Penn State Environmental Law Review

Volume 8 | Number 1 Article 11

6-1-1999

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I. Introduction

The Clean Water Act (the "CWA") regulates the discharge of pollutants into the nation's waters.[1] The objective of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[2] Its primary regulatory mechanism is the National Pollutant Discharge Elimination System ("NPDES"), which requires permits to be issued for discharges of any pollutant or combination of pollutants into navigable waters.[3] However, courts do not agree on whether the permit system covers pollution discharged into the nation's groundwater that is hydrologically connected to surface waters. Some courts hold that the CWA's NPDES permit requirement applies to discharges to

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1. 33 U.S.C.A. § 1251 (West 1986 & Supp. 1998).
2. *Id.* Congress declared the following policies and goals:

> (1) it is the national goal that discharge of pollutants into navigable waters be eliminated by 1985;
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> (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;
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> (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;
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> (4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;
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> (5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and
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> (6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into navigable waters, waters of the contiguous zone, and the oceans; and
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> (7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

Id.

3. 33 U.S.C.A. § 1342 (West 1986 & Supp. 1998). *See infra* notes 30 and 31 and accompanying text for the definition of "navigable waters."

groundwater when that groundwater affects or is hydrologically connected to surface water.[4] However, other courts hold that the provisions under the CWA do not apply to groundwater, regardless of whether pollutants discharged into such groundwater flow into and pollute surface water.[5]

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4. Mutual Life Insurance Company of New York v. Mobil Corp., No. CIVA96CV1781RSP/DNH, 1998 WL 160820 (N.D.N.Y. Mar. 31, 1998) (denying defendant's motion to dismiss plaintiff's claim that defendant discharged pollutants into navigable water when it released gasoline into a well which plaintiff alleges migrated onto and contaminated its property, because of the broad interpretation given to navigable waters under the CWA and the general policy to protect the quality of surface waters); Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300 (S.D. Iowa, Central Div. 1997) (holding that any pollutants that enter surface waters either directly or through groundwater are subject to regulation by the national pollution discharge elimination system); Friends of Santa Fe County v. LAC Minerals, 892 F. Supp. 1333 (D.N.M. 1995) (holding that the 10th Circuit's expansive construction of the CWA jurisdictional reach foreclosed any argument that the CWA does not protect groundwater with some connection to surface water); Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983 (E.D. Wash. 1994) (holding that the CWA regulates discharges of pollutants that could affect surface water, and therefore regulates groundwater that is hydrologically connected to surface water because the goal of the CWA is to protect the quality of surface water); Sierra Club v. Colorado Refining Co., 383 F. Supp. 1428 (D. Colo. 1993) (holding that the CWA's preclusion of the discharge of any pollutant into navigable waters includes such discharge which reaches navigable waters through groundwater); McClellan Ecological. Seepage Situation (MESS) v. Weinberger, 707 F. Supp. 1182 (E.D. Cal. 1988), vacated on other grounds, 47 F.3d 325 (9th Cir.), *cert. denied*, 116 S. Ct. 51, 113 L.E.2d 16 (1995) (finding clear Congressional intent to limit discharges of pollutants that could affect surface waters of the United States, and thus, holding that groundwater that is hydrologically connected to surface water constitutes "navigable waters" and is regulated under the CWA).

5. Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962 (7th Cir.), *cert. denied* 513 U.S. 930 (1994) (holding that a possibility of a hydrological connection between groundwater and surface water was insufficient to justify CWA regulation); Town of Norfolk v. United States Army Corps of Engineers, 968 F.2d 1438 (1st Cir. 1992) (finding that the definition of "waters of the United States" does not indicate the inclusion or exclusion of groundwater and holding that such a judgment should be left to the discretion of the Army Corps of Engineers or the EPA); Kelley v. United States, 618 F. Supp. 1103 (W.D. Mich. 1985) (holding that the history of the CWA demonstrates that Congress did not intend the Act to extend federal regulatory and enforcement authority over groundwater contamination); United States v. GAF Corp., 389 F. Supp. 1379 (S.D. Tex. 1975) (finding that because of the language of the CWA and its legislative history, Congress could not have meant to achieve in a roundabout fashion (the regulation of groundwater) what it expressly declined to accomplish in a straightforward manner); Exxon Corp. v. Train, 554 F.2d 1310 (5th Cir. 1977) (finding that the legislative history indicates that the CWA did not authorize federal control over any phase of groundwater pollution); Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc., 962 F. Supp. 1312 (D. Ore. 1997) (holding that discharges of pollutants into groundwater are not subject to the CWA's NPDES permit requirement even if that groundwater is hydrologically connected to surface water); Umatilla Waterquality

Resolving this conflict, which exists within the district courts of some circuits, as well as among the circuit courts nationally, is important to companies which discharge pollutants into groundwater, such as those that operate holding ponds, lagoons, landfills, and mines.[6] Retroactive liability for such entities could be created that is similar to that imposed by state and federal waste cleanup statutes if the CWA is held to apply universally to groundwater discharges.[7] Indeed, the CWA is a strict liability statute and a defendant's intent, good faith, and state of mind are irrelevant in establishing liability under the Act.[8]

This Comment will discuss and analyze the legal and policy arguments behind the conflicting positions taken by the courts. This Comment will argue that the NPDES permit requirement should not be applied to groundwater discharges regardless of whether the groundwater is hydrologically connected to, and affects, surface water. Finally, this Comment will contend that Congressio-

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Protective Ass'n, Inc. v. Smith Frozen Foods, Inc., No. 96-657-JO, 1997 U.S. Dist. LEXIS 16458, (D. Ore. September 23, 1997) (finding that the EPA never has promulgated a regulation globally interpreting the CWA's NPDES permit requirement to apply to any discharges of groundwater, and holding that, absent such an interpretation from the EPA, the language of the Act and the legislative history clearly indicates that the permit requirement does not apply to groundwater in any capacity).

6. District Court Affirms Earlier Court Ruling on Ground Water Discharge Under CWA, [1997] 28 ENVTL. REP. (BNA) 1039.

7. *Id.* Retroactive liability could be created similar to that which was imposed on some companies under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"). CERCLA is a federal statute that imposes strict liability and makes persons who are responsible for hazardous substance releases liable for cleanup and restitution costs. *See* ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW IN A NUTSHELL, 4th ed. 222-24 (West Publishing Co. 1996). In one of the early suits by the federal government to recover its costs of removing hazardous substances from disposal sites, the Fourth Circuit in *United States v. Monsanto Co.* applied CERCLA retroactively, and imposed liability on the defendants for conduct which occurred prior to the Act's passage. *See id.* at 228-30.

8. *See* PARTHENIA B. EVANS, THE CLEAN WATER ACT HANDBOOK 198 (1994). The CWA provides for criminal, civil, and administrative enforcement. *See id.* at 195. Section 309 authorizes the United States Environmental Protection Agency to (1) issue an administrative order requiring compliance, (2) bring a civil action, or (3) allow the state to bring the enforcement action where it has been delegated the authority to administer the NPDES permit program. *See id.* at 196. "To establish a violation under section 309, the government must prove five elements: (1) that the defendant is a person (2) who discharged pollutants (3) from a point source (4) into navigable waters (5) without authorization from a valid NPDES permit." *Id.* at 198. Section 309(d) provides for civil penalties for violation of the CWA not to exceed $25,000 per day for each violation. *See id.* at 196-97.

nal intent, as evidenced by the plain language and legislative history of the CWA, clearly supports such a conclusion.

II. Background

A. Historical Overview of the Clean Water Act

The Rivers and Harbors Act of 1890 (the "River and Harbors Act") was the first federal statute that governed water pollution.[9] It prohibited the dumping of waste into the New York Harbor and was intended only to safeguard navigability.[10] In 1899, the River and Harbors Act was amended to grant the Secretary of the Army the power to regulate the discharge of waste into navigable waters through a permit system, regardless of whether such discharge impeded navigation.[11]

Concern regarding the effects of pollution in lakes and streams on public health began to surface in the early twentieth century.[12] In 1912, the Public Health Service was authorized to investigate the health effects of pollution in navigable lakes and streams, but was not given power to institute measures to abate dangerous conditions.[13] The lack of authority to regulate discharges of dangerous pollutants was not considered a significant problem since state and local health agencies, along with the Public Health Service, voluntarily adopted nationwide standards for the treatment of drinking water.[14] By the 1930s, Congress recognized that water pollution was a significant problem and several bills were proposed to address the issue on a national level.[15] It was not until 1948, however, that Congress enacted the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act).[16] Originally, the CWA emphasized cooperative action with local governments and federal enforcement powers were comparatively limited, "the principal federal responsibility being to bolster local pollution control programs with technical services and money."[17] However, in 1965 Congress granted the federal government greater

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9. *See* N. William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality*, 52 IOWA L. REV. 799, 803 (1967).
10. *See id.*
11. *See id.* at 804.
12. *See id.*
13. *See id.*
14. *See* Hines, *supra* note 9, at 804-05.
15. *See id.* at 805-08.
16. *See id.* at 810.
17. *Id.*

control over water quality, amending the CWA to include water quality standards for interstate waters.[18] Nevertheless, the 1965 CWA was ineffective because of its limited scope and difficulties with determining violations under the standards adopted.[19]

The current version of the CWA was the result of a comprehensive revision and recodification in 1972.[20] Several less significant amendments were added in the late 1970's and 1980's.[21] As a result of the amendments, the CWA established a program for continuing the existing standards, while providing flexibility by allowing for their modification.[22] Significantly, the CWA established the NPDES permit program as a federal and state cooperative system to supplement and replace the River and Harbors Act permit program.[23]

B. The National Pollutant Discharge Elimination System Permit Program and the Dispute Among the Courts

Section 301(a) of the CWA provides that "the discharge of any pollutant by any person shall be unlawful" unless such discharge is otherwise in compliance with this section or other sections of the Act.[24] Permitted discharges under the NPDES is one such exception to the general prohibition on the discharge of pollutants.[25] Section 402(a) authorizes the Administrator of the Envi-

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18. *See* EVANS, *supra* note 8, at 5.
19. *See id.*
20. *See id.*
21. *See id.* at 5-6. Evans summarized the amendments in the following manner:

> The highlights of the 1977 amendments were the provisions dealing with sixty-five so-called priority or toxic pollutants. Rather than relying solely on water quality standards, Congress required 'best available technology' limitations for toxic pollutants to be achieved by July 1, 1984. Congress established a new requirement of 'best conventional pollutant control technology' limitations to be achieved by July 1, 1984, for conventional pollutants such as suspended solids, biological oxygen demanding (BOD), fecal coliform, and pH.
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> In 1987, Congress adopted amendments to the CWA that established post-BAT water quality requirements, provided for administrative civil remedies, and codified the requirements for stormwater discharges and other features of the program.

Id.

22. *See id.* at 5.
23. *See* EVANS, *supra* note 8, at 5.
24. 33 U.S.C.A. § 1311(a) (West 1986).
25. 33 U.S.C.A. § 1342 (West 1986 & Supp. 1998). NPDES permits have five components. *See* EVANS, *supra* note 8, at 14. They are: (1) technology-based limitations, (2) water quality-based limitations, (3) monitoring and reporting requirements, (4) standard conditions, and (5) special conditions. *See id.*

ronmental Protection Agency (the "EPA") to issue permits for "the discharge of any pollutant, or combination of pollutants" provided that such discharge meets certain requirements.[26] Specifically, the NPDES permit program and its regulations require "permits for the discharge of 'pollutants'[27] from any 'point source'[28] into 'waters of the United States.'"[29]

"Technology-based limitations are industry-specific and are based upon technological and economic capabilities." *Id.* Water-quality based limitations are "limitations necessary to ensure that a discharge complies with applicable state water quality standards [and] must be included in NPDES permits." *Id.* The monitoring and reporting requirements require the permittee to monitor its pollutant discharges and report the results, and allows the EPA to determine whether the discharger is complying with permit limitations. *See id.* Certain standard conditions the EPA has promulgated must be included in NPDES permits. *See id.* at 15. Finally, special conditions are site-specific and may be incorporated into the NPDES permit as is deemed appropriate. *See* EVANS, *supra* note 8, at 16.

26. 33 U.S.C.A. § 1342(a)(1) (West 1986 & Supp. 1998).

27. "Pollutant" is defined as "dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954 . . .), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." EPA Administered Permit Programs: The National Pollutant Discharge Elimination System, 40 C.F.R. § 122.2 (1995). *See also* 33 U.S.C.A. § 1362(6) (West 1986 & Supp. 1998). "Pollutant" does not mean "(a) [s]ewage from vessels; or (b) water, gas or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well" if certain requirements are met. 40 C.F.R. § 122.2. *See also* 33 U.S.C.A. § 1362(6).

"Discharge of a pollutant" is defined as:

> (a) [a]ny addition of any 'pollutant' or combination of pollutants to 'waters of the United States' from any 'point source,' or (b) [a]ny addition of any pollutant or combination of pollutants to the waters of the 'contiguous zone' or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation.

40 C.F.R. § 122.2. *See also* 33 U.S.C.A. § 1362(12) (West 1986).

28. "Point source" is defined as "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, landfill leachate collection system, vessel or other floating craft, from which pollutants are or may be discharged." 40 C.F.R. § 122.2. *See also* 33 U.S.C.A. § 1362(14) (West 1986 & Supp. 1998). "'The definition of a point source is to be broadly interpreted,'" and an entire facility may be a point source. *See* Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1319 (S.D. Iowa Central Div. 1997).

29. 40 C.F.R. § 122.1 (1995). The EPA defines "waters of the United States" as follows:

> (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all water which are subject to the ebb and flow of the tide;

The controversy over whether the CWA covers groundwater that is hydrologically connected to, and therefore, affects the quality of, surface water is related to Congress's definition of navigable waters. The term "navigable waters" is misleading because it is not limited to waters that are in fact navigable.[30] Under the CWA, navigable waters is defined as "the waters of the United States, including the territorial seas."[31] The EPA has broadly interpreted "navigable waters" and the courts have upheld that interpretation to include any surface water body capable of affecting interstate commerce.[32] Nevertheless, courts still disagree on whether such an expansive definition of "waters of the United States" includes groundwater, and therefore, disagree on whether an NPDES permit

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(b) All interstate waters, including interstate 'wetlands;'

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, 'wetlands,' sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) 'Wetlands' adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

40 C.F.R. § 122.2.

30. *See* EVANS, *supra* note 8, at 10. *See also, e.g., United States v. Phelps Dodge*, 391 F. Supp. 1181 (D. Ariz. 1975) (stating that "a legal definition of 'navigable waters' or 'waters of the United States' . . . includes normally dry arroyos through which water may flow, where such water will ultimately end up in public waters such as a river or a stream"); Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983 (E.D. Wash. 1994) (*quoting* United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455 (1985)) (stating that "the Supreme Court recognized that 'the term navigable is of little import.' To the extent permitted under the Constitution, Congress intended 'navigable waters' to embrace virtually 'every creek, stream, river or body of water that in any way may affect interstate commerce'").

31. 33 U.S.C.A. § 1362(7) (West 1986).

32. United States v. Riverside Bayview House, Inc., 474 U.S. 121, 132, 106 S. Ct. 455, 462, 88 L.E.2d 419, 429 (1985) (citing C.F.R. § 323.2).

is required for discharges into groundwater.[33] This Comment will examine representative cases on each side of the controversy to describe the reasoning behind the two different views.

1. Courts that Hold that Groundwater Is Not Regulated by the NPDES Permit Program—Several district and circuit courts have held that groundwater hydrologically connected to surface water is not considered "navigable water" under the CWA.[34] Under this view, the NPDES permit program does not regulate discharges of pollutants into groundwater.[35] These courts conclude that Congress clearly intended not to regulate such groundwater under the NPDES permit system based on the legislative history and the plain language of the statute.[36]

In *Exxon Corporation v. Train*, one of the first cases to deal with the groundwater issue after the 1972 amendments to the CWA, the court addressed the issue whether the Environmental Protection Agency ("EPA") has the authority under the CWA to control the discharge of wastes into deep wells in which the groundwater was considered isolated and non-migrating.[37] Exxon did not have an NPDES permit for the discharges into those wells.[38] Exxon's position was that the EPA did not have jurisdiction over discharges to groundwater under the NPDES permit program.[39] To the contrary, the EPA argued that as an incident to its power to issue permits authorizing the discharge of pollutants into surface water, it has the power to place conditions in such permits that limit the associated disposal of wastes into wells.[40] The court held that Congress did not grant the EPA that power, but declined to express an opinion on the EPA's authority to regulate the discharge of pollutants into groundwater that migrates to surface water.[41] The court based its conclusion on the legislative history and the structure of the CWA.[42]

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33. *See* Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc., 962 F. Supp. 1312, 1314, 1317 (D. Ore. 1997).

34. *See, e.g.*, Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 963, 966 (7th Cir. 1994).

35. *See id.* at 965.

36. *See id.* at 964-66.

37. Exxon Corp. v. Train, 554 F.2d 1310, 1311-12 (5th Cir. 1977).

38. *See id.* at 1313-14.

39. *See id.* at 1314.

40. *See id.* at 1312.

41. *See id.*

42. *See Exxon Corp.*, 554 F.2d at 1317-30. After stating that the court had "examined the structure of the Act and its legislative history in an attempt to

Regarding the structure of the CWA, the court reasoned that "a clear pattern of congressional intent with respect to groundwater emerges upon close examination of those sections of the Act that deal with the subject."[43] First, the court found that the CWA specifically provided for information gathering regarding how to deal with the groundwater pollution problem and encouraged cooperative efforts with the states to control groundwater pollution.[44] Additionally, the court noted that Congress included two provisions in the CWA designed to encourage protection of groundwater in the Administrator's authorization to make grants to state and local authorities for the construction of waste treatment facilities.[45] Thus, Congress intended to develop information on

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discern the congressional intent with regard to the question here," the court stated:

> What we have found belies an intention to impose direct federal control over any phase of pollution of subsurface waters. Instead, the congressional plan was to leave control over subsurface pollution to the states until further studies, provided for in the Act, determined the extent of the problem and possible methods for dealing with it. In our view, the evidence is so strong that Congress did not mean to substitute federal authority over groundwaters for state authority that the Administrator's construction, although not unreasonable on its face, must give way because "it is contrary to congressional intentions."

Id. at 1322.

43. *Id.* at 1322.

44. *See id.* The court found, for instance, that the following sections of the CWA demonstrate that Congress intended to encourage the development of information necessary to deal with groundwater pollution:

> s[ection] 102, "Comprehensive Programs for Water Pollution Control," provides . . . : (a) The Administrator shall, after careful investigation, and in cooperation with other Federal agencies, interstate agencies, and the municipalities and industries involved, prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of navigable waters and ground waters and improving the sanitary condition of surface and underground waters.
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> s[ection] 104, "Research, Investigations, Training, and Information," provides . . . : (a) The Administrator shall establish national programs for the prevention, reduction, and elimination of pollution and as part of such programs shall— . . . (5) in cooperation with the States, . . . and other Federal agencies establish, equip, and maintain a water quality surveillance system for the purpose of monitoring the quality of the navigable waters and ground waters.

Id. at 1322-23. *See also* 33 U.S.C.A. § 1252(a) (West 1986); 33 U.S.C.A. § 1254(a) (West 1986 & Supp. 1998).

45. *See Exxon Corp.*, 554 F.2d at 1323. The court noted that section 202(a) provides for certain federal grants for projects approved by the Administrator to be increased. *See id.* The court also noted that section 208(b) set up a process and authorized certain grants designed to encourage and facilitate establishment of areawide waste treatment management plans, and such plans must protect ground and surface water quality. *See id.*

groundwater pollution but left regulation of the problem to the individual states.

Most importantly, the court noted that provisions found in certain sections of the CWA that transformed the information gathered into enforceable limitations were not set forth within the sections dealing with groundwater.[46] For instance, section 304(b) directs the Administrator to publish guidelines identifying the degree of effluent reduction attainable through application of the best practicable and best available technology for classes of point sources and to use those guidelines in establishing effluent limitation regulations, which are incorporated into permits.[47] In contrast, section 304(a) includes no similar provision for transforming the information developed to deal with the groundwater problem into enforceable limitations.[48] The court found that the absence of provisions for transforming such information into limitations "strongly suggests that Congress meant to stop short of establishing federal controls over groundwater pollution," and that the purpose of the legislation was for the individual states to benefit from the knowledge which was developed.[49] Thus, granting to the EPA Administrator "power to control groundwater pollution resulting from deep-well disposal . . . would stand in sharp contrast to the evident structure of the rest of the Act."[50]

The court also found that the legislative history of the CWA strongly supported the conclusion that Congress did not intend to regulate groundwater under the NPDES permit program.[51] The court noted that the report of the Senate Committee on Public Works that accompanied the bill stated that the Committee did not adopt a recommendation to "establish Federally approved standards for groundwater which permeate rock, soil, and other subsurface formations" because of the complexity of the jurisdiction regarding groundwater.[52] Although the Committee report noted the importance of groundwater in the hydrological cycle, and that rivers, streams and lakes are supplied with water from the ground, it

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46. *See id.* at 1324.
47. *See id.* at 1323-24.
48. *See id.* at 1324.
49. *See id.*
50. *See Exxon Corp.*, 554 F.2d at 1325.
51. *See id.*
52. *See id.* (citing S. REP. NO. 414, 92d Cong., 1st Sess. 73 (1971), 2 Leg. Hist. 1491, U.S. Code Cong. & Admin. News 1972, p. 3739).

declined to regulate it.[53] The court concluded that the committee did not intend to interfere with state programs implemented to control groundwater pollution, but meant only to provide the states with the information needed to operate their own groundwater pollution control programs.[54]

Finally, the court noted that a representative testified in favor of adding federal standards and controls over groundwater stating that "'without reason or rationale, [the bills] virtually exempt the subject of ground water pollution from the purview of Federal study and regulation.'"[55] In fact, the representative noted that the term groundwater appeared in other sections of the CWA, but was not included in the sections enacting NPDES.[56] Consequently, an amendment was introduced to bring groundwater within the NPDES permit provisions.[57] There was a "heated" debate, but the amendment failed.[58] Therefore, the court concluded that the

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53. *See id.* The Senate report stated:

> The importance of groundwater in the hydrological cycle cannot be underestimated. Although only about 21.5 percent of our domestic, industrial [sic](,and) agricultural supply comes directly from wells, it must be remembered that rivers, streams and lakes themselves are largely supplied with water from the ground not surface runoff.
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> Present water pollution control programs concentrate on the control of pollutants placed in surface waters, on the assumption that to control these inputs will assure desirable qualities in the groundwaters. Unfortunately, this is not always the case. . . .
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> Groundwater pollution is not as serous a national problem as is surface water pollution, but groundwater availability and quality is deteriorating. In some locales, serious hazard exists.

Id. (quoting S. REP. NO. 414, 92d Cong., 1st Sess. 73 (1971), 2 Leg. Hist. 1491, U.S. Code Cong. & Admin. News 1972, p.3739).

54. *See id.* at 1325-26.

55. *See Exxon Corp.*, 554 F.2d at 1327-28.

56. *See id.* at 1327.

57. *See id.* at 1326-27. Representative Aspin stated:

> (T)he amendment brings ground water into the subject of the bill, into the enforcement of the bill. Ground water appears in this bill in every section, in every title except title IV. It is under the title which provides [that] EPA can study ground water. It is under the title dealing with definitions. But when it comes to enforcement, title IV, the section on permits and licenses, then ground water is suddenly missing. That is a glaring inconsistency which has no point. 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.

Id. at 1328 (quoting 118 CONG. REC. 10666 (1972), 1 Leg. Hist. 589 (remarks of Rep. Aspin)).

58. *See id.* at 1328. Various members of Congress expressed their opposition to the regulation of groundwater under NPDES citing the lack of knowledge to devise standards. *See id.* at 1328-29 (citing 118 CONG. REC. 10666-669 (1972), 1

legislative history demonstrates that Congress believed it was not granting the Administrator any power to control disposal into non-migrating groundwater.[59]

Village of Oconomowoc Lake v. Dayton Hudson Corporation applied the *Exxon Corporation* rationale to the discharge of pollutants into groundwater that eventually migrates into surface water.[60] In *Dayton Hudson Corporation,* the dispute regarded the development of a warehouse that the Village of Oconomowoc (the "Plaintiff") claimed would have indirect effects in discharging pollutants into a nearby lake.[61] The Plaintiff claimed that trucks would drip oil onto the paved surface around the warehouse that would be washed into a nearby retention pond after a rain storm.[62] The contended violation was that the polluted water from the pond would seep into the ground and eventually be discharged into a lake, which is considered "navigable water."[63]

The court held that the district court had properly dismissed the Plaintiff's complaint by holding that groundwater is not part of "waters of the United States," even though groundwater eventually reaches streams, lakes, and oceans.[64] Although "[t]he Clean Water Act is a broad statute, reaching waters and wetlands that are not navigable or even directly connected to navigable waters,"[65] it does not assert authority over groundwater even when the groundwater is hydrologically connected to surface water.[66] The court found that Congress intentionally declined to regulate groundwater because it defeated a proposed Amendment that would have

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Leg. Hist. 589-596). In fact, one representative stated, "I think this is a very dangerous amendment, and I hope that we do not accept it lightly because, as I understand what they are attempting to do here is bring ground water under the control of the EPA." *Id.* at 1329 (quoting 118 CONG. REC. 10669 (1972), 1 Leg. Hist. 596).

59. *See id.*

60. *See* Village of Oconomowoc v. Dayton Hudson Corp., 24 F.3d 962, 964-65 (7th Cir. 1994).

61. *See id.* at 963.

62. *See id.*

63. *See id.*

64. *See id.* at 963, 966.

65. *See Dayton Hudson Corp.,* 24 F.3d at 964.

66. *See id.* It has been argued that all groundwater comes within the regulatory power of the federal government through the Commerce Clause of the United States Constitution. *See id.* However, the court found that the CWA "does not attempt to assert national power to the fullest." *Id.* It stated that "'[w]aters of the United States' must be a subset of 'water'; otherwise why insert the qualifying clause in the statute?" *Id.*

included groundwater within the permit system.[67] Congress did so in part because of the complexity of groundwater jurisdiction and related regulation; it elected to leave groundwater regulation to the states.[68] Thus, *Dayton Hudson* reaffirms that the jurisdictional complexity surrounding groundwater jurisdiction, which the legislature noted approximately twelve years earlier, is still considered applicable rationale by the courts in holding the NPDES permit program not applicable to groundwater.

Additionally, the court found that the EPA has not formally interpreted the NPDES permit program to include groundwater within its jurisdiction.[69] It stated that although the EPA noted a possible connection between groundwater and surface water in its Permit Application Regulations for Storm Water Discharges, the EPA had merely made a "collateral reference to groundwater in those regulations and that such a reference was not satisfactory in creating enforceable regulations."[70] Nevertheless, the court stated that it would be a more difficult question if the EPA formally promulgated a regulation covering groundwater,[71] implying that the EPA may, in fact, have the power to regulate groundwater under the NPDES permit program if it formally promulgates such a regulation.[72]

Umatilla Waterquality Protective Association, Inc. v. Smith Frozen Foods, Inc., one of the recent cases analyzing the applicability of the NPDES permit program to groundwater, also held that the NPDES permit system does not regulate discharges of pollut-

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67. *See id.* at 965.

68. *See id.* The court cited *Exxon Corporation* with approval for its summary of the legislative history behind the statutory sections enacting the NPDES permit program as it relates to the groundwater issue. *See id.* at 965. *See also supra* notes 42 to 59 and accompanying text.

69. *See Dayton Hudson Corp.*, 24 F.3d at 965.

70. *See id.* at 966.

71. *See id.*

72. Circuit Judge Manion apparently does not agree with the majority that the EPA may have the power to regulate groundwater under the current form of the CWA. *See Dayton Hudson Corp.*, 24 F.3d at 966 (Manion, Circuit Judge, concurring). In his concurring opinion he stated:

> Nor would I suggest that the EPA can figuratively "wade in" to ground water as part of the waters of the United States without first having specific direction from Congress to do so. This would take more than a simple amendment of regulations by the administrators at the EPA. Regulations are promulgated at the direction of Congress, and at this juncture, Congress has not permitted collateral attacks against parking lots, septic tanks, and sprinkler systems—the natural consequence if we were to approve the interpretation espoused by the plaintiffs.

Id.

ants into groundwater hydrologically connected to surface water.[73] The court applied the *Exxon Corporation* rationale basing its decision on the plain language of the statute and the legislative history behind the CWA.[74] Additionally, the court found persuasive the fact that current EPA regulations did not include groundwater within the NPDES permit program.[75]

Significantly, on a motion for reconsideration filed by the plaintiff, the court held that the most recent EPA regulations are not entitled to Chevron deference and dismissed the motion.[76] In its motion, the plaintiff argued that "since [the court's] April 9 decision, EPA has formally interpreted the Clean Water Act so that the NPDES permit requirement applies to discharges to groundwater that is hydrologically connected to surface water."[77] In a response to a comment on its notice of Final General NPDES Permit for Concentrated Animal Feeding Operations in Idaho dated April 27, 1997, the EPA stated that the CWA "does not give the EPA the authority to regulate groundwater quality through NPDES permits [and] [t]he only situation in which groundwater may be affected by the NPDES program is when a discharge of pollutants to surface waters can be proven to be via groundwater."[78] Additionally, the court noted that the EPA, in an earlier regulation, stated that "'many discharges of pollutants from a point source to surface water through groundwater (that constitutes a direct hydrologically connection) also may be a point source discharge to waters of the United States.'"[79] The court held that the EPA's interpretation of its authority to regulate groundwater under the NPDES permit program, as set forth in the regulations it promul-

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73. *See* Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc., 962 F. Supp. 1312, 1317 (D. Ore. 1997).

74. *See id.* at 1318-19. *See also supra* notes 42 to 59 and accompanying text.

75. *See id.* at 1319. However, the court stated that "if EPA in the future formally interprets the CWA so as to bring hydrologically-connected groundwater explicitly within the ambit of NPDES permitting, this court will accord that formal interpretation normal Chevron deference." *Id.* at 1319 n.2. *See infra* note 80 for discussion of judicial deference in administrative proceedings.

76. *See* Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc. No. 96-657-JO, 1997 U.S. Dist. LEXIS 16458, at *2 (D. Ore. Sept. 23, 1997).

77. *Id.*

78. Final General NPDES Permit for Concentrated Animal Feeding Operations (CAFO) in Idaho, 62 Fed. Reg. 20,177, 20,178 (April 25, 1997); *Smith Frozen Foods, Inc.*, 1997 U.S. Dist. LEXIS 16458, at *5.

79. *Smith Frozen Foods, Inc.*, 1997 U.S. Dist. LEXIS 16458, at *5-6 (*quoting* EPA Final Guide Manual on NPDES Regulations for Concentrated Animal Feeding Operations, at 2.1 (Dec. 1995)).

gated, was not entitled to deference[80] because the regulations were

80. The Administrative Procedures Act (APA) governs agency actions and determines the scope of judicial review of those actions. 1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 2.30, at 120 (2d ed. 1997 & Supp. 1998). Agency action is entitled to deference and the degree of deference granted in judicial review of agency action depends on whether a court is faced with administrative policymaking, policy that the agency created under authorization from Congress, or agency deriving policy through interpretation of statutory law. 3 *id.* § 12.30, at 232-33. Koch explained this distinction in the following manner:

> If a court is faced with administrative policymaking, policy the agency itself has created under authorization from congress, then its review authority is very limited. That is, when the law giving authority leaves to the agency the power to decide how to advance or protect collective goals of the community as a whole, it authorizes the agency to make policy rather than making policy itself. It does not authorize courts to do so and hence, a court violates the law if it unduly infers such authority. The limit is not on the judicial power over law but on the judicial power under the law to exercise a policymaking function assigned elsewhere.
>
> On the other hand, if a court is faced with the agency deriving policy from some other source— . . . usually the interpretation of statutory law—then the court has the power of decision at least vis-a-vis the agency. The agency's authority is secondary here because it is doing no more than interpreting a decision made by another institution. Moreover, the court can claim superior expertise in interpreting the law. . . . [C]ourts have been admonished to respect the agency's view of the law under which the agency operates, i.e. to give 'deference' to the agency's interpretations of law within the agency's specific sphere of interest.

3 *id.* § 12.30, at 233-34.

Thus, "'an agency acting within its authority to make policy choices consistent with the congressional mandate should receive considerable deference from courts, provided . . . that its actions conform to applicable procedural requirements and are not arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law.'" 3 *id.* § 12.31[2], at 240 (*citing* Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, 464 U.S. 89, 97 n.8 (1983)). Essentially, a reviewing court is limited to determining whether the "agency's exercise of policymaking discretion is the result of the appropriate intellectual process," 3 *id.*, and whether the agency has "articulate[d] a rational connection between its factual judgments and its ultimate policy choice." 3 *id.* § 12.31[4], at 245 (quoting Center for Auto Safety v. Federal Highway Administration, 956 F.2d 309, 313 (D.C. Cir. 1992). However, the case for judicial deference is less compelling when an agency fails to follow prior policy that has been established, and must adequately explain that failure. 3 *id.* § 12.31[5], at 246.

To the contrary, a court reviewing an agency's interpretation of law must agree with the agency's interpretation, rather than merely finding it reasonable or not arbitrary. 3 *id.* § 12.32[1], at 250. "Section 706 of the APA [provides that]: '[t]he reviewing court shall—(2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) . . . not in accordance with the law.'" 3 *id.* § 12.32[1], at 251. Thus, "[a] court cannot let stand an erroneous view of the law." 3 *id.* § 12.32[1], at 250. Nevertheless, courts are required to grant an agency's interpretation of the law deference, which requires courts to exercise judicial restraint in reviewing an agency's interpretation. 3 *id.* § 12.32[1], at 251-52.

Courts generally follow a two step process in evaluating an agency's

not sufficiently comprehensive, definitive, or formal.[81]

The cases described above, *Exxon Corporation*, *Dayton Hudson Corporation*, and *Smith Frozen Foods, Inc.*, set forth the basic framework of analysis employed by courts that hold that the NPDES permit program does not apply to groundwater, even when the groundwater can be shown to be hydrologically connected to surface water.[82] These courts agree that the legislative history and plain language of the CWA clearly require such a conclusion. Additionally, some courts find that current EPA interpretations are not sufficiently comprehensive to entitle them to deference and hold that discharges to groundwater do not require an NPDES permit.

2. Courts that Hold that Groundwater is Regulated by the NPDES Permit Program—Courts that hold that groundwater hydrologically connected to surface water is considered "navigable water" under the CWA distinguish between "isolated" groundwater and groundwater that is hydrologically connected to, and thus, flows into and affects surface water.[83] These courts hold that, although discharges to "isolated" groundwater are not regulated under the permit program, groundwater hydrologically connected to surface water is regulated under the permit program.[84] These courts find that the Congressional purpose for enacting the CWA, to protect the nation's waters, is persuasive in supporting a broad interpreta-

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interpretation of law. 3 *id.* § 12.32[2], at 255. First, the court "must give effect to the unambiguously expressed intent of Congress." 3 *id.* § 12.32[2], at 256. The inquiry ends here if such intent can be determined. However, if the statute is ambiguous or does not deal with the specific issue, the court must then determine whether the agency's interpretation is reasonable, and must uphold that interpretation if it is reasonable. 3 *id.*

This is merely a general overview of judicial review of agency action under the APA; there are many complex issues regarding such judicial review. Any further discussion of judicial review under the APA is beyond the scope of this comment.

81. *See Smith Frozen Foods, Inc.*, 1997 U.S. Dist. LEXIS 16458, at *6-7. The court stated that "[i]n the absence of a clear and global interpretation from EPA that delegated states must adopt as a modification to their often-longstanding NPDES permitting programs, the language of the Act, the regulatory history of the Act, and the Act's legislative history leave this court convinced that the NPDES permit requirement does not apply to any discharges to groundwater." *Id.* at *11. Thus, the court indicates that the EPA may have the power to promulgate regulations that brings groundwater hydrologically connected to surface water under the NPDES permit program.

82. *See supra* note 5, for cases that hold or support the conclusion that the NPDES permit program does not regulate groundwater hydrologically connected to surface water.

83. *See, e.g.*, Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983, 989 (D. Wash. 1994).

84. *See id.* at 990.

tion of the Act.[85]

For example, in *Sierra Club v. Colorado Refining Company*, the court extended the Tenth Circuit's rationale for holding the permit system applicable to discharges to surface water bodies that are not in fact navigable and applied it to discharges to groundwater hydrologically connected to surface water.[86] In *Colorado Refining Company,* the plaintiff, Sierra Club, asserted a cause of action against the defendant, Colorado Refining Company, for discharging pollutants into groundwater beneath the defendant's refinery that eventually reaches a creek or "navigable water."[87]

The court found that two opinions within the Tenth Circuit indicate that the Circuit has broadly interpreted the CWA.[88] First, the court noted that *United States v. Earth Sciences, Inc.* ruled that unpermitted waste escaping into a creek partially through groundwater seeps violated the CWA "which 'was designed to regulate to the fullest extent possible those sources emitting pollution into rivers, streams and lakes.'"[89] The court found that Congress "'intended to regulate discharges into every creek, stream, river or body of water that in any way may affect interstate commerce [and that] [e]very court to discuss the issue has used a commerce power approach and agreed upon that interpretation."[90] Secondly, the court noted that *Quivira Mining Company v. United States EPA* held that the EPA had the authority to regulate discharges to normally dry arroyos under the NPDES permit system, reasoning that although the arroyos were not in fact navigable there is a surface connection with navigable water during times of heavy rains.[91] That court stressed that "'it was the clear intent of Congress to regulate waters of the United States to the fullest extent possible.'"[92]

The *Colorado Refining Company* court stated that "[t]hese decisions leave little doubt that the Tenth Circuit has chosen to

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85. *See* McClellan Ecological Seepage Situation (MESS) v. Weinberger, 707 F. Supp. 1182, 1193-95 (E.D. Cal. 1988).

86. *See* Sierra Club v. Colorado Refining Co., 838 F. Supp. 1428, 1433-34 (D. Colo. 1993). 1432.

87. *See id.* at 1432.

88. *See id.* at 1433.

89. *Id.*

90. *Id.*

91. *See Colorado Refining Co.,* 838 F. Supp. at 1434. An arroyo is "a water course (as a creek or stream) in an arid region" or "a water-carved gully or channel." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 49 (G. & C. Merriam Company 1972).

92. *Colorado Refining Co.,* 838 F. Supp. at 1434.

interpret the terminology of the Clean Water Act broadly to give full effect to Congress' declared goal and policy 'to restore and maintain the chemical, physical and biological integrity of the Nation's waters.'"[93] Therefore, the court concluded that discharges to groundwater hydrologically connected to surface water are subject to the NPDES permit program.[94]

McClellan Ecological Seepage Situation (MESS) v. Weinberger also holds that discharges to groundwater hydrologically connected to surface water are subject to the NPDES permit program but that isolated groundwater is clearly not regulated by the program.[95] In this case, the plaintiff, McClellan Ecological Seepage Situation, alleged that McClellan Air Force Base violated the CWA because it failed to obtain an NPDES permit for wastes discharged into the groundwater beneath the base.[96] The court's holding essentially rests on the conclusion that Congress, in enacting the CWA, intended to limit discharges that could affect surface waters.[97] The court supported its holding in the following manner:

> Whereas it is clear that Congress did not intend to require permits for discharges to isolated groundwater, it is also clear that Congress did mean to limit discharges of pollutants that could affect surface waters of the United States. In Riverside Bayview, for instance, the [Supreme] Court [of the United States] noted the importance of the Corps' conclusion that adjacent wetlands "may affect the water quality of adjacent lakes, rivers, and streams" by "serv[ing] to filter and purify water draining into adjacent bodies of water . . . and . . . slow-[ing] the flow of surface runoff into lakes, rivers, and streams and thus prevent[ing] flooding and erosion."[98]

The court also noted that other courts have taken notice of the ultimate effect on surface waters in holding the NPDES permit program applicable to discharges to groundwater hydrologically connected to surface waters, and, thus, held that the plaintiff should be given the opportunity to show such a hydrological connection.[99]

Thus, these courts generally agree with the *Exxon Corporation*

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93. *Id.* (citing 33 U.S.C. § 1251(a)).
94. *See id.*
95. *See* McClellan Ecological Seepage Situation (MESS) v. Weinberger, 707 F. Supp. 1182, 1193-95 (E.D. Cal. 1988).
96. *See id.* at 1193.
97. *See id.* at 1196.
98. *Id.* (quoting United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455. 463 (1985)).
99. *See id.*

holding and rationale as it applies to isolated or non-migrating groundwater. However, they do not agree that the *Exxon* analysis applies to groundwater hydrologically connected to surface water. *MESS* and *Colorado Refining Company* demonstrate the basic framework of analysis employed by courts holding that the NPDES permit program applies to groundwater hydrologically connected to surface water.[100] These courts have generally found that the permit program regulates discharges into groundwater if a connection exists between surface water and that groundwater such that the discharge will affect the quality of the surface water. The courts reason that Congress intended to use its power under the Commerce Clause to the fullest extent possible.

III. Analysis

The plain language of the CWA and its legislative history clearly support the conclusion that, although Congress found the quality of the nation's groundwater important, Congress had intended to distinguish between groundwater and surface water in implementing the NPDES permit system. The statute indicates that Congress intended to encourage the development of information to deal with the groundwater problem at the federal level and to encourage the states to develop and to implement groundwater pollution control programs, but to preclude federal enforcement.[101] Therefore, courts should hold that discharges to groundwater hydrologically connected to surface water do not require a NPDES permit.

Nevertheless, one commentator argues that "[o]nly by including tributary groundwater within 'navigable waters' can the CWA fulfill its stated objective of 'restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters;'" therefore, courts should hold navigable waters to include tributary groundwater.[102] He asserts that "arguments for the inclusion of tributary groundwater are supportable by the CWA and the CWA's legislative history" and contends that the most compelling argument for including groundwater within the definition of "navigable waters" is found in *United States v. Ashland Oil and Transportation*

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100. *See supra* note 4, for cases holding that the NPDES permit program applies to discharges to groundwater hydrologically connected to surface water.

101. *See supra* notes 42 to 59 and accompanying text.

102. Philip M. Quatrochi: Comment, *Groundwater Jurisdiction Under the Clean Water Act: The Tributary Groundwater Dilemma*, 23 B.C. ENVTL. L. REV. 603, 640 (1996).

Company.[103] In that case, the "[d]efendant-appellant was indicted for failing immediately to report the discharge of 3,200 gallons of oil into the water of Little Cypress Creek, which was a tributary of a nonnavigable stream."[104] The court reviewed various provisions of the CWA and portions of its legislative history and then stated that "Congress knew exactly what it was doing and that it intended the Federal Water Pollution Control Act to apply . . . 'to all water bodies, including mainstreams and their tributaries.'"[105] Thus, the court held that "the Congressional language must be read to apply to our case involving pollution of one of the tributaries of a navigable river."[106] He argues that "[c]ourts should take the approach of *Ashland* and focus not on the nature of the water into which the pollution initially is discharged, but rather on the ultimate destination of the pollution," and apply the NPDES permit system to groundwater hydrologically connected to surface water.[107]

The reasoning of the courts holding that groundwater hydrologically connected to surface water is regulated under the NPDES permit program, as well as the commentator's position described above on the issue, is somewhat compelling on the surface. However, the United States Supreme Court has stated that "[i]f [an] . . . Act falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not . . . the courts, to address."[108] Thus, if the statutory language and legislative history show that Congress did not intend to authorize the regulation of groundwater under the NPDES program, then courts may not interpret the statute otherwise, regardless of whether such an interpretation benefits the public interest or promotes the purported broad purposes of the legislation. In fact, the structure of the CWA as well as its legislative history supports the conclusion that Congress intended to preclude all groundwater from federal regulation and enforcement.

The CWA, in certain sections, as *Exxon Corporation* noted in its comprehensive review of groundwater jurisdiction under the

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103. *Id.* at 641.
104. United States v. Ashland Oil and Transportation Co., 504 F.2d 1317, 1319 (6th Cir. 1974).
105. *See id.* at 1320-25.
106. *See id.*
107. Quatrochi, *supra* note 102, at 641.
108. Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 374 (1986).

CWA, speaks of both navigable water and groundwater.[109] Whereas in other sections, such as those setting forth the NPDES permit program, the CWA speaks only of navigable water.[110] Furthermore, the legislative history of the CWA demonstrates that Congress intended to preclude groundwater from coverage under the NPDES permit system.[111] The report of the Public Works Committee that accompanied the CWA stated, in codifying the NPDES permit system in section 402, that there were several bills before the Committee that provided the authority to establish Federal standards for groundwater, but because of the complexity of groundwater jurisdiction, the Committee did not recommend the adoption of such standards, and the bills failed.[112] Additionally, the Report stated that the Committee recognizes the relationship between groundwater and surface water, that groundwater has an effect on surface water, and that the quality of groundwater is deteriorating.[113] Nevertheless, the committee declined to implement a system developing federal standards specifically for groundwater.[114]

This history clearly indicates that Congress intended to differentiate between groundwater and surface water in developing the permit system and intended to preclude federal regulation of groundwater under the system. Otherwise, Congress could merely have enacted legislation specifically covering all waters of the United States, rather than specifying just navigable water. Furthermore, the reasoning of the cases holding that surface water that is not in fact navigable is included within the definition of navigable water, such as in *Earth Sciences*,[115] *Quivira Mining*,[116] and *Ash-*

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109. *See supra* notes 46 to 50 and accompanying text.

110. *See supra* notes 46 to 50 and accompanying text.

111. *See supra* notes 51 to 59 and accompanying text.

112. *See* S. REP. NO. 92-414, 92d Cong., 1st Sess 73 (1971), *reprinted in* U.S.C.C.A.N. 3668, 3735-39. Senator Cooper proposed a bill to amend the Federal Water Pollution Control Act to extend "the Federal-State program for establishment and approval of standards and plans applicable to all navigable and ground waters." *Id.* at 3770. Senator Scott also proposed a bill to amend the Act to expand "standards requirement to navigable, boundary and ground waters and waters of the contiguous zone." *Id.* at 3773. All of these bills failed and there is no mention of groundwater within the legislation authorizing the permit system. *See id.* at 3739; 33 U.S.C.A. § 1342 (West 1986 & Supp. 1998).

113. *See* S. REP. NO. 92-414, 92d Cong., 1st Sess. 73 (1971), *reprinted in* U.S.C.C.A.N. 3668, 3735, 39.

114. *See id. See supra* note 53 for reproduction of relevant portions of the text of the Committee report.

115. *See supra* notes 89 to 90 and accompanying text.

116. *See supra* notes 91 to 92 and accompanying text.

land Oil and Transportation Company,[117] does not apply to the groundwater cases because the jurisdictional complexity of groundwater was not at issue in the nonnavigable surface water cases. Thus, the two types of cases are not analogous. Finally, the legislature did not distinguish between isolated groundwater and groundwater hydrologically connected to surface water in the statute itself, nor does the legislative history indicate that Congress considered such a distinction. Thus, it does not logically follow for the courts to create such a distinction.

Surprisingly, the EPA's failure to promulgate a formal regulation interpreting the CWA to regulate groundwater on a comprehensive basis and the regulations it has promulgated have apparently caused increased confusion among the courts.[118] The EPA has stated, in a response to a comment regarding NPDES permit requirements on concentrated animal feeding operations, that "groundwater may be affected by the NPDES program when a discharge of pollutants to surface waters can be proven to be via groundwater."[119] However, the EPA also stated that it "agrees the Clean Water Act does not give EPA authority to regulate groundwater quality through NPDES permits."[120] The EPA's position is apparently that permit requirements which apply to the contamination of groundwater which are intended to protect surface waters that are contaminated through a groundwater connection are not violative of the Act.[121] However, it has never promulgated a formal and comprehensive regulation regarding discharges to groundwater.

In fact, *Smith Frozen Foods, Inc.* held that the EPA's limited construction of the CWA does not render the CWA comprehensively applicable to the discharge of pollutants into groundwater.[122] Nevertheless, the court indicated that the EPA may have the power to promulgate such a comprehensive regulation.[123] An agency's

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117. *See supra* notes 104 to 106 and accompanying text.

118. *See* Umatilla Waterquality Protection Ass'n, Inc. v Smith Frozen Foods, Inc., No. 96-657-JO, 1997 U.S. Dist. LEXIS 16458, at *8 (D. Ore, Sept. 23, 1997).

119. Final General NPDES Permit for Concentrated Animal Feeding Operations (CAFO) in Idaho, 62 Fed. Reg. 20177, 20178 (1997).

120. *Id.*

121. *Id.*

122. *See* Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc., No. 96-657-JO, 1997 U.S. Dist LEXIS 16458, at *2 (D. Ore. September 23, 1997). *See also supra* notes 75 to 80.

123. *See Smith Frozen Foods, Inc.*, 1997 U.S. Dist. LEXIS 16458, at *10. The court stated that "[w]hile neither the statute nor the legislative history absolutely prohibits an interpretation that the NPDES permit requirement applies to

rulemaking power, however, "is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute."[124] "If [an act] falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the [administrative agency] or the courts, to address.[125] Therefore, the EPA can not promulgate a regulation interpreting navigable water to include groundwater, because such an interpretation would not be a reasonable interpretation of navigable water under the CWA.[126]

For example, in *Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, the United States Supreme Court held that the Federal Reserve Board (the "Board") exceeded its statutory authority granted under the Bank Holding Company Act of 1956 (the "Bank Act") in the expansive definition of "bank" it promulgated.[127] The Bank Act originally defined a bank as "'any national banking association or any State bank, savings bank, or trust company.'"[128] Eventually, Congress amended the Bank Act and narrowed the definition of "bank" to "exclud[e] all institutions that did not 'engag[e] in the business of making commercial loans.'"[129] Congress recognized that its definition of "bank" included institutions that did not pose significant dangers to the banking system.[130] Finally, Congress defined a bank as "any institution that '(1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans.'"[131]

The Board responded by amending its definition of demand deposit to mean "a deposit that 'as a matter of practice is payable on demand,'" so that institutions offering NOW accounts would be

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discharges of pollutants to hydrologically-connected groundwater, they do strongly indicate that such an interpretation was not Congress's intent. *Id.*

124. Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361, 374 (1985). Although the court's holding relates directly to administrative agencies and their power in interpreting statutes, the Court also stated in dicta that a court cannot interpret a statute contrary to what the legislature intended. *See infra* notes 127 to 133.

125. *Id.*

126. Judge Manion, in his concurring opinion in *Dayton Hudson Corporation*, stated that the EPA has no authority to regulate groundwater under the current form of the CWA. *See supra* note 72.

127. *See Dimension Financial Corp.*, 474 U.S. at 368.

128. *Id.* at 365.

129. *Id.* at 366.

130. *Id.*

131. *Id.*

included within its regulatory authority.[132] However, the Court held such an interpretation to be an inaccurate and unreasonable interpretation of the definition of bank under the Bank Act.[133] The Court noted that in determining whether the Board acted within its statutory authority, it "must give effect to the unambiguously expressed intent of Congress," if the statute is clear and unambiguous.[134] Finally, the Court found that "[t]he traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress," and that the Federal Reserve Board's definition of "bank" violated Congress's clear intent as expressed in the statute.[135]

The Federal Reserve Board also promulgated a regulation defining "commercial loan" under the Bank Act. The Federal Reserve Board noted that "[t]he purpose of the amended regulation is to regulate as banks institutions offering 'commercial loan substitutes,' that is, extensions of credit to commercial enterprises through transactions other than the conventional commercial loan."[136] The Board supported its definition by stating:

> it is proper to include these instruments within the scope of the term commercial loan as used in the Act in order to carry out the Act's basic purposes: to maintain the impartiality of banks in providing credit to business, to prevent conflicts of interest, and to avoid concentration of control of credit.[137]

Nevertheless, the Court also struck down this definition finding that "[t]he statute by its terms . . . exempts from regulation all institutions that do not engage in the business of making commercial loans."[138] The Court stated that "[n]othing in the statutory language or the legislative history . . . indicates that the term 'commercial loan' meant anything different from its accepted ordinary commercial usage,'" and that the Board's interpretation was unreasonable.[139]

Finally, the Court rejected the Board's contention that its new

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132. *Dimension Financial Corp.*, 474 U.S. at 368.
133. *Id.*
134. *Id.* (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)).
135. *Id.*
136. *Id.* at 369.
137. *Dimension Financial Corp.*, 474 U.S. at 369 (citing 49 Fed. Reg., at 841).
138. *Id.* at 371.
139. *Id.* at 373.

definitions fall within the plain purpose of the Bank Act.[140] The Board contended that "[t]he plain purpose of the legislation . . . is to regulate institutions 'functionally equivalent' to banks."[141] The Court noted that "[t]he 'plain purpose' of legislation . . . is determined in the first instance to the plain language of the statute itself [and 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."[142] The Court stated that "[i]nvocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent."[143] Thus, the Court held that the action of the Board was inconsistent with the meaning of the statute.[144] It noted that an agency's "rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute" and that it is for Congress to address the areas in which legislation falls short of its apparent goals.[145]

Thus, *Dimension Financial Corporation* is instructive in regard to the groundwater issue in two respects. First, an agency's regulation will not be granted deference, and thus, will not be upheld, where it contradicts the unambiguously expressed intent of Congress as evidenced by statutory language and legislative history. Second, an agency's regulation that does, in fact, contribute to carrying out the broad purposes of a piece of legislation, but by contradicting the provisions in the statute, will also be struck down because such action ignores the basic legislative process.

Although the EPA's interpretation is entitled to deference in most circumstances,[146] the EPA, in this instance, would not be so entitled because it would be inaccurately interpreting the CWA in defining navigable water as including groundwater hydrologically connected to surface water. Although *Dimension Financial Corporation* is distinguishable on its facts because the Federal Reserve Board expanded the definition of "bank" after Congress had narrowed it, whereas Congress has consistently expanded the coverage of the CWA over the past several decades,[147] the analy-

140. *Id.* at 373-374.
141. *Id.* at 373.
142. *Dimension Financial Corp.*, 474 U.S. at 373-74.
143. *Id.* at 374.
144. *Id.*
145. *Id.*
146. *See supra* note 80.
147. *See supra* notes 9 to 23 and accompanying text.

sis employed by the Court, nonetheless, requires the conclusion that the EPA would be beyond its statutory authority in defining "navigable water" to include groundwater hydrologically connected to surface water.

The intent of Congress under the CWA to exclude groundwater from regulation is clearly evident by reviewing the various sections of the statute that deal with groundwater and the NPDES permit program, as well as the CWA's legislative history. Nevertheless, the arguments for regulating groundwater under the NPDES permit program are compelling because such an interpretation would carry out the act's basic purpose, the elimination of pollutants into navigable waters and the improvement of water quality. In fact, this is essentially the courts' rationale for interpreting navigable water to include groundwater hydrologically connected to surface water.[148]

However, this is exactly the type of analysis that the Supreme Court precluded in *Dimension Financial Corporation*.[149] In that case, the Court stated that "[a]pplication of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of problems Congress is called upon to address [and an agency's] rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute."[150] The legislative history of the CWA in fact shows that the complexity of groundwater jurisdiction was a factor in excluding groundwater from NPDES.[151] Therefore, the penalties for violating the NPDES program should not be enforced against entities discharging pollutants into groundwater without a further congressional mandate.

Finally, groundwater is not left entirely unprotected, but is regulated under other statutes. For instance, the Resource Conservation and Recovery Act (RCRA) protects groundwater quality by controlling "every aspect of hazardous waste generation, transportation, storage, processing and disposal."[152] It requires the EPA "to promulgate criteria for 'identifying the characteristics' of hazardous waste . . . , which should be subject to RCRA

148. *See supra* notes 86 to 99 and accompanying text.
149. *See supra* notes 127 to 145 and accompanying text.
150. *Dimension Financial Corp.*, 474 U.S. at 373-74.
151. *See supra* note 52 and accompanying text.
152. DAVID H. GETCHES, WATER LAW IN A NUTSHELL, 2d ed. 274 (West Publishing Co. 1990).

regulation."[153] Specifically, section 3004 provides that "new landfills and surface impoundments, as well as expansions of existing units, must have double plastic liners, leachate collection systems, and groundwater monitoring facilities unless the EPA specifically finds for a particular site that an alternative design or operating practice will be equally effective in preventing migration of hazardous substances into ground or surface water."[154]

CERCLA also protects groundwater by establishing federal authority to respond to hazardous substance emergencies and to clean up leaking hazardous waste storage, treatment, or disposal sites, and making persons responsible for such releases liable for cleanup and restitution costs.[155] In addition, groundwater is regulated under the Safe Drinking Water Act which "requires EPA to set maximum levels for contaminants in water delivered to users of public water systems."[156] In fact, the "EPA has developed a special regulatory program to deal specifically with pesticide contamination of groundwater."[157] The Safe Drinking Water Act is among the statutes invoked in regard to the program.[158] Thus, groundwater is not left entirely unprotected.

IV. Conclusion

The CWA was enacted in order to protect the integrity of the nation's waters. The NPDES permit system was developed to carry out the CWA's purpose by limiting the amount of pollution discharged into navigable water through the issuance of permits related to the amount of pollution a discharger may discharge into certain waterways. Congress, however, excluded the term groundwater from the section codifying the NPDES permit system after much debate. Nevertheless, some courts have held that the permit system applies to groundwater hydrologically connected to surface water, reasoning that Congress intended to protect the nation's waters to the fullest extent possible, and thus, to regulate all discharges into waterways that affect interstate commerce. Whereas, other courts have held that the permit system does not regulate groundwater at all, reasoning that the plain language of the statute and legislative history clearly show that Congress intended

153. FINDLEY & FARBER, *supra* note 7, at 204.
154. *Id.* at 205.
155. *See id.* at 223-24.
156. *See* GETCHES, *supra* note 152, at 198.
157. *Id.* at 199.
158. *See id.*

to preclude groundwater from federal regulation. This conflict between the courts must be resolved so that companies discharging pollutants directly into the ground know whether they must comply with the CWA's permit system to avoid potential retroactive liability.

Courts should hold that the permit system does not apply to groundwater, regardless of whether it is hydrologically connected to surface water. Legislative history clearly shows that Congress chose not to include groundwater in the section codifying the permit system. In fact, Congress rejected many proposed amendments to the CWA that would have explicitly included groundwater within the permit system. Furthermore, groundwater is explicitly stated in other sections of the CWA, particularly in the sections that encourage the development of information on the groundwater problem and the implementation of groundwater control systems at the state level. Whereas, no mention of groundwater is made in the section codifying the permit system. Furthermore, the EPA does not have the power to issue regulations to bring groundwater hydrologically connected to surface water within the NPDES permit program, because it lacks Congressional authority to do so. Finally, groundwater is not left entirely unprotected. It is protected under other Federal statutes including the Safe Drinking Water Act, CERCLA, and the Resource Conservation and Recovery Act.

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