

No. 18-1307

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**In the Supreme Court of the United States**

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TENNESSEE CLEAN WATER NETWORK, ET AL.,  
PETITIONERS

*v.*

TENNESSEE VALLEY AUTHORITY

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT*

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**BRIEF FOR THE RESPONDENT**

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### QUESTION PRESENTED

Whether a “discharge of a pollutant,” 33 U.S.C. 1362(12), occurs when a pollutant is released from a point source, travels through groundwater, and ultimately migrates to navigable waters.

**TABLE OF CONTENTS**

	Page
Opinions below .....	1
Jurisdiction .....	1
Statement .....	2
Discussion .....	8
Conclusion .....	9

**TABLE OF AUTHORITIES**

Cases:

<i>County of Maui v. Hawaii Wildlife Fund</i> , 139 S. Ct. 1164 (2019) .....	8, 9
<i>Hawai'i Wildlife Fund v. County of Maui</i> , 886 F.3d 737 (9th Cir. 2018), cert. granted, 139 S. Ct. 1164 (2019) .....	8
<i>Kentucky Waterways Alliance v. Kentucky Utilities Co.</i> , 905 F.3d 925 (6th Cir. 2018).....	6
<i>Rapanos v. United States</i> , 547 U.S. 715 (2006) .....	7
<i>Upstate Forever v. Kinder Morgan Energy Partners, L.P.</i> , 887 F.3d 637 (4th Cir. 2018), petition for cert. pending, No. 18-268 (filed Aug. 28, 2018) .....	7

Statutes and regulation:

Clean Water Act, 33 U.S.C. 1251 <i>et seq.</i> .....	2
33 U.S.C. 1251(a) .....	2
33 U.S.C. 1251(b) .....	2, 6
33 U.S.C. 1288(b)(2)(F) .....	3
33 U.S.C. 1311(a) .....	2, 5, 8
33 U.S.C. 1319 .....	3
33 U.S.C. 1329 .....	3
33 U.S.C. 1323 .....	3

IV

Statutes and regulation—Continued:	Page
33 U.S.C. 1342(a) .....	3
33 U.S.C. 1342(b) .....	3
33 U.S.C. 1342(d) .....	3
33 U.S.C. 1362(7) .....	2
33 U.S.C. 1362(8) .....	2
33 U.S.C. 1362(12) .....	3
33 U.S.C. 1362(12)(A) .....	8
33 U.S.C. 1362(12)(A)-(B) .....	2
33 U.S.C. 1362(14) .....	2
33 U.S.C. 1365 .....	3
33 U.S.C. 1365(a)(1) .....	3
Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 <i>et seq.</i> .....	7
Tenn. Code Ann. §§ 68-211 <i>et seq.</i> (2013 & Supp. 2018) .....	4
40 C.F.R. 257.53 .....	4
Miscellaneous:	
80 Fed. Reg. 21,302 (Apr. 17, 2015) .....	7

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**BRIEF FOR THE RESPONDENT**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 905 F.3d 436. The order of the court of appeals denying rehearing en banc (Pet. App. 264a-290a) is reported at 913 F.3d 592. The order of the district court directing judgment (Pet. App. 46a-47a) is not published in the Federal Supplement but is available at 2017 WL 6462543. The district court's findings of fact and conclusions of law (Pet. App. 48a-209a) are reported at 273 F. Supp. 3d 775. A prior memorandum opinion of the district court (Pet. App. 212a-263a) is reported at 206 F. Supp. 3d 1280.

**JURISDICTION**

The judgment of the court of appeals was entered on September 24, 2018. A petition for rehearing was de-

nied on January 17, 2019 (Pet. App. 264a-266a). The petition for a writ of certiorari was filed on April 15, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATEMENT

1. Congress enacted the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, to “restore and maintain \* \* \* the Nation’s waters,” 33 U.S.C. 1251(a), while “recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution,” 33 U.S.C. 1251(b). Subject to certain exceptions that are not implicated here, the CWA prohibits the “discharge of any pollutant” unless the discharge is authorized by a permit issued in accordance with the Act. 33 U.S.C. 1311(a). The Act defines the term “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source,” as well as additions of pollutants to “waters of the contiguous zone or the ocean” from any point source other than a vessel or other floating craft. 33 U.S.C. 1362(12)(A)-(B).

The CWA defines the term “navigable waters”—which are sometimes called jurisdictional surface waters—as “the waters of the United States, including the territorial seas.” 33 U.S.C. 1362(7); see 33 U.S.C. 1362(8) (defining “territorial seas”). The Act defines the term “point source” as “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.” 33 U.S.C. 1362(14). The Act recognizes that certain other sources

of diffuse pollution, referred to as “nonpoint source” discharges, also will occur, see, *e.g.*, 33 U.S.C. 1288(b)(2)(F) and 1329, but it does not include such releases within the definition of the term “discharge of a pollutant,” 33 U.S.C. 1362(12).

The CWA establishes permitting programs through which appropriate federal or state officials may authorize discharges of pollutants from point sources into the waters of the United States. Under the National Pollutant Discharge Elimination System (NPDES) program, the United States Environmental Protection Agency (EPA) may permit the discharge of pollutants other than dredged or fill material. 33 U.S.C. 1342(a). The EPA may authorize a State that meets certain statutory criteria to administer its own NPDES program. 33 U.S.C. 1342(b). When a State receives such authorization, the EPA retains oversight and enforcement authority. 33 U.S.C. 1319, 1342(d). As its name suggests, the goal of the NPDES program is to eliminate uncontrolled point source discharges to waters of the United States.

The CWA authorizes enforcement actions to be brought either by government officials, 33 U.S.C. 1319, or by private citizens under specified circumstances, 33 U.S.C. 1365. A citizen suit may be brought against a person “who is alleged to be in violation of” specified CWA requirements. 33 U.S.C. 1365(a)(1).

2. Respondent operates a coal-fired electric power plant, known as the Gallatin plant, located in Sumner County, Tennessee, adjacent to the Cumberland River. Pet. App. 3a, 56a-57a. The Gallatin plant is a federal facility under the CWA. *Id.* at 152a; see 33 U.S.C. 1323. A byproduct of burning coal for electricity generation is coal combustion residuals (CCRs, commonly known as

coal ash). Pet. App. 3a-4a. Historically, respondent has disposed of coal ash in two locations at the Gallatin plant: the Non-Registered Site (NRS) and the Ash Pond Complex (Complex). *Id.* at 7a.

From 1956 to 1970, the Gallatin plant sluiced coal ash to the NRS, an unlined 65-acre site that runs along the western edge of the river and is situated atop alluvium (loose soil, silt, and clay). Pet. App. 7a. In 1970, respondent ceased operating the NRS and, in 1998, closed the NRS. *Id.* at 57a. The NRS is regulated under Tennessee's solid waste landfill standards, which include ongoing groundwater monitoring. *Id.* at 8a; see Tenn. Code Ann. §§ 68-211 *et seq.* (2013 & Supp. 2018). Approximately 2.3 million cubic yards of coal ash are stored at the NRS. Pet. App. 8a.

After 1970, respondent began treating its coal ash in a series of unlined ponds, collectively known as the Complex. Pet. App. 8a. The Complex, which covers roughly 476 acres, treats sluiced wastewater by allowing coal ash to settle before releasing wastewater to the Cumberland River through a NPDES-permitted discharge point. *Ibid.* Approximately 11.5 million cubic yards of coal ash are stored at the Complex, which sits atop karst terrain—a landscape characterized by underground sinkholes, fissures, and caves caused by water dissolving the limestone. *Id.* at 8a-9a; see 40 C.F.R. 257.53 (defining “karst terrains”). The Complex has been subject since 1976 to a NDPEs permit for the release of wastewater to the river through an outfall, Pet. App. 9a-10a, and it is in the process of being closed, *id.* at 7a.

3. Petitioners filed a citizen suit alleging that respondent was violating the CWA through seeps or leaks of coal ash from the Complex and from the NRS through

groundwater that was hydrologically connected to the Cumberland River. Pet. App. 10a-11a. Petitioners alleged that respondent was thereby unlawfully discharging pollutants into the river without a NPDES permit, in violation of 33 U.S.C. 1311(a). After dismissing some of petitioners' claims, the district court conducted a bench trial in January and February 2017. Pet. App. 48a-49a.

Following trial, the district court granted judgment for petitioners on several of their claims. Pet. App. 49a. As relevant here, the court held that the NRS qualifies as a point source because it "channel[s] the flow of pollutants \* \* \* by forming a discrete, unlined concentration of coal ash," *id.* at 166a (citation and internal quotation marks omitted), and that the Complex is also a point source because it comprises "a series of discernible, confined, and discrete ponds that receive wastewater, [and] treat that wastewater," *id.* at 162a-163a. The court further held that the NPDES program covers pollutant discharges to navigable waters through groundwater where the point source and the receiving navigable waters are linked by a hydrological connection that is "direct, immediate, and can generally be traced." *Id.* at 179a. The court found that such a hydrological connection existed for seeps from the NRS "through rainwater vertically penetrating the Site, groundwater laterally penetrating the Site, or both," *id.* at 181a-182a; as well as for leaks from the Complex involving its karst features, *id.* at 183a-184a. As a remedy, the district court ordered respondent to excavate and remove the 13.8 million cubic yards of coal ash stored at the NRS and the Complex. *Id.* at 13a-14a, 208a-209a.

4. A divided panel of the court of appeals reversed. Pet. App. 3a-27a.

a. The court of appeals noted that, in a “companion decision” issued the same day, the court had addressed another case involving allegations of unpermitted discharges of pollutants from power plant coal ash ponds to jurisdictional surface waters via groundwater flowing through karst terrain. Pet. App. 4a (citing *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 905 F.3d 925 (6th Cir. 2018)). As in that case, the court held that the “hydrological connection theory,” upon which the district court had relied here, “is not a valid theory of liability” under the CWA. *Id.* at 15a. The court of appeals explained that, although respondent “is discharging pollutants into the groundwater and the groundwater is adding pollutants to” the Cumberland River, “groundwater is not a point source.” *Id.* at 19a (citation omitted). The court concluded that, “when the pollutants are discharged to the river, they are not coming *from* a point source,” as required for coverage under the NPDES program, but rather “from groundwater[,] which is a nonpoint-source conveyance.” *Ibid.* (citation omitted).

The court of appeals further determined that its conclusion was supported by the CWA’s stated goal of “protect[ing] the primary rights and responsibilities of the States to regulate pollution.” Pet. App. 21a (citing 33 U.S.C. 1251(b)). Applying the NPDES program to releases that add pollutants to navigable waters via groundwater, the court explained, would cross the “line between point-source pollution and nonpoint-source pollution,” the latter of which is “within the states’ regulatory domain.” *Id.* at 6a.

The court of appeals also explained that applying the NPDES program to pollutants that travel via groundwater to jurisdictional surface waters “would disrupt

the existing regulatory framework” by “remov[ing] coal ash treatment and storage practices from” coverage under the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.* Pet. App. 22a. The court noted that, “pursuant to RCRA, the EPA has issued a formal rule that specifically covers coal ash storage and treatment.” *Ibid.* (citing 80 Fed. Reg. 21,302 (Apr. 17, 2015)) (citation omitted). The court “declin[ed] to interpret the CWA in a way that would effectively nullify the CCR Rule and large portions of RCRA.” *Id.* at 23a.

b. Judge Clay dissented. Pet. App. 28a-45a. In his view, the NPDES program “does not require a plaintiff to show that a defendant discharged a pollutant from a point source *directly* into navigable waters.” *Id.* at 30a. Instead, Judge Clay relied on the plurality opinion in *Rapanos v. United States*, 547 U.S. 715, 743 (2006), for the proposition that the program “applies to indirect pollution.” Pet. App. 37a. Judge Clay also rejected the majority’s concern that applying the NPDES program to pollutant releases that migrate to surface water through groundwater would upset the cooperative federalism embodied in the CWA, *id.* at 37a-38a, or would undermine rules established by the EPA under the RCRA, *id.* at 39a.

5. The court of appeals denied a petition for rehearing. Pet. App. 264a-290a. Judge Stranch dissented, endorsing the analysis set forth in Judge Clay’s dissent from the panel’s decision. *Id.* at 266a-272a. Judge Stranch also emphasized that the panel’s decision conflicts with decisions of other courts of appeals. *Id.* at 270a (citing *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 650 (4th Cir. 2018), petition for cert. pending, No. 18-268 (filed Aug. 28, 2018);

and *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737, 746 (9th Cir. 2018), cert. granted, 139 S. Ct. 1164 (2019)).

#### DISCUSSION

The CWA prohibits the unpermitted “discharge of [a] pollutant,” 33 U.S.C. 1311(a), a term defined to include “any addition of any pollutant to navigable waters from any point source,” 33 U.S.C. 1362(12)(A). The courts of appeals are divided on the question whether a “discharge of [a] pollutant” within the meaning of Section 1311(a) occurs when pollutants are released from a point source to groundwater and migrate through, or are conveyed by, groundwater to navigable waters. This Court has granted the petition for a writ of certiorari in *County of Maui v. Hawaii Wildlife Fund*, 139 S. Ct. 1164 (2019) (No. 18-260), to address that question.

The United States has filed a brief as amicus curiae in support of the petitioner in *County of Maui*. That brief argues that the CWA’s text, structure, and history support the conclusion that a NPDES permit is not required when a pollutant is released from a point source to groundwater, even if the pollutant ultimately migrates to navigable waters. Among other things, that conclusion reflects: Congress’s deliberate decision to exclude groundwater pollution from the NPDES program; the separate treatment of such pollution under distinct CWA provisions and other federal statutes; legislative history indicating that Congress rejected proposals to regulate groundwater under the NPDES program despite its awareness that pollutants sometimes reach surface waters by migrating through groundwater; and the need to avoid upending the traditional federal-state regulatory balance by substantially enlarging the

EPA’s authority beyond what Congress intended. U.S. Br. at 20-33, *County of Maui, supra* (No. 18-260).

The issue presented by the instant petition is materially identical to the one presented in *County of Maui*. Petitioners agree (Pet. 13) that the two cases “present[] the same question of statutory interpretation.” The petition accordingly should be held pending the Court’s decision in *County of Maui* and then disposed of as appropriate in light of that decision.

#### CONCLUSION

The petition for a writ of certiorari should be held pending this Court’s decision in *County of Maui v. Hawaii Wildlife Fund*, 139 S. Ct. 1164 (2019), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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