No. 18-5115

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENTUCKY UTILITIES CO.,
Defendant-Appellee,

v.

KENTUCKY WATERWAYS ALLIANCE;
SIERRA CLUB,
Plaintiffs-Appellants.

On Appeal from the United States District Court
for the Eastern District of Kentucky, Central Division
Case No. 5:17-cv-00292-DCR

BRIEF OF THE STATE OF ALABAMA, SIXTEEN OTHER STATES, AND THE MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY AS *AMICI CURIAE* IN IN SUPPORT OF APPELLEE KENTUCKY UTILITIES CO.

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Kentucky Waterways Alliance, et al,
No. 18-5115

CERTIFICATE OF INTERESTED PERSONS

To the best of counsel's knowledge, except for the following, all parties, intervenors and amici appearing before the district court and in this Court are listed in the Brief for Appellant:

> State of Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah, West Virginia, Wisconsin, Wyoming, and the Mississippi Department of Environmental Quality – amici curiae

Counsel for the Appellant further certify that no additional publicly traded company or corporation has an interest in the outcome of this appeal.

Respectfully submitted this 4th day of May 2018.

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INTEREST OF *AMICUS CURIAE*

The States of Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah, West Virginia, Wisconsin, Wyoming, and the Mississippi Department of Environmental Quality file this brief under Rule 29(a) of the Federal Rules of Appellate Procedure.[1]

The *amici* States have a substantial interest in this case because the outcome sought by Kentucky Waterways Alliance and the Sierra Club would create an unprecedented extension of federal jurisdiction under the Clean Water Act ("CWA") and the National Pollutant Discharge Elimination System ("NPDES"), and expand federal regulation to waters historically regulated by the States. That result is contrary to both the text of the CWA and the cooperative federalism scheme on which the CWA is premised. For these reasons, the *amici* States have already submitted a brief in support of the Tennessee Valley Authority in the pending appeal *Tennessee Clean Water Network et al. v. Tennessee Valley Authority*, No. 17-6155 (6th Cir. *appeal docketed* Oct. 3, 2017), which also presents the question whether CWA jurisdiction extends to hydrologically connected groundwater.

[1] A State "may file an amicus-curiae brief without consent of the parties or leave of court." Fed. R. App. P. 29(a).

The *amici* States appreciate the importance of protecting state and national waters, and have long exercised their traditional authority to regulate in this sphere. *Amici* believe, however, that judicially expanding the scope of the NPDES regime to hydrologically connected groundwaters would violate the text of the statute and erode the States' role as the principal protectors of local water resources. Moreover, *amici* are concerned that the result of this federal jurisdictional creep will not be more aggressive environmental cleanup actions, but rather an unwarranted expansion of the NPDES program—with its costly and time-consuming requirements—to scores of new lands and water sources that the program was not designed to address. Navigating these complexities will increase compliance costs and administrative burdens on States and their agencies without materially improving environmental quality. These burdens could divert resources from existing state enforcement efforts and emergency clean-up measures, while opening the States to the threat of liability from new citizen suits seeking enforcement of new duties that are nowhere to be found in the text of the CWA.

SUMMARY OF ARGUMENT

The CWA strikes a balance between state and federal environmental enforcement in a cooperative scheme designed to protect the nation's waters. The CWA prohibits discharges of pollutants from "point sources" into waters of the United States. But Congress expressly left regulation of groundwater pollution to

the States. The pollution at issue here occurred on intrastate land, with some pollutants—eventually and indirectly—allegedly making their way to waters of the United States by seeping into the ground from coal ash ponds and migrating through the groundwater. The CWA's prohibition on pollution discharges without an NPDES permit does not apply to this form of groundwater pollution.

Nevertheless, Plaintiffs urge this Court to adopt a "hydrological connection" theory of CWA jurisdiction. The effect of this theory is to create an end-run around the jurisdictional limitations embodied in the text of the CWA. The hydrological connection theory is unsupported by the text and would lead to a limitless expansion of federal jurisdiction, effectively erasing the distinctions between state and federal authority that are incorporated into the CWA's very structure.

Further, expanding the CWA's scope to encompass hydrologically connected groundwaters would introduce unwarranted complications and complexities for States attempting to administer new and unanticipated regulatory duties. The uncertainties inherent in this approach would make it impossible for States to regulate with certainty in this area, and threaten to drain resources from other vital environmental and water-quality programs. Finally, there is no need for this dramatic expansion of CWA jurisdiction. Both the federal government and the States already have broad and sufficient authority to address threats to groundwater.

This Court should not clear the way for countless citizen suits calculated to second-guess State environmental remedial decisions, like this one. Instead, it should follow the clear text of the CWA and affirm the lower court's decision.

ARGUMENT

I. The Hydrological Connection Theory of CWA Jurisdiction Is Inconsistent with the Text of The CWA and Cooperative Federalism Principles

The Tenth Amendment reserves all powers not delegated to the United States by the Constitution to "the States respectively, or to the people." U.S. Const. amend. X. The "ownership of submerged lands, and the accompanying power to control navigation, fishing, and other public uses of water 'is an essential attribute of sovereignty.'" *Tarrant Regional Water Dist. v. Hermann*, 133 S.Ct. 2120, 2132 (2013) (quoting *United States v. Alaska*, 521 U.S. 1, 5 (1997)). Indeed, the management of local lands and waters "is perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 767, n. 20 (1982). To secure the reserved power of the States over local land and water resources, the Supreme Court has required a clear statement of congressional intent to interfere with the States' "traditional and primary power of land and water use" when assessing the validity of expansive interpretations of the CWA. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (hereinafter "*SWANCC*").

But there is nothing resembling a clear statement of Congressional intent to subject regulated parties to liability for groundwater discharges present in the text of the CWA. Instead, the text of the Act unambiguously precludes liability for such discharges, and affirmatively indicates that Congress chose to leave regulation of groundwater, including groundwater that is "hydrologically connected" to "navigable waters" within the regulatory jurisdiction of the States. Accordingly, the lower court's decision below must be affirmed.

The CWA generally prohibits "the discharge of any pollutant" from a "point source" to "navigable waters," without an NPDES permit. *See* 33 U.S.C. §§ 1311(a); 1342; 1362(12). The term "discharge of any pollutant" is defined as "any addition of any pollutant *to* navigable waters *from* any point source." 33 U.S.C. § 1362(12) (emphasis added). This prohibition could apply to groundwater discharges only if (1) hydrologically connected groundwater itself constitutes "navigable waters" under the CWA, (2) groundwater constitutes a "point source," such that a discharge from hydrologically connected groundwater into navigable waters would constitute a discharge from a "point source," or (3) the discharge of a pollutant from a point source that travels through groundwater to navigable water in itself constitutes the addition of a pollutant to navigable waters from a point source. None of these theories are plausible.

First, it is beyond dispute that groundwater does not in itself constitute "navigable waters." The CWA's definition of navigable waters—"waters of the United States, including the territorial seas"—excludes groundwater. 33 U.S.C. § 1362(7). Federal regulations likewise exclude groundwater from navigable waters. 40 C.F.R. §§ 122.2, 230.3(o); 33 C.F.R. § 328.3(a). *See also* 79 FR 22188, 22218 (Apr. 21, 2014) ("The agencies have never interpreted 'waters of the United States' to include groundwater").

Second, groundwater itself cannot constitute a "point source" within the meaning of the Act. Under the CWA, a "point source" is "any discernible, confined and discrete conveyance," which includes (but is not limited to) "any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). But groundwater is neither discernable, confined, nor discrete. "It is basic science that ground water is widely diffused by saturation within the crevices of underground rocks and soil," and "[a]bsent exceptional proof of something akin to a mythical Styx-like subterranean river," "passive migration of pollutants" through groundwater is not a discharge from a point source. *26 Crown Assocs., LLC v. Greater New Haven Reg'l Water Pollution Control Auth.*, 2017 WL 2960506, at *8 (D. Conn. July 11, 2017). Accordingly, the discharge of a pollutant from hydrologically connected

groundwater into navigable waters cannot constitute an "addition of any pollutant *to* navigable waters *from* any point source." 33 U.S.C. § 1362(12) (emphasis added).

Third, a discharge that migrates through groundwater from a point source to navigable water is not an addition of a pollutant *to* navigable waters *from* a point source, as the plain text of the statute requires. It is an addition of a pollutant *to* groundwater *from* a point source. Thus, the addition of pollutants to navigable waters through hydrologically connected groundwater does not constitute an "addition of any pollutant to navigable waters from any point source," as the Plaintiffs' hydrological connection theory requires. 33 U.S.C. § 1362(12). The possibility of a "hydrological connection" between groundwater and navigable waters is not "a sufficient ground of regulation." *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) ("the statute Congress enacted excludes *some* waters, and ground waters are a logical candidate.") (emphasis in original).

While the CWA does prohibit indirect discharges into navigable waters, those discharges must proceed from one distinct point source (*e.g.* a pipe) into another (*e.g.* a drainage ditch), which is designed or intended to channel water into navigable waters. *See, e.g.*, *Rapanos v. United States*, 547 U.S. 715, 743 (2006) (plurality opinion) (collecting cases). As a result, migration of pollutants through groundwater

is not covered by the CWA's prohibition on indirect discharges because groundwater does not constitute a "point source" within the meaning of the statute.

In short, the words "to" and "from" in the text of the CWA's definition of the term "discharge of [a] pollutant" unambiguously limit the statute's coverage to conveyance of pollutants (a) from a point source directly into navigable waters, or (b) from a point source through another point source into navigable waters. The Plaintiffs' interpretation of the CWA permits an end-run around the jurisdictional limitations embedded in the CWA's plain text.

Even if Plaintiffs were correct that the statutory definition of "discharge of any pollutant" as the "addition of any pollutant *to* navigable waters *from* any point source" can be read to extend CWA jurisdiction to discharges carried to navigable waters through intermediaries that are not themselves point sources, this Court would still be required to reject the hydrological connection theory. 33 U.S.C. § 1362(12) (emphasis added). Given the ubiquitous presence of groundwater in state lands, Plaintiffs' expansive reading of the CWA would authorize the federal government "to function as a *de facto* regulator of immense stretches of intrastate land." *Rapanos*, 547 U.S. at 738 (plurality opinion) (citation omitted). Such "an unprecedented intrusion into traditional state authority" requires a "clear and manifest statement from Congress," *id.*, because authority over submerged lands and

groundwater is an inherent incident of state sovereignty. *See Tarrant Regional Water Dist.*, 133 S.Ct. at 2132.

"The phrase 'waters of the United States' hardly qualifies." *Id.* The same is true of the statutory definition of "discharge of any pollutant" as the "addition of any pollutant *to* navigable waters *from* any point source." 33 U.S.C. § 1362(12) (emphasis added). This language cannot be said to clearly extend CWA jurisdiction to discharges that travel through non-point source intermediaries such as groundwater, because at minimum, it can just as easily be read to require that a discharge travel immediately *from* a point source *to* navigable waters. Thus, because the CWA contains no clear statement of Congressional intent to extend federal jurisdiction to discharges carried to navigable waters by groundwater, this Court should recognize the States' reserved power over intrastate water resources and interpret the CWA to leave the sovereign authority of the States undiminished.

Indeed, far from authorizing the Plaintiffs' expansive interpretation of CWA jurisdiction, Congress's limitation of the Act's scope to "waters of the United States" reflects a clear intention to respect the States' traditional authority over local land and water use. 33 U.S.C. § 1362(7). Indeed, Congress expressly stated its purpose to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . of land and water resources" in the text of the CWA. 33 U.S.C. § 1251(b). This delineation of responsibilities between

the States and the federal government is a classic exercise in cooperative federalism: The federal government relies on experts at the state level to make the primary judgments about how best to ensure local water quality and to monitor compliance with those requirements. Expanding the scope of the CWA beyond its precise textual limits would upend this cooperative federalism scheme and "alter[ ] the federal-state framework by permitting federal encroachment upon a traditional state power" and raise "significant constitutional questions" about the validity of the CWA. *SWANCC*, 531 U.S. at 172-74.

"Congress did not intend for the CWA to extend federal regulatory authority over groundwater, regardless of whether that ground water is eventually or somehow 'hydrologically connected' to navigable surface waters." *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014). The CWA's legislative history confirms that Congress extensively considered whether to extend CWA jurisdiction to groundwater and determined that groundwater regulation should be left to the States. *See Exxon Corp. v. Train*, 554 F.2d 1310, 1325-29 (5th Cir. 1977). Although the Senate Committee on Public Works expressly recognized "the essential link between ground and surface waters and the artificial nature of any distinction," it expressly rejected, after "heated debate," an amendment that would have extended the CWA to groundwater. *Id*. at 1325, 27-29 (*quoting* S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971)). Instead, Congress determined that

regulation of groundwater should be left to the States, and this determination is reflected in the structure of the statute. *Id*. at 1325-29; *see also Kelley ex rel. Mich. v. United States*, 618 F. Supp. 1103, 1107 (W.D. Mich. 1985).

As a consequence of the distribution of federal and state responsibilities present on the face of the statute, EPA has also recognized that safeguarding state authority to manage lands and waters is one of the primary goals in administering the CWA. The EPA has emphasized that the CWA "commands the [EPA] to pursue two policy goals simultaneously: (a) To restore and maintain the nation's waters; and (b) *to preserve the States' primary responsibility and right to prevent, reduce, and eliminate pollution*." 82 Fed. Reg. at 34900 (emphasis added).

The position advocated by Plaintiffs would fundamentally alter this cooperative federalism regime. Instead of relying on States to regulate groundwater pollution, the hydrological connection approach would dramatically expand the scope of the NPDES permitting regime and the States' obligations under it. Respecting the balance of roles and policy goals that Congress adopted in the CWA is the best way to ensure the existence of strong environmental protection programs at both the state and federal levels. *See, e.g.*, *Catskill Mountains Ch. of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 514 (2d Cir. 2017) (the CWA "balances a welter of . . . goals, establishing a complicated scheme of federal regulation employing both federal and state implementation and supplemental state regulation.

In this regard, the Act largely preserves states' traditional authority over water allocation and use") (citation omitted).

Finally, the hydrological connection theory is infinitely elastic and would mandate regulation of any land capable of absorbing water—essentially, any land within a State. Groundwater naturally migrates downhill, and because it is more likely than not that groundwater will, at some point, connect with navigable waters, reading a hydrological connection gloss onto the CWA could lead to a limitless expansion of federal power by requiring NPDES permits wherever groundwater eventually connects with navigable waters. In *Rapanos*, a plurality of the Supreme Court emphasized that the "plain language of the [CWA] simply does not authorize [a] 'Land is Waters' approach to federal jurisdiction." 547 U.S. at 734 (opinion of Scalia, J.). The same logic requires the exclusion of groundwater from the scope of the CWA. Justice Kennedy's concurring opinion emphasized that wetlands adjacent to navigable waters fall under the CWA only if there is a "significant nexus" between them. *Id.* at 767 (Kennedy, J., concurring in the judgment). Both approaches presuppose a meaningful statutory distinction between waters that are—and are not—subject to the CWA. It is hard to see what would remain of this distinction if CWA jurisdiction were held to extend to any water that is hydrologically connected to navigable waters.

It is true that some courts have attempted to cabin the reach of the hydrological connection theory by requiring a "hydrologic connection between the source of the pollutants and navigable waters" that "is direct, immediate, and can generally be traced." *Tennessee Clean Water Network v. Tennessee Valley Authority*, 273 F. Supp. 3d 775, 827 (M.D. Tenn. 2017); *see also Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 17-1640, 2018 WL 1748154 (4th Cir. Apr. 12, 2018); *Haw. Wildlife Fund v. Cty. of Maui*, 886 F.3d 737 (9th Cir. 2018). But this caveat has no grounding in the text of the CWA, and leaves all the critical questions unanswered. It does not begin to articulate what makes it the case that a hydrological connection is sufficiently "direct" and "immediate" for the CWA's prohibition on the discharge of pollutants to apply. Given the uncertainties inherent in such an open-textured and undefined standard, it is likely that regulated parties will feel compelled to seek an NPDES permit any time there is any risk that the use of their land will potentially result in the migration of pollutants through groundwater to navigable waters. It is highly unlikely that Congress intended these extreme results, and the text of the statute supplies no evidence that this is the case. Thus, this Court should affirm the lower court's decision.

II. The Hydrological Connection Theory Dramatically Increases State Regulatory and Compliance Costs and Creates New, Unanticipated Costs for Regulated Parties.

There is good reason not to upset the CWA's careful balance between state and federal powers: Extending the NPDES program to include discharges of pollutants to soils that are merely "hydrologically connected" to navigable waters would entail myriad practical difficulties, require States to take on significant new regulatory costs at the expense of existing environmental protection programs, and multiply the confusion that has long plagued CWA enforcement for regulators and citizens alike.

A. The Hydrological Connection Theory Would Require an Impracticable Expansion of State NPDES Permitting Programs

State NPDES programs do not currently offer permits for groundwater pollution, nor are these programs designed to do so. Expanding CWA liability to groundwater pollution would require a dramatic expansion of state NPDES programs beyond discharges from discrete conveyances to the entire network of underground capillaries that ultimately lead to navigable waters—or else put States at risk of having the EPA revoke their authority to issue NPDES permits altogether. *See* 33 U.S.C. § 1342(c)(3). But the States cannot complete such a novel NPDES permitting task with any certainty, and certainly not without taking on considerable and unjustifiable costs.

NPDES permits issued by authorized state agencies contain precise discharge limits from specific point sources into covered water. Compliance with the terms of a permit is the prerequisite for avoiding liability. *See, e.g.*, 33 U.S.C. §§ 1311(a), 1342. But the degree of precision necessary to draft permits with clear compliance requirements would be nearly impossible to replicate with respect to groundwater discharges. It is one thing to issue a meaningful permit regulating discharges from a pipe into navigable waters. But how would a state agency issue a permit for a flow, seep, or fissure, as the hydrological connection theory requires? As pollutants migrate through state lands, would a permit need to be constantly amended? Where would the monitoring outfalls be placed along the groundwater's route to ensure compliance, and how many would be required to account for the full depth and breadth of seepage as pollutants migrate through the earth?

Groundwater may or may not seep through many feet of soil and take multiple directions before ultimately reaching surface water, and the trajectory and speed of groundwater flow depends on geography and gravity, not design. These factors would make it extremely difficult to draft a permit with precise discharge parameters or monitor compliance. At minimum, States would be required (at great cost) to undertake significant environmental impact studies into the many newly covered sources of pollution in order to develop data sufficient to regulate with any degree of precision, coherence, and conformity with established scientific principles.

The struggle to regulate this expanded realm of CWA permitting would place an untenable strain on the environmental protection resources of the States. At present, the time and costs for States to administer NPDES permitting programs and otherwise satisfy the requirements of the CWA already require an estimated $83 million in annual labor costs and 1.8 million hours per year. *See* EPA ICR Supporting Statement, Information Collection Request for National Pollutant Discharge Elimination System (NPDES) Program (Renewal), OMB Control No. 2040-0004, EPA ICR No. 0229.22 at 23 tbl. 12.1 (Sept. 2017). The broad expansion of NDPES programs mandated by the extension of CWA jurisdiction to groundwater could cause these costs to skyrocket.

Even before processing the hundreds or thousands of new permitting applications States are likely to receive, States might be required to establish water quality standards ("WQS") for groundwater throughout their territory based on its potential hydrological connection to navigable waters. Currently, States are required to establish WQS for each body of water that falls under the definition of "waters of the United States." *See* 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(A); 40 C.F.R. §§ 130.3, 131.3(i), 131.4(a). But if a hydrological connection is sufficient to trigger CWA liability for groundwater discharges, States will potentially be required to expand their WQS standards as well and study those "waters" to determine whether current standards should apply, or whether new WQS standards should be issued.

See 33 U.S.C. § 1313(c)(4). States then have a continuing duty to revise their WQS as environmental conditions change, 33 U.S.C. § 1313(c)(3), and must submit biennial water quality reports to the EPA, 33 U.S.C. § 1315(b)(1)(A)-(B). If these duties were expanded to encompass potentially all of a State's groundwater, state compliance burdens could rise exponentially.

Ultimately, the hydrological connection theory of CWA jurisdiction could require States to devote astronomical resources from already scarce budgets to administer an accurate and timely NPDES permitting regime that extends to all discharges into groundwater with a hydrological connection to navigable waters. This would not only be expensive in its own right—it would also carry a significant opportunity cost, as States could be forced to divert resources away from other state programs that, as discussed below, already protect state waters from groundwater pollution. *See infra* Part III.B.

B. The Hydrological Connection Theory Would Impose New and Increased Compliance Costs on Regulated Parties

The difficulties of administering the hydrological connection theory of CWA jurisdiction would also dramatically increase compliance costs for regulated parties seeking to shield themselves from liability and further complicate an already thorny and uncertain area of law.

As is, the "systemic consequences" of the CWA can be "crushing" "to landowners for even inadvertent violations." *Hawkes*, 136 S.Ct. at 1816 (Kennedy,

J., concurring). The CWA's reach is "notoriously unclear," and "[a]ny piece of land that is wet at least part of the year is in danger of being classified as [navigable waters]." *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring). Adopting the hydrological connection theory would go even further, making it likely that planned or accidental discharges onto any piece of land could trigger liability under the CWA. Unlike discharges into a ditch, tunnel, or similarly discrete conveyance that leads to navigable waters, regulated parties do not have direct control over where, how long, and how far a discharge into groundwater will disperse. Thus, it would be extremely difficult for covered parties to take precautions to ensure that they meet prescribed NPDES permitting requirements for groundwater discharges. The hydrological connection theory would put States in the untenable position of administering an unwieldy and time-consuming permitting program that may prove challenging for even the most diligent parties to meet.

Given that essentially any groundwater may eventually migrate to navigable waters, individuals and companies will likely find it prudent to seek NPDES permits for essentially every discharge that might find its way into groundwater. This would result in the imposition of immense compliance costs on regulated parties. As the Supreme Court has recently emphasized, the NPDES permitting process is "arduous, expensive, and long." *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S.Ct. 1807, 1815 (2016). Permits issued by the Army Corps of Engineers for more complex

regimes—which may be more akin to the type of new regulated sources that would be covered by the Plaintiffs' theory—can involve even greater costs and waits. There, the process to obtain an "individual" permit can take "788 days and $271,596," and even "more readily available 'general' permits," take "313 days and $28,915 to complete" on average. *Id.* at 1812. Here, where individuals and businesses may be required to seek permits for discharges into even indisputably non-navigable groundwater, the aggregate compliance costs imposed on regulated parties could skyrocket.

Finally, widespread adoption of the hydrological connection theory would dramatically increase the number of parties regulated by the CWA. The implications of the Plaintiffs' theory would radiate far beyond the parties in this appeal and encompass many new sources of nonpoint source pollution that have never been understood to fall within the coverage of the CWA. States would likely be required to permit and monitor all of them. For instance, personal septic tanks typically discharge pollutants into groundwater, but their owners have not historically had to apply for NPDES permits. But under the Plaintiffs' theory, individual owners would be required to apply for a permit whenever the groundwater surrounding a septic tank is hydrologically connected to navigable waters. The potential scale of these new burdens is massive. The EPA estimates that 25% of American homes use septic systems that discharge more than 4 billion gallons of wastewater into the soil every

day.[2] And the concern that septic tanks could become a new source of CWA litigation is not merely speculative: the EPA has already received complaints arguing that States should be required to include septic tanks in their NPDES programs.[3]

Similarly, owners of large parking lots could find themselves subject to CWA citizen suits. Storm water mixes with petroleum products discharged by cars parked on pavement, and the runoff may make its way into ditches and surrounding soil before seeping into the groundwater. The same logic would extend CWA jurisdiction to government agencies and municipalities that own stretches of roads. As with personal septic tanks, storm water runoff has attracted attention as a potential source of NPDES liability under the CWA.[4] The same analysis could apply to untold other sources of potential liability, including accident sites where a ruptured fuel tank causes a leak into groundwater, irrigation systems, underground storage tanks that spring a leak, and more.

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[2] *See* Envtl. Prot. Agency, *A Homeowner's Guide to Septic Systems* 5 (2005), *available at* https://ww3/epa/gov.npdes/pubs/jomeowner_guide_long.pdf.

[3] Envtl. Prot. Agency, *Initial Results of a Review of the National Pollutant Discharge Elimination System Program in the State of Minnesota*, at 5 (May 2013), *available at* https://www.epa.gov/sits/production/files/2017-04/documents/mn_petition_report_may-03-2013updated.pdf (alleging in part that Minnesota failed to establish and enforce an effective NPDES permitting program for over 55,000 septic systems).

[4] *See* Petition, Am. Rivers et al., Petition for a Determination that Stormwater Discharges from Commercial, Industrial, and Institutional Sites Contribute to Water Quality Standards Violation and Require Clean Water Act Permits (July 10, 2013), *available at* https://www.clf.org/wp-content/uploads/2013/07/RDA-Petition-WQS-Violations-REGION-I-FINAL-7-13.pdf.

In sum, adoption of the hydrological connection theory would dramatically increase CWA and NPDES compliance costs for both individuals and businesses, while saddling a host of new parties with novel regulatory burdens. As a result, this Court should affirm the lower court's decision rejecting this theory.

III. Extending the CWA's Scope Is Unnecessary to Address Groundwater Pollution

Beyond the heavy costs of expanding the NPDES permitting regime to include discharges into groundwater, this Court should affirm the district court's decision because there is no need to adopt the hydrological connection theory to ensure that groundwaters are adequately protected from pollution. The NPDES structure is ill-suited to regulate discharges into groundwater, as explained above, but there are numerous federal and state programs that are better tailored to address groundwater pollution. These existing laws and programs render the extension of CWA jurisdiction to hydrologically connected groundwater unnecessary. *See Catskill Mountains*, 846 F.3d at 529 (finding narrower interpretation of CWA reasonable in part because "several alternatives could regulate pollution . . . even in the absence of an NPDES permitting scheme").

A. Other Federal Statutes Provide Alternative Methods of Addressing Groundwater Pollution

There are already federal statutes in place that regulate the migration of pollutants through groundwater. To take one example, the federal government may

file a lawsuit under the Resource Conservation and Recovery Act ("RCRA") against "any person" when there is evidence that any handling or disposal of solid or hazardous waste, past or present, "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6973(2). Congress designed RCRA to deal with situations in which "regulatory schemes break down or have been circumvented" and "expressly intended that this and other language of the Act [would] close loopholes in environmental protection." *United States v. Waste Indus., Inc.*, 734 F.2d 159, 164-65 (4th Cir. 1984).

Indeed, the EPA has exercised its authority to regulate the disposal of solid waste under the RCRA by promulgating a rule establishing minimum national standards for the disposal of coal combustion residuals ("CCR") generated by electric utilities and independent power producers, like the pollutants at issue in this case. *See* Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015), 2010 WL 2470432 ("*CCR Rule*"); 40 C.F.R. 257.50-257.107. Under this rule, any existing unlined CCR surface impoundment that is contaminating groundwater above a groundwater protection standard established by the EPA must stop receiving CCR and either retrofit or close, except in limited circumstances. 40 C.F.R. § 257.71; *id.* § 257.101. All applicable regulatory requirements apply even to CCR

surface impoundments that do not receive CCR after the effective date of the rule, but still contain water and CCR. *CCR Rule*, 81 Fed. Reg. at 51,802.

In addition, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") grants federal authority to order removal of pollutants or other remedial action whenever any "hazardous substance is released or there is a substantial threat of such a release into the environment." 42 U.S.C. § 9604(a)(1). Congress defined releases of hazardous substances extremely broadly in CERCLA. *See* 42 U.S.C. § 9601(22) ("The term 'release' means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment"). "Environment" is defined in similarly expansive terms: Unlike the CWA, it includes "navigable waters" *and* "any other surface water, *ground water*, drinking water supply, *land surface*, or subsurface strata, or ambient air within the United States." 42 U.S.C. § 9601(8) (emphasis added). In other words, CERCLA provides direct authority to remediate situations like the one involved in this case, in which CCRs allegedly leached into groundwater, without the need to shoehorn the facts into the comparatively narrow elements of a CWA action.

The existence of these regulatory regimes fatally undermines any contention that the federal government would be powerless to address the migration of pollutants from CCR surface impoundments and similar threats to the environment

without the extension of CWA jurisdiction to hydrologically connected groundwaters.

B. State Law Provides Other Mechanisms to Address Groundwater Pollution

Mechanisms to redress pollution of groundwater are even more abundant at the state level. Under the CWA, States establish total maximum daily loads ("TMDLs") to regulate pollutants in state waters. *See, e.g.*, 33 U.S.C. § 1313(d)(1)(C). The EPA also provides States with information regarding "processes, procedures, and methods to control pollution" to assist the States in fulfilling their responsibility to regulate nonpoint source pollution within their borders. 33 U.S.C. § 1314(f). And the States expressly retain the "right" to expand their NPDES programs or to "adopt or enforce" other environmental standards—including standards governing discharged into groundwater—where they determine that the CWA is insufficient to protect state lands and waters. *See* 33 U.S.C. § 1370.

States have long exercised their power to protect state waters independent of the CWA's basic requirements for NPDES permitting programs. Kentucky law, for example, directly addresses the discharge of pollutants into groundwater, providing that "no person shall, directly or indirectly . . . discharge into any of the waters of the Commonwealth . . . any pollutant, or any substance that shall cause or contribute to the pollution of the waters of the Commonwealth" except as authorized by state regulatory authorities. KRS § 224.70-110. The applicable statutory definition of

"waters" and "waters of the Commonwealth" explicitly includes "underground water." *Id.* § 224.1-010. Kentucky has also created a complex non-NPDES regime designed to protect current and future uses of groundwater, prevent groundwater pollution, and provide remedial measures to address discharges into state groundwater. *See, e.g.*, 401 KAR 5:037 (groundwater protection plans); 401 KAR 100:030 (remediation requirements); 401 KAR Chapter 46 (coal combustion residuals program); 401 KAR Chapter 45 (special waste permits).

Other States in this Circuit enforce similar laws, including—but not limited to—the following:

- Michigan law provides that a "person shall not directly or indirectly discharge into the waters of the state a substance that is or may become injurious" to a broad array of interests, including public health, commercial, industrial and agricultural land uses, and the protection of wild flora and fauna. M.C.L. 324.3109(1). The term "waters of the state" is explicitly defined to include "groundwaters . . . within the jurisdiction of this state." M.C.L. 324.3101(aa).

- Ohio law makes it unlawful for any person to "cause pollution or place or cause to be placed any sewage, sludge, sludge materials, industrial waste, or other wastes in a location where they cause pollution of any waters of the state." R.C. § 6111.04(A)(1); *see also id.* § 6111.01 (defining "waters of the state" to include all "bodies or accumulations of water, surface and underground, natural or artificial, regardless of the depth of the strata in which underground water is located . . . except those private waters that do not combine or effect a junction with natural surface or underground waters").

- Tennessee law renders it "unlawful for any person to discharge any substance into the waters of the state" where such substances qualify as statutorily defined pollutants and the discharge was not "properly authorized" by state authorities. T.C. § 69-3-114(a); *see also id.* § 69-3-

> 103 (defining "pollutant"). the applicable statutory definition of "waters" includes "any and all water, public or private, on or *beneath the surface of the ground*, that are contained within, flow through, or border upon Tennessee." *Id.* § 69-3-103 (emphasis added).

These and other laws provide important regulatory checks on groundwater pollution. There is thus no merit to any claim that rewriting the CWA to cover hydrologically connected groundwaters is necessary to avoid pollution of state groundwater and the nation's waterways. Accordingly, this Court should respect the jurisdictional limitations embodied in the text of the CWA and affirm the district court's decision below.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

Respectfully submitted,

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Dated: May 4th, 2018

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CERTIFICATE OF SERVICE

I certify that on May 4, 2018, I electronically filed this document using the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

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