

County of Maui v. Hawaii Wildlife Fund

Background: CWA

- Developed and passed in response to national outrage over 1969 Cuyahoga River fire;
- Very ambitious goals expressed in the CWA:
 - ‘...discharge of toxic pollutants in toxic amounts be prohibited’;
 - ‘...discharge of pollutants into the navigable waters be eliminated by 1985’;
 - ‘...protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983’;
 - ‘...research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters’;
- Effect:
 - Dramatic improvement in water quality;
 - Law lived up to potential... and is in need of reform.

Background: CWA

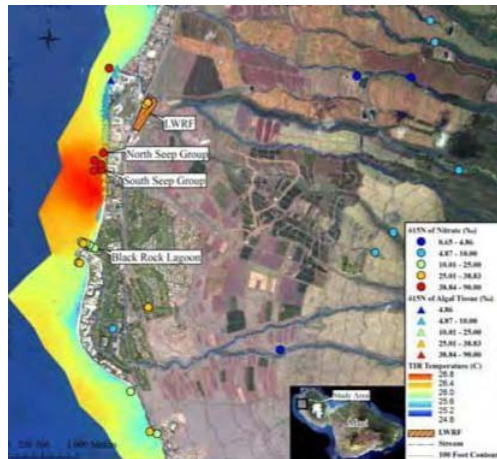
- Covered: all waters 'close to' navigable waters are covered by CWA;
 - 'waters of the United States, including the territorial seas';
 - Intermittent streams, dry lake beds, wetlands?
 - Rapanos v. United States: '...only those relatively permanent, standing or continuously flowing bodies of water...';
- Point sources vs non-point sources;
- Technology standards vs quality standards;
- Tiered standards and anti-degradation;

Background: CWA – six titles

- Title I: declaration of goals, grants for R&D;
- Title II: construction grants for treatment facilities;
- Title III: no discharge w/o permit, technology/quality standards;
- Title IV: structure of permit program;
- Title V: citizen suits, whistleblower protection;
- Title VI: construction grants for treatment facilities, appended 1987;

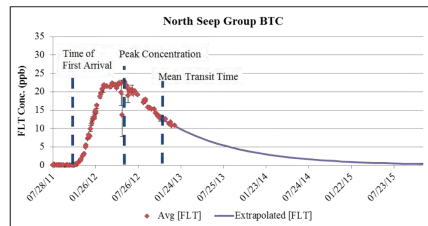
Background: the case

- The Lahaina Wastewater Reclamation Facility (Maui County, Hawaii) treats wastewater from homes and businesses;
- Authorized (EPA, Hawaii Department of Health) to inject the reclaimed water into four Class V wells on the island;
- Leads to $\approx 3\text{--}5$ million gallons/day of which $> 2.7\text{--}4.5$ million gallons/day enters ocean via seepage;
- EPA/state: no need for NPDES permit, not a **point source** under the CWA.

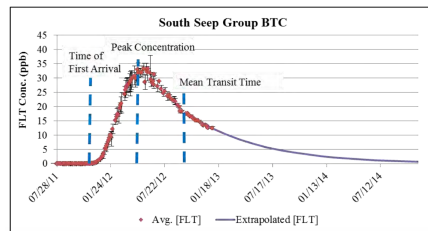


Background

- University of Hawai'i researchers put dye into wells – able to trace wastewater;
- Peak concentration of dye from wells 9-10 months later;
- Estimated 64% of wastewater in wells reaches ocean; treated wastewater could be as much as 92% of spring output:
- “...our results conclusively demonstrate that a hydrogeologic connection exists between LWRF Injection Wells 3 and 4 and the nearby coastal waters of West Maui.”



(a) North Seep Group



- After pleading with county to seek permitting for years, multiple environmental groups...
 - Hawaii Wildlife Fund;
 - Surfrider Foundation;
 - Sierra Club-Maui;
 - Earthjustice;sued the county for lacking permits;
- EPA supported county, arguing that there was no need to permit under CWA.

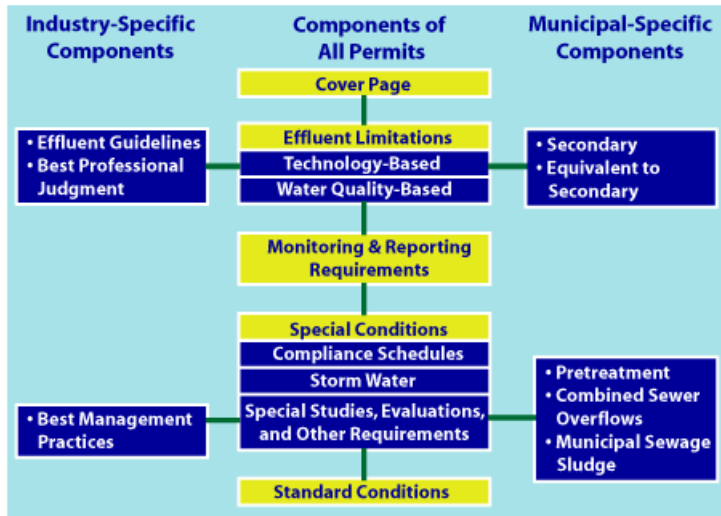
“502(12) The term “discharge of a pollutant” and the term “discharge of pollutants” each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.”

~CWA 1972

- Point sources that discharge to (necessarily “into” or “directly into”?) Waters of the United States require an NPDES permit;
- Nonpoint sources are covered by separate policies (e.g., grants for farmers to manage runoff);

“The NPDES permit program, created in 1972 by the Clean Water Act (CWA), helps address water pollution by regulating point sources that discharge pollutants to waters of the United States. The permit provides two levels of control: technology-based limits and water quality-based limits (if technology-based limits are not sufficient to provide protection of the water body).”

~<https://www.epa.gov/npdes/about-npdes>



Context: legalese

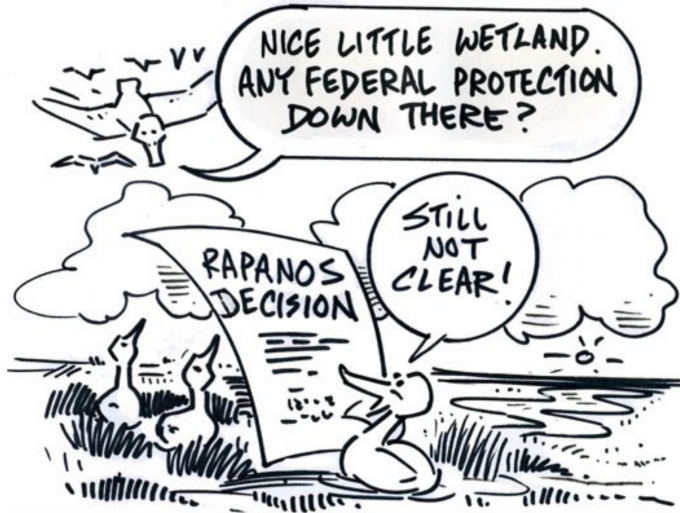
- statutory provision, structure, interpretation
- interpretive guidance
- deference
- citizen suit
- cert. (certiorari)
- plaintiff, respondent, Solicitor General, amici briefs
- textual argument (textualism vs. originalism)
- bright line
- proximate cause
- judgment to reverse/affirm
- majority, plurality, dissent, dicta
- settle

- In 2014 United States District Court for the District of Hawaii found for plaintiffs: facility needed NPDES permits;
- Healdsburg test: plaintiffs must demonstrate a hydrologic connection between the aquifer and the ocean (that is “direct and immediate”);
 - need a connection;
 - connection needs to matter;

Second Decision

- County appealed - appeals for United States District Court for the District of Hawaii go to Ninth Circuit;
- In 2018 Ninth Circuit found for plaintiffs: held that CWA required a permit if pollutants are “fairly traceable” to original point source;
- Traceability test: drew on *Rapanos v. United States*;
 - A 4-1-4 split;
 - Four justices for “do nothing” and let stand the “hydrological connection” test;
 - Justice Kennedy for a new (more limited?) “significant nexus” test;
 - Four justices for a new (much more limited) “permanent surface waters only” test;
 - Kennedy joined the “surface waters only” justices in judgement/outcome (ruling for Mr. Rapanos) but did not join their opinion, making it a plurality opinion not a majority opinion and thus not precedential—i.e., not binding policy.

Second Decision



So what were they left with?

- A decision that relied on a presidentially ambiguous judgement;
- Advanced an novel, possibly ambiguous test – no bright line?;
- EPA changed positions to be more in line with county;
- County filed for writ of certiorari to the Supreme Court.

Third Decision

- Parties agree that:
 - treated waste water is a pollutant;
 - wells are point sources;
 - ocean is navigable;
 - groundwater is not a point source;
- Parties disagree about “from”;
 - County argued that “from” means “delivered by”;
 - Plaintiff argued that “from” means “starting point”;
- 30 amicus briefs:
 - EPA: groundwater is excluded - breaks causal chain;
 - Solicitor general: supports EPA’s position - no agency deference to EPA requested;

Third Decision

- Vacated the Ninth Circuit decision;
- Breyer: Permit required for point sources or for non-point sources when there is “the functional equivalent of a direct discharge”;
- Functionally equivalent to direct discharge test:
 - distance pollutant travels from point source to waterway;
 - time;
- Case remanded to Ninth Circuit under instructions to consider Functionally equivalent to direct discharge test.

Final Thoughts

- Why did we listen to this?
- Demonstration of the complexity of putting policy into law (e.g. “from”);
- Reminder that the Supreme Court does not ONLY declare things constitutional or not - they are final arbiter of statutory interpretation;
- **Is the Clean Water Act good?**