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

DAMIEN SCHIFF*

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 33 U.S.C. §§ 1251–1388. The Act's formal title is the Federal Water Pollution Control Act Amendments of 1972. See Pub. L. No. 92-500, § 1, 86 Stat. 816 (Oct. 18, 1972).

² 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.”).

³ See, e.g., *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring) (“[B]ased on the Government's representations in this case, the reach and systemic consequences of the Clean Water Act remain a cause for concern.”); *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring) (“The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified . . . as wetlands covered by the Act . . .”). The United States Environmental Protection Agency and the United States Army Corps of Engineers, the agencies that jointly administer the Act, have earned a reputation for reading their Clean Water Act authority expansively. See *Rapanos v. United States*, 547 U.S. 715, 722 (2006) (plurality op.) (“[An] immense expansion of federal regulation of land use . . . has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations.”)

⁴ 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).

⁵ 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 wrong-headed.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

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) (“[M]ost 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 ENVTL. 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,”¹¹ the Act directly regulates.¹² 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.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.”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.”¹⁵

Extending the Act to directly regulate any pollutant discharges to groundwater would compromise this statutory division of labor.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”).

¹¹ 33 U.S.C. § 1362(14).

¹² *See id.* § 1311(a).

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)).

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)).

¹⁵ Robert W. Adler, *The Two Lost Books in the Water Quality Trilogy: The Elusive Objectives of Physical and Biological Integrity*, 33 ENVTL. L. 29, 56 (2003), quoted in *Or. Nat. Desert Ass’n*, 550 F.3d at 785. *Cf.* *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (rejecting an interpretation of the Clean Water Act that “would result in a significant impingement of the States’ traditional and primary power over land and water use”); Lawrence Ng, Note, *A DRASTIC Approach to Controlling Groundwater Pollution*, 98 YALE L.J. 773, 784 (1989) (noting “the traditional deference of the federal government to the states in the area of groundwater regulation”).

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.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.¹⁸

Neither may the congressional design be reworked through the so-called “conduit” theory, which several district courts recently have explicitly adopted.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.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,²¹ an aim that, admittedly, cannot be achieved without taking groundwater into account.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.²³ Undeniably, nonpoint source

¹⁷ See *infra* Section II.A.

¹⁸ See *infra* Section II.B.

¹⁹ See *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 2017 WL 3476069, at *42–*44 (M.D. Tenn. Aug. 4, 2017); *Sierra Club v. Va. Elec. & Power Co.*, 145 F. Supp. 3d 601, 606–08 (E.D. Va. 2015); *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 445–46 (M.D. N.C. 2015); *Hawaii Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 980, 996–98 (D. Haw. 2014). Arguably, the theory appears in embryo in *N. Cal. River Watch v. Mercer Fraser Co.*, 2005 WL 2122052, at *2–*3 (N.D. Cal. Sept. 1, 2005), and perhaps even earlier decisions. See, e.g., *Sierra Club v. Colo. Refining Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993). But it is often difficult to ascertain in these early cases whether the courts were merely using the existence of the groundwater connection to establish jurisdiction over the original point source discharge itself. See *N. Cal. River Watch*, 2005 WL 2122052, at *3 (“[T]his Court holds that a hydrological connection between a man-made settling basin and a water of the United States is sufficient to *subject the basin* to the provisions of the CWA.”) (emphasis added).

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. ENVTL.

pollution poses a serious obstacle to achieving federal water quality standards.²⁴ And for decades the same has been true for a subset of that pollution—groundwater pollution.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.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.²⁷

The Article begins with an introduction to the Act’s direct and indirect regulatory framework, explained through the lens of cooperative federalism.²⁸ The Article then proceeds to present and refute three theories for direct regulation of groundwater pollution: groundwater as among the “navigable waters”²⁹; groundwater as a “point source” of pollution added to regulated surface waters³⁰; and groundwater as a “conduit” of pollution added to regulated surface waters.³¹ The Article concludes with a few thoughts about the difficulty of statutory interpretation in environmental law.³²

AFF. L. REV. 527, 584 (2005) (“The specific political compromise that produced the [Clean Water Act] has continued to shape the federal framework . . .”).

²⁴ See William L. Andreen, *No Virtue Like Necessity: Dealing With Nonpoint Source Pollution and Environmental Flows in the Face of Climate Change*, 34 VA. ENVTL. L.J. 255, 257 (2016) (“The water quality problems that nonpoint source pollution can create can be severe, as such discharges often contain nutrients and pesticides, bacteria, and organic materials, as well as sediment and mine acid.”).

²⁵ See Robert L. Glicksman & George Cameron Coggins, *Groundwater Pollution I: The Problem and the Law*, 35 KAN. L. REV. 75 (1986) (“[T]he nation’s groundwater supplies . . . are in serious danger from a wide variety of sources.”).

²⁶ Robin Kundis Craig & Anna M. Roberts, *When Will Governments Regulate Nonpoint Source Pollution? A Comparative Perspective*, 42 B.C. ENVTL. AFF. L. REV. 1, 2 (2015).

²⁷ The importance of that role is as great today if not more so than when the law was enacted. See Douglas R. Williams, *Toward Regional Governance in Environmental Law*, 46 AKRON L. REV. 1047, 1052 (2013) (noting that states “play a dominant role in ensuring that water quality is protected,” one that has become “central to the overall success of the CWA’s regulatory program, representing a fairly dramatic shift from the underlying premises of the program”).

²⁸ See *infra* Part I.

²⁹ See *infra* Section II.A.

³⁰ See *infra* Section II.B.

³¹ See *infra* Section II.C.

³² See *infra* Part III.

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.³³ Therefore, extending direct federal regulatory control to groundwater pollution would constitute an unwarranted inflation of the Act's already bloated coverage.³⁴

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.³⁵ Congress considered the prior approach defective because it had "focused on the tolerable effects rather than the preventable causes of water pollution."³⁶ 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.³⁷ 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").

³⁵ For a summary of those shortcomings, see Jeffrey M. Lipman, Note, *The Federal Water Pollution Control Act Amendments of 1972: Effective Controls at Last?*, 39 BROOK. L. REV. 403, 403–04 (1972).

³⁶ *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202 (1976). See Sen. Edmund S. Muskie, *A Legislator's View of Impending Amendments to the Water Pollution Control Act*, B.C. INDUS. & COMM. L. REV. 629, 631 (1972) ("Instead of proceeding through ambient water quality standards to control requirements, the bill provides directly for control requirements [which] allows immediate application of enforceable control requirements . . ."). See also David Drelich, *Restoring the Cornerstone of the Clean Water Act*, 34 COLUM. J. ENVTL. L. 267, 304 (2009) (noting that "harm-based enforcement scheme" of the Act's predecessor statutes had "resulted in only one prosecution").

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,³⁸ while retaining in modified form the procedure for designating water quality standards.³⁹

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."⁴⁰ These aquatic features are defined—rather cryptically—to include the two "waters of the United States."⁴¹ 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,⁴² whereas a discharge of any other pollutant requires a permit (commonly called a Section 402 or "NPDES" permit) from EPA.⁴³ A distinctive aspect of the revamped Clean Water Act is the statute's authorization for permitting authority to be passed to the states.⁴⁴ Although few states have obtained Section 404 permitting authority,⁴⁵ nearly all have obtained Section 402 permitting authority.⁴⁶

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.").

³⁹ See Lawrence S. Bazel, Comment, *Water-Quality Standards, Maximum Loads, and the Clean Water Act: The Need For Judicial Enforcement* 34 HASTINGS L.J. 1245, 1253–54 (1983).

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).

⁴² See *id.* § 1344(a). A version of this permitting authority antedated the Clean Water Act, deriving from the Rivers and Harbors Appropriation Act of 1899, § 9, 30 Stat. 1121, 1151 (Mar. 3, 1899). See Lipman, *supra* note 35, at 413–16. Although that prior authority applied generally to all pollution, the Act transferred most of it to EPA. See S. CONF. REP. NO. 92-1236, at 138–39 (1972).

⁴³ See 33 U.S.C. § 1342(a).

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.*

⁴⁶ See EPA, *NPDES State Program Information*, <https://www.epa.gov/npdes/npdes-state-program-information> [<https://perma.cc/44BT-6QJD>].

Violating the Act's provisions for direct water quality regulation can create significant civil and even criminal liability.⁴⁷ Just the maximum daily civil penalty for unpermitted pollutant discharges is currently pegged at \$37,500.⁴⁸ That is especially onerous when one considers that liability will attach despite the discharger's exercise of all due care.⁴⁹ And the threat of such liability is by no means insignificant, due to the Act's authorization for enforcement by private citizens,⁵⁰ in addition to the EPA⁵¹ and the Corps.⁵²

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.⁵³ That

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.").

⁵⁰ See 33 U.S.C. § 1365(a) (authorizing citizen suits against any person for violation of any effluent standard or limitation, or order pertaining to the same). Cf. Oliver A. Houck, *Standing on the Wrong Foot: A Case for Equal Protection*, 58 SYRACUSE L. REV. 1, 15 n.91 (2007) [hereinafter Houck, *Standing on the Wrong Foot*] ("Two of the most citizen-enforced programs in environmental law are the Clean Air and Clean Water Acts.").

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.⁵⁴ Although Congress has followed that approach in other statutes,⁵⁵ the practice is by no means universal or a default.⁵⁶ Thus, Congress' decision to give the power to wield significant federal permitting authority with respect to controlling water pollution reflects its particular concern "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," as well as "to plan the development and use . . . of land and water resources."⁵⁷

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."⁵⁸ Because "discharge of a pollutant" is in turn expressly defined as "any addition of any pollutant to *navigable waters* from any *point source*,"⁵⁹ 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."⁶⁰ 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.⁶¹

permits which requires duplicative effort or destroys the initiative of the States and local governments is wasteful and non-productive.").

⁵⁴ 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.").

⁵⁵ *See New York v. United States*, 505 U.S. at 167–68 (discussing other examples).

⁵⁶ For example, the Endangered Species Act reserves to the federal government the authority to issue permits for the incidental take of listed species. *See* 16 U.S.C. § 1540(a).

⁵⁷ 33 U.S.C. § 1251(b).

⁵⁸ *Id.* § 1311(a). *See* Allison LaPlante & Lia Comerford, *On Judicial Review Under the Clean Water Act in the Wake of Decker v. Northwest Environmental Defense Center: What We Now Know and What We Have Yet to Find Out*, 43 ENVTL. L. 767, 773 (2013) ("The CWA's central prohibition lies in section 301 of the statute.").

⁵⁹ 33 U.S.C. § 1362(12)(A) (emphases added).

⁶⁰ *See United States v. Wilson*, 133 F.3d 251, 260–61 (4th Cir. 1997).

⁶¹ *See Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 288 (3d Cir. 2015) ("Under th[e Clean Water Act], the EPA and the states participate in a 'cooperative federalism' framework working together to clean the Nation's waters."). *See also* 33 U.S.C. § 1251(b) (establishing a national policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution," while also allowing the states "to

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”).

⁶² See *United States v. Lopez*, 514 U.S. 549, 552 (1995).

⁶³ *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997).

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").

⁷⁰ Charles W. Smith, *Highlights of the Federal Water Pollution Control Act of 1972*, 77 DICK. L. REV. 459, 460 (1973). See Colburn T. Cherney & Karen M. Wardzinski, *State and Federal Roles Under the Clean Water Act*, 1 NAT. RES. & ENV'T 19, 22 (1986) ("Congress has entrusted to EPA and the states the joint responsibility of implementing the NPDES permit program under the Clean Water Act. Only through a cooperative . . . relationship between EPA and the state can this obligation be carried out effectively.").

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.").

⁷³ 33 U.S.C. § 1313(a). See Miss. Comm'n on Nat. Res., 625 F.2d at 1275 ("Congress did place primary authority for establishing water quality standards with the states."). The Clean Water Act's water quality standards program is in fact a continuation of the long-standing federal policy to defer to the states in establishing pollution control goals. See Jeffrey M. Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 VAND. L. REV. 1167, 1177–80 (1983).

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 indiscrete

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.

* * *

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

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)).

⁸⁴ *Shanty Town Assocs. Ltd. P’ship v. EPA*, 843 F.2d 782, 791 (4th Cir. 1988).

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 espouses⁹¹—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.⁹²

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.⁹³ As set forth below, none of these theories of liability withstands scrutiny.⁹⁴ 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.⁹⁵

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.”⁹⁶ The statute

⁹¹ *Pronsolino*, 291 F.3d at 1126–27.

⁹² See *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (“[I]f the Federal Government would ‘radically readjust[] the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit’ about it.”) (quoting *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)).

⁹³ Allison L. Kvien, Note, *Is Groundwater That Is Hydrologically Connected to Navigable Waters Covered Under the CWA?: Three Theories of Coverage and Alternative Remedies for Groundwater Pollution*, 16 MINN. J.L. SCI. & TECH. 957, 984–91 (2015).

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.”⁹⁷ For example, Section 102 of the Act requires the preparation of comprehensive programs for water pollution control for “the navigable waters and ground waters.”⁹⁸ Section 104 mandates the establishment of a water surveillance system for monitoring the quality of, among other things, “the navigable waters and ground waters.”⁹⁹ 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.”¹⁰⁰ And Section 304 requires both the production of federal guidelines for maintaining water quality for, among other things, “all navigable waters [and] ground waters,”¹⁰¹ 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.”¹⁰²

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.¹⁰³ Indeed, although the Act mentions “ground waters” repeatedly, the term is absent from that Title of the Act governing water quality standards and permitting.¹⁰⁴ 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).

⁹⁷ 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 Ruckelshaus, 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 . . .”).

⁹⁸ 33 U.S.C. § 1252(a).

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 found¹⁰⁵; and text should not be interpreted to be superfluous.¹⁰⁶ The textual argument against reading “navigable waters” to include “ground waters” is rather robust.¹⁰⁷

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,¹⁰⁸ nevertheless “evidences a clear intent to leave the establishment of standards and controls for groundwater pollution to the states.”¹⁰⁹ 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.¹¹⁰ A similar effort was rejected in the House of Representatives.¹¹¹ 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.”¹¹² Rising against the amendment, Representative Clausen—a House bill sponsor¹¹³—explained that “there was not sufficient information on ground waters to justify the types of controls that are required for navigable waters.”¹¹⁴ He noted that a provision of the existing bill—ultimately carried forward into the enacted law¹¹⁵—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.¹¹⁶ The Aspin amendment was resoundingly voted down.¹¹⁷ Advocates of

¹⁰⁵ See *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 86–87 (1994).

¹⁰⁶ *Marx v. Gen. Rev. Corp.*, 568 U.S. 371, 386 (2013).

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.

¹¹³ *Umatilla Waterquality Protective Ass’n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1319 (D. Or. 1997). See *supra* note 87 (on the weight to be given to a sponsor’s views).

¹¹⁴ LEGIS. HISTORY OF WATERS POLLUTION CONTROL ACT, *supra* note 88, at 591.

¹¹⁵ See 33 U.S.C. § 1342(b)(1)(D).

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.

¹¹⁹ 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

pollutants into groundwater itself but rather whether the CWA regulates the discharge of pollutants to navigable waters via groundwater.") (quoting *Yadkin Riverkeeper, Inc.*, 141 F. Supp. 3d at 445); *Hawaii Wildlife Fund*, 24 F. Supp. 3d at 996 (upholding liability on a "conduit theory," but still recognizing that an "unpermitted discharge into the groundwater, without more, does not constitute a violation of the Clean Water Act").

¹²⁶ See Wood, *supra* note 118, at 607–09.

¹²⁷ 33 U.S.C. § 1362(6)(B).

¹²⁸ Wood, *supra* note 118, at 609.

¹²⁹ See 33 U.S.C. § 1362 (directing that the section's definitions apply "when used in this chapter" unless "otherwise specifically provided").

¹³⁰ See *Exxon Corp.*, 554 F.2d at 1321 n.19. See also *United States v. GAF Corp.*, 389 F. Supp. 1379, 1384 (S.D. Tex. 1975) ("It is at least plausible that Congress intended to include within the scope of research under Subchapter I of the Act and of the permit programs, especially those of the States, under Subchapter IV that which was excluded from the enforcement provisions of Subchapter III.") (footnote and citations omitted).

¹³¹ Wood, *supra* note 118, at 608.

¹³² *Vill. of Oconomowoc Lake*, 24 F.3d at 965.

¹³³ See Jason R. Jones, Comment, *The Clean Water Act: Groundwater Regulation and the*

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.¹³⁴ Several decisions have recognized that groundwater does not fit within this statutory definition.¹³⁵ 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.”¹³⁶

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.¹³⁷ As Representative Roncolio observed in speaking against the failed Aspin

National Pollutant Discharge Elimination System, 8 DICK. J. ENVTL. L. & POL’Y 93, 111 (1999) (“[A]lthough Congress found the quality of the nation’s groundwater important, Congress . . . intended to distinguish between groundwater and surface water [so as] to encourage the states to develop and to implement groundwater pollution control programs, but to preclude federal enforcement.”).

¹³⁴ 33 U.S.C. § 1362(14).

¹³⁵ See *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 8:16-4003-HMH, 2017 WL 2266875, at *5 (D.S.C. Apr. 20, 2017) (“[M]igration of pollutants through soil and groundwater is nonpoint source pollution.”); *Tri-Realty Co.*, 2013 WL 6164092 at *7 n.7 (“A discharge of pollutants into navigable waters occurring only through migration of groundwater and uncontrolled soil runoff represents ‘nonpoint source’ pollution.”); *Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC*, 794 F. Supp. 2d 602, 619–20 (D. Md. 2011) (“Discharge from migrations of groundwater or soil runoff is not point source pollution, however, but nonpoint source pollution.”); *Ky. Waterways Alliance v. Ky. Utils. Co.*, 2017 WL 6628917, at *10 (E.D. Ky. Dec. 28, 2017) (“Groundwater is, by its nature, ‘a diffuse medium’ and not the kind of discernible, confined and discrete conveyance contemplated by the [Clean Water Act’s] definition of ‘point source.’”) (quoting *26 Crown Assocs., LLC v. Greater New Haven Reg. Water Pollution Control Auth.*, 2017 WL 2960506, at *8 (D. Conn. July 11, 2017)).

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.”¹³⁸ In other words, the mere fact that pollutants can flow through *X* does not make *X* a point source conveyance.¹³⁹

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.”¹⁴⁰ 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.”¹⁴¹ The court’s argument is not convincing. First, given that Clean Water Act liability generally does not depend on the amount of pollutant discharged,¹⁴² 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 pollution¹⁴³—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.¹⁴⁴ 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.¹⁴⁵ 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 See 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.”).

¹⁴³ See EPA, *What is Nonpoint Source?*, <https://www.epa.gov/nps/what-nonpoint-source> [<https://perma.cc/M3DV-MJX7>] (“Nonpoint source pollution generally results from land runoff, precipitation, atmospheric deposition, drainage, seepage or hydrologic modification.”).

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.¹⁴⁶ The “owner” of groundwater in most states is anyone who owns a portion of the land above the aquifer.¹⁴⁷ 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.¹⁴⁸ For that reason, the landowner would become subject as well to the Act’s burdensome monitoring and record-keeping requirements for point source owners.¹⁴⁹ 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.¹⁵⁰

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.¹⁵¹ 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.”¹⁵² Typically, this theory of liability

¹⁴⁶ “An aquifer is any underground formation saturated with water.” James T.B. Tripp & Adam B. Jaffe, *Preventing Groundwater Pollution: Towards a Coordinated Strategy to Protect Critical Recharge Zones*, 3 HARV. ENVTL. L. REV. 1, 3 n.19 (1979).

¹⁴⁷ See Joseph W. Dellapenna, *A Primer on Groundwater Law*, 49 IDAHO L. REV. 265, 271–72 (2013).

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 . . .”).

¹⁵⁰ Cf. *California v. United States*, 438 U.S. 645, 653 (1978) (running through “[t]he history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States” is a “consistent thread of purposeful and continued deference to state water law by Congress”).

¹⁵¹ See *Tenn. Clean Water Act Network*, 2017 WL 3476069, at *43–44; *Hawaii Wildlife Fund*, 24 F. Supp. 3d at 997–98. See also Kvien, *supra* note 93, at 987–88.

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,”¹⁵³ and (ii) the surface-water pollution be traceable through the groundwater connection back to the original point source.¹⁵⁴ 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.¹⁵⁵ The statute prohibits the unpermitted discharge of any pollutant,¹⁵⁶ which activity in turn is defined as “any addition of any pollutant to navigable waters from any point source.”¹⁵⁷ Liability therefore requires that the addition of a pollutant to regulated waters occur *by virtue of* a point source conveyance.¹⁵⁸ Groundwater, however, is not a point source.¹⁵⁹ Thus, groundwater’s conveyance of pollutants to regulated waters cannot trigger liability because it consists solely of the delivery of nonpoint source pollution.¹⁶⁰

Nothing in the Supreme Court’s Clean Water Act case law is to the contrary.¹⁶¹ 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.¹⁶² 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.¹⁶³ As the plurality explained, prior lower court decisions had affirmed liability for pollutant discharges “even

¹⁵³ *E.g.*, Amicus Br. of United States at 12, *Hawaii Wildlife Fund v. County of Maui*, No. 15-17447 (9th Cir. May 31, 2016) [hereinafter EPA Amicus Br.]; *Tenn. Clean Water Act Network*, 2017 WL 3476069, at *44.

¹⁵⁴ *E.g.*, *Hawaii Wildlife Fund*, 24 F. Supp. 3d at 1000.

¹⁵⁵ *Ky. Waterways Alliance*, 2017 WL 6628917, at *11.

¹⁵⁶ 33 U.S.C. § 1311(a).

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.”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.¹⁶⁵ This reading of *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 *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.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.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.”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

¹⁶⁴ *Id.*

¹⁶⁵ See *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.

¹⁶⁶ See, e.g., *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 . . .”); *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.”).

¹⁶⁷ See Kvien, *supra* note 93, at 980–81; Brett Smith, 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, *supra* note 118, at 574.

¹⁶⁸ *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994). See Anna Makowski, *Beneath the Surface of the Clean Water Act: Exploring the Depth of the Act’s Jurisdictional Scope of Groundwater Pollution*, 91 OR. L. REV. 495, 516 (2012) (“From a policy standpoint, it makes sense to allow regulation of pollution to hydrologically connected groundwater because Congress did not intend to create ‘a ground water loophole through which the discharges of pollutants could flow, unregulated, to surface water.’”) (quoting 66 Fed. Reg. 2960, 3016 (Jan. 12, 2001)).

to announce a grand goal, and quite another for it to mandate full implementation of that goal.”¹⁶⁹ In other words, a statute does not always pursue its stated objectives “at all costs.”¹⁷⁰ 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.”¹⁷¹ 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,¹⁷² a traditional area of state regulatory pre-eminence.¹⁷³ 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.¹⁷⁴

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.¹⁷⁵

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*

¹⁶⁹ See *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982), *quoted in* *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 647 (2d Cir. 1993).

¹⁷⁰ *Rapanos*, 547 U.S. at 752.

¹⁷¹ *Id.* at 755–56. See Smith, *supra* note 70, at 460 (“The Act bears the scars of years of legislative wrangling and compromise . . .”); *Ky. Waterways Alliance*, 2017 WL 6628917, at *12.

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.

¹⁷⁴ See Jones, *supra* note 133, at 118 (arguing that “[a]pplication of ‘broad purposes’ of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address,” and therefore rejecting a purpose-based justification for direct Clean Water Act regulation of groundwater pollution) (quoting *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373–74 (1986)). Cf. Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699, 1710 (2006) (noting that “the strongest argument against the purposive approach [is] that it tends to override legislative compromises”).

¹⁷⁵ *N. Cal. River Watch*, 2005 WL 2122052.

and maintain the chemical, physical, and biological integrity of the Nation's waters."¹⁷⁶

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."¹⁷⁷

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."¹⁷⁸ A purpose-based analysis interprets statutory text in light of, and to effect, the statute's purpose.¹⁷⁹ 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.¹⁸⁰ 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."¹⁸¹ Rather, laws often are the product of "a delicate compromise among competing interests and concerns."¹⁸² Putting it more bluntly, "reasonable people in the legislature do not always produce reasonable results"; sometimes they produce little more than "backroom deals."¹⁸³ 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."¹⁸⁴

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

¹⁷⁶ *Id.* at * 2 (quoting 33 U.S.C. § 1251(a)).

¹⁷⁷ *Id.* at *2.

¹⁷⁸ *Rapanos*, 547 U.S. at 752.

¹⁷⁹ See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 332–39 (1990).

¹⁸⁰ See *Rapanos*, 547 U.S. at 755–56 (plurality op.).

¹⁸¹ Damien M. Schiff, *Purposivism and the "Reasonable Legislator": A Review Essay of Justice Stephen Breyer's Active Liberty*, 33 WM. MITCHELL L. REV. 1081, 1091 (2007).

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.¹⁸⁵ This kind of built-in statutory backstop is as much the source of a law's "purposes" as its express grants of authority.¹⁸⁶ 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.¹⁸⁷ 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"¹⁸⁸—they in fact "constitute[] a substantial portion of all water pollution and significantly affect[] the quality of both surface water and groundwater"¹⁸⁹—but Congress chose to leave this problem to the states to address.¹⁹⁰

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.¹⁹¹ But there is no logically compelled way to distinguish between

¹⁸⁵ *Or. Nat. Desert Ass'n*, 550 F.3d at 785; *26 Crown Assocs.*, 2017 WL 2960506, at *9.

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.

¹⁸⁹ David Zaring, Note, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 HARV. ENVTL. L. REV. 515, 517 (1996).

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.”¹⁹² Without such a method for determining liability, the decision whether to regulate becomes an arbitrary line-drawing exercise,¹⁹³ which typically is the province of the legislature not the judiciary or the executive.¹⁹⁴ Even if such a distinction could be formulated, its implementation would be impracticable.¹⁹⁵ 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.¹⁹⁶

486, 514–15 (2d Cir. 2005)). 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. *See* 33 U.S.C. § 1342(b)(1)(D). 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.

¹⁹² Tripp & Jaffe, *supra* note 146, at 4.

¹⁹³ 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.”).

¹⁹⁴ *See* *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006) (“[M]aking distinctions . . . where line-drawing is inherently complex, may call for a ‘far more serious invasion of the legislative domain’ than we ought to undertake.”) (quoting *United States v. Treasury Employees*, 513 U.S. 454, 479 n.26 (1995)); *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 384 (4th Cir. 2011) (“[A] classic line-drawing exercise [falls] uniquely within the competence of the legislative branch.”).

¹⁹⁵ 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.”).

¹⁹⁶ *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,¹⁹⁷ 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.¹⁹⁸ 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.¹⁹⁹ Thus, the conduit theory improperly collapses two conceptually distinct issues: the standard of liability, and likelihood of establishing that standard in any given case.²⁰⁰

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.²⁰¹ Such a

¹⁹⁷ See, e.g., *Tenn. Clean Water Act Network*, 2017 WL 3476069, at *43.

¹⁹⁸ Cf. Miller, *supra* note 85, at 11132 (“[T]he definition of point source does not mention or suggest traceability.”).

¹⁹⁹ Cf. *Wayte v. United States*, 470 U.S. 598, 607 (1985) (noting that prosecutorial discretion is a function of, among other factors, “the strength of the case”).

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

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,²⁰⁶ 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.²⁰⁷ 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*²⁰⁸ 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.²⁰⁹ 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.

²⁰⁶ See *Ark. v. Okla.*, 503 U.S. at 101.

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.