No. 18-5115

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

KENTUCKY WATERWAYS ALLIANCE; SIERRA CLUB,

Plaintiffs-Appellants,

v.

Kentucky Utilities Co.,

Defendant-Appellee.

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

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, KENTUCKY CHAMBER OF COMMERCE, KENTUCKY FARM BUREAU, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN CHEMISTRY COUNCIL, AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, AND EDISON ELECTRIC INSTITUTE IN SUPPORT OF DEFENDANT-APPELLEE

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Sixth Cir. R. 26.1, *amici* make the following disclosure:

1. Is any of *amici* a subsidiary or affiliate of a publicly owned corporation?

No.

2. Is there a publicly owned corporation, not a party to the appeal or an *amicus*, that has a financial interest in the outcome?

No.

Dated: May 4, 2018

/s/ Thomas A. Lorenzen
Thomas A. Lorenzen

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CONSENT OF ALL PARTIES TO FILING

The Defendant-Appellee and Plaintiffs-Appellants have consented to the filing of this brief.

INTEREST OF AMICI CURIAE[1]

Amici are a coalition of trade associations whose members represent a broad spectrum of the Nation's economy. They are the Chamber of Commerce of the United States of America, Kentucky Chamber of Commerce, Kentucky Farm Bureau, National Association of Manufacturers, American Chemistry Council, American Fuel & Petrochemical Manufacturers, and Edison Electric Institute.

Although *Amici* and their members have an institutional interest in a number of the issues presented in this case, their focus here is the part of the district court's decision addressing the reach of the Clean Water Act's ("CWA") National Pollutant Discharge Elimination System ("NPDES") permit program. *Amici* have a substantial interest in the CWA question presented in this appeal. Many of their members are already subject to regulation under the CWA, as well as other state

[1] No party's counsel authored any portion of this brief. No party or party's counsel contributed money to fund this brief's preparation or submission. No person other than the *amici*, their members, or their counsel contributed money that was intended to fund this brief's preparation or submission.

and federal environmental laws governing releases of pollutants and other substances into the environment. The decision below ensured that those members would not become subject to unauthorized and unwarranted restrictions under the NPDES program as to releases to groundwater. The decision below set out a rule that is sound as a matter of law and logic, and workable in practice. *Amici* and their members have a strong interest in defending such rules.

ARGUMENT

The principal CWA question in this case is not *whether* pollutants released to groundwater are controlled, but *how* and *by whom* they are controlled—under the Act's point source program and directly administered by the Federal Government, or under the Act's nonpoint source programs as primarily administered by the States. Congress intentionally addressed water pollution differently under the CWA's point source and nonpoint source programs. Under the former, Congress prohibited "any addition of any pollutant to navigable waters from any point source," such as a pipe, ditch, or other "discernible, confined and discrete conveyance," except as authorized by an NPDES permit. *See* 33 U.S.C. §§ 1362(12), (14); *see also id.* § 1311(a). Because pollution often reaches navigable waters by means other than point source discharges to those waters, *e.g.*, from diffuse sources like land runoff, atmospheric deposition, or seepage,

Congress also enacted nonpoint source programs. It deliberately left administration of those programs in the hands of the individual States; no NPDES permit is required for nonpoint source releases of pollutants. Congress left States to control nonpoint source pollution, while "recogniz[ing], preserv[ing], and protect[ing] the primary responsibilities and rights of States … to plan the development and use … of land and water resources[.]" 33 U.S.C. § 1251(b). Congress also addressed water pollution in other statutes. Most relevant here, in the Resource Conservation and Recovery Act ("RCRA") Congress gave EPA the authority to regulate "solid wastes." EPA's authority under RCRA includes regulation of groundwater contamination from the very sorts of coal ash impoundments here at issue.

The district court correctly held that pollutants released from ash impoundments into groundwater are *not* subject to the CWA's NPDES program. The contrary position urged by the Kentucky Waterways Alliance and the Sierra Club (collectively "KWA") is inconsistent with the Act's text, structure, and history, and effectively overrides Congress's decision to not extend point source regulation to groundwater, as well as the distinct line Congress drew between point and nonpoint sources. Moreover, KWA's position warrants rejection because it runs contrary to established interpretive canons. KWA invites this Court to adopt an interpretation that not only will lead to an unreasonable degree of regulatory

uncertainty for millions of businesses and private landowners across the country, but also will undermine existing regulatory programs that are already effective in controlling pollutants released from ash impoundments and other nonpoint sources. Those significant adverse consequences underscore why Congress declined to adopt the regulatory scheme KWA proposes.

I. THE DISTRICT COURT PROPERLY CONCLUDED THAT KWA'S INTERPRETATION IS NOT CONSISTENT WITH THE CWA'S TEXT, STRUCTURE, AND HISTORY.

The Kentucky Utilities Company's brief ably explains why the CWA's text, structure, and history compel the conclusion that Congress did not intend to regulate releases to or from groundwater under the NPDES program. *Amici*'s intent here is to highlight how the CWA's structure and legislative history support the district court's interpretation of the text.

The Act's structure and history confirm that Congress intended that the sort of pollution at issue here—migration of pollutants to navigable waters after seepage from the bottom of engineered structures—be addressed under nonpoint source programs. *E.g.*, 33 U.S.C. §§ 1288, 1314. Section 304(f) of the CWA requires EPA to provide technical information to appropriate federal agencies and the States for use in state nonpoint source control programs, as well as information regarding "processes, procedures, and methods to control pollution resulting from

… the disposal of pollutants in wells or in subsurface excavations." 33 U.S.C. § 1314(f)(2)(D);[2] *see also Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 587 (6th Cir. 1988) ("Congress apparently intended that pollution problems caused by" facilities described in § 1314(f) "are generally to be regulated by means other than the NPDES permit program"). The House Report characterized "section [304(f)] and the information on such nonpoint sources [as] among the most important in the 1972 Amendments." H.R. Rep. No. 92-911, at 109 (1972). Thus, the report suggested that EPA should "be most diligent in gathering and distribution of the guidelines for the identification of nonpoint sources and the information on processes, procedures, and methods for control of pollution from such nonpoint sources as ... the disposal of pollutants in wells or other subsurface excavations[,]" among other nonpoint sources. *Id.*

[2] The reference to "appropriate Federal agencies" in Section 304(f) in no way suggests that the Federal Government can regulate nonpoint sources. Congress simply understood at the time that many nonpoint sources "are the subject, directly or indirectly, of Federal programs established for other purposes" and thus, it wanted EPA to "utilize the existing knowledge and existing programs of other Federal agencies and incorporate the fruits of such programs into the information published under [section 304(f)]." S. Rep. No. 92-414, at 52 (1971). One such program that Congress had in mind was the Department of Agriculture's Rural Environmental Assistance Program, through which that agency provided "technical and financial assistance" and conducted research to promote sound land use. *Id.*

The Senate Report further opined that the information EPA must provide to States under Section 304(f) "may range from provisions for evaluating geological characteristics of disposal sites to the costs and benefits of alternative methods of disposal." S. Rep. No. 92-414, at 53 (1971). That report fully acknowledged the potential for "groundwater contamination" at "shallower disposal sites," which is why it called upon EPA to outline provisions "to control leaching of materials from such sites, which include land-fill sites as well as abandoned mines." *Id.*[3]

The many nonpoint sources of pollution identified in Section 304(f), including pollutants disposed in wells and subsurface excavations, also appear in Section 208, which requires States to develop waste management plans that include "a process to control the disposal of pollutants on land or in subsurface excavations within such area to protect ground and surface water quality." 33 U.S.C. § 1288(b)(2)(K). Section 208, and later Section 319, "were designated by Congress as methods to keep states accountable for identifying and tracking nonpoint sources of pollution, as well as identifying 'the best management

[3] Elsewhere, the Senate Report recognizes that pollutants placed in shallow disposal sites could migrate to navigable waters. *Id.* at 73 (discussing "the essential link between ground and surface waters and the artificial nature of any distinction."). Congress nonetheless continued to maintain the point source/nonpoint source distinction in the Act.

practices and measures' to reduce such pollution." *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 785 (9th Cir. 2008).

Importantly, when the Senate Report examined the progress of state nonpoint source programs in 1977, it acknowledged that "Section 208, the 1972 act's laboratory for new institutional control mechanisms for vexing nonpoint source problems … may not be adequate." S. Rep. No. 95-370, at 10 (1977). The report recognized that States might resist developing protective control measures, speculating that it "may be that sometime in the future a Federal presence can be justified and afforded." *Id.* Importantly, the report nevertheless opined that "it is both necessary and appropriate to make a distinction as to the kinds of activities that are to be regulated by the Federal Government and the kinds of activities which are to be subject to some measure of local control" under the Act's nonpoint source programs. *Id.*

That critical distinction between point and nonpoint source pollutants has remained firmly in place for more than four decades. And States, including Kentucky, are indeed addressing various nonpoint sources of pollutants under their own nonpoint source management plans. *See* Ky. Div. of Water, 2014 Nonpoint

Source Management Plan;[4] *see also infra* Part III.B (discussing Kentucky nonpoint source program success stories). By reserving to the individual States the authority to control nonpoint source pollution, including that which eventually results from the disposal of pollutants into subsurface excavations like the ash impoundments in this case, Sections 304(f) and 208(b)(2) show that Congress never intended to apply NPDES requirements to pollution resulting from such disposal.

Rather than override the foundational distinction that Congress carefully drew between point and nonpoint source pollutants and the disparate approaches Congress established for addressing those sources of pollutants, this Court should affirm the district court's dismissal of KWA's CWA claim.

II. KWA'S INTERPRETATION IS NEITHER COMPATIBLE WITH ORDINARY PRINCIPLES OF STATUTORY INTERPRETATION NOR REASONABLE.

The district court's holding should also be affirmed because KWA's position conflicts with several established principles of statutory interpretation. KWA's interpretation would "bring about an enormous and transformative expansion in EPA's regulatory authority [by extending NPDES coverage to nonpoint sources of

[4] *Available at* http://water.ky.gov/nsp/Documents/NPS%20Management%20Plan%20-%20Final%20EPA%20R4.pdf.

pollutants] without clear congressional authorization." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) ("*UARG*"). That expansion would occur at the expense of the States' traditional authority to control nonpoint sources and regulate groundwater. KWA's interpretation would also foster an unreasonable amount of regulatory uncertainty, raise fair notice concerns, and result in a massive increase in the costs of the NPDES permitting program for the States and for industry and other property owners. The district court's decision does not present any of those problems and, thus, this Court should affirm.

A. Clear Statement Rules Weigh Against KWA's Interpretation.

KWA's interpretation flies in the face of "clear statement rules." Such rules generally require a clear statement on the face of a statute to rebut a well-established policy presumption. At least two clear statement rules—one from *UARG*, the other from *United States v. Bass*, 404 U.S. 336 (1971)—militate against KWA's interpretation in this case.

1. The CWA Lacks A Plain Statement From Congress Authorizing The Extraordinary Expansion Of The NPDES Program That Would Result Under KWA's Interpretation.

Where a statutory interpretation effects an unprecedented and extraordinary expansion of federal regulatory authority, courts expect the statute's text to clearly indicate that Congress intended such a result. *See UARG*, 134 S. Ct. at 2444.

Unsurprisingly, the Supreme Court has "been reluctant to read into ambiguous statutory text" the "power to require permits for … thousands … [or] millions, of small sources nationwide." *Id.* The Court has also said the fact that a given interpretation of statutory text places "plainly excessive demands on limited governmental resources is alone a good reason for rejecting it." *Id.* Congress "must speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). By those measures, KWA's interpretation warrants rejection.

Under KWA's interpretation, thousands, if not millions, of additional sources authorized under existing state and local requirements could be swept into the federal NPDES program, so long as pollutants released from those sources eventually reach navigable waters through groundwater. Indeed, as KWA interprets the Act, there appears to be no limit to the number or types of releases into groundwater that would likely require an NPDES permit. For instance, over 22.2 million homes have septic systems,[5] which to date have almost never required

[5] *See* U.S. Dep't of Housing & Urban Devel. & U.S. Census Bureau, American Housing Survey for the United States: 2011, Current Housing Reports, H150/11, at

(Continued…)

NPDES permits because they are considered nonpoint sources of pollutants. *See United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 345 (E.D. Va. 1997) (referring to septic systems as nonpoint sources).[6] Yet because those systems collect wastewater and disperse it into soil and groundwater, which might at some point reach navigable waters, septic systems seemingly satisfy the amorphous criteria KWA proposes for imposing NPDES permitting requirements.

Numerous industries rely on unlined impoundments—such as stormwater ponds, farm ponds, surface impoundments, cooling ponds, and water supply reservoirs—that could release pollutants to groundwater. Many of these structures and facilities do not currently require NPDES permits. For those that do, NPDES permits focus primarily on regulating pollutants that reach jurisdictional surface

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14 Tbl. C-04-AO (Sept. 2013), *available at* https://www.census.gov/content/dam/Census/programs-surveys/ahs/data/2011/h150-11.pdf.

[6] To be sure, if pollutants from septic tanks reach navigable waters via a discernible, confined, and discrete conveyance, they would be point source discharges. *E.g.*, *United States v. Lucas*, 516 F.3d 316, 332 n.43 (5th Cir. 2008) (installation of "septic systems directly in wetlands that are waters of the United States, thus ma[de] a system that is typically a diffuse, non-point source into a point source"); *see also id.* at 333-34 (collecting cases holding that pollutants conveyed from septic systems to navigable waters via pipes were point source discharges). But KWA's interpretation goes well beyond that.

waters through a discernible, confined, discrete conveyance, rather than through passive and diffuse groundwater migration. By KWA's illogic, though, owners and operators of those impoundments may need to seek new or modified permits and identify additional NPDES discharge points.

Ironically, KWA's interpretation could discourage the construction or operation of any number of public and private treatment and pollution control infrastructure projects specifically designed to protect and preserve water resources. Groundwater recharge systems use spreading basins, percolation ponds, infiltration basins, and injection wells, among other technologies and structures, to convey stormwater or recycled wastewater into subsurface aquifers. These systems provide a host of ecological benefits; they augment public water supplies, create seawater intrusion barriers, and eliminate surface outfalls. *See* U.S. EPA, *2012 Guidelines for Water Reuse*, at 4-25 (Sept. 2012).[7] Additionally, green infrastructure is designed to absorb and infiltrate stormwater into the ground to minimize discharges of industrial and municipal stormwater. *See* U.S. EPA,

[7] *Available at* https://cfpub.epa.gov/si/si_public_record_report.cfm?dirEntryId=253411.

Benefits of Green Infrastructure.[8] EPA even promotes green infrastructure and other infiltration practices to control for certain types of pollution. *See* U.S. EPA, *National Management Measures to Control Nonpoint Source Pollution from Urban Areas* 5-9, 5-10 (2005).[9] Under KWA's interpretation, however, many of these systems would be subject to confusing and costly NPDES permitting requirements, *see infra* Part II.B, whenever the water (and any pollutants in it) they collect or disperse ultimately migrates through the groundwater to navigable waters—which, due to the natural hydrologic cycle, much groundwater does. *See id.* at 5-9.

Such a sweeping and unprecedented expansion of the NPDES program, to cover nonpoint source pollution traditionally left to state regulation, is just the sort of "enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization" that the Supreme Court has warned against. *See UARG*, 134 S. Ct. at 2444. This Court should decline KWA's invitation to interpret the CWA so broadly.

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[8] *Available at* https://www.epa.gov/green-infrastructure/benefits-green-infrastructure.

[9] *Available at* https://www.epa.gov/nps/urban-runoff-national-management-measures.

2. The CWA Lacks A Plain Statement From Congress Displacing Traditional State Authority Over Nonpoint Sources Of Pollutants.

Another fundamental principle of statutory interpretation is that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Bass*, 404 U.S. at 349; *see also Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991) ("If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.").

The Supreme Court has applied this clear statement rule in construing the CWA. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173–74 (2001). The duty to ensure that the federal-state balance is not significantly altered is heightened in the case of the CWA because Congress made explicit its "policy … to recognize, preserve, and protect the primary responsibilities and rights of States … to plan the development and use … of land and water resources." 33 U.S.C. § 1251(b); *see also* S. Rep. No. 95-370, at 8–9 (1977) (explaining that Congress drew a "clear and precise distinction between point sources, which [are] subject to direct Federal regulation, and nonpoint sources, control of which was specifically reserved to State and local

governments" because those are "the level[s] of government closest to the sources of the problem").

The district court properly recognized that extending the NPDES program's coverage to the alleged discharges at issue here would undermine Congress's deliberate distinction between regulation of ground and surface waters, and between point and nonpoint source pollution. Absent a clear statement from Congress, the CWA cannot properly be interpreted to impose burdensome NPDES requirements on pollution that reaches navigable waters by groundwater migration. Such pollution has long been understood to be nonpoint source pollution, subject to control by state and local governments.

B. Application Of NPDES Requirements To The Alleged Discharges In This Case Would Lead To Unacceptable Regulatory Uncertainty And Absurd Results.

The district court applied a bright-line rule that is easy for all—regulators and regulated—to follow: discharges of pollutants to navigable waters through discernible, confined, and discrete conveyances are subject to the NPDES permitting program; discharges of pollutants to navigable waters via hydrologically-connected groundwater are not. The interpretation advocated by KWA, on the other hand, will often be difficult or impossible to apply, given the temporal and spatial issues it necessarily raises, and will thus generate enormous

regulatory uncertainty. These concerns are all the more important to consider because of the serious penalties—civil and also criminal—that violations of the CWA can entail.

1. KWA's Interpretation Would Lead To Unreasonable Levels Of Regulatory Uncertainty.

Under KWA's interpretation, an NPDES permit could be required for any release of pollutants into the ground so long as the pollutants might somehow, someday, somewhere, make their way into navigable waters. KWA does not identify any geographic or temporal limit on that principle, nor is one readily discernable.[10] Regulators thus will inevitably be called upon to make fact-intensive permitting decisions for millions of discharges into and onto the ground, no matter how remote from navigable waters those discharges might be or how long their migration to navigable waters might take. Just that possibility is a nightmare for regulators and regulated parties alike.

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[10] Other courts have attempted to articulate limiting principles. *E.g.*, *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737 (9th Cir. 2018) (permit required for pollutants that are "fairly traceable" from a point source to a navigable water and arrive in more than *de minimis* levels); *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018) (alleged discharge reaching navigable waters within 1,000 from the point source groundwater with a direct hydrological connection is within the CWA's scope). Each of those tests is too open-ended and none of them is found in the CWA's text.

It is not hard to envision other practical problems Congress likely had in mind when it drew the line—between NPDES-regulated point source discharges and state-regulated nonpoint source pollution—that KWA seeks to blur here. To illustrate, pollutants in groundwater sometimes migrate to navigable waters via someone else's land or via many others' lands, in which case the person responsible for releasing the pollutants might be unable to track or control their movement. Often pollutants will take so long to migrate to navigable waters, or will migrate across such long distances before reaching navigable waters, that tracing their movements will be impracticable. And often, upon entering groundwater, pollutants from one source will mix with pollutants from other sources, so that, by the time the pollutants reach navigable waters, it will be impossible to tell which pollutants came from which source, even if some of the pollutants are traceable to particular groups of sources.

In many cases, the only way to tell whether a particular source is releasing pollutants into groundwater, or whether certain pollutants in navigable waters ultimately come from that source, will be to conduct detailed hydrologic studies. Those studies are time-consuming, often requiring months to complete. They are also expensive, typically costing several thousand dollars, even in relatively simple cases. Even if a person can afford them, the studies will not always yield

conclusive and reliable results. This stems, in part, from the nature of the NPDES permitting program. NPDES permitting regulations are, by their nature, "end-of-pipe." *See Froebel v. Meyer*, 217 F.3d 928, 937 (7th Cir. 2000). Unlike pollutants from a pipe, groundwater seldom discharges into a navigable water at a discrete and identifiable point. It is not always possible, therefore, to determine exactly where pollutants in groundwater reach navigable waters. And when there is no obvious discharge point, there is nowhere to conduct the monitoring and sampling required by the Clean Water Act. *See* 40 C.F.R. pt. 122, subpt. C.

Things get particularly tricky when, as is often the case, pollutants are injected into groundwater as part of a treatment process. In those cases, sampling at the injection site will typically be inadequate because filtration through the soil is itself part of the intended treatment process, and compliance with the Act is to be determined only "after all treatment processes" have occurred. *See* U.S. EPA, *NPDES Permit Writer's Manual* § 8.1.2.3 (Sept. 2010).[11] The result of KWA's interpretation, therefore, is that many people and businesses will be unable, as a practical matter, to discern in advance whether their conduct requires an NPDES permit, and if so, what the requirements of that permitting scheme are.

[11] *Available at* https://www.epa.gov/npdes/npdes-permit-writers-manual.

When a proffered interpretation of a statute would leave ordinary people unable to discern whether their intended course of conduct exposes them to liability under that statute, the interpretation offends due process. *See Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that [all persons] are entitled to be informed as to what the State commands or forbids."). Such an interpretation ought to be avoided when an alternative, reasonable one exists and does not raise similar constitutional difficulties. *See Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) (explaining canon of constitutional avoidance). The offending interpretation should be especially avoided when, as here, it would only further muddy the waters about the reach of a statute with a "notoriously unclear" geographic scope. *Sackett v. EPA*, 566 U.S. 120, 132–33 (2012) (Alito, J., concurring) (lamenting Congress's and EPA's failure to resolve the "critical ambiguity" in the "precise reach of the Act"); *see also U.S. Army Corps of Engr's v. Hawkes Co.*, 136 S. Ct. 1807, 1816 (2016) (Kennedy, J., concurring) (highlighting concerns about "the reach and systemic consequences of the Clean Water Act").

It is manifestly unreasonable to inject in the CWA this additional "level of uncertainty … [that] would expose potentially [millions] of … [sources] to … litigation and legal liability if they [or regulators] happen[] to make the 'wrong'

choice." *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods*, 962 F. Supp. 1312, 1320 (D. Or. 1997). Yet that is exactly the result KWA urges upon this Court.

2. If A Karst Groundwater System Is A Point Source, So Is Almost All Groundwater.

One of KWA's arguments about what constitutes a "point source" raises a novel issue that deserves special attention. According to KWA, the E.W. Brown site sits atop karst geology, which is characterized by networks of underground caves, apertures, and pathways. KWA characterizes those openings as discrete "karst conduits," which KWA alleges to be naturally-occurring point sources through which pollutants from the E.W. Brown site migrate to navigable waters.

The logical and practical implications of that theory are staggering. KWA points to no authority holding that subsurface geology constitutes a near-limitless collection of point sources. That comes as no surprise: If a karst groundwater system is indeed a tangled web of individual point sources, it is nearly impossible to say what groundwater feature is not. At a certain scale, all groundwater in all regions of the country migrates through identifiable paths within subsurface soils or rock. Yet no one could seriously maintain that the subsurface itself is a point-source. That is true even though, at some level, all of those things arguably contain identifiable conduits or channels through which groundwater moves.

KWA never articulates what makes karst groundwater systems unique, such that it is a point source when all other groundwater is not. Nor does KWA offer any limiting principle for its theory that karst is a network of point sources. Indeed, the CWA contains no such limiting principle. It speaks of point sources only as "discernible, confined and discrete conveyance[s]," 33 U.S.C. § 1362(14), without regard to their size, shape, or geologic characteristics. Were karst a network of abundant point sources, there would be no statutory or logical basis for excluding the endless number of other pathways by which groundwater naturally and inevitably migrates from one place to another. In short, there would no longer be such a thing as nonpoint source pollution. *Everything* would be a point source.

That line-drawing problem is precisely why Congress restricted the definition of "point source" to "discernible, confined and discrete conveyance[s]"—language that does not fairly encompass a karst groundwater system. *See* 33 U.S.C. § 1362(14). Karst is not "discrete," a term that normally describes "separate" or "distinct" entities. *See Discrete*, Merriam-Webster.com (visited Apr. 20, 2018). Rather, karst is characterized by vast subterranean networks of complicated, unpredictable, and ever-evolving caves, apertures, and

pathways that lack any regular or readily identifiable pattern.[12] Karst is also not a "conveyance" as that term is normally used. No one thinks of a network of karst openings as a means of conveying anything, just as no one would think of a collection of interconnected rooms in a basement as a conveyance.

Unmoored from any textual or logical limitations, KWA's interpretation would expose anyone who owns property with karst geology to NPDES permitting obligations. Consider, for instance, the case of two neighboring properties, one sitting atop karst, the other not. If the owner of the non-karst property releases pollutants into groundwater underneath his property and they migrate over to the neighboring karst property, KWA's interpretation could require the owner of the karst property to obtain an NPDES permit if the pollutants subsequently migrated from his property to a navigable water. And this would be the case even though that property owner was not the original source of the pollutant and, indeed, might

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[12] The subsurface in Kentucky's Mammoth Cave National Park exemplifies these characteristics. *See* Nat'l Park Serv., *Mammoth Cave: Karst Geology*, at 2, *available at* www.nps.gov/maca/planyourvisit/upload/Karst%20Geology%20Site%20Bulletin.pdf (last visited Apr. 25, 2018) (describing the constantly evolving nature of karst landscapes and the "chance interconnect[ions]" between underground channels in karst); www.Merriam-Webster.com, *Karst* (last visited Apr. 25, 2018) (defining karst as "an irregular limestone region with sinkholes, underground streams, and caverns").

have no knowledge of the pollutant's existence or of its migration through his property.

Of course, landowners will often have no reason to suspect or care their properties might sit atop a karst groundwater system. Nor will they necessarily have any reason to suspect that water flowing through such a system beneath their properties might someday end up in a navigable water. And many, perhaps most, prospective landowners will not have the time or the money to figure any of that out when acquiring property. KWA's theory that karst is a point source will thus create potentially millions of new point sources, owned by people who have no reason to suspect that those point sources exist on their lands.[13] It is hard to imagine Congress could have intended such an outcome.

3. KWA's Interpretation Would Increase Costs Enormously For *Amici* And The Public.

Even if all of those practical problems did not exist, it would still be true that KWA's interpretation threatens to dramatically increase regulatory costs for businesses and landowners across the country. As the Supreme Court has

[13] That is precisely the kind of unfair surprise that multiple members of the Supreme Court have lately bemoaned in other cases involving the Clean Water Act's scope. *See Sackett*, 566 U.S. at 132–33 (Alito, J., concurring); *Hawkes*, 136 S. Ct. at 1816 (Kennedy, J., concurring).

recognized, complying with NPDES permitting requirements is no small matter. *Rapanos v. United States*, 547 U.S. 715, 719 (2006) (plurality op.) (explaining that compliance "is not trivial"). According to a recent EPA estimate, the public spends more than 26 million labor hours and over $1 billion *annually* just applying for NPDES permits and complying with existing permit requirements. *See* EPA, ICR Supporting Statement, *Information Collection Request for National Pollutant Discharge Elimination System (NPDES) Program (Renewal)*, OMB Control No. 2040-0004, EPA ICR No. 0229.22, at 23, Tbl. 12.1, App. A (Sept. 2017).[14] Those numbers would swell to unthinkable levels were this Court to reverse the district court and adopt KWA's strained and misguided interpretation of the CWA. Under that interpretation, virtually any source that adds pollutants to groundwater in any amount would have to undertake a detailed technical assessment of hydrologic and geologic conditions to determine whether to apply for an NPDES permit. Even conservatively estimated, the additional cost to the public would be in the billions of dollars. And all of it thanks to an unreasonable interpretation of a statute that has been on the books for decades. The district court correctly rejected such an

[14] *Available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2008-0719-0110.

outcome, and this Court should do the same. *See UARG*, 134 S. Ct. at 2444 ("When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.") (quotation marks and citation omitted).

III. KWA'S INTERPRETATION THREATENS TO UNDERMINE OTHER REGULATORY PROGRAMS THAT PROTECT NAVIGABLE WATERS.

KWA's interpretation of the CWA further ignores the statutory scheme chosen by Congress by undermining other regulatory programs that protect water quality. In particular, KWA's interpretation could preclude protections under RCRA aimed at addressing groundwater contamination (and resulting surface water impacts) from coal ash impoundments and undercut state nonpoint source programs.

A. Application Of NPDES Requirements To The Alleged Discharges Would Eliminate Important Regulatory Protections Under RCRA.

Were this Court to adopt KWA's interpretation of the CWA, it would effectively upend regulations that EPA put in place in part to control and remediate groundwater contamination from coal ash impoundments like the ones at the E.W. Brown site. EPA promulgated those regulations, known as the Federal Coal

Combustion Residuals Rule or "CCR Rule," pursuant to its authority to regulate "solid wastes" under RCRA. *See* 80 Fed. Reg. 21,302 (Apr. 17, 2015). "RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996). But RCRA regulations like the CCR Rule apply only to "solid wastes," which the statute defines to *exclude* industrial point source discharges subject to the CWA's NPDES permitting program. *See* 42 U.S.C. § 6903. Thus, a ruling that the discharges at issue in this case are subject to NPDES would prevent application of the more stringent, tailored CCR Rule.

The CCR Rule established comprehensive federal standards governing the disposal of coal ash in surface impoundments. EPA designed the rule to ensure "no reasonable probability of adverse effects on health or the environment" from disposal of coal ash. *See* 80 Fed. Reg. at 21,311. It achieved that goal by imposing robust requirements for groundwater monitoring and remediation. For instance, the rule requires monitoring for specific constituents found in coal ash. *See* 40 C.F.R. Part 257, Appendices III & IV. If a facility detects contamination above background levels, it must conduct additional monitoring to determine whether contaminants exceed the Rule's rigid groundwater protection standards. *See* 40 C.F.R. § 257.95(a). If those standards, most of which are equal to Safe Drinking

Water Act "maximum contaminant levels" for finished drinking water,[15] are exceeded, the facility must undertake corrective action to remediate the groundwater until contaminant levels are at or below the level of the standard. *See id.* §§ 257.96(a), 257.98(c).

In determining what corrective action is warranted, a facility must assess potential measures that can achieve the required remediation of groundwater impacts and abate not only future groundwater contamination, but also related surface water impacts. The facility must select a remedy that protects human health and the environment; attains the groundwater protection standard; controls the source of the releases of coal ash constituents; removes from the environment as much contaminated material released from the CCR unit as feasible; and satisfies all regulatory standards for management of wastes. *See id.* § 257.97(b).

This comprehensive regulatory framework is the product of decades of EPA study on coal ash disposal. EPA designed the rule to identify and "ensure that groundwater contamination at new and existing CCR units will be detected and

[15] "Maximum contaminant level" means "the maximum permissible level of a contaminant in water which is delivered to any user of a public water system." 40 C.F.R. § 141.2.

cleaned up as necessary to protect human health and the environment." *See* 80 Fed. Reg. at 21,396.

KWA's proposed expansion of the NPDES program to cover releases to navigable waters via hydrologically-connected groundwater would preclude application of the CCR Rule's comprehensive provisions to the alleged groundwater contamination in this case. Again, RCRA applies only to "solid wastes," which the statute defines to *exclude* "industrial discharges which are point sources subject to permits under [the NPDES program]." 42 U.S.C. § 6903.

Courts have applied RCRA's industrial discharge exclusion to "point source" discharges regulated by the CWA's NPDES program. *E.g.*, *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1328-29 (S.D. Iowa 1997) (dismissing RCRA claim because the groundwater discharges at issue were subject to NPDES permitting requirements); *Coldani v. Hamm*, Civ. No. S-07-660, 2007 WL 2345016, at *10 (E.D. Cal. Aug. 16, 2007) (same); *New York v. PVS Chems., Inc.*, 50 F. Supp. 2d 171, 177–78 (W.D.N.Y. 1998) (applying industrial discharge exclusion and dismissing RCRA claim to avoid subjecting the same discharges to duplicative regulation under the CWA and RCRA). Although *amici* believe that the *Williams* and *Coldani* courts wrongly decided the issue of whether discharges via hydrologically-connected groundwater require an NPDES permit, those cases

illustrate that regulation of releases to groundwater as point source discharges under the CWA would displace regulation under RCRA.

Were KWA correct that the pollutants migrating from the E.W. Brown site via groundwater to jurisdictional waters constitute point source discharges subject to NPDES, that alleged contamination would not be subject to any RCRA regulation, including the specifically tailored groundwater protection standards and remediation requirements in the CCR Rule. To avoid this outcome, this Court should affirm the district court's holding. KWA's interpretation of the CWA gets things precisely backwards: rather than address groundwater contamination under the CCR Rule, KWA would leave the alleged contamination at issue to be regulated under an NPDES permitting scheme that, as shown above, is ill-suited for addressing diffuse groundwater migration.

B. KWA's Interpretation Frustrates The CWA's Nonpoint Source Programs.

The CWA envisions that states and local governments will tackle the important problem of nonpoint source pollution control, including the abatement of pollutants released to groundwater. *See supra* Parts I & II. When Congress amended the CWA in 1987, it enacted Section 319 to empower the States to improve nonpoint source pollution control. *See* 33 U.S.C. § 1329. That section requires States to identify waters which, without control of nonpoint sources of

pollution, are not expected to attain water quality standards; identify categories of nonpoint sources that add significant pollution to those waters; and identify and describe best management practices and other state and local programs to control and reduce the identified nonpoint sources of pollution. *Id.* § 1329(a)(1).

States, including Kentucky, have successfully leveraged Section 319 grants and other funding to implement restoration efforts and document water quality improvements. For instance, Kentucky fixed failing septic systems as part of a watershed restoration plan to reduce bacteria levels in Eagle Creek.[16] Other states have comparable success stories.[17] Under KWA's interpretation of the CWA, these successful nonpoint source programs would not be possible, because Section 319 funding is aimed solely at nonpoint source pollution control. By expanding the NPDES program to include releases from sources like septic tanks and abandoned

[16] *See* U.S. EPA, *Nonpoint Source Program Success Story, Kentucky, Upgrading Septic Systems and Removing Straight Pipes as Part of a Watershed Plan Reduces Bacteria in Eagle Creek*, EPA-841-F-15-007UU (Oct. 2015), *available at* https://www.epa.gov/sites/production/files/2015-12/documents/ky_eagle.pdf.

[17] *See* U.S. EPA, *Nonpoint Source Program Success Story, Tennessee, Septic Tank Effluent Pumping Project Improves King Branch*, EPA-841-F-16-001R (Aug. 2016), *available at* https://www.epa.gov/sites/production/files/2016-09/documents/tn_king_branch_508.pdf.

mine facilities to groundwater, Kentucky and other States would lose Section 319 grant funding to address such pollution. *See* 33 U.S.C. § 1329(b).

CONCLUSION

The district court got it right: Pollutants released to and from groundwater should not be subject to NPDES permitting requirements under the CWA. The Act's text, structure, and history conclusively establish as much. Moreover, the practical consequences of KWA's interpretation of the CWA would counsel strongly against adopting that interpretation, especially where an alternative interpretation exists that is more workable and more in keeping with the text and purposes of the Act.

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 6,360 words, excluding the portions exempted by Rule 32(f) of the Federal Rules of Appellate Procedure. I further certify that the above brief complies with the type size and typeface requirements of Rule 32(a)(5) and (6) because it was prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point typeface.

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