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## Running Clean: Discharges to Groundwater Hydrologically Connected to Navigable Waters as a Means for Asserted Clean Water Act Jurisdiction

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# RUNNING CLEAN: DISCHARGES TO GROUNDWATER HYDROLOGICALLY CONNECTED TO NAVIGABLE WATERS AS A MEANS FOR ASSERTING CLEAN WATER ACT JURISDICTION

**Abstract:** On September 24, 2018, the United States Court of Appeals for the Sixth Circuit in *Tennessee Clean Water Network v. Tennessee Valley Authority*, held that the Clean Water Act (CWA) does not apply when a pollutant first traveled a short distance through groundwater before entering a navigable waterway. In doing so, the court held only direct discharges into navigable waters are governed by the CWA. This Comment argues that the Sixth Circuit’s decision runs counter to the CWA’s purpose and plain meaning; furthermore, it asserts that the *Tennessee Clean Water Network* decision will hamper the government’s ability to hold polluters accountable by opening up a significant loophole in the CWA’s jurisdiction.

## INTRODUCTION

Can polluters avoid triggering jurisdiction under the Clean Water Act (CWA) by ending their outflow pipes a couple feet from surface water?<sup>1</sup> According to Judge Eric Clay’s dissent, that is exactly what the United States Court of Appeals for the Sixth Circuit was deciding when it heard *Tennessee Clean Water Network v. Tennessee Valley Authority*.<sup>2</sup> On September 24, 2018, the Sixth Circuit answered the aforementioned question with a resounding yes.<sup>3</sup>

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<sup>1</sup> See *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 447–48 (6th Cir. 2018) (Clay, J., dissenting), *cert. dismissed*, 140 S. Ct. 35 (2019) (opening the dissent by posing the question, “Can a polluter escape liability under the Clean Water Act . . . by moving its drainage pipes a few feet from the riverbank?”); see also Clean Water Act, 33 U.S.C. §§ 1251–1387 (2018).

<sup>2</sup> *Tenn. Clean Water Network*, 905 F.3d at 447–48. The majority, in contrast, seemingly viewed this case as a simple question of federalism; primarily, who has jurisdiction to regulate this pollution: the state or the federal government? See *id.* at 439 (stating that the Clean Water Act (CWA) was designed to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources”) (citation omitted).

<sup>3</sup> See *id.* at 448 (“In two cases today, the majority says yes.”). In *Tennessee Clean Water Network*, the Sixth Circuit broke with precedent from the Ninth, Fourth and Second Circuits that the CWA covered both direct and indirect discharges into navigable waters. Compare *id.* at 444 (holding pollution that travels through groundwater before entering navigable waters not covered by the CWA), with *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 652 (4th Cir. 2018) (holding indirect discharges—discharges through an intervening groundwater medium—into navigable waters constitute a violation of the CWA), *Haw. Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 749

In *Tennessee Clean Water Network*, the Sixth Circuit held that CWA jurisdiction requires pollutants to be discharged directly from a point source into a navigable body of water.<sup>4</sup> In making this decision, the Sixth Circuit split from contrary precedent in the United States Courts of Appeals for the Fourth and Ninth Circuits, which had previously held that pollutants discharged into groundwater hydrologically connected to navigable waterways trigger CWA jurisdiction.<sup>5</sup> This Comment explores the implications and rationale behind the Sixth Circuit's decision.<sup>6</sup>

Part I of this Comment examines the factual and procedural background of *Tennessee Clean Water Network* as well as the CWA's history and hydrological connection theory.<sup>7</sup> Part II discusses the Sixth Circuit's reasoning in *Tennessee Clean Water Network* as well as the reasoning of the Fourth and Ninth Circuits in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.* and *Hawaii Wildlife Fund v. County of Maui*.<sup>8</sup> Finally, Part III argues that the Sixth Circuit incorrectly read into the CWA a directness requirement that runs counter to the plain meaning, history, and purpose of the CWA, and therefore, the Supreme Court should avoid adopting the Sixth Circuit's rationale when it decides *Hawaii Wildlife Fund*.<sup>9</sup>

## I. AN OVERVIEW OF THE SIXTH CIRCUIT'S *TENNESSEE CLEAN WATER NETWORK* DECISION AND THE CLEAN WATER ACT

Congress enacted the CWA of 1972 with the objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's

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(9th Cir. 2018) (same), *cert. granted*, 139 S. Ct. 1164 (2019), *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 510–11 (2d Cir. 2005) (holding that discharges through an intervening land medium violate the CWA), *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) (same), and *Peconic Baykeeper, Inc. v. Suffolk Cty.*, 600 F.3d 180, 188 (2d Cir. 2010) (holding that discharges from a point source that travel through intervening air to water still violate the CWA). On the same day the Sixth Circuit decided *Tennessee Clean Water Network*, the court released a nearly identical opinion involving a similar case: *Kentucky Waterways Alliance v. Kentucky Utilities Co.* Ky. Waterways All. v. Ky. Utilities Co., 905 F.3d 925, 925 (6th Cir. 2018). In *Kentucky Waterways Alliance*, the court also considered if pollution carried by groundwater from a coal ash impoundment to a nearby body of surface water triggered the CWA. *Id.* at 930–31.

<sup>4</sup> *Tenn. Clean Water Network*, 905 F.3d at 444 (“[Tennessee Valley Authority] is discharging pollutants into the groundwater and the groundwater is adding pollutants to the Cumberland River. But groundwater is not a point source. Thus, when the pollutants are discharged to the river, they are not coming from a point source; they are coming from groundwater which is a nonpoint-source conveyance. The CWA has no say over that conduct.” (quotation omitted)).

<sup>5</sup> *Compare id.* (finding no CWA jurisdiction), with *Upstate Forever*, 887 F.3d at 652 (deciding that pollution that travels a short distance through groundwater prior to entering navigable waters does not defeat CWA jurisdiction), and *Haw. Wildlife Fund*, 886 F.3d at 749 (same).

<sup>6</sup> See *infra* notes 10–102 and accompanying text.

<sup>7</sup> See *infra* notes 10–43 and accompanying text.

<sup>8</sup> See *infra* notes 44–75 and accompanying text.

<sup>9</sup> See *infra* notes 76–102 and accompanying text.

waters.”<sup>10</sup> In order to achieve this purpose, Congress established the goal of eliminating all discharges of pollutants.<sup>11</sup> To facilitate this, Congress included a citizen suit provision in the CWA that authorizes citizens to bring civil actions against any alleged violator of the CWA so long as the Environmental Protection Agency (EPA) or an applicable state agency is not prosecuting the entity for the alleged violations.<sup>12</sup>

In 2015, two environmental groups brought a claim under the citizen suit provision alleging that the Tennessee Valley Authority (TVA) violated the CWA at a coal-fired power plant the agency operated in Gallatin, Tennessee.<sup>13</sup>

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<sup>10</sup> 33 U.S.C. § 1251(a). By the time Congress passed the CWA, a wide-spread frustration with the inadequacy of previous efforts to protect the nation’s waterways from pollution already existed. *See* S. REP. NO. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3675. High profile incidents such as the Cuyahoga River in Cleveland, Ohio in 1969 helped spark a national movement to clean up America’s waters. *See* Jonathan H. Adler, *The Fable of the Burning River, 45 Years Later*, WASH. POST (June 22, 2014), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/22/the-fable-of-the-burning-river-45-years-later/> [<https://perma.cc/KKU8-NB45>] (noting that the Cuyahoga River fire exemplified the environmental dangers facing the United States in the 1960s); Tim Folger, *The Cuyahoga River Caught Fire 50 Years Ago. It Inspired a Movement.*, NAT’L GEO. (June 21, 2019), <https://www.nationalgeographic.com/environment/2019/06/the-cuyahoga-river-caught-fire-it-inspired-a-movement/#close> [<https://perma.cc/MKF6-ERNA>] (stating that the Cuyahoga River fire inspired environmentalists to act).

<sup>11</sup> 33 U.S.C. § 1251 (a)(1)–(2). Unlike some legislative purposes, which contain high sounding language that the drafters never returned to in the act, the CWA contains a fail-safe provision which allows the Administrator of the Environmental Protection Agency (EPA) to set higher standards in regions where the normal effluent limitations would not facilitate achievement of Congress’s objectives. *See id.* § 1312 (“Whenever, in the judgment of the Administrator . . . , discharges of pollutants from a point source or group of point sources . . . would interfere with the attainment or maintenance of that water quality . . . effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.”).

<sup>12</sup> *Id.* § 1365(a)–(b); *see also* Justin Rheingold, Comment, *Digging Deep: The Clean Water Act’s Applicability to Groundwater Discharges*, 60 B.C. L. REV. E-SUPP. II-311, II-311–12 (2019) (discussing the role played by citizen suits in facilitating enforcement of the CWA). Additionally, a citizen suit can be brought against the Administrator of the EPA for failure to perform a non-discretionary duty imposed by the statute. 33 U.S.C. § 1365(a)(2). As a matter of procedure, a plaintiff must give sixty days notice to the EPA Administrator, the state in which the alleged violation occurs, and the alleged violator before filing a citizen suit. *Id.* § 1365(b)(1).

<sup>13</sup> *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 273 F. Supp. 3d 775, 781 (M.D. Tenn. 2017), *rev’d* 905 F.3d 436. The plaintiffs in this case were the Tennessee Clean Water Network, a non-profit advocating for water protection programs in Tennessee, and Tennessee Scenic Rivers Association, a non-profit organization dedicated to the conservation and rehabilitation of Tennessee rivers. *See Mission and History*, TENN. CLEAN WATER NETWORK, <https://www.tcwn.org/mission-history> [<https://perma.cc/TTQ7-BMSZ>]; *About Us*, TENN. SCENIC RIVERS ASS’N, <http://www.paddle-tsra.org/home/about> [<https://perma.cc/V4E9-XSND>]. Because both organizations had members who used and enjoyed the Old Hickory Lake portion of the Cumberland River, which the Gallatin Plant was alleged to have polluted, the organizations had standing to sue on behalf of their members. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (holding environmental groups have standing to sue under the CWA’s citizen suit provision if at least some of their individual members have standing to sue); *Tenn. Clean Water Network*, 905 F.3d at 441 (noting that members of both organizations made use of Old Hickory Lake).

Specifically, the plaintiffs alleged that the Gallatin Plant's coal ash impoundments were polluting the Cumberland River through hydrologically connected groundwater.<sup>14</sup> Section A of this Part reviews the factual background and procedural history of the *Tennessee Clean Water Network v. Tennessee Valley Authority* litigation.<sup>15</sup> Section B reviews the CWA's background, purpose, and key definitions, as well as the hydrological connection theory.<sup>16</sup>

### A. Factual Background and Procedural History of Tennessee Clean Water Network

In 1956, the TVA began operating the Gallatin Plant, a coal-fired power plant, located along the bank of Old Hickory Lake, a reservoir formed out of the Cumberland River in Sumner County, Tennessee.<sup>17</sup> The TVA disposed of coal combustion residual (CCR) from the Gallatin Plant at a 65-acre surface impoundment, identified as the Non-Registered Site (NRS), from 1956 until the NRS's closure in 1970.<sup>18</sup> From 1970 to the present, CCR has been stored in the Ash Pond Complex (the Complex), which is roughly 476 acres.<sup>19</sup> Both the NRS and the Complex are unlined impoundments.<sup>20</sup> The entire Gallatin Plant

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<sup>14</sup> *Tenn. Clean Water Network*, 905 F.3d at 441.

<sup>15</sup> See *infra* notes 17–28 and accompanying text.

<sup>16</sup> See *infra* notes 29–43 and accompanying text.

<sup>17</sup> *Tenn. Clean Water Network*, 273 F. Supp. 3d at 784.

<sup>18</sup> *Id.* at 785. Coal combustion residual (CCR) refers to the various types of ash produced during the burning of coal. *Frequent Questions About the 2015 Coal Ash Disposal Rule*, EPA, <https://www.epa.gov/coalash/frequent-questions-about-2015-coal-ash-disposal-rule> [<https://perma.cc/D8BV-NAN3>]. CCR contains heavy metals, some of which are carcinogenic, including mercury, cadmium, and arsenic. See *id.* The disposal process used at the Gallatin Plant is called “sluicing.” *Tenn. Clean Water Network*, 273 F. Supp. 3d at 785. Sluicing refers to the mixing of CCR with water, in order to ease transport into impoundments where the CCR settles out and the water eventually evaporates or is discharged. *Frequent Questions About the 2015 Coal Ash Disposal Rule*, *supra*; see also *Tenn. Clean Water Network*, 905 F.3d at 438 (discussing that the Gallatin Plant's coal ash disposal process involved “allowing the coal ash solids to settle in a series of unlined man-made coal ash ponds adjacent to the river”).

<sup>19</sup> *Tenn. Clean Water Network*, 273 F. Supp. 3d at 785. CCR is either stored in landfills or, as occurred at the Gallatin Plant, in surface impoundments. *Id.*; see *Frequent Questions About the 2015 Coal Ash Disposal Rule*, *supra* note 18 (“In 2012, approximately 40 percent of the CCRs generated were beneficially used, with the remaining 60 percent disposed in surface impoundments and landfills. Of that 60 percent, approximately 80 percent was disposed in on-site disposal units. CCR disposal currently occurs at more than 310 active on-site landfills, averaging more than 120 acres in size with an average depth of over 40 feet, and at more than 735 active on-site surface impoundments, averaging more than 50 acres in size with an average depth of 20 feet.”).

<sup>20</sup> *Tenn. Clean Water Network*, 273 F. Supp. 3d at 785. An impoundment is a man-made or natural reservoir used for storing liquid hazardous waste. See *Hazardous Waste Management Facilities and Units*, EPA [hereinafter EPA, *Hazardous Waste Management*], <https://www.epa.gov/hwpermitting/hazardous-waste-management-facilities-and-units#surfaceimpoundments> [<https://perma.cc/ZEN5-YQP>]. The fact that the Gallatin Plant's impoundments were unlined means that they lacked an impermeable man-made liner designed to prevent CCR from entering the groundwater. *Tenn. Clean*

and both CCR impoundments are located on karst geological features, meaning that the land is characterized by porous limestone “with sinking streams, shallow bedrock, and sinkholes.”<sup>21</sup>

On November 10, 2014, the plaintiffs, concerned about the water quality in Old Hickory Lake, informed the TVA, the Tennessee Department of Environment and Conservation (TDEC), and the EPA that they intended to file a citizen suit alleging multiple violations of the CWA at the Gallatin Plant.<sup>22</sup> Subsequently, on April 14, 2015, the plaintiffs filed their Complaint in the United States District Court for the Middle District of Tennessee.<sup>23</sup> Ultimately, because the TDEC began an enforcement action against the TVA, the court dismissed the claims with the exception of those related to pollution in the Cumberland River caused by groundwater discharges from the NRS and the Complex.<sup>24</sup>

The court held a four-day bench trial that ended on February 2, 2017.<sup>25</sup> The district court found that the TVA violated the CWA at the Gallatin Plant because the NRS and the Complex leaked pollutants without a permit through groundwater that is hydrologically connected to the Cumberland River.<sup>26</sup>

The defendants appealed and argued the district court erred in holding that the CWA applies to pollutants that travel from point sources to navigable waters through groundwater.<sup>27</sup> In a divided decision, the Sixth Circuit reversed the district court’s opinion, holding that no basis in the law exists to support CWA jurisdiction when discharges indirectly enter navigable waterways.<sup>28</sup>

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*Water Network*, 273 F. Supp. 3d at 785; see EPA, *Hazardous Waste Management*, *supra* (stating that required liners are meant to stop leaks).

<sup>21</sup> *Tenn. Clean Water Network*, 273 F. Supp. 3d at 785; see *Karst Landscapes*, NAT’L PARK SERV., <https://www.nps.gov/subjects/caves/karst-landscapes.htm> [<https://perma.cc/P54L-95W3>] (“Karst is a type of landscape where the dissolving of the bedrock has created sinkholes, sinking streams, caves, springs, and other characteristic features. Karst is associated with soluble rock types such as limestone, marble, and gypsum.”).

<sup>22</sup> *Tenn. Clean Water Network*, 273 F. Supp. 3d at 786. The CWA authorizes citizens to file civil actions enforcing the Act so long as they notify the alleged violator, the Administrator of the EPA, and the State where the violation occurred of their intention to sue sixty days before filing the action. 33 U.S.C. § 1365.

<sup>23</sup> *Tenn. Clean Water Network*, 273 F. Supp. 3d at 786.

<sup>24</sup> See *id.* at 786–87 (“The Court also dismissed the remaining claims except as they applied to two sets of allegations: ‘discharges from the Non-Registered Site into the Cumberland River; and discharges from the Ash Pond Complex via hydrologic flows that are not seeps alone.’”).

<sup>25</sup> *Id.* at 787.

<sup>26</sup> See *id.* at 836, 842 (finding that, due to the karst topography of the region, water polluted with CCR from NRS and the Complex migrated through ground waters into the Cumberland River). The CWA requires that anyone discharging pollution into a waterway obtain a National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. § 1342. An NPDES permit lays out the conditions under which discharges may occur. *Id.*; see *infra* notes 30–31 and accompanying text (discussing NPDES permits).

<sup>27</sup> *Tenn. Clean Water Network*, 905 F.3d at 442 (clarifying that the defendants asserted that such indirect discharges were not subject to the CWA, and could only be regulated by the states).

<sup>28</sup> *Id.* at 443.

### B. The Clean Water Act and Hydrological Connection Theory

The CWA's enactment marked a departure from previous congressional efforts to clean up the nation's waterways.<sup>29</sup> Under the statute, all entities—corporations, individuals, and municipalities—wishing to discharge pollutants into a waterway must obtain a permit under the National Pollutant Discharge Elimination System (NPDES).<sup>30</sup> NPDES permits require the implementation of the best available technology in order to reach specific limits on the discharge of various contaminants.<sup>31</sup>

The Act defines the phrase “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.”<sup>32</sup> Therefore, to have a claim under the CWA, a pollutant must be discharged from a point source to navigable waters.<sup>33</sup> Under the CWA, “pollutants” are defined broadly to include all sorts of chemical and physical items that could contaminate waterways.<sup>34</sup> A “point source” includes any identifiable and unique source of pollu-

<sup>29</sup> See S. REP. NO. 92-414 (shifting the focus of federal regulatory efforts from measuring excess pollution levels in the waterways to limiting the amount of pollution a given entity could discharge); see also N. William Hines, *History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform*, 4 GEO. WASH. J. ENERGY & ENVTL. L. 80, 87 (2013) (discussing the congressional objective of improving water quality and public health in light of frustration with the limited success of the Water Quality Improvement Act during the 1950s and 60s). In addition to establishing the goal of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation’s waters,” the CWA made it a national goal to eliminate the discharge of pollutants by 1985 and established an interim goal of water quality suitable for fishing and recreation by mid-1983. 33 U.S.C. §§ 1251, 1251(a)(1)–(2).

<sup>30</sup> 33 U.S.C. § 1342; see *id.* § 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.”); *id.* § 1362(5) (defining person as “an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body”).

<sup>31</sup> *Id.* § 1311(b)(1)–(2) (instructing that the EPA Administrator implement effluent limitations based on “best practicable control technology” for the pollutant or the “best available technology economically achievable”); see also Antonio G. Fraone, *Shucking a Patent: How a Simple Best Available Technology Law Can Break the Shell of Patent Protections*, 59 B.C. L. REV. 1049, 1074–76 (2018) (providing an in-depth discussion of how best available technology laws function).

<sup>32</sup> 33 U.S.C. § 1362(12).

<sup>33</sup> See *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982) (holding that to have a claim under the CWA, “(1) pollutants must be (2) added (3) to navigable waters (4) from (5) a point source”).

<sup>34</sup> 33 U.S.C. § 1362(6). A pollutant includes “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” *Id.* This definition does not include “sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces” or “water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.” *Id.*

tion.<sup>35</sup> Finally, the term “navigable waters” is a statutory term of art defined as “the waters of the United States, including the territorial seas.”<sup>36</sup>

It is well established that the CWA does not regulate groundwater; therefore, discharges to groundwater do not violate the Act.<sup>37</sup> Groundwater, however, is often a source of surface water, and the hydrological connections between these types of waterbodies allow pollution to migrate from groundwater to surface water.<sup>38</sup> For this reason, courts increasingly grapple with whether to bring groundwater under the purview of the CWA in instances where a pollutant is discharged from a point source but passes through groundwater before entering a navigable waterway.<sup>39</sup> Federal courts that have found CWA violations in such situations have done so on the basis of a hydrological connection between the

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<sup>35</sup> *Id.* § 1362(14). A “point source” is defined 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.” *Id.* Non-point sources such as “agricultural stormwater discharges” are exempted from federal regulation. *Id.* Instead, the CWA relies on states to regulate non-point source pollution. *Id.* § 1329.

<sup>36</sup> *Id.* § 1362(7). Traditionally, navigable waters have only included those interstate waters that are “navigable in fact.” See *Rapanos v. United States*, 547 U.S. 715, 723 (2006) (plurality opinion) (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870)). In *United States v. Riverside Bayview Homes, Inc.*, however, the Supreme Court expanded the definition of waters of the United States to include a wetland adjacent to a body of navigable water. 474 U.S. 121, 131 (1985). The Supreme Court concluded that when Congress adopted an alternative definition of navigable waters it “intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.” *Id.* at 133. Since then, the exact scope of what constitutes the “waters of the United States” has been a contentious question that has remained unsettled in the courts and various administrations. Compare *Rapanos*, 547 U.S. at 739 (concluding that “navigable waters” refers only to those “permanent, standing or continuously flowing bodies of water”), and Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4154, 4155 (Feb. 14, 2019) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302 & 401) (same), with *Rapanos*, 547 U.S. at 782 (Kennedy, J., concurring) (stating that to be covered by the CWA, the waters need only have a “significant nexus” to some navigable waterway), and Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054, 37,054–55 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302 & 401) (same). Although this dispute is largely outside the scope of this Comment, it is clear that “waters of the United States” does not include groundwater. Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. at 37,055; Revised Definition of “Waters of the United States,” 84 Fed. Reg. at 4155.

<sup>37</sup> Kathrine Klaus, Note, *The Conduit Theory: Protecting Navigable Waters from Discharges to Tributary Groundwater*, 43 VT. L. REV. 871, 872 (2019).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 877–81 (discussing three theories for establishing CWA jurisdiction over discharges to tributary groundwater: the point source theory, the navigable waters theory, and the conduit theory). As the name describes, “‘point source theory’ asserts that groundwater is itself a point source.” *Id.* at 878. Navigable water theory argues that groundwater is a “jurisdictional navigable” water of the United States. *Id.* at 879. Meanwhile the conduit theory claims that groundwater, due to hydrological connections with surface water, acts as a conduit that transports pollution to a navigable waterway. *Id.* at 880–81.

ground water and navigable surface water.<sup>40</sup> This rationale, known as the “hydrological connection theory,” is premised on the Supreme Court’s plurality opinion in *Rapanos v. United States*, holding that the CWA’s definition of a discharge of a pollutant does not require a discharge directly into navigable waters.<sup>41</sup> In 2018, however, the Sixth Circuit rejected the hydrological connection theory and in doing so split with the Fourth and Ninth Circuits.<sup>42</sup> In order to resolve this split, the Supreme Court granted certiorari to *Hawaii Wildlife Fund v. County of Maui*, an appeal from the Ninth Circuit decision, and will hear the case during the 2019–2020 term.<sup>43</sup>

## II. LEGAL CONTEXT OF THE SIXTH CIRCUIT’S DECISION IN *TENNESSEE CLEAN WATER NETWORK*

When the United States Court of Appeals for the Sixth Circuit held that discharges into hydrologically connected ground water were not subject to the CWA, the court rejected the rationale previously employed by the United States Courts of Appeals for the Fourth and Ninth Circuits.<sup>44</sup> Section A of this Part discusses the analysis undertaken by the Sixth Circuit in *Tennessee Clean Water Network v. Tennessee Valley Authority*.<sup>45</sup> Section B discusses the Fourth and Ninth Circuits’ approach in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.* and *Hawaii Wildlife Fund v. County of Maui*.<sup>46</sup>

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<sup>40</sup> See *Upstate Forever*, 887 F.3d at 652 (holding that discharges of pollution into groundwater that are then carried a short distance to surface water constitute a violation of the CWA); *Haw. Wildlife Fund*, 886 F.3d at 749 (same).

<sup>41</sup> *Rapanos*, 547 U.S. 743; e.g., *Upstate Forever*, 887 F.3d at 649 (relying on Justice Scalia’s plurality opinion in *Rapanos* to conclude that the CWA applies to indirect discharges to navigable waterways); *Haw. Wildlife Fund*, 886 F.3d at 748–49 (same).

<sup>42</sup> Compare *Tenn. Clean Water Network*, 905 F.3d at 438, and *Ky. Waterways*, 905 F.3d at 933, with *Upstate Forever*, 887 F.3d at 652, and *Haw. Wildlife Fund*, 886 F.3d at 749.

<sup>43</sup> *Haw. Wildlife Fund*, 886 F.3d 737. Petitions for writs of certiorari were also filed from the decisions of the Fourth and Sixth Circuits. *Upstate Forever*, 887 F.3d 637, petition for cert. filed, (U.S. Aug. 28, 2018) (No. 18-268); *Tenn. Clean Water Network*, 905 F.3d 436, petition for cert. filed, (U.S. Apr. 15, 2019) (No. 18-1307).

<sup>44</sup> Compare *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 444 (6th Cir. 2018) (concluding that the CWA is only triggered by direct discharges into surface water), with *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 652 (4th Cir. 2018) (concluding the CWA is triggered when pollution reaches surface water, even if that pollution was first discharged into groundwater), and *Haw. Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 749 (9th Cir. 2018), cert. granted, 139 S. Ct. 1164 (2019) (same). See generally Clean Water Act, 33 U.S.C. §§ 1251–1387 (2018).

<sup>45</sup> See *infra* notes 47–62 and accompanying text.

<sup>46</sup> See *infra* notes 63–75 and accompanying text.

### A. *The Sixth Circuit's Rationale for Rejecting Hydrological Connection Theory*

In determining whether discharges of pollutants into groundwater hydrologically connected to surface water constituted a violation of the CWA, the Sixth Circuit considered the CWA's language and construction.<sup>47</sup> The Sixth Circuit's textual analysis relied on: (1) the statutory definition of "effluent limitations" and (2) the CWA's jurisdictional requirement that pollutants be added to waterways "from" a point source.<sup>48</sup> Based on this analysis, the court concluded that the CWA mandates an element of directness.<sup>49</sup> Additionally, the court concluded that *Rapanos v. United States* was irrelevant to the case at hand.<sup>50</sup>

First, in reviewing the district court's finding that the TVA violated the CWA when the Gallatin Plant's coal ash ponds discharged pollutants into groundwater hydrologically connected to the Cumberland River, the court looked to the definition of "effluent limitations."<sup>51</sup> The CWA defines effluent limitations as the maximum amount of a pollutant allowed to be "discharged from point sources into navigable waters."<sup>52</sup> The court concluded that for a point source to discharge "into navigable waters," the pollutant cannot travel

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<sup>47</sup> *Tenn. Clean Water Network*, 905 F.3d at 442, 445. Because this Comment is focused on whether hydrological connection theory is valid under the CWA, it will not discuss the Sixth Circuit's conclusion that the Resource Conservation and Recovery Act (RCRA) also prevented CWA jurisdiction in the instant case. *Id.* at 445–46. This holding, however, should not be considered settled law as this interpretation directly conflicts with the EPA's interpretation of the statute. See 40 C.F.R. § 261.4(a)(2) (2019) (determining CCR is regulated under both the RCRA and the CWA, with the CWA becoming applicable the moment CCR is discharged into navigable waters).

<sup>48</sup> *Tenn. Clean Water Network*, 905 F.3d at 444.

<sup>49</sup> See *id.* (holding that direct contamination from a point source to a surface waterway is required for CWA jurisdiction).

<sup>50</sup> *Id.* at 444–45. In *Rapanos v. United States*, the Supreme Court considered the scope of "waters of the United States" under the CWA. 547 U.S. 715, 739 (2006). Writing for the plurality, Justice Scalia concluded that "from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates § 1311(a), even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Id.* at 743. The plaintiffs and the lower court used Justice Scalia's decision to support the idea that indirect discharges were captured by the CWA and that, therefore, the Sixth Circuit needed to respond to this potentially contradictory precedent. See *Tenn. Clean Water Network*, 905 F.3d at 444 (noting that the plaintiffs relied on an irrelevant non-binding statement by Justice Scalia to support their arguments).

<sup>51</sup> *Tenn. Clean Water Network*, 905 F.3d at 444. The court referred to effluent limitations as "the heart of the CWA's regulatory power" because they are the federally prescribed restrictions on a given industry's ability to pollute. *Id.*; see 33 U.S.C. § 1314(b) (providing that effluent limitations constitute the maximum amount of a pollutant that can be discharged from a point source). The CWA requires the EPA Administrator to set effluent limitations as part of the NPDES. 33 U.S.C. § 1342.

<sup>52</sup> 33 U.S.C. § 1362(11) ("The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.").

through some other medium; it must leave a point source and go “*directly*” into a CWA jurisdictional water.<sup>53</sup>

Next, to further augment its conclusion that pollutants must be added directly to waterways for the CWA to apply, the Sixth Circuit turned to the definition for “discharge of a pollutant,” which entails the addition of a pollutant to a navigable waterway “from any point source.”<sup>54</sup> The court determined that, because the coal ash was first discharged to ground water and then migrated to the Cumberland River, the pollutants were not coming “from” a point source, but rather “from” the groundwater.<sup>55</sup> Therefore, the court concluded the coal ash discharge was not a direct discharge actionable under the CWA.<sup>56</sup>

Finally, the Sixth Circuit addressed why its decision was not in conflict with the Supreme Court’s plurality opinion from the *Rapanos* case.<sup>57</sup> The Ninth Circuit and the Fourth Circuit held that pollutants traveling through hydrologically connected groundwater constituted grounds for CWA liability based, in large part, on the plurality opinion in *Rapanos*.<sup>58</sup> The Sixth Circuit, however, concluded that the plurality decision was not on-point and binding because the case dealt with a different legal issue.<sup>59</sup> The court determined that supporters of hydrological connection theory misunderstood Justice Scalia’s

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<sup>53</sup> *Tenn. Clean Water Network*, 905 F.3d at 444. The court justified this interpretation based on the definition of “into” in *Webster’s Third New International Dictionary* and the *Oxford English Dictionary*, which define it as “entry, introduction, insertion” and “[e]xpressing motion to a position within a space or thing: [t]o point within the limits of; to the interior of; so as to enter,” respectively. *Id.*; see *Into*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 2018) (“entry, introduction, insertion”); *Into*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/74884> [<https://perma.cc/B8QD-DY2D>] (“Expressing motion to a position within a space or thing: [t]o point within the limits of; to the interior of; so as to enter.”).

<sup>54</sup> See 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, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.”).

<sup>55</sup> See *Tenn. Clean Water Network*, 905 F.3d at 444 (“TVA is discharging pollutants into the groundwater and the groundwater is adding pollutants to the Cumberland River. But groundwater is not a point source. Thus, when the pollutants are discharged to the river, they are not coming *from* a point source; they are coming from groundwater which is a nonpoint-source conveyance. The CWA has no say over that conduct.”) (quotations and citations omitted).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 444–45. See generally *Rapanos*, 547 U.S. at 719 (noting that three other justices joined Justice Scalia’s opinion).

<sup>58</sup> See *Upstate Forever*, 887 F.3d at 649 (discussing plurality opinion in *Rapanos*); *Haw. Wildlife Fund*, 886 F.3d at 748–49 (finding support from Justice Scalia’s plurality opinion for holding that no directness requirement exists in the CWA).

<sup>59</sup> See *Tenn. Clean Water Network*, 905 F.3d at 444–45 (interpreting *Rapanos* as having addressed the scope of waters of the United States and not whether pollution reaching a river via groundwater triggered the CWA); see also *Rapanos*, 547 U.S. at 739 (concluding that “waters of the United States includes only those relatively permanent standing or continuously flowing bodies of water,” and not those which only occasionally divert rainfall).

discussion concerning the absence of a directness requirement in the CWA.<sup>60</sup> According to the Sixth Circuit’s analysis, the *Rapanos* plurality only addressed pollutants that traveled through multiple point sources before being discharged, not pollutants that were discharged and then traveled through an intervening medium.<sup>61</sup> The groundwater in this case was an intervening medium and not a point source in and of itself; therefore, CWA jurisdiction could not be asserted.<sup>62</sup>

### B. The Fourth and Ninth Circuits’ Rationale for Upholding Hydrological Connection Theory

In reaching its decision in *Tennessee Clean Water Network*, the Sixth Circuit rejected the approach taken by the Fourth Circuit in *Upstate Forever* and the Ninth Circuit in *Hawaii Wildlife Fund*.<sup>63</sup> In *Upstate Forever*, the Fourth Circuit held that CWA jurisdiction existed even though the pollution—oil released by a ruptured pipeline—traveled through groundwater before seeping into a nearby river.<sup>64</sup> In *Hawaii Wildlife Fund*, the Ninth Circuit affirmed the district court’s decision holding the County of Maui liable under the CWA for discharging sewage from groundwater wells into the Pacific Ocean.<sup>65</sup> In reaching their respective decisions, the Fourth and Ninth Circuits found support for their holdings in the text of the CWA.<sup>66</sup> Additionally, both Circuits relied on precedent and the Fourth Circuit looked to congressional purpose in enacting the CWA.<sup>67</sup>

Both Circuits began their analyses with the text of the CWA.<sup>68</sup> The courts pointed to 33 U.S.C. § 1362(12)(A) to demonstrate that the CWA’s plain language requires only that a pollutant originate at a point source and reach navi-

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<sup>60</sup> *Tenn. Clean Water Network*, 905 F.3d at 444.

<sup>61</sup> *See id.* at 445 (“[W]hen Justice Scalia pointed out the absence of the word directly from § 1362(12)(A), he did so to explain that pollutants which travel through multiple *point sources* before discharging into navigable waters are still covered by the CWA.”) (quotations and citations omitted).

<sup>62</sup> *See id.* (“Justice Scalia’s reference to ‘conveyances’—the CWA’s definition of a point source—reveals his true concern. He sought to make clear that intermediary point sources do not break the chain of CWA liability; the opinion says nothing of point-source-to-nonpoint-source dumping like that at issue here.”) (citations omitted).

<sup>63</sup> *Compare id.* at 438, with *Upstate Forever*, 887 F.3d at 652, and *Haw. Wildlife Fund*, 886 F.3d at 749.

<sup>64</sup> *Upstate Forever*, 887 F.3d at 641.

<sup>65</sup> *Haw. Wildlife Fund*, 886 F.3d at 742.

<sup>66</sup> *Upstate Forever*, 887 F.3d at 650; *Haw. Wildlife Fund*, 886 F.3d at 744.

<sup>67</sup> *See Upstate Forever*, 887 F.3d at 649–52 (concluding that allowing groundwater to defeat CWA jurisdiction is contrary to Congress’s “zero-tolerance” approach to water pollution); *Haw. Wildlife Fund*, 886 F.3d at 746–48 (citing to Supreme Court and Second Circuit precedent on whether indirect discharges are governed by the CWA).

<sup>68</sup> *Upstate Forever*, 887 F.3d at 650; *Haw. Wildlife Fund*, 886 F.3d at 744. Both circuits focused their analyses on 33 U.S.C. § 1362(12)(A), which defines the “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12)(A); *Upstate Forever*, 887 F.3d at 650; *Haw. Wildlife Fund*, 886 F.3d at 744.

gable waters in order to trigger regulations.<sup>69</sup> According to the courts, the Supreme Court decision in *Rapanos*, as well as precedent from the Second Circuit, supports this reading.<sup>70</sup> The courts followed the plurality opinion in *Rapanos*, which held that the CWA contains no directness requirement and acknowledged that federal courts have historically held polluters liable under the CWA when their discharges naturally washed downstream.<sup>71</sup> Similarly, the courts employed the rationale developed by the Second Circuit in earlier cases—*Peconic Baykeeper, Inc. v. Suffolk County, Waterkeeper Alliance, Inc. v. EPA*, and *Concerned Area Residents for the Environment v. Southview Farm*—to support the proposition that the CWA captures indirect discharges into navigable waterways.<sup>72</sup> These cases from the Second Circuit held that the CWA regulates pollution that travels through a non-point source (such as the air or a field) before entering a navigable waterway.<sup>73</sup>

Moreover, the Fourth Circuit concluded that allowing polluters to escape liability for indirect discharges would run counter to Congress' intent in pass-

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<sup>69</sup> See *Upstate Forever*, 887 F.3d at 650 (“The plain language of the CWA requires only that a discharge come ‘from’ a ‘point source.’ Just as the CWA’s definition of a discharge of a pollutant does not require a discharge directly to navigable waters . . . neither does the Act require a discharge directly from a point source. The word ‘from’ indicates ‘a starting point: as (1) a point or place where an actual physical movement . . . has its beginning.’”) (citations omitted); *Haw. Wildlife Fund*, 886 F.3d at 744 (“As the pollutants here enter navigable waters and can be traced back to identifiable points of discharge, the wells are subject to NPDES regulation, as are all point sources under the plain language of the CWA.”) (internal quotations and citations omitted).

<sup>70</sup> *Upstate Forever*, 887 F.3d at 649–51; *Haw. Wildlife Fund*, 886 F.3d at 746–48.

<sup>71</sup> See *Upstate Forever*, 887 F.3d at 649–50 (stating that, based on *Rapanos*, the pollutants need not enter navigable water directly from point sources); *Haw. Wildlife Fund*, 886 F.3d at 748 (“[I]n *Rapanos v. United States*, Justice Scalia recognized . . . that ‘any pollutant that naturally washes downstream likely violates § 1311(a), even if the pollutants discharged from a point source do not emit “directly into” covered waters, but pass “through conveyances” in between.’”) (citations omitted).

<sup>72</sup> See *Upstate Forever*, 887 F.3d at 650; *Haw. Wildlife Fund*, 886 F.3d at 747–48. In *Waterkeeper Alliance, Inc. v. EPA*, the Second Circuit held that if courts required both the cause of the pollution and any intervening land to qualify as point sources, such an interpretation would, in practice, “impose a requirement not contemplated by the Act: that pollutants be channeled not once but twice before the EPA can regulate them.” 399 F.3d 486, 510–11 (2d Cir. 2005); see also *Concerned Area Residents for Env’t v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) (holding that liquid manure that passed from tankers through intervening fields to nearby waters constituted a discharge from a point source). The Second Circuit further recognized the indirect discharge theory in *Peconic Baykeeper, Inc. v. Suffolk Cty.*, where it rejected the district court’s conclusion that “because the trucks and helicopters discharged pesticides into the air, any discharge was indirect, and thus not from a point source.” 600 F.3d 180, 188 (2d Cir. 2010).

<sup>73</sup> See *Peconic Baykeeper, Inc.*, 600 F.3d at 188 (holding that discharges into the air were still actionable under the CWA); *Waterkeeper Alliance, Inc.*, 399 F.3d at 510–11 (ruling that unchanneled runoff from concentrated animal feeding operation were regulated by the CWA); *Concerned Area Residents for Env’t*, 34 F.3d at 119 (concluding manure dumped on a field and washed to a stream was a discharge of a pollutant under the CWA).

ing the CWA.<sup>74</sup> The CWA makes all unpermitted discharges to navigable waters illegal; therefore, the court concluded that allowing some discharges simply because they first passed through an intervening medium would be contrary to congressional intent.<sup>75</sup>

### III. THE SIXTH CIRCUIT IGNORED PLAIN MEANING AND CONGRESSIONAL PURPOSE IN DISMISSING HYDROLOGICAL CONNECTION THEORY

The Sixth Circuit Court of Appeals' decision in *Tennessee Clean Water Network v. Tennessee Valley Authority* undermines the CWA's ability to protect the nation's waterways by opening up a new loophole which will allow those who pollute to escape liability.<sup>76</sup> The court's decision lacks support from either the plain meaning of the statute, precedent, or congressional purpose.<sup>77</sup> Therefore, as the Supreme Court decides *Hawaii Wildlife Fund v. County of Maui*, it should refrain from adopting the rationale that the Sixth Circuit employed.<sup>78</sup>

A basic tenet of statutory interpretation is that Congress does not attempt to hide changes to regulatory regimes in obscure definitional provisions.<sup>79</sup>

<sup>74</sup> See *Upstate Forever*, 887 F.3d at 652 (stating that allowing Kinder Morgan to escape CWA liability would run counter to the purpose of the Act).

<sup>75</sup> See *id.* (“[T]he statute establishes a regime of zero tolerance for unpermitted discharges of pollutants, 33 U.S.C. § 1311(a). In contrast, if the presence of a short distance of soil and ground water were enough to defeat a claim, polluters easily could avoid liability under the CWA by ensuring that all discharges pass through soil and ground water before reaching navigable waters. Such an outcome would greatly undermine the purpose of the Act.”); see also 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.”).

<sup>76</sup> See *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 448–49 (6th Cir. 2018) (Clay, J., dissenting) (expressing concern that the majority's decision allows polluters to escape CWA liability by reducing the length of their outflow pipe so that pollution travels a few feet through soil before entering a navigable body of water); see also *Clean Water Act*, 33 U.S.C. §§ 1251–1387 (2018). If the Sixth Circuit's interpretation of the CWA is adopted nationally, countless prior court decisions protecting waterways would be invalidated; for example, a plane could discharge pollution over rivers or lakes without triggering the CWA because the pollution traveled through the air (a non-point source) before reaching the water. See, e.g., *Peconic Baykeeper, Inc. v. Suffolk Cty.*, 600 F.3d 180, 188 (2d Cir. 2010) (noting that pesticides sprayed through the air travel through an intervening medium).

<sup>77</sup> See *Rapanos v. United States*, 547 U.S. 715, 743 (2006) (concluding that Congress, in writing the CWA, did not include a requirement that discharges travel directly from a point source into navigable waters); *Whitman v. Am. Trucking Ass'ns., Inc.*, 531 U.S. 457, 468 (2001) (laying out a core tenet of statutory interpretation); *Tenn. Clean Water Network*, 905 F.3d at 450–51 (Clay, J., dissenting) (objecting to the majority's reading of the CWA as improperly focusing on the wrong provisions of the statute).

<sup>78</sup> Compare *Haw. Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 749 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 1164 (2019) (holding indirect discharges to navigable waters to be governed by the CWA), with *Tenn. Clean Water Network*, 905 F.3d at 444 (holding only direct discharges to navigable water trigger the CWA).

<sup>79</sup> *Whitman*, 531 U.S. at 468 (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”).

Courts have routinely refused to uphold agency interpretations of statutes that use small provisions to fundamentally alter the scope of an act.<sup>80</sup> It was therefore unreasonable for the court to conclude that Congress meant for the CWA to contain a previously missed directness requirement, based on the inclusion of the word “into” in the definition of “effluent limitations.”<sup>81</sup>

Furthermore, despite the Sixth Circuit’s claims to the contrary, the word “into” is not found in any provision relevant to this case.<sup>82</sup> Instead of the definition of effluent limitation, the court should have analyzed the definition of “effluent standard or limitation,” which the CWA defines as “an unlawful act under subsection (a) of section 1311 of this title.”<sup>83</sup> Had the court considered the more relevant text, it would have been left parsing the definition of “to” instead of “into.”<sup>84</sup> “To” definitively lacks the directness of “into.”<sup>85</sup>

The court also used the appearance of the word “from” in the definition of “discharge of a pollutant” to impart a directness requirement.<sup>86</sup> This explanation is a little strained, however, as it defies the dictionary understanding of the word “from,” which in common usage would denote a starting point or a source.<sup>87</sup> Based on its plain meaning, a point source is the place from which

<sup>80</sup> See, e.g., *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (holding that Congress did not covertly grant the FDA authority to regulate the sale of tobacco products); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994) (determining that an agency’s power to “modify” does not give it the power to render voluntary what Congress made mandatory).

<sup>81</sup> See *Whitman*, 531 U.S. at 468 (concluding that key changes to the statutory regime are not surreptitiously inserted into the obscure sections of an act); *Tenn. Clean Water Network*, 905 F.3d at 451 (Clay, J., dissenting) (“Congress did not hide a massive regulatory loophole in its use of the word ‘into.’”).

<sup>82</sup> See *Tenn. Clean Water Network*, 905 F.3d at 451 (Clay, J., dissenting) (explaining that the citizen suit provision, under which this action was brought, includes the phrase “effluent standard or limitation” and not “effluent limitation”). “Effluent standard or limitation” is distinguishable from “effluent limitation” because the citizen suit provision defines the former as “an unlawful act under subsection (a) of section 1311 of this title.” 33 U.S.C. § 1365(f); *id.* § 1362(11).

<sup>83</sup> 33 U.S.C. § 1365(f).

<sup>84</sup> See *id.* § 1311(a) (declaring that “the discharge of any pollutant by any person shall be unlawful”). The “discharge of a pollutant” is defined as “any addition of any pollutant to navigable waters from any point source.” *Id.* § 1362(12)(A) (emphasis added).

<sup>85</sup> See *To*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/202695> [<https://perma.cc/DZ8F-TSWK>] (“Expressing motion directed towards and reaching: governing a noun denoting the place, thing, or person approached and reached.”); see *supra* note 53 (discussing the meaning of “into”).

<sup>86</sup> *Tenn. Clean Water Network*, 905 F.3d at 444.

<sup>87</sup> See *From*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/from> [<https://perma.cc/DL5W-XVLX>] (“[U]sed as a function word to indicate a starting point of a physical movement . . . .”); *From*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/74884> [<https://perma.cc/65XR-8GKB>] (“[I]ndicates a point of departure or place whence motion takes place.”); *From*, THE AMERICAN HERITAGE DICTIONARY, <https://ahdictionary.com/word/search.html?q=from> [<https://perma.cc/L6KW-QJBY>] (defining “from” as indicating a starting point, source, or cause).

pollution originates; but, no requirement exists that the discharge exit the point source and flow immediately into navigable waters.<sup>88</sup>

Likewise, the court's attempt to distinguish *Tennessee Clean Water Network* from *Rapanos* is unconvincing at best.<sup>89</sup> As the dissent rightly indicated, although the facts were different, the legal issues were identical in both cases.<sup>90</sup> Additionally, in *Rapanos*, Justice Scalia voiced support for the long-standing practice of district courts holding polluters responsible under the CWA when they discharge indirectly into navigable waters.<sup>91</sup>

This practice of applying the CWA to indirect discharges is further supported by the whole act rule.<sup>92</sup> The whole act rule is a doctrine of statutory interpretation establishing that the language of a statutory provision should be interpreted, not in isolation, but rather in the context of the entire act.<sup>93</sup> The CWA defines a point source as including, among other things, a "well."<sup>94</sup> Anything discharged from a well would, by design, enter groundwater before entering surface water.<sup>95</sup> Therefore, if wells constitute point sources, Congress must have intended the CWA to regulate discharges into groundwater that sub-

<sup>88</sup> See *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 650 (4th Cir. 2018) ("Under this plain meaning, a point source is the starting point or cause of a discharge under the CWA, but that starting point need not also convey the discharge directly to navigable waters.").

<sup>89</sup> See *Tenn. Clean Water Network*, 905 F.3d at 445 (concluding that the *Rapanos* plurality's conclusion that no directness requirement exists in the CWA only applies to pollutants that travel through multiple point sources).

<sup>90</sup> See *id.* at 452 (Clay, J., dissenting) (stating that both cases assessed whether the CWA applied when pollution traversed additional mediums after leaving its original point source).

<sup>91</sup> See *Rapanos*, 547 U.S. at 743 ("[F]rom the time of the CWA's enactment, lower courts have held that the discharge . . . of any pollutant that naturally washes downstream likely violates § 1311(a), even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between."). In fact, Justice Scalia cited a Second Circuit Court of Appeals case, *Concerned Area Residents for Environment v. Southview Farm*, from which hydrological connection theory draws considerable influence because it stands for the proposition that pollutants which enter a waterway indirectly, after passing through an intervening medium, are still discharges under the CWA. See *Rapanos*, 547 U.S. at 744; *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) (holding manure that enters a nearby waterway after being dumped onto a field by a tanker is governed by the CWA).

<sup>92</sup> See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 675–76 (5th ed. 2014) (defining the whole act rule as the strategy of interpreting statutory provisions in light of the entire act). The whole act rule has been an integral part of Supreme Court statutory interpretation jurisprudence. *Id.*; see *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Ass'ns.*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor."); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) ("When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . .") (internal quotations omitted).

<sup>93</sup> ESKRIDGE, *supra* note 92, at 675–76.

<sup>94</sup> 33 U.S.C. § 1362(14); see also *id.* § 1362(6) (exempting discharges into oil and gas extraction wells from the definition of pollutants).

<sup>95</sup> See *Groundwater Wells*, U.S. GEOLOGICAL SERV., [https://www.usgs.gov/special-topic/water-science-school/science/groundwater-wells?qt-science\\_center\\_objects=0#qt-science\\_center\\_objects](https://www.usgs.gov/special-topic/water-science-school/science/groundwater-wells?qt-science_center_objects=0#qt-science_center_objects) [<https://perma.cc/VBY5-HUYW>] (describing the types and functions of wells).

sequently migrate to navigable waterways.<sup>96</sup> By holding otherwise, the Sixth Circuit effectively interpreted the CWA's definition of effluent limitations in a way that directly conflicts with the definition of a point source.<sup>97</sup>

Moreover, the Sixth Circuit's decision is contrary to Congress's purpose in passing the CWA.<sup>98</sup> In *Tennessee Clean Water Network's* companion opinion, *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, the Sixth Circuit condemned its sister circuit courts for relying on the CWA's statutory purpose when adopting the hydrological connection theory, claiming that such reliance is a method of "last resort."<sup>99</sup> Even if that claim were true, it would not excuse the Sixth Circuit's utter disregard for the CWA's purpose.<sup>100</sup> Congress set clear goals for eliminating pollution from the nation's waterways and gave the Administrator of the EPA explicit powers to achieve that vision; the congressional purpose, in short, does not constitute a mere nicety.<sup>101</sup> As it currently stands, those who wish to avoid CWA liability in the Sixth Circuit need only discharge their pollutants first into groundwater or through the air, which is a far cry from Congress's aim to restore and maintain the nation's waters.<sup>102</sup>

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<sup>96</sup> See 33 U.S.C. § 1362(14) (defining a point source as "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") (emphasis added); ESKRIDGE, *supra* note 92, at 679 (explaining that it is inappropriate to interpret one provision of a statute in a manner that would create a conflict with another provision); see also Robinson v. Shell Oil Co., 519 U.S. 337, 345–46 (1997) (concluding the definition of "employee" includes former employees, because excluding them from the class of protected people would impair Title VII of the Civil Rights Act's anti-retaliation provision).

<sup>97</sup> See ESKRIDGE, *supra* note 92, at 679 (noting that an essential element of the whole act rule is the rule against interpreting a provision in derogation of other provisions, which essentially means that courts should not read one part of a statute in a manner that would abrogate another section of the statute); *supra* notes 51–53 and accompanying text (discussing the Sixth Circuit's interpretation of effluent limitations).

<sup>98</sup> See 33 U.S.C. § 1251(a) (providing that the explicit statutory purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"). The court's decision undermines Congress's purpose by creating an opening for polluters to escape responsibility for contaminating the nation's waters by ensuring their discharge first passes through some non-point source medium before reaching a navigable waterway. See *Tenn. Clean Water Network*, 905 F.3d at 449, 452 (Clay, J., dissenting).

<sup>99</sup> *Ky. Waterways All. v. Ky. Utilities Co.*, 905 F.3d 925, 937 (6th Cir. 2018).

<sup>100</sup> *Tenn. Clean Water Network*, 905 F.3d at 449, 452 (Clay, J., dissenting); see *supra* notes 74–75 and accompanying text (describing the purpose of the CWA).

<sup>101</sup> See *supra* notes 10–11 and accompanying text (explaining the context and rationale for congressional enactment of the CWA).

<sup>102</sup> See *Ky. Waterways All.*, 905 F.3d at 933 (holding that groundwater cannot be a conveyance under the CWA because it is a "diffuse medium" and pollutants in it are guided "only by the general pull of gravity"). The majority's opinion would allow a polluter to spray pollutants through the air into Lake Michigan. *Id.* at 942 (Clay, J., dissenting).

## CONCLUSION

The Sixth Circuit Court of Appeals' decision in *Tennessee Clean Water Network v. Tennessee Valley Authority* created a significant loophole by barring CWA liability if a pollutant travels first through groundwater, or potentially any other diffuse medium, before entering a navigable body of water. Congress enacted the CWA with the express goal of eliminating all discharges of pollution to navigable waterways. The Ninth and Fourth Circuits accurately assessed that the plain language of the CWA creates no requirement that pollution flow immediately from a point source directly into a navigable waterway. Furthermore, the Ninth and Fourth Circuits' conclusions are consistent with precedent from the Supreme Court and the Second Circuit. The Sixth Circuit's rejection of the theory that CWA liability exists when pollutants travel a short distance through hydrologically connected groundwater to navigable waterways ignores the purpose of the CWA, while misconstruing CWA precedent and the Act's plain meaning. Therefore, as the Supreme Court prepares to rule on *Hawaii Wildlife Fund v. County of Maui*, it should refuse to adopt Sixth Circuit's misguided interpretation.

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