Keeping the Clean Water Act Cooperatively Federal—Or, Why the Clean Water Act Does Not Directly Regulate Groundwater Pollution

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KEEPING THE CLEAN WATER ACT COOPERATIVELY FEDERAL—OR, WHY THE CLEAN WATER ACT DOES NOT DIRECTLY REGULATE GROUNDWATER POLLUTION

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INTRODUCTION

The Clean Water Act¹ is the leading federal environmental law regulating water pollution.² In recent years, its scope and application to normal land-use activities have become extremely contentious.³ Yet, despite the growing controversy, the environmental community continues to try to extend the Act’s reach.⁴ One of its most recent efforts has focused on expanding the Act to groundwater pollution.⁵ In this Article

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¹ Senior Attorney, Pacific Legal Foundation.
³ See, e.g., Paul Boudreaux, Federalism and the Contrivances of Public Law, 77 ST. JOHN’S L. REV. 523, 544 (2003) (“[T]he Clean Water Act has been a major feature of water law for thirty years.”).
⁵ Indeed, one could argue that these controversies have actually emboldened the environmental community to step up its efforts to expand the Act’s reach. See, e.g., 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 (2016) (arguing that the controversial “Waters of the United States” rule—controversial because of its widely perceived overreach—did not regulate far enough).
⁶ Notably, all of the cases discussed in this Article that have upheld direct Clean Water Act regulation over groundwater were citizen suits brought by environmental groups against private companies or local governments.
I aim to show that this environmentalist endeavor is legally wrongheaded.6

The Clean Water Act was passed to restore “the Nation’s waters.”7 The Act’s principal prohibition focuses on a subset of those waters—namely, “navigable waters” or “waters of the United States.”8 This prohibition, as well as the Act’s other proscriptions and mandates, operates within a framework of cooperative federalism.9 That framework is evidenced in part by how the Act chooses to regulate pollution that reaches regulated waters.10

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6 Whether it is also ill-advised policy I do not address, although there is significant scholarship supporting a policy presumption that the environment would do better by less, not more, federal regulation. See Jonathan H. Adler & Andrew P. Morriss, Introduction, 58 CASE W. RES. L. REV. 575, 576 (2008) (“Today there is widespread dissatisfaction with many aspects of federal environmental law.”); Roger Meiners & Bruce Yandle, Common Law and the Conceit of Modern Environmental Policy, 7 GEO. MASON L. REV. 923, 925 (1999) (“Most federal pollution control efforts are fundamentally misguided. The common law, combined with various state-level controls, was doing a better job addressing most environmental problems than the federal monopoly, which directed most environmental policy for the last part of this century. America’s move down the track of central environmental planning is incompatible with . . . environmental protection itself.”); Jonathan H. Adler, Conservative Principles for Environmental Reform, 23 DUKE ENVTL. L. & POL’Y F. 253, 278–80 (2013) (contending that “environmental protection efforts would benefit from greater decentralization” because (i) “most environmental problems are local or regional in nature,” (ii) it “creates the opportunity for greater innovation in environmental policy,” and (iii) the federal government could then focus “on those environmental concerns where a federal role is easiest to justify, such as in supporting scientific research and addressing interstate spillovers.”); William W. Buzbee, Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction, 82 N.Y.U. L. REV. 1547, 1556 (2007) (“The common law system’s independence and private incentives to challenge the status quo are particularly valuable antidotes to complacency and ineffective regulation.”), quoted in Adler & Morriss, supra, at 577 n.15.

7 See 33 U.S.C. § 1251(a).

8 See id. § 1311(a) (prohibiting the unpermitted discharge of pollutants); id. § 1362(12)(A) (defining “discharge of pollutants” as “any addition of any pollutant to navigable waters from any point source”); id. § 1362(7) (defining “navigable waters” to include “the waters of the United States”).

9 See Ark. v. Okla., 503 U.S. 91, 101 (1992) (“The Clean Water Act anticipates a partnership between the States and the Federal Government . . . .”). At least one prominent observer contends that the partnership is nevertheless heavily weighted in favor of federal authority. See, e.g., Oliver A. Houck, Cooperative Federalism, Nutrients, and the Clean Water Act: Three Cases Revisited, 44 ENVT. L. REP. NEWS & ANALYSIS 10426, 10428–29 (2014) [hereinafter Houck, Cooperative Federalism]. The characterization, however, is based on the Act’s treatment of point source pollution, see id. at 10428, which bears little on the congressional decision to allow the states to maintain the leading role in controlling non-point source pollution, including—as discussed infra Part II—groundwater pollution.

10 It is also demonstrated by the Act’s authorization for the transfer of federal permitting authority to the states. See 33 U.S.C. §§ 1342(b), 1344(g). See New York v. United States, 505 U.S. 144, 167 (1992) (identifying as part of a program of cooperative federalism the
Pollution conveyed to regulated waters by a “point source,” i.e., any “discernible, confined and discrete conveyance,” the Act directly regulates.\footnote{11} Pollution conveyed to those waters by something other than a point source, i.e., a “nonpoint source,” the Act largely leaves to the states to address.\footnote{13} This division of responsibility reflects a legislative understanding that “nationwide uniformity in controlling non-point source pollution [is] virtually impossible,” as well as that “the control of non-point source pollution often depends on land use controls, which are traditionally state or local in nature.”\footnote{14} Put another way, the Act’s election not to regulate all sources of pollution—or for that matter all waters of the nation—is rooted in the traditional congressional “reluctance . . . to allow extensive federal intrusion into areas of regulation that might implicate land and water uses in individual states.”\footnote{15}

Extending the Act to directly regulate any pollutant discharges to groundwater would compromise this statutory division of labor.\footnote{16} Congress carefully distinguished throughout the Act between “navigable congressional practice of ‘offer[ing] States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation’”\footnote{11} 33 U.S.C. § 1362(14).\footnote{12}

\footnote{13} Appalachian Power Co. v. Train, 545 F.2d 1351, 1373 (4th Cir. 1976) (“Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the Act to regulate only the former.”). This is not to say that the Act is indifferent to nonpoint source pollution, but rather that the Act does not directly regulate it. Pronsolino v. Nastri, 291 F.3d 1123, 1126–27 (9th Cir. 2002) (“[T]he Act provides no direct mechanism to control nonpoint source pollution but rather uses the “threat and promise” of federal grants to the states to accomplish this task’ . . . ”) (quoting Or. Nat. Desert Ass’n v. Dombeck, 172 F.3d 1092, 1097 (9th Cir. 1998)).

\footnote{14} Or. Nat. Desert Ass’n v. U.S. Forest Serv., 550 F.3d 778, 785 (9th Cir. 2008) (quoting Marc R. Poirier, Non-point Source Pollution, in ENVTL. L. PRACTICE GUIDE § 18.13 (2008)).


\footnote{16} I do not address whether the Act’s existing approach to groundwater pollution—using the promise of federal grant money to encourage the states to regulate that pollution consistent with federal policies—is permissible. Cf. Jonathan Adler & Nathaniel Stewart, Is the Clean Air Act Unconstitutional? Coercion, Cooperative Federalism and Conditional Spending after NFIB v. Sebelius, 43 ECOLOGY L.Q. 671 (2016) (questioning the constitutionality of a similar conditional grant program in the Clean Air Act).
waters” and “ground waters,” providing for direct federal regulation only of the former.\(^\text{17}\) Contrary to the desire of some advocates and courts, the consequences of that congressional choice cannot be avoided by the artifice of classifying groundwater as a point source of pollution—groundwater simply does not fit within the Act’s definition of point source.\(^\text{18}\)

Neither may the congressional design be reworked through the so-called “conduit” theory, which several district courts recently have explicitly adopted.\(^\text{19}\) This theory holds that groundwater, although not itself a point source, nevertheless functions as a liability-maintaining “conduit” for point source pollution that reaches regulated surface waters.\(^\text{20}\) The theory’s advocates find support for it in the Clean Water Act’s goal to restore the health of the nation’s waters,\(^\text{21}\) an aim that, admittedly, cannot be achieved without taking groundwater into account.\(^\text{22}\)

Although superficially attractive, the conduit theory falls apart on closer scrutiny. Predicating direct federal regulation based on a rationale of “what makes the best sense for water quality” cannot be reconciled with the compromise—witnessed by the Clean Water Act’s treatment of non-point source pollution—between federal interests and states’ traditional regulatory roles that the statute embodies.\(^\text{23}\) Undeniably, nonpoint source

\(^{17}\) See infra Section II.A.

\(^{18}\) See infra Section II.B.


\(^{20}\) Given that “point source” is itself defined to include a “conduit,” see 33 U.S.C. § 1362(14), there is a tension between the “conduit” theory and the concession that groundwater is not itself a point source. Sensing this tension, at least one district court of the “conduit” camp has concluded that groundwater can qualify as a point source. Hawaii Wildlife Fund, 24 F. Supp. 3d at 999.

\(^{21}\) See 33 U.S.C. § 1251(a).

\(^{22}\) See Blumm & Thiel, supra note 4, at 367–69.

\(^{23}\) See Kenneth M. Murchison, Learning From More than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future, 32 B.C. ENVT'L.
pollution poses a serious obstacle to achieving federal water quality standards.\textsuperscript{24} And for decades the same has been true for a subset of that pollution—groundwater pollution.\textsuperscript{25} Yet, despite its acknowledgment that “nonpoint source pollution is . . . one of the last major barriers to achieving state and national water quality goals[,] . . . Congress made a conscious decision to leave regulation of nonpoint source pollution to the states” when it passed the Clean Water Act.\textsuperscript{26} Hence, a water-quality-based argument for groundwater regulation just boils down to a plain—and unconvincing—disagreement with the congressional policy to allow the states to take on a meaningful role in the national effort to end water pollution.\textsuperscript{27}

The Article begins with an introduction to the Act’s direct and indirect regulatory framework, explained through the lens of cooperative federalism.\textsuperscript{28} The Article then proceeds to present and refute three theories for direct regulation of groundwater pollution: groundwater as among the “navigable waters”\textsuperscript{29}; groundwater as a “point source” of pollution added to regulated surface waters\textsuperscript{30}; and groundwater as a “conduit” of pollution added to regulated surface waters.\textsuperscript{31} The Article concludes with a few thoughts about the difficulty of statutory interpretation in environmental law.\textsuperscript{32}
Without doubt, the question of whether discharges of pollution to groundwater can ever be regulated under the Act is an important and emerging issue concerning the Clean Water Act’s scope. As I hope to show in this Article, because the subjection of such pollution to the Act’s direct control would substantially increase the federal role in groundwater regulation, it would unavoidably upset the statute’s cooperative framework. Moreover, and critically in my view, such expansion would undercut the rights of property owners whose land-use activities may affect groundwater. Therefore, extending direct federal regulatory control to groundwater pollution would constitute an unwarranted inflation of the Act’s already bloated coverage.

I. THE CLEAN WATER ACT’S COOPERATIVE FEDERALISM FRAMEWORK FOR WATER QUALITY REGULATION

What we commonly call today the Clean Water Act was a set of significant amendments enacted in response to the perceived shortcomings of existing federal and state water quality law. Congress considered the prior approach defective because it had “focused on the tolerable effects rather than the preventable causes of water pollution.” That is to say, it began with the establishment of water quality standards and worked backwards to the sources of pollution, but only if water quality standards were not being met. Congress chose to overhaul this approach to include

33 See U.S. Army Corps of Eng’rs, at 1817 (“The [Clean Water] Act . . . continues to raise troubling questions regarding the Government’s power to cast doubt on the full use and enjoyment of private property throughout the Nation.”) (Kennedy, J., concurring).
34 See Rapanos, 547 U.S. at 722 (plurality op.) (criticizing “the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute”).
37 See NDRC v. EPA, 915 F.2d 1314, 1316 (9th Cir. 1990). Thus, a discharger needed no permit to deposit pollutants into a water that had “room to spare” in achieving its water quality standards.
a permitting regime for pollution discharges, while retaining in modified form the procedure for designating water quality standards.

A. The Act’s Structure for Direct Regulation

The central aspect of the new regime is the Act’s general prohibition on the unpermitted discharge of pollutants from point sources into “navigable waters.” These aquatic features are defined—rather cryptically—to include the two “waters of the United States.” The permitting regime is divided into programs: a discharge of dredged or fill material requires a permit (commonly called a Section 404 permit) from the Army Corps of Engineers, whereas a discharge of any other pollutant requires a permit (commonly called a Section 402 or “NPDES” permit) from EPA. A distinctive aspect of the revamped Clean Water Act is the statute’s authorization for permitting authority to be passed to the states. Although few states have obtained Section 404 permitting authority, nearly all have obtained Section 402 permitting authority.

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38 See Miss. Comm’n on Nat. Res. v. Costle, 625 F.2d 1269, 1272 (5th Cir. 1980) (“The major change was the establishment of the National Pollutant Discharge Elimination System (NPDES), under which it is illegal to discharge pollutants without a permit complying with the Act.”).


40 See 33 U.S.C. §§ 1311(a), 1362(12)(A). The prohibition also applies to point source pollution discharged to the water beyond the territorial seas and to the high seas, if from a point source other than a vessel. See id. §§ 1362(9), (10), (12)(B).

41 Id. § 1362(7). The statute also deems the “territorial seas”—the water from the beach to three miles offshore, see id. § 1362(8)—to be “navigable waters.” See id. § 1362(7).


44 See id. §§ 1342(b), 1344(g), (h).

45 EPA, State or Tribal Assumption of the Section 404 Permit Program, https://www.epa.gov/cwa-404/state-or-tribal-assumption-section-404-permit-program [https://perma.cc/9BYB-FNA2] (only Michigan and New Jersey). According to EPA, the reasons for the low number of permit authority transfers include “lack of funding,” “concerns regarding Federal requirements and oversight,” and “the controversial nature of regulation of wetlands and other aquatic resources.” Id.

Violating the Act’s provisions for direct water quality regulation can create significant civil and even criminal liability. Just the maximum daily civil penalty for unpermitted pollutant discharges is currently pegged at $37,500. That is especially onerous when one considers that liability will attach despite the discharger’s exercise of all due care. And the threat of such liability is by no means insignificant, due to the Act’s authorization for enforcement by private citizens, in addition to the EPA and the Corps.

B. Congressional Concern for State Prerogatives in a Cooperative Federalism Framework

Despite this federally heavy-handed approach, the Act still adheres even within its direct regulatory provisions to a policy of allowing the states to take an important role in water quality control. That

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47 The Act “‘impose[s] criminal liability,’ as well as steep civil fines, ‘on a broad range of ordinary industrial and commercial activities.’” *Rapanos*, 547 U.S. at 721 (plurality op.) (quoting Hanousek v. United States, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting from denial of certiorari)).
48 See 40 C.F.R. § 19.4, Table 1 (2011).
49 NRDC v. EPA, 822 F.2d 104, 123 (D.C. Cir. 1987) (“The Clean Water Act does not permit pollution whenever that activity might be deemed reasonable or necessary; rather, the statute provides that pollution is permitted only when discharged under the conditions or limitations of a permit.”).
51 See 33 U.S.C. § 1319(a)(1)–(3) (compliance orders); id. § 1319(d) (civil actions); id. § 1319(g) (administrative penalties).
52 See id. § 1344(s)(1)–(4) (compliance orders, civil actions, and administrative penalties).
53 See S. REP. No. 92-414, at 71 (“The Federal Government as the custodian of the navigable waters has the responsibility to control affirmatively any discharges of pollutants into the navigable waters and, under the Committee bill, seek to achieve elimination of the discharge of pollutants. [¶] It is expected that the States will play a major role in the administration of this program.”); H.R. REP. No. 92-911, at 125 (1971) (“Another problem raised by the [current] permit program is the total usurpation of enforcement of water quality control by the Federal Government. This is inconsistent with the Federal-State partnership that is necessary if we are ever to have clean and safe waters. The role of the States must be clearly recognized. It is impossible for the Federal Government to succeed in this program without the close and active cooperation of the States. A system of
policy is furthered most clearly through the Act’s permitting transfer provisions. But it also can be seen in Section 401, 33 U.S.C. § 1341, which effectively gives the states a veto power over projects requiring a Clean Water Act permit. See S. Rep. No. 92-414, at 69 (“The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements.”).

Such solicitude for the states’ prerogatives is not, however, limited to the Act’s direct regulatory provisions. As noted above, the Clean Water Act’s central prohibition makes unlawful “the discharge of any pollutant by any person.” Because “discharge of a pollutant” is in turn expressly defined as “any addition of any pollutant to navigable waters from any point source,” the Act by necessary implication leaves to the states to regulate (or not to regulate) the addition of any pollutant to things other than “navigable waters,” or the addition of any pollutant from a “nonpoint source.” These inferred limitations on federal power—especially that pertaining to nonpoint source pollution—also bear witness to the cooperative federalism framework embodied in the Act.
What is cooperative federalism? Federalism itself is a basic principle of our constitutional structure.62 According to that principle, the federal government is a government of enumerated powers63; all authority not expressly granted to it is reserved to the states or to the people.64 In a sense, all federalism is cooperative: the federal government and the state governments, acting according to their unique prerogatives and competencies, achieve a better regulatory result than would be the case if all power were assigned to one level.65 The modifier “cooperative” thus must denote something more: it refers to the value obtained when one level of government does have the constitutional authority to act, but nevertheless recognizes that its policies would be better served by inviting other levels of government to participate in regulation.66

Although cooperative federalism “retains some currency outside of environmental law, it does not play as central a role in any other field.”67 And in the field of environmental law,68 one of the clearest examples of cooperative federalism is the Clean Water Act.69 As one commentator noted plan the development and use (including restoration, preservation and enhancement) of land and water resources”).

64 U.S. CONST. amend. X. See Alden v. Maine, 527 U.S. 706, 713 (1999) (“The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government . . . underscore the vital role reserved to the States by the constitutional design . . . .”).
65 As, if not more, important than the governmental efficiencies that federalism encourages is the protection and increase of liberty that it fosters. See New York v. United States, 505 U.S. at 181 (“[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.”) (quoting Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). Professor Corwin memorably described federalism’s double nature as the interplay between “more or less jealous rivals for power,” and “mutually supplementing agencies of government.” Edward S. Corwin, National-State Cooperation—Its Present Possibilities, 46 YALE L.J. 599, 601 (1937).
66 Robert L. Fischman, Cooperative Federalism and Natural Resources Law, 14 N.Y.U. ENVTL. L.J. 179, 184 (2005) (“Since the New Deal, cooperative federalism typically appears as congressional or administrative efforts to induce . . . states to participate in a coordinated federal program.”).
67 Id. at 187.
68 “Environmental law is an unplanned by-product of the unique politics of environmentalism in the late 1960s and early 1970s” with “two distinct but overlapping branches, public health protection and biodiversity conservation.” A. Dan Turlock, The Future of Environmental “Rule of Law” Litigation, 19 PACE ENVTL. L. REV. 575, 581–82 (2002). In my view, the Clean Water Act principally falls under Professor Turlock’s former branch, whereas, for example, the Endangered Species Act falls under his latter branch.
69 See Jim Rossi & Thomas Hutton, Federal Preemption and Clean Energy Floors, 91 N.C.
shortly after the law’s passage, “[t]he Act provides for an intricate system of federal-state interaction in the administration and enforcement of the Act, with emphasis on state responsibility.”70 Indeed, throughout the Act one can find instances, in addition to the permitting-transfer authorities discussed above, of congressional reliance on nonfederal methods to control water pollution.71

For example, Section 208 expressly relies upon appropriate local or regional governments to take charge of cleaning up areas with greater-than-usual water quality control problems.72 Section 303(a) provides for the states, not the federal government, to establish water quality standards for a state’s waters.73 Similarly, Section 303(d) places principal responsibility on the states again for identifying those waters within their jurisdictions that do not meet water quality standards, and which should therefore be deemed “impaired.”74 And Section 303(e) directs states to create and maintain continuing planning processes for addressing water pollution.75

L. Rev. 1283, 1294–95 (2013) (observing that the Act’s allowance for state-created water quality standards is “widely considered a leading example of cooperative federalism”).


71 See Fischman, supra note 66, at 190–91 (explaining how the Act uses federal funding to support state-based programs, and allows states to develop water quality standards that are stricter and more locally tailored than federal standards).

72 See 33 U.S.C. § 1288. One early commentator reckoned Section 208 to be a key component to the Act’s ability to control nonpoint source pollution, provided continued Congressional interest in local land-use decision-making. See Michael Jungman, Comment, Areawide Planning under the Federal Water Pollution Control Act Amendments of 1972: Intergovernmental and Land Use Implications, 54 Tex. L. Rev. 1047, 1080 (1976) (“Section 208 will foster effective programs to improve water quality through land use management, but Congress must pass additional legislation to ensure adequate progress in achieving other equally important objectives that require land use planning.”).


74 33 U.S.C. § 1313(d).

75 Id. § 1313(e). One might also cite Section 401, which gives states a near veto-power over projects involving pollution discharge that require a federal permit. See id. § 1341. I do not cite the section in the text because its importance today is a direct result of the wondrously expansive reading that EPA and the Corps have, to some extent, successfully
These are activities that conceivably could be done in the first instance at the federal level, but Congress elected otherwise.

Notably, these state-based authorities and responsibilities figure prominently in the states’ administration of the Clean Water Act’s permitting programs.\(^76\) If, then, Congress was willing to allow states to retain such a significant regulatory role in areas—such as point source pollution—where a distinctive federal overhaul was expressly effected,\(^77\) it should not be surprising that, as we shall see, Congress chose to defer even more broadly to the states in regulating nonpoint source pollution,\(^78\) for which Congressional concern was not at that time paramount.\(^79\)

C. Cooperative Federalism and Nonpoint Source Pollution

The Act does not define “nonpoint source pollution,”\(^80\) but by logical implication it is “pollution that does not result from the ‘discharge’ or ‘addition’ of pollutants from a point source.”\(^81\) Such pollution typically is caused by “rainfall around activities that employ or cause pollutants,”\(^82\) and which thereupon enters regulated waters “primarily through indiscriminately attributed to “navigable waters.” Cf. Rapanos, 547 U.S. at 722 (plurality op.) (“[An] immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations [that has resulted in] [a]ny plot of land containing such a channel [of ephemeral water] may potentially be regulated as a ‘water of the United States.’”). Congress, in my view, did not intend the Act to operate like a land-use regulation, Gary E. Parish & J. Michael Morgan, History, Practice and Emerging Problems of Wetlands Regulation: Reconsidering Section 404 of the Clean Water Act, 17 LAND & WATER L. REV. 43, 84 (1982) (“There should be little doubt that Congress did not intend such a result.”), and so I do not believe that Congress intended Section 401 to play the outsized role in water-pollution regulation that it does today.

\(^76\) For example, permits must be consistent with the water quality standards and related limitations that states adopt pursuant to Section 303 of the Act. See 33 U.S.C. § 1311(b); 40 C.F.R. § 122.44(d)(1).

\(^77\) See Or. Nat. Desert Ass’n, 172 F.3d at 1096 (observing that the Act “overhauled the regulation of water quality” through “[d]irect federal regulation [of] the level of effluent that flows from point sources” by means of “the issuance of permits”).

\(^78\) See Appalachian Power Co., 545 F.2d at 1373 (“Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the Act to regulate only the former.”).

\(^79\) Even Professor Houck, who believes that the importance of the states to the Act’s structure is overplayed, nevertheless acknowledges that the Act only “relegates the states to a highly circumscribed role for those dischargers most on the national mind in 1972”—namely, “point sources.” Houck, Cooperative Federalism, supra note 9, at 10428.

\(^80\) The Act does, however, use the term. See 33 U.S.C. §§ 1288(b)(2)(F)(i), (j)(1); id. § 1329(k).

\(^81\) Swanson v. U.S. Forest Serv., 87 F.3d 339, 342 n.2 (9th Cir. 1996).

\(^82\) United States v. Earth Sci., Inc., 599 F.2d 368, 373 (10th Cir. 1979).
and less identifiable natural processes such as runoffs, precipitation and percolation.83 In part because “the control of nonpoint source pollution [i]s so dependent on such site-specific factors as topography, soil structure, rainfall, vegetation, and land use,” Congress “shift[ed] primary control for the control of nonpoint source pollution to the states.”84

The relevant legislative history, although by no means decisive,85 nevertheless supports the conclusion that Congress recognized the practical, and federalism-based, reasons for allowing nonfederal actors to take the lead in addressing nonpoint source pollution.86 From the Senate floor, Senator Edwin Muskie—the Act’s chief sponsor in the upper House87—emphasized that, although “a great quantity of pollutants is discharged by [nonpoint source] runoff,”88 the Act’s discharge standards pertain only to point source pollution.89 The reason, he explained, was that “[t]here is no effective way, as yet other than land use control, by which you can intercept that [nonpoint source] runoff and control it in the way that you do a point source.”90 In other words, because nonpoint source pollution is principally a problem of land-use, its resolution falls principally within the states’ regulatory domain.

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The preceding discussion establishes that an interpretation of the Act that would result in a substantial amount of such nonpoint source

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83 Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 220 (2d Cir. 2009) (quoting FRANK P. GRAD, TREATISE ON ENVTL LAW § 3.03 (updated 2009)).
85 See Jeffrey G. Miller, Plain Meaning, Precedent, and Metaphysics: Interpreting the “Point Source” Element of the Clean Water Act Offense, 45 ENVTL. L. REP. NEWS & ANALYSIS 11129, 11131 (2015) (besides discussion over the regulation of thermal discharges, “[n]othing in the House, Senate, or Conference Reports further explains the meanings of point source, nonpoint source, the differences between the two terms, or why the permit programs are limited to point sources”).
86 Shanty Towns Assocs. Ltd. P’ship, 843 F.2d at 791.
87 Although the “remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history,” Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979) (emphasis added), the floor statement of a sponsor is among “the most authoritative and reliable materials of legislative history,” Disabled in Action of Met. N.Y. v. Hammons, 202 F.3d 110, 124 (2d Cir. 2000).
88 H. COMM. ON PUBLIC WORKS, 93D CONG., LEGIS. HISTORY OF THE WATERS POLLUTION CONTROL ACT AMENDS. OF 1972 at 1315 (Comm. Print 1973) [hereinafter LEGIS. HISTORY OF WATERS POLLUTION CONTROL ACT]; Miller, supra note 85, at 11131.
89 LEGIS. HISTORY OF WATERS POLLUTION CONTROL ACT, supra note 88, at 1314.
90 Id. at 1315.
pollution being shifted to direct federal control—as opposed to leaving it subject to the indirect methods that the Act currently espouses—would conflict with the cooperative framework that Congress has chosen to address pollution from nonpoint sources. As I explain below, regulation of pollution discharges to groundwater would upset this federal-state balance. Because Congress has not expressly authorized that rebalancing, the Act therefore should not be interpreted to encompass direct federal control of such pollution.

II. DISCHARGES TO GROUNDWATER ARE NOT SUBJECT TO DIRECT FEDERAL CONTROL UNDER THE CLEAN WATER ACT

Three theories have been developed to justify direct federal regulation of groundwater pollution under the Clean Water Act: (i) groundwater is among the “navigable waters”; (ii) groundwater is a “point source” for pollution that reaches regulated surface waters; and (iii) groundwater, although not a “point source,” nevertheless operates as a liability-sustaining “conduit” for point source pollution that reaches regulated surface waters. As set forth below, none of these theories of liability withstands scrutiny. They all suffer from the same defect: attempting to undo the statute’s cooperative federalism framework, either by increasing the number of waters subject to direct federal regulation, or by improperly converting nonpoint source pollution into directly regulated point source pollution.

A. Groundwater Is Not Among the “Navigable Waters”

As previously noted, the Act does not directly regulate all waters within the United States, but rather only “navigable waters.” The statute

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91 Pronolino, 291 F.3d at 1126–27.
94 For a compendium of cases addressing the extent to which the Act reaches groundwater pollution, see id. at 1001–10. Rather than discuss particular cases, I principally address in this part the main arguments that have been developed by certain courts and commentators to justify direct federal regulation of groundwater pollution under the Act.
95 Id. at 979, 981.
96 See 33 U.S.C. § 1311(a) (prohibiting “the discharge of any pollutant”); id. § 1362(12)(A)
also repeatedly distinguishes between “navigable waters” and “ground waters.” For example, Section 102 of the Act requires the preparation of comprehensive programs for water pollution control for “the navigable waters and ground waters.” Section 104 mandates the establishment of a water surveillance system for monitoring the quality of, among other things, “the navigable waters and ground waters.” Section 106 conditions federal funding of state pollution control programs on, among other things, the establishment of monitoring and data collection for “the quality of navigable waters and to the extent practicable, ground waters.” And Section 304 requires both the production of federal guidelines for maintaining water quality for, among other things, “all navigable waters [and] ground waters,” as well as federal pollution control guidelines that take account of “changes in the movement, flow, or circulation of any navigable waters or ground waters.”

If Congress had intended groundwater to be considered part of “navigable waters,” it would have had no reason to list it separately in the foregoing sections. Indeed, although the Act mentions “ground waters” repeatedly, the term is absent from that Title of the Act governing water quality standards and permitting. Thus, reading “ground waters” to be included in “navigable waters” would violate two well-established canons of statutory interpretation: the inclusion of text in one portion of a statute and its exclusion elsewhere means that the text should (defining “discharge of a pollutant” to include “any addition of any pollutant to navigable waters”). See also id. § 1362(12)(B) (regulating discharges from point sources other than vessels on the waters of the contiguous zone and the high seas).

The distinction was one that the EPA Administrator himself made during the hearings leading to the Act’s adoption. See Hearings before the Subcomm. on Air and Water Pollution of the Comm. on Public Works, on Bills Amending the Federal Water Pollution Control Act and Other Pending Legislation Relating to Water Pollution Control, 92d Cong. 5 (1971) (statement of William Ruckleshaus, EPA Administrator) (“We would extend water quality standards to all navigable waters and their tributaries, whether interstate or intrastate, as well as to ground waters . . . .”).

99 Id. § 1254(a)(5).
100 Id. § 1256(e)(1).
101 Id. § 1314(a)(2).
102 Id. § 1314(f)(2)(F).
103 See Tri-Realty Co. v. Ursinus College, No. 11-5885, 2013 WL 6164092, at *9 n.7 (E.D. Pa. Nov. 21, 2013) (noting that, in the part of the Act dealing “with program development and the study of water pollution, Congress consistently refers to ‘navigable waters and ground waters,’” but in the part of the Act concerning “water quality and discharge permit[,] Congress uses only the phrase ‘navigable waters’”).
104 Id.
not be implied where it is not expressly found; and text should not be interpreted to be superfluous. The textual argument against reading “navigable waters” to include “ground waters” is rather robust.

The argument is strengthened by the Clean Water Act’s legislative history. The report of the Senate Committee on Public Works, while noting the harms posed by groundwater pollution, nevertheless “evidences a clear intent to leave the establishment of standards and controls for groundwater pollution to the states.” For example, the report explains that, “[b]ecause the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt th[e] recommendation” to establish federal pollution standards for groundwater. A similar effort was rejected in the House of Representatives. In that body, Representative Aspin of Wisconsin had proposed an amendment on the floor that would have prohibited the unpermitted “addition of any pollutant to any ground waters from any point source.” Rising against the amendment, Representative Clausen—a House bill sponsor—explained that “there was not sufficient information on ground waters to justify the types of controls that are required for navigable waters.” He noted that a provision of the existing bill—ultimately carried forward into the enacted law—specifically addressed groundwater pollution by denying the transfer of permitting authority if a state could not demonstrate that it had the power to control the disposal of pollutants into wells. The Aspin amendment was resoundingly voted down. Advocates of

107 See Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc., 25 F. Supp. 3d 798, 810 (E.D. N.C. 2014) (“Congress did not intend for the CWA to extend federal regulatory authority over groundwater, regardless of whether that groundwater is eventually or somehow ‘hydrologically connected’ to navigable surface waters.”).
108 S. REP. NO. 92-414, at 3739 (“The importance of groundwater in the hydrological cycle cannot be underestimated . . . . Groundwater pollution is not as serious a national problem at present as is surface water pollution, but groundwater availability and quality is deteriorating.”).
109 Exxon Corp. v. Train, 554 F.2d 1310, 1325 (5th Cir. 1977).
110 S. REP. NO. 92-414, at 3739.
111 LEGIS. HISTORY OF WATERS POLLUTION CONTROL ACT, supra note 88, at 597.
112 See id. at 589.
114 LEGIS. HISTORY OF WATERS POLLUTION CONTROL ACT, supra note 88, at 591.
116 LEGIS. HISTORY OF WATERS POLLUTION CONTROL ACT, supra note 88, at 591.
117 See id. at 597.
groundwater regulation have tried to minimize the significance of the Aspin amendment’s rejection, arguing that it means only that Congress did not believe that all groundwater—isolated as well as connected—should be regulated.118 But this explanation fails to recognize that none of those who spoke against the amendment did so because the amendment was overbroad.119 Moreover, there is no indication that Mr. Aspin himself thought that the amendment would extend to isolated groundwater.120

No doubt taking their cue in part from the statute’s text and legislative history, the EPA and the Corps also have concluded that groundwater is not itself “navigable waters.”121 In their 2015 rule-making to define “waters of the United States,” EPA and the Corps expressly excluded “groundwater.”122 The agencies did so despite their Science Advisory Board’s admonition that the “exclusion[] of groundwater . . . do[es] not have scientific justification.”123 As EPA and the Corps explained, the rule excluded groundwater because “the agencies have never interpreted [it] to be a ‘water of the United States.’ ”124 Indeed, even courts that have approved direct federal regulation of groundwater-derived pollution have recognized that groundwater itself is not a regulated water.125

118 See Kvien, supra note 93, at 965. Another commentator has contended that the Aspin amendment may have been rejected simply because it would have eliminated the definitional exclusion for “pollutant” applicable to oil and gas wells. See Mary Christina Wood, Regulating Discharges Into Groundwater: The Crucial Link in Pollution Control Under the Clean Water Act, 12 HARV. ENVTL. L. REV. 569, 613–14 (1988). But as many who spoke against the amendment did so because of its groundwater effects as those who did so because of its elimination of the definitional exclusion. See LEGIS. HISTORY OF WATERS POLLUTION CONTROL ACT, supra note 88, at 590–97.


120 See id. at 589 (“If we do not stop pollution of ground waters through seepage and other means, ground water gets into navigable waters, and to control only the navigable water and not the ground water makes no sense at all.”).

121 See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,073 (June 29, 2015) (EPA and Army Corps rule-making noting that “groundwater . . . ha[s] never [been] interpreted to be a ‘water of the United States’”). See also Vill. of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994) (“Neither the Clean Water Act nor the EPA’s definition asserts authority over ground waters, just because these may be hydrologically connected with surface waters.”).

122 See Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,105 (to be codified at 33 C.F.R. § 328.3(b)(5)); id. at 37,114 (to be codified at 33 C.F.R. § 122.2(2)(v)).

123 Id. at 37,064–65.

124 Id. at 37,073.

125 See, e.g., Tenn. Clean Water Network, 2017 WL 3476069, at *43 (“The Court agrees with those courts that ‘view[] the issue not as whether the CWA regulates the discharge of
Against this significant collection of evidence, advocates for direct federal regulation point to the Act’s definition of “pollutant.”126 That definition specifically excludes material injected into a well in connection with oil or gas production, so long as the well has been state-approved and the injection will not degrade “ground or surface water resources.”127 The argument goes that Congress would have had no reason to exclude such underground pollution from the Act’s definition of “pollutant” unless it had believed that such pollution otherwise would be subject to the Act.128 Of course, the natural rejoinder is that the Act’s definition section applies throughout the statute—to its regulatory as well as to its research and funding sections.129 Hence, Congress could quite reasonably have decided that the definitional exclusion was necessary to avoid triggering the nonregulatory provisions of the Act, even while maintaining that the exclusion was unnecessary to avoid triggering the Act’s direct regulatory exclusions.130 And it is no answer to the foregoing that Congress could simply have specified that the exclusion only apply to the Act’s nonregulatory provisions.131 Such a selected exclusion might well have given rise to the unjustified implied conclusion that such pollutant injections would otherwise be regulated under the Act.

In short, the omission of groundwater from direct federal regulatory control under the Clean Water Act “is not an oversight,” but rather reflects “Congress[’] elect[ion] to leave the subject to state law.”132 Recognizing that groundwater is not among the statute’s “navigable waters” thus directly vindicates the Act’s cooperative federalism framework.133
B. Groundwater Is Not a “Point Source”

The Clean Water Act defines “point source” as “any discernible, confined and discrete conveyance,” and then lists a number of illustrative items, including pipes, ditches, channels, and conduits. Several decisions have recognized that groundwater does not fit within this statutory definition. In fact, as one commentator otherwise friendly to groundwater regulation has conceded, “[c]ontrasting even the most ‘confined and discrete’ groundwater with traditional point sources such as pipes makes the contention that groundwater can be a point source look like a rather weak one.”

The fit between groundwater and the statutory definition of “point source” is poor because, unlike pollutants contained in a point source, polluted groundwater typically does not flow in discrete channels but instead oozes through the hollow spaces of subterranean material. As Representative Roncolio observed in speaking against the failed Aspin

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136 Kvien, supra note 93, at 986.
137 See James W. Hayman, Regulating Point-Source Discharges to Groundwater Hydrologically Connected to Navigable Waters: An Unresolved Question of Environmental Protection Agency Authority Under the Clean Water Act, 5 BARRY L. REV. 95, 121 (2005) (“[G]roundwater is that water which exists in the pore spaces among the soil or rock material below the water table . . . . In order for groundwater to move through soil or rock material, the pore spaces (i.e., porosity) must be interconnected to create flow paths (i.e., permeability).”) (footnote omitted); 26 Crown Assocs., 2017 WL 2960506, at *8 (“It is basic science that ground water is widely diffused by saturation within the crevices of underground rocks and soil.”).
amendment, “water that is seeped into the ground and returns to the aquifer or streamflow is not a point of discharge.” In other words, the mere fact that pollutants can flow through X does not make X a point source conveyance.

At least one district court has thought otherwise. In Hawaii Wildlife Fund, the court ruled that groundwater can qualify as a “discrete and confined” conveyance if it can transport “a high proportion of a pollutant from one place to another . . . , irrespective of its other geologic properties.” Rejecting the argument that pollution could become so diffuse in groundwater that it would not trigger liability, the court explained that “a diffused conduit is no less covered under the Act if it actually conveys pollutants to navigable-in-fact water.” The court’s argument is not convincing. First, given that Clean Water Act liability generally does not depend on the amount of pollutant discharged, it would be odd to make the pollutant-conveyance potential of X determine whether X is a liability-creating point source. Second, one can certainly conceive of “a high proportion of a pollutant” being conveyed to regulated waters by virtue of unconfined, rainfall-induced, sheet flow—the classic example of nonpoint source pollution—which all would acknowledge the Act does not regulate. Third, as noted in the preceding paragraph, that X can convey pollutants to regulated waters does not mean that X is a point source. Were that not so, then the concept of nonpoint source pollution would be meaningless; for by the very fact of having reached regulated waters by some outside agency—i.e., having been conveyed to those waters—the discharge would necessarily consist only of point source pollution. In a word, Hawaii Wildlife Fund renders nonpoint source pollution a contradiction in terms.

138 LEGIS. HISTORY OF WATERS POLLUTION CONTROL ACT, supra note 88, at 590.
139 Miller, supra note 85, at 11132.
140 Hawaii Wildlife Fund, 24 F. Supp. 3d at 999.
141 Id. at 1000.
142 See Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617, 626–27 (8th Cir. 1979) (“We find no justification in the Act for the District Court’s conclusion that a significant alteration in water quality must be demonstrated before the addition of a particular substance to navigable waters can be classified as the discharge of a pollutant.”).
144 Miller, supra note 85, at 11132.
145 The argument assumes, not unreasonably in my view, that a pollutant cannot travel from point A to point B unless it is in some sense conveyed (even if only by “nature”) from point A to point B.
Besides illogicality, defining groundwater as a point source would introduce a significant and unprecedented layer of federal regulation, even for those landowners who do not discharge pollutants but who happen to own land over a polluted aquifer. The “owner” of groundwater in most states is anyone who owns a portion of the land above the aquifer. Such a landowner could easily be considered an “owner” of the groundwater “point source” beneath his or her property, and thus be liable for the polluted groundwater that is conveyed to regulated surface waters. For that reason, the landowner would become subject as well to the Act’s burdensome monitoring and record-keeping requirements for point source owners. These serious consequences for the nation’s owners of groundwater rights marks another reason why an implied direct regulatory control over groundwater pollution makes for bad statutory interpretation.

C. The “Conduit” Theory Improperly Expands the Act’s Coverage

Recently, several district courts have adopted the theory that, even if groundwater itself is neither a regulated water nor a point source, liability may attach to a point source discharge of pollutants to groundwater, if those pollutants reach a regulated surface water. As a leading decision explains the theory, a “discharge into groundwater . . . is functionally equivalent to a discharge into the [regulated surface water] itself . . . as long as the groundwater is a conduit through which pollutants are reaching [regulated surface] water.” Typically, this theory of liability

148 See United States v. Huseby, 862 F. Supp. 2d 951, 965 (D. Minn. 2012) (liability extends to those with responsibility for or control over the pollution discharge).
149 See 33 U.S.C. §§ 1318(a)(4)(A), 1318(a)(4)(B), 1318(b). The burden of such obligations for groundwater owners would be especially severe. See Tripp & Jaffe, supra note 146, at 4 (“[M]onitoring groundwater quality is fundamentally more difficult than monitoring surface water quality . . . .”).
152 Hawaii Wildlife Fund, 24 F. Supp. 3d at 994.
is limited by the requirements that (i) the connection through groundwater between surface point source and regulated surface water be “direct” or “immediate,” and (ii) the surface-water pollution be traceable through the groundwater connection back to the original point source. Even with these limitations, the “conduit” theory is an impermissible extension of federal regulation.

To begin with, the conduit theory cannot be reconciled with the Act’s text. The statute prohibits the unpermitted discharge of any pollutant, which activity in turn is defined as “any addition of any pollutant to navigable waters from any point source.” Liability therefore requires that the addition of a pollutant to regulated waters occur by virtue of a point source conveyance. Groundwater, however, is not a point source. Thus, groundwater’s conveyance of pollutants to regulated waters cannot trigger liability because it consists solely of the delivery of nonpoint source pollution.

Nothing in the Supreme Court’s Clean Water Act case law is to the contrary. It is true that, in Rapanos v. United States, a plurality of the High Court suggested that liability may attach to discharges that “naturally” but not “directly” reach regulated waters. This observation was part of the plurality opinion’s attempt to show that its narrow interpretation of “navigable waters” would not necessarily lead to a significant reduction in the Act’s scope. As the plurality explained, prior lower court decisions had affirmed liability for pollutant discharges “even

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154 E.g., Hawaii Wildlife Fund, 24 F. Supp. 3d at 1000.
157 § 1362(12)(A).
158 See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 105 (2004) (“[A] point source need not be the original source of the pollutant; it need only convey the pollutant to ‘navigable waters’ . . . .”).
159 Id.
160 See Tripp & Jaffe, supra note 146, at 13 (“A possible explanation for the exclusion of groundwater from the major regulatory provisions of the Act might be that Congress considered groundwater pollution to be, in effect, nonpoint source pollution . . . .”).
161 See Hawaii Wildlife Fund, 24 F. Supp. 3d at 996 (“While it makes sense to regulate groundwater under the conduit theory, this court acknowledges that it cannot point to controlling appellate law or statutory text expressly allowing this theory in the present context.”).
162 Rapanos, 57 U.S. at 743.
163 See id. at 742–43.
if the pollutants discharged from a point source do not emit ‘directly into’ covered waters, but pass ‘through conveyances’ in between.\textsuperscript{164} In other words, the plurality was entertaining a point-source-to-point-source-to-regulated-water theory of liability. That is why the plurality thought it relevant that those features that might no longer qualify as “waters of the United States” under its test could still be deemed to be point sources.\textsuperscript{165} This reading of \textit{Rapanos} is not hair-splitting. There is, after all, a significant difference between a theory of liability based on (i) point-source-to-point-source-to-regulated-water, and (ii) point source pollution traveling through a nonpoint source like groundwater—potentially for many miles—before reaching regulated surface waters. Seeking approval from the \textit{Rapanos} plurality for the liability-expanding conduit theory is particularly inapt, given that the plurality’s clear intent was to narrow, not expand, the Act’s scope.\textsuperscript{166}

Defenders of the conduit theory also assert that the theory comports with the Clean Water Act’s purposes, in light of the interrelation between groundwater pollution and surface water pollution.\textsuperscript{167} As one early district court decision puts the point, “since the goal of the [Act] is to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through groundwater, is subject to regulation.”\textsuperscript{168} The argument fails, however, in two important ways. First, it ignores that, as a general matter of statutory interpretation, “it is one thing for Congress

\textsuperscript{164} Id.

\textsuperscript{165} See \textit{id.} at 743. The opinion’s recitation of the lower court case law supporting that possibility reveals that in nearly all of the cited cases, the “indirect” discharge was simply the result of a series of point-source-to-point-source conveyances.

\textsuperscript{166} See, \textit{e.g.}, \textit{id.} at 768 (Kennedy, J., concurring) (“[T]he plurality proceeds to impose two limitations on the Act; but these limitations, it is here submitted, are without support . . . .”); \textit{id.} at 800 (Stevens, J., dissenting) (“The plurality imposes two novel conditions on the exercise of the Corps’ jurisdiction that can only muddy the jurisdictional waters.”).

\textsuperscript{167} See Kvien, \textit{supra} note 93, at 980–81; Brett Smith, \textit{Note, Pollution Problems in Paradise: Does the Clean Water Act Apply to Groundwater Pollution in Maui?}, 22 J. ENVTL. & SUSTAINABILITY 292, 309 (2016). But at least one strong defender of the regulation of groundwater pollution through the Clean Water Act acknowledges that “incorporating groundwater into [the Act’s framework] can only be achieved by construing either ‘point source’ or ‘navigable waters’ to include groundwater.” Wood, \textit{supra} note 118, at 574.

to announce a grand goal, and quite another for it to mandate full implementation of that goal.”

In other words, a statute does not always pursue its stated objectives “at all costs.” Second, the argument does not recognize that “clean water is not [the Clean Water Act’s] only purpose”—also relevant “is the preservation of primary state responsibility for ordinary land-use decisions.” Indeed, one critical reason why Congress chose not to regulate all waters in the country, or all sources of pollution, was precisely because it would require an unprecedented and unwanted federal intrusion into land-use regulation, a traditional area of state regulatory pre-eminence. By privileging one statutory purpose over another, the conduit theory impermissibly overrides the delicate legislative balance between federal and state control that the Clean Water Act codifies.

Because the purpose-based argument is perhaps what the defenders of the conduit theory consider to be its strongest point, and because such an approach to statutory interpretation I believe to be especially pernicious, allow me to dwell a bit on the issue. In doing so, I hope that the defects in such a purpose-based approach will be seen more readily. To that end, I set forth below the conduit theory’s purpose-based defense in two steps, drawing from an oft-cited 2005 district court decision that presaged the more recent conduit-favorable case law.

**Question:** Does the Clean Water Act directly regulate groundwater pollution?

**Step 1:** Acknowledge the Clean Water Act’s remedial purpose: “Congress has explicitly stated that the objective of the [Act] is to restore

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170 Rapanos, 547 U.S. at 752.
172 See Or. Nat. Res. Ass’n, 550 F.3d at 784. As Professor Andreen memorably put the point, “What was the EPA supposed to do, tell farmers how to farm?” William A. Andreen, Water Quality Today—Has the Clean Water Act Been a Success?, 55 ALA. L. REV. 537, 562 (2004).
173 Solid Waste Ag. of N. Cook Cnty., 531 U.S. at 174.
and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

**Step 2:** Note that the aforementioned purpose would not be served by regulating “a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater.”

**Answer:** Yes, the Clean Water Act directly regulates groundwater pollution, because such direct regulation would serve the Act’s purpose of cleaning up the Nation’s waters.

This is an excellent purposivist analysis, so it should come as no surprise that its errors are precisely a function of its adherence to “that last resort of extravagant interpretation.” A purpose-based analysis interprets statutory text in light of, and to effect, the statute’s purpose. That is where the error begins. As we have already seen, the Clean Water Act does not embody a single “let’s clean up our water” purpose. Moreover, it is simply “a misunderstanding of the nature of lawmaking in a democratic system to assume that each statute will, like a good work of art, show forth consistent and well-developed themes.” Rather, laws often are the product of “a delicate compromise among competing interests and concerns.” Putting it more bluntly, “reasonable people in the legislature do not always produce reasonable results”; sometimes they produce little more than “backroom deals.” Hence, trying to “interpret” a statute exclusively according to “public-regarding rhetoric” often just results in the “substitut[ion of] the judge’s conception of public policy for that of the legislature.”

Beyond these generally applicable concerns, a myopic purpose-based theory of interpretation bodes particularly ill for the continuing vitality of the Act’s federalism-infused distinction between point source and non-point source pollution. Again, one important way that the Clean Water Act serves the purpose of maintaining state land-use authority as against

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176 Id. at *2 (quoting 33 U.S.C. § 1251(a)).
177 Id. at *2.
178 Rapanos, 547 U.S. at 752.
180 See Rapanos, 547 U.S. at 755–56 (plurality op.).
182 Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1113 (9th Cir. 2000).
183 Eskridge & Frickey, supra note 179, at 335.
184 Id.
federal intrusion is through its regulatory limitation to point source pollution. This kind of built-in statutory backstop is as much the source of a law’s “purposes” as its express grants of authority. Yet the same myopic purpose-based approach of, “if regulating it would help the environment, then regulate it,” which ostensibly supports the conduit theory, would impermissibly support regulation of pollution traditionally thought of as nonpoint source. Put another way, construing the Clean Water Act solely through the lens of environmental protection is bad statutory interpretation, because that unqualified criterion did not motivate Congress. “Nonpoint sources discharge more pollutants than point sources”—they in fact “constitute[] a substantial portion of all water pollution and significantly affect[] the quality of both surface water and groundwater”—but Congress chose to leave this problem to the states to address.

Perhaps recognizing the overreaching effects of wholesale acceptance of the conduit theory, EPA has attempted to limit the theory through a directness requirement—only pollutant discharges that reach regulated surface waters through a “direct” groundwater connection trigger liability. But there is no logically compelled way to distinguish between

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186 Director, Office of Workers’ Comp. Programs, Dep’t of Labor v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 136 (1995) (“Every statute proposes, not only to achieve certain ends, but also to achieve them by particular means . . . . The withholding of agency authority is as significant as the granting of it, and we have no right to play favorites between the two.”).
187 See Miller, supra note 85, at 11147–48 (observing that much nonpoint source pollution originates from vehicles, which comfortably fit within the definition of point source).
188 Id. at 11135.
190 See Miss. Comm’n on Nat. Res., 625 F.2d at 1275 (“[T]he legislative history reflects congressional concern that the Act not place in the hands of a federal administrator absolute power over zoning watershed areas. The varied topographies and climates in the country call for varied water quality solutions.”). See also Ky. Waterways Alliance, 2017 WL 6628917, at *10.
191 See EPA Amicus Br., supra note 153, at 12 (“It has been EPA’s longstanding position that discharges moving through groundwater to a jurisdictional surface water are subject to CWA permitting requirements if there is a ‘direct hydrological connection’ between the groundwater and the surface water.”). See also 66 Fed. Reg. at 3016 (“The Agency has determined that discharges via hydrologically connected ground water impact surface waters and, therefore, should be controlled at the source.”). EPA contends that the Second Circuit upheld its “direct hydrological connection” theory in partially affirming the agency’s effluent limitation guidelines for discharge permits issued to concentrated animal feeding operations. See 73 Fed. Reg. at 70,420 (citing Waterkeeper Alliance, Inc. v. EPA, 399 F.3d
a direct and an indirect discharge if both discharges are to the same groundwater aquifer and that aquifer discharges to a regulated surface water, especially given that “ground and surface waters are connected” and that “polluted groundwater will in most cases eventually discharge to the surface.” Without such a method for determining liability, the decision whether to regulate becomes an arbitrary line-drawing exercise, which typically is the province of the legislature not the judiciary or the executive. Even if such a distinction could be formulated, its implementation would be impracticable. And predicating liability based on foreseeability—which seems to be the consideration underlying EPA’s direct/indirect distinction—is a poor fit with the Clean Water Act’s strict liability regime.

EPA’s reliance is misplaced. No one disputes that EPA may take groundwater into account when superintending the NPDES permitting program; after all, transfer of that power to the states is based on, among other things, a state’s having an adequate program in place to deal with well (read: groundwater) pollution. Moreover, no one disputes that the Act takes account of groundwater pollution—the question is how the Act does so. The indirect methods of funding and permitting guidelines are consonant with a congressional desire to avoid direct federal regulation of groundwater pollution.

The Clean Water Act’s legislative history reveals Congress’ awareness of the arbitrary nature of the division in pollution regulation that it was enacting. See S. REP. NO. 92-414, at 73 (“The Committee recognizes the essential link between ground and surface waters and the artificial nature of any distinction.”).


Hayman, supra note 137, at 122 (“[I]n general, the directness of hydrologic connection is far more obtuse and difficult either to demonstrate or to disprove.”).

Stoddard v. W. Carolina Regional Sewer Auth., 784 F.2d 1200, 1208 (4th Cir. 1986) (“Liability under the Clean Water Act is a form of strict liability.”). Cf. David P. Griffith, Note, Products Liability—Negligence Presumed: An Evolution, 67 Tex. L. Rev. 851, 854 (1989) (“Strict liability . . . dispos[es] of foreseeability . . . .”). It is plausible that injunctive relief may be available to restrain the foreseeable and imminent addition of pollutants to regulated surface waters. See Drelich, supra note 36, at 287–88 (citing, inter alia, Milwaukee v. Ill., 451 U.S. 304 (1981)). But that possibility does not support the regulation of groundwater pollution, if I am correct that should be considered nonpoint source pollution. For even advocates of expansive direct Clean Water Act liability—such as Mr. Drelich—presumably would agree that the Act provides no authority to restrain a foreseeable addition of nonpoint source pollution.
Adding a traceability requirement to conduit-theory liability for “direct” groundwater-carried discharges, as some courts have done, actually worsens rather than moderates the interpretive error. Whether a pollutant that has reached regulated waters is traceable to a given point source is a question of trying to pin an already existing liability on the right actor, as opposed to determining whether liability exists in the first place. In other words, the inability to trace the pollutant back to a particular point source does not mean that no liability has been incurred, but rather that such liability likely cannot be proved. But weighing the difficulty in establishing liability is a quintessentially prosecutorial not judicial function. Thus, the conduit theory improperly collapses two conceptually distinct issues: the standard of liability, and likelihood of establishing that standard in any given case.

CONCLUSION

In the spirit of cooperative federalism, Congress left the problem of nonpoint source pollution to the states. In the preceding pages, I have endeavored to show that direct federal regulation of discharges to groundwater—the consequence of judicial adoption of the “conduit” or related theories—would upset this careful legislative compromise.

The courts that have concluded otherwise all appear to adhere—whether explicitly or not—to a purpose-based interpretive approach to support direct federal regulation, one which I sketched out in the preceding section. Such an interpretation produces what I have elsewhere called “interpretive creep,” i.e., the process of construing particular provisions of a statute in light of its supposed purpose such that, after a series of interpretations, the statute begins to take more and more the view of only one faction of the legislature that helped to enact it. Such a

198 Cf. Miller, supra note 85, at 11132 (“[T]he definition of point source does not mention or suggest traceability.”).
200 By asking the courts to assume that task, the traceability limitation invites the judiciary to exceed its proper role. Cf. Morrison v. Olson, 487 U.S. 654, 680–81 (1988) (observing that “one purpose of the broad prohibition upon the courts’ exercise of executive or administrative duties of a nonjudicial nature,” “is to ensure that “judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by those branches”) (quoting Buckley v. Valeo, 424 U.S. 1, 123 (1976)).
201 Schiff, supra note 181, at 1091–92.
phenomenon is frequently seen in environmental law, perhaps because people—judges, politicians, and even businessmen included—generally harbor favorable views of environmental protection.202

Given these unspoken prejudices, coupled with the force of interpretive creep, a query would naturally arise in the courts that have followed the above-described purposivist interpretive theory: Why, after all, wouldn’t Congress want groundwater pollution to be cleaned up?203 Unavoidably, this line of inquiry leads to the wrong result because it asks the wrong question. It impliedly *denies* the existence of other or competing purposes—if there are no other purposes than environmental protection, then it may well follow that Congress would have had no good reason to decline to directly regulate groundwater pollution. The analysis depends on the counterfactual that the Act has no other purpose than environmental protection *à l’outrance*.

More importantly, the purposivist analysis is misguided because it is exclusively concerned with ends (getting rid of water pollution). That is problematic because a statute is not just about ends—it is also about the *means* chosen to achieve those ends.204 Congress quite reasonably can choose not to select certain means for a variety of reasons, *e.g.*, economic costs, tradition, or political controversy. To find such choosiness over means in the Clean Water Act should not be surprising at all, given the statute’s express policy to protect the states’ land-use authority.205 Thus, a question

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202 Environmental law “came from a public awareness so spontaneous and deep that within a few short years, it had produced over a dozen major public welfare laws and more than twenty new federal programs.” Houck, *Standing on the Wrong Foot*, supra note 50, at 15. Importantly, these new laws—including the Clean Water Act—“were largely bi-partisan, and . . . received overwhelming votes in [their] favor.” *Id*. It should not come as a surprise, then, that “it is now bad politics to be considered anti-environment, [as well as] bad business for a company to conduct its operations without considering environmental impacts.” Mark A. Stach, *The Gradual Reform of Environmental Law in the Twenty-First Century: Opportunities Within a Familiar Framework*, 22 J. CORP. L. 621, 623 (1997). Environmental law also quickly became exceedingly popular in law school, shaping the views of decades-worth of judges. See David Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 613 (1970) (“The popularity of environmental law seminars overwhelms their instructors.”).

203 As my exemplar district court observed, “it would hardly make sense” to regulate the direct discharger but not the groundwater-to-surface-water discharger. *N. Cal. River Watch*, 2005 WL 2122052, at *2. Of course, it’s not quite fair to fault a certain legislative distinction for bearing no rational connection to one purpose, where, as with the Clean Water Act, a statute serves more than one purpose.

204 See Director, *Office of Workers’ Compensation Programs, Dep’t of Labor*, 514 U.S. at 136.

205 See 33 U.S.C. § 1251(b).
better tailored to good statutory interpretation would be, why would Congress choose not to regulate groundwater pollution? The answer lies in the cooperative framework that animates the Clean Water Act, one according to which primary responsibility for remedying groundwater pollution is assigned to the states. Perhaps that framework was then or is now ill-judged. If so, then it falls to Congress—not private litigants or the courts—to recalibrate the Act’s federal-state balance.

EPILOGUE

Shortly before this Article went to press, the United States Court of Appeals for the Ninth Circuit ruled in Hawai’i Wildlife Fund v. County of Maui that Clean Water Act liability attaches to point-source discharges of pollutants that reach jurisdictional waters through groundwater, if the pollution is more than de minimis and is “fairly traceable” to the point source. The court’s very liability-friendly standard shares many of the shortcomings associated with the conduit theory, discussed supra Section II.C, perhaps most notably the failure to preserve any meaningful distinction between point-source and nonpoint-source pollution.

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207 See, e.g., Terence J. Centner, Nutrient Pollution from Land Applications of Manure: Discerning a Remedy for Pollution, 21 STAN. L. & POL’Y REV. 213, 225 (2010) (“States have provisions concerning nonpoint source pollution, but state efforts have not been very successful in precluding nonpoint source pollution.”); Ky. Waterways Alliance, 2017 WL 6628917, at *12 (“Indeed, the distinction between point-and non-point sources would appear untenable in light of this purpose [of protecting surface water quality], given that ‘non[-]point sources of pollution constitute a major source of pollution in the nation’s waters.’”) (quoting Or. Nat’l Res. Council, 834 F.2d at 849).
208 No. 15-17447, 2018 WL 650973 (9th Cir. Feb. 1, 2018).
209 Id. at *7.