

No. 17-6155

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

TENNESSEE CLEAN WATER NETWORK;
TENNESSEE SCENIC RIVERS ASSOCIATION,
Plaintiffs-Appellees,

v.

TENNESSEE VALLEY AUTHORITY,
Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Tennessee, Nashville Division
Case No. 3:15-cv-00424

**BRIEF OF THE STATE OF ALABAMA, THE STATE OF KENTUCKY, FIFTEEN OTHER
STATES, AND THE MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY AS *AMICI
CURIAE* IN IN SUPPORT OF APPELLANT TENNESSEE VALLEY AUTHORITY**

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INTEREST OF *AMICUS CURIAE*

The States of Alabama, Kentucky, Arkansas, Georgia, Indiana, Kansas, 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 lower court's decision creates an unprecedented extension of federal jurisdiction under the Clean Water Act ("CWA") and the National Pollutant Discharge Elimination System ("NPDES"), expanding federal regulation to those waters historically regulated by the States. That result is contrary to both the text and the cooperative federalism scheme expressed in the CWA, and erodes the States' role as principal regulators and protectors of groundwater and land resources. Moreover, the lower court's expansion of federal jurisdiction to "hydrologically-connected" groundwater will increase administrative and legal costs to the States and their environmental protection agencies without materially improving environmental quality.

In addition, certain *amici* States' interest extends beyond legal and jurisdictional disputes. The lower court's remedy, ordering closure of the Gallatin

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

ash ponds by excavation and removal, would cost approximately \$1.8 billion to 4.0 billion. As TVA will pass this cost on to its captive utility customers, such a costly remedy will have an unanticipated, immediate, and profound impact on utility ratepayers. If this Court upholds the lower court's remedy, and closure-by-removal is subsequently applied throughout the Sixth Circuit, the resulting costs to utility customers would be astronomical, costing in the tens-of-billions of dollars. Ratepayers in states outside of the Sixth Circuit who receive wholesale utility service from TVA, like Mississippi, Georgia, and Alabama, would suffer the same negative consequences if the legal arguments and remedies the lower court adopted are accepted by this Court.

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," like pipelines, into waters of the United States. 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—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 does not apply to this form of groundwater pollution.

Nevertheless, the district court adopted a “hydrological connection” theory, which has the effect of end-running the jurisdictional limitations embodied in the CWA. The lower court’s adoption of this theory effectively erases the distinction between state and federal authority, which is incorporated into the CWA’s very structure. Moreover, the lower court’s decision creates unnecessary complexities and administrative costs to States attempting to navigate new and unanticipated regulatory duties imposed upon them under an atextual theory, rather than clear text approved by representatives of the States in Congress.

Indeed, the lower court’s decision creates additional, unanticipated costs for TVA’s utility customers both in and out of the Sixth Circuit. Notably, while monopoly-status utilities pass on environmental compliance costs to captive customers, those costs are typically associated with legal and regulatory policy initiatives enacted by elected officials or their delegates. Despite this fact, the lower court mandated – in a proceeding with limited evidence and stakeholder participation – a remedy of “closure by excavation and removal,” which will cost billions that will ultimately be passed on to captive customers in states both within the Sixth Circuit and elsewhere. Application of such a remedy to the dozens of coal ash ponds in the Sixth Circuit in subsequent litigation would add to already mounting costs and could effectively mean hundreds-of-thousands of customers being unable

to afford electricity. This Court should avoid such unintended, costly results and reverse the lower court's flawed decision.

ARGUMENT

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

This Court should reject a flawed hydrological connection theory of CWA jurisdiction that is contradictory to the text of the statute and the cooperative federalism principles embodied in its structure. 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). However, the Act’s express language does not include groundwater within federal jurisdiction – a limitation confirmed by the Act’s legislative history, wherein Congress explicitly determined that regulation of ground water be left to the States. Indeed, numerous courts have confirmed that the theory adopted by the lower court is unworkable, finding that hydrologically connected groundwater is neither a “point source” nor a “navigable water” under the text of the Act. *See e.g., Kentucky Waterways Alliance, et al. v. Kentucky Utilities*, Civ. Action No. 5: 17-292-DCR, 2017 WL 6628917, (E.D. Ky. Dec. 28, 2017).

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 no clear statement of Congressional intent to subject regulated parties for groundwater discharges present in the text of the CWA. Instead, Congress chose to leave regulation of groundwater, including groundwater that is “hydrologically connected” to “navigable waters” within the purview and jurisdiction of the States. As a result, the lower court erred when it adopted the hydrological connection theory of CWA jurisdiction.

It is beyond dispute that groundwater does not in itself constitute “navigable waters” and the District Court’s opinion below does not purport to hold otherwise. 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”).

And the CWA defines the term “discharge of any pollutant” as “any addition of any pollutant *to* navigable waters *from* any point source.” 33 U.S.C. § 1362(12) (emphasis added). The addition of a pollutant to *groundwater* from a point source is not enough; Congress repeatedly rejected proposed bills adding that language. *See infra* pp. 8-9.

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. It is an addition of a pollutant *to* groundwater *from* a point source. Thus, the addition of pollutants to groundwater does not constitute an “addition of any pollutant to navigable waters from any point source,” as the District Court’s 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).

Nor does groundwater itself constitute a “point source.” 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).

Moreover, 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). Given the ubiquitous presence of groundwater in State lands, the lower court’s expansive reading of the CWA would authorize the federal government “to function as a *de facto* regulator of immense stretches of intrastate land.” *Id.* at 738 (plurality opinion) (citation omitted). Such “an unprecedented intrusion into traditional state authority” requires a “clear and manifest statement from Congress.” *Id.* “The phrase ‘waters of the United States’ hardly qualifies.” *Id.* 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.

Extending the reach of the CWA to encompass hydrologically connected groundwater would be facially inconsistent with the cooperative federalism structure embodied in 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). As one court stated: "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). Instead, Congress determined that regulation of groundwater pollution be left to the states. *See Exxon Corp. v. Train*, 554 F.2d 1310, 1325-29 (5th Cir. 1977).

The CWA's legislative history further confirms that Congress extensively considered whether to extend CWA jurisdiction to groundwater and chose not to. *Id.* 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 be left to the States. *Id.* at 1325-29; *see also Kelley ex rel. Mich. v. United States*, 618 F. Supp. 1103, 1107 (W.D. Mich. 1985)). 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. For these reasons, this Court should reverse 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.

This Court should not adopt an atextual theory of federal CWA jurisdiction that is certain to drastically increase the cost of States' administration, regulation, enforcement of the NPDES program as well as the costs of citizen and business compliance with the CWA and NPDES program. Initially, expanding CWA liability to groundwater would immediately force States to undergo massive expansion of NPDES programs beyond discharges from "discrete conveyances" to the entire network of underground capillaries that ultimately lead to "navigable waters," or else risk losing their authority to issue NPDES permits altogether. *See* 33 U.S.C. § 1342(c)(3). Next, expanding the NPDES permitting regime would strap the States' environmental protection resource. Finally, the hydrological connection theory

would dramatically increase the number of regulated individuals and business and their CWA and NPDES compliance costs.

Simply put, the adoption of the hydrological connection theory would cause a radical and impracticable expansion of States' NPDES permitting programs. 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. States would be forced to issue permits for any flows, seeps, or fissures, including those that are hidden and malleable. 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 or seepage.

The struggle to regulate this radically 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).

In addition to the hundreds or thousands of new permitting applications, States would, at a minimum, be forced to undertake significant environmental impact studies of 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. States would also necessarily be required to expand the extent and applicability of their respective water quality standards (“WQS”) to cover groundwater. *See* 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(A); 40 C.F.R. §§ 130.3, 131.3(i), and 131.4(a). Such a result would expand States’ duties to revise WQS or require them to issue altogether new WQS. *See* 33 U.S.C. §§ 1313(c)(3); 1315(b)(1)(A)-(B). Moreover, States could not simply decline to undertake these burdensome costs. Instead, if a State chose not to extend its permitting programs to include the addition of pollutants to “groundwater,” it would immediately risk EPA revocation of its authority to issue NPDES permits altogether. *See* 33 U.S.C. § 1342(c)(3). Ultimately, this theory of CWA jurisdiction would require States to devote astronomical resources from already strained budgets.

Finally, the hydrological connection theory would dramatically increase the number of regulated parties and their compliance costs. The “systemic consequences” of the CWA can be “crushing” “to landowners for even inadvertent

violations.” *Hawkes*, 136 S.Ct. at 1816 (Kennedy, J., concurring). For example, owners of large parking lots could find themselves subject to CWA citizen suits as storm water runoff mixes with petroleum products discharged by cars parked on pavement, and may make its way into groundwater and eventually “navigable water.” The same logic extends to runoff from state, county, and municipal roads and highways. As all 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 to groundwater, resulting 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). In sum, the lower court’s adoption of the hydrological connection theory would cause CWA and NPDES compliance costs to skyrocket for both individuals and businesses. As a result, this Court should reverse the lower court’s decision.

III. Extending the CWA’s Scope Is Unnecessary.

This Court should not adopt an unnecessary, atextual theory of federal CWA jurisdiction in light of other state and federal laws that provide adequate, alternative methods for addressing groundwater 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 v. Ch. of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 529 (2d Cir. 2017) (finding narrower interpretation of CWA reasonable in part because “several alternatives could regulate pollution . . . even in the absence of an NPDES permitting scheme”).

Several other federal statutes provide the federal government authority to regulate the migration of pollutants through groundwater. For example, the Resource Conservation and Recovery Act (“RCRA”) provides the government the power to bring suits and criminal actions against persons who dispose of solid or hazardous waste, past or present, which “may present an imminent and substantial endangerment to health or the environment.” 42 U.S.C. § 6973(2). Indeed, the EPA has exercised its authority under RCRA to regulate the disposal of solid waste 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 the 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.

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). Unlike the CWA, CERCLA provides authority to remediate “release of pollution” into “environment,” expressly including the “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). Had Congress intended the CWA to include ground water it would have explicitly said so, as it did under CERCLA.

Moreover, States have long exercised their power to protect intrastate waters and groundwater independent of the CWA NPDES permitting program. Tennessee law, for example, directly addresses the discharge of pollutants into groundwater by rendering 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); T.C. § 69-3-103 (defining “pollutant”). This prohibition clearly encompasses the discharge of pollutants into groundwater, because 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.”

T.C. § 69-3-103 (emphasis added). Other States in this Circuit enforce similar laws, including—but not limited to—the following:

- Kentucky law provides 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; KRS § 224.1-010 (defining “waters” and “waters of the Commonwealth” to include “underground water”).
- 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); R.C. § 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”).

In sum, state and federal laws already provide important regulatory checks on groundwater pollution. At best, the hydrologically connected groundwater theory is an expensive, atextual, redundancy. As a result, this Court should respect the

jurisdictional limitations embodied in the text of the CWA and reverse the lower court's decision.

IV. The Lower Court's Order Would Impose Substantial Costs on Utility Customers

A. The Impact to Customers Is Immediate and Profound.

Just like any other utility with regulated rates, the TVA generally passes its costs on to consumers.² While the specific type of costs that utilities experience may vary, the broad categories of costs the TVA incurs are typical of the industry, and include “[o]peration, maintenance and administration of the utilities’ power system; taxes or in lieu of tax payments; and, capital costs such as debt service payments.”³

Over the past few decades, utilities have spent an increasing amount of capital on environmental compliance. For instance, “[f]rom the 1970s to 2017, TVA spent approximately \$6.7 billion on controls to reduce emissions from its coal-fired power plants.”⁴ The bulk of environmental compliance costs are attributable to government mandates and sweeping regulatory changes, such as the implementation of the Clean

² The TVA board has some discretion in determining when costs are recovered through rates, but generally, the TVA sets its rates at levels that will recover its costs. TVA 10-K For the fiscal year ended Sep. 30, 2017 (“TVA 2017 10-K”), at 11-12, accessible [here](https://www.sec.gov/Archives/edgar/data/1376986/000137698617000031/tve-09302017x10k.htm) <<https://www.sec.gov/Archives/edgar/data/1376986/000137698617000031/tve-09302017x10k.htm>>.

³ *Id.*

⁴ *Id.* at 32-33.

Water Act and Clean Air Act, or standards for Sulfur Dioxide or Nitrogen Oxides. For example, in 2011 the TVA initiated a project at the Gallatin Plant to install a dry flue gas desulfurization control (“dry FGD”) to the tune of \$730M, wherein, “[t]he Project allowed TVA to reduce the plant’s sulfur dioxide and nitrous oxide emissions into the air.”⁵ When a utility spends significant sums for the purpose of regulatory compliance, the expenses are typically passed on to consumers. When provided with two reasonable options like in this matter — deciding between whether to close-by-removal or close-in-place a coal ash pond — a utility’s decision will generally be reflected on customers’ bills for decades to come.

The remedy provided by the lower court much more expensive than the alternative remedy. The TVA’s preferred option of addressing the future of the Gallatin ash ponds—and an option specifically authorized by the EPA’s CCR rule—is a process referred to as closure-in-place. The estimated cost of closure-in-place, as provided to TDEC, is \$230 million.⁶ This is in stark contrast to the remedy ordered by the lower court (and advanced by the Appellees) of the “excavation and offsite relocation of CCR Material,” costing approximately \$2 billion.⁷ Should this remedy

⁵ Trial Tr. (Vol. 4), RE 237, PageID#9513.

⁶ Trial Tr. (Vol. 4), RE 237, PageID#9520.

⁷ *Id.*

be upheld, the cost to TVA's customers for this project alone will likely be nearer to \$4 billion when considering the cost of debt.⁸

B. If this Remedy in this Case Is Upheld and Applied to Additional TVA Sites, the Cost will be Unduly Burdensome to Customers.

If the hydrological connection theory becomes binding in this Circuit, these costs will dramatically increase. Additional citizen suits will almost certainly follow, likely resulting in closure-by-removal of most, if not all, of the coal ash ponds operated by the TVA. The ratepayer impact of this broad reading and implementation of the CWA, together with the burdensome remedy and subsequent application to other impoundments, would lead to unaffordable bills for many TVA customers. For instance, the cost estimation information provided by the Part II EIS programmatic review, an environmental impact and cost study conducted for the TVA, of ten (10) other wet ash-handling facilities at six (6) additional TVA fossil fuel sites, suggests that if those facilities were closed-by-removal, rather than closed-in-place, the *net* difference in cost would be roughly \$2.7 billion, before considering financing costs.⁹

⁸ Calculated assuming a 30-year amortization period and a debt rate of 4.75%, which is conservative compared to the TVA's 2017 blended interest rate of 5.11%, TVA 2017 10-K, at 61. 30 years was used as the amortization period as it is generally the ordinary length of time in which large, long-term debts are borrowed and to reflect the anticipated length of ash pond closure-by-removal for Gallatin (24 years), *See Proposed Compliance Timetable*, RE268, PageID#10883.

⁹ To simplify, the amounts used were those provided for the closure-by-removal (truck) option in the Part II-Programmatic Reviews.

Coupled with the *net* difference between the costs of the two options at the Gallatin facility, and including financing costs, the estimated cost to TVA customers if the utility is forced to close-by-removal fourteen (14) of its twenty-two (22) total coal ash facilities is more than \$8,500,000,000. This estimate does not include the eight (8) ash impoundments that do not have Part II EIS reviews or are part of this litigation.¹⁰ If the other eight (8) ash impoundments are considered, the *net* cost to TVA customer for the closure-by-removal remedy vs. closure-in-place is likely in excess of \$10,000,000,000. Importantly, the TVA currently has outstanding debt in excess of \$20 billion, while the TVA Act only authorizes the TVA to issue bonds in an amount not to exceed \$30 billion at any time.¹¹ Similar citizen suits and the imposition of same remedy as the underlying matter could ultimately devastate TVA's financial position, putting the future of millions of American's energy supply at risk.

¹⁰ Page 6 of Part I-Programmatic NEPA Review, available at <https://www.tva.com/file_source/TVA/Site%20Content/Environment/Environmental%20Stewardship/Environmental%20Reviews/Closure%20of%20Coal%20Combustion%20Residual%20Impoundments/Final%20EIS%20Part%20I.pdf>.

¹¹ See TVA 2017 10-K, at 112-113; See also TVA Act, at 20, available at <https://www.tva.com/file_source/TVA/Site%20Content/About%20TVA/TVA_Act.pdf>

In 2016, Kentucky customers represented approximately 6.5% of the total kWh's sold by TVA.¹² Thus, it is reasonable to assume that Kentucky customers would be liable for approximately 6.5% of the \$8,500,000,000 net cost associated with the closure-by-removal remedy (rather than closure-in-place) for fourteen (14) of TVA's ash impoundments – or \$550,000,000. Assuming those costs are recovered on a levelized basis over 30 years¹³, the cost of this *single issue* will lead to residential customers in Kentucky paying \$5,000,000 more a year.¹⁴ This increase to Kentucky customers provides them no corresponding benefit. These customers do not live in a State where any of the fourteen (14) referenced impoundments are located, while those in Kentucky who live near the Cumberland River are hundreds-of-miles upstream from the Gallatin plant. Any perceived safety or environmental benefits that may be claimed by the Appellees as a result of the ordered remedy will be of little assistance to those 200,000 Kentucky households that will see their bills rise more than necessary than if the TVA closes-in-place its ash ponds. When considering the effect on customers of closing-by-removal *all* TVA ash

¹² TVA at a glance website and TVA in Kentucky website, 2016 figures, available at <https://www.tva.com/About-TVA/TVA-at-a-Glance> and <https://www.tva.com/About-TVA/TVA-in-Kentucky>.

¹³ See footnote 9 stating that the assumed amortization period is 30 years.

¹⁴ \$ 8.5 billion*6.5%=\$552,500,000

\$ 552,500,000/30 years= \$18,416,667

\$ 18,416,667*.2745 (% of total 2016 Ky. kilowatt-hours represented by residential customers)= \$5,055,375

impoundments, as opposed to closure-in-place, the remedy ordered by the lower court appears to be even more unreasonable.

If similar citizen suits, demanding the same draconian remedy for every impoundment, are applied across the Sixth Circuit additional consumers will suffer. Kentucky, like the others states in the Sixth Circuit, has dozens of ash impoundments. If the lower court's interpretation of law and the applied remedy are upheld in this matter, similar citizen suits will undoubtedly follow. Due to the rate-regulated nature of most States' utilities, the consequence of these suits and subsequent mandated remedy of closure-by-removal, will without question lead to increased rates for consumer. For legal precedent based on limited evidence to mandate that utilities close-by-removal all ash impoundments, regardless of whether that method is the most reasonable, will ultimately lead to unaffordable and burdensome utility rates. Using the estimated size of the ash impoundments in Kentucky, and extrapolating the cost estimated in TVA's programmatic reviews, the costs that will be passed onto customers within the Sixth Circuit alone will be tens-of-billions of dollars. Along with the inappropriate interpretation of the CWA, the remedy the lower court ordered is an unreasonable application of the CWA to these facts, and the precedent it sets for the rest of the States within the Circuit is untenable for customers. Reasonable minds can differ among stakeholders as to the most prudent long-term plans for these impoundments, and under cooperative federalism

every stakeholder has an opportunity in the process to voice those concerns. If upheld, customers across the Circuit will be paying for the preference of those citizens who have strong opinions regarding environmental issues – not what the most reasonable outcome should be.

Consumers in Mississippi, Georgia and Alabama all receive service from, and pay rates to TVA, although they are located outside of the Sixth Circuit. As a consequence of this matter, and any others where TVA may be *forced* to close its ash impoundments by removal under an unreasonable application of the CWA, customers in those States will pay their portion of the costs, just like residents of the Sixth Circuit States. These States are not within the footprint of the Sixth Circuit, but those consumers will nevertheless be burdened with any negative consequences of the district court's decision. In fact, the Fifth Circuit, in which Mississippi is located, has already rejected similar arguments under the CWA as those before us.¹⁵ Thus, although the federal courts in their State and Circuit have rejected the legal arguments made by Appellees here, consumers may nevertheless pay for a contradictory decision from a different Circuit.

¹⁵ See *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the District Court.

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CERTIFICATE OF COMPLIANCE

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Dated: February 6, 2018

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CERTIFICATE OF SERVICE

I certify that on February 6, 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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