

COUNTY OF MAUI V. HAWAII WILDLIFE FUND

Does a Discharge to Groundwater Require an NPDES Permit?

Arkansas Environmental Federation Webinar

May 21, 2020

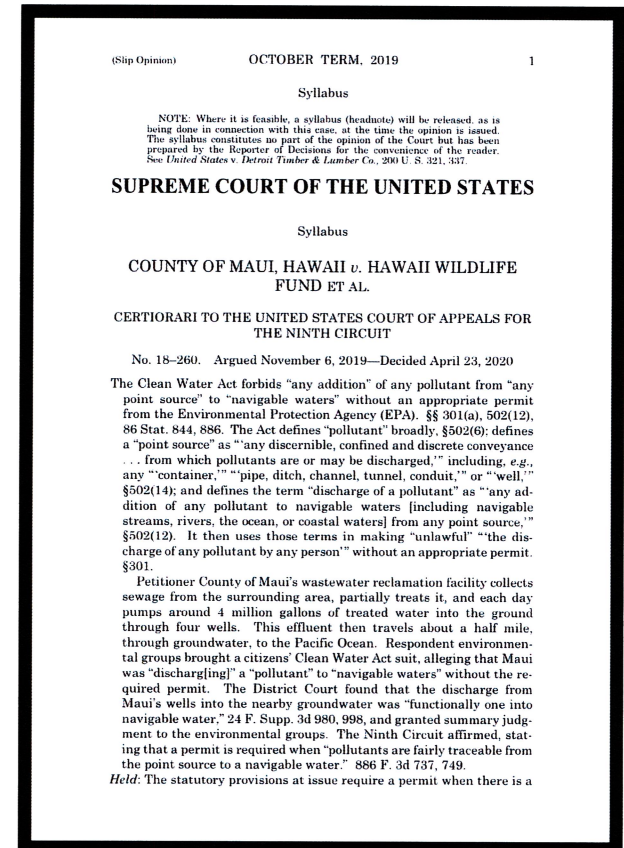
Jamie Ewing -- Allan Gates --Jordan Wimpy

MITCHELL || WILLIAMS

Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.

County of Maui v. Hawaii Wildlife Fund

- Most important CWA case since *Rapanos* (2006)
- Question Presented: *Whether a point source discharge to groundwater requires an NPDES permit if the pollutants reach navigable waters*
- Two Surprises:
 - A totally new test for CWA jurisdiction
 - An unexpected line-up of votes



Lahaina Wastewater Reclamation Facility

Factual Background

- LWRF constructed in 1976
- Expanded in 1985
- Effluent used for irrigation
- 4 Class V injection wells used for backup
- Agricultural reuse ends 1999-2009
- Current injection rate \approx 4 MGD
- Population served \approx 40,000
- R-1 reuse of some water continues



Controversy Develops

- 2007: SCUBA researchers identify submarine seeps near shoreline
- 2007-2013: Multiple studies confirm LWRF effluent flows to the seeps
- EPA & Hawaii equivocate on NPDES requirement
- Public protest builds

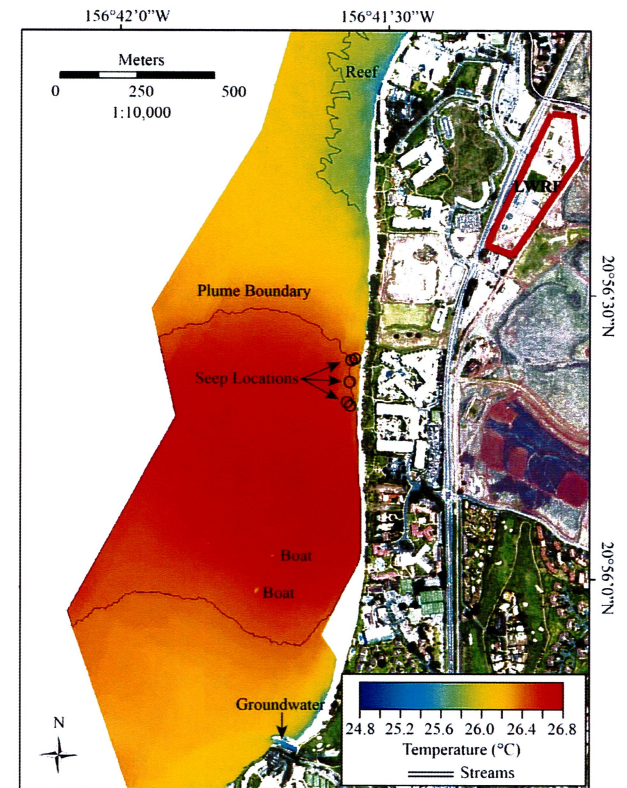
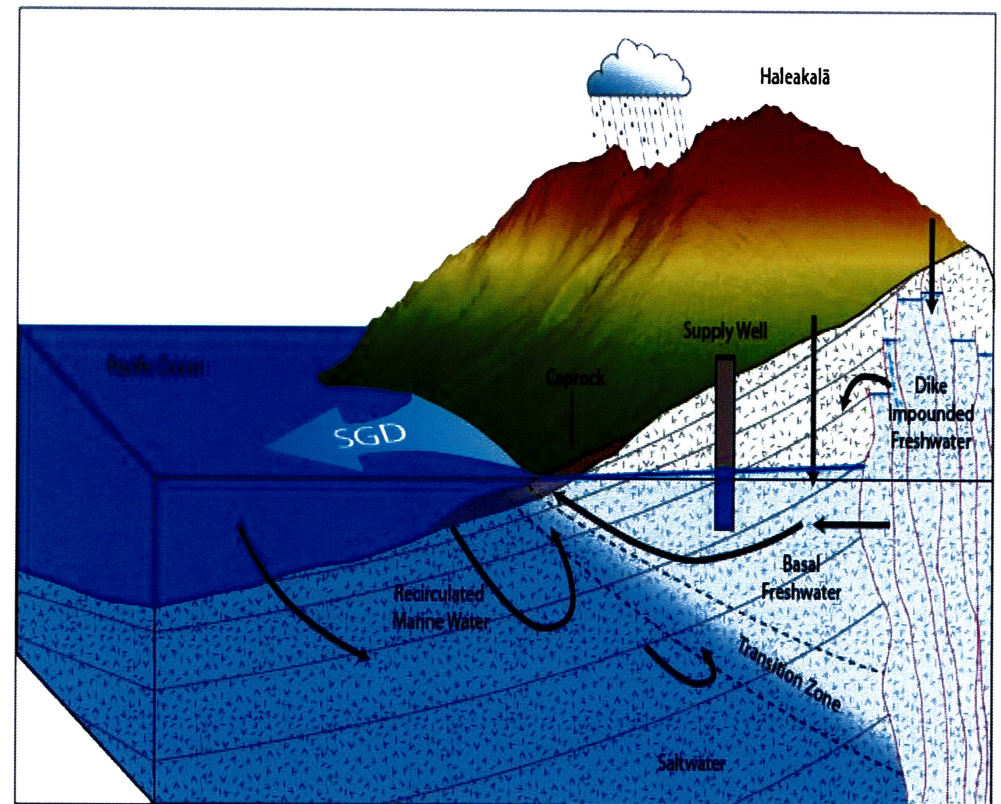


Figure ES-5: Aerial TIR sea surface temperature map thermal anomaly at North Kaanapali Beach.

Chronology of the Case

- 2012 Citizen suit filed
- 2014 USDC holds NPDES permit Is required
- 2018 9th Circuit affirms
- 2/19/19 Certiorari granted
- 11/6/19 SCOTUS hears oral argument
- 4/23/20 SCOTUS vacates & remands



Prior SCOTUS CWA Cases

- *Riverside Bayview* – Wetlands adjacent to Navigable Waters covered
- *SWANCC* – Isolated wetlands not covered (“Bird Rule” thrown out)
- *Rapanos* – Non Adjacent wetlands with clear impacts may be covered
 - Kennedy: Significant Nexus Test
 - Scalia: Direct adjacency required for wetlands jurisdiction
(But discharge “to” does not necessarily mean directly into”)

The Textualist Quandary

CWA Definition of Discharge:

“Any addition of any pollutant to navigable waters from a point source”

- Addition of a Pollutant
- To Navigable Waters
- A Point Source
- From?



Historical Evolution of Theories

- EPA₍₁₉₉₀₋₂₀₁₆₎ → Direct Hydrologic Connection (sometimes)
- *Rapanos*₍₂₀₀₆₎ → Significant Nexus (wetland context)
- USDC₍₂₀₁₄₎ → Direct Conduit
- DOJ₍₂₀₁₆₎ → Direct Hydrologic Connection
- 9th Cir.₍₂₀₁₈₎ → Fairly Traceable, Not De Minimis
- EPA/DOJ₍₂₀₂₀₎ → GW Discharges Categorically Excluded

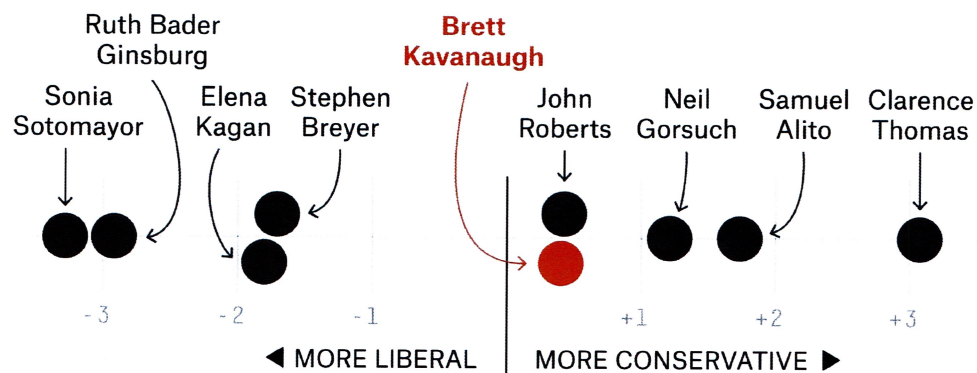
Where Do You Get 5 Votes?

Votes in Rapanos

Ginsburg—Breyer—Stevens—Souter Kennedy Roberts—Scalia—Alito—Thomas

Kavanaugh is Roberts 2.0

The ideologies of the Supreme Court justices in the October 2018 term, based on Martin-Quinn ideology scores



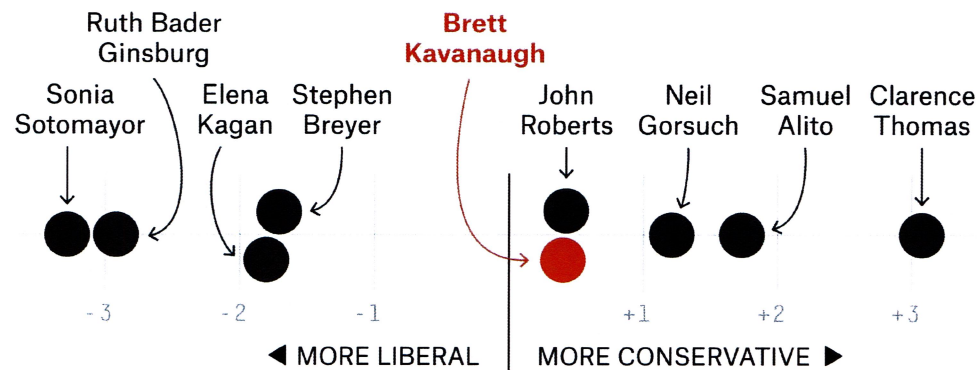
Where Do You Get 5 Votes?

Votes in Rapanos

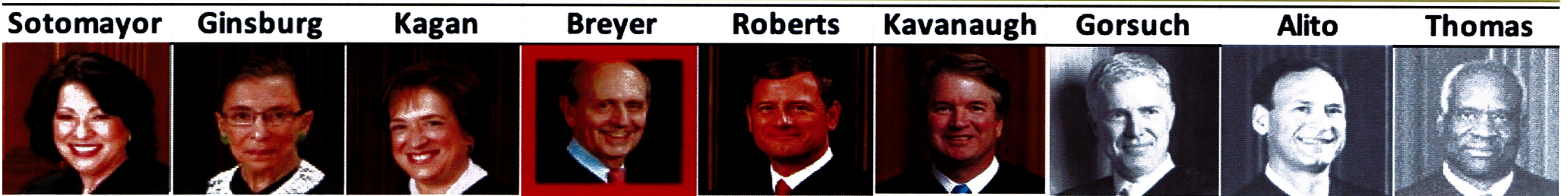
Ginsburg—*Breyer*—*Stevens*—*Souter*—*Kennedy*—*Roberts*—*Scalia*—*Alito*—*Thomas*

Kavanaugh is Roberts 2.0

The ideologies of the Supreme Court justices in the October 2018 term, based on Martin-Quinn ideology scores



Justice Breyer Writes Majority Opinion (6-3)



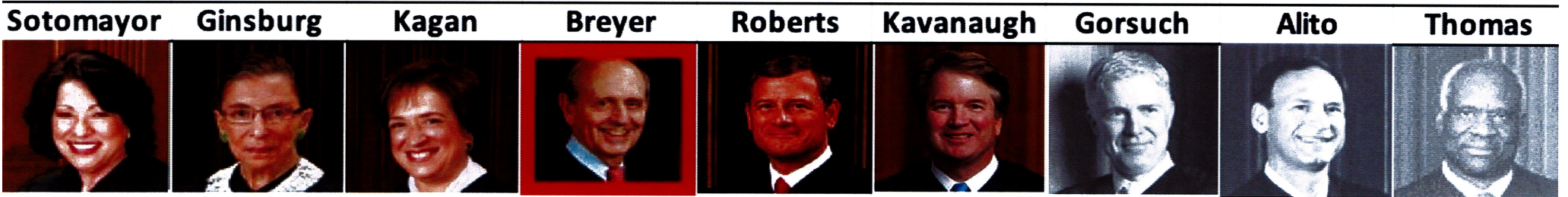
- Everyone agrees “From” is the key term in the statute
- 9th Cir. “Fairly Traceable” test too broad – Every drop of water winds up in the sea eventually
- EPA/DOJ categorical exclusion of GW too narrow -- Invites evasion
- Limiting principle needed → **Functional Equivalent Test**
- New test supported by CWA’s text, structure, context, **purpose & legislative history**
- No bright line test possible -- EPA & courts can handle ambiguity
- Seven factors offered for determining functional equivalence

Determining Functional Equivalence

Justice Breyer's Enumerated Factors

- (1) Transit time,
- (2) Distance traveled,
- (3) Nature of the material through which the pollutant travels,
- (4) Extent to which the pollutant is diluted or chemically changed as it travels,
- (5) 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

Concurring & Dissenting Opinions



- Justice Kavanaugh writes concurring opinion (joins majority opinion in full)
- Justice Thomas writes dissenting opinion, which Justice Gorsuch joins
- Justice Alito writes separate dissenting opinion

Discussion

- Questions?
(Audience Questions are welcome. Use the Chat function)
- What do You Think?

M | W

(Slip Opinion)

OCTOBER TERM, 2019

1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COUNTY OF MAUI, HAWAII *v.* HAWAII WILDLIFE
FUND ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 18–260. Argued November 6, 2019—Decided April 23, 2020

The Clean Water Act forbids “any addition” of any pollutant from “any point source” to “navigable waters” without an appropriate permit from the Environmental Protection Agency (EPA). §§ 301(a), 502(12), 86 Stat. 844, 886. The Act defines “pollutant” broadly, §502(6); defines a “point source” as “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged,” including, *e.g.*, any “container,” “pipe, ditch, channel, tunnel, conduit,” or “well,” §502(14); and defines the term “discharge of a pollutant” as “any addition of any pollutant to navigable waters [including navigable streams, rivers, the ocean, or coastal waters] from any point source,” §502(12). It then uses those terms in making “unlawful” “the discharge of any pollutant by any person” without an appropriate permit. §301.

Petitioner County of Maui’s wastewater reclamation facility collects sewage from the surrounding area, partially treats it, and each day pumps around 4 million gallons of treated water into the ground through four wells. This effluent then travels about a half mile, through groundwater, to the Pacific Ocean. Respondent environmental groups brought a citizens’ Clean Water Act suit, alleging that Maui was “discharg[ing]” a “pollutant” to “navigable waters” without the required permit. The District Court found that the discharge from Maui’s wells into the nearby groundwater was “functionally one into navigable water.” 24 F. Supp. 3d 980, 998, and granted summary judgment to the environmental groups. The Ninth Circuit affirmed, stating that a permit is required when “pollutants are fairly traceable from the point source to a navigable water.” 886 F. 3d 737, 749.

Held: The statutory provisions at issue require a permit when there is a

Thank You

Thank you for Inviting Us to Speak

For more information:

Jamie Ewing

LR Water Reclamation Authority

Jamie.Ewing@lrwra.com

(501) 688-1486

Allan Gates

Mitchell Williams

agates@mwlaw.com

(501) 688-8816

Jordan Wimpy

Mitchell Williams

jwimpy@mwlaw.com

(501) 688-8872

