No. _____

In the Supreme Court of the United States

TENNESSEE CLEAN WATER NETWORK and TENNESSEE SCENIC RIVERS ASSOCIATION,
Petitioners,

v.

TENNESSEE VALLEY AUTHORITY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

SOUTHERN ENVIRONMENTAL LAW CENTER
Frank S. Holleman III
Counsel of Record
Nicholas S. Torrey
Leslie Griffith
601 West Rosemary Street, Suite 220
Chapel Hill, North Carolina
27516-2356
(919) 967-1450
fholleman@selcnc.org

Amanda R. Garcia
Anne E. Passino
1033 Demonbreun Street, Suite 205
Nashville, Tennessee 37203
(615) 921-9470
Counsel for Petitioner Tennessee Scenic Rivers Association

KENNERLY, MONTGOMERY & FINLEY, P.C.
Michael S. Kelley
550 Main Street, Fourth Floor
Knoxville, Tennessee
37902-2567
(865) 546-7311
mkelley@kmfpc.com
Counsel for Petitioner Tennessee Clean Water Network

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QUESTION PRESENTED

Absent authorization by permit, the Clean Water Act prohibits the "discharge of a pollutant," defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). In *County of Maui v. Hawai'i Wildlife Fund*, No. 18-260 (U.S. filed Aug. 27, 2018) (*Maui*), the Court granted certiorari to determine "whether the [Clean Water Act] requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater." In this case, after a trial, the district court found that Respondent Tennessee Valley Authority is violating the Clean Water Act by adding toxic coal ash pollutants to the Cumberland River via a network of pipe-like conduits in the bedrock through which groundwater flows. The Sixth Circuit reversed, holding as a matter of law that the Clean Water Act never applies to any pollutant that travels from a point source through groundwater before polluting navigable waters.

The question presented is:

Whether a defendant's addition of pollutants to a navigable water from a point source via groundwater conduits may ever violate the Clean Water Act's prohibition on the unpermitted "discharge of a pollutant."

LIST OF PARTIES

Tennessee Clean Water Network and Tennessee Scenic Rivers Association are petitioners here and were the plaintiffs-appellees below. Tennessee Valley Authority is the respondent here and was the defendant-appellant below.

CORPORATE DISCLOSURE STATEMENT

Petitioners Tennessee Clean Water Network and Tennessee Scenic Rivers Association have no parent corporations and have issued no stock to any publicly held company.

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PETITION FOR WRIT OF CERTIORARI

Like *Maui*, this case illustrates the loophole that would be created in the Clean Water Act if any conveyance through groundwater conduits were sufficient to eliminate—as a matter of law—the Act's long-accepted jurisdiction over sources of pollutants that enter navigable waters indirectly, but traceably. This Petition asks the Court to preserve the existing scope of the Clean Water Act, as set out in the statutory text and implemented for decades.

To handle the large quantities of ash produced by burning coal at the Gallatin Fossil Plant (Plant), the Tennessee Valley Authority (TVA) built a system of coal ash treatment ponds immediately next to the Cumberland River on karst terrain it knew was riddled with sinkholes and over a "sinking creek," an apparent former tributary to the Cumberland River. App. 69a–70a, 188a. For the first seven years that the current treatment system, the Ash Pond Complex (Complex), was operating, TVA discharged approximately 27 billion gallons of wastewater and coal ash into the river through groundwater conduits in the karst terrain. App. 141a–142a, 189a. TVA's own engineers voiced concerns about karst fissures and sinkholes to TVA management in the 1970s, but TVA never fully repaired them. App. 73a, 183a, 188a–190a. With full knowledge that the Complex is discharging coal ash pollutants into the river via groundwater conduits, TVA continued to dump coal ash into the Complex, and the Complex continues to discharge coal ash pollutants into the Cumberland River. App. 183a.

Tennessee Clean Water Network and Tennessee Scenic Rivers Association (the Conservation Groups) brought this citizen suit to enforce the Clean Water Act's prohibition on unpermitted discharges. The district court held that plaintiffs may prove a violation of this provision when a pollutant reaches navigable waters through groundwater, and found that the Conservation Groups had proven it here. App. 154a–160a, 179a–194a.

The Sixth Circuit did not dispute the district court's extensive factual findings supporting liability in this case. App. 27–28a. Instead, the Sixth Circuit created a new bright-line exemption barring all Clean Water Act claims alleging discharges through groundwater. App. 24a. This bright-line exemption disturbs a long-standing judicial approach—recently followed by the Fourth and Ninth Circuits—that applies the plain text of the statute to the specific facts alleged to determine whether an unlawful discharge of a pollutant is occurring.

Next Term in *Maui*, the Court will consider whether a "discharge of a pollutant," 33 U.S.C. § 1362(12), may occur when a pollutant is discharged from a point source, travels through groundwater, and enters navigable waters.

The Conservation Groups respectfully request that the Court either grant certiorari to hear this case or hold this Petition pending resolution of *Maui*. If the Court elects to hold this Petition, after the Court's final ruling in *Maui*, this Petition should then be set for plenary review, or alternatively, the

Court should grant the Petition, vacate the judgment below, and remand for further proceedings.

OPINIONS BELOW

The Sixth Circuit's order denying rehearing en banc and the dissent from denial are reported at 913 F.3d 592 and reproduced at App. 264a–290a. The Sixth Circuit's opinion and dissent are reported at 905 F.3d 436 and reproduced at App. 1a–45a. The district court's order directing judgment is unreported but is available at No. 3:15-CV-00424, 2017 WL 6462543 and reproduced at App. 46a–47a. The district court's findings of fact and conclusions of law are reported at 273 F.Supp.3d 775 and reproduced at App. 48a–209a. The district court's order on the parties' dispositive motions is unreported and reproduced at App. 210a–211a. The district court's memorandum opinion on the parties' dispositive motions is reported at 206 F.Supp.3d 1280 and reproduced at App. 212a–263a.

JURISDICTION

The Sixth Circuit issued its 2-1 panel decision on September 24, 2018, and denied rehearing en banc on January 17, 2019, by a divided vote. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions excerpted below are reproduced in their entirety at App. 291a–336a.

33 U.S.C. § 1251(a): The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

33 U.S.C. § 1311(a): Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1362(12): The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source. . . .

33 U.S.C. § 1362(14): The term "point source" means any discernible, confined and discrete conveyance, including but 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. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1365(a): Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter. . . .

33 U.S.C. § 1365(f): For purposes of this section, the term "effluent standard or limitation under this

chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title. . . .

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365, presenting a federal question under 28 U.S.C. § 1331.

I. Statutory Background

The object of the Clean Water Act is to eliminate the discharge of pollutants into navigable waters to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. To achieve this goal, Congress forbade "the discharge of any pollutant by any person" without a permit. *Id.* § 1311(a). "[D]ischarge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12).

A "point source" is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." *Id.* § 1362(14). Congress "embrac[ed] the broadest possible definition" for point sources. *United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979). The statute enumerates several examples, including any "well," "container," "concentrated animal feeding operation," and "rolling stock," 33 U.S.C. § 1362(14)—none of which is the ultimate means by which pollutants reach navigable waters. For example, pollutants must travel through some other medium in order to make it from a "well" or "rolling stock" to a navigable water.

Congress empowered citizens to enforce the Clean Water Act against any person "alleged to be in violation of . . . an effluent standard or limitation under this chapter." *Id.* § 1365(a)(1)(A). For purposes of citizen enforcement, an "effluent standard or limitation" includes "an unlawful act under subsection (a) of section 1311 of this title." *Id.* § 1365(f).

II. Factual Background

Coal ash contains "myriad carcinogens and neurotoxins," *Util. Solid Waste Activities Grp. v. Envtl. Prot. Agency*, 901 F.3d 414, 420 (D.C. Cir. 2018), including arsenic, lead, boron, chromium, selenium, mercury, and thallium. *See id.* at 421.

Burning coal does not generate wastewater but only dry ash. However, since the Plant began operation in 1956, App. 57a, TVA has mixed its coal ash waste with water, thereby creating a wastewater mix, and sluiced it to unlined impoundments, which allow the previously dry coal ash solids to settle before wastewater is discharged through an authorized outfall structure into the Cumberland River. App. 214a–215a, 57a–58a, 94a, 196a.

The Plant occupies Odom's Bend Peninsula, which is surrounded on three sides by the Cumberland River, App. 56a–57a, a navigable water of the United States. App. 180a. The Peninsula is made of layers of limestone, significant parts of which have been dissolved by water over time to create "karst" conditions characterized by sinkholes, fissures, and conduits. App. 57a, 65a–67a, 189a–190a. The resultant "voids" or "tubular tunnels"

caused by eons of subsurface erosion provide pathways for rapid flows of coal ash and coal ash pollutants dissolved in the groundwater to flow into the Cumberland River. App. 65a–67a, 140a.

Until 1970, TVA sluiced its coal ash to a 65-acre unlined impoundment on the western edge of the Peninsula now known as the Non-Registered Site (NRS). App. 57a.

Since 1970, TVA has accumulated coal ash waste in a 389-acre unlined series of impoundments called the Ash Pond Complex. App. 58a. When the Complex opened in 1970, it could not retain coal ash wastewater because so much of it leaked into the river. App. 70a–72a, 187a–189a. Over nearly a decade, TVA allowed billions of gallons of coal ash wastewater to flow into the river through karst features before it partially repaired the impoundments. App. 70a–72a, 141a–142a, 189a.

III. Proceedings Below

A. District Court Proceedings

In November 2014, pursuant to 33 U.S.C. § 1365, the Conservation Groups notified TVA, the U.S. Environmental Protection Agency, and the Tennessee Department of Environment and Conservation of their intent to sue TVA for violations of the Clean Water Act. App. 60a–61a.[1] As is relevant

[1] In January 2015, the State of Tennessee filed an enforcement action in state court against TVA under the Tennessee Solid Waste Disposal Act and the Tennessee Water Quality Control Act "in response" to the Conservation Groups' Clean Water Act

here, the Conservation Groups alleged that TVA is violating the Clean Water Act by discharging coal ash pollutants from the NRS and Complex into the Cumberland River without a permit.

In April 2015, the Conservation Groups filed this case in the U.S. District Court for the Middle District of Tennessee. App. 61a. After the district court ruled on a series of dispositive motions,[2] the Conservation Groups proceeded to trial on two Clean Water Act claims alleging two types of unlawful discharges under § 1311(a): (1) the unpermitted discharge of pollutants into the Cumberland River from the NRS; and (2) the unpermitted discharge of pollutants from the Complex to the Cumberland River through faster-moving karst conduits, not soil seepage alone. App. 49a–50a, 179a, 231a–232a.

In August 2017, the district court filed 123 pages of findings of fact and conclusions of law and entered judgment against TVA, concluding that TVA is violating the Clean Water Act. App. 182a, 196a. The district court followed the lead of courts that have understood the issue presented by 33 U.S.C. §§ 1311(a) and 1362(12)(A) as not whether the Clean Water Act regulates the discharge of pollutants from a point source "into groundwater itself," but "to

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notice. App. 221a–222a. The Conservation Groups intervened in the state action, App. 222a, which remains pending.

[2] In these motions, TVA argued, among other things, that the Clean Water Act's "diligent prosecution" provision, 33 U.S.C. § 1365(b)(l)(B), required dismissal of the Conservation Groups' claims. App. 226a. The district court dismissed claims that overlapped with claims being prosecuted in the state case. App. 236a, 210a–211a.

navigable waters via groundwater." App. 157a–158a, 160a. Consequently, the district court endorsed the conclusion that a cause of action may be brought under § 1311(a) "if the hydrologic connection between the source of the pollutants and navigable waters is direct, immediate, and can generally be traced." App. 159a–160a.

The district court concluded that both the NRS and Complex convey pollutants into the river in a direct and traceable manner: (1) the NRS continues to leak coal ash waste into the Cumberland River, App. 182a; and (2) the Complex is adding coal ash pollutants through karst features into the Cumberland River. App. 183a–184a, 187a–191a. Further, "the Ash Pond Complex is situated directly next to the shores of that river, arguably even on top of one of its former tributaries," making the polluted water's path "simple, clear, and direct." App. 194a–195a.[3]

Based on its factual findings, the district court found that the Conservation Groups had established an ongoing violation of the Clean Water Act at both the NRS and the Complex. App. 182a, 196a.

B. Sixth Circuit Appeal

TVA appealed. A divided panel of the Sixth Circuit reversed the district court's judgment that TVA is violating the Clean Water Act. The majority

[3] The district court also looked to the statutory definition of "point sources" to conclude that the NRS and Complex met the test, given that the pollution had been "collected or channelled by man." App. 162a–169a.

held that the Clean Water Act "has no say" over TVA's addition of coal ash pollutants to the Cumberland River for the sole reason that those pollutants travel a short distance through groundwater before entering the river. App. 19a. The majority acknowledged that the "discharge of a pollutant," defined as "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12)(A), does not contain the word "directly." App. 19a–20a. Nevertheless, the majority asserted, the "[Clean Water Act's] text" demands that a discharge be direct, because a separate term, "effluent limitation," defines restrictions on permitted discharges "from point sources *into* navigable waters." App. 18a (quoting 33 U.S.C. § 1362(11)). The majority reasoned that "[t]he term 'into' indicates directness," App. 18a, and therefore, a point source "must dump *directly* into those navigable waters" for the Clean Water Act to cover the discharge. App. 18a–19a.

The majority also expressed concern that prohibiting pollution that travels via groundwater to surface water under the Clean Water Act "would disrupt the existing regulatory framework," because it would "remove coal ash treatment and storage practices from" coverage under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992k. App. 22a.

Judge Clay dissented. Rejecting the majority's holding that a plaintiff "may never—as a matter of law—prove that a defendant has unlawfully added pollutants to navigable waterways via groundwater," App. 34a, the dissent would have joined the Fourth

and Ninth Circuits and allowed cases alleging these types of discharges to "be decided on their facts." *Id.*

The dissent found no support for the majority's bright-line exemption in either the text or the history of the Clean Water Act. App. 28a; *see also* App. 30a ("[T]he [Clean Water Act] does not require a plaintiff to show that a defendant discharged a pollutant from a point source *directly* into navigable waters. . . .") (citing 33 U.S.C. § 1362(12)(A)). The dissent observed that in both the plurality opinion in *Rapanos v. United States,* 547 U.S. 715, 743 (2006) (plurality opinion) (Scalia, J.), and in this case, "[T]he legal issue is the same: whether the [Clean Water Act] applies to pollution that travels from a point source to navigable waters through a complex pathway." App. 37a. In *Rapanos*, the plurality "made clear that the [Clean Water Act] applies to indirect pollution," App. 37a, and "no Justice challenged this aspect of the opinion." App. 31a.

The dissent further observed that the citizen-suit provision authorizes citizens to enforce an "effluent standard or limitation," which is a "term of art" defined to include the prohibition on the "discharge of a pollutant," and the relevant text in 33 U.S.C. § 1362(12)(A). App. 35a–36a. For this reason, the definition of "effluent limitation" relied on by the panel "is simply irrelevant to this lawsuit." App. 36a. In any case, the dissent reasoned, "Congress did not hide a massive regulatory loophole in its use of the word 'into.'" App. 35a.

The dissent found that the Clean Water Act and RCRA play distinct and complementary roles in

limiting TVA's coal ash pollution. Citing the long-standing interpretation of the U.S. Environmental Protection Agency, the dissent explained that "RCRA regulates the way polluters store [coal ash pollutants], and the [Clean Water Act] kicks in the moment [coal ash pollutants] enter[] a navigable waterway." App. 39a.

C. Petition for Rehearing En Banc

The Conservation Groups sought rehearing en banc, which was denied by a sharply divided court. App. 264a–266a. Judge Clay would have granted rehearing for the reasons stated in his dissent. Judge Stranch delivered a separate dissenting opinion, joined by five other judges.

The en banc dissent was unpersuaded by the panel majority's textual analysis, which "relies on a single preposition that is not found in the [Clean Water Act] provision at issue." App. 266a. Even if the term "into" were relevant, the dissent explained, "Pollutants are discharged from coal ash ponds *into* navigable waters just as a rocket is launched from the ground *into* space or a path leads from a city *into* a forest—inevitably, but not immediately." App. 269a.

The en banc dissent was also unconvinced by the panel majority's analysis of a potential conflict between the Clean Water Act and RCRA. Applying the distinction drawn in *United States v. Dean*, 969 F.2d 187, 194 (6th Cir. 1992), the dissent explained that "'Actual discharges' from the ponds to surface waters are governed by the [Clean Water Act], and everything else—from the strength of the

embankment surrounding a pond to the frequency of its inspections and the design of its liner—is governed by RCRA." App. 269a. The dissent doubted "the feasibility of using a statute designed to govern solid waste to regulate pollution of rivers," App. 272a, and was "even less confident that existing environmental law can fill the new loopholes created now that a polluter can escape liability under the [Clean Water Act] 'by moving its drainage pipes a few feet from the river bank.'" *Id.* (quoting Clay, J., dissenting).

REASONS FOR GRANTING THE PETITION

I. The Court already has agreed to consider the legal issue presented by this Petition.

This case presents the same question of statutory interpretation as the petition in *Maui*, for which this Court has granted plenary review. As formulated by the petitioners in *Maui*:

> Whether the [Clean Water Act] requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, such as groundwater.

Petition for Writ of Certiorari at i, *Maui*, No. 18-260 (U.S. Aug. 27, 2018). In *Maui*, both the petitioner and the Solicitor General cited the Sixth Circuit opinion in this case as creating the disagreement among the circuits necessary to warrant review. Supplemental Brief for Petitioners at 2, *Maui,* No. 18-260 (U.S. Jan. 7, 2019); Brief of United States as Amicus Curiae at 11, *Maui,* No. 18-260 and *Kinder*

Morgan Energy Partners, L.P. v. Upstate Forever, No. 18-268 (U.S. Jan. 3, 2019).

Because this Court already has determined that the question raised by this Petition warrants review, the Court should either grant certiorari to hear this case or hold this Petition pending the decision in *Maui*.

II. The Sixth Circuit's decision conflicts with the view of every other circuit that has considered whether the Clean Water Act may protect navigable waters from pollutants added from a point source via groundwater.

The Sixth Circuit held as a matter of law that the Clean Water Act forecloses the claim alleged and proven by the Conservation Groups. *See* App. 24a ("[T]he district court erred in adopting Plaintiffs' theory that the [Clean Water Act] prohibits discharges of pollutants through groundwater that is hydrologically connected to navigable waters.").

The Sixth Circuit's decision departs from decades of precedent affirming liability under the Clean Water Act for pollution that reaches navigable waters indirectly, through groundwater or otherwise. Most recently, the Ninth and Fourth Circuits reaffirmed this principle in cases addressing pollution from point sources that reached navigable waters through groundwater. In *Hawai'i Wildlife Fund v. County Of Maui*, a unanimous panel of the Ninth Circuit held that the Act forbids the unpermitted discharge of pollutants traveling from injection wells a short distance through groundwater

to the ocean. 886 F.3d 737, 746–49 (9th Cir. 2018), *cert. granted*, 87 U.S.L.W. 3319 (U.S. Feb. 19, 2019) (No. 18-260). Similarly, in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, the Fourth Circuit held that plaintiffs had sufficiently alleged a violation of the Act where the unpermitted discharge of pollutants travels a short distance from a pipe through groundwater. 887 F.3d 637, 650–53 (4th Cir. 2018), *petition for cert. filed*, 87 U.S.L.W. 3069 (U.S. Aug. 28, 2018) (No. 18-268).

Both the Ninth and Fourth Circuits grounded their decisions in the plain language defining the "discharge of a pollutant" in § 1362(12)(A). *See Maui*, 886 F.3d at 749 (rejecting an interpretation of the Act that included "at least one critical term that does not appear on its face—that the pollutants must be discharged 'directly' to navigable waters from a point source"); *Upstate Forever*, 887 F.3d at 650 ("The plain language of the [Clean Water Act] requires only that a discharge come 'from' a 'point source.'"). The Ninth and Fourth Circuits applied the text to the facts before them and in each case held that plaintiffs stated a claim.

Both the Ninth and Fourth Circuits also noted that Justice Scalia's plurality opinion in *Rapanos*, 547 U.S. at 743, supports their reading of the plain language of a "discharge of a pollutant." *See Maui*, 886 F.3d at 748–49 (citing *Rapanos* for its persuasive value); *Upstate Forever*, 887 F.3d at 649–50 (noting Justice Scalia's statement). In *Rapanos*, Justice Scalia explained that "[t]he 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.'" 547 U.S. at 743 (emphasis in original). As the dissent in this case observed, "[N]o Justice challenged this aspect of the opinion, and for good reason: the statutory text unambiguously supports it." App. 31a (Clay, J., dissenting).

The decisions of the Fourth and Ninth Circuits flow from a long line of cases affirming that the Clean Water Act does not provide a blanket exemption for discharges that reach surface waters indirectly through groundwater. Until the Sixth Circuit's opinion in this case, every circuit court that had considered the issue reached the same conclusion. *See Waterkeeper All., Inc. v. Envtl. Prot. Agency,* 399 F.3d 486, 514–15 (2d Cir. 2005) (affirming EPA's case-by-case approach to regulating discharges through groundwater at concentrated animal feeding operations); *Quivira Mining Co. v. Envtl. Prot. Agency,* 765 F.2d 126, 129–30 (10th Cir. 1985) (upholding Clean Water Act coverage of flows carrying pollutants "through underground aquifers . . . into navigable-in-fact streams")*; U.S. Steel Corp. v. Train,* 556 F.2d 822, 851–52 (7th Cir. 1977), *overruled on other grounds by City of West Chicago v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632 (7th Cir. 1983) (upholding Clean Water Act permitting requirements for discharges through underground injection wells). [4]

[4] *Rice v. Harken Exploration Company*, 250 F.3d 264, 269 (5th Cir. 2001), and *Village of Oconomowoc Lake v. Dayton Hudson Corporation*, 24 F.3d 962, 965 (7th Cir. 1994), held only that groundwater itself is not a water of the United States—a point which the Ninth Circuit assumed without deciding. *See Maui*,

Adopting a bright-line exemption to the contrary, the Sixth Circuit decision put the courts of appeals "squarely in conflict." Brief for the United States as Amicus Curiae at 11–12, *Maui*, No. 18-260 and *Kinder Morgan*, No. 18-268 (U.S. Jan. 3, 2019).

III. The Sixth Circuit's new bright-line exemption is not supported by the text and structure of the Clean Water Act.

Like the plaintiffs in *Maui* and *Upstate Forever*, here the Conservation Groups sought to enforce the Clean Water Act's prohibition on unpermitted discharges. In finding that the plaintiffs properly alleged that claim, the Fourth and Ninth Circuits focused on the definition of the activity the Act prohibits without a permit: the "discharge of a pollutant," as defined in § 1362(12)(A). *See Maui*, 886 F.3d at 749 (analyzing the text of § 1362(a)); *Upstate Forever*, 887 F.3d at 650 (same). In contrast, the Sixth Circuit limited the prohibition on unpermitted discharges based upon its interpretation of the definition for "effluent limitation[s]," § 1362(11), a different provision of the Act that applies only to certain *permitted* discharges. App. 18–19a; *see also* App. 37a (Clay, J., dissenting) (explaining why the term "effluent limitation" is "irrelevant to this lawsuit").

Even if the term "effluent limitation" were relevant, the use of the preposition "into" in its definition does not bear the weight attributed to it by

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886 F.3d at 745–46 n.2 ("We are not suggesting that the [Clean Water Act] regulates all groundwater.").

the Sixth Circuit. The Sixth Circuit emphasized that the definition of "effluent limitation" places limits "on the amount of pollutants that may be 'discharged from point sources *into* navigable waters.'" App. 18a (quoting 33 U.S.C. § 1362(11)). According to the Sixth Circuit, "the term 'into' indicates directness," and "leaves no room for intermediary mediums to carry the pollutants." App. 18a–19a. As the dissent to the denial of rehearing en banc in this case observed, however, "[T]he definitions cited by the majority require only entry, not 'direct' entry." App. 268a (Stranch, J., dissenting).

Unlike the term "effluent limitation," the term "point source" appears in the text of § 1362(12) itself. The definition of "point source" illustrates the broad scope of the prohibition intended by Congress in § 1311(a). In particular, the statutory definition of "point source" includes a "well." 33 U.S.C. § 1362(14). Pollutants discharged into groundwater through injection wells, like those at issue in *Maui,* can *only* reach surface waters through groundwater. *See U.S. Steel*, 556 F.2d at 852 (concluding Clean Water Act regulates "'pollutants' when injected into wells" in circumstances other than "'production of oil or gas'"). Congress' confirmation that such wells can be point sources reflects congressional intent that discharges *to* surface waters *through* groundwater are regulated by the Clean Water Act. In fact, when Congress passed the Safe Drinking Water Act, 42 U.S.C. §§ 300f–300j-27, in 1977, it recognized that the Clean Water Act regulates discharges into deep water wells when there is an associated "discharge into navigable waters." H. Rep. No. 93-1185, at 6457 (1974).

Applying the Clean Water Act to discharges through groundwater conduits is neither unworkable nor novel. It is well within courts' fact-finding capacity to determine whether "any addition of any pollutant to navigable waters" originated "from any point source." 33 U.S.C. § 1362(12). *See, e.g.*, *Greater Yellowstone Coal. v. Larson*, 641 F. Supp. 2d 1120, 1139 (D. Idaho 2009), *aff'd*, 403 F. App'x 275 (9th Cir. 2010), *aff'd sub nom. Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143 (9th Cir. 2010), *as amended* (Jan. 25, 2011) (applying § 1362(12) to find no Clean Water Act certification necessary where runoff could take hundreds of years to move through four miles of groundwater to surface water). *See also* App. 34a (Clay, J., dissenting) ("[W]here, as here, a plaintiff alleges that a defendant is polluting navigable waters through a complex pathway, the court should require the plaintiff to prove the existence of pollutants in the navigable waters and to persuade the factfinder that the defendant's point source is to blame. . . ."). As in *Maui,* that is precisely what the district court did in this case. App. 159a–160a, 179a–196a.

IV. The Sixth Circuit's decision undoes a long-standing statutory scheme.

The Sixth Circuit's new bright-line exemption allows "a polluter [to] escape liability under the Clean Water Act . . . by moving its drainage pipes a few feet from the riverbank." App. 272a (Stranch, J., dissenting) (quoting Clay, J., dissenting). The decision breaks with courts' and regulators' long-standing approach. In addition, the Sixth Circuit's concern that applying the Clean Water Act to pollutants that travel via groundwater to navigable

waters would conflict with RCRA is unfounded. As the courts of appeal (including the Sixth Circuit) and EPA have recognized, Congress made clear in RCRA that the Clean Water Act's protection of navigable waters takes precedence.

A. Since the Clean Water Act's inception, EPA has recognized that the Act protects navigable waters from indirect but traceable pollution that travels via groundwater.

For four decades, under administrations of both parties, EPA has consistently recognized and implemented the protection of navigable waters from discharges of pollutants that flow into surface waters covered by the Act via groundwater, reaching back to EPA's injection well permitting in the 1970s. *See U.S. Steel*, 556 F.2d at 852 ("The statute authorizes EPA to regulate the disposal of pollutants into deep wells, at least when the regulation is undertaken in conjunction with limitations on the permittee's discharges into surface waters"). EPA recently acknowledged its long-standing practice in a notice in the Federal Register: "EPA has previously stated that pollutants discharged from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional water may be subject to [Clean Water Act] permitting requirements." Envtl. Prot. Agency, Clean Water Act Coverage of "Discharges of Pollutants" via Direct Hydrologic Connection to Surface Water, Request for Comment, 83 Fed. Reg. 7,126, 7,127 (Feb. 20, 2018); *see id.* (collecting examples of EPA taking this position in

rulemaking, adjudication, and guidance documents).[5] EPA further acknowledged that its application of the Clean Water Act to indirect discharges has been "fact-specific." *Id.* at 7,128.

The various fact-specific circumstances warranting EPA's protection of navigable waters from discharges that travel, however briefly, through groundwater highlight the regulatory disruption that would result from the Sixth Circuit's bright-line ban. For example, EPA's standard permit for concentrated animal feeding operations (CAFOs) prohibits discharges "to surface waters of the United States through groundwater with a direct hydrologic connection to surface waters."[6] EPA's CAFO rulemaking summarized its longstanding "jurisdictional determination" that the Act covers such discharges, recognized that the "determination of whether a discharge to ground water in a specific case constitutes an illegal discharge to waters of the U.S. if unpermitted is a fact specific one," and analogized it to other routine, fact-based determinations under the Clean Water Act. Envtl. Prot. Agency, National Pollutant Discharge Elimination System Permit Regulation and Effluent

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[5] In its brief filed in support of the petition in *Maui* on January 3, 2019, the Solicitor General represented that EPA expects to take further action on the request for comment "within the next several weeks." Brief of United States as Amicus Curiae at 14, *Maui,* No. 18-260 and *Kinder Morgan,* No. 18-268 (U.S. Jan. 3, 2019). As of the date of filing of this Petition, the Conservation Groups are unaware of EPA taking such action.

[6] Envtl. Prot. Agency Region 6, National Pollutant Discharge Elimination System (NPDES) General Permit for Concentrated Animal Feeding Operations (CAFOs) in New Mexico II.A.2(b)(vi) (Sept. 1, 2016).

Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2,960, 3,018 (Jan. 12, 2001).

Eschewing EPA's long-standing interpretation and implementation of the Act, the Sixth Circuit decision throws into confusion permits issued across the country to regulate discharges from point sources that add pollutants to navigable waters indirectly through groundwater, such as the CAFOs found by EPA to warrant such regulation. The resulting regulatory upheaval puts at risk the public health in communities in the Sixth Circuit and across the nation.

B. Protecting navigable waters from pollutants conveyed through groundwater under the Clean Water Act does not conflict with the Resource Conservation and Recovery Act.

Recognizing the "major environmental problem" its decision leaves unaddressed, App. 27a, the Sixth Circuit stated that "other environmental laws have been enacted to remedy these concerns." *Id*. The court concluded that the Clean Water Act's coverage of discharges to surface water through groundwater "would remove coal ash treatment and storage practices from RCRA's coverage," in particular the Coal Combustion Residuals Rule (CCR Rule) regarding coal ash ponds that EPA issued under its RCRA authority. App. 22a. The Sixth Circuit is wrong.

RCRA governs the disposal of solid waste. By its own terms, RCRA makes clear that if there is a conflict between RCRA and the Clean Water Act, the Clean Water Act takes precedence—not the other way around. Congress expressly eliminated RCRA's applicability to activities subject to the Clean Water Act, "except to the extent that such application (or regulation) is not inconsistent with the requirements of [the Clean Water Act]." 42 U.S.C. § 6905(a).

Congress further required EPA to "integrate" RCRA with the Clean Water Act and to "avoid duplication, to the maximum extent practicable. . . ." *Id.* § 6905(b)(1). Toward that end, Congress exempted "industrial discharges which are point sources subject to permits under section 1342 of Title 33" from the definition of "solid waste" regulated by RCRA. *Id.* § 6903(27).

To implement the statutory exclusion for industrial discharges, EPA explained, "This exclusion applies only to the actual point source discharge. It does not exclude industrial wastewaters while they are being collected, stored or treated before discharge. . . ." 40 C.F.R. § 261.4(a)(2) cmt. EPA has made clear that these statutory and regulatory provisions mean what they say when applied to pollution of navigable waters that travels through groundwater. While generally "wastewater releases to groundwater from treatment and holding facilities. . . remain within the jurisdiction of RCRA," when groundwater carries pollution to navigable waters, "discharges are subject to [Clean Water Act] jurisdiction, based on EPA's interpretation that discharges from point sources through groundwater

where there is a direct hydrologic connection to nearby surface waters of the United States are subject to the prohibition against unpermitted discharges" and "are subject to the NPDES permitting requirements." Memorandum from Michael A. Shapiro & Lisa Friedman, Envtl. Prot. Agency Office of Solid Waste, Interpretation of Industrial Wastewater Discharge Exclusion from the Definition of Solid Waste (Feb. 17, 1995).

Accordingly, RCRA applies to the regulation of the contents of wastewater treatment ponds, like TVA's ponds here. But the Clean Water Act protects navigable waters from the unlawful discharge of pollutants from the ponds.

Courts of appeal across the country have acknowledged the primacy Congress afforded to the Clean Water Act and the dividing line it drew in application of the two statutes. *See, e.g.*, *Ecological Rights Found. v. Pac. Gas & Elec. Co.,* 874 F.3d 1083, 1095 (9th Cir. 2017) ("RCRA's anti-duplication provision does not bar RCRA's application unless that application contradicts a specific mandate imposed under the [Clean Water Act]"); *Goldfarb v. Mayor of Baltimore*, 791 F.3d 500, 510 (4th Cir. 2015) (noting that RCRA yields to the Clean Water Act when regulation under both statutes would be "'incompatible, incongruous, inharmonious'") (quoting *Webster's Third Int'l Dictionary* 1144); *see also Dean,* 969 F.2d at 194 ("[I]t is only the actual discharges from a holding pond or similar feature into surface waters which are governed by the Clean Water Act, not the contents of the pond or discharges into it.").

Similarly, the Sixth Circuit's view that "the CCR Rule, not the [Clean Water Act], is the framework envisioned by Congress . . . to address the problem of groundwater contamination caused by coal ash impoundments," App. 23a–24a, cannot rewrite the plain terms of the Clean Water Act, RCRA, and the CCR Rule itself. The CCR Rule, promulgated by EPA pursuant to RCRA, expressly requires coal ash ponds to comply with the Clean Water Act's prohibition on discharges of pollutants. *See* 40 C.F.R. § 257.52(b) ("Any . . . CCR surface impoundment . . . continues to be subject to the requirements in . . . §257.3-3");[7] *id.* § 257.3-3(a) ("For purposes of section 4004(a) of the Act, a facility shall not cause a discharge of pollutants into waters of the United States that is in violation of the requirements of the National Pollutant Discharge Elimination System (NPDES) under section 402 of the Clean Water Act, as amended.").

The Sixth Circuit's conclusion that protecting navigable waters from pollutants that travel via groundwater would "disrupt the existing regulatory framework," App. 22a, cannot be squared with the plain text of the Clean Water Act or RCRA, as well as EPA's regulations and permitting practice over decades, and the interpretations of several courts of appeals.

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[7] A CCR surface impoundment is defined as "a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, and the unit treats, stores, or disposes of CCR." 40 C.F.R. § 257.53.

CONCLUSION

The Petition should be granted, or held pending the Court's disposition of *County of Maui v. Hawai'i Wildlife Fund*, No. 18-260. If the Court elects to hold this Petition, once *Maui* has been decided, the Court should set this case for plenary review or grant the Petition, vacate the decision below, and remand for further proceedings.

Respectfully submitted,

Frank S. Holleman III
Counsel of Record
Nicholas S. Torrey
Leslie Griffith
SOUTHERN ENVIRONMENTAL LAW CENTER
601 West Rosemary Street, Suite 220
Chapel Hill, North Carolina 27516-2356
(919) 967-1450
fholleman@selcnc.org

Amanda R. Garcia
Anne E. Passino
SOUTHERN ENVIRONMENTAL LAW CENTER
1033 Demonbreun Street, Suite 205
Nashville, Tennessee 37203
(615) 921-9470
Counsel for Tennessee Scenic Rivers Association

Michael S. Kelley
KENNERLY, MONTGOMERY & FINLEY, P.C.
550 Main Street, Fourth Floor
Knoxville, Tennessee 37902
(865) 546-7311
mkelley@kmfpc.com
Counsel for Tennessee Clean Water Network

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