No. 17-6155

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TENNESSEE CLEAN WATER NETWORK AND 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

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BRIEF OF THE STATES OF MARYLAND, CALIFORNIA, AND WASHINGTON AND THE COMMONWEALTH OF MASSACHUSETTS AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTEREST OF AMICI CURIAE

The States of Maryland, California, and Washington and the Commonwealth of Massachusetts file this brief as amici curiae pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure.[1] Amici have a substantial interest in the appropriate application of the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") program and prohibition against unauthorized discharges of pollutants into navigable waters. In particular, amici rely on the Act's safeguards as a means of protecting their surface waters against pollution flowing downstream from states with less restrictive controls on discharges of pollutants. *See generally Int'l Paper Co. v. Ouelette*, 479 U.S. 481, 489-91 (1987). Amici rely on the Act's cooperative federalism framework to ensure that discharges to navigable waters are monitored and comply with permits that take into account the capabilities of treatment technologies, impacts on water quality, and the Act's overall goal of protecting the nation's waters. Amici believe that reversal of the district court's decision, or embrace of the arguments made by the Tennessee Valley Authority ("TVA") and its amici concerning the scope of the Clean Water Act's prohibition on unauthorized point source discharges into navigable waters, would threaten the Act's proper application and give polluters an incentive to skirt regulation by rerouting discharges

[1] *See* Fed. R. App. P. 29(a)(2) (providing that "a state may file an amicus-curiae brief without the consent of the parties or leave of court").

to nearby groundwater. Amici therefore file this brief to urge the Court to uphold the district court's decision that the Act prohibits unauthorized point source discharges to navigable waters via a direct and immediate groundwater connection.

INTRODUCTION

This is a straightforward Clean Water Act case in which pollutants from a point source—here, unlined impoundments used for the disposal of coal ash—are discharged into an adjacent navigable waterway via a "direct, traceable connection" that is "anything but remote." Findings of Fact and Conclusions of Law ("FFCL"), RE258, PageID 10531. Those impoundments are on the banks of the Cumberland River, as the extensive factual record below reflects. But the pollutants at issue must travel briefly through groundwater before reaching the river itself—and it is principally on that basis that the TVA and its amici argue against application of the Clean Water Act's prohibition on unpermitted point source discharges.

Those arguments lack merit. The ruling below applies a principle that multiple courts have accepted without controversy: an unpermitted point source discharge into navigable waters via a direct groundwater connection is unlawful. In this case, for instance, abundant scientific evidence demonstrated that pollutants befouling the Cumberland River had in fact originated at TVA's adjacent coal ash impoundments, traveling only a short distance through the groundwater before reaching the river.

The district court's decision does not reflect an assertion of jurisdiction over discharges into groundwater as such, nor does it raise the specter of unfettered liability for groundwater discharges. And it certainly does not call for a ruling that discharges into navigable waters, no matter how traceable to a point source, are exempt from the Clean Water Act as long as they pass through groundwater first.

BACKGROUND

This case is about TVA's coal ash discharges into the Cumberland River. Coal ash is a byproduct of burning coal for electricity generation. It contains a number of toxic substances, including arsenic, lead, and mercury, and is disposed of at sites throughout the country.[2] Two such sites are TVA's unlined Non-Registered Site and Ash Pond Complex (collectively "the impoundments"), which are immediately adjacent to the Cumberland River at TVA's Gallatin coal-fired power plant. FFCL, RE258, PageID 10427. The Non-Registered Site is a closed, unlined, and leaking impoundment that stores coal ash. *Id.* at PageID 10427, 10519-20. The Ash Pond Complex is an active series of unlined and leaking ponds that likewise store coal ash. *Id.* at PageID 10427, 10436-39.

Based on the evidence at trial, the district court found that the impoundments were point sources within the meaning of the Clean Water Act. The court found that

[2] *See, e.g.*, Sierra Club, *Dangerous Waters: America's Coal Ash Crisis* 1, 11 (2014), https://www.eenews.net/assets/2014/05/15/document_gw_02.pdf (last visited Mar. 22, 2018).

they were discernible, discrete, and confined—as required by the statutory definition of "point source"—because the very purpose of a coal ash pond is to concentrate coal ash and its pollutants in one location. *See id.* at PageID 10505-11; 33 U.S.C. § 1362(14) (defining "point source"). The court also found that the impoundments were "conveyances"—again, as required by the statutory definition—as they were unlined and leaking coal ash pollutants. FFCL, RE258, PageID 10506-07, 10511.

The court further concluded that the impoundments discharge coal ash pollutants to the Cumberland River through a direct and immediate groundwater connection. *See id.* at PageID 10444, 10504-05, 10510, 10519, 10521, 10531. The Ash Pond Complex impoundment was built upon "terrain riddled with potential karst-related leaks," with karst terrain prone to the development of sinkholes and other drainage features. *Id.* at PageID 10526; *see id.* at PageID 10433 (describing evidence that karst features are fractures that gradually grow larger, such that "an underground drainage system begins to develop," and that "in karst landscapes, tributary networks combine with one another, leading to larger and larger flows"). Coal ash pollutants, the court found, have escaped this unlined impoundment through the porous and drainage-prone karst formation and have taken a short, direct path through groundwater to the adjacent Cumberland River. *Id.* at PageID 10531.

TVA's unlined Non-Registered Site impoundment, meanwhile, was built on porous, alluvial formations. *Id.* at PageID 10494. This impoundment has also historically leaked. *Id*. at PageID 10519-21. Although this impoundment was closed in 1998, aerial photography in 2015 showed coloration indicative of coal ash in the Cumberland River adjacent to the impoundment, suggesting that the closure had not stopped the leaks. *Id.* at PageID 10450, 10520-21. Indeed, TVA's own expert conceded that seeps from the impoundment have continued after 1998. *Id.* at PageID 10521. Additionally, a "highly credible" witness for the plaintiffs concluded that the impoundment was discharging pollutants into the groundwater and the navigable water. *Id.* at PageID 10467-48. This evidence led the district court to conclude as a factual matter that, like the Coal Ash Complex, the leaking and unlined Non-Registered Site impoundment was adding coal ash pollutants to the Cumberland River. *Id.* at PageID 10521.

SUMMARY OF ARGUMENT

The district court was correct to hold that discharges such as those here are prohibited unless authorized by an NPDES permit. The coal ash impoundments fit comfortably within the Clean Water Act's definition of a "point source," because they are discrete and confined containers that convey pollutants through their unlined and leaking bottoms. And they discharge those pollutants to navigable waters via a direct and immediate groundwater connection.

That the point source discharge reaches navigable waters via a brief groundwater connection does not exempt it from the Clean Water Act's prohibition on unauthorized point source discharges. The Act broadly prohibits the unauthorized addition of pollutants to navigable waters, without any requirement that the point source add the pollutants *directly* to those waters. Indeed, EPA has repeatedly acknowledged that a polluter may violate the Clean Water Act by discharging pollutants into navigable waters through a sufficiently proximate groundwater connection. Multiple courts, moreover, have made clear that discharges to navigable waters via such a connection fall within the scope of the Clean Water Act, and thus are prohibited unless authorized by a permit. Far from amounting to the federal regulation of discharges to groundwater as such, this principle ensures that navigable waters are protected against discharges, such as those in this case, that can readily be traced to particular point sources. The district court's decision should be affirmed.

ARGUMENT

DISCHARGES TO NAVIGABLE WATERS VIA A DIRECT AND IMMEDIATE GROUNDWATER CONNECTION ARE SUBJECT TO NPDES PERMITTING.

A. The District Court's Findings Established that the Coal Ash Impoundments Are Point Sources Adding Pollutants to Navigable Waters.

The Clean Water Act prohibits "the discharge of any pollutant," defined to include "any addition of any pollutant to navigable waters from any point source,"

without an NPDES permit. 33 U.S.C. §§ 1311, 1342(a), 1362(12). A "point source," in turn, is "any discernible, confined and discrete conveyance"—including, by way of example, any "ditch," "well," or "container"—"from which pollutants are or may be discharged." *Id.* § 1362(14).

The district court's factual findings amply established that the impoundments are "point sources." As the court found, the impoundments are "discernible, confined, and discrete" containers for coal ash. FFCL, RE258, PageID 10506, 10508-09. And the impoundments act as "conveyances" of pollutants by virtue of discharges that emanate from their unlined sides and bottom. *Id.* at PageID 10508-09, 10511.[3]

The court's factual findings likewise established that the impoundments "add[] . . . pollutant[s] to navigable waters." 33 U.S.C. § 1362(12). The court found that coal ash and its constituents are "pollutants" and the Cumberland River is a "navigable water." FFCL, RE258, PageID 10520. In addition, the court found that the impoundments conveyed coal ash into the adjacent river, and did so via a direct

[3] Courts have held that point sources need not discharge pollutants from a single exit point or limited geographical area. *See Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004) (multiple piles of debris served as point sources discharging pollutants); *Washington Wilderness Coalition v. Hecla Min. Co.*, 870 F. Supp. 983, 988 (E.D. Wa. 1994) (rejecting the argument that a thirty-eight-acre manmade pond was too large to qualify as a point source, and stressing that the "touchstone for finding a point source is the ability to identify a discrete facility from which pollutants have escaped").

groundwater connection. *See id.* at PageID 10444, 10504-05, 10510, 10519, 10521, 10531

B. Passage Through a Direct and Immediate Groundwater Connection Does Not Defeat Clean Water Act Liability for Discharging Pollutants to Navigable Waters.

TVA and its amici do not seem to dispute that the discharges at issue would have been prohibited had they gone directly into the Cumberland River through a pipe, ditch, or other manmade conveyance. Instead, they maintain that, because the pollutants traveled briefly through groundwater before reaching the Cumberland River, they fall outside the Clean Water Act's scope. *See* Brief of Defendant-Appellant TVA at 24-35 ("TVA Br."); Brief of Amici Curiae Chamber of Commerce of the United States of America et al. in Support of Defendant-Appellant at 4-28 ("Chamber Br."); Brief of State of Alabama et al. as Amici Curiae in Support of Appellant TVA at 4-16 ("Alabama Br."). That argument is inconsistent with both the statutory text and the EPA's longstanding interpretation of it.

To begin, the Clean Water Act's text defeats the idea that the Act does not cover discharges that pass through groundwater to reach navigable waters. The Act categorically proscribes the unpermitted "addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). On its face, that broad language encompasses both direct and indirect additions of pollutants to navigable waters. Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006),

acknowledged as much, in responding to arguments that a narrow construction of "waters of the United States" would "significantly affect[]" enforcement of the NPDES program:

> The Act does not forbid the "addition of any pollutant *directly* to navigable waters from any point source," but rather the "addition of any pollutant *to* navigable waters." Thus, from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between.

Id. at 743 (emphasis in original; citations omitted). Yet the position taken by TVA and its amici would effectively rewrite the statute to forbid the unpermitted "addition of any pollutant *directly* to navigable waters from any point source"—exactly what the *Rapanos* plurality made clear that the statute does *not* say.

Indeed, reading in a requirement that pollutants be discharged "directly" to navigable waters would create an easy way to skirt federal prohibitions on unpermitted discharges from point sources. Instead of discharging directly into a river, a polluter might move its discharge pipe a short distance away from the river, even though its pollutants are sure to reach those waters, and thus evade Clean Water Act point source regulation altogether. *See Hawai'i Wildlife Fund v. County of Maui*, 881 F.3d 754, 768 (9th Cir. 2018) ("The County could not under the CWA build an ocean outfall to dispose of pollutants directly into the Pacific Ocean without an

NPDES permit. It cannot do so indirectly either to avoid CWA liability. To hold otherwise would make a mockery of the CWA's prohibitions."). Remarkably, TVA's amici *concede* that this is the upshot of their position (although they do note the potential for liability if the "momentum from the pipe release" carries the pollutants into the river). Chamber Br. 8 n.5. TVA's amici do not explain why it would be sensible to give polluters a road map to evade liability while threatening the integrity of the nation's waters. *See N. Cal. River Watch v. Mercer Fraser Co.*, No. C-04-4620 SC, 2005 WL 2122052, at *2 (N.D. Cal. Sept. 1, 2005) ("[I]t would hardly make sense for the CWA to encompass a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via the groundwater.").[4]

Alternatively, TVA's amici attempt to deny that their position—that a groundwater intermediary forecloses point source liability—requires reading the word "directly" into the statute. Chamber Br. 6 n.3. Amici argue that "a pollutant discharged

[4] TVA and its amici cannot reach the same result by suggesting that the unlined and leaking impoundments somehow are not point sources in the first place. *See* TVA Br. 25; Chamber Br. 5-7. A point source need only be a "discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Under the district court's factual findings, the manmade coal ash impoundments plainly are "discernible," "confined," and "discrete" containers of pollutants; additionally, they "convey[]" and "discharge" those pollutants via their leaking, unlined bottoms. FFCL, RE258, PageID 10505-11; 33 U.S.C. § 1362(14).

by a point source may 'indirectly' reach navigable waters, if it has 'passed through conveyances in between' and is added to those navigable waters by a point source." *Id.* (brackets omitted). But groundwater that flows to navigable waters *is* a conveyance, and the impoundments here are the point sources adding pollutants to navigable waters via that conveyance. If there truly is no need for a "direct" discharge from a point source to navigable waters, then a groundwater intermediary cannot vitiate liability.

In all events, liability for discharges to navigable waters via a direct and immediate groundwater connection, such as that in this case, is consistent with EPA's view. Contrary to amici's suggestion (Chamber Br. 12-16), EPA does not have a longstanding position that the presence of a groundwater connection removes Clean Water Act point source jurisdiction. Rather, as the United States explained in a recent amicus brief, "EPA's longstanding position has been that point-source discharges of pollutants moving through groundwater to a jurisdictional surface water are subject to CWA permitting requirements if there is a 'direct hydrological connection' between the groundwater and the surface water." Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellees, *Hawai'i Wildlife Fund v. County of Maui*, No. 15-17447, at 22-23 (9th Cir. May 31, 2016) ("U.S. *Hawai'i Wildlife Fund* Br.").

Indeed, EPA's regulatory preambles have stressed—at least since 1990—that the Act's point source provisions apply where groundwater directly connects the point source and nearby navigable waters. *See id.* at 22-25. Specifically, in the preamble to its 1990 NPDES storm water discharge regulations, EPA stated that its rulemaking addressed only "discharges to waters of the United States," so that "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 body*)." National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990) (emphasis added). In the years since, EPA has repeatedly made a similar point. *See* Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991) (discharges to groundwater with a direct hydrological connection to surface water "are regulated because such discharges are effectively discharges to the directly connected surface waters"); Reissuance of NPDES General Permits for Storm Water Discharges from Construction Activities, 63 Fed. Reg. 7,858, 7,881 (Feb. 17, 1998) ("EPA interprets the CWA's NPDES permitting program to regulate discharges to surface water via groundwater where there is a direct and immediate hydrologic connection . . . between the groundwater and the surface water."); National Pollutant Discharge Elim-

ination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2,960, 3,017 (Jan. 12, 2001) ("As a legal and factual matter, EPA has made a determination that, in general, collected or channeled pollutants conveyed to surface waters via ground water can constitute a discharge subject to the Clean Water Act."); *see also* FFCL, RE258, PageID 10503-04 (citing EPA's pronouncements).

The district court's approach was faithful to these principles while preserving the states' primary role in regulating groundwater as such. Under the district court's decision, a discharge to navigable waters via groundwater is regulated under the Clean Water Act's NPDES program as long as the groundwater connection is "real, direct, and immediate," *id.* at PageID 10504-05—as it was in this case, where TVA's impoundments are adjacent to the Cumberland River. *See id.* at PageID 10432, 10444, 10450, 10461-63, 10478, 10504-05, 10510, 10519, 10521, 10531. Where the groundwater connection is more attenuated, by contrast, a discharge is regulated—if at all—only as a discharge into groundwater, and not under the NPDES program. It is thus not true that, under the district court's decision, point source discharges directly into groundwater are subject to Clean Water Act liability simply because pollutants might someday find their way into navigable waters. *Compare* Chamber Br. 6 and Alabama Br. 9, *with* FFCL, RE258, PageID 10504 (emphasizing that "a generalized assertion that covered surface waters will eventually be affected

by remote, gradual, natural seepage from the contaminated groundwater is insufficient to establish liability" (quoting *Rice v. Harken Exploration Co.*, 250 F.3d 264, 272 (5th Cir. 2001))).

Similarly, many of amici's arguments miss the mark because they rest on the premise that the district court's decision is focused on discharges into groundwater. That premise is mistaken, for the court carefully explained that the issue is "not whether the CWA regulates the discharge of pollutants into groundwater itself but rather whether the CWA regulates the discharge of pollutants to navigable waters via groundwater." FFCL, RE258, PageID 10503 (quoting *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 445 (M.D.N.C. 2015)). Amici therefore are not helped by Congress's rejection of an amendment that would have added "groundwater," alongside "navigable waters," as a category of waters to which an unpermitted discharge is barred. *See* Chamber Br. 11-12. That amendment would have broadly regulated discharges to groundwater qua groundwater—without any requirement of a subsequent connection to navigable waters. *See* Addendum to TVA Br. 97, 102. The district court's decision, by contrast, confirms that discharges to navigable waters via groundwater are regulated as long as the connection is direct, immediate, and generally traceable, *see* FFCL, RE258, PageID 10504-05, and it is thus fully consistent with Congress's rejection of the amendment. *See Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D. Ida. 2001) (agreeing with this

view of "Congress's decision not to comprehensively regulate groundwater as part of the CWA").

C. The District Court's Decision Accords with Those of Other Courts.

The district court's decision is consistent with numerous decisions holding that the NPDES program covers discharges to navigable waters via a sufficiently direct groundwater connection. For instance, in *Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753 (E.D. Va. 2017), *appeal docketed*, Nos. 17-1895 & 17-1952 (4th Cir. 2017) (oral argument heard Mar. 21, 2018), the court considered three ponds and a landfill used to store coal ash from a power plant surrounded by navigable waters. *Id.* at 756-57. Coal ash pollutants dissolved into the groundwater, which then carried them directly to the navigable waters. *Id.* at 758. The court concluded that Dominion's ponds and landfills were point sources, for Dominion had built them to "concentrate coal ash, and its constituent pollutants, in one location." *Id.* at 763. "That one location," the court continued, "channels and conveys arsenic directly into the groundwater and thence into the surface waters." *Id.* And the court further held that the discharges were covered by the Clean Water Act's point source program even though they traveled to navigable waters through groundwater. *See id.* at 762. "Where the facts show a direct hydrological connection between ground water and surface water," the court reasoned, denying liability would

defeat the Congress's goal of "protect[ing] the quality of the nation's surface water." *Id.*

The court in *Yadkin* reached a similar result. *Yadkin* concerned alleged discharges into the Yadkin River, via a groundwater connection, from three unlined coal ash lagoons at a power plant adjacent to the river. 141 F. Supp. 3d at 436-37, 443. The court concluded that the lagoons were "confined and discrete" because they were "designed to hold accumulated coal ash," and that they were "conveyances" because they were "allegedly unlined and leaking pollutants into the groundwater." *Id.* at 443-44. The discharges fell within Clean Water Act jurisdiction, moreover, because they allegedly reached navigable waters via a hydrologically connected groundwater conduit. *See id.* at 445 (noting the Act's goal of "protect[ing] the quality of the nation's waters," and describing EPA's statements on the issue).

A recent Ninth Circuit decision, postdating the district court's decision here, is to similar effect. In *Hawai'i Wildlife Fund*, the defendant injected wastewater into groundwater via disposal wells; the groundwater, in turn, conveyed much of that wastewater into the ocean. 881 F.3d at 758-60. The court held that the defendant's unpermitted discharges of wastewater pollutants into the ocean, via a groundwater conduit, violated the Clean Water Act. *Id.* at 768. In reaching this conclusion, the court cited other cases in which pollutants were discharged from point sources into

protected waters "indirectly"—that is, via an intermediary conduit such as groundwater or rainwater. *Id.* at 763 (citing *Peconic Baykeeper Inc. v. Suffolk County*, 600 F.3d 180, 188 (2d Cir. 2010), which involved pesticides sprayed from trucks and helicopters that traveled through the air to reach protected water; *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994), which concerned liquid manure discharged from tankers onto fields with a direct connection to navigable waters; and *Sierra Club v. Abston Constr.*, 620 F.2d 41, 45 (5th Cir. 1980), which involved sediment discharged from collection basins via gravity flow of rainwater)); *see Hawai'i Wildlife Fund*, 881 F.3d at 765 (focusing on whether the pollutants are "fairly traceable" from the point source through the groundwater to the protected water).[5]

[5] *See also* U.S. *Hawai'i Wildlife Fund* Br. 14 ("This reading of 'discharge of a pollutant' has been applied in other similar contexts where discharges of pollutants have moved from a point source to navigable waters over the surface of the ground or by some other means."). More generally, a long series of cases have held that industrial waste impoundments and pollutant piles are point sources when they add pollutants to protected water. *See, e.g.*, *Parker*, 368 F.3d at 1009 (storm water collecting in piles of industrial debris that entered protected water); *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 306-09 (9th Cir. 1993) (facility designed to reduce mine runoff occasionally experienced spillover into navigable waters); *Trustees for Alaska v. EPA*, 749 F.2d 549, 552, 558 (9th Cir. 1984) (sluice boxes used for mining discharged wastewater); *Sierra Club*, 620 F.2d at 43, 45 (sediment basins to collect mine runoff failed to prevent discharging of acid material into navigable waters); *United States v. Earth Scis. Inc.*, 599 F.2d 368, 374-75 (10th Cir. 1979) (pits or wells in the mining process discharged into navigable waters); *Residents Against Indus. Landfill Expansion (R.A.I.L.E) v. Diversified Sys., Inc.*, 804 F. Supp. 1036, 1038-39 (E.D. Tenn. 1992) (sediment pond collecting landfill waste discharged pollutants into navigable waters).

Indeed, even the Fifth Circuit's decision in *Rice*, on which TVA's amici rely, supports the district court's decision here. TVA's amici urge that *Rice* stands for the proposition that the Clean Water Act does not apply when pollutants discharged to groundwater reach and then contaminate navigable waters. Alabama Br. 22 n.15; Chamber Br. 17-18. Not so: the Fifth Circuit held only that a "generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from . . . contaminated groundwater" will not establish liability. *Rice*, 250 F.3d at 272. And in so holding, the Fifth Circuit faulted the plaintiffs for not presenting evidence regarding, among other things, flow rates into navigable waters; "the level of threat to" those waters; or "any present or past contamination" of those waters. *See id.* Such evidence would be beside the point, of course, if amici were correct that a groundwater intermediary automatically vitiates Clean Water Act liability. And it is the exact sort of evidence that the plaintiffs presented here.

D. Amici's Remaining Arguments Fail.

Amici make a smattering of other arguments for reversing the district court's liability holding, but none is persuasive. First, amici are wrong to insist that the district court's decision will unreasonably increase the burdens of compliance. *See, e.g.*, Alabama Br. 12. The district held not that the Clean Water Act regulates all discharges to groundwater, but only that it regulates discharges to navigable waters via a direct and immediate groundwater connection. FFCL, RE258, PageID 10500-

05.[6] For many sites, such as coal ash impoundments located (as they often are) immediately adjacent to navigable waters, the prospect of Clean Water Act liability should be clear. To the extent that a site's operator has any doubt about the directness or immediacy of any groundwater connection, moreover, TVA and its amici provide no reason why it is sensible to require the public to tolerate the ensuing pollution, rather than require the operator to investigate the immediacy of the groundwater connection—as plaintiffs have done here—and either take the measures necessary to forestall any discharges to navigable waters or apply for an NPDES permit. And in all events, amici overlook a crucial point: as discussed above, a raft of decisions nationwide have been consistent with the district court's decision here, *see supra* pp. 7 n.3, 15-18 & n.5, and there is no reason to think that the consequences have been grievous or destabilizing.

Second, the supposed difficulty of setting effluent limitations for discharges through a groundwater intermediary does not foreclose liability. To begin, the definition of "effluent limitation" includes "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged *from point sources into navigable*

[6] TVA and its amici knock down a strawman, meanwhile, when they insist that groundwater cannot be a point source. *See, e.g.*, Chamber Br. 7. The district court's decision did not treat the groundwater at issue as a point source. Instead, it held TVA liable because its impoundments, which are point sources, discharge pollutants to navigable waters via a direct and immediate groundwater conduit.

waters." 33 U.S.C. § 1362(11) (emphasis added). There is no requirement that the discharges go *directly* to navigable waters. And nothing in the definition of "effluent limitation" requires that compliance be assessed precisely where a pollutant leaves the point source, rather than being assessed by measuring water quality where the pollutant enters or affects navigable waters. *See, e.g.*, *Natural Res. Def. Council, Inc. v. County of Los Angeles*, 725 F.3d 1194, 1199-200 (9th Cir. 2013).

Finally, there is no merit to the argument that other federal statutes are sufficient to guard against the harms threatened by discharges that reach navigable waters via groundwater. *See* Alabama Br. 13-14. The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, is broadly directed to the storage and disposal of solid and hazardous waste, and is not targeted towards protecting navigable waters. The coal combustion residuals (CCR) standards that amici cite (Alabama Br. 13-14), in turn, target contamination of groundwater itself, not contamination of navigable waters. *See, e.g.*, 40 C.F.R. § 257.101. Not only that, but EPA has described the CCR standards in a manner that makes clear that they coexist with the Clean Water Act's prohibition on discharges to navigable waters via groundwater: "For purposes of [RCRA's exclusion of discharges covered by an NPDES permit]," the agency has written, "EPA considers the 'actual point source discharge' to be the point at which a discharge reaches the jurisdictional waters, and not *in the ground-*

water or otherwise prior to the jurisdictional water."[7] And the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, on which amici likewise rely (Alabama Br. 14), does not even prohibit discharges or contamination in the first instance—it just provides for cleanup of sites that have already been contaminated.

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

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[7] EPA, Relationship Between the Resource Conservation and Recovery Act's Coal Combustion Residuals Rule and the Clean Water Act's National Pollutant Discharge Elimination System Permit Requirements, https://www.epa.gov/coalash/relationship-between-resource-conservation-and-recovery-acts-coal-combustion-residuals-rule (last visited Mar. 22, 2018) (emphasis added).

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1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) as it satisfies the length limit of Fed. R. App. P. 29(a)(5) because, excluding the parts exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1), this document contains 4,990 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in 14-point Times New Roman.

Dated: March 22, 2018

/s/ Leah J. Tulin
Leah J. Tulin

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I certify that on March 22, 2018, I electronically filed this document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

/s/ Leah J. Tulin
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