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Village of Oconomowoc Lake v. Dayton Hudson Corporation: Did the Clean Water Act Overlook Ground Waters?

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Village of Oconomowoc Lake v. Dayton Hudson Corporation: Did the Clean Water Act Overlook Ground Waters?

I. INTRODUCTION

The Clean Water Act prohibits the addition of any pollutant to "the waters of the United States" without a permit.[1] The Act does not, however, define what constitutes "waters of the United States," and federal courts have reached conflicting decisions on the question of whether the term encompasses ground waters. Most courts have generally concluded that isolated or nontributary ground waters that are not hydrologically connected with surface waters do not fall under the regulatory authority of the Act.[2] Courts have split, though, on the question of whether tributary ground waters, those ground waters connected naturally and hydrologically to surface waters, fall within the Act's coverage. In *Village of Oconomowoc Lake v. Dayton Hudson Corporation*,[3] the Seventh Circuit Court of Appeals faced this issue. It held that neither the Clean Water Act nor the EPA's regulations assert "authority over ground waters, just because these may be hydrologically connected with surface waters."[4]

II. FACTS AND HOLDING OF *VILLAGE OF OCONOMOWOC LAKE*

The Dayton Hudson Corporation[5] was building a distribution center in Oconomowoc, Wisconsin. The entire site encompassed 110 acres, 25 acres of which were to be paved for parking. Rainwater runoff from the site was to collect in a six-acre artificial pond. The pond was designed to retain oil, grease, and other pollutants while "exfiltrating" the water to the ground below.

The distribution center itself would not discharge any pollutants into any body of water. Nonetheless, the Village of Oconomowoc feared that the center could indirectly cause pollution of the ground water system. Trucks parked near the warehouse would drip oil. That oil would collect in the rainwater runoff from storms. Even a few inches of rain falling on the large paved surface would create many acre-feet of oil-polluted water which would collect in the artificial retention pond. As the pond water seeped into the ground, the Village feared it would carry hydrocarbons and other unwelcome substances into the ground water below.

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1. 33 U.S.C. §§ 1311(a), 1342, 1362 (1994).

2. *See* Exxon Corp. v. Train, 554 F.2d 1310 (5th Cir. 1977); United States v. GAF Corp., 389 F. Supp. 1379 (S.D. Tex. 1975); *see also* Sierra Club v. Colorado Refining Co. 838 F. Supp. 1428, 1432 (D. Colo. 1993); Washington Wilderness Coalition v. Hecla Mining Co. 870 F. Supp. 983, 990 (E.D. Wash. 1994) (noting that courts that have considered the issue agree that "waters of the United States" do not include isolated/nontributary ground water).

3. 24 F.3d 962 (7th Cir. 1994).

4. *Id.* at 965.

5. The Target Stores division of the Dayton Hudson Corporation was building the distribution center.

The Village filed a "citizen suit" under the Clean Water Act[6] to halt construction of the distribution center. It claimed that the defendants had not obtained the National Pollutant Discharge Elimination System ("NPDES") permit that Section 402 of the Clean Water Act required before pollutants may legally be discharged into "the waters of the United States."[7] The Village alleged that an NPDES permit was necessary because the stormwater runoff from the site would be discharged from the artificial retention pond into the ground water system, and the polluted ground water would migrate into nearby wetlands and surface waters that are "waters of the United States."

The district court dismissed the action for lack of subject matter jurisdiction and the Seventh Circuit Court of Appeals affirmed. The Court of Appeals held that neither the Clean Water Act nor the EPA's regulatory definition of "waters of the United States" asserts authority over ground waters "just because these may be hydrologically connected with surface waters."[8]

III. THE CLEAN WATER ACT AND PRIOR CASES

The Clean Water Act prohibits the discharge of any pollutant into "navigable waters" without a National Pollutant Discharge Elimination System (NPDES) permit.[9] The Act defines the term "navigable waters" as "the waters of the United States, including the territorial seas."[10] Unfortunately, this definition does nothing to clarify whether ground water is part of the waters of the United States, and the Act does not define the term "waters of the United States."

The EPA has promulgated a regulatory definition of the term. The regulation defines "waters of the United States" to include "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use,

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6. 33 U.S.C. § 1365 (1994). 33 U.S.C. § 1365 (1994) authorizes any citizen to commence a civil action on his own behalf against any person who is alleged to be in violation of an effluent standard or limitation under the Clean Water Act. "Citizen" is defined as any person or persons having an interest which is or may be adversely affected.

7. 33 U.S.C. §§ 1311(a), 1342(a)-(b) (1994).

8. Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994). The court also stated as part of its holding that the artificial retention pond was outside the coverage of the Clean Water Act, relying primarily on the fact that the EPA's regulatory definition of "waters of the United States" speaks only of "natural ponds." *Id.* at 965. *See* 40 C.F.R. § 230.3(s)(3) (1995).

9. 33 U.S.C. §§ 1311(a), 1342(a), 1362(12) (1994). Section 301 of the Clean Water Act, 33 U.S.C. § 1311(a) (1994), provides that "[e]xcept as in compliance with this section and [certain other sections of the Act], the discharge of any pollutant by any person shall be unlawful." Section 502(12) of the Clean Water Act, 33 U.S.C. § 1362(12) (1994), defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." Section 402 of the Clean Water Act, 33 U.S.C. § 1342(a) (1994), gives the Administrator of the EPA the power to "issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either" the requirements of the Clean Water Act or "such conditions as the Administrator determines are necessary to carry out the provisions of this chapter."

10. 33 U.S.C. § 1362(7) (1994).

degradation or destruction of which could affect interstate or foreign commerce."[11] Like the Clean Water Act, the EPA's regulatory definition fails to state specifically whether ground waters are part of the "waters of the United States."

Most courts have concluded ground waters that are "isolated" or "nontributary," that is, those which are not hydrologically connected with surface waters, are outside of the Clean Water Act's coverage. In *United States v. GAF Corporation*,[12] the district court considered whether the Clean Water Act applied to subsurface wells. That court held that the disposal of chemical wastes into underground waters that have not been alleged to flow into, or otherwise affect, surface waters does not constitute an addition of a pollutant to the waters of the United States within the meaning of the Clean Water Act.[13] Relying heavily on the legislative history of the Act, the court concluded that the term "waters of the United States" did not include subsurface discharges. The court reasoned that the failure of proposed amendments to include authority over ground waters "strongly militates against a judgment that Congress intended a result that it expressly declined to enact."[14]

In 1977, the Fifth Circuit faced a similar question. In *Exxon Corporation v. Train*,[15] the issue was whether the EPA, as an incident to its power to issue permits authorizing the discharge of pollutants into surface waters, had the power to place conditions on those permits that limited the "associated" disposal of pollutants into deep wells. The EPA *did not* dispute Exxon's assertion that the disposal of waste into deep wells was not a discharge of a pollutant into "navigable waters" or "waters of the United States." In fact, the agency expressly disclaimed jurisdiction and authority to regulate subsurface disposal directly. Instead, the EPA claimed that when a person disposes waste into both surface waters and deep wells, the Administrator may impose conditions that limit or prohibit the subsurface disposal in the surface discharge permit.[16] After an exhaustive analysis of the legislative history of the Clean Water Act, the Court of Appeals held that Congress did not intend to grant the EPA any power to control disposals into ground water.[17] *Exxon*, however, *only* addressed waste

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11. 40 C.F.R. § 230.3(s)(3) (1995). *See also* Hoffman Homes, Inc. v. Administrator, EPA, 999 F.2d 256, 260-61 (7th Cir. 1993) (concluding that the EPA did not exceed its power when promulgating this definition).

12. 389 F. Supp. 1379 (S.D. Tex. 1975).

13. *Id.* at 1383-85.

14. *Id.* at 1383-84 (citing Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 95 S. Ct. 392 (1974)).

15. 554 F.2d 1310 (5th Cir. 1977).

16. *Id.* at 1318-19.

17. *Id.* at 1322-31. The *Exxon* court stated that what it found in its examination of the structure and legislative history of the Clean Water Act "belies an intention to impose direct federal control over any phase of pollution of subsurface waters." *Id.* The Fifth Circuit explained that "[i]nstead, the congressional plan was to leave control over subsurface pollution to the states until further studies, provided for in the Act, determined the extent of the problem and possible methods for

disposal into *isolated, non-migrating* ground waters; the Fifth Circuit expressly declined to state an opinion concerning disposal of wastes into wells that might migrate from ground waters back into surface waters.[18]

Courts have divided on the issue of whether tributary or migrating ground waters are part of the "waters of the United States." One of the first cases to consider the *possibility* of a hydrological connection between ground waters and surface waters as a basis for placing ground waters within the coverage of the Clean Water Act was *United States Steel Corporation v. Train.*[19] In *United States Steel*, the Seventh Circuit faced the same question posed in *Exxon*: whether the Clean Water Act gave the EPA the power to regulate the "associated" disposal of pollutants into deep wells as an incident to its power to issue permits authorizing the discharge of pollutants into surface waters. Unlike the Fifth Circuit in *Exxon*, the Seventh Circuit ruled that the Clean Water Act *does*

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dealing with it." *Id.* In support of its conclusions, the *Exxon* court cited a report of the Senate Committee on Public Works regarding the 1972 amendments to the Clean Water Act. The report reads:

> Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil, and other subsurface formations. Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.
>
> The Committee recognizes the essential link between ground and surface waters and the artificial nature of any distinction. Thus the Committee bill requires in section 402 that each State include in its program for approval under section 402 affirmative controls over the injection or placement in wells of any pollutants that may affect ground water. This is designed to protect ground waters and eliminate the use of deep well disposal as an uncontrolled alternative to toxic and pollution control.

S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3739.

The court characterized the report as evidencing "a clear intent to leave the establishment of standards and controls for groundwater pollution to the states." *Exxon*, 554 F.2d at 1325. The Fifth Circuit also discussed debate in the House of Representatives over an amendment to bring ground waters within the permit provisions of Title IV of the Clean Water Act. In its review of the proceeding, the court cited the remarks of numerous congressmen, including those of Representative Aspin introducing the amendment:

> [T]he amendment brings ground water into the subject of the bill, into the enforcement of the bill. Ground water appears in this bill in every section, in every title except title IV. It is under the title which provides EPA can study ground water. It is under the title dealing with definitions. But when it comes to enforcement, title IV, the section on permits and licenses, then ground water is suddenly missing. That is a glaring inconsistency which has no point. If we do not stop pollution of ground waters through seepage and other means, ground water gets into navigable waters, and to control only the navigable water and not the ground water makes no sense at all.

118 Cong. Rec. 10666 (1972) (statement of Rep. Aspin). Concluding its discussion of the debate, the court noted that the House rejected the amendment by a vote of 86 to 34. *Exxon*, 554 F.2d at 1329 (citing 118 Cong. Rec. 10669 (1972)).

18. *Exxon*, 554 F.2d at 1312 n.1. In footnote 1 the *Exxon* court stated that the "EPA has not argued that the wastes disposed of into wells here do, or might, 'migrate' from groundwaters back into surface waters that concededly are within its regulatory jurisdiction. . . . We mean to express no opinion on what the result would be if that were the state of facts."

19. 556 F.2d 822 (7th Cir. 1977).

authorize the EPA to regulate a permittee's disposal of pollutants into deep wells when the regulation is undertaken in conjunction with limitations on the permittee's discharges into surface waters.[20]

United States Steel is factually distinguishable from *Exxon*. The *United States Steel* court's view of the facts underlying its decision differs crucially from the *Exxon* court's view of the facts underlying its decision. *Exxon* addressed only isolated ground water and explicitly expressed no opinion as to situations in which "wastes disposed of into wells . . . do, or might, 'migrate' from groundwaters back into surface waters. . . ."[21] In a footnote to *United States Steel*, the court discussed the fact that United States Steel argued in its brief that the EPA lacked jurisdiction under the Clean Water Act to regulate deep wells that do not discharge into navigable waters. The court also noted that United States Steel had pointed to "unrefuted testimony at the adjudicatory hearing" that its deep well injection *was* into ground waters unconnected with surface waters. The Seventh Circuit, however, indicated that it did not base its decision on such limited facts. It stated, the "EPA . . . was not bound by this testimony [that United Steel's injection was into ground waters unconnected with surface waters] and [the EPA] could have properly concluded that too little is known about the effects of discharges into ground waters to justify allowing increases in them."[22] Hence, *United States Steel* arguably stands for the proposition that the *possibility* of a hydrological connection between ground waters and surface waters is enough for the EPA to assert jurisdiction over ground water under the Clean Water Act.

Kelly v. United States[23] was the first case to directly address the issue of whether EPA jurisdiction under the Clean Water Act extended to ground waters hydrologically connected with surface waters. *Kelly* involved the alleged release of certain toxic chemicals into the ground at a Coast Guard Air Station. The plaintiffs alleged that these chemicals contaminated the underlying ground water which migrated and eventually discharged into a nearby surface body of water. The district court held that the Clean Water Act did not extend federal regulatory and enforcement authority over the ground water contamination.[24] In coming to this conclusion, the court looked to the language of the Act, particularly the terms "navigable waters" and "waters of the United States," and the failure of Congress to expressly include the term "groundwaters" in the Act's regulatory provisions.[25] The district court reasoned that these factors, coupled with the legislative history of the Act as analyzed in *Exxon Corporation v. Train*,[26]

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20. *Id.* at 852.

21. *Exxon*, 554 F.2d at 1312 n.1. *See supra* note 18 and accompanying text.

22. *United States Steel Corp.*, 556 F.2d at 852 n.61.

23. 618 F. Supp. 1103 (W.D. Mich. 1985).

24. *Id.* at 1107.

25. *Id.* at 1105-06.

26. 554 F.2d 1310 (5th Cir. 1977). The *Kelly* court correctly noted that the holding of *Exxon* was limited to isolated, nontributary ground waters, while relying on its reasoning and analysis of the Clean Water Act's language, structure, and legislative history as a basis for its conclusion that

demonstrated a clear Congressional intent not to assert authority over ground water contamination, but rather to leave such authority to the states.[27]

McClellan Ecological Seepage Situation (MESS) v. Cheney[28] was the next case to consider the hydrological connection between ground waters and surface waters in determining whether the Clean Water Act covers ground waters. The district court had to decide whether to dismiss the plaintiff's claim that McClellan Air Force Base violated Section 301 of the Clean Water Act by discharging hazardous substances from waste pits into ground water beneath the base without an NPDES permit. In *MESS*, a man-made, artificially-created process temporarily interrupted the natural hydrological connection between the allegedly contaminated ground water beneath the base and nearby surface bodies of water. Fearing that it would be sending out a signal that a man-made interruption of the natural hydrological connection between ground waters and surface waters could negate the permitting requirements of the Clean Water Act, the court stated that it was not ready to rule as a matter of law that an NPDES permit was not required for any discharges from the waste pits into the ground water.[29] The court indicated that the permit requirements of the Clean Water Act might be applicable if the plaintiff could demonstrate that any discharge from the defendant's waste pits into ground water had "a reasonably foreseeable and temporally imminent effect on the surface waters of the United States."[30]

The question of whether the term "waters of the United States" includes ground waters again came before the courts in *Town of Norfolk v. United States Army Corps of Engineers*.[31] *Town of Norfolk* presented the First Circuit with a challenge to a decision of the United States Army Corps of Engineers ("Corps") to issue a permit under Section 404 of the Clean Water Act.[32] The permit would have allowed the Massachusetts Water Resources Authority ("MWRA") to place fill in an artificial wetland. The plaintiffs claimed that the Corps improperly disregarded the adverse impact the proposed landfill would have had on ground water resources when it decided to issue the permit. They argued that ground water resources are "waters of the United States" and should not have been excluded from the Corps' consideration. In rejecting this claim, the First Circuit relied on the Corps' interpretation of the regulatory definition of "waters of the United States."[33] Although that regulation did not indicate whether ground waters were

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"tributary" ground waters are also beyond the scope of the Act. *Kelly*, 618 F. Supp. at 1106. *See supra* notes 17-18 and accompanying text.

27. *Kelly*, 618 F. Supp. at 1105-07.

28. 763 F. Supp. 431 (E.D. Cal. 1989).

29. *Id.* at 437.

30. *Id.*

31. 968 F.2d 1438 (1st Cir. 1992).

32. 33 U.S.C. § 1344 (1994).

33. 40 C.F.R. § 230.3(s)(3) (1995) which provides that "waters of the United States" include "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce."

within the term's scope, the Corps had interpreted this definition to refer only to surface waters. The First Circuit held that the determination of whether the term "waters of the United States" includes ground waters should be left in the first instance to the discretion of the EPA and the Corps.[34] The court reasoned that deference should be given to the Corps' interpretation of the term because such a determination ultimately involves an ecological judgment about the relationship between surface waters and ground waters.[35]

Sierra Club v. Colorado Refining Company[36] was the most recent opinion to consider this issue prior to *Village of Oconomowoc Lake v. Dayton Hudson Corporation*. *Colorado Refining Company* was also the first case to hold expressly that the Clean Water Act's preclusion of the discharge of any pollutant into "navigable waters" includes a discharge that reaches "'navigable waters' through groundwater."[37] In arriving at its decision, the district court noted the conflicting case law on the issue of whether the term "navigable waters" in the Clean Water Act encompassed ground waters hydrologically connected with surface waters. Taking special notice of Tenth Circuit jurisprudence,[38] the court reasoned that the broad scope given the Clean Water Act by that court left little doubt of that circuit's choice to interpret the Act as regulating those sources emitting pollution into rivers, streams, and lakes to the fullest extent possible. The court concluded that Congress intended to regulate discharges into such bodies of water that affect interstate commerce in any way.[39]

The subject of this note, *Village of Oconomowoc Lake v. Dayton Hudson Corporation*, was the next case to examine the issue of whether ground waters hydrologically connected to surface waters were covered by the Clean Water Act. In *Village of Oconomowoc Lake*, the Seventh Circuit held that neither the Clean Water Act nor the EPA's regulatory definition of waters of the United States asserted authority over ground waters just because these may have become hydrologically connected with surface waters.[40]

Shortly after *Village of Oconomowoc Lake* was decided in 1994, the United States District Court for the Eastern District of Washington handed down the latest decision to address this issue, *Washington Wilderness Coalition v. Hecla Mining Co.*[41] The *Washington Wilderness Coalition* court followed *McClellan*

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34. *Town of Norfolk*, 968 F.2d at 1450-51.

35. *Id.*

36. 838 F. Supp. 1428 (D. Colo. 1993).

37. *Id.* at 1434.

38. *See* Quivira Mining Co. v. United States EPA, 765 F.2d 126 (10th Cir. 1985) (EPA had authority under the Clean Water Act to issue NPDES permits regulating uranium mining company discharges into normally dry arroyos in New Mexico); United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979) (unpermitted leach mining waste escaping into a creek, not navigable in fact, violated the Clean Water Act which was designed to regulate to the fullest extent possible those sources emitting pollution into rivers, streams and lakes).

39. *Colorado Refining Co.*, 838 F. Supp. at 1433.

40. Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994).

41. 870 F. Supp. 983 (E.D. Wash. 1994).

Ecological Seepage Situation (MESS) and *Colorado Refining Co.* It found that since the goal of the Clean Water Act was to protect the quality of surface waters, any pollutant which enters such waters, whether directly or through ground water, was subject to regulation under the Clean Water Act. The district court qualified its holding, however, explaining that it was not sufficient to simply allege ground water pollution and assert a general connection between all waters. "Rather, pollutants must be traced from their source to surface waters, in order to come within the purview of the CWA."[42]

IV. REASONING OF *VILLAGE OF OCONOMOWOC LAKE V. DAYTON HUDSON CORPORATION*

Village of Oconomowoc Lake held that neither the Clean Water Act nor the EPA's regulatory definition of waters of the United States "asserts authority over ground waters, just because these may be hydrologically connected with surface waters."[43] In coming to this decision, the Seventh Circuit relied on the language of the Clean Water Act, the EPA's regulatory definition, and the Act's legislative history.

The court began with the language of the Clean Water Act, acknowledging that the Clean Water Act is a broad statute that reaches waters and wetlands that are not "navigable" or even directly connected to "navigable waters."[44] It explained, however, that the Act does not attempt to assert national power to the fullest. Rather, the Clean Water Act's authority is limited to "waters of the United States." The court reasoned that "'[w]aters of the United States' must be a subset of 'water'; otherwise why insert the qualifying clause in the statute?"[45]

In finding that the EPA's regulatory definition[46] of "waters of the United States" does not assert authority over ground waters, the Seventh Circuit relied on the definition's omission of any reference to ground waters. Indeed, the court asserted that the omission of ground waters from the regulations was not an oversight, as congressional amendments adding ground waters to the scope of the Clean Water Act have been defeated and the "EPA evidently has decided not to wade in on its own."[47] The court explained that the EPA has noted the potential connection between ground waters and surface waters on several occasions, but has nevertheless left the regulatory definition alone.[48]

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42. *Id.* at 990.

43. 24 F.3d at 965.

44. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S. Ct. 455 (1985).

45. 24 F.3d at 965. The court parenthetically noted that "[n]o one suggests that the function of this phrase is to distinguish domestic waters from those of Canada or Mexico." *Id.*

46. *See* 40 C.F.R. § 230.3(s)(3) (1995).

47. *Village of Oconomowoc Lake*, 24 F.3d at 965.

48. *Id.* Cited as an example is the Preamble to NPDES Permit Application Regulations for Storm Water Discharges which reads in part: "[T]his rule-making only addresses discharges to waters of the United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water

Finally, the court based its holding on the legislative history of the Clean Water Act. Its analysis of that history led the court to conclude that Congress had elected to leave the regulation of ground waters to individual state law. The court specifically looked at the rejection in 1972 of amendments to the Clean Water Act by the Senate Committee on Public Works; those amendments would have provided authority to establish federally approved standards for ground waters.[49] In addition, the court cited the detailed legislative history recounted in *Exxon Corporation v. Train*.[50] It explained that although decisions not to enact proposed legislation are not conclusive on the meaning of the text actually enacted, it was "confident that the [Clean Water Act] Congress enacted excludes some waters, and ground waters [were] a logical candidate."[51]

V. ANALYSIS

A. Possible Readings of the Holding

The Seventh Circuit's language in its *Village of Oconomowoc Lake* holding raises some interesting questions about its meaning and its scope. The court stated: "Neither the Clean Water Act nor the EPA's definition asserts authority over ground waters, *just because these may be hydrologically connected with surface waters*."[52] The "*just because these may be*" language is ambiguous and subject to a broad spectrum of possible readings. At one extreme, the holding could mean that even the *fact* of a hydrological connection between ground waters and nearby surface waters does not place such ground waters under the authority of the Clean Water Act. At the other extreme, the holding could mean that the Seventh Circuit requires something more than a *mere possibility or potential* of a hydrological connection between ground waters and surface waters to find such ground waters under the authority of the Act. Both interpretations are possible readings of the "*just because these may be*" language quoted above. The first is the result of reading the language to mean that ground waters, *whether or not they are hydrologically connected* to surface waters, are not

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body)." 55 Fed. Reg. 47990, 47997 (1990). According to the court, such a "[c]ollateral reference to a problem is not a satisfactory substitute for focused attention in rule-making or adjudication. By amending its regulations, the EPA could pose a harder question." *Village of Oconomowoc Lake*, 24 F.3d at 965-66.

49. *Id.* at 965. *See* S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1972), which reads in part:

> Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil, and other subsurface formations. Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.

50. 554 F.2d 1310, 1325-29 (5th Cir. 1977). The *Exxon* court concluded that the legislative history of the act evidenced a clear Congressional intent to exclude the regulation any form of ground water pollution. *See supra* note 17.

51. *Village of Oconomowoc Lake*, 24 F.3d at 965.

52. *Id.* at 965 (emphasis added).

covered by the Act. The second is the result of stressing the connotation of possibility or likelihood discernible from the words "*may be*," so that all the opinion says is that the *possibility* of a hydrological connection is not enough.

The first, broader interpretation, reading the opinion to mean that even the *fact* of a hydrological connection between ground waters and surface waters does not place ground waters under the authority of the Clean Water Act, would mean that *no* ground waters fall within the scope of the Clean Water Act's regulatory scheme. Even the existence of a hydrological connection between the ground water and surface waters that are "waters of the United States" would not invoke the Act's regulatory authority. This reading is supported by language in the *Village of Oconomowoc Lake* opinion in which the court concluded that the omission of ground waters generally from the Clean Water Act and the EPA's regulations was not an oversight, but a conscious decision to leave ground water regulation to state law.

The second, narrower interpretation of the holding, however, finds more support in the rest of the opinion. This reading of the holding would mean that the *mere possibility* of a hydrological connection between ground waters and surface waters is not enough to place ground waters under the authority of the Act. Interpreting the holding in this manner limits its scope to the situation where only a possibility of a hydrological connection between ground waters and surface waters is alleged or proven. Such a reading says nothing about the case in which a plaintiff is able to establish something more than the mere possibility of a hydrological connection. It thus leaves room to assert the Clean Water Act's authority over at least some ground waters.

A thorough reading of the entire decision supports this narrower reading of the holding of *Village of Oconomowoc Lake*. Moreover, such an interpretation appears an inevitable consequence of the Seventh Circuit's framing of the issue early in the opinion. The court asked: "What of the *possibility* that water from the pond will enter the local ground waters, and thence underground aquifers that feed lakes and streams that are part of the 'waters of the United States'?"[53] Furthermore, the court later explains: "The *possibility* of a hydrological connection cannot be denied, but neither the [Clean Water Act] nor the regulations makes such a *possibility* a sufficient ground of regulation."[54]

If the narrower reading of the *Village of Oconomowoc Lake* holding is accepted, the next logical question is what, if anything, beyond the mere possibility of a hydrological connection between ground waters and surface waters, must be alleged or proved to invoke the regulatory authority of the Clean Water Act over ground water. *Washington Wilderness Coalition v. Hecla Mining Company*,[55] decided after *Village of Oconomowoc Lake*, suggests one possible answer. *Washington Wilderness* held that any pollutant that enters surface

53. *Id.*

54. *Id.* (emphasis added).

55. 870 F. Supp. 983 (E.D. Wash. 1994).

waters, whether directly or through ground water, is subject to regulation under the Clean Water Act.[56] However, the district court qualified its holding with the following language:

> It is not sufficient to allege groundwater pollution, and then to assert a general hydrological connection between all waters. Rather, pollutants must be traced from their source to surface waters, in order to come within the purview of the CWA.[57]

Washington Wilderness requires proving something beyond the *possibility* of a hydrological connection with surface waters for ground waters to come under the Act. The requirement that pollutants be traced from their source to surface waters indicates that, at the very least, a direct hydrological connection between the ground waters in question and surface waters must be alleged in order to support a claim under the Clean Water Act.

Nevertheless, courts following *Village of Oconomowoc Lake* may conclude that ground waters are not covered by the Clean Water Act where a plaintiff proves something more than the mere possibility of a hydrological connection. Just because the narrow interpretation of the *Oconomowoc Lake* opinion leaves room for a later decision asserting the Act's authority over some ground waters, it does not dictate such a decision.

B. Basis of the Holding

Regardless of the actual meaning attributed to the holding of *Village of Oconomowoc Lake*, some interesting questions arise as to the basis for that holding. The Seventh Circuit stated that "[n]either the Clean Water Act nor the EPA's [regulatory] definition [of what constitutes 'waters of the United States'] asserts authority over ground waters, just because these may be hydrologically connected with surface waters."[58] Neither the Clean Water Act nor the EPA's regulatory definition specifically or expressly include ground waters. Therefore, the question is whether the Seventh Circuit based its decision on its own interpretation of the Clean Water Act, on the EPA's failure to include a specific reference to ground waters in its regulatory interpretation, or on a combination of the two. Determining the precise basis for the holding will become particularly crucial if the EPA amends its regulatory definition of "waters of the United States" to include ground waters.

The most plausible answer is that the decision, as recited in the holding, is based on a combination of both the court's own interpretation of the Clean Water Act and the failure to include ground waters in the EPA's definition. This answer is, however, a very qualified response that requires some explanation.

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56. 870 F. Supp. at 990.
57. *Id.*
58. *Village of Oconomowoc Lake*, 24 F.3d at 965.

Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.[59] establishes the standard for a court's review of an agency's construction of the statute which it administers. The court must confront two questions. The first is whether Congress has directly spoken to the precise question at issue. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[60] However, if the court determines that Congress has not directly addressed the precise question at issue, the court should not simply impose its own construction on the statute. "Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[61]

In reaching its decision, the *Village of Oconomowoc Lake* court asserted the existence of a Congressional intent to exclude ground water regulation from the coverage of the Clean Water Act and to leave the subject to state law. The court cited the failure of proposed amendments to the Act that would have added ground waters to its scope, as well as a Senate Committee Report which recounted the same.[62] Apparently, the Seventh Circuit believed the Congressional intent was clear and that it was giving effect to that intent. If such was the case, the court needed to look no further under *Chevron*. However, the court did not stop there. Rather, the court's reasoning included discussion of the EPA's leaving ground waters out of its regulatory definition. The *Village of Oconomowoc Lake* court stated that the omission was not an oversight and that the "EPA has evidently decided not to wade in on its own."[63]

Thus, in the context of a *Chevron* analysis, even if the court did base its decision on the clear intent of Congress in the Clean Water Act, the court still believed it needed to support that decision with the fact that the EPA had also chosen to exclude ground waters from its regulations. On the other hand, the court's decision could also be read as deferring to the agency's administrative interpretation of "waters of the United States" as that interpretation excluded ground waters. Whichever the case, the outcome would have been the same. The court took advantage of the congruence of these two bases, using each to compliment the other to conclude that neither asserts authority over ground waters just because these may be hydrologically connected with surface waters.

If the EPA amends its regulatory definition of "waters of the United States" to include ground waters, the court's analysis, and perhaps even its decision, would be quite different. Indeed, the Seventh Circuit opined that "[b]y amending its regulations, the EPA could pose a harder question."[64] The court would not be able to "disguise" the true basis of its decision because such a situation would

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59. 467 U.S. 837, 104 S. Ct 2778 (1984).
60. *Id.*. at 842-43, 104 S. Ct at 2781.
61. *Id.* at 843, 104 S. Ct. at 2781-82.
62. *See supra* note 49.
63. Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962, 965 (7th Cir. 1994).
64. *Id.* at 966. *See also supra* note 48 and accompanying text.

necessitate strict adherence to a *Chevron* analysis. First, the court would have to determine whether Congress had spoken to the precise question at issue. In an open analysis of whether a clear and unambiguous Congressional intent to exclude ground waters from the scope of the Clean Water Act existed, the failure to mention ground waters as covered or excluded within the text of the Act may outweigh the rejection of proposed amendments to cover ground water. The congressional history of the Clean Water Act may be insufficient to meet the *Chevron* requirement that Congress spoke to the precise question and indicated a clear and unambiguous intent to exclude ground water from the Clean Water Act.

If the court determines that Congress has not directly addressed the precise question at issue, the court must decide whether the inclusion of ground waters in the agency's definition of "waters of the United States" is a permissible construction of the Clean Water Act. At the very least, Congress has made an implicit legislative delegation to the EPA to promulgate a definition of "waters of the United States."[65] Therefore, the "court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[66] The question, therefore, is whether the inclusion of ground waters, or at least hydrologically connected ground waters, within the definition of "waters of the United States" is a reasonable interpretation of the Clean Water Act. The court should accord the EPA considerable weight and deference in this administrative interpretation.[67]

VI. CONCLUSION

The *Village of Oconomowoc Lake* court passed up an opportunity to hand down a clear and unambiguous decision on whether ground waters hydrologically connected with surface waters are covered by the Clean Water Act. Instead, the Seventh Circuit issued an opinion vulnerable to a range of interpretation. At one extreme, the decision could mean that the Clean Water Act does not cover any ground waters, regardless of the existence of a hydrological connection with surface waters. Such a broad exclusion of all ground waters, even those whose pollution or contamination has a direct effect on surface waters, is contrary to the purposes and goals of the Clean Water Act.[68]

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65. *Chevron*, 467 U.S. at 843-44, 104 S. Ct. at 2782. *See* Hoffman Homes, Inc. v. Administrator, EPA, 999 F.2d 256 (7th Cir. 1993) (concluding that the EPA did not exceed its power in promulgating the definition (without the ground water amendment of course) of "waters of the United States").

66. *Chevron*, 467 U.S. at 844, 104 S. Ct. at 2782.

67. *Id.*

68. *See* 33 U.S.C. § 1251(a) (1994) (stating that the objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters, and declaring national goals of eliminating the discharge of pollutants into navigable waters and to achieving an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water).

At the other extreme, the decision could mean that the mere possibility of a hydrological connection between ground waters and surface waters is insufficient to state a claim under the Clean Water Act. This interpretation is more in line with the purposes of the Clean Water Act because it does not exclude all ground waters from the Act's coverage. Rather, it leaves room for later decisions to assert the Clean Water Act's jurisdiction over at least some ground waters hydrologically connected to surface waters. Unfortunately, even if accepted, this narrow interpretation creates more questions than it answers. Such a limited holding only resolves the case where the plaintiff has failed to allege or prove something more than a possibility of a hydrological connection. It does not articulate a standard for determining how much more needs to be alleged or proved to state a claim under the Act. In fact, it does not even indicate whether alleging or proving something more than a mere possibility of a hydrological connection would state a claim under the Clean Water Act.

More questions would arise if the EPA were to amend its regulatory definition of "waters of the United States" to include ground waters. In *Village of Oconomowoc Lake*, the Seventh Circuit based its decision on both its own interpretation of the Clean Water Act and the EPA's exclusion of ground waters from its regulatory definition. The inclusion of ground waters in the EPA regulations would destroy one of the main bases upon which the *Village of Oconomowoc Lake* court had reasoned its decision. Furthermore, once the definition is amended, *Chevron* dictates that in the absence of a clear and unambiguous Congressional intent to exclude ground waters from the scope of the Clean Water Act, the reviewing court must decide whether the inclusion of ground waters is a reasonable interpretation of the Act by the EPA.

Regardless of whether or not the EPA amends its regulatory definition of "waters of the United States" to include ground waters, courts should reach the same result. Where discharges into ground waters hydrologically connected to surface waters *directly lead* to the addition of pollutants to those surface waters, those discharges into ground waters should fall under the regulatory authority of the Clean Water Act.

The purpose of the Clean Water Act is to regulate the addition of pollutants to the "waters of the United States." A discharge of pollutants into ground waters hydrologically connected to surface waters which directly leads to the addition of pollutants to those surface waters *is* an addition of pollutants to the waters of the United States. One could not escape the regulatory authority of the Clean Water Act by simply discharging pollutants (from a point source) just short of a surface body of water and not actually directly into the water body. If such were the case, everyone's discharge pipes would end just short of the water body into which they are discharging. Discharges of pollutants into ground waters hydrologically connected with surface waters that directly lead to the addition of pollutants to those surface waters are so factually similar that courts should view them the same way. The use of ground water as the intermediate link between the point source and the water body should not have the effect of placing the discharge outside the scope of the Clean Water Act's regulation.

Of course this argument does not apply where the ground water in question is isolated and not hydrologically connected to surface waters. The law is settled that such ground waters are not regulated by the Act.[69] In order to fulfill the purposes and goals of the Clean Water Act, courts must regulate ground water discharges which directly lead to the addition of pollutants to waters of the United States. The courts should articulate the standard a plaintiff must meet in order to state a claim under the Clean Water Act with regard to discharges into ground water. The author proposes the following two-part test. First, a plaintiff must allege with particularity facts that support the direct hydrological connection between the ground water and the surface water body at issue. Second, the plaintiff must allege that the addition of pollutants to the surface water body is directly traceable back to the discharges into the ground water.

If the EPA amends its regulatory definition of waters of the United States to include ground waters, the result should be the same. Under the second prong of the *Chevron* analysis, a court must decide whether the inclusion of ground waters in the agency's definition is a permissible construction of the Clean Water Act.[70] The court must give considerable weight and deference to the EPA's administrative interpretation.[71] Therefore, the court may only rule on the reasonableness of the interpretation and may not simply substitute its own construction for a reasonable construction by the EPA.

The argument articulated above strongly supports the reasonableness of an EPA regulatory definition of "waters of the United States" that includes ground waters hydrologically connected to surface waters. Just as where the EPA definition did not include any mention of ground water, the courts should articulate a standard for stating a claim under the Clean Water Act with regard to hydrologically connected ground waters. That standard should be the same two-part test discussed earlier. First, a plaintiff must allege with particularity facts that support the direct hydrological connection between the ground water and the surface water body at issue. Second, the plaintiff must allege that the addition of pollutants to the surface water body is directly traceable back to the discharges into the ground water.

An amendment of the EPA's regulatory definition to embrace all ground waters, including isolated ground waters, is another story. The argument for covering ground waters hydrologically connected to surface waters does not apply to isolated ground waters. Jurisprudence holding that isolated ground waters are outside of the coverage of the Clean Water Act,[72] as well as the legislative history, strongly suggest that the EPA's inclusion of isolated ground waters in its regulation would be unreasonable. Nevertheless, after finding the definition unreasonable, courts could still articulate a standard for stating a claim

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69. *See supra* note 2 and text accompanying notes 12-18.

70. Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 843-44, 104 S. Ct. 2778, 2782 (1984).

71. *Id.*

72. *See supra* notes 2 and 69 and text accompanying notes 12-18.

under the Clean Water Act with regard to ground waters. Again, it should be the same two-part test. First, a plaintiff must allege with particularity facts that support the direct hydrological connection between the ground water and the surface water body at issue. Second, the plaintiff must allege that the addition of pollutants to the surface water body is directly traceable back to the discharges into the ground water.

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