertise in both statutory interpretation and water law but also for his assistance with this article.

1. 33 U.S.C. §§ 1251-1388 (2012).
2. *Id.*
3. Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C.A. § 1251-1388.
4. *County of Maui*, 140 S.Ct. at 1468.
5. *Id.*

National Pollution Discharge Elimination System (“NPDES”).”<sup>6</sup> The CWA also gives “the [EPA] the authority to implement pollution control programs such as setting wastewater standards for industry and water quality standards for all contaminants in surface waters.”<sup>7</sup> However, the Act is criticized for being vague because “Congress’ basic aim [is] to provide federal regulation of identifiable sources of pollutants entering navigable waters without undermining the States’ longstanding regulatory authority over land and groundwater.”<sup>8</sup> Persons discharging pollutants, attorneys, and judges struggle to determine the scope of the CWA, resulting in inconsistency, confusion, and ambiguity.

The Supreme Court’s most recent interpretation of the CWA, *County of Maui v. Hawaii Wildlife Fund*,<sup>9</sup> explored the provision forbidding the discharge of any pollutant from a point source to navigable waters without a permit from the EPA. In a 6-3 decision, the Court held “from a point source” to mean either directly from a point source or from the “functional equivalent of a direct discharge.”<sup>10</sup> The Supreme Court granted certiorari to address a split amongst the Fourth, Sixth, and Ninth Circuit Courts regarding the test to determine whether discharge of pollutants from a point source requires a permit under the CWA.<sup>11</sup> The Court also granted certiorari to address a loophole that was beginning to form that would allow polluters to avoid a permit if they discharged into groundwater instead of directly into navigable waters.<sup>12</sup>

Critics, like dissenters Justice Alito and Justice Thomas, argue the Supreme Court created too broad a rule to be used in future CWA suits which will ultimately lead to ambiguous and inconsistent holdings.<sup>13</sup> While

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6. Bureau of Ocean Energy Management, *Clean Water Act (CWA)*, <https://www.boem.gov/environment/environmental-assessment/clean-water-act-cwa#:~:text=The%20CWA%20establishes%20conditions%20and,such%20as%20setting%20wastewater%20standards> (last visited Nov. 14, 2020) (quotations added).

7. *Id.*

8. *County of Maui*, 140 S.Ct. 1462, 1476 (2020) (citing 33 U.S.C. § 1251).

9. *Id.* at 1462.

10. *Id.* at 1476.

11. *See Id.* at 1469. The Supreme Court granted certiorari based on the discrepancies between the Ninth Circuit’s “fairly traceable,” the Fourth Circuit’s “direct hydrological connection” in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 (4th Cir. 2018), and the Sixth Circuit’s “discharge through groundwater [is] excluded from the Act’s permitting requirements” in *Kentucky Waterways Alliance v. Kentucky Util. Co.*, 905 F.3d 925, 932-938 (6th Cir. 2018).

12. *Id.* at 1473.

13. *Id.* at 1483 (Alito, J., dissenting).

the Court's decision in *County of Maui* does create a broad rule, it is the right decision by the Court to ensure States' rights and the purpose of the CWA remains intact. The language of the CWA is intended to be vague and the Supreme Court's decision in *County of Maui* creates a rule to help navigate the statute's vague language while also ensuring that States' rights in controlling groundwater, the EPA's job of issuing permits, and Congress's intent in drafting the CWA, are not infringed upon.<sup>14</sup>

Put another way, the Supreme Court had two options: (1) allow this loophole to the CWA's permit system to happen by deciding in favor of the County of Maui and let future polluters circumvent the permit process *or* (2) create a rule that would ensure such a loophole would not occur in the future. By deciding upon the latter, the Court ensured future polluters would not be able to avoid the CWA's permit requirements by polluting into groundwater instead of directly into navigable waters; however, in order to do so, the Court had to create a broad rule that critics argue will lead to ambiguities.<sup>15</sup> The Court issued guidance in the form of factors to weigh when determining future CWA cases regarding a nonpoint source like groundwater to help prevent inconsistent holdings in the future.<sup>16</sup> While the Court's new rule *is* broad, it ensures Congress's purpose for enacting the CWA remains unadulterated—protecting the waters of the United States from pollution.<sup>17</sup>

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14. *County of Maui*, 140 S.Ct. at 1478 (Kavanaugh, J., concurring) (Justice Kavanaugh's concurrence discussing the unique and difficult role the Supreme Court is faced with when deciphering CWA cases) ("The source of vagueness is Congress' statutory text, not the Court's opinion. The Court's opinion seeks to translate the vague statutory text into more concrete guidance.").

15. *Id.* at 1482-3 (Alito, J., dissenting) (referring to the majority's holding and creation of the direct discharge or "functional equivalent of direct discharge" rule: "[i]f the Court is going to devise its own legal rules, instead of interpreting those enacted by Congress, it might at least adopt rules that can be applied with a modicum of consistency. Here, however, the Court makes up a rule that provides no clear guidance and invites arbitrary and inconsistent application.").

16. *See Id.* at 1477, for some of the factors the court discusses to help alleviate confusion for judges in their attempt to decipher the CWA: "(1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity. Time and distance will be the most important factors in most cases, but not necessarily every case."

17. See Justice Kavanaugh's discussion, *supra* note 14.

The aim of this Note is to analyze the Supreme Court's decision in *County of Maui* and illustrate why the Court's majority opinion is the correct decision. This Note is broken into four parts. *First*, I will explain the CWA and the CWA cases that led to the Supreme Court granting certiorari for *County of Maui*. I will specifically look at the circuit split regarding the proper test to determine whether a permit is required for discharge through groundwater, and *Rapanos v. United States*, another major CWA case that occurred prior to *County of Maui*. *Second*, I will discuss the facts, issue, and holding in *County of Maui v. Hawaii Wildlife Fund*, with special focus on how the Supreme Court reached its decision, Justice Kavanaugh's concurrence, and Justice Thomas and Justice Alito's dissents. *Third*, I will explain why statutory interpretation is so critical in *County of Maui*, by discussing why the EPA's interpretive statement was not binding on the Court's decision, why the Court had to create such a broad rule, and the different theories of statutory interpretation utilized in the Court's decision to support the majority rule. *Lastly*, I will address the future of CWA jurisprudence and how courts will interpret and utilize *County of Maui* in future opinions by debunking Justice Alito's criticisms about the majority's "functional equivalent of a direct discharge" test.<sup>18</sup>

### *I. The Clean Water Act Prior to County of Maui*

#### *A. The Clean Water Act Defined*

Before the CWA,<sup>19</sup> "[f]ederal and [s]tate governments regulated water pollution in large part by setting water quality standards."<sup>20</sup> In 1948, Congress enacted The Federal Water Pollution Control Act to address water pollution.<sup>21</sup> As the country grew more aware of water pollution, the Act was amended in 1972 to account for the country's changing awareness and personal investment in water quality.<sup>22</sup> In 1972, the Act became known as

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18. *See Id.* at 1483 (Alito, J., dissenting), Justice Alito, in his dissent, questions and criticizes the ambiguities and holes in the majority created rule: "[j]ust what is the 'functional equivalent' of a 'direct discharge'?" The Court provides no real answer. All it will say is that the distance a pollutant travels and the time this trip entails are the most important factors, *but at least five other factors* may have a bearing on the question, and even this list is not exhaustive."

19. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1388 (2012).

20. *County of Maui*, 140 S.Ct. at 1468.

21. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1388 (2012).

22. U.S. Environmental Protection Agency, Laws & Regulations, *History of the Clean Water Act* (last updated June 15, 2020), available at <https://www.epa.gov/laws-regulations/history-clean-water-act>.

the “Clean Water Act.”<sup>23</sup> The stated objective of the CWA by Congress is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” as well as to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.”<sup>24</sup>

The CWA “forbids ‘any addition’ of any pollutant from ‘any point source’ to ‘navigable waters’ without an appropriate permit from the [EPA].”<sup>25</sup> A principal provision of the CWA’s regulatory power is addressed in the United States Code, Title 33, Section 1311(a), which provides that “the discharge of any person shall be unlawful.”<sup>26</sup> The CWA defines “discharge of [a] pollutant” as the “addition of any pollutant to navigable waters from any point source.”<sup>27</sup> “Pollutant” is defined broadly as “to include not only traditional contaminants but also solids such as ‘dredge spoil, . . . rock, sand, [and] cellar dirt.’”<sup>28</sup> “Point source” includes “‘any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.’”<sup>29</sup> And lastly, “navigable waters” as “the waters of the United States, including the territorial seas.”<sup>30</sup>

To determine whether a person is required to apply for a permit under the CWA, courts must determine whether “the addition of any pollutant to navigable waters from any point source” has occurred.<sup>31</sup> While this question seems straight forward, courts have struggled to answer it. The CWA’s complicated jurisprudence is evident in the Supreme Court’s holding, *Rapanos v. United States*, in which the Court, in a plurality opinion, addressed the meaning of “the waters” in the CWA.<sup>32</sup> Prior to the enactment of the CWA, “navigable waters of the United States” referred to waters that were “navigable in fact.”<sup>33</sup> “Navigable in fact” is how courts originally

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23. *Id.*

24. *Rapanos v. United States*, 547 U.S. 715, 722 (2006) (citing 33 U.S.C. §1251(a-b)).

25. *County of Maui*, 140 S.Ct. at 1468.

26. 33 U.S.C. § 1311(a).

27. 33 U.S.C. § 1362(12).

28. 33 U.S.C. § 1362(6).

29. 33 U.S.C. § 1363(14).

30. 33 U.S.C. § 1362(7).

31. *Id.*

32. *Rapanos*, 547 U.S. at 733.

33. *Id.* at 723 (citing *The Daniel Ball*, 77 U.S. 557, 563 (1870), explaining how the Court interpreted “navigable waters of the United States” prior to the CWA’s enactment).

interpreted “navigable waters of the United States” following the passage of the CWA.<sup>34</sup>

*B. Rapanos v. United States*<sup>35</sup>

The issue before the Court, in *Rapanos*, was whether the CWA’s “waters of the United States” included a wetland that occasionally emptied into a tributary of a traditionally “navigable water.” The divided Court rejected, in a plurality opinion, this idea that “waters of the United States” meant “navigable in fact” because the Congress defined “navigable waters” in the CWA as “waters of the United States.”<sup>36</sup> The Court in *Rapanos*, defined “the waters,” narrowly, to mean “water ‘[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,’ or ‘the flowing or moving masses, as of waves or floods, making up such streams or bodies.’”<sup>37</sup> The Court noted that the CWA defines “navigable waters” as “*the* waters of the United States” not “waters of the United States.”<sup>38</sup> This distinction is critical because it shows Congress did not intend to include all bodies of water but rather a narrower definition of waters to include only “streams and bodies forming geographical features” like an ocean, river, lake, stream, etc. and not water that “occasionally or intermittently flows.”<sup>39</sup> The Court determined that “the waters of the United States” did not include “channels containing merely intermittent or ephemeral flow,” but does include “relatively *permanent* bodies of water.”<sup>40</sup> However, the Court chose to not go into too much detail regarding “the precise extent to which the qualifiers ‘navigable’ and ‘of the United States’ restrict the coverage of the Act. Whatever the scope of these qualifiers, the CWA authorizes federal jurisdiction *only* over ‘waters.’”<sup>41</sup>

The plurality opinion in *Rapanos* went on to say the CWA does not prohibit the “addition of any pollutant *directly* to navigable waters,” it says, “addition of any pollutant *to* navigable waters.”<sup>42</sup> This differentiation is noted in Scalia’s plurality opinion because previous interpretation of the CWA by lower courts has led to decisions that said “any pollutant *that*

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34. *Id.*

35. *See generally Rapanos*, 547 U.S. 715 (2006), for the Court’s definition of the CWA’s “waters of the United States.”

36. *Id.* at 730.

37. *Id.* at 732.

38. *Id.* (emphasis added).

39. *Id.* at 732.

40. *Id.* at 733-34.

41. *Rapanos*, 547 U.S. at 731-32 (emphasis added).

42. *Id.* at 743.

*naturally washes downstream* likely violates [section] 1311(a), even if the pollutants discharged from a point source do not emit ‘directly into’ covered waters, but pass ‘through conveyances’ in between.”<sup>43</sup> This assertion by the Court implies that, if looked at broadly, the CWA’s permit requirement *would* be triggered if a pollutant were discharged from a point source, through groundwater, to navigable waters, even if it is not directly from the point source to navigable waters. An issue that is central to the decision in *County of Maui*, however, the Court in *County of Maui* found the dictum in *Rapanos* did not apply.<sup>44</sup>

Justice Kennedy’s concurrence, in *Rapanos*, has frequently been regarded as the governing opinion in *Rapanos*. Justice Kennedy framed the question before the Court as “whether the term ‘navigable waters’ in the Clean Water Act extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact.”<sup>45</sup> Justice Kennedy argued the Court should have utilized the “significant nexus” test from *Solid Waste Agency of Northern Cook City v. Army Corps of Engineers*.<sup>46</sup> Under the “significant nexus” test, “a water or wetland must possess a ‘significant nexus’ to waters that are, or were, navigable in fact or that could reasonably be so made” to constitute as a “navigable water” in terms of the CWA.<sup>47</sup> Meaning, a wetland falls under federal regulation under the CWA when it has a “significant nexus” to a traditional navigable water. The “significant nexus” requirement is satisfied if the wetland has a significant impact on the “chemical, physical, and biological integrity” of bodies of water that are “more readily understood as navigable.”<sup>48</sup>

### *C. The Circuit Split Which Led to the Supreme Court Granting Certiorari in County of Maui*

In addition to the complicated precedent the Court set in *Rapanos* regarding the CWA, a circuit split amongst the Fourth, Fifth, Sixth,

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43. *Id.*

44. *See generally County of Maui*, 140 S.Ct. 1462 (2020).

45. *Rapanos v. United States*, 547 U.S. at 759 (Kennedy, J., concurring).

46. 531 U.S. 159 (2001).

47. *Rapanos v. United States*, 547 U.S. at 759 (Kennedy, J., concurring).

48. *Id.* at 780. (Kennedy, J., concurring) (“[W]etlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters,’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’ When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’”).



Seventh, and Ninth Circuit Courts' regarding the appropriate test to determine if a discharge through groundwater to navigable waters requires a permit had been created. In 2018, the Fourth Circuit considered the Supreme Court's *Rapanos* decision in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, and held "a plaintiff must allege a direct hydrological connection between groundwater and navigable waters in order to state a claim under the CWA for a discharge of a pollutant that passes through ground water."<sup>49</sup> The Fourth Circuit determined "[j]ust as the CWA's definition of a discharge of a pollutant does not require a discharge directly to navigable waters, [n]either does the Act require a discharge directly from a point source."<sup>50</sup> However, the Supreme Court's holding in *Rapanos* and the Fourth Circuit's holding in *Upstate Forever* were not extended to the Sixth Circuit's holding in *Kentucky Waterways Alliance v. Kentucky Utilities Company*.<sup>51</sup> In *Kentucky Waterways Alliance*, the Sixth Circuit held "when the pollutants are discharged to [a] lake, they are not coming from a point source; they are coming from groundwater, which is a nonpoint-source conveyance. The CWA has no say over that conduct."<sup>52</sup> The Sixth Circuit's holding in *Kentucky Waterways Alliance* fell more in line with the Fifth Circuit in *Rice v. Harken Exploration Co.*,<sup>53</sup> where the court also heard a CWA case regarding pollutants being discharged through groundwater to navigable waters. The Fifth Circuit held that Congress did not intend to regulate groundwater in the CWA. Therefore, the CWA's "navigable waters" does not include conveyances via groundwater.<sup>54</sup> The Sixth and Fifth Circuit's decisions followed the Seventh Circuit's decision in 1994 in *Village of Oconomowoc Lake v. Dayton Hudson Corp.*<sup>55</sup> In *Village of Oconomowoc Lake*, the Seventh Circuit held regulation of groundwater fell to the states and therefore, it was not an oversight by Congress to omit groundwater from the text of the CWA.<sup>56</sup> The Seventh Circuit explained that the CWA states "waters of the United States," not all waters.<sup>57</sup>

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49. 887 F.3d 637, 651 (4th Cir. 2018).

50. *Id.*

51. 905 F.3d 925 (6th Cir. 2018).

52. *Id.* at 934.

53. 250 F.3d 264 (5th Cir. 2001).

54. *Id.* at 272.

55. 24 F.3d 962 (7th Cir. 1994).

56. *Id.* at 965.

57. *Id.*

The Fifth, Sixth, and Seventh Circuits found the CWA *did not* include groundwater conveyances, while the Fourth Circuit and the Supreme Court’s plurality opinion in *Rapanos*—if read expansively—held the CWA *did* include groundwater.<sup>58</sup> The difference between the holdings in the Fourth, Fifth, Sixth, and Seventh Circuits comes down to interpreting the same sentence of the CWA and yet, there is an astounding difference in outcomes. The language of the CWA is not complex; rather it is the simplicity of its language that creates vagueness. Legal scholars and CWA interpreters argue the reason for the CWA’s complicating past stems from “Congress . . . [leaving] gaps and ambiguities in the statutory test, including the unexplained or poorly explained use of multiple terms for seemingly similar or identical issues.”<sup>59</sup> Take “[f]or example, Congress established an overall objective to ‘restore and maintain . . . the Nation’s waters,’ but then applied the Act’s regulatory controls to ‘navigable waters,’ which it then re-defined to ‘the waters of the United States.’”<sup>60</sup>

The Supreme Court granted certiorari on *County of Maui* because of the inconsistent holdings amongst the circuit courts regarding whether discharges from a point source through groundwater to navigable waters is covered under the CWA. The Court also granted certiorari to determine whether the plurality opinion in *Rapanos* was binding on CWA jurisprudence.

## II. County of Maui, Hawaii v. Hawaii Wildlife Fund

### A. Facts and Procedural History

In the Supreme Court’s October 2019 Term, the Court heard the most recent CWA case, *County of Maui v. Hawaii Wildlife Fund*.<sup>61</sup> The County of Maui owns and operates a wastewater reclamation facility, the Lahaina Wastewater Reclamation Facility, that collects sewage from the

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58. While the Supreme Court’s plurality opinion in *Rapanos* does not explicitly discuss groundwater, if read expansively, groundwater can be included in the *Rapanos* Court’s interpretation of the CWA, “discharging . . . pollutants into noncovered intermittent watercourses that lie upstream of covered waters” does not “evade the permitting requirement of [the CWA].” *County of Maui*, 140 S.Ct. 1462, 1478-9 (2020) (Kavanaugh, J., concurring) (arguing *Rapanos* does resolve the matter in *County of Maui* because the *Rapanos* plurality found discharge that passes through intermittent channels before reaching navigable waters is not necessarily exempt from the CWA’s permit requirement.).

59. Robert W. Adler & Brian House, *Atomizing the Clean Water Act: Ignoring the Whole Statute and Asking the Wrong Questions*, 50 ENVTL. L. 45, 47 (2020).

60. *Id.* at n.6. (citations omitted).

61. 140 S.Ct. 1462 (2020).

surrounding area, partially treats it, and then pumps the treated water into the ground through wells.<sup>62</sup> Four million gallons of treated sewage water then travel half a mile through groundwater to the Pacific Ocean.<sup>63</sup>

In 2012, several environmental groups (“Hawaii Wildlife Fund”) brought suit against the County of Maui for violating the Clean Water Act, claiming the County was “discharging” a “pollutant” to “navigable waters.”<sup>64</sup> The District Court for the District of Hawaii held the County’s discharge of pollutants into groundwater was “functionally one into navigable water” because the pollutants in the ocean were traceable to the reclamation facility.<sup>65</sup> The District Court granted summary judgment in favor of Hawaii Wildlife Fund because the pollutants path from the reclamation site to the ocean was “clearly ascertainable,” the County appealed, and the Ninth Circuit affirmed the District Court’s holding.<sup>66</sup> The Ninth Circuit affirmed but took a broader approach by saying a permit is required under the CWA when “the pollutants are *fairly* traceable from the point source to a navigable water.”<sup>67</sup> The Ninth Circuit chose to not answer what happens when the distance between the point source and navigable water is too far apart to determine a connection regarding liability.<sup>68</sup> The Supreme Court granted the County’s petition for certiorari due to the circuit split between the Fourth, Fifth, Sixth, Seventh, and, now, Ninth Circuit Courts regarding the causal relationship between the point source and navigable waters in the language of the CWA.<sup>69</sup>

#### *B. The Supreme Court’s Holding*

The issue before the Supreme Court is whether the CWA requires a person to obtain a permit when discharging pollutants from a point source to navigable waters via groundwater.<sup>70</sup> To put it another way, whether “from” means “directly from” or “fairly traceable from.”<sup>71</sup> Hawaii Wildlife Fund argued a permit is required if the pollutant is “*fairly traceable*” to a

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62. *Id.* at 1469.

63. *Id.*

64. *Id.* at 1468.

65. *Id.* at 1469.

66. *County of Maui*, 140 S.Ct. at 1469.

67. *Id.*

68. *Id.*

69. *Id.* at 1469-70.

70. *Id.* at 1470.

71. *Id.*

point source, whereas the County argued a permit is only required if the pollutant is “*directly from*” a point source.<sup>72</sup>

The Court held, in a 6-3 decision written by Justice Breyer, to vacate the Ninth Circuit’s application of the statutory language and remand.<sup>73</sup> The Court did not reverse the Ninth Circuit’s decision as the Ninth Circuit and the Supreme Court both ruled in favor of the Hawaii Wildlife Fund; however, the Supreme Court reached its outcome differently than the District and Circuit Court.<sup>74</sup> The Court referred to the holding in *Rapanos* which said, the Clean Water Act refers to “any addition of any pollutant” meaning it is much more broad and not only limited to *directly from*.<sup>75</sup> The Court held, under the CWA, a permit is required when there is “direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*.”<sup>76</sup> The Court reasoned adding the “functional equivalent of a direct discharge” accounts for Congress’ intention to allow states authority over groundwater while also asserting proper federal authority over discharge from an identifiable point source to navigable waters.<sup>77</sup>

When determining whether a pollutant is a direct discharge or “functional equivalent of a direct discharge,” the Court determined that time and distance play an important role.<sup>78</sup> If the “pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach), the permitting requirement clearly applies.”<sup>79</sup> However, “[i]f the pipe ends 50 miles from navigable waters and the pipe emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later, the permitting requirements likely do not apply.”<sup>80</sup> The Court admits this approach is difficult to articulate and vague because it only accounts for those extreme instances and not the grey, middle, instances.<sup>81</sup> The Court takes this broad approach because every future CWA case will be unique and fact specific and therefore, the judge can utilize the various factors to

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72. *County of Maui*, 140 S.Ct. at 1470. (emphasis added).

73. *Id.* at 1478.

74. *Id.* at 1478.

75. *Id.* at 1475 (citing *Rapanos*, 547 U.S. 715 at 771).

76. *Id.*

77. *County of Maui*, 140 S.Ct. at 1476.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

determine whether the discharge is a direct discharge or the functional equivalent.<sup>82</sup> The Court created a non-exhaustive list of several factors for courts to consider when grappling with like cases:

(1) [T]ransit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity.<sup>83</sup>

The court emphasized the two principal factors will be time and distance.<sup>84</sup> Courts will utilize these factors and the underlying objective of the CWA—to protect the navigable waters of the United States—when determining whether a permit is required.<sup>85</sup> This multi-factor approach should eliminate loopholes to the permitting requirement and ensure the goal of the CWA remains intact.<sup>86</sup>

#### *1. Kavanaugh's Concurrence*

Justice Kavanaugh filed a concurring opinion which made three points of disagreement with the majority opinion and other dissents filed.<sup>87</sup> First, the majority's holding *is* in line with the Court's holding in *Rapanos*. The County of Maui claims to not need a permit because the pollutants they are discharging at the reclamation facility enter the groundwater and then empty into navigable waters.<sup>88</sup> Justice Kavanaugh argues the plurality opinion in *Rapanos* explains why this application of the CWA is not accurate.<sup>89</sup> The plurality opinion in *Rapanos* held “the fact that the pollutants from Maui's wastewater facility reach the ocean via an indirect route does not itself exempt Maui's facility from the Clean Water Act's permitting requirement for point sources.”<sup>90</sup> Second, the source of

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82. *Id.* at 1476.

83. *County of Maui*, 140 S.Ct. at 1476-7.

84. *Id.*

85. *Id.* at 1477.

86. *Id.*

87. *Id.* at 1478. (Kavanaugh, J., concurring).

88. *Id.*

89. *County of Maui*, 140 S.Ct. at 1478. (Kavanaugh, J., concurring).

90. *Id.*

vagueness that the majority opinion discusses in its holding is not the Court's fault, rather from the CWA itself.<sup>91</sup> The CWA provides no "bright-line test" to determine when a pollutant comes from a point source.<sup>92</sup> Third, the majority *does* indicate relevant factors for courts to consider, despite Justice Thomas' dissent, when "determining whether pollutants that enter navigable waters come 'from' a point source" and how courts can determine the meaning of the majority's "functional equivalent of a direct discharge" rule.<sup>93</sup> The Court discussed several possible factors that might be relevant when grappling with a similar issue with particular emphasis on time and distance.<sup>94</sup> The list of factors provided by the majority is a non-exhaustive list and judges will utilize these factors, and others, depending on the facts of the case.<sup>95</sup> Ultimately, Justice Kavanaugh agreed with the majority opinion that the Ninth Circuit decision ought to be vacated and the case remanded.

## 2. Thomas's Dissent

Justice Thomas wrote one of two dissents in *County of Maui*.<sup>96</sup> Justice Thomas takes a textual approach to the CWA and dissents because the majority conducted an "open-ended inquiry into congressional intent and practical considerations."<sup>97</sup> Justice Thomas looks at the statutory definition of "discharge" coupled with "addition" instead of "from," like the majority does.<sup>98</sup> Explaining "addition" is more practical because with "to" and "from" it limits the meaning of "discharge" regarding navigable waters.<sup>99</sup> Justice Thomas agrees with the majority, *Rapanos* does not resolve the present case, because the Court in *Rapanos* issued a plurality opinion as the Court could not reach a decision and the present Court is not bound by dictum in a plurality opinion.<sup>100</sup> In conclusion, Justice Thomas states "[t]he best reading of the statute is that a 'discharge' is the release of pollutants

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91. *Id.*

92. *Id.*

93. *Id.* at 1478. (Kavanaugh, J., concurring).

94. *Id.* ("Although the statutory text does not supply a bright-line test, the Court's emphasis on time and distance will help guide application of the statutory standard going forward."), *supra* note 16.

95. *County of Maui*, 140 S.Ct. 1478 (Kavanaugh, J., concurring).

96. *Id.* at 1478. (Thomas, J., dissenting).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

directly from a point source to navigable waters” as there is no “discharge” the judgment of the Ninth Circuit should be reversed.<sup>101</sup>

### 3. *Alito’s Dissent*

The second dissent, written by Justice Alito, is extremely critical of the majority’s holding for making up its own rules and in doing so, creating a rule that is difficult to apply and will no doubt lead to future ambiguities.<sup>102</sup> Justice Alito argues “[t]here is no comprehensible alternative to these two interpretations, but the Court refuses to accept either. Both alternatives, it believes, lead to unacceptable results, and it therefore tries to find a middle way.”<sup>103</sup> The “functional equivalent of a direct discharge” or “when there is a direct discharge from a point source into navigable waters” test that the majority created, “has no clear meaning.”<sup>104</sup> Justice Alito defined the CWA’s permit provision to read as “a permit is required when a pollutant is discharged directly from a point source to navigable waters.” Or, put another way, “if water discharged on the surface of the land finds or creates a passage leading to navigable waters, a permit may be required if the course that the discharge takes is (1) a ‘conveyance’ that is (2) ‘discernible’ and (3) ‘confined.’”<sup>105</sup> Justice Alito argues this definition is consistent with both the statutory language of the CWA and with the CWA’s regulatory scheme and therefore, should be adopted.<sup>106</sup>

### III. *County of Maui Heavily Turns on Statutory Interpretation*

The main point of contention amongst the majority, concurrence, and dissents in *County of Maui* is how to interpret the CWA.<sup>107</sup> When the statute is unclear, different Courts and judges utilize different non-textual sources to determine the meaning of an ambiguous statute.<sup>108</sup> Whereas, “[i]f the text is sufficiently clear, the text usually controls.”<sup>109</sup> As the language of

101. *County of Maui*, 140 S.Ct. at 1482. (Thomas, J., dissenting).

102. See generally *Id.* at 1482-92 (Alito, J., dissenting), for criticism of the majority for creating an ambiguous and inconsistent rule in their attempt to clarify the CWA.

103. *Id.* at 1483.

104. *Id.*

105. *Id.* at 1487.

106. *Id.* at 1488.

107. See generally 140 S.Ct. 1462 (2020), for discussion of the meaning of “from” in the CWA as argued the entire opinion.

108. Robert A. Katzmann, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2118 (2016).

109. *Id.*

the CWA, regarding transferences by groundwater, is not clear, the Court in *County of Maui* turned to several alternative sources to decipher the statute's meaning and Congress's intent.<sup>110</sup> The Court discussed several methods of statutory interpretation in *County of Maui*, such as legislative intent, legislative purpose, agency interpretation, and plain language, to name a few.<sup>111</sup> Ultimately, the Court determined the agency interpretation of the CWA was improper and took a more purposivist and textualist approach to the ambiguous language of the CWA. Combining aspects of purposivism and textualism allowed for a rule encompasses both the language of the statute, Congress's intent, and precedent. In turn, the majority created a rule that *will* lead to easier interpretation of the CWA in future cases by providing judges, lawyers, and laypeople a non-exhaustive list of factors and an articulation of Congress's intent to guide interpreters.<sup>112</sup>

*A. The EPA's Interpretative Statement Regarding the CWA and Groundwater*

*1. Chevron Deference to Agency Interpretations of Ambiguous Statutes*

The Supreme Court has long held that “[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.”<sup>113</sup> And, that “administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”<sup>114</sup> *Chevron* deference is derived from the Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>115</sup>

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110. See generally *Id.*, for the majority discussion of Congress's intent in enacting the CWA; see also *Id.* at 1484-5, for Justice Alito opinion on the textual construction of the CWA and the plain meaning of “from.”

111. William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *Legislation and Statutory Interpretation* 219 (2nd ed. 2006).

112. See *County of Maui*, 140 S.Ct. at 1476-7 (discussing the various factors for courts to rely upon when determining whether a discharge is “the functional equivalent of a direct discharge.”).

113. *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

114. *U.S. v. Mead Corp.*, 533 U.S. 218, 226-227 (2001).

115. 467 U.S. 837, 844 (1984).



[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme," and "the principle of deference to administrative interpretations 'has been consistently followed by this Court whenever decision as to the meaning . . . of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.'

In other words, *Chevron* is step zero of statutory construction, that asks two questions.<sup>116</sup> The first question courts ask is, "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."<sup>117</sup> On the other hand, if "the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation."<sup>118</sup> And second, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on permissible construction of the statute."<sup>119</sup> Permissible meaning whether the agency's interpretation is reasonable.<sup>120</sup> If the interpretation appears to be "reasonable," the court "should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."

An agency, like the EPA, is better informed to discuss matters of the CWA than the average lawyer or judge because the EPA has more specialized knowledge on the subject.<sup>121</sup> An agency's specialized

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116. William N. Eskridge, Jr., *Legislation and Statutory Interpretation*, *supra* note 111, at 328 ("Perhaps the best way to understand *Chevron* is as articulating a default rule of statutory construction: if statutory text is ambiguous, and Congress has delegated rulemaking authority to an agency, courts should presume that Congress also intended to delegate to the agency the power to say what the law is.").

117. *Chevron*, 467 U.S. at 844.

118. *Id.* at 842-3.

119. *Id.*

120. William N. Eskridge, Jr., *Legislation and Statutory Interpretation*, *supra* note 111, at 328.

121. *Id.* at 323 ("In construing statutes, agencies consider the same sources private lawyers and public judges do (statutory text, legislative history, and purpose), but they are

knowledge is gained from expertise in the area as well as “practical experience.”<sup>122</sup> However, while an agency, like the EPA, might have the practical experience and expertise to speak to the interpretation of an ambiguous or vague statute, that is not to say agencies do not take “statutory policy in . . . troubling directions.”<sup>123</sup> A good example of an agency taking a statutory policy in a troubling direction is the EPA’s interpretive statement regarding groundwater and the CWA, issued in April 2019.<sup>124</sup> While *Chevron* is considered to be good law, “the Court has recently spurned the framework in major cases involving agency statutory interpretations.”<sup>125</sup>

## 2. EPA’s Interpretative Statement Under the Trump Administration

In April 2019, the EPA issued the *Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater* (“Statement”):

After receiving more than 50,000 comments from the public, and after the Ninth Circuit released its opinion in [*County of Maui*], [the] EPA wrote that ‘the best, if not the only, reading’ of the statutory provisions is that ‘all releases of pollutants to groundwater’ are excluded from the scope of the permitting program, ‘even where pollutants are conveyed to jurisdictional surface waters via groundwater.’<sup>126</sup>

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also better informed about the statutory history and the practicality of competing policies than courts are.”).

122. *County of Maui*, 140 S.Ct. 1462, 1474 (2020); see also *United States v. Mead Corp.*, 533 U.S. 218, 234-235, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

123. William N. Eskridge, Jr., *Legislation and Statutory Interpretation*, *supra* note 111, at 323.

124. See generally *Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants from a Point Source to Groundwater*, 84 Fed. Reg. 16810 (April 23, 2019), for the EPA’s opinion on the issue discussed at length in *County of Maui*, yet not utilized in the case due to recent change in the agency’s opinion.

125. Note, *The Rise of Purposivism and Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 Harv. L. Rev. 1227, 1227 (2017).

126. *County of Maui*, 140 S.Ct. at 1474 (citing 84 Fed. Reg. 16810, 16811).

The statement, released just one month after the amending of the Ninth Circuit's holding in *Hawaii Wildlife Fund v. County of Maui*,<sup>127</sup> aimed to alleviate confusion regarding the CWA's stance on groundwater.<sup>128</sup> The EPA, under the Trump Administration, reached the conclusion that the CWA does not require a permit under the NPDES for any pollutants released from a point source to groundwater, regardless of the connection between the groundwater and the navigable water.<sup>129</sup> Meaning, persons would be allowed to pollute groundwater before it empties into surface water without being required to apply for a NPDES permit. Even in instances where the pollutant is only added a few feet before emptying into navigable water, like an ocean. This interpretation of the CWA is troubling for several reasons, but mostly because it would allow a loophole in the CWA's permit requirement to continue.

### 3. County of Maui's Decision to Forego Utilizing EPA's Interpretive Statement

While *Chevron* is the customary rule for courts to apply in situations where the language of a statute is vague and ambiguous, the Court in *County of Maui* chose to forego *Chevron* and the EPA's recent Interpretive Statement.<sup>130</sup> The Court explained that aside from no party to the lawsuit asking for the Statement to be utilized in the Court's decision, the danger of implementing such Statement would create a serious loophole to the CWA's permit requirement.<sup>131</sup> To rely upon the Statement in the Court's decision in *County of Maui* would allow polluters to bypass the CWA's permit requirement, NPDES, by polluting into groundwater instead of navigable waters even if the groundwater emptied into navigable waters only a few feet from the discharge point. Thus, contradicting years of CWA jurisprudence and disregarding the very reason Congress enacted such legislation in the first place.<sup>132</sup> The whole purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>133</sup>

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127. 886 F.3d 737 (9th Cir. 2018).

128. 84 Fed. Reg. 16810 (April 23, 2019).

129. *Id.*

130. *County of Maui*, 140 S.Ct. at 1474.

131. *Id.*

132. Jon Devine and David Henkin, *Closing a Concocted Clean Water Act Loophole*, *The Regulatory Review* (July 20, 2020), <https://www.theregreview.org/2020/07/20/devine-henkin-closing-concocted-clean-water-act-loophole/>.

133. 33 U.S.C. § 1251.

The reason for the Court and this Notes emphasis on *what* administration this Statement was issued under is “[b]ecause agencies generally give greater weight to policy and statutory purpose and may be swayed by political pressure from the President, Congress, and interest groups, they be more likely than courts to bend the text and supersede the original legislative expectations than courts.”<sup>134</sup> *Chevron* places a lot of confidence in a body of people that are so easily swayed by external pressures. Thankfully, the Court and the parties in *County of Maui* did not utilize—or even ask to utilize—this interpretation and the waters of the U.S. remain protected by the CWA from pollutants via groundwater through the act’s permit system.

*B. Theories of Statutory Interpretation and How they Relate to County of Maui*

While the Court chose to forego *Chevron*, it did utilize other means of statutory interpretation in its *County of Maui* decision. Although there are numerous approaches to statutory interpretation, for the purpose of this Note, we will be analyzing two of the more popular approaches: purposivism and textualism. Purposivism and textualism “seek to construct an objective intent because “[t]he actual intent of the legislature that passed a given statute is usually unknowable with respect to the precise situation presented to the court.”<sup>135</sup> The goal of both purposivism and textualism is to interpret statutes by keeping Congress’s intent in mind.<sup>136</sup> While both theories have similarities, they differ on “the best way to determine [the] objective intent [of Congress].”<sup>137</sup> Purposivism focuses on ensuring Congress’s purpose for enacting such legislation is at the forefront of the interpretation process of an ambiguous statute while textualism focuses on the actual words of the statute to decipher ambiguity.<sup>138</sup> To summarize in the simplest of terms, “textualist and legal process purposivist opinions account for both semantic and policy context, but textualist opinions prioritize semantic context, whereas legal process purposivist opinions

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134. William N. Eskridge, Jr., *Legislation and Statutory Interpretation*, *supra* note 111, at 333.

135. Valerie C. Brannon, Cong. Research Serv., *Statutory Interpretation: Theories, Tools, and Trends* 11 (2018).

136. *Id.*

137. *Id.*

138. *Id.*

prioritize policy context.”<sup>139</sup> Purposivism and textualism are both evident throughout the decision in *County of Maui*.

*1. Purposivism Defined and Aspects of Purposivism in County of Maui*

Purposivism has been around since the sixteenth century and said to rise as *Chevron* has fallen out of use, reinforcing judicial power.<sup>140</sup> Purposivism “attempts to achieve the democratic legitimacy of other intentionalist theories in a way that renders statutory interpretation adaptable to new circumstances.”<sup>141</sup> It does so by “taking into account the problem that Congress was trying to solve by enacting the disputed law and asking how the statute accomplished that goal.”<sup>142</sup> A purposivist argues “judges should pay attention to ‘how Congress makes its purposes known, through text and reliable accompanying materials constituting legislative history.’”<sup>143</sup> A judge “can best observe legislative supremacy by paying attention to the legislative process.”<sup>144</sup> Purposivism asks “[w]hat was the statute’s goal?” rather than “[w]hat did the drafters specifically intend?”<sup>145</sup> This allows for analysis of “new or unforeseen circumstances” which is why purposivism is said to be adaptable.<sup>146</sup>

However, “[p]urposivism does not yield determinate answers when there is no neutral way to arbitrate among different purposes.”<sup>147</sup> So,

Even if there were agreement as to which purpose should be attributed to a statute, the analysis in the hard cases might still be indeterminate. Often an attributed policy purpose is too general and malleable to yield interpretive closure in specific cases, because its application will depend heavily upon *context* and the interpreter’s perspective. Not only are such judgments difficult, but they implicate political and policy considerations better

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139. Note, *The Rise of Purposivism and Fall of Chevron: Major Statutory Cases in the Supreme Court*, *supra* note 125, at 1229.

140. See generally *Id.*, for discussion of the rise of purposivism and the fall of *Chevron* amongst the various Courts over the years.

141. William N. Eskridge, Jr., *Legislation and Statutory Interpretation*, *supra* note 111, at 229.

142. See Valerie C. Brannon, *supra* note 135.

143. *Id.* at 12 (citing Robert A. Katzmann, *Judging Statutes* 31 (2014)).

144. *Id.*

145. William N. Eskridge, Jr., *Legislation and Statutory Interpretation*, *supra* note 111, at 230.

146. *Id.*

147. *Id.*

suited to the branches that are more democratically accountable than the judiciary.<sup>148</sup>

While purposivism is a theory of statutory interpretation, it does not necessarily create a finite and rigid test, or rule, every time it is utilized.<sup>149</sup> Purposivism goes further and accounts for the specificity and unique characteristics of each case.<sup>150</sup>

Not producing a rigid rule is frustrating for judges, lawyers, and laypersons; however, it creates the ability for statutes and rules to adapt over time and account for change. A purposivist approach to the CWA would look at the goal of Congress in enacting the CWA, relying on legislative history and other non-textual sources. A purposivist would also analyze the legislative history of the statute to determine whether Congress achieved its goal in creating the legislation. The Supreme Court's decision in *County of Maui* has many aspects of purposivism embedded in the Court's analysis. The majority looks to the legislative history of the CWA to determine whether the EPA's interpretive statement was consistent with CWA jurisprudence and ultimately decided it was not consistent with the statute's purpose.<sup>151</sup> Another aspect of purposivism is evident in the majority's "functional equivalent of a direct discharge" test,<sup>152</sup> a rule that is heavily criticized for being overly broad and ambiguous. However, a purposivist would argue that due to the complexity of CWA jurisprudence and how fact specific each case is, a broad rule is desirable.

Justice Alito and Justice Thomas both criticize, in their separate dissents, the majority's inability to create a rule that future courts can utilize.<sup>153</sup> Justice Thomas goes as far to say "save for a list of seven factors" judges are left on their own to decipher this new rule crafted by the majority.<sup>154</sup> However, bright line rules are not always the answer, especially with a statute like the CWA that is so purposely vague and yields cases that are so fact specific.<sup>155</sup> The factors articulated by the majority in *County of Maui*

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148. *Id.* (emphasis added).

149. *Id.*

150. *Id.*

151. *County of Maui*, 140 S.Ct. at 1475 (2020).

152. *Id.* at 1476.

153. *Id.* at 1480 (Thomas, J., dissenting); *Id.* at 1483 (Alito, J., dissenting).

154. *Id.* at 1480 (Thomas, J., dissenting).

155. *County of Maui*, *supra* note 14.

allow for evolution and change.<sup>156</sup> And, will ultimately lead to more continuity in future holdings. A loophole in the CWA was nearly created because courts focused too narrowly on the interpretation of the CWA instead of focusing on the goal of Congress. Future courts will likely not lose sight of the goal of the CWA because it is embedded in the analysis judges will utilize in future like cases.

## 2. *Textualism Defined and Aspects of Textualism in County of Maui*

Justice Kagan said, “we’re all textualists now.”<sup>157</sup> Textualism looks to the plain meaning of a statute as a guide for determining how to apply a statute and is arguably the best approach to statutory interpretation because it looks to the literal meaning of the words that make up the vague or ambiguous statute.<sup>158</sup> Textualism has recently been defined as “the meaning an ordinary speaker of the English language would draw from the statutory text is the alpha and the omega of statutory interpretation.”<sup>159</sup> While some textualists, like Justice Scalia, argue that a judge “should almost never consult, and never rely on, the legislative history of a statute,”<sup>160</sup> some textualist judges might look to dictionaries and previous provisions of the statute to help provide context.<sup>161</sup> A big difference between purposivism and textualism is that textualism does not look to legislative history while purposivism does.

The central question in *County of Maui* focuses on the meaning of the word “from.”<sup>162</sup> Both parties argue what the word “from” entails and their definitions of the word.<sup>163</sup> The majority looks to the definition of each word in the CWA in their attempt to interpret the statute in a groundwater context.<sup>164</sup> While the majority does look to the textual meaning of the

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156. See *County of Maui*, 140 S.Ct. at 1476-7 (discussing the factors a judge should consider when determining whether groundwater conveyances are included under the CWA).

157. See Robert A. Katzmann, *Fixing Statutory Interpretation*, *supra* note 108 (quoting Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes at 8:09 (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation> [<http://perma.cc/3BCF-FEFR>]).

158. William N. Eskridge, Jr., *Legislation and Statutory Interpretation*, *supra* note 111, at 231.

159. *Id.* at 236.

160. *Id.*

161. *Id.*

162. *County of Maui*, 140 S.Ct. 1462, 1470 (2020).

163. *Id.*

164. See generally *Id.* at 1462-1492.

CWA, they also rely on the intent of Congress and look to other non-textual sources other than dictionaries, making the “functional equivalent a direct discharge”<sup>165</sup> test a combination of purposivism and textualism. Justice Thomas’s dissent is a great example of a textualist approach to an ambiguous statute.<sup>166</sup> He looks at the context of the word “discharge” and determines that “to” and “from” limit “discharge” to “the augmentation of navigable waters.”<sup>167</sup> He then looks to the dictionary definition, referencing various dictionary definitions.<sup>168</sup> Plus, what makes Justice Thomas’s dissent a classic textualist approach to statutory interpretation is that he does *not* rely on the legislative intent of the CWA, merely the statute’s structure and the plain meaning of the words of the CWA.<sup>169</sup>

*IV. County of Maui’s Impact on CWA Jurisprudence: Will There Be More Ambiguity and Inconsistency in Holdings Post County of Maui?*

The combination of both purposivism and textualism in the *County of Maui* decision shows the Court used and blended several statutory interpretation methods to determine the meaning of the CWA in the context of groundwater conveyances.<sup>170</sup> The Court’s emphasis on Congress’s intent and the meaning of the language of the CWA shows the “functional equivalent of a direct discharge” test was not created on a whim or merely to answer the question before the Court the way they wanted to.<sup>171</sup> While the test created in *County of Maui* is vague, it is the best way to approach future CWA cases because it ensures States’s rights and Congress’s intent are accounted for; it also recognizes the complexity of CWA jurisprudence and how fact specific cases are. A non-exhaustive list of factors for courts to utilize need not mean inconsistent holdings and ambiguity, it means quite the opposite and that is evident in the theory of purposivism.<sup>172</sup> Purposivism ensures the goal of Congress remains the same even as time changes and new difficulties arise. The factors discussed in *County of Maui*

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165. *Id.* at 1468.

166. See generally *Id.* at 1479-82 (Thomas, J., dissenting), for Justice Thomas’s textualist approach to interpreting an ambiguous statute.

167. *Id.* at 1479.

168. *Id.*

169. *Id.* at 1479-82.

170. See discussion *supra*, Part III.B.

171. See *County of Maui*, 140 S.Ct. at 1482-3 (Alito, J., dissenting) (criticizing the majority’s “functional equivalent of a direct discharge” test for leading to more future inconsistencies in CWA jurisprudence.).

172. See discussion *supra* note 16; see also *supra* discussion Part III.B.1.



ensure this decision can withstand change and complex cases because they provide a parameter for judges to analyze when determining whether said conveyance by groundwater is protected under the CWA's permit requirement.<sup>173</sup>

Even though Justice Thomas believes the Court is not bound by dictum from the plurality opinion in *Rapanos*,<sup>174</sup> the majority opinion in *County of Maui* coupled with a broad reading of *Rapanos*, creates a precedent that most groundwater conveyances will be protected under the CWA. And now, it is no longer dictum that protects groundwater but a case-by-case analysis of the facts.

Justice Alito's dissent objects to the majority's test because he argues the majority ignores Congress's intent for enacting the CWA.<sup>175</sup> He argues the majority made its own rule to answer the question before the Court.<sup>176</sup> Justice Alito is critical of the majority's decision to create a new rule *and* one that is both ambiguous and difficult for future courts to follow.<sup>177</sup> In turn, causing inconsistent holdings.<sup>178</sup> However, Justice Alito's criticism does not give the majority's "functional equivalent of a direct discharge" rule enough credit. The majority recognized how broad the rule they were implementing in *County of Maui* was.<sup>179</sup> Not only did they directly acknowledge the lack of "middle instances," they provided a non-exhaustive list of factors for future courts to utilize in like cases.<sup>180</sup> So much of CWA cases depend on specific facts.<sup>181</sup> Facts centered on distance pollutants traveled to reach navigable water, amount of time it took for pollutants to enter navigable waters, and so on.<sup>182</sup> And while it is easy to determine the extreme answers to those questions, the middle instances are easier to grapple with when remembering the purpose of the CWA and the reason for Congress enacting such legislation. If the CWA is to protect "the waters of the United States" from pollutants, then a reclamation site discharging pollutants into groundwater that ultimately empties into the Pacific Ocean goes against the purpose of the CWA. Taking a step back to

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173. See discussion *supra* note 16.

174. See *County of Maui*, 140 S.Ct. at 1482 (Thomas, J., dissenting) ("We are not bound by dictum in a plurality opinion or by the lower court opinions it cited.").

175. *County of Maui*, 140 S.Ct. at 1482-3 (Alito, J., dissenting).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 1476.

180. *Id.* at 1476-7.

181. *County of Maui*, 140 S.Ct. at 1477.

182. *Id.*

look at Congress's goal behind the CWA ensures future courts issue consistent holdings. Justice Alito and Justice Thomas wrongly criticize this purposivist and textualist approach to the CWA. The majority rule prevents a loophole to the permit requirement that would go against the statute's structure, language, and purpose. Therefore, the holding in the majority is the correct decision.

Yes, "the functional equivalent of a direct discharge" sounds like meaningless words compiled together but analyzing them contextually, they make sense. If the source of the discharge is known and their pollutants are clearly ascertainable, it should not matter how it arrived at the "navigable water." The CWA's permit requirement was created to ensure that if you are polluting to navigable waters, you are required to file for a permit to ensure you are complying with the EPA and the CWA. The permit requirement protects navigable waters from pollutants directly discharged into navigable waters or discharged to groundwater which ultimately empties into navigable waters. Either way, the discharge is ascertainable so the means of travel should not matter.

#### *Conclusion*

In conclusion, the majority decision in *County of Maui* was correct. The majority articulated a rule which accounted for Congress's intent, States's rights, and the EPA's expressed duty in the CWA, but it also provided parameters—to the greatest extent possible of such a simplistic, yet diverse, statute. CWA jurisprudence is complex. Factors account for the complexity of CWA cases and will help judges determine those middle instances that the majority in *County of Maui* could not think of in the moment. The majority in *County of Maui* articulated the CWA's relation to groundwater in a way that utilized Congress's purpose in enacting the statute and actual language of the text to ensure the waters of the United States are protected from discharge via groundwater.