1. Introduction
2. Legal Background

The Clean Water Act (the CWA or the Act) prohibits the unpermitted discharge of any pollutant by any person from any point source to navigable waters. 33 U.S. § 1311. The Act defines “discharge of a pollutant” to mean any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft. 33 U.S. § 1362(12). Further, the Act explicitly defines point source in an effort to reduce confusion among stakeholders: “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U.S. § 1362(14). Congress excluded nonpoint sources from federal jurisdiction, making clear their desire to regulate only the sources with the most obvious and direct contributions to downstream water quality.

1. Livestock Agriculture Under the CWA: A Refresher

See – [EPA Regulatory Definitions of Large CAFOs, Medium CAFOs, and Small CAFOs](https://www.epa.gov/sites/production/files/2015-08/documents/sector_table.pdf).

CAFOs are named Point Sources under the CWA

To be classified as a CAFO, an operation must:

1. Satisfy the requirements of an **Animal Feeding Operation**
* animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and
* crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.
1. Meet the **Large CAFO** size threshold or
2. Meet the **Medium CAFO** size threshold and **discharge to WOTUS** via a man-made ditch, flushing system, or other similar man-made device
3. Is Groundwater Subject to Federal Jurisdiction?

As a medium – no.

Congress’s intent to deliberately leave groundwater out of the definition of “discharge of a pollutant” is confirmed by the legislative history of the Act. Representative Leslie Aspin recommended that the term “ground water” be added to the operative NPDES provisions so that discharges to groundwater also would be covered by the statute, explaining that “sometimes a navigable water and ground-water source run into each other, or come close to each other, so that seepage from polluted ground-water source the navigable water[;]…[t]o say the Federal Government can regulate the ecology of one, but not the other, is silly and counterproductive.” Water Pollution Control Legislation-1971 (Proposed Amendments to Existing Legislation): Hearings before the H. Comm. On Pub. Works 92nd Cong. 793 (1971) (remarks of Rep. Aspin). Representative Aspin went on to propose an amendment to regulate groundwater under the NPDES program by amending Title IV of the statute to include explicit references to groundwater and adding the term “ground waters” to the definition of
discharge of pollutant” found in section 502(12). He explained that these amendments were necessary given the likelihood that polluted groundwater would contaminate jurisdictional surface waters. The amendments were rejected by a vote of 86 to 34. 118 Cong. Rec. 10,666 (1972), 1 Leg. Hist. 589 (remarks of Rep. Aspin). The amendments were rejected 86 to 34. *Id.* At 597. The failure of a proposed amendment “strongly militates against a judgment that Congress intended a result that it expressly declined to enact.” *Gulf Oil Corp. v. Copp Paying Co.*, 419 U.S. 186, 200 (1974).

The Environmental Protection Agency affirmed Congressional intent earlier in 2019, releasing an interpretive statement on the Application of the Clean Water Act NPDES Program to Releases of Pollutants from a Point Source to Groundwater. EPA concluded that, not only does the Agency not have authority to regulate groundwater, but that federal authority is severed when pollutants reach groundwater.

1. Does a Point Source Discharge via Groundwater Equate to Liability Under the CWA: A Quadruple Circuit Split and Supreme Court Question

A. Fifth and Seventh Circuits

*Village of Oconomowoc Lake v. Dayton Hudson Corp.* - (7th Cir. 1994)

In 1994, the Seventh Circuit considered whether retention ponds constructed adjacent to a warehouse discharged pollutants in a manner that was not prohibited by the Clean Water Act. *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 963, 965-66 (7th Cir. 1994). The court in *Village of Oconomowoc Lake v. Dayton Hudson Corp.* did not expand jurisdiction to these releases, holding “ground waters are not part of the (statutory) ‘waters of the United States.’ The possibility of a hydrological connection cannot be denied, […] but neither the statute nor the regulations make such a possibility a sufficient ground of regulation.” *Id.* at 965-66. *Dayton Hudson* laid vital groundwork in this issue area. As the first appellate court to consider the question, the Seventh Circuit looked at both the standard’s legal basis and practical implications. In preventing the expansion of CWA jurisdiction to groundwater discharges, the court considered Congress’s reasoning behind its term “waters of the United States:”

[a]ll groundwaters could be thought within the power of the national government. But the Clean Water Act does not attempt to assert national power to the fullest. "Waters of the United States" must be a subset of "water"; otherwise why insert the qualifying clause in the statute? 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.

*Id.* At 965. The court went on to conclusively state that the federal government “has not asserted a claim of authority over artificial ponds that drain into ground waters.” *Id.*

*Rice v. Harken Expl. Co.* - (5th Cir. 2001)

In 2001, the Fifth Circuit followed this approach, finding that CWA’s authority does not extend to “discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of ‘navigable waters.’” *Rice v. Harken Expl. Co.*, 250 F.3d 264, 272 (5th Cir. 2001). The Fifth Circuit was the first court to address connection, noting that even while groundwater may be connected to navigable waters, the federal government does not have regulatory jurisdiction. The court referenced its previous opinion in *Exxon Corp. v. Train*, finding “the text and legislative history of the CWA ‘belied an intention to impose direct federal control over any phase of pollution of subsurface waters.’” *Id.* at 272 (citing Exxon Corp. v. Train 554 F.2d 1310, 1322 (5th Cir. 1977)). Allowing EPA to control discharges to groundwater would directly contradict the intent of the CWA.

B. Ninth Circuit

*Hawaii Wildlife Fund v. County of Maui* - (D. Haw. 2014)

In 2014, the U.S. District Court for the District of Hawai’i adjudicated a case where a municipal wastewater treatment facility injected pollutants into underground wells which leaked pollutants into the Pacific Ocean via groundwater migration. *Haw. Wildlife Fund v. Maui*, 24 F. Supp. 3d 980, 983 (D. Haw. 2014). The Court found that pollutant released from a point source that reaches surface water via groundwater migration constitutes an illegal discharge under the Clean Water Act. *Id.* at 991. In *Hawai’i Wildlife Fund v. County of Maui*, the district court developed what is known as the Conduit Theory:

There is nothing inherent about groundwater conveyances and surface water conveyances that requires distinguishing between these conduits under the Clean Water Act. When either type of waterway is a conduit through which pollutants reach the ocean, then there has been the ‘addition of [a] pollutant to navigable waters.’

*Id.* at 995. The district court’s decision clearly indicates a deliberate refusal to consider statutory language, and instead considers factual evidence in a vacuum. Upon appeal to the Ninth Circuit, EPA submitted a brief in support of Hawai’i Wildlife Fund’s position but suggested a different standard with new terminology. EPA made the case for expanded jurisdiction under the Direct Hydrologic Connection theory. The Agency’s strongest argument for its position is found in the proposed preamble language. The 2001 proposed CAFO Rule contained language which would “require CAFOs to achieve zero discharge to groundwater beneath the production area that has a direct hydrologic connection to surface water.” National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7216 (Feb. 12, 2003). Following public comment, EPA removed this provision. Specifically, EPA acknowledged that “site-specific variables” prevented the establishment of national technology-based standards, and imposing requirements through a national effluent limitation guideline would “divert resources from other technologies and practices that are more effective at controlling CAFO discharges to surface waters.” *Id.*

Litigation surrounding the 2003 CAFO rule considered the extent to which large CAFOs were required to apply for permits and the effectiveness of nutrient management plans. *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 495 (2d Cir. 2005). Following a decision and court order from the Second Circuit, the EPA revised the CAFO rule to address legality concerns. When an agency is directed by a court to make changes in regulations or guidance, these revisions do not require public comment but can be done through a direct final rule. EPA’s 2008 direct final rule contained preamble language which stated that requirements limiting the discharge of pollutants to surface water via groundwater that has a direct hydrologic connection to surface water should be addressed on a site-specific basis. Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision, 73 Fed. Reg. 70418, 70420 (Nov. 20, 2008). The EPA also indicated “that nothing in the 2003 rule was to be construed to expand, diminish, or otherwise affect the jurisdiction of the CWA over discharges to surface water via groundwater that has a direct hydrologic connection to surface water.” National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176 (Feb. 12, 2003). The reference to the 2003 Final Rule is out of context and inaccurately portrayed by the Agency in the 2008 Rule. In the 2003 Final Rule, EPA addressed site-specific concerns but in a limited scope. Site-specific standards concerning a direct hydrologic connection only mentioned additional storage that may be required to meet management or regulatory goals. In this section of the rule, the EPA recommended implementation of NRCS practices “to ensure appropriate design and construction.” The rule has no mention of liability for discharges that result from storage, but only requires additional storage following site-specific assessment as part a farm’s nutrient management plan development.

Further, the EPA’s advisory statement preserving its regulatory authority carries little weight. While such a statement may seem powerful in the 2008 Rule, it has little meaning when placed in context of the 2003 Final Rule. In the 2003 Final Rule, this statement follows the Agency’s explicit recognition of scientific uncertainty and conflicting legal precedent in this area, as well as the EPA’s stated refusal to establish requirements for discharges to surface water that occur via groundwater with a direct hydrologic connection.

With no regulatory justification, the EPA argued that discharges which reach surface waters via groundwater with a direct hydrologic connection are subject to liability under the CWA. The EPA outlined in explicit detail how the CWA’s jurisdiction encapsulates discharges that make their way to WOTUS via diffuse groundwater migration. The crux of EPA’s argument was not the inclusion of any language in the CWA, rather, the absence of language that they claimed would limit federal jurisdiction. EPA’s primary argument was that Congress did not limit regulatory jurisdiction to only direct discharges, that such an omission gave the EPA power over indirect discharges, so long as their connection was direct. This claim is logically flawed. Courts and agencies are required to interpret the text of statutes to determine Congressional intent— they are not asked to speculate what Congress intended by leaving out any given word or phrase. Such an exercise would leave the courts unable to resolve any legal question. If courts had the power to interpret law based on what Congress excluded, words on paper would mean nothing.

The Ninth Circuit considered both the conduit and direct hydrologic connection theories but accepted neither in its opinion. The Court held the County of Maui liable but under a different standard entirely. The standard adopted by the court is made up of three parts:

We hold the County liable under the CWA because (1) the County discharged pollutants from a point source, (2) the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water, and (3) the pollutant levels reaching navigable water are more than de minimis.

The Ninth Circuit gave no explanation for its three-part test. Particularly interesting is the court’s third consideration that the discharge reaches a certain threshold. Not only does this add a new layer to the groundwater discharge liability question, but the larger issue of CWA liability generally. The magnitude of a discharge is not part of the CWA liability scheme – the act by nature is a strict liability statute with no de minimus provision. However, the Ninth Circuit rationalizes, even without acknowledging it, that discharge liability via groundwater cannot be applied if the CWA is to function as Congress intended.

C. Fourth Circuit

In 2014, an underground pipeline leaked gasoline that made its way to tributaries of the Savannah River in South Carolina. Environmental groups sued the company under the Clean Water Act’s citizen suit provision, arguing that the release was an unpermitted point source discharge. The Fourth Circuit agreed. However, rather than a complete adoption of the Ninth Circuit’s three-part test, the Conduit Theory, or EPA’s Direct Hydrologic Connection theory, the Fourth Circuit established a hybrid standard:

Although we conclude that an indirect discharge may fall within the scope of the CWA, such discharges must be sufficiently connected to navigable waters to be covered under the Act. As the Ninth Circuit recently held, a discharge that passes from a point source through ground water to navigable waters may support a claim under the CWA. However, a discharge through groundwater does not always support liability under the Act. Instead, the connection between a point source and navigable waters must be clear.

The Fourth Circuit refused to adopt the Ninth’s Circuit’s “fairly traceable” standard, instead following EPA’s standard which requires a distinct connection from point source, to groundwater, to surface water. The Fourth Circuit strays from EPA’s Direct Hydrologic Connection standard, refusing to limit liability to those discharges with only an indirect connection. However, another Fourth Circuit case, released only five months after the *Kinder Morgan* decision, limited this analysis significantly. In *Sierra Club v. Virginia Electric & Power Company*, the court rejected claims that coal ash seepage through groundwater, which made its way to navigable waters, could be regulated under the CWA. *Sierra Club v. Va Elec. & Power Co.*, 903 F.3d 403 (4th Cir. 2018). Coal ash ponds allow water to separate from solids, leaving ash to sit on the bottom of the pond. The Fourth Circuit opined that coal ash ponds are not CWA point sources because they do not convey pollutant. This is a key distinction. Rather than delivering pollutant to jurisdictional surface waters, coal ash ponds are “’stationary feature[s] of the landscape through which rainwater or groundwater can move diffusely,’ resulting in a type of discharge that the CWA does not regulate.”

D. Sixth Circuit

Most recently, the Sixth Circuit released opinions in two cases, *Kentucky Waterways Alliance v. Kentucky Utilities Company* and *Tennessee Clean Water Network v. Tennessee Valley Authority*. *Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436 (6th Cir. 2018); *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925 (6th Cir. 2018). Both cases considered CWA liability for coal ash ponds designed to permanently store coal combustion residuals. Environmental groups claimed that selenium from the ash made its way to a nearby WOTUS, diminishing local fish populations. The Sixth Circuit followed the Fourth Circuit’s decision in Sierra Club, finding that coal ash ponds are not point sources. However, in both cases the Sixth Circuit diverged from the Ninth and Fourth Circuits by finding that even if the coal ash ponds were point sources, pollutants that make their way from a point source to navigable waters through no discernable, confined, and discrete conveyance are not discharges that can be regulated under the CWA.

Acquiescing to the Fourth Circuit’s decision in Sierra Club, the Sixth Circuit distinguished between facilities which are designed and constructed to convey pollutant and those which are designed to store pollutant. Both the Fourth and Sixth Circuits found that a “simple causal link does not fulfill the Clean Water Act’s requirement that the discharge be from a point source.”

The Court concluded that groundwater, while perhaps a conveyance, is neither confined nor discrete. In reaching this conclusion, the court relied on *South Florida Water Management District v. Miccosukee Tribe of Indians*, which established a standard for CWA conveyances. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). Following the Miccosukee Tribe analysis, the Sixth circuit considered whether groundwater was a channel or medium which facilitated the movement of something from one place to another. Groundwater’s diffuse nature prevents it from consideration as a CWA conveyance because it does not possess channelized flow—pollutants that make their way to WOTUS via groundwater migration occurs by happenstance.

1. Impact on Agriculture: The Conduit and Direct Hydrologic Connection Theories in Context

In February 2019, the Supreme Court granted Certiorari in County of Maui v. Hawaii Wildlife Fund. While this case has the potential to greatly impact all regulated stakeholders, it carries significant weight for all agricultural producers – especially those who raise livestock. Consider the federal and state regulatory balance of AFOs. As previously stated, CAFOs are point sources under the CWA. To meet the CAFO threshold, an operation must first satisfy the definitional standards for AFOs. Large AFOs are automatically regulated as CAFOs, but Small and Medium AFOs are only regulated as CAFOs if they meet specific discharge criteria. Medium AFOs, specifically, can be defined or designated as CAFOs if they discharge pollutants to waters of the United States via some “man-made ditch, flushing system, or other similar man-made device.” Owners and operators of Medium AFOs are aware of this standard and implement practices to prevent discharge including liners in wastewater retention structures, agronomic land application, and a host of other best management practices. Excess nutrients that pass the root zone of a crop can be filtered out by soil before reaching the water table and have a negligible environmental impact.

Manure management systems are specifically designed to contain pollutants. Implementation of such systems can be expensive, but the government realizes their value and provides cost-share programs through the USDA. USDA’s NRCS sets technical standards for manure management systems which must be abided to receive cost-share dollars. However, NRCS standards allow for small amounts of seepage; even the best practices are unable to achieve a zero-discharge standard. As a matter of good public policy, medium or small AFOs that implement NRCS conservation standards on their operations to manage and contain all on-farm nutrients should be absolved of CWA liability. Regrettably, NRCS standards are not enough to foreclose liability under the conduit and direct hydrologic connection theories. Indeed, the very manure management systems constructed to contain pollutants are the legal linchpin to CWA liability. These structures meet the discharge criteria of “man-made ditch, flushing system, or other similar man-made device”. A retention pond or other storage structure at a Medium AFO readily satisfies the catch-all category of man-made device providing the means of defining or designating a Medium AFO as a CAFO. Paradoxically, rather than creating an incentive to implement on-farm conservation programs, the conduit and direct hydrologic connection theories create a deterrent. Such a standard has the potential to regulate thousands of additional livestock and poultry operations, catapulting previously unregulated NPS AFOs into the CWA’s strict liability schema.

Outside the CAFO and AFO world, row crop agriculture stands to lose its long-recognized NPS status. Following the Sixth Circuit’s contentious decision in Cotton Council v. EPA crop producers are required to obtain NPDES permits if they use pesticides. As mentioned above, the CWA exempts agricultural irrigation return flows from regulation and discharge liability. While courts have expanded the irrigation return flow exemption to various sources, no court has considered the scope of “runoff.” Widespread implementation of the direct hydrologic connection or conduit theory in permits would significantly reduce the effectiveness of the CWA’s return flow exemption and promote unsustainable practices. No-till crop production is a viable option for many producers in the United States, depending on their climate and soil conditions. This best management practice is supported by NRCS, in part because it significantly reduces surface runoff, making nutrient application more efficient and effective. However, even the most agronomic application of nutrients cannot ensure 100% nutrient uptake. As some nutrients make it past the root zone, courts may find those producers liable because they implemented a sustainable practice. At what point does regulation penalize excellence in the pursuit of perfection? Courts and the EPA can avoid this unintended consequence by clarifying the irrigation return flow exemption covers discharges that occur from agricultural operations through groundwater due to irrigation. Potential additional liability in light of expanded CWA jurisdiction, without clarification of the Act’s statutory exemptions would lead to farmers abandoning voluntary conservation practices. Such a jurisdictional expansion without equivalent coverage in statutory exemptions would create a new class of regulated stakeholders. For example, organic crop producers that were never previously subject to NPDES regulation under the pesticide permit would need to identify whether they will need coverage due to subsurface water under their cropland.

Farmers and ranchers work hard to ensure that they manage manure in a way that prevents its escape to jurisdictional surface waters. Similarly, crop producers are required to apply pesticides in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). If the Supreme Court ultimately finds that groundwater serves as a conduit from point sources to surface water, the implementation of voluntary on-farm manure management systems will provide no regulatory relief for agricultural producers and will even expose them to CWA liability.

A significant portion of agricultural producers and other regulated entities would face a constant, unpreventable risk of discharge under the direct hydrologic connection or conduit theory. A negligible risk of discharge always exists, and proactive regulated stakeholders will attempt to obtain a CWA NPDES permit to avert liability. The conduit and direct hydrologic connection theories move the goalposts, forcing agricultural producers out of voluntary conservation partnerships and into mandated permitting requirements. Such blurring of the lines will have significant economic impact on regulated stakeholders, and the American economy by consequence. As EPA under the Trump Administration works to rescind the Clean Water Rule (CWR), one driving force is the negative impact that increased federal jurisdiction could have on economic development, with ever-diminishing environmental benefits. Should EPA rescind the CWR, returning surface water jurisdiction to the status quo, implementation of the conduit or direct hydrologic connection theory would counteract this action by stretching federal jurisdiction through other means.