

**MUDDY WATERS: HOW EXPANSION OF
FEDERAL WATER JURISDICTION UNDER
COUNTY OF MAUI V. HAWAII WILDLIFE FUND
WILL IMPACT NEBRASKA AGRIBUSINESS**

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I. INTRODUCTION

In April 2020, the United States Supreme Court concluded, in limited circumstances, Clean Water Act¹ (“CWA”) regulations extend to state groundwater.² *County of Maui v. Hawai’i Wildlife Fund*³ resolved a circuit split regarding when, if ever, a National Pollutant Discharge Elimination System (“NPDES”) permit is required for discharges of pollutants from a point source into groundwater.⁴ Under the CWA, NPDES permits are required for all discharges from a point source into “waters of the United States.”⁵ This phrase was most recently interpreted in *Rapanos v. United States*,⁶ though *Rapanos* has left a mess of confusing litigation in its wake.⁷ Many states, including Nebraska, maintain the NPDES permits, with the Environmental Protection Agency maintaining oversight.⁸

This Note will begin by explaining the facts and holding of *County of Maui*.⁹ This Note will then provide background on the interpreta-

1. 33 U.S.C. §§ 1251-1388.

2. *Cnty. of Maui v. Hawai’i Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020) (“We conclude that the statutory provisions at issue require a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters.”)

3. 140 S. Ct. 1462 (2020).

4. *Cnty. of Maui*, 140 S. Ct. at 1469-70.

5. *Id.* at 1468.

6. 547 U.S. 715 (2006).

7. See, e.g., Wade Foster, Note, *Parsing Rapanos*, VA ENVTL. LAW J. (Apr. 7, 2018), syndicated on ENVTL. L. REV. SYNDICATE, <http://www.velj.org/elrs/parsing-rapanos> (explaining the increase in litigation following the *Rapanos* decision). See generally Kristen Clark, *Navigating Through the Confusion Left in the Wake of Rapanos: Why a Rule Clarifying and Broadening Jurisdiction Under the Clean Water Act Is Necessary*, 39 WILLIAM & MARY ENV. LAW & POLICY REV. 295 (2014).

8. 33 U.S.C. § 1342(a)(5) (“The Administrator [of the Environmental Protection Agency] shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of [the Clean Water Act], to issue permits for discharges into the navigable waters within the jurisdiction of such State.”); *Nebraska NPDES Permits*, ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/npdes-permits/nebraska-npdes-permits> (last visited Jan. 2, 2021); *NPDES Permits Around the Nation*, ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/npdes-permits> (last visited Jan. 2, 2021).

9. See *infra* notes 17-45 and accompanying text.

tion and application of the CWA, both nationwide and in Nebraska.¹⁰ This Note will further describe the hydrological makeup of Nebraska and its regulation of groundwater and surface water.¹¹ This Note will indicate that, as the largest user of water in the state, the Nebraska agriculture industry is vulnerable to lawsuits as a result of the *County of Maui* decision.¹² Then, this Note will argue that, due to Nebraska's careful regulation of groundwater, the Nebraska Department of Environment and Energy is unlikely to enforce additional NPDES permits now possibly required under *County of Maui*.¹³ This Note will then argue that, if citizens or citizen groups bring enforcement actions against farmers or ranchers in Nebraska, district courts should use the discretion granted to them by the *County of Maui* Court and not require NPDES permits where water quality is not impaired.¹⁴ However, this Note will concede that where water quality is endangered, NPDES permits should be required where they will improve water quality.¹⁵ This Note will conclude by asking Congress to take action to clear up ambiguous Supreme Court decisions by amending the CWA to reflect current understandings of groundwater and surface water integration.¹⁶

II. FACTS AND HOLDING

In *County of Maui v. Hawai'i Wildlife Fund*,¹⁷ the Hawai'i Wildlife Fund, the Sierra Club-Maui Group, the Surfrider Foundation, and the West Maui Preservation Association brought suit in the United States District Court for the District of Hawai'i against the County of Maui in Hawai'i ("the County") for violating the Clean Water Act¹⁸ ("CWA") by indirectly discharging pollutants into the Pacific Ocean without a National Pollutant Discharge Elimination System ("NPDES") permit, administered by the Environmental Protection Agency ("EPA").¹⁹ The Hawai'i Wildlife Fund argued that the County's discharges should require an NPDES permit to fulfill the

10. See *infra* notes 46-139 and accompanying text.

11. See *infra* notes 85-139 and accompanying text.

12. See *infra* notes 151-93 and accompanying text.

13. See *infra* notes 194-243. Please note that in 2019, the Nebraska Unicameral changed the name of the Nebraska Department of Environmental Quality to the Nebraska Department of Environment and Energy. NEB. DEP'T OF ENV'T & ENERGY, 2019 NEBRASKA GROUNDWATER QUALITY MONITORING REPORT 1 (2019). Many administrative codes and department resources created or promulgated before this change still have the old department name. *Id.*

14. See *infra* notes 244-69 and accompanying text.

15. See *infra* notes 256-69 and accompanying text.

16. See *infra* Part V.

17. 140 S. Ct. 1462 (2020).

18. 33 U.S.C. §§ 1251-1388.

19. *Hawai'i Wildlife Fund v. Cnty. of Maui*, 881 F.3d 754, 758-59 (9th Cir. 2018).

purpose of the CWA to protect the health and safety of coastal waters, even though discharges into groundwater have not been traditionally covered by NPDES permits.²⁰

The County operated four wastewater treatment wells which discharged between three to five million gallons of treated sewage into groundwater every day.²¹ Both parties agreed that some of the discharged treated wastewater reached the Pacific Ocean, an undisputed navigable water.²² The Hawai'i Wildlife Fund provided evidence that sixty-four percent of wastewater injected into two of the County's wells reached the Pacific Ocean within eighty-four days.²³ The increased phosphorus and nitrogen from the treated waste caused algal blooms that threatened the biodiversity of Hawai'i's coastal reefs.²⁴ The district court granted summary judgment for the Hawai'i Wildlife Fund, finding that the CWA required an NPDES permit for the discharged effluent that reached the Pacific Ocean.²⁵ The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision based on a different standard than applied by the district court.²⁶

The United States Supreme Court granted certiorari to resolve a circuit split created by the Ninth Circuit's decision in *County of Maui*, the United States Court of Appeals for the Fourth Circuit's decision in *Upstate Forever v. Kinder Morgan Energy Partners*,²⁷ and the United States Court of Appeals for the Sixth Circuit's decision in *Kentucky Waterways Alliance v. Kentucky Utility Co.*,²⁸ because each circuit court created a different standard to determine whether the CWA required an NPDES permit for discharges of pollutants into groundwater when the pollutant reached a navigable water.²⁹

20. *Hawai'i Wildlife Fund*, 881 F.3d at 762.

21. *Id.* at 758.

22. *Id.*

23. *Id.* at 759. The Hawai'i Wildlife Fund and EPA used tracer dye studies to monitor discharges from the County. *Id.* Tracer dye studies are an affordable way to monitor pollution. See George F. Arsnow et. al., *Dye Tracer Study—Tried and True Method Yields Surprising Results*, 15 PROC. OF THE ANN. INT'L CONF. ON SOILS, SEDIMENTS, WATER & ENERGY 337, 337 (2010) (reporting that the "use of tracer dyes is a technically valid and cost-effective method" for monitoring which pollutants ("contaminants") are in hydrogeologic systems). See generally Stanley N. Davis, et. al., *Ground Water Tracers 2* (National Ground Water Association, 1985).

24. Brief for Respondent at 9-10, *Cnty. of Maui v. Hawai'i Wildlife Fund*, 140 S. Ct. 1462 (2020) (No. 18-260).

25. *Hawai'i Wildlife Fund*, 881 F.3d at 759.

26. *Cnty. of Maui*, 140 S. Ct. at 1469.

27. 887 F.3d 637 (4th Cir. 2018).

28. 905 F.3d 925 (6th Cir. 2018).

29. See *Cnty. of Maui*, 140 S. Ct. at 1469-70 (comparing *Upstate Forever v. Kinder Morgan Energy Partners*, 887 F.3d 637, 651 (4th Cir. 2018) with *Kentucky Waterways Alliance v. Kentucky Util. Co.*, 905 F.3d 925, 932-938 (6th Cir. 2018) and noting the two different standards applied by the circuit courts).

In its opinion, the Supreme Court responded to the Ninth Circuit's approach, the County's approach, and the dissent's approach to EPA jurisdiction over groundwater, and the Court ultimately issued a compromise opinion between the different approaches.³⁰ The Ninth Circuit decision determined NPDES permits are required for discharges into groundwater that are the proximate cause of pollutants entering a navigable water.³¹ The Court rejected this approach, reasoning such EPA authority would be too broad for several reasons: the interpretation of the word "from" in the CWA, the structure of the CWA, legislative history, and longstanding regulatory practice.³² The County argued that any discharge that reached a water of the United States indirectly through groundwater was not subject to NPDES permits.³³ It argued the CWA intended states to control groundwater, and NPDES permits only were required where pollutants were *directly* discharged into a water of the United States.³⁴ Similarly, the two dissents focused on the words "from" and "addition" in the statute as limitations to CWA permitting of discharges of pollutants into groundwater, which the majority asserted would create a loophole, similar to the County's argument.³⁵ The Court found this approach would create a loophole that would allow polluters to evade NPDES permitting.³⁶ NPDES permitting is the main regulatory function in fulfilling the purpose of the CWA to regulate pollution at its source.³⁷ Congress could not have intended such an obvious loophole whereby pollutants to the nation's waters could evade the law by discharging into groundwater instead of waters of the United States.³⁸

Resolving the split between the Fourth, Sixth, and Ninth circuits, the Supreme Court came to a different approach than any of the circuit courts in holding that the CWA requires an NPDES permit when there is direct discharge of a pollutant from a point source into navigable waters or when there is the functional equivalent of a direct dis-

30. See *Cnty. of Maui*, 140 S. Ct. at 1470-76 (stating, "courts and EPA have tried to find general language that will reflect a middle ground between these extremes" and adopting a rule different from those suggested by the parties and the Ninth Circuit).

31. *Id.* at 1470.

32. *Id.* at 1471-72.

33. *Id.* at 1473.

34. *Id.*; see also *Hawai'i Wildlife Fund*, 881 F.3d at 765 (describing the County's argument as excluding the discharges from the well from NPDES permitting because the CWA delegated that authority to the states).

35. *Cnty. of Maui*, 140 S. Ct. at 1470-76.

36. *Id.* at 1473.

37. *Id.*; Interpretative Statement on Application of the CWA NPDES Program to Releases of Pollutants from a Point Source to Groundwater, 84 Fed. Reg. 16,810, 16813 (Apr. 23, 2019).

38. *Cnty. of Maui*, 140 S. Ct. at 1473.

charge.³⁹ The Court outlined several non-exhaustive factors for district courts to consider in determining whether an indirect discharge is a functional equivalent of a direct discharge and thus subject to NPDES permitting.⁴⁰ The primary factors are time and distance: the time it takes a pollutant to reach a navigable water and the distance the pollutant must travel before it reaches a navigable water.⁴¹ Other potentially relevant considerations include the material through which the pollutant travels (rock, sandstone, sand, etc.), the extent to which the pollutant is diluted as it travels, the amount of the pollutant entering navigable waters relative to the amount of the pollutant that leaves the point source, and how and where the pollutant enters the navigable waters.⁴² The Court did not address whether district courts should consider if an entity discharged a pollutant from a point source into groundwater as a means to avoid NPDES permitting.⁴³

The Court reasoned that this factor-based approach avoided a loophole in the law, thus fulfilling the purpose of the CWA without upsetting the states' traditional regulatory authority over their own groundwater.⁴⁴ The Court argued that allowing EPA to exercise CWA jurisdiction to cover groundwater in only certain circumstances does not infringe on state control because states would still maintain primary control over groundwater.⁴⁵

39. *Id.* at 1468.

40. *Id.* at 1476-77.

41. *Id.*

42. *Id.*

43. *See id.* (listing factors to be considered by district courts when determining if a discharge of effluent is functionally equivalent to a direct discharge into navigable waters, including: "(1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity"). For further discussion of whether intent to avoid NPDES permits will factor into district court decisions, see Interview with Jesse Richardson, law professor at West Virginia University, and Anthony Schutz, law professor at the University of Nebraska, AG LAW IN THE FIELD PODCAST (May 21, 2020), <https://aglaw.libsyn.com/episode-80-jesse-richardson-anthony-schutz-scotus-decision-in-maui-county-v-hawaii-wildlife-fund>.

44. *Cnty. of Maui*, 140 S. Ct. at 1476.

45. *Id.* EPA issued a guidance memorandum on January 14, 2021, indicating that EPA does not expect the *County of Maui* decision to drastically increase the number of NPDES permits for discharges into groundwater. Memorandum from Anna Wildeman, Acting Assistant Adm'r, Env't Prot. Agency 6-7 (Jan. 14, 2021) (<https://www.epa.gov/npdes/guidance-memorandum-applying-supreme-courts-county-maui-v-hawaii-wildlife-fund-decision-clean>). Notably, this memo was released prior to the current administration. *Id.* at 1. EPA also provided additional factors that could be considered to determine if a discharge into groundwater is functionally equivalent to a discharge into navigable waters, including a facility's design and performance. *Id.* at 7.

III. BACKGROUND

A. HISTORY OF THE UNITED STATES SUPREME COURT'S INTERPRETATIONS OF THE CLEAN WATER ACT

Congress passed the Clean Water Act⁴⁶ (“CWA”) in 1972 in response to growing public concern across the country about pollution of rivers, lakes, oceans, and other bodies of water.⁴⁷ Congress created the Environmental Protection Agency (“EPA”), and with it EPA’s primary method of enforcement: the National Pollutant Discharge Elimination System (“NPDES”) permit.⁴⁸ The CWA prohibits any discharge of a pollutant through a point source into a navigable water without an NPDES permit.⁴⁹ “Pollutant,” “point source,” and “navigable water” are all terms defined by EPA and interpreted by the United States Supreme Court.⁵⁰ The centerpiece of the NPDES permit system is the requirement that producers of pollutants treat discharges before the pollution reaches navigable waters, in compliance with pre-discharge treatment standards promulgated by EPA.⁵¹

The purpose of the CWA is to regulate pollution at its source while leaving substantial responsibility to states to manage discharges of pollutants not subject to NPDES permits, such as discharges not from a point source or discharges into non-navigable waters.⁵² Further, many states implement and maintain the NPDES permitting system while EPA retains oversight.⁵³ The CWA was designed to allow citizens and public interest or environmental groups to have standing to

46. 33 U.S.C. §§ 1251-1388.

47. 33 U.S.C. § 1251(a)(1) (stating, “it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985”).

48. Clean Water Act § 402, 33 U.S.C. § 1342.

49. *Id.*

50. David Ivester, Partner, Briscoe, Ivester, & Bazel, Clean Water Act and the Scope of Federal Power, Panel Speaker at the University of Denver Sturm College of Law Water Law Symposium: At the Confluence: The Past, Present, and Future of Water Law (Apr. 7, 2017), <https://www.youtube.com/watch?v=ASXuRNUEg3U>.

51. *EPA v. California*, 426 U.S. 200, 204-05 (1976).

52. *See* 33 U.S.C. § 1251(a)-(b) (stating the Clean Water Act’s objective is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” and to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution to plan the development and use . . . of land and water resources”).

53. *See* Clean Water Act § 402, 33 U.S.C. § 1342(a)(5) (“The Administrator [of the Environmental Protection Agency] shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of [the Clean Water Act], to issue permits for discharges into navigable waters within the jurisdiction of such State.”); *NPDES Permits Around the Nation*, *supra* note 8 (“EPA issues all National Pollutant Discharge Elimination System (NPDES) water quality permits in Massachusetts, New Hampshire, New Mexico, District of Columbia, U.S. territories, and on federal and tribal lands. Other states have been delegated by EPA to issue their own permits.”).

bring suit against polluters, even without an actual injury.⁵⁴ Citizens and citizen-action groups can bring suit against polluters who are not in compliance with NPDES permit requirements by proving that the polluter is required to obtain an NPDES permit under the CWA.⁵⁵ By design, the CWA empowers states to be the primary regulators of the NPDES program.⁵⁶ Each state's Department of Environmental Quality, or similar agency, can determine its own water quality control standards for discharges into water while complying with the baseline established by EPA.⁵⁷

B. *RAPANOS v. UNITED STATES*

In 2006, the United States Supreme Court released a plurality opinion determining what water is subject to the CWA⁵⁸ and NPDES permitting.⁵⁹ The statute reads "navigable waters," which is defined later in the statute as "waters of the United States."⁶⁰ In *Rapanos v. United States*,⁶¹ the Court attempted to clarify which waters in particular were subject to NPDES permits under the United States Constitution and under the terms of the statute, though the plurality opinion left both the industry and its regulators in muddy waters.⁶² Ultimately, Justice Kennedy's concurring opinion has provided the most concrete test, which lower courts have used to determine if discharges into certain bodies of water are subject to NPDES permitting.⁶³ The *Rapanos* plurality attempted to clarify ambiguity created by previous

54. See *California*, 426 U.S. at 222-24 (describing the circumstances for a citizen to bring an enforcement suit pursuant to 33 U.S.C. § 1342 and only requiring that citizens show violation of the CWA); *Frontline: Poisoned Waters* (PBS television broadcast Apr. 21, 2009), <https://www.pbs.org/wgbh/frontline/film/poisonedwaters/>.

55. Clean Water Act § 505, 33 U.S.C. § 1365; see also *California*, 426 U.S. at 222-24 (describing the conditions that enable a citizen to bring suit for NPDES enforcement). Section 505 requires that a citizen complainant give notice to EPA, the state, and to the alleged violator. § 1365(b).

56. 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources . . .").

57. See *id.* § 1251(g) (empowering states to create their own pollutant limitation standards with the assistance of EPA).

58. 33 U.S.C. § 1251-1388.

59. *Rapanos v. United States*, 547 U.S. 715, 730 (2006).

60. 33 U.S.C. § 1362(7).

61. 547 U.S. 715 (2006).

62. Compare *Rapanos*, 547 U.S. at 730 (stating the court granted certiorari to determine the limits of "waters of the United States"), with Melinda Kassen, Interim Dir., Theodore Roosevelt Conservation P'ship's Ctr for Water Res., Panel Speaker at *supra* note 50 (discussing the lingering confusion left after the *Rapanos* plurality), Foster, *supra* note 7 (explaining the confusion resulting from the *Rapanos* decision), and *United States v. Bailey*, 571 F.3d 791, 798-99 (8th Cir. 2009) (describing the different circuit approaches in applying the *Rapanos* decision).

63. Foster, *supra* note 7; Clark, *supra* note 7, at 306.

Court decisions regarding which surface waters were subject to NPDES permitting.⁶⁴ The plurality limited NPDES permit jurisdiction to discharges into waters of the United States which were relatively permanent.⁶⁵ Justice Kavanaugh's concurring opinion in *County of Maui v. Hawai'i Wildlife Fund*⁶⁶ focused on Justice Scalia's refusal to restrict NPDES permits to only *direct* discharges into navigable waters.⁶⁷

As of 2018, thirty-five different jurisdictions have had to determine whether certain discharges of a pollutant were subject to NPDES permitting and CWA jurisdiction under *Rapanos*.⁶⁸ Various circuits have applied Justice Kennedy's concurrence, finding it to be the narrowest ground by which to interpret the plurality opinion, while others have used Justice Scalia's opinion to allow or deny jurisdiction.⁶⁹ The United States Court of Appeals for the Eighth Circuit has indicated it will find EPA jurisdiction for discharges which meet either the concurrence or the plurality standard.⁷⁰

C. THE ENVIRONMENTAL PROTECTION AGENCY'S WATER JURISDICTION

The CWA⁷¹ grants EPA jurisdiction over navigable waters, or the so-called "waters of the United States."⁷² NPDES permits have historically excluded discharges into groundwater.⁷³ However, EPA regulates groundwater quality through other acts of Congress, including (but not limited to) the Safe Drinking Water Act,⁷⁴ the Resource Con-

64. Foster, *supra* note 7.

65. *Rapanos*, 547 U.S. at 733-34.

66. 140 S. Ct. 1462 (2020).

67. *Cnty. of Maui v. Hawai'i Wildlife Fund*, 140 S. Ct. 1462, 1478 (2020) (Kavanaugh, J., concurring).

68. Foster, *supra* note 7.

69. *Id.*

70. *Bailey*, 571 F.3d at 799 ("[W]e join the First Circuit in holding that the [federal government] has jurisdiction over wetlands that satisfy either the plurality or Justice Kennedy's test."). District courts in the Eighth Circuit have applied *Bailey* and the Clean Water Act requirements in different agricultural settings. See *Eoff v. EPA*, No. 4:13-cv-368-DPM, 2015 U.S. Dist. LEXIS 65379, at *1, *2-3 (E.D. Ark. May 19, 2015) (applying the *Rapanos* plurality opinion in determining whether a tributary was a navigable water subject to NPDES permitting); *Garrison v. New Fashion Pork LLP*, 449 F. Supp. 3d 863, 866 (N.D. Iowa 2020) (granting defendant's motion for summary judgment after plaintiff alleged, in part, that defendant needed an NPDES permit).

71. 33 U.S.C. §§ 1251-1388.

72. The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250, 22,251 (proposed Apr. 21, 2020) (to be codified at 33 C.F.R. pt. 328).

73. Interpretative Statement on Application of the CWA NPDES Program to Releases of Pollutants from a Point Source to Groundwater, 84 Fed. Reg. 16,810, 16,813 (Apr. 23, 2019).

74. 42 U.S.C. § 300(f) (1974).

servation and Recovery Act,⁷⁵ and the Comprehensive Environmental Response, Compensation, and Liability Act⁷⁶ (also known as CERCLA or the Superfund Program); each of these congressional acts indicates EPA has regulated groundwater before, and EPA will continue to do so in the future.⁷⁷ NPDES permits are meant to regulate discharges into navigable waters, which has been understood to exclude groundwater.⁷⁸

While *Rapanos v. United States*⁷⁹ and its progeny excluded groundwater from NPDES permits, EPA has exerted its jurisdiction over discharges into groundwater where discharges from a point source are hydrologically connected to waters of the United States.⁸⁰ Prior to the *County of Maui v. Hawai'i Wildlife Fund*⁸¹ ruling, different federal circuit courts created different standards to determine when NPDES permits were appropriate.⁸² Recognizing the inconsistent applications of NPDES permits across states due to this circuit split, in 2019, EPA began the rulemaking process to provide consistency in areas without a circuit court decision.⁸³ After soliciting public comments, EPA released its interpretative statement and ultimately decided to exclude discharges into groundwater from a point source from NPDES permitting except in states bound by court

75. 42 U.S.C. § 6901 (1976).

76. 42 U.S.C. § 9601 (1980).

77. *Compare* Interpretative Statement on Application of the CWA NPDES Program to Releases of Pollutants from a Point Source to Groundwater, 84 Fed. Reg. 16,810, 16,823-24 (Apr. 23, 2019) (detailing the various EPA programs and duties to regulate groundwater as a means of showing that NPDES permits are unnecessary to regulate groundwater), *with County of Maui*, 140 S. Ct. at 1477 (stating EPA has traditionally regulated groundwater and that states and EPA have not found such regulation of groundwater unmanageable).

78. Interpretative Statement on Application of the CWA NPDES Program to Releases of Pollutants from a Point Source to Groundwater, 84 Fed. Reg. 16,810, 16,813 (Apr. 23, 2019); *Rapanos v. United States*, 547 U.S. 715, 733 (2020).

79. 547 U.S. 715 (2020).

80. *See* Interpretative Statement on Application of the CWA NPDES Program to Releases of Pollutants from a Point Source to Groundwater, 84 Fed. Reg. 16,810, 16,810, 16,812 (Apr. 23, 2019) (admitting that EPA has exerted jurisdiction over discharges into groundwater which have a “direct hydrologic connection to a jurisdictional surface water”).

81. 140 S. Ct. 1462 (2020).

82. *See* Interpretative Statement on Application of the CWA NPDES Program to Releases of Pollutants from a Point Source to Groundwater, 84 Fed. Reg. 16,810, 16,812 (Apr. 23, 2019) (describing EPA’s interpretation of jurisdiction into groundwater and citing the United States Courts of Appeals for the Ninth and Fourth Circuits, and explaining the hydrological connection theory as applied to NPDES permits for discharges into groundwater).

83. *Id.* at 16,811-12.

decisions in the United States Courts of Appeals for the Ninth and Fourth Circuits.⁸⁴

D. NEBRASKA'S GROUNDWATER

1. *Hydrological Makeup of Nebraska*

Nebraska is home to the High Plains Aquifer system, also referred to as the Ogallala Aquifer, which spans from South Dakota to Texas.⁸⁵ The High Plains Aquifer is a body of permeable sediment, including sand, gravel, silt, sandstone, and mud-rock, which traps and stores precipitation below the surface layer.⁸⁶ Rock and other geologic formations trap the water in the aquifer.⁸⁷ Water leaves the aquifer by man-made wells, or, when the aquifer is full, the water will break free from the aquifer and flow into above-ground lakes and streams.⁸⁸ When water leaves the aquifer, rain and stormwater refill the permeable rock layer.⁸⁹ While other areas that rely on the High Plains Aquifer have seen severe drops in the water table and fear the water in the aquifer is being used at a higher rate than the aquifer is able to recharge, vast portions of the aquifer in Nebraska are untapped.⁹⁰ Specifically, under the Sandhills in northern and western Nebraska, the High Plains Aquifer is plentiful but is untapped because the region is unsuitable for agriculture.⁹¹ Thus, much of the water from the full aquifer feeds the smaller rivers and streams that feed Nebraska's larger rivers.⁹²

84. *See id.* at 16,812, n.1 (“Neither the Ninth Circuit decision nor Fourth Circuit decision prohibits application of the Agency’s interpretation expressed in this action in those circuits . . . [B]y not applying this interpretation in the Ninth and Fourth Circuits, the agency is simply choosing to maintain the status quo pending further clarification by the Supreme Court, after which time the Agency intends to follow with notice and comment rulemaking.”).

85. J. CLARK ARCHER ET AL., *ATLAS OF NEBRASKA* 9 (University of Nebraska Press, Bison Books 2017).

86. *Id.*

87. *Id.*

88. *Id.* Nebraska has been able to avoid aquifer depletion, unlike other states that suffer severe drought and groundwater shortages. *See generally* Matthew Sanderson, *Farmers Are Depleting the Ogallala Aquifer Because the Government Pays Them To Do It*, *CONVERSATION* (Nov. 9, 2020), <https://theconversation.com/farmers-are-depleting-the-ogallala-aquifer-because-the-government-pays-them-to-do-it-145501>.

89. ARCHER, *supra* note 85, at 9.

90. *See id.* (“The High Plains aquifer has not been tapped in most of [the Sand Hills] because the topography . . . make[s] this area unsuitable for profitable agriculture.”); Sanderson, *supra* note 88 (“[F]armers are pulling water out of the Ogallala faster than rain and snow can recharge it.”).

91. ARCHER, *supra* note 85, at 9.

92. James Goeke, Professor, Survey Division, School of Natural Resources, University of Nebraska-Lincoln, *The Significance of Water to Nebraska*, Presentation at the Future of Water for Food Conference (May 3-5, 2009) at 31-32.

Where precipitation does not reach the aquifer, it runs off into streams and rivers and eventually reaches the Missouri River.⁹³ The Missouri River is the longest river in the United States.⁹⁴ The headwaters start in western Montana, and the river winds east through North Dakota, then turns south through South Dakota, where it forms the Iowa-Nebraska and Kansas-Missouri state boundaries.⁹⁵ The Missouri River travels east through Missouri and feeds into the Mississippi River at the border between Illinois and Missouri.⁹⁶ Every river in Nebraska drains into the mighty Missouri River.⁹⁷ Nebraska rivers and streams that originate at the top of the High Plains Aquifer in the Sandhills are primarily fed by the groundwater in the aquifer.⁹⁸ The Niobrara, Dismal, Calamus, Loup, and Snake rivers receive ninety-seven percent of their water from groundwater in the aquifer.⁹⁹

Because of its expansive groundwater resources and major rivers like the Platte, the Republican, and the Niobrara, Nebraska is widely considered a state rich in water resources.¹⁰⁰ This is not to say that water is unlimited; Nebraska is prone to droughts and most famously fell victim to the 1930s Dust Bowl.¹⁰¹ The Dust Bowl dried up Nebraska industries and opportunities for farmers, demonstrating how important reliable quality water is to Nebraska's economy.¹⁰² Without precipitation, the High Plains Aquifer cannot recharge and potentially may dry up.¹⁰³ Pollution from herbicides and livestock waste also pose a threat to groundwater.¹⁰⁴ Thus, the state of Nebraska has increased regulation of groundwater to protect Nebraska residents.¹⁰⁵

93. ARCHER, *supra* note 85, at 5; *see also* Goeke, *supra* note 92, at 32. (comparing Nebraska's water to arteries in the heart, "the water heart of Nebraska").

94. PARKER A. NORTON ET. AL., TRENDS IN ANNUAL, SEASONAL, AND MONTHLY STREAMFLOW CHARACTERISTICS AT 227 STREAMGAGES IN THE MISSOURI RIVER WATERSHED, WATER YEARS 1960-2011, USGS SCI. INVESTIGATIONS REPORT 2014-5053, at 1 (2014).

95. *Id.*

96. *Id.*

97. ARCHER, *supra* note 85, at 5.

98. Goeke, *supra* note 92, at 32.

99. *Id.*

100. Christina Hoffman & Sandra Zellmer, *Assessing Institutional Ability to Support Adaptive, Integrated Water Resources Management*, 91 NEB. L. REV. 805, 810 (2013).

101. *Id.* at 32.

102. *See id.* (describing the Dust Bowl as a "significant event in Nebraska," and detailing the "unprecedented drought" which killed crops).

103. *See* ARCHER, *supra* note 85, at 5 (stating "Nebraska's water supplies come ultimately from precipitation" and indicating that without precipitation, the aquifer will not be able to recharge).

104. NEB. DEP'T OF ENV'T & ENERGY, *supra* note 13, at 7.

105. *See id.* (describing various entities monitoring groundwater quality); Sanderson, *supra* note 88 (indicating that other states struggle keeping the aquifer at stable levels, but Nebraska has seen increases in water levels).

2. Regulation of Nebraska Groundwater and Surface Water

Groundwater in Nebraska is owned by the public.¹⁰⁶ Overlying property owners possess the right to use groundwater on an overlying surface for a beneficial use, though such use is broadly interpreted.¹⁰⁷ The state gives priority to whoever's use of the water was first in time, a system known as prior appropriation; however, the first use must be for a beneficial purpose.¹⁰⁸ The aquifer's water supply has provided groundwater for Nebraskans for a variety of uses, and prior to 1972, wells were virtually unregulated, and towns, farmers, and businesses drilled wells without interference.¹⁰⁹

Today, Nebraska's groundwater is carefully monitored because eighty-eight percent, an overwhelming majority, of the state's residents rely on groundwater in the aquifer for drinking water.¹¹⁰ Groundwater is also vital for Nebraska's agriculture industry, to which one in four Nebraskans' employment is in some way related.¹¹¹ Several different entities monitor groundwater quality and quantity, including twenty-three local Natural Resources Districts ("NRDs"), the Nebraska Department of Agriculture ("NDA"), the Nebraska Department of Environment and Energy ("NDEE"), the Nebraska Department of Health and Human Services, Public Water Suppliers, the University of Nebraska-Lincoln ("UNL"), and more.¹¹² In 1996, the NDA, NDEE, and UNL began developing a centralized database, the Quality-Assessed Agrichemical Contaminant Database for Nebraska Groundwater ("the Database"), to collect information from each of these entities.¹¹³ These entities submit their data to UNL, where UNL assesses the data and then forwards their findings to the

106. Bamford v. Upper Republican Nat. Res. Dist., 245 Neb. 299, 313, 512 N.W.2d 642, 652 (1994).

107. *Id.*; see also 117 NEB. ADMIN. CODE § 4 (2014) ("It is the public policy of the State of Nebraska to protect and improve the quality of surface water for human consumption, wildlife, fish and other aquatic life, industry, recreation, and other productive, beneficial uses."); 118 NEB. ADMIN. CODE § 6 (2006) (stating the beneficial uses of ground water "include existing or potential use for drinking water, irrigation, livestock watering, industrial and commercial purposes, maintaining assigned surface water uses, and other beneficial uses").

108. Hoffman & Zellmer, *supra* note 100, at 810, 813.

109. See *id.* at 856 (describing the deficiencies of Nebraska policy to regulate wells and explaining the exemption for "limited commercial purposes and for household use" for certain properties "if the lot was created prior to 1972," indicating that wells prior to 1972 were not regulated at all).

110. NEB. DEP'T OF ENV'T & ENERGY, *supra* note 13, at 20.

111. Kermit Spade, *Fast Facts: Nebraska's Agricultural Economy*, NEBRASKA WORKFORCE TRENDS, Aug. 2019, at 10-12.

112. NEB. DEP'T OF ENV'T & ENERGY, *supra* note 13, at 7.

113. *Id.* at 8.

Database hosted by the Nebraska Department of Natural Resources.¹¹⁴

The Nebraska Environmental Quality Council (“EQC”) promulgates rules regarding the Nebraska Environmental Protection Act, the Integrated Solid Waste Management Act, and the Livestock Waste Management Act.¹¹⁵ The EQC is made up of seventeen members, and each member represents a different industry or interest relevant to water use, including agriculture, petroleum, and public health.¹¹⁶ The EQC meets twice a year to promulgate rules in the Nebraska Administrative Code.¹¹⁷ The EQC sets the pollutant limitations for NPDES permits in Nebraska.¹¹⁸

Every year, the NDEE releases a report regarding the status of water in Nebraska.¹¹⁹ In 2019, the report addressed concerns with nitrates found in large quantities of Nebraska water.¹²⁰ Nitrates are a commonly occurring natural chemical that may, in high quantities, harm water quality and human health.¹²¹ The NDEE report published information regarding groundwater quality data, how it is gathered, and the agencies involved in gathering data; the NDEE also reported its conclusions about the status of Nebraska’s groundwater.¹²² NRDs release a separate groundwater management summary every year, with each of the twenty-three NRDs reporting various data points relevant to each district’s unique management strategy.¹²³

3. *Agriculture and Water Regulation in Nebraska*

Under the CWA, NPDES permits are required for many different industries, including construction, agriculture, dairy farms, food processing, laundromats, chemical producers, private and public wastewater treatment facilities, automobile repair, and any industry that

114. *Id.*

115. NEB. REV. STAT. § 81-1504(1) (2020).

116. NEB. REV. STAT. § 81-1503(1) (2020); *Envtl. Quality Council Members*, NEB. DEP’T OF ENV’T. & ENERGY (June 18, 2020), <http://dee.ne.gov/NDEQProg.nsf/OnWeb/EQCMem>.

117. *Id.*

118. NEB. REV. STAT. § 81-1504(11) (2020).

119. NEB. REV. STAT. § 46-1304 (2019).

120. NEB. DEP’T OF ENV’T & ENERGY, *supra* note 13, at 20.

121. *Id.* Agricultural activities lead to higher nitrate levels in groundwater. *Id.* at 8.

122. *See generally* NEB. DEP’T OF ENV’T & ENERGY, *supra* note 13, at 1 (2019).

123. Dean Edson, *Introduction to the 2019 NRD WATER MANAGEMENT ACTIVITIES SUMMARY 1* (Neb. Natural Resources Districts, 2020). The NRD Water Management Activities Summary details water quality and NRD activities across Nebraska. *See, e.g.*, London Vogt, *Central Platte NRD, in 2019 NRD WATER MANAGEMENT ACTIVITIES SUMMARY 14*, 14 (detailing nitrate levels and ongoing projects to protect the Central Platte NRD, which includes Grand Island, Gibbon, and Kearney, NE).

uses and discharges water.¹²⁴ The NPDES permit is required for *any* discharge of a pollutant from a point source into navigable waters, and most NPDES permits are not industry-specific.¹²⁵ While agriculture is a leading cause of pollution in water and often agricultural activities require NPDES permits, there are no agriculture-industry-specific NPDES permits.¹²⁶

Over ninety-three percent of Nebraska's groundwater withdrawals can be attributed to Nebraska's largest industry: irrigated agriculture.¹²⁷ Prior to the 1950s, most water for irrigation came from wells along rivers and streams—the water from wells was surface water.¹²⁸ After center pivot wells were invented and gained traction, more farmers in Nebraska began utilizing aquifer water.¹²⁹ At the peak of the use of center pivot wells in the mid-1970s, the Nebraska Groundwater Management and Protection Act¹³⁰ established local NRDs to manage groundwater and local ground and surface water disputes.¹³¹ Today, before farmers withdraw groundwater from the aquifer, users of water involved in agriculture must receive permission from the NRD board in their region.¹³² Many players in the agriculture industry sit on these very boards which regulate groundwater usage.¹³³ The prior appropriation system in Nebraska means that longtime water users are given preferential treatment by the law and through these NRD boards.¹³⁴ The Nebraska Unicameral found that agriculture is an important industry in Nebraska and it should continue; thus, NRDs are, by design, meant to encourage agriculture and enable industry players to utilize the water they need.¹³⁵

Nebraska has many statutes targeted at mitigating pollution from agribusiness.¹³⁶ One such statute is the Livestock Management

124. *NDEE Permit Matrix*, NEB. DEP'T. OF ENV'T & ENERGY (Aug. 15, 2018), <http://deq.ne.gov/Press.nsf/pages/NEWS081518>. The Nebraska Administrative Code outlines when NPDES permits are required in Nebraska. 119 NEB. ADMIN. CODE § 2.002.

125. *See NDEE Permit Matrix*, *supra* note 124 (providing guidance from the Nebraska Department of Environment and Energy regarding discharges of water, and the need to obtain a permit).

126. Mary Jane Angelo, *Maintaining a Healthy Water Supply While Growing a Healthy Food Supply: Legal Tools for Cleaning Up Agricultural Water Pollution*, 62 KANS. L. REV. 1003, 1003 (2014); *see also NDEE Permit Matrix*, *supra* note 124 (listing various NPDES permits required for different industries, and not listing agriculture).

127. Hoffman & Zellmer, *supra* note 100, at 812.

128. ARCHER, *supra* note 85, at 108

129. *Id.* at 108-09.

130. NEB. REV. STAT. §§ 46-701 et seq. (2014).

131. ARCHER, *supra* note 85, at 109.

132. Hoffman & Zellmer, *supra* note 100, at 836.

133. *Id.* at 835.

134. ARCHER, *supra* note 85, at 116.

135. NEB. REV. STAT. § 46-704 (2019).

136. *See NEB. DEP'T OF ENV'T & ENERGY*, *supra* note 13, at 7 (listing various state departments and actors that regulate agricultural activities in Nebraska).

Act, which manages discharges of manure into groundwater in Nebraska.¹³⁷ Some livestock agribusinesses in Nebraska run *no-discharge sites* under the statute, where manure from livestock is discharged away from navigable waters, thus avoiding a CWA permit.¹³⁸ The manure discharged into the ground may eventually reach navigable waters.¹³⁹

IV. ANALYSIS

The United States Supreme Court's decision in *County of Maui v. Hawai'i Wildlife Fund*¹⁴⁰ concluded that National Pollutant Discharge Elimination System ("NPDES") permits, administered by the Environmental Protection Agency ("EPA") or corresponding state agencies like the Nebraska Department of Environment and Energy ("NDEE"), are required both for direct discharges of a pollutant from a point source into navigable water and for discharges which are functionally equivalent to a direct discharge of a pollutant from a point source into navigable water.¹⁴¹ In the last several decades, Supreme Court decisions like *Rapanos v. United States*¹⁴² have increased litigation around discharges of pollutants across the country, but different jurisdictions have enforced different rules regarding when NPDES permits are necessary.¹⁴³

This Note will first argue that the *County of Maui* decision will most significantly impact the industry in Nebraska most commonly subjected to NPDES permits: agriculture.¹⁴⁴ The agriculture industry will be vulnerable to lawsuits because this industry uses the most water in the state.¹⁴⁵ This Note will then argue that NPDES permits are unlikely to protect water quality in Nebraska, except in limited circumstances.¹⁴⁶ Finally, this Note will argue that if a farmer is sued in federal court for violating the new standard under *County of Maui*, the court should exercise its discretion and rule against requiring an NPDES permit if the discharge does not impair water quality.¹⁴⁷

137. Interview with Richardson & Schutz, *supra* note 43.

138. *Id.*

139. *Id.* Where drinking water is impaired, EPA has authority under the Safe Drinking Water Act to intervene. 42 U.S.C. § 300(i).

140. 140 S. Ct. 1462 (2020).

141. *Cnty. of Maui v. Hawai'i Defenders of Wildlife*, 140 S. Ct. 1462, 1476-77 (2020).

142. 547 U.S. 715 (2006).

143. *See, e.g.*, Foster, *supra* note 7 (explaining that 90 lawsuits have been filed to establish which waters are "waters of the United States" and subject to NPDES permitting and describing the different standards applied by different courts in the United States).

144. *See infra* notes 151-93 and accompanying text.

145. *See infra* notes 151-69 and accompanying text.

146. *See infra* notes 194-243 and accompanying text.

147. *See infra* notes 244-69 and accompanying text.

This Note concedes that citizens may bring lawsuits against different industries, thus increasing litigation in this area.¹⁴⁸ This Note further concedes that where a discharge does not meet water quality standards, an NPDES permit should be required because nitrates from agricultural activities may threaten water quality.¹⁴⁹ This Note is careful to point out that, due to much of the uncertainty both in the Court's decision in *County of Maui* as well as other confusion surrounding which waters are subject to EPA jurisdiction under *Rapanos*, it is difficult to determine how and if different industries will be impacted without citizen litigation to test these muddy waters.¹⁵⁰

A. NEBRASKA FARMERS THAT DISCHARGE POLLUTANTS INTO GROUNDWATER WITHOUT A PERMIT MIGHT BE VULNERABLE TO LAWSUITS

1. *Agriculture Is the Largest User of Water in Nebraska*

Due to the great volume of water required by agricultural activities, the agriculture industry is the most likely to be impacted by changing water regulations from the federal and state governments.¹⁵¹ Ambiguous requirements for discharges of pollutants leave agricultural actors vulnerable to both lawsuits by private citizens under § 505 of the Clean Water Act¹⁵² (“CWA”) and enforcement actions that can be brought by EPA or the NDEE.¹⁵³

NPDES permits are required of agriculture users that discharge water under the CWA, but no NPDES permits are specific to the agriculture industry.¹⁵⁴ Farms and other agribusinesses in Nebraska are subject to many different regulations from a variety of agencies, including EPA, Nebraska Natural Resource Districts (“NRDs”), the NDEE, and the Nebraska Department of Natural Resources.¹⁵⁵ In

148. See *infra* notes 170-93 and accompanying text.

149. See *infra* notes 256-62 and accompanying text.

150. See *infra* notes 249-69 and accompanying text.

151. Compare ARCHER, *supra* note 85, at 105 (reporting that “more than 80 percent of [Nebraska] land areas [are] devoted to agriculture,” making agriculture the state’s largest industry), Hoffman & Zellmer, *supra* note 100, at 812 (“[G]roundwater irrigated agriculture . . . now accounts for over 93% of [Nebraska’s] groundwater withdraws.”), and Spade, *supra* note 111, at 11 (reporting that one in four Nebraskans’ employment is related to agriculture), *with* Cnty. of Maui v. Hawai’i Wildlife Fund, 140 S. Ct. 1462, 1468 (2020) (determining that discharges which are the functional equivalent of a direct discharge into navigable waters are subject to NPDES permitting, expanding federal jurisdiction of water into groundwater in limited circumstances when previously discharges of effluent into groundwater were not considered subject to NPDES permits and EPA jurisdiction).

152. 33 U.S.C. §§ 1251-1388.

153. Interview with Richardson & Schutz, *supra* note 43.

154. Angelo, *supra* note 126, at 1003-04.

155. NEB. DEP’T OF ENV’T & ENERGY, *supra* note 13, at 7-8.

Nebraska, federal laws, the Nebraska Environmental Protection Act,¹⁵⁶ the Nebraska Livestock Waste Management Act,¹⁵⁷ and the Integrated Solid Waste Management Act¹⁵⁸ govern water quality and water compacts with other states.¹⁵⁹ Water use is carefully monitored, particularly for nitrates, a commonly occurring chemical which impacts drinking water quality when high quantities exist in ground-water supply.¹⁶⁰

Some livestock agribusinesses in Nebraska run so-called “no-discharge sites” where manure from livestock is discharged away from navigable waters to avoid NPDES permitting.¹⁶¹ The manure discharged into the ground may, in some circumstances, mix with underground water that reaches a navigable water, thus subjecting the discharge to NPDES permitting under the new *County of Maui v. Hawai'i Wildlife Fund*¹⁶² rule.¹⁶³

In *County of Maui*, the United States Supreme Court reasoned that the County of Maui wastewater treatment plant was deliberately trying to avoid NPDES permitting by exploiting a loophole that allowed them to discharge into the ground without a permit rather than discharging directly into the Pacific Ocean, a navigable water under the CWA.¹⁶⁴ The Court did not list intent as a factor to consider in whether a discharge into groundwater is functionally equivalent to a direct discharge into navigable waters, but the Court did not preclude district courts from considering other factors such as intent to avoid NPDES permitting.¹⁶⁵ In fact, the Court explained that the Maui wastewater treatment plant was attempting to exploit a loophole in the CWA and that Congress could not have intended such a loop-

156. NEB. REV. STAT. §§ 81-1501 et seq. (1998).

157. NEB. REV. STAT. §§ 54-2416 et seq. (2006).

158. NEB. REV. STAT. §§ 13-2001 et seq. (2020).

159. NEB. REV. STAT. § 81-1501(3) (1998).

160. NEB. DEP'T OF ENV'T & ENERGY, *supra* note 13, at 20-21.

161. Interview with Richardson & Schutz, *supra* note 43; *see also* NEB. REV. STAT. § 54-2419(3) (2006) (describing the conditions when an NPDES permit is required for animal feeding operations).

162. 140 S. Ct. 1462 (2020).

163. *Compare* Interview with Richardson & Schutz, *supra* note 43 (explaining how intent to evade NPDES permitting may or may not factor into district court decisions to require NPDES permits), *with Cnty. of Maui*, 140 S. Ct. at 1468 (ruling that discharges which are the functional equivalent of a direct discharge into navigable waters are subject to NPDES permitting).

164. *Cnty. of Maui*, 140 S. Ct. at 1473 (discussing that Congress could not have intended to create such a large loophole as to allow a pipe's owner to move a pipe back a few yards to avoid directly discharging pollutant into a navigable water, and thus the discharge must be subject to NPDES permitting).

165. *See id.* at 1476-77 (listing factors for courts to consider depending on the circumstances of a particular case and not including intent to avoid NPDES permitting or intent to exploit a loophole as a factor).

hole.¹⁶⁶ It is reasonable that district courts may read *County of Maui* to look harder at water quality standards and discharges of pollutants when the polluter is intentionally trying to avoid NPDES permits.¹⁶⁷

Nebraska farmers' no-discharge sites may attract attention from litigants near the manure where non-perennial streams or sandy soils feed into larger rivers in Nebraska, like the North Platte or Niobrara rivers which, in turn, feed into the Missouri River, the United States' longest navigable water.¹⁶⁸ The NDEE may feel pressure to require NPDES permits for these facilities because of the similarity between the no-discharge sites and the County of Maui wastewater sewage treatment facilities' intent to avoid NPDES permitting.¹⁶⁹

2. County of Maui Will Increase Litigation Due to Uncertainty

Since the United States Supreme Court decided *Rapanos v. United States*,¹⁷⁰ the United States Court of Appeals for the Eighth Circuit and its lower district courts have seen a number of lawsuits related to the CWA and agriculture.¹⁷¹ Both EPA and citizens or public interest groups have brought suit to enforce NPDES permitting standards for businesses and individuals, including farmers and ranchers, who discharge pollutants from a point source into navigable waters.¹⁷²

Both *Rapanos* and *County of Maui* expanded the scope of the CWA and NPDES permits, which increases litigation.¹⁷³ NPDES permits are the enforcement arm of the CWA and are meant to regulate how much and which types of pollutants are allowed to be discharged from

166. See *id.* at 1473 (implying that the County of Maui was attempting to exploit an unintended loophole).

167. See *id.* at 1476 (explaining that the facts of each case will require different considerations for determining if a discharge into groundwater is functionally equivalent to a discharge into navigable waters before giving only examples of factors to be considered by lower courts).

168. Interview with Richardson & Schutz, *supra* note 43.

169. *Id.*

170. 547 U.S. 715 (2006).

171. See, e.g., *Eoff v. EPA*, No. 4:13-cv-368-DPM, 2015 U.S. Dist. LEXIS 65379, at *1, *2-3 (E.D. Ark. May 19, 2015) (describing a situation where an individual raising cattle is being sued by EPA to enforce NPDES permits); *Garrison v. New Fashion Pork LLP*, 449 F. Supp. 3d 863, 866 (N.D. Iowa 2020) (describing the plaintiff as a citizen with property adjacent to defendant's controlled animal feeding operation).

172. See *Eoff*, 2015 LEXIS 65379, at *2-3 (describing EPA as bringing an NPDES enforcement action); *Garrison*, 449 F. Supp. 3d at 866 (describing a neighbor as a citizen bringing an NPDES enforcement action).

173. Compare *Kassen*, *supra* note 62 (describing the expansion of EPA jurisdiction under *Rapanos* and subsequent litigation), with *County of Maui*, 140 S. Ct. at 1468 (concluding that EPA has jurisdiction over discharges into groundwater which are the functional equivalent of a direct discharge into navigable water, thus expanding EPA jurisdiction).

a point source into waters of the United States.¹⁷⁴ The *Rapanos* decision changed the definition of waters of the United States in the same way that the *County of Maui* decision has changed the definition of a discharge to include discharges that are functionally equivalent to a direct discharge into waters of the United States.¹⁷⁵ Both *County of Maui* and *Rapanos* impact what discharges of pollutants are subject to enforcement by EPA via NPDES permits.¹⁷⁶ Enforcement actions, either in court or in administrative proceedings, are the way to ensure EPA is fulfilling the objectives of the CWA.¹⁷⁷

The way groundwater and surface waters interact is dependent on geography and geology.¹⁷⁸ For these reasons, it is impossible for the Supreme Court or any nationwide body to establish uniform rules for all the water in the United States.¹⁷⁹ The CWA reflects this understanding of water, as it directs states to retain the primary responsibility of protecting water.¹⁸⁰ The CWA acts as a minimum for water

174. See Clean Water Act § 402, 33 U.S.C. § 1342 (describing the conditions by which the administrator of EPA may bring enforcement actions against those not complying with NPDES permit requirements).

175. Compare *United States v. Bailey*, 571 F.3d 791, 797-799 (8th Cir. 2009) (quoting *Rapanos v. United States*, 547 U.S. 715, 742 (2006) (plurality opinion)) (describing how the *Rapanos* opinion allows federal jurisdiction under both the Justice Kennedy concurrence, which will find federal jurisdiction over surface waters with a significant nexus to navigable waters, and the plurality, which will find federal jurisdiction over surface waters with “a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands, are ‘adjacent to’ such waters and covered by the [Clean Water Act]”), with *Cnty. of Maui v. Hawai’i Wildlife Fund*, 140 S. Ct. 1462, 1477-78 (2020) (admitting that the interpretation in *County of Maui* will expand EPA jurisdiction to discharges to navigable waters through groundwater).

176. Compare *Cnty. of Maui*, 140 S. Ct. at 1477-78 (remanding the case for further proceedings to determine whether the discharge by County of Maui wastewater treatment plants are the functional equivalent to a discharge from a point source into navigable waters, even though the Government opposed such interpretation), with *Bailey*, 571 F.3d at 799-803 (finding that the Army Corps of Engineers did have jurisdiction over the disputed wetlands using Justice Kennedy’s concurrence in *Rapanos*).

177. Clean Water Act § 505, 33 U.S.C. § 1365(2) (providing that citizens can sue the Administrator if the Administrator fails “to perform any act or duty under this Act which is not discretionary with the Administrator”). See generally *Hawai’i Wildlife Fund v. Cnty. of Maui*, 881 F.3d 754 (9th Cir. 2018) (noting that the case was a citizen suit showing how enforcement actions brought by citizens can enforce the CWA by suing noncompliant dischargers of pollutants).

178. See ARCHER, *supra* note 85, at 2 (describing the impact of Nebraska’s “underlying geology” on Nebraska’s topography and formation of rivers and lakes).

179. See *Cnty. of Maui*, 140 S. Ct. at 1476-77 (explaining, “there are too many potentially relevant factors applicable to factually different cases for this Court now to use more specific language” and giving only examples of factors to be considered by lower courts, many factors being dependent on the particular geology of a discharge of effluent).

180. 33 U.S.C. § 1251(b) (stating the Clean Water Act’s objective is to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution to plan the development and use . . . of land and water resources”).

standards for discharges of pollutants into navigable waters, or waters of the United States.¹⁸¹ EPA has largely delegated the primary administration of NPDES permits to states.¹⁸² This is true in Nebraska, where the NDEE retains the power to issue NPDES permits and enforce NPDES requirements.¹⁸³ The CWA sets basic nationwide expectations and a level playing field to maintain clean water.¹⁸⁴ EPA primarily bases pollutant limitations on available technology and water quality-based limitations.¹⁸⁵ Nebraska maintains responsibility for bringing currently unpermitted discharges of pollutant from a point-source into compliance, whether by NDEE action or an action by a citizen under the CWA citizen suit provision.¹⁸⁶

After *Rapanos*, litigation around NPDES permitting enforcement increased.¹⁸⁷ Federal district and circuit courts had to determine what standard to apply, and they often used Justice Kennedy's concurring opinion rather than the plurality opinion penned by Justice Scalia.¹⁸⁸ Luckily for circuit and district courts, *County of Maui* deliv-

181. See Clean Water Act § 402, 33 U.S.C. § 1342(s)(5)(B) ("Nothing in this subsection reduces or eliminates any . . . authority of a State to revise a water quality standard . . .").

182. Clean Water Act § 402, 33 U.S.C. § 1342(a)(5) ("The Administrator [of the Environmental Protection Agency] shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of [the Clean Water Act], to issue permits for discharges into navigable waters within the jurisdiction of such State."); see also *NPDES Permits Around the Nation*, *supra* note 8 ("EPA issues all National Pollutant Discharge Elimination System (NPDES) water quality permits in Massachusetts, New Hampshire, New Mexico, District of Columbia, U.S. territories, and on federal and tribal lands. Other states have been delegated by EPA to issue their own permits.").

183. *Nebraska NPDES Permits*, *supra* note 8.

184. Compare 33 U.S.C. § 1251(a)(3) ("[I]t is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited . . ."), with Clean Water Act § 402, 33 U.S.C. § 1342(s)(5)(B) ("Nothing in this subsection reduces or eliminates any . . . authority of a State to revise a water quality standard . . .").

185. 33 U.S.C. § 1311(b)(1)(A)(i)-(ii).

186. Compare *Cnty. of Maui*, 140 S. Ct. at 1468 ("We conclude that the statutory provisions at issue require a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters."), and Clean Water Act § 505, 33 U.S.C. 1365(a) (allowing "any citizen" to "commence a civil action on his own behalf . . ."), with *Nebraska NPDES Permits*, *supra* note 8 (stating that the Nebraska Department of Environment and Energy is responsible for administering and enforcing NPDES permits), and *NPDES Permits Around the Nation*, *supra* note 8 ("EPA issues all National Pollutant Discharge Elimination System (NPDES) water quality permits in Massachusetts, New Hampshire, New Mexico, District of Columbia, U.S. territories, and on federal and tribal lands. Other states have been delegated by EPA to issue their own permits.").

187. Foster, *supra* note 7 (explaining the increase in litigation following the *Rapanos* decision); see also Clark, *supra* note 7, at 306 (explaining the circuit court confusion regarding how to apply *Rapanos*).

188. See, e.g., *Bailey*, 571 F.3d at 798-799 (citing *United States v. Robison*, 505 F.3d 1208, 1221-22 (11th Cir. 2007)) (holding that in the Eighth Circuit, EPA has jurisdiction over "wetlands that satisfy either the plurality or Justice Kennedy's test," and explain-

ered a majority, not a plurality, opinion.¹⁸⁹ However, state administrative agencies, like the NDEE, and courts, like the United States District Court for the District of Nebraska, will have to wade through muddy waters left by both *County of Maui* and *Rapanos* before imposing NPDES permits on facilities currently operating without an NPDES permit.¹⁹⁰

3. *Agriculture Industries in Nebraska Are Vulnerable to Lawsuits After County of Maui*

Agriculture, as the largest user of water in Nebraska, is vulnerable to NPDES permitting enforcement from the NDEE and from citizen suits.¹⁹¹ The pollutants from “no-discharge sites” may only reach surface waters through sandy soils, which under *Rapanos* may or may not be considered navigable waters.¹⁹² The uncertainty of the *County of Maui* and *Rapanos* Supreme Court decisions, combined with conflicting interpretative statements from EPA, leave the discretion in the hands of the NDEE—or in the hands of district courts if citizens bring suit attempting to impose liability for a lack of an NPDES permit.¹⁹³

ing that of the circuits “that have considered *Rapanos*, most have concluded that Justice Kennedy’s opinion” is the standard determining EPA and the Army Corps of Engineers’ jurisdiction).

189. *Cnty. of Maui*, 140 S. Ct. at 1465. Justice Breyer authored the opinion with Chief Justice Roberts and Justices Ginsburg, Sotomayor, Kagan, and Kavanaugh joining. *Id.*

190. Compare Clark, *supra* note 7, at 319 (arguing that *Rapanos* left vague a critical piece of where the Clean Water Act and NPDES permitting apply), with *Cnty. of Maui*, 140 S. Ct. at 1477 (leaving substantial room for district courts to determine when NPDES permits apply based on factors suggested by the Court, but allowing district courts to use other factors when relevant).

191. Interview with Richardson & Schutz, *supra* note 43.

192. Compare *id.* (stating that discharges from so-called no discharge sites may reach navigable waters through sandy soils), with Clark, *supra* note 7, at 296, 319 (arguing that wetlands and other waters that have a “significant nexus” to navigable waters are debatably subject to CWA jurisdiction).

193. Compare Hoffman & Zellmer, *supra* note 100, at 864 (discussing Nebraska’s framework for integrated water quality through its use of NRDs and comparing it to other western states, noting that bifurcated water management systems are increasingly unworkable and integrated systems are preferable to protect water quality and use), with Groundwater Management and Protection Act, NEB. REV. STAT. § 46-703(1) (2004) (“The management, conservation, and beneficial use of hydrologically connected ground water and surface water are essential to the continued economic prosperity and well-being of the state, including the present and future development of agriculture in the state . . .”), and Clean Water Act, 33 U.S.C. § 1251(a)(1) (stating the purpose of the Clean Water Act is to reduce and eliminate pollution in the nation’s waters).

B. THE NDEE IS UNLIKELY TO ENFORCE NPDES PERMIT
REQUIREMENTS FOR EXISTING DISCHARGES INTO GROUNDWATER

1. *Nebraska Carefully Monitors Groundwater Quality*

Nebraska is home to several major rivers that feed into the Missouri River, the longest river in the United States.¹⁹⁴ The High Plains Aquifer, or Ogallala Aquifer, is an underground storage of water that feeds these rivers and feeds the Missouri River.¹⁹⁵ Thus, the Nebraska Unicameral has long recognized the importance of maintaining high quality water, both for Nebraskans and for downstream states.¹⁹⁶ The Nebraska Environmental Quality Council (“EQC”) promulgates rules pursuant to the Nebraska Livestock Waste Management Act, the CWA, and the Integrated Solid Waste Management Act to protect both surface and groundwater quality.¹⁹⁷ NRDs across the state promulgate rules and regulations regarding groundwater management.¹⁹⁸ The EQC sets maximum contaminant levels for known public health parameters, radionuclides, microbiology, and other parameters affecting use.¹⁹⁹ Pollutants are subject to the maximum contaminant levels if the contaminant would impair beneficial uses of groundwater (such as using the water as drinking water), or would impair hydrologically connected waters, surface or other groundwaters.²⁰⁰

Prior to the 1969 creation of NRDs, Nebraska had 154 special purpose districts throughout the state, including watershed planning boards, rural water districts, flood control districts, and other governmental entities.²⁰¹ Now, the twenty-three NRDs collaborate with other water management bodies in Nebraska to protect groundwater quality.²⁰² Nebraska’s water use laws increasingly recognize the hydrologic connection between surface and groundwater, distinguishing

194. Goeke, *supra* note 92, at 32; NORTON, *supra* note 94, at 1.

195. See Goeke, *supra* note 92, at 31-32 (referring to the High Plains, or Ogallala, Aquifer as the main source of groundwater in Nebraska and describing rivers in Nebraska as being fed by groundwater).

196. NEB. REV. STAT. § 81-1501 (1998) (indicating that the original act, enacted in 1971, has provided Nebraska with the ability to conserve and protect high quality water).

197. NEB. REV. STAT. § 81-1505(1) (2019).

198. NEB. REV. STAT. § 46-707(1)(a) (2019).

199. 118 NEB. ADMIN. CODE § 4.002 (2006).

200. 118 NEB. ADMIN. CODE § 4.001 (2006).

201. Hoffman & Zellmer, *supra* note 100, at 815.

202. Compare *id.* (“Groundwater resources within Nebraska are managed by twenty-three locally run NRDs.”), with NEB. REV. STAT. §§ 46-707(a), 46-707(g) (2019) (stating that NRDs will promulgate rules to protect groundwater and NRDs will report and consult with the NDEE).

Nebraska from other states and the federal government.²⁰³ The Nebraska Association of Resource Districts and the NDEE both publish annual reports regarding groundwater quality.²⁰⁴ Each NRD's report is unique to the needs of its community.²⁰⁵ Each NRD has different herbicides, pesticides, or other pollutants in the water, and each NRD attempts to mitigate these pollutants through education and regulation within its respective territory.²⁰⁶ The Nebraska Unicameral determined in creating NRDs that statewide monitoring and local administration of water was the best method to protect clean drinking water while also protecting Nebraska's economy.²⁰⁷ In 2019, studies from water administration agencies in Nebraska reported high quality drinking water, though nitrates and other pesticides are impacting water quality.²⁰⁸

NRDs and the EQC carefully regulate and monitor Nebraska's water quality to ensure that Nebraska's water is available for beneficial uses, such as drinking water, irrigation, and other uses.²⁰⁹ NPDES permits are designed to protect navigable waters, not groundwater.²¹⁰ The state of Nebraska has fulfilled the purpose of the CWA by taking on the primary responsibility of protecting and maintaining quality groundwater to protect citizens and the economy.²¹¹ By protecting groundwater, NRDs and the EQC also protect the rivers and

203. See Hoffman & Zellmer, *supra* note 100, at 864 (concluding that "Nebraska's NRD system and the state's recent move towards integrated management planning offer a unique institutional approach for cultivating improved linkages between local and state water management authorities" and comparing Nebraska's water approach to other western states including Kansas, Utah, Alaska, North Dakota, and Nevada).

204. Edson, *supra* note 123, at 1; NEB. REV. STAT. § 46-1304 (2019).

205. See Edson, *supra* note 123, at 1 (publishing letters from each of the twenty-three NRDs across the state regarding their water quality and quantity findings and each NRD's particular needs).

206. *Id.*

207. Groundwater Management and Protection Act, NEB. REV. STAT. § 46-702 (2007).

208. See, e.g., Vogt, *supra* note 123, at 14 (reporting from various NRDs the levels of specifically nitrate found in tested groundwater); NEB. DEP'T OF ENV'T & ENERGY, *supra* note 13, at 12 (reporting specific nitrate levels found across the state of Nebraska).

209. 118 NEB. ADMIN. CODE § 6.001 (2006). The Neb Admin Code also provides that drinking water is the "highest and most sensitive beneficial use of ground water" and recognizes that protecting the quality of groundwater for drinking protects the water for other purposes. 118 NEB. ADMIN. CODE § 6.002 (2006).

210. See Clean Water Act § 402, 33 U.S.C. § 1342(a)(4) (requiring permits for discharges into navigable waters, but not mentioning groundwater).

211. Compare 33 U.S.C. § 1251(b) (stating a purpose of the Clean Water Act is to protect states' authority over their jurisdictional waters), and, e.g., Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 et seq. (2016) (establishing local NRDs to administer water quality and conservation rules in Nebraska, indicating that Nebraska is protecting its jurisdictional waters), with Clean Water Act § 402, 33 U.S.C. § 1342(a)(1) (requiring a permit for discharges of pollutants from a point source into a navigable water, and not requiring permits for discharges into groundwater, indicating that NPDES permits are not designed to protect groundwater quality).

streams that are fed by groundwater, such as the Snake, Niobrara, and other rivers that feed into the Missouri River.²¹²

2. *The Purpose of NPDES Permits and the CWA Is to Protect Navigable Water Quality, Leaving Protection of Groundwater Primarily to States*

Congress enacted the CWA to eliminate water pollution by 1985, thus naming the primary enforcement mechanism the National Pollutant Discharge *Elimination* System.²¹³ Obviously this goal has not been met, but the CWA and EPA still work to restore and maintain water quality through NPDES permitting.²¹⁴ It is not illegal to discharge pollutants, but it is illegal to discharge pollutants into navigable waters without a permit.²¹⁵ The purpose of NPDES permits is to enforce water quality standards for discharges of pollutants into navigable waters.²¹⁶ In creating the CWA, Congress left substantial responsibility to the states to manage and control groundwater and other non-navigable waters.²¹⁷

NPDES permits protect water quality by ensuring companies, farms, laundromats, construction projects, and many other industries regulate water discharges before they reach navigable waters.²¹⁸ The NPDES permit program fulfills the purpose of the CWA by regulating

212. Compare 118 NEB. ADMIN. CODE § 4.001 (2006) (protecting groundwater from “wastes, toxic substances, or any other pollutant”), with Goeke, *supra* note 92, at 32 (stating that Nebraska has many streams and rivers which are fed by groundwater, such as the Platte River), and ARCHER, *supra* note 85, at 5 (“[A]ll of the water that runs into Nebraska’s streams and rivers and that does not evaporate and is not used within the state ends up in the Missouri River, which drains the entire state.”).

213. Compare 33 U.S.C. § 1251(a)(1) (“[I]t is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985 . . .”), with Clean Water Act § 402, 33 U.S.C. § 1342 (naming the permit system by which to enforce the CWA the “[n]ational pollutant discharge elimination system”).

214. See *Rapanos v. United States*, 547 U.S. 715, 787 (2006) (Stevens, J., dissenting) (describing Congress’s goal to end water pollution by 1985 as “[h]erculean,” implying that such a goal is highly improbable, and further describing EPA’s regulation of discharges of pollutants into water).

215. See Clean Water Act § 301, 33 U.S.C. § 1311(a) (“Except as in compliance with this section and [other sections of the CWA], the discharge of any pollutant by any person shall be unlawful.”).

216. Clean Water Act § 402, 33 U.S.C. § 1342(a)(1).

217. 33 U.S.C. § 1251(b). The federal government exerts jurisdiction over state groundwater through other regulations. See, e.g., Safe Drinking Water Act, 42 U.S.C. § 300(f).

218. Compare *NDEE Permit Matrix*, *supra* note 124 (listing a number of industries that may be subject to several different NPDES permit requirements), with *EPA v. California*, 426 U.S. 200, 204 (1976) (describing how NPDES permitting enforcement allows EPA to avoid “work[ing] backward” by ensuring that “a discharger’s performance is now measured against strict technology-based effluent limitations . . .”).

navigable waters.²¹⁹ NPDES permits have sometimes regulated discharges into groundwater, but states have maintained primary control.²²⁰ NPDES permits are only designed to protect navigable waters from discharges of pollutant from a point source.²²¹ States maintain primary responsibility for regulating other discharges into water, such as discharges not into navigable waters and discharges not from a point source.²²² NPDES permits for discharges of pollutants into groundwater may be necessary to fulfill the purpose of the CWA if water quality of navigable waters is impaired.²²³

3. *Requiring NPDES Permits for Already-Regulated Discharges into Groundwater Will Not Fulfill the Purpose of the CWA and Will Not Be Enforced by the NDEE*

The NDEE is unlikely to enforce the expanded jurisdiction under *County of Maui v. Hawai'i Wildlife Fund*²²⁴ against the agriculture industry because NPDES permits are not designed to protect groundwater quality.²²⁵ The *County of Maui* decision does not mandate NPDES permits where water quality is not impaired.²²⁶ The agriculture industry in Nebraska already faces scrutiny from a number of state and federal administrative agencies which control potential pollutants and protect both ground and surface water.²²⁷

219. Compare 33 U.S.C. § 1251(b) (stating the purpose of the CWA is to protect the nation's waters from pollutants), with Clean Water Act § 402, 33 U.S.C. § 1342(a) (requiring NPDES permits for discharges only into navigable waters and excluding discharges into groundwater from NPDES permitting).

220. *Cnty. of Maui v. Hawai'i Wildlife Fund*, 140 S. Ct. 1462, 1477 (2020).

221. See Clean Water Act § 402, 33 U.S.C. 1342(a)(1) (requiring permits for discharges of pollutants into navigable waters, but not requiring permits for discharges into groundwater).

222. Compare 33 U.S.C. § 1251(b) (stating a purpose of the Clean Water Act is to protect states' authority over their jurisdictional waters), with Clean Water Act § 402, 33 U.S.C. § 1342(a)(1) (requiring a permit for discharges of pollutants from a point source into a navigable water, and not requiring permits for discharges into groundwater).

223. See *Cnty. of Maui*, 140 S. Ct. at 1476 (holding that Congress intended to protect navigable waters by requiring an NPDES permit, and that to fulfill that role, NPDES permits will need to be required "when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge").

224. 140 S. Ct. 1462 (2020).

225. See Clean Water Act § 402, 33 U.S.C. § 1342(a)(1) (prescribing permits for discharges into navigable waters and reserving regulation of groundwater to the states).

226. Compare Brief for Respondent, *supra* note 24, at 8-10 (stating that phosphorus and nitrogen from the County of Maui wastewater treatment plants reached the Pacific Ocean, a navigable water, and damaged the ocean flora and fauna), with NEB. DEP'T OF ENV'T & ENERGY, *supra* note 13, at 11-12 (indicating that Nebraska's water quality is very high and that the NDEE is monitoring certain harmful chemicals to protect water for drinking and other beneficial uses).

227. See, e.g., Neb. Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 et seq. (2014) (establishing NRDs to regulate water use, including for agriculture use); Neb. Livestock Waste Management Act, NEB. REV. STAT. § 54-2416 et seq.

In *County of Maui*, the unpermitted discharged pollutants that reached the Pacific Ocean caused visible, measurable damage to the coastal reefs.²²⁸ The respondents in *County of Maui* asserted that the treated wastewater, which reached the Pacific Ocean, complied with the Safe Drinking Water Act²²⁹ and state law.²³⁰ The respondents asserted that the Safe Drinking Water Act and state permitting requirements were less restrictive than the NPDES permit requirements, specifically regarding phosphorus and nitrogen.²³¹ Phosphorus and nitrogen are common in treated sewage water.²³² The United States Supreme Court did not mention impaired water quality as a factor for district courts to consider in determining whether to require an NPDES permit.²³³ However, the Court did list potential considerations that would impact water quality, such as the extent to which the pollutant is diluted as it travels, the amount of pollutant entering navigable waters relative to the amount of pollutant that leaves the point source, and the manner by or area which the pollutant enters the navigable waters.²³⁴ The Court did not limit the factors to pure geologic or pure hydrologic connection determinations.²³⁵

Unlike in *County of Maui*, where respondents demonstrated the harm to the biology and ecosystem where the unpermitted discharge reached the Pacific Ocean, Nebraska's careful monitoring of both ground and surface water do not indicate that discharges from agriculture are impairing the lakes, streams, or surface waters in Ne-

(2006) (regulating animal waste); Nebraska Environmental Protection Act, NEB. REV. STAT. §§ 81-1501 et seq. (1998) (establishing an EQC to regulate water use, including for agriculture use); 118 NEB. ADMIN. CODE § 4.002 (2006) (establishing pollutant limitations for all discharges into groundwater, including from agriculture); 117 NEB. ADMIN. CODE § 4 (2014) (establishing pollutant limitations for all discharges into surface waters, including from agriculture).

228. Brief for Respondent, *supra* note 24, at 9-10 (“[T]he submarine springs where the majority of the County’s wastewater enters the ocean, measurements of phosphorous and nitrogen substantially exceed CWA regulatory limits . . . nutrients and other pollutants from injected sewage have devastated the once-pristine reef, stimulating algal growth that smothers the coral.”).

229. 42 U.S.C. § 300(f) et seq.

230. Brief for Respondent, *supra* note 24, at 7.

231. *Id.* at 8.

232. *Id.*

233. See *Cnty. of Maui*, 140 S. Ct. at 1476-77 (listing potentially relevant facts to be considered by district courts to determine whether an NPDES permit is necessary and not listing impaired water quality).

234. *Id.*

235. See *id.* (explaining, “there are too many potentially relevant factors applicable to factually different cases for this Court now to use more specific language” before giving only examples of factors to be considered by lower courts, and not including intent).

braska.²³⁶ Requiring NPDES permits for already-regulated discharges into groundwater will not fulfill the purpose of the CWA to protect water quality.²³⁷ States play a vital role in fulfilling the purpose of the CWA, and the Nebraska Unicameral has enacted laws that protect water quality, both underground and on the surface.²³⁸ The NDEE has the power to enforce NPDES permitting requirements for discharges into groundwater that it may deem a functional equivalent to a direct discharge into surface water.²³⁹ Many places in Nebraska, such as near the Sand Hills and above the aquifer, pollutants discharged into the ground almost certainly reach surface water.²⁴⁰ However, the NDEE, because it already protects groundwater and surface water quality, will not need NPDES permits to protect water quality pursuant to the CWA.²⁴¹ Nebraska law provides a more integrated approach to ground and surface water, so NPDES permits are not necessary to protect groundwater quality.²⁴² Thus, the NDEE is

236. Compare Brief for Respondent, *supra* note 24, at 8 (discussing the impact of pollutants on water quality), with Edson, *supra* note 123, at 6 (reporting groundwater quality reports from Nebraska's NRDs), and NEB. DEP'T OF ENV'T & ENERGY, *supra* note 13, at 12 (2019) (stating that Nebraska has high quality groundwater).

237. Compare NEB. DEP'T OF ENV'T & ENERGY, *supra* note 13, at 7, 11 (detailing the organizations that monitor groundwater and the chemicals currently monitored in groundwater, exhibiting a robust regulation of groundwater quality), with 33 U.S.C. § 1251(a)(1) (stating the purpose is to reduce and eliminate pollution and that states must retain a primary responsibility in fulfilling this purpose).

238. See 33 U.S.C. § 1251(b) (stating the Clean Water Act's objective is to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution to plan the development and use . . . of land and water resources"). See generally NEB. DEP'T OF ENV'T & ENERGY, *supra* note 13, at 7 (listing entities that regulate groundwater quality); Edson, *supra* note 123, at 1 (summarizing the various NRD groundwater quality reports); Neb. Groundwater Management and Protection Act, NEB. REV. STAT. §§ 46-701 et seq. (2014) (regulating water); Neb. Livestock Waste Management Act, NEB. REV. STAT. §§ 54-2416 et seq. (2006) (same); Nebraska Environmental Protection Act, NEB. REV. STAT. §§ 81-1501 et seq. (1998) (same); Neb. Integrated Solid Waste Management Act, NEB. REV. STAT. §§ 13-2001 et seq. (2020) (same).

239. Compare *Cnty. of Maui*, 140 S. Ct. at 1477 ("EPA, too, can provide administrative guidance (within statutory boundaries) . . ."), with *NDEE Permit Matrix*, *supra* note 124 ("In Nebraska, EPA has delegated authority to issue NPDES permits to the Nebraska [Department of Environment and Energy].").

240. Goeke, *supra* note 92, at 32-33.

241. Compare 118 NEB. ADMIN. CODE § 4.002 (2006) (establishing groundwater pollutant limitations), and 117 NEB. ADMIN. CODE § 4.001 (2014) (establishing that this chapter sets standards for surface water quality "to protect and improve the quality of surface water" for various beneficial uses), with 119 NEB. ADMIN. CODE § 2.002 (describing various operations which may require NPDES permits and directing discharges of water to obtain NPDES permits pursuant to the NDEE regulations).

242. Compare Hoffman & Zellmer, *supra* note 100, at 809-10 ("Recent legislative efforts have moved Nebraska much closer to an adaptive, integrated framework of management . . . [I]t is a commendable advancement in achieving more adaptable water resource institutions and it is imperative that Nebraska and other western states continue to use the platform of integrated management planning to shape water management decisions into the future."), with *Cnty. of Maui*, 140 S. Ct. at 1476 (reasoning that

unlikely to require NPDES permits for already-regulated discharges into groundwater.²⁴³

C. NEBRASKA COURTS SHOULD RULE AGAINST REQUIRING NPDES PERMITS FOR DISCHARGES INTO GROUNDWATER THAT REACH NAVIGABLE WATERS WHERE WATER QUALITY IS NOT IMPAIRED

Due to the region-specific nature of water, the United States Supreme Court did not mandate a specific set of factors when deciding *County of Maui v. Hawai'i Wildlife Fund*²⁴⁴ and determining that NPDES permits are required for both direct discharges of pollutant into waters of the United States as well as the functional equivalent of a direct discharge into waters of the United States.²⁴⁵

Instead of creating a hardline test for when NPDES permits are required for discharges into groundwater, the Court listed potentially relevant facts to be considered depending on the particular situation.²⁴⁶ The Court did not limit the considerations to pure geologic or pure hydrologic connection determinations, though water quality was not listed as a consideration.²⁴⁷ The potential considerations are predicated both on geology and on the discharged pollutant itself, including whether the pollutant has been diluted and how much of the pollutant reaches the waters of the United States.²⁴⁸

The Court laid out these factors as a guide, not as a rule, and the Court did not intend for the factors enumerated to be an exhaustive list of considerations.²⁴⁹ Instead, the Court recognized that district courts and EPA are better equipped to evaluate specific circumstances

many factors may prove relevant in determining when a discharge into groundwater is functionally equivalent to a direct discharge into navigable waters, and providing examples of factors to be considered by lower courts, leaving room open for district courts to consider statewide management of groundwater).

243. See *Cnty. of Maui*, 140 S. Ct. at 1476 (requiring NPDES permits for discharges of pollutants which are the functional equivalent of a direct discharge into navigable waters to fulfill the purpose of the CWA). Compare 33 U.S.C. § 1251(a)-(b) (stating two purposes of the Clean Water Act are to protect the nation's water while simultaneously protecting states' rights to manage their own jurisdictional waters), with NEB. DEP'T OF ENV'T & ENERGY, *supra* note 13, at 11-12 (indicating that Nebraska already carefully monitors groundwater and has very high-quality groundwater).

244. 140 S. Ct. 1462 (2020).

245. *Cnty. of Maui v. Hawai'i Wildlife Fund*, 140 S. Ct. 1462, 1477 (2020) (finding that the “the permitting requirement, § 301, was applicable to a discharge (from a point source) of pollutants that reach navigable waters after traveling through groundwater if that discharge is the functional equivalent of a direct discharge from the point source into navigable waters”).

246. *Id.* at 1476-77.

247. *Id.*

248. See *id.* (listing factors focused on the identity of the pollutant (factors one, two, and four) and factors focused on an area's geology (factors three and six)).

249. *Id.* at 1476 (“[T]here are too many potentially relevant factors applicable . . . for this Court now to use more specific language.”).

of water quality and the hydrological makeup of different areas, rather than the Court drawing a hard line in the sand.²⁵⁰ The Court recognized that using general language, rather than setting firm, immovable boundaries for NPDES permits, protects the state's role in regulating groundwater, prevents loopholes from being exploited, and allows EPA to promulgate appropriate rules to fulfill the purpose of the CWA and NPDES permits.²⁵¹

For these reasons, courts in Nebraska have the blessing of the Supreme Court to consider state regulation of groundwater, the purpose of the CWA, and even avoiding duplicative permits.²⁵² The *County of Maui* decision recognizes the important role that state law plays in administering the CWA.²⁵³ Thus, district courts should also recognize these laws and consider existing groundwater quality protections and managements to determine whether a NPDES permit would be unnecessary and duplicative.²⁵⁴ District courts are best equipped to weigh the threat of pollution, the existing water quality standards, and the hydrologic connection of water sources in the unique hydrologic region that is Nebraska.²⁵⁵

Nebraska courts must ask critical questions when faced with NPDES enforcement actions.²⁵⁶ The most important question is whether water quality is actually impaired.²⁵⁷ Even though Nebraska law recognizes the importance of water quality, many of the members on the bodies which promulgate rules regarding water quality, like NRDs and the EQC, are also members of the industries which are regulated.²⁵⁸ Thus, the rules and pollutant limitations promul-

250. *Id.* at 1477.

251. *Id.*

252. *See id.* ("We expect that district judges will exercise their discretion mindful, as we are, of the complexities inherent to the context of indirect discharges through groundwater, so as to calibrate the Act's penalties when, for example, a party could reasonably have thought that a permit was not required.")

253. *Id.* ("EPA and the States also have tools to mitigate those harms, should they arise . . .").

254. *See id.* (providing substantial authority to EPA, states, and district courts to administer permit requirements for discharges of pollutants into navigable water that first travel through groundwater). EPA has already begun issuing guidance for when a discharge into groundwater may be functionally equivalent to a discharge into navigable waters. *See generally* Memorandum from Anna Wildeman, *supra* note 45.

255. *Cnty. of Maui*, 140 S. Ct. at 1477.

256. *Compare id.* (describing a judge's discretion in applying penalties), with NEB. DEP'T OF ENV'T & ENERGY, *supra* note 13, at 10-11 (describing the various ways that the Nebraska agriculture industry is regulated and the ways that water quality is monitored and protected).

257. *See, e.g.*, Brief for Respondent, *supra* note 24, at 8-10 (indicating that impaired water quality was a vital factor in Hawai'i Wildlife Fund bringing a lawsuit against the County of Maui).

258. Hoffman & Zellmer, *supra* note 100, at 835-36; *see also* Environmental Quality Council, NEB. REV. STAT. § 81-1503(1)(a)-(p) (describing each industry represented in

gated may sometimes be inadequate to protect water quality in favor of profit for those industries.²⁵⁹ In fact, NRDs are directed by law to protect the agriculture industry specifically.²⁶⁰ Statutory preference for agriculture, such as the NRD directive to protect agriculture and the NPDES permitting exceptions in the Livestock Waste Management Act, might indicate a state regulatory failure that protects agriculture by risking water quality.²⁶¹ Luckily for potential injured parties, NPDES permits could protect water quality, and tracer dye studies and other methods of proving pollutants have reached surface waters are largely used and are cost effective.²⁶²

Nebraska courts must also consider existing regulations and the purpose of the CWA.²⁶³ Courts can act as a check on a state or federal agency that oversteps its regulatory jurisdiction, or if permitting becomes too complicated and burdensome.²⁶⁴ Judges have the opportunity to have the punishment fit the crime.²⁶⁵ Current discharges into groundwater that may now be subject to NPDES permitting are subject to penalties and fines under the CWA, but the CWA provides opportunities to mitigate penalties.²⁶⁶

Current ranchers and those involved in the agriculture industry should not worry too much about their discharges and should focus on

prescribed seats on the Environmental Quality Council); *Envtl. Quality Council Members*, *supra* note 116 (listing the current appointed members of the EQC and the industry represented).

259. See *Envtl. Quality Council Members*, *supra* note 116 (listing several of the industries regulated by the EQC as representatives on the EQC, and listing the “public health representative” of the EQC as vacant).

260. Groundwater Management and Protection Act, NEB. REV. STAT. § 46-702 (2014) (stating a purpose of NRDs is to protect the agriculture industry).

261. Compare *id.* (indicating a systematic preference for agriculture in Nebraska), and Hoffman & Zellmer, *supra* note 100, at 835 (stating that “NRD Boards are made up in large part of agricultural interests” and implying that agricultural interests may take priority over water quality interests), with Interview with Richardson & Schutz, *supra* note 43 (describing the statutory “no-discharge sites” as a way to intentionally circumvent NPDES permitting requirements). But see Groundwater Management and Protection Act, NEB. REV. STAT. § 46-702 (noting that the agriculture industry benefits from high quality water and implying that protecting water quality and protecting the agriculture industry are aligned).

262. Arsnow, *supra* note 23, at 337 (2010) (reporting that the “use of tracer dyes is a technically valid and cost-effective method” for monitoring which pollutants (“contaminants”) are in hydrogeologic systems); see also *Hawai'i Wildlife Fund v. Cnty. of Maui*, 881 F.3d 754, 759 (9th Cir 2018) (describing the tracer dye study done by EPA to monitor discharges from the appellant-wastewater treatment plant). See generally Davis, *supra* note 23, at 2.

263. *Cnty. of Maui*, 140 S. Ct. at 1477

264. *Id.*

265. *Id.*

266. *Id.* (quoting the Clean Water Act to state that courts are vested “with broad discretion to set a penalty that takes account of many factors, including ‘any good faith efforts to comply’”).

being good neighbors.²⁶⁷ Making a good-faith effort to mitigate and reduce pollution by using available and affordable technology will go a long way to protect both the farmer from litigation and the water from pollution.²⁶⁸ After all, such is the goal of the CWA and Nebraska state law.²⁶⁹

V. CONCLUSION

Any industry that discharges effluent from a point-source into groundwater may face different regulations after *County of Maui v. Hawai'i Wildlife Fund*.²⁷⁰ However, the limits and extent of these regulations is yet to be seen and must be determined in court, where judges will consider water quality, geography, hydrology, and existing water quality regulations. In Nebraska, farmers and ranchers will bear the brunt of this litigation as they use the most water in the state and provide one in four jobs in Nebraska.

The NDEE and EPA have an opportunity to update their rules to reflect the *County of Maui* decision. Much is still uncertain about the scope and limitations of NPDES permitting and the CWA in the wake of *Rapanos v. United States*.²⁷¹ Nebraska's efforts to integrate surface and groundwater management through locally based NRDs and the EQC will allow federal district courts to avoid plaguing the agriculture industry with unnecessary, duplicative permits. However, without more litigation to establish when certain discharges are subject to NPDES permitting, the agriculture industry is vulnerable to lawsuits which can be devastating to business and local economies. Ideally, Congress could act to amend the CWA to alleviate uncertainty, prevent lawsuits, and protect an already struggling economy.

-Kaitlyn Westhoff, '22

267. Interview with Richardson & Schutz, *supra* note 43.

268. See *Cnty. of Maui*, 140 S. Ct. at 1477 (allowing judges to consider efforts to comply with the CWA as potentially mitigating factors when applying NPDES permitting penalties).

269. Compare Clean Water Act, 33 U.S.C. § 1251(a)(1) (“[I]t is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985 . . .”), with Groundwater Management and Protection Act, NEB. REV. STAT. § 46-702 (2014) (stating a purpose of NRDs is to protect the agriculture industry).

270. 140 S. Ct. 1462 (2020).

271. 547 U.S. 715 (2006).