RECORD NUMBER: 17-1895(L), 17-1952

United States Court of Appeals

for the

Fourth Circuit

SIERRA CLUB,

Plaintiff/Appellee-Cross-Appellant,

– v. –

VIRGINIA ELECTRIC & POWER COMPANY,
d/b/a Dominion Energy Virginia,

Defendant/Appellant-Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT RICHMOND

PAGE-PROOF
OPENING BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 17-1895,17-1952 Caption: Sierra Club v. Virginia Electric & Power Company, f/k/a Dominion Virginia Power, d/b/a Dominion Energy Virginia

Pursuant to FRAP 26.1 and Local Rule 26.1,

Virginia Electric & Power Company, d/b/a Dominion Energy Virginia
(name of party/amicus)

who is Appellant-Cross-Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:
Dominion Energy, Inc.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☑ YES ☐ NO
If yes, identify all such owners:
Dominion Energy, Inc.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Jeffrey A. Lamken Date: September 13, 2017

Counsel for: Virginia Electric & Power Company

CERTIFICATE OF SERVICE

****

I certify that on September 13, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Jeffrey A. Lamken
(signature)

September 13, 2017
(date)

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INTRODUCTION

The Clean Water Act ("CWA") plays an important but defined role in the web of federal and state environmental laws. It addresses "point sources" that discharge pollutants into "navigable waters"—*surface* waters like lakes, rivers, and streams. Congress recognized that the pollution of *groundwater*—underground water in the interstices between soil particles—inevitably affects surface waters as well. But Congress repeatedly rejected proposals to regulate groundwater contamination under the CWA nonetheless.

Congress instead left groundwater to the States and to regimes tailored to address diffuse migration of pollutants through groundwater. Within the CWA, Congress included provisions to assist States in creating programs for groundwater monitoring and control. Congress also enacted the Resource Conservation and Recovery Act ("RCRA") to impose federal restrictions on the disposal of certain wastes while encouraging state regulation of others, including comprehensive provisions specifically aimed at groundwater pollution. Throughout those enactments, Congress preserved the primary role of States in land and water management.

The district court's decision reverses Congress's deliberate choice. In conflict with every court of appeals to have considered the issue, it held that the CWA regulates pollutants that leach from solid waste to groundwater if the groundwater

is "hydrologically connected" to navigable waters. That ruling lacks any support in statutory text or history. It reverses Congress's deliberate choice to leave groundwater regulation to other laws tailored to the unique challenges of diffuse, underground seepage. And it upsets the federal-state balance Congress sought to preserve.

The district court compounded the error by expanding the term "point source" beyond its ordinary meaning. Congress defined that term to avoid intruding into traditional state land-use regulation. In particular, it limited the term to pipes and other conveyances that transport pollutants from one location to another. Expanding the CWA beyond that careful boundary, the court treated a 44-acre area as a "point source." And the court's rationale would convert *anything* that changes the landscape, and thus the path of precipitation, into a potential point source—even a house with a shingled roof or a parking lot.

That dramatic expansion of the CWA was unnecessary and counterproductive. The district court specifically found that any groundwater seepage here "poses no threat to health or the environment." Op. 8 (JA____). More important, the Commonwealth of Virginia has long regulated groundwater impacts at the site through comprehensive waste-management regulations adapted to such issues. Under those regulations, the State oversees corrective measures to address the very concerns over groundwater contamination at issue here. The district court

offered no good reason for upending the State's reasoned determination that those groundwater issues are properly handled through waste-management regulation under RCRA and state law, not the CWA.

JURISDICTIONAL STATEMENT

Virginia Electric and Power Company ("Dominion") seeks review of the district court's injunction of July 13, 2017 (JA____-____), as amended July 31, 2017 (JA____-____), and the underlying liability determination issued on March 23, 2017 (JA____-____). Dominion timely appealed on July 31, 2017, and Sierra Club timely cross-appealed on August 11, 2017. The district court had jurisdiction over the issues here under 28 U.S.C. § 1331 and 33 U.S.C. § 1365(a). This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1292(a)(1).

ISSUES PRESENTED

Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the "discharge" of pollutants into "navigable waters" from a "point source" without a permit. The questions presented are:

1. Whether § 301 covers stored solid waste that allegedly leaches contaminants into groundwater with a "hydrological connection" to surface water.

2. Whether a land mass spanning 44 acres—or the groundwater underneath—is a "point source" within the meaning of the Clean Water Act.

STATEMENT OF THE CASE

This case concerns the storage of coal ash previously generated at the Chesapeake Energy Center, a now-decommissioned coal-fired power plant. In particular, it concerns whether the effects of that stored coal ash on groundwater should be addressed under the Clean Water Act, because some undetermined amount of affected groundwater may migrate into nearby waterways, or through state and federal programs specifically directed to solid-waste storage and groundwater in particular.

I. STATUTORY AND REGULATORY BACKGROUND

A. The Clean Water Act's Regulation of Discharges to Navigable Waters

Congress enacted the Clean Water Act ("CWA") in 1972 to protect the "integrity of the Nation's waters" through various mechanisms. Pub. L. No. 92-500, § 2, 86 Stat. 816, 816 (1972). It sought to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b).

1. *Section 301's Prohibition on Discharges*

Most relevant here, § 301 prohibits the "discharge of any pollutant" except as authorized by a permit. 33 U.S.C. § 1311(a). The phrase "discharge of a pollutant" means the "addition of any pollutant to *navigable waters* from any *point source*." § 1362(12) (emphasis added).

Navigable Waters. "Navigable waters" are "the waters of the United States." §1362(7). Congress rejected "[s]everal bills" that would have extended federal regulation to "groundwaters," *i.e.*, water in the soil. S. Rep. No. 92-414, at 73 (1971). Congress "recognize[d] the essential link between ground and surface waters and the artificial nature of any distinction." *Id.* But "jurisdiction regarding groundwaters" was too "complex and varied from State to State" to permit regulation at the federal level. *Id.*

Congress instead addressed groundwater pollution through different mechanisms. For example, Title I of the CWA instructs the EPA to establish "national programs" for "monitoring the quality of the navigable waters and ground waters." §1254(a)(5). The EPA must also develop "comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters." §1252(a). Title II supports local efforts to address groundwater pollution, including plans that "protect ground and surface water quality" from the "disposal of pollutants on land." §1288(b)(2)(K). Finally, the EPA must "publish . . . information" about how to protect the "integrity of all navigable waters, ground waters, [and] waters of the contiguous zone." §1314(a)(2).

Point Source. Declining to address every potential source of contamination, Congress confined the CWA's permit requirement to discharges from "point source[s]." §1362(12). A "point source" is "any discernable, confined and

discrete conveyance, including . . . 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." § 1362(14). Congress recognized that diffuse sources of pollutants can have "severe, damaging" effects on surface water quality. S. Rep. No. 92-414, at 39. But it limited the CWA's permit regime to discharges from "specific confined conveyances, such as pipes." *Id.* at 78.

2. *The NPDES Permitting Process*

The CWA is implemented through a federal-state partnership. Both the EPA and the States may issue permits, known as National Pollutant Discharge Elimination System ("NPDES") permits, for discharges of pollutants from point sources to navigable waters. § 1342(a)(1). The EPA sets "effluent limitations," §§ 1314, 1316, 1317, which limit the amount of pollutants that can be added to navigable waters from a point source, § 1362(11). Those limitations, and "any more stringent limitation" established by a State, § 1311(b)(1)(C), are incorporated into NPDES permits. § 1342(a)(1).

The EPA is authorized to issue NPDES permits, but States may seek approval to administer programs themselves. § 1342(a)-(b). The EPA must ensure the State can operate the program, inspect sites, and enforce permit restrictions. § 1342(b). Once the EPA approves a state program, it cannot issue permits for that

State. § 1342(c)(1). The State must notify the EPA of every application, and the EPA may object. § 1342(d). The EPA monitors state programs, § 1342(c)(3), and can take enforcement actions, § 1319(a).

B. Solid-Waste Regulation Under the Resource Conservation and Recovery Act

Enacted in 1976, the Resource Conservation and Recovery Act ("RCRA") addresses the treatment, storage, and disposal of solid waste. *See* 42 U.S.C. §§ 6922-6925, 6941. The term "solid waste" is defined expansively to include semi-solid and liquid waste, but it excludes waste from an "industrial discharge[]" that is a "point source[] subject to" NPDES permitting under the CWA. § 6903(27).

Congress declared that waste management should "continue to be primarily the function of State, regional, and local" authorities. § 6901(a)(4). Although "hazardous waste" facilities must obtain a federal permit, § 6925(a), there is no direct federal oversight of most facilities handling "nonhazardous" waste. Instead, RCRA provides financial and technical assistance to States and localities developing "comprehensive plans" that meet federal guidelines. § 6941; *see* §§ 6942-6949a. Those plans must ensure "reasonable protection of the quality of the ground and surface waters from leachate contamination." §§ 6942(c)(1), 6943(a).

The EPA classifies coal ash and other "coal combustion residuals" as nonhazardous waste subject to RCRA. EPA, *Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities*, 80 Fed. Reg. 21,302, 21,302 (Apr. 17, 2015) ("*CCR Rule*"). The EPA has developed comprehensive guidelines for state solid-waste plans addressing the design, management, and closure of sites holding coal ash. 40 C.F.R. §§ 257.50-257.107. According to the EPA, those guidelines "reflect Congressional intent that protection of groundwater be a prime objective of any new solid waste regulations." *CCR Rule*, 80 Fed. Reg. at 21,396.

Initially, EPA guidelines were implemented through state solid-waste plans. *CCR Rule*, 80 Fed. Reg. at 21,303. In December 2016, Congress amended RCRA to require coal-ash sites to obtain a permit from the EPA or an EPA-approved state program. *See* Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322, § 2301, 130 Stat. 1628, 1736-40 (2016) (codified at 42 U.S.C. § 6945(d)).

C. Virginia's Environmental Programs

Virginia's Department of Environmental Quality ("VDEQ") administers two comprehensive programs that address environmental impacts from the coal ash at issue here—one addressing surface-water discharges, the other addressing waste management.

1. *Management of Discharges to Surface Water*

Virginia's VPDES program addresses "discharge[s]" from "point source[s] to surface waters." 9 Va. Admin. Code §25-31-10. That program has a dual character. It is an EPA-approved program for issuing NPDES permits under the CWA, and it implements additional state restrictions. *See State Water Control Bd. v. Smithfield Foods, Inc.*, 542 S.E.2d 766, 767-68 (Va. 2001).

VDEQ regulations require "[a]ny person who discharges or proposes to discharge pollutants" to obtain a VPDES permit. 9 Va. Admin. Code §25-31-100. A "[d]ischarge" is the "addition of any pollutant or combination of pollutants to surface waters from any point source." *Id.* §25-31-10. In the agency's view, a VPDES permit is not required for "diffuse seepage" from a landfill or surface impoundment into groundwater. Tr. 794:19-795:9 (JA____-____) (authorized testimony by VDEQ).

Anyone seeking a VPDES permit must submit a detailed application that typically identifies outfalls, water quantities, and effluent characteristics. 9 Va. Admin. Code §25-31-100(H)-(I). Applications and draft permits are subject to VDEQ and EPA scrutiny, public comment, and judicial review. Va. Code §§62.1-44.15:02, 62.1-44.29; 9 Va. Admin. Code §§25-31-290 to 25-31-330. Permits must ensure compliance with the CWA and state law. 9 Va. Admin. Code §§25-

31-190(A), 25-31-210(A). And the VDEQ must enforce permit conditions. Va. Code § 62.1-44.15; 9 Va. Admin. Code § 25-31-910.

2. *Management of Groundwater Impacts*

The VDEQ's waste-management regulations address groundwater impacts at landfills and impoundments. Tr. 795:15-19 (JA____) (VDEQ testimony). Virginia's Waste Management Act, Va. Code §§ 10.1-1400 to 10.1-1458, requires a permit for "disposal, treatment or storage of nonhazardous solid waste." *Id.* § 10.1-1408.1(A). That statute, like RCRA, defines "solid waste" to include "semisolid" and "liquid" waste, but excludes "industrial discharges" subject to VPDES permits. *Id.* § 10.1-1400. Site owners must submit detailed applications. 9 Va. Admin. Code §§ 20-81-450 to 20-81-485. Those applications and draft permits are likewise subject to VDEQ scrutiny, public comment, and judicial review. Va. Code §§ 10.1-1408.1, 10.1-1457; 9 Va. Admin. Code § 20-81-450.

Permitted sites must comply with comprehensive waste-management regulations meeting RCRA standards. Va. Code § 10.1-1408.1; 9 Va. Admin. Code §§ 20-81-100 to 20-81-260; EPA, *Adequacy of Virginia's Municipal Solid Waste Landfill Program*, 74 Fed. Reg. 11,540, 11,540-01 (Mar. 18, 2009); VDEQ, *Waste Permits*, http://www.deq.virginia.gov/Programs/LandProtectionRevitalization/PermittingCompliance/WastePermits.aspx. Those regulations require leachate controls, groundwater monitoring, and corrective action for groundwater contami-

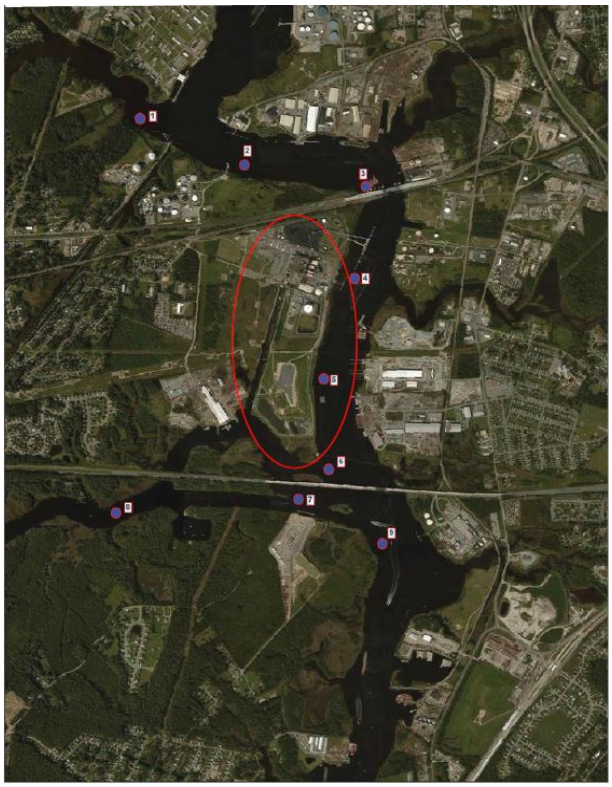
nation. 9 Va. Admin. Code §§ 20-81-210 to 20-81-260. They also regulate the closure of waste sites, and post-closure care and monitoring for up to 30 years. *Id.* § 20-81-170.

After the EPA adopted its CCR Rule in 2015, Virginia incorporated EPA coal-ash standards into its waste-management regulations. 9 Va. Admin. Code § 20-81-800(A). Those regulations require that plans for groundwater monitoring, groundwater remediation, site closure, and post-closure care meet EPA standards. *Id.* §§ 20-81-810 to 20-81-820; *see also* 2017 Va. Acts ch. 817. The VDEQ monitors and enforces compliance. Va. Code §§ 10.1-1455 to 10.1-1456.

II. FACTUAL BACKGROUND

A. The Chesapeake Energy Center

Dominion operated a coal-fired power plant at the Chesapeake Energy Center ("CEC") in Chesapeake, Virginia, from 1953 to 2014. Final Pretrial Order ("FPO") ¶¶ 1-2, 5 (JA____-____); Op. 2 (JA____). The plant site covers 145 acres, including a peninsula bounded by a branch of the Elizabeth River, a stream called Deep Creek, and a cooling-water channel. FPO ¶ 3 (JA____-____); Dominion Ex. 2G, DOM0000880 (JA____); Op. 2 (JA____). The image below shows the site (indicated in red) in relation to its surroundings:



Dominion Ex. 86, DOM00275349 (JA____) (oval added).

Many factories operate (or have operated) nearby along the heavily industrialized Elizabeth River, including a wood-treatment plant, lumber mill, car-assembly plant, asphalt plant, and chemical plant:

Dominion Ex. 85, DOM00275542 (JA____); *see* Tr. 326:7-11, 602:4-5, 603:1-2, 768:23-769:7 (JA____, ____-____, ____-____, ____-____); Dominion Ex. 85, DOM00275537-DOM00275540 (JA____-____); Op. 7 (JA____). A "lot of big ship[s]" ply the river, which is an entrance to the Intercoastal Waterway. Tr. 773:6-17 (JA____); Dominion Ex. 153 (JA____). The river's mouth houses the world's largest naval base and shipping terminals forming part of the sixth largest U.S. port by volume. Dominion Ex. 153 (JA____); U.S. Navy, *Welcome to the Area*, http://www.public.navy.mil/AIRFOR/cvn77/Pages/Welcometothearea.aspx; Port of Virginia, *Norfolk International Terminals*, http://www.portofvirginia.com/

facilities/norfolk-international-terminals-nit/; iContainers, *Top 10 US Ports*, http://www.icontainers.com/us/2017/05/16/top-10-us-ports/.

B. The Operation and Closure of the Chesapeake Energy Center Coal-Fired Plant

Until ceasing coal-fired operations in 2014, the Chesapeake Energy Center generated coal ash as a byproduct of coal-fired power production. FPO ¶¶4-5 (JA____); Tr. 122:16-17 (JA____); Op. 2, 4 (JA____, ____). That coal ash was stored onsite. FPO ¶¶6, 11, 13 (JA____-____); Op. 2 (JA____).

Before 1984, Dominion piped coal-ash slurry to an unlined, bermed basin known as the "Historic Pond" to allow solids to settle out. FPO ¶6 (JA____); Tr. 605:16-20, 676:15-22 (JA____-____, ____); Op. 2 (JA____). Water was then removed and discharged pursuant to a CWA permit. Tr. 642:1-3 (JA____). The basin spanned "almost the entire area of the peninsula," more than 44 acres. Tr. 115:3-6, 919:8-13 (JA____, ____).

In the mid-1980s, Dominion obtained permits to change its storage practices. Tr. 115:17-19, 642:7-12 (JA____, ____); FPO ¶¶9-10 (JA____). To store dry coal ash, it constructed a 22-acre landfill on top of a portion of the Historic Pond. Tr. 606:17-18 (JA____); FPO ¶¶9-10 (JA____); Dominion Ex. 21 (JA____); Op. 2-3 (JA____-____). Dominion placed a geosynthetic liner underneath the landfill to prevent leachate from seeping into the groundwater below, and dug ditches around the landfill to collect any leachate that might seep over the liner's edge. Tr. 608:5-

7 (JA____); Op. 3 (JA____). Pursuant to its permits, Dominion installed wells outside the landfill for groundwater monitoring. Tr. 610:2-7, 620:24-25 (JA____-____, ____); Dominion Ex. 95, DOM00006921 (JA____).

Dominion also constructed two smaller unlined basins next to the landfill. FPO ¶¶14-15 (JA____); Op. 3 (JA____). One of them—the "bottom ash pond"—allowed coal ash to "settle[ ] out" of wastewater from the power plant. Tr. 599:15-23, 606:4-24 (JA____, ____-____). Dominion periodically dredged the basin and placed any coal ash it removed on the landfill. Tr. 606:19-24 (JA____); FPO ¶18 (JA____). The other basin, the "sedimentation pond," held wastewater from the bottom ash pond, as well as stormwater runoff and leachate from the landfill. Tr. 599:20-23 (JA____-____); FPO ¶19 (JA____). That basin has an outfall (Outfall 002) that is permitted under the CWA and discharges into Deep Creek. Tr. 600:3-9 (JA____); FPO ¶22 (JA____).

In 2014, the Chesapeake Energy Center closed its coal units and stopped generating coal ash. FPO ¶5 (JA____, ____). Dominion then began the process of closing the coal-ash storage site by installing temporary covers to prevent erosion, strengthening the surrounding shorelines to protect against erosion and flooding, and developing detailed closure plans. Tr. 602:16-22, 647:6-648:20, 675:8-13 (JA____, ____-____, ____).

C. Site Regulation

The Chesapeake Energy Center is heavily regulated. After Congress enacted the CWA in 1972, Dominion obtained a VPDES permit to discharge wastewater from the Historic Pond into Deep Creek. Tr. 642:1-3 (JA____). The permit conditions included effluent limitations and other requirements. *See, e.g.*, Sierra Club Ex. P520, SELC_008919-SELC_008952, SELC_009576-SELC_009604 (JA____-____, ____-____). When Dominion built the landfill in the 1980s, it obtained an updated permit to authorize discharge of waters collected in the sedimentation basin through Outfall 002. Tr. 642:7-16 (JA____).

Dominion also obtained a solid-waste permit for the landfill. FPO ¶¶9-10 (JA____); Op. 2-3 (JA____-____); Dominion Ex. 21 (JA____-____). That permit contained numerous conditions, including that Dominion install a system to collect leachate and monitor the surrounding groundwater. Tr. 608:5-17 (JA____-____); Dominion Ex. 95, DOM00006920-DOM00006921 (JA____-____).

As required by those permits, Dominion and state regulators closely monitored Outfall 002, the landfill, and the surrounding peninsula. Tr. 620:10-621:10, 622:17-24, 812:12-21 (JA____-____, ____, ____-____). Dominion tested discharges through Outfall 002 for compliance with its VPDES permit. *See* Tr. 222:25-223:1 (JA____); Dominion Ex. 17, DOM000098941 (JA____). Using wells placed around the peninsula's perimeter, Dominion tested the groundwater for

compliance with its solid-waste permit. Tr. 610:4-10, 620:20-621:10, 622:14-16, 637:16-20 (JA____-____, ____-____, ____, ____-____). Dominion reported test results to state regulators, who conducted inspections usually "four or five times [each] year." Tr. 673:6-10 (JA____); *see* Tr. 622:20-24, 637:16-18 (JA____-____, ____).

In 2002, Dominion's groundwater monitoring revealed arsenic levels that exceeded state standards. FPO ¶28 (JA____). As required by its solid-waste permit, Dominion developed a corrective action plan. *Id.* After extensive study, Dominion proposed a plan that relied on natural attenuation and extensive site monitoring to verify that the arsenic would pose no threat to health or wildlife as iron in the soil naturally adsorbed and neutralized it. Tr. 629:1-17, 632:13-634:13 (JA____, ____-____). That plan called for Dominion to conduct semi-annual groundwater testing at 10 wells around the peninsula's perimeter. Dominion Ex. 1A, DOM00006733 (JA____); Dominion Ex. 48, DOM00008493 (JA____).

After public comment and agency review, the VDEQ approved the plan and incorporated it into Dominion's solid-waste permit. Tr. 616:9-18, 625:13-636:20, 635:2-11, 817:5-7 (JA____-____, ____-____, ____, ____); Dominion Ex. 51 (JA____-____). That plan undergoes VDEQ review every three years. Tr. 637:16-25 (JA____-____). The VDEQ's most recent draft solid-waste permit requires

Dominion to evaluate additional remedial measures to ensure arsenic in the groundwater remains no threat to humans or the environment. Dominion Ex. 2D_02, DOM00005727-DOM00005728 (JA____-____). The VDEQ has repeatedly found Dominion to be in full compliance with its permits. *See* Tr. 410:3-4, 674:10-17, 802:17-20, 803:23-804:2 (JA____, ____, ____, ____); Op. 10 (JA____); Dominion Ex. 19_10, DOM00001133-DOM00001144 (JA____-____); Dominion Ex. 19_16, DOM00001103-DOM00001109 (JA____-____).

After the Chesapeake Energy Center ceased coal-fired operations in 2014, Dominion began reviewing measures for the coal-ash storage area's permanent closure. Tr. 647:24-648:3, 651:11-652:16, 736:3-743:8 (JA____-____, ____-____, ____-____). Dominion sought VDEQ approval for detailed plans for site closure, as well as post-closure monitoring and management, consistent with state regulations and the EPA's CCR Rule. Tr. 647:6-648:20 (JA____-____); FPO ¶¶40-44 (JA____). Those plans include measures for capping the landfill to prevent erosion and stormwater infiltration. Dominion Ex. 10, SELC_070208 (JA____). They include systems for collecting and treating stormwater runoff and leachate. Dominion Ex. 15, DOM00277398 (JA____). And they include measures for both groundwater and surface water monitoring and (if necessary) implementing further "corrective action measures . . . outlined in [Virginia's solid-waste regulations] and [the] CCR rule." Dominion Ex. 16, DOM00277426-

DOM00277457 (JA____-____); *see* Dominion Ex. 221_02, DOM00277623-DOM00277627. That proposed monitoring and care will continue for at least 30 years. Dominion Ex. 15, DOM00277399 (JA____).

III. PROCEEDINGS BELOW

A. The Complaint

In 2015, Sierra Club filed this action against Dominion under the CWA's citizen-suit provision, 33 U.S.C. § 1365 (JA____-____). The complaint asserted two principal theories. First, Sierra Club alleged that Dominion had released arsenic into "surface waters . . . via hydrologically-connected groundwater." Compl. ¶ 140 (JA____). Sierra Club did not allege that Dominion had released arsenic into surface waters directly. It alleged only that coal ash on Dominion's property had "leach[ed]" arsenic into groundwater, and that the groundwater had "flow[ed]" into surface waters. *Id.* ¶¶ 130, 140 (JA____-____).

Second, Sierra Club alleged that Dominion had violated its VPDES permit. Compl. ¶¶ 142-171 (JA____-____). That permit requires Dominion to dispose of waste so as to keep pollutants from reaching "state waters," and restricts the addition of pollutants to "state waters." *Id.* ¶¶ 146, 162 (JA____, ____). Because Virginia law defines "state waters" to include "both surface waters and groundwater," Sierra Club alleged that Dominion had violated *federal* law when

arsenic reached groundwater and (ultimately) surface waters. *Id.* ¶¶151, 153, 167 (JA____, ____, ____).

B. Evidence at Trial

At trial, Sierra Club likewise asserted that arsenic from the coal ash had "leach[ed] . . . into the groundwater that flows directly to the surrounding surface waters." Tr. 14:9-13 (JA____); *see* Tr. 49:23-50:4 (JA____); FPO Ex. J, ¶1 (JA____). Sierra Club did not conduct any studies or collect any samples to prove its case. It did no "leaching test" to determine how much arsenic might be leaching into groundwater. Tr. 221:12-222:11 (JA____-____). It did not attempt to estimate how much arsenic allegedly entered surface waters through groundwater. Tr. 217:1-10, 221:7-10 (JA____, ____). It performed no dye or other studies to trace the groundwater's migration. *See* Tr. 20:15-16, 62:4-6 (JA____, ____). It collected no samples of groundwater or surface waters nearby. Tr. 222:15-17, 224:5-7, 230:23-231:1 (JA____, _____, _____). Instead, it relied on the testing and monitoring Dominion had conducted and submitted to the VDEQ pursuant to its solid-waste permit.

That testing showed that the surface waters surrounding the Chesapeake Energy Center had arsenic concentrations well below all applicable standards. Tr. 763:5-764:3 (JA____-____). Those concentrations were similar to, or below, concentrations both upstream and downstream. Tr. 613:1-4, 768:12-18 (JA____,

____); *see* Tr. 218:20-23 (JA____). All studies of aquatic life showed arsenic concentrations within safe levels and "in most instances . . . below the detection limit." Tr. 884:24-885:7 (JA____-____); *see* Dominion Ex. 1A, DOM00006664-DOM00006665 (JA____-____); Op. 8-9 (JA____-____).

Sierra Club nonetheless asserted that coal ash was contaminating groundwater at Dominion's site. Its expert testified that groundwater absorbs arsenic while "flowing through" any coal ash below the water table, and that rainwater "percolat[ing] through" coal ash above the water table also transmits arsenic into groundwater. Tr. 122:12-21, 123:23-124:3, 161:12-20 (JA____-____, ____-____, ____).

Sierra Club argued that the contaminated groundwater then migrated into surrounding surface waters. Tr. 18:6-9, 135:11-16 (JA____, ____). Its expert stated that the site's topography, and pressure exerted by rainwater entering the ground, caused groundwater to flow "downward." Tr. 138:15-19, 156:2-4 (JA____, ____). Groundwater then "flow[ed] from the center of the site out towards the edges." Tr. 134:11-14 (JA____). As groundwater approached the surrounding surface waters, it allegedly made a "major turn" upwards to discharge into those surface waters. Tr. 157:8 (JA____); *see* Tr. 156:15-157:5 (JA____). One set of samples from the river bed—called "pore-water samples"—showed elevated arsenic concentrations in 2010, with the highest concentrations closest to

the shoreline. Tr. 166:7-12, 169:24-170:2, 496:11-15 (JA____-____, ____, ____). That, the expert asserted, was "consistent with arsenic being transported in groundwater from the CEC site to the surface water." Tr. 176:16-20 (JA____).

Dominion disputed that analysis. One expert testified that clays in the soil and the local topography made it "very difficult" for groundwater "to flow horizontally." Tr. 847:1-9 (JA____-____); *see* Tr. 835:17-838:8, 839:20-22 (JA____-____, ____). Others testified that iron oxide in the soil would bind with arsenic and immobilize it—indeed, evidence showed that arsenic concentrations decreased as groundwater radiated outward. Tr. 732:8-734:24, 851:12-854:1 (JA____, ____-____). The pore-water samples from 2010, moreover, had the highest concentrations of arsenic in "the shallowest samples," *i.e.*, those closest to the *top* of the river bed. Tr. 212:25-213:2 (JA____). That result indicated that arsenic was coming not from groundwater below, but from the heavily trafficked and industrialized river above. Tr. 696:2-12, 721:2-5 (JA____-____, ____).

Evidence also showed myriad nearby sources of arsenic and other pollutants, including wood-treatment plants, lumber mills, a car-assembly plant, an asphalt plant, and a chemical factory. Tr. 768:23-770:14 (JA____-____); Dominion Ex. 85, DOM00275537-DOM00275540 (JA____-____). Within five miles of Dominion's site, there are "six Superfund sites, half a dozen record cleanup sites and well over a dozen sites" subject to state remediation programs. Tr. 575:7-

11 (JA____). Two Superfund sites were known to cause "a very intense spike of arsenic." Tr. 770:20-25 (JA____). And Dominion itself is *permitted* to discharge wastewater, runoff, and leachate through Outfall 002—all of which contain some arsenic. Tr. 600:23-601:9 (JA____-____).

Tidal surges, boat traffic, and dredging can cause arsenic to move many miles along the river before settling in quieter waters near Dominion's property. Tr. 699:2-703:13, 750:4-8, 772:11-776:10 (JA____-____, ____, ____-____). One study showed that pollutants could move as far as 10 miles *upstream*. Tr. 702:20-25 (JA____).

C. The District Court's Rulings

Liability. The district court ruled that Dominion had violated the CWA. Coal ash at the Chesapeake Energy Center, it declared, "convey[ed] arsenic directly into the groundwater," which migrated "directly into the surface water" around the peninsula. Op. 7, 15 (JA____, ____). The court could not "determine how much groundwater reaches the surface waters, or how much arsenic goes from the CEC to the surrounding waters." Op. 8 (JA____). But it "kn[e]w" one thing for certain: "[T]he discharge poses no threat to health or the environment." *Id.* "All tests of the surface waters surrounding the CEC" were "well below the water quality criteria for arsenic." Op. 8-9 (JA____-____). An expert "review[ing] surface water, sediment, pore water, and fish tissue data (including bottom

feeders)" had "found no 'human health or environmental concerns around the CEC facility.'" Op. 9 (JA____). That evidence, the court stated, was not "dispute[d]." *Id.*

Dominion had urged that the CWA does not apply to groundwater contamination, even when a plaintiff claims a "hydrological connection" to surface waters. The district court noted that "[c]ourts have disagreed" over that issue. Op. 12 (JA____). Extending the CWA to hydrologically connected groundwater, it conceded, required "a novel interpretation of the law." Op. 17 (JA____). But the court nonetheless "conclude[d] that discharges to groundwater that is hydrologically connected to surface water are covered by the CWA." Op. 13 (JA____). Absent such an extension, the court declared, the CWA's goal of protecting "the water quality of the nation's surface waters" would be "defeated." Op. 12 (JA____).

The district court also rejected Dominion's argument that Sierra Club had identified no "point source" covered by the CWA. The coal ash at the Chesapeake Energy Center, the court asserted, was a point source because it "concentrate[d]" arsenic into "one location" and then "channel[ed] and convey[ed] arsenic directly into the groundwater and thence into the surface waters." Op. 14 (JA____). The coal ash "channel[ed]" the arsenic by "changing the original flow path of any precipitation." Op. 15 (JA____).

The district court rejected Sierra Club's claims that Dominion violated its VPDES permit. Op. 15-16 (JA____-____). Noting that those claims required an "interpretation of state law," the court "defer[red]" to the VDEQ's view that Dominion had complied with the permits. Op. 16 (JA____).

Remedy. The district court declined to impose civil penalties. Op. 17-20 (JA____-____). Dominion had "cooperated" with regulators at "every step"; Dominion had "been a good corporate citizen"; and liability rested on a "novel interpretation of the law." Op. 17 (JA____).

The court also rejected Sierra Club's demand that Dominion excavate the coal ash and deposit it elsewhere. "[N]o evidence shows that any injury . . . has occurred to health or the environment." Op. 18 (JA____). Sierra Club had offered "no credible evidence of how the ash will safely travel across Tidewater Virginia." *Id.* Finally, removing the coal ash would "entail years of effort costing hundreds of millions of dollars, for very little return." *Id.* Indeed, Dominion's expert estimated that excavating 44 acres of coal ash would cost $477 million and take eight years. Tr. 894:19-895:5 (JA____-____).

The district court instead ordered Dominion to conduct additional site monitoring and reopen a previously withdrawn solid-waste permit application. Op. 20 (JA____). After reviewing the parties' competing monitoring plans, the court entered an injunction (JA____-____), which it later modified (JA____-____). The

injunction requires Dominion to test surface water, groundwater, sediment, pore water, and aquatic life for arsenic, beginning by fall 2017 and continuing for at least two years. Am. Inj. ¶¶2-33 (JA____-____). It also requires Dominion to apply for a revised solid-waste permit that includes "corrective measures for the discharge of groundwater" beyond merely capping the landfill. *Id.* ¶35 (JA____).

SUMMARY OF ARGUMENT

The district court's decision sanctions a massive expansion of the Clean Water Act that overturns Congress's careful regulatory choices. Congress enacted the permit requirement in §301 of the CWA to address discharges from *point sources* to *navigable waters*. Congress fully understood that discharges from *nonpoint sources*, and contamination of *subterranean groundwater*, would affect navigable waters as well. But it made a conscious decision to address groundwater and nonpoint sources by other means—through different provisions of the CWA, other federal statutes like the Resource Conservation and Recovery Act, and traditional state land-use regulation.

I. Text, history, and precedent all confirm that the CWA does not regulate groundwater contamination. The CWA's permit requirement applies only to discharges to "navigable waters." 33 U.S.C. §§1311(a), 1362(7), 1362(12). Nowhere does it mention "groundwater"—even though Congress used that term elsewhere in the statute. Congress expressly considered extending the permit

requirement to groundwater. But it rejected the proposal, concluding that States were better positioned to address the issue.

The district court's ruling defies that deliberate choice. The court reasoned that groundwater beneath Dominion's site is "hydrologically connected" to surface waters. But there is no "hydrological connection" exemption from the CWA's limitations. Any such exception would swallow the rule. Congress was well aware that groundwater normally migrates into navigable waters, and that discharges to groundwater inevitably affect surface-water quality as well. But Congress consciously chose to exclude groundwater from the Act's permit requirement *despite* those ubiquitous hydrological linkages. Every court of appeals to address the issue has thus concluded that the CWA's permit requirement excludes discharges to groundwater—even hydrologically connected groundwater. *See Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994); *Rice v. Harken Expl. Co.*, 250 F.3d 264, 272 (5th Cir. 2001).

The CWA is singularly ill-suited to regulating groundwater pollution. The CWA relies on effluent limitations, which require the measurement of quantities, rates, and concentrations discharged from specific outfalls. The gradual seepage of pollutants through groundwater defies such measurement. The expert agency charged with implementing the CWA in Virginia—as well as RCRA and state solid-waste laws—sensibly concluded that groundwater impacts from coal ash are

properly regulated under detailed solid-waste regimes calibrated to the task. The district court's decision overturning that judgment threatens to create serious regulatory gaps, while extending the CWA's permit requirement to countless new sources Congress could not possibly have envisioned.

II. The district court also erred by deeming a 44-acre deposit of coal ash to be a "point source" under the CWA. The statute defines "point source" to include only "discernible, confined and discrete conveyance[s]." 33 U.S.C. §1362(14). An area spanning 44 acres is none of those things. The stored coal ash is not a "conveyance" because it does not "convey"—transport or move—anything from one identifiable place to another. It is a stationary feature of the landscape through which rainwater or groundwater can move diffusely. Nor is the coal ash "discernible, confined and discrete" in any sense of those terms. It is precisely the sort of physical site feature that Congress classified as a *nonpoint* source.

Congress was well aware that such site features could contribute to pollution. It specifically considered the problem of "runoff"—the pollution that occurs when rainwater falling on a physical site feature picks up contaminants. But Congress deemed such features and runoff to be *nonpoint* sources. Diffuse seepage of water through coal ash, whether percolating rainwater or migrating groundwater, is nonpoint-source pollution for precisely the same reasons. The

district court substituted its own preferred regulatory approach for the considered judgment of Congress and Virginia regulators.

ARGUMENT

In enacting the Clean Water Act, Congress chose to regulate only discharges into "navigable waters"—not groundwater. Without analyzing the statute's text or history, the district court extended the CWA to cover groundwater too, so long as it has some "hydrological connection" to surface waters. That ruling defies Congress's deliberate choice to exclude groundwater from the CWA's permit requirement. It conflicts with the decisions of every court of appeals to have considered the issue. It contravenes the structure of federal environmental law, which leaves regulation of groundwater contamination from solid waste like coal ash to the Resource Conservation and Recovery Act and related state laws. And it is contrary to Virginia's regulation of the site at issue, which addresses the solid waste stored there and related groundwater concerns through Virginia's solid-waste program—not the CWA.

The district court likewise departed from Congress's careful definition of "point source." That term refers only to "discernable, confined and discrete conveyance[s]," such as pipes, ditches, and channels. 33 U.S.C. § 1362(14). But the court expanded the term to cover diffuse seepage from a land mass spanning 44 acres—an area twice the size of the median housing subdivision.

That expansion of the CWA was not merely "novel." Op. 17 (JA____). It was unnecessary. The district court expressly found—declaring that it "know[s]"—that any groundwater reaching navigable waters "poses no threat to health or the environment." Op. 8 (JA____). Moreover, groundwater contamination (from coal ash in particular) is expressly addressed by federal statutes like RCRA and state laws tailored to such concerns. The VDEQ long ago determined that groundwater impacts at the site are properly addressed through those specifically calibrated regulatory mechanisms. The district court erred in substituting Sierra Club's "novel" legal theory for that agency's experienced and expert judgment. In doing so, it both expanded the CWA beyond sensible bounds and created serious gaps in other regulatory regimes.

Standard of Review. This Court reviews statutory construction questions *de novo*. *See Morgan v. Sebelius*, 694 F.3d 535, 537 (4th Cir. 2012).

I. THE CLEAN WATER ACT'S PERMIT REQUIREMENT DOES NOT COVER GROUNDWATER

The courts of appeals unanimously agree that the CWA's permit requirement does not reach groundwater contamination from the storage of solid waste, *even if* the plaintiff claims that the groundwater is "hydrologically connected" to navigable waters. There is good reason for that. The statute's text and history show that Congress deliberately chose to regulate groundwater through other means.

A. Congress Deliberately Excluded Groundwater from the CWA's Permit Requirement

1. *The Statute's Text and Structure Make Clear That the Clean Water Act Prohibits Only Discharges to Surface Waters*

"When interpreting a statute, [courts] look first and foremost to its text." *United States v. Alvarez-Sanchez*, 511 U.S. 350, 356 (1994). The CWA prohibits the "discharge of any pollutant" without a permit from a "point source" to "navigable waters." 33 U.S.C. §§1311(a), 1362(7), 1362(12). Congress thus required permits for discharges into surface waters, such as lakes and rivers. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001). The CWA also requires a permit for discharges into "waters of the contiguous zone" and "the ocean." §§1311(a), 1362(12). Nowhere does it require a permit for releases affecting groundwater—*i.e.*, water underground in the pores of soil or crevices between rocks.

That is no accident. "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015). The terms "ground waters" or "underground waters" appear in at least 12 *other* sections of the CWA. *See* §§1252(a), 1254(a)(5), 1256(e)(1), 1274(a)(4), 1282(b)(2), 1288(b)(2)(K), 1291(b), 1314(a)(1)-(2), 1314(f), 1329(b)(2)(A), 1329(h)(5)(D), 1329(i)(1). But

Congress *omitted* groundwater from the CWA's permit requirement, limiting it to "navigable waters" instead.

Congress addressed groundwater by other means. For example, the CWA encourages States to develop groundwater pollution programs. *See, e.g.*, §1329(b)(2)(A) (encouraging state programs that "tak[e] into account the impact of the practice on ground water quality"). Other provisions authorize grants so States can develop their own "ground water quality" programs. *See, e.g.*, §§1329(h)(5)(D), 1329(i)(1). Still others allow the EPA to collect information about pollution of "ground waters" and issue guidelines for controls. *See, e.g.*, §§1252(a), 1254(a)(5), 1314(a)(2), 1314(f).

Those provisions dispel any notion that groundwater is a subset of "navigable waters." The terms "ground waters" and "navigable waters" appear side-by-side no less than seven times. *See* 33 U.S.C. §1252(a) ("the pollution of the navigable waters and ground waters"); §1254(a)(5) ("the navigable waters and ground waters and the contiguous zone and the oceans"); §1256(e)(1) ("the quality of navigable waters and to the extent practicable, ground waters"); §1288(b)(2)(K) ("to protect ground and surface water quality"); §1291(b) ("ground or surface water quality"); §1314(a)(2) ("all navigable waters, ground waters, waters of the contiguous zone, and the oceans"); §1314(f) ("any navigable waters or ground waters"). Reading "navigable waters" to encompass groundwater would render the

separate term "ground waters" in each of those provisions wholly superfluous. Basic canons of statutory construction preclude that result. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

Congress, moreover, explicitly addressed groundwater protection in other environmental statutes. For example, RCRA expressly addresses groundwater impacts from solid-waste storage. That statute requires sites storing hazardous waste to have "ground water monitoring" systems. 42 U.S.C. § 6924(*o*). For "non-hazardous" wastes—a category that includes coal ash—RCRA encourages States to adopt standards to protect "the quality of the *ground and surface waters* from leachate contamination." § 6942(c)(1) (emphasis added).

Most recently, Congress addressed coal-ash storage through the Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322, § 2301, 130 Stat. 1628, 1736 (2016) (codified at 42 U.S.C. § 6945(d)). That statute amends RCRA to require compliance with EPA-approved standards for groundwater protection, monitoring, and remediation. *See id.* Congress's express regulation of groundwater in other legislation confirms that Congress did not surreptitiously regulate groundwater through CWA provisions that make no mention of it.

2. *Legislative History Confirms That Congress Deliberately Excluded Releases to Groundwater*

Congress deliberately chose not to address groundwater through the CWA's permit requirement. Both the Senate and House considered—and rejected—

proposals to extend the CWA to groundwater. The Senate Committee on Public Works observed that "[s]everal bills" would have "establish[ed] Federally approved standards for groundwaters." S. Rep. No. 92-414, at 73 (1971). The Committee recognized that there is an "essential link between ground and surface waters," making any distinction between them "artificial." *Id.* But it nonetheless "did not adopt" those bills, observing that "jurisdiction regarding groundwaters is so complex and varied from State to State." *Id.*

The House Committee on Public Works likewise rejected efforts to extend the CWA to groundwater. During four days of hearings, Representative Aspin proposed an amendment to require a permit for releases to groundwater. 118 Cong. Rec. 10,666 (1972). He thought it a "glaring inconsistency" to omit groundwater from the CWA's permit requirement. *Id.* "Ground water appears in this bill in every section," he stated, except the "section on permits and licenses," where "ground water is suddenly missing." *Id.* He proposed amending that section to include the term "ground waters" "after 'navigable waters.'" *Id.*

The Committee overwhelmingly rejected that amendment. 118 Cong. Rec. at 10,669. Representative Sisk "recognize[d]" that groundwater could become polluted but objected that "bringing this ground water under this type of control, is improper, and . . . is a very dangerous thing to do." *Id.* Representative Harsha cited the absence of "knowledge or the technology to devise water-quality

standards for ground water." *Id.* at 10,668. Representative Clausen opposed the amendment because "there was not sufficient information on ground waters to justify the types of controls that are required for navigable waters." *Id.* at 10,667. He emphasized "the need for research" and technological "development." *Id*.

Congress thus rejected a permit requirement for groundwater pollution. Instead, it opted to support *state* groundwater regulation through cooperative programs, federally sponsored studies, and federal grants. *See* S. Rep. No. 92-414, at 73 (urging that state programs should include "affirmative controls over the injection or placement in wells of any pollutants that may affect ground water"); 118 Cong. Rec. at 10,667-69 (rejecting groundwater-pollution controls but advocating research and development); p. 32, *supra* (discussing CWA programs encouraging state regulation).

3. *Precedent Confirms That "Navigable Waters" Excludes Groundwater*

The courts agree that the CWA does not extend to groundwater. In *Rapanos v. United States*, 547 U.S. 715 (2006), the Supreme Court rejected the EPA's attempt to expand the term "navigable waters" to cover wetlands (surface waters) connected to navigable waters through intermittent flows. As the plurality explained, Congress defined "navigable waters" to cover only a *subset* of all possible waters—"the qualifier 'navigable' is not devoid of significance." *Id.* at 731. "The use of the definite article ('the') and the plural number ('waters') shows

plainly that §1362(7) does not refer to water in general," but "refers more narrowly" to a subset. *Id.* at 732. Justice Kennedy's concurring opinion similarly recognized that "navigable waters" encompasses only a subset of waters. *Id.* at 759-83. Extending the CWA to groundwater would likewise render the modifier "navigable" insignificant. If intermittent surface flows are not "navigable waters," groundwater cannot be either.

The *Rapanos* plurality expressed concern over the "immense expansion of federal regulation of land . . . under the Clean Water Act—without any change in the governing statute." 547 U.S. at 722. It rejected regulations that would have covered virtually "the *entire land area* of the United States" merely because it "l[ay] in some drainage basin" or "contain[s] water ephemerally wherever the rain falls." *Id.* (emphasis added). Expanding the CWA to cover groundwater would have much the same effect.

Every court of appeals to consider the issue agrees that "navigable waters" *excludes* groundwater. In *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994), the Seventh Circuit observed that the term "'[w]aters *of the United States*' must be a subset of 'water'"; otherwise Congress would not have "insert[ed] the qualifying clause in the statute." *Id.* at 965. "[T]he statute Congress enacted excludes *some* waters, and ground waters are a logical candidate." *Id.* Other circuits are in accord. *See Rice v. Harken Expl. Co.*, 250

F.3d 264, 269 (5th Cir. 2001) ("The law in this Circuit is clear that ground waters are not protected waters under the CWA."); *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1450-51 (1st Cir. 1992) ("waters of the United States" refers only to "surface waters"); *Exxon Corp. v. Train*, 554 F.2d 1310, 1329 (5th Cir. 1977) ("[T]he legislative history demonstrates conclusively that Congress believed it was not granting [EPA] power to control disposals into groundwater."); *United States v. Johnson*, 437 F.3d 157, 161 n.4 (1st Cir. 2006) ("The CWA does not cover any type of ground water; the CWA covers only surface water."), *vacated on other grounds*, 467 F.3d 56 (1st Cir. 2006).

The EPA concurs. The EPA has "*never* interpreted" "groundwater . . . to be a 'water of the United States' under the CWA." EPA, *Notice of Final Rule for Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054, 37,073 (June 29, 2015) (emphasis added); *see also* EPA, *Notice of Proposed Rule for Definition of "Waters of the United States" Under the Clean Water Act*, 79 Fed. Reg. 22,188, 22,218 (Apr. 21, 2014) (same). The EPA recently codified that understanding, declaring that the term "navigable waters" excludes "[g]roundwater, including groundwater drained through subsurface draining systems." 40 C.F.R. § 122.2(2)(v).[1] By contrast, the EPA recognizes that

[1] The EPA plans to rescind its regulation interpreting "navigable waters" to *narrow* it even further. *See* EPA, *Notice of Proposed Rule for Definition of "Waters of the*

Congress intended "protection of groundwater [to] be a prime objective" of "*solid waste* regulations." *CCR Rule*, 80 Fed. Reg. at 21,396 (emphasis added); pp. 7-8, *supra*. The agency has thus directed States to regulate coal-ash pollutants through solid-waste programs. 80 Fed. Reg. at 21,396; 40 C.F.R. §§257.50-257.107.

B. There Is No "Hydrological Connection" Exception to Congress's Exclusion of Groundwater from the Clean Water Act

The district court nevertheless ruled that "the CWA encompasses groundwater if it is hydrologically connected to surface water." Op. 12 (JA____); *see id.* ("[D]ischarges to groundwater hydrologically connected to surface water are covered by the CWA."). Congress's effort to protect "the water quality of the nation's surface water," the court claimed, "would be defeated if the CWA's jurisdiction did not extend to discharges to that groundwater." *Id.* That attempt to create a "hydrological connection" exception defies unanimous court of appeals precedent and circumvents Congress's deliberate legislative choice.

1. *The District Court's "Hydrological Connection" Theory Defies the Clean Water Act's Text and History*

The CWA's permit requirement applies to discharges "from" a point source "to" navigable waters. 33 U.S.C. §§1311(a), 1362(12). It does not address pollution affecting groundwater that, in turn, migrates diffusely toward navigable waters. It is quite unnatural to describe groundwater contamination as a discharge

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United States"—Recodification of Pre-Existing Rules, 82 Fed. Reg. 34,899, 34,899-900 (July 27, 2017).

"to" navigable waters—even if pollutants ultimately migrate there. Even the district court repeatedly described the pollution alleged here as "discharges *to groundwater*." Op. 13 (JA____) (emphasis added); *see* Op. 12 (JA____).

Congress was fully aware that groundwater contamination affects—inevitably affects—navigable waters. The Senate Committee on Public Works emphasized as much when considering whether to extend the CWA's permit requirement to groundwater: "The importance of groundwater in the hydrological cycle cannot be underestimated. . . . [R]ivers, streams and lakes themselves are *largely supplied with water from the ground*—not surface runoff." S. Rep. No. 92-414, at 73 (emphasis added). The Committee thus "recognize[d] the essential link between ground and surface waters and the artificial nature of any distinction." *Id.*[2]

Representative Aspin concurred: "If we do not stop pollution of ground waters through seepage and other means, ground water [will] get[ ] into navigable waters." 118 Cong. Rec. at 10,666. "[T]o control only the navigable water and not the ground water," he opined, "makes no sense at all." *Id.* But Congress nonetheless chose to *exclude* groundwater from the permit requirement and leave its regulation to other regimes.

[2] Sierra Club's witness agreed: The "most common" groundwater discharge is to "a water body such as a stream or river or a lake or even the ocean." Tr. 89:6-11 (JA____).

An exception for "hydrologically connected" groundwater would judicially reverse that legislative decision. Congress understood that groundwater *is* hydrologically connected to surface water—they have an "essential link," making any distinction between them "artificial." But Congress refused to extend the CWA's permit requirement to groundwater nonetheless.

Any such exception would also defy Congress's reason for limiting the CWA's scope, federalizing vast swaths of state authority over land use and solid-waste disposal. Congress's express purpose in the CWA was "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. §1251(b). Congress accomplished that goal by rejecting "[f]ederally approved standards for groundwaters" in favor of state programs. S. Rep. No. 92-414, at 73; *see also* 118 Cong. Rec. at 10,667-69. Congress must "convey[] its purpose clearly" if it seeks to "significantly change[] the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). Congress did not do that here. Regulating pollution affecting "hydrologically connected" groundwater would upset the balance Congress chose to respect, imposing federal regulation over traditional areas of state concern.

Congress, moreover, recognized that "the jurisdiction regarding groundwaters is so complex and varied from State to State," S. Rep. No. 92-414, at 73, and that it lacked the "information," "knowledge," and "technology" to "devise

water-quality standards for ground water" or "justify the types of controls that are required for navigable waters," 118 Cong. Rec. at 10,667-68. Congress therefore gave States autonomy to address groundwater pollution within their borders. Only later, through other statutes like RCRA, did Congress regulate *select* sources of groundwater contamination at the federal level. *See* pp. 7-8, *supra*. Regulating releases to "hydrologically connected" groundwater under the CWA would force States to implement one federal option for *all* releases in lieu of their chosen regulatory schemes. That interpretation would dismantle Congress's deliberate choice to leave groundwater regulation to specifically tailored regimes.

2. *The Courts of Appeals Agree That the Clean Water Act Does Not Apply to Hydrologically Connected Groundwater*

Every court of appeals to confront the issue has agreed: Groundwater contamination falls outside the scope of the CWA, even if there is a putative "hydrological connection" to surface waters. In *Oconomowoc Lake*, for example, the Seventh Circuit held that the CWA does not cover pollutants "seep[ing]" into "local ground waters." 24 F.3d at 963, 965. The court understood that those pollutants could reach "underground aquifers that feed lakes and streams that are part of the 'waters of the United States.'" *Id.* at 965. But the court refused to extend the CWA to cover such discharges "just because the[y] may be hydrologically connected with surface waters." *Id.*

The Fifth Circuit reached the same conclusion in *Rice*. Any effort to construe the CWA to cover pollutants that reach navigable waters by "gradual, natural seepage" through groundwater, the court held, would be an "unwarranted expansion of the [statute]." 250 F.3d at 271. "Congress was aware that there was a connection between ground and surface waters but nonetheless decided to leave groundwater unregulated by the CWA." *Id.* The court "respect[ed] Congress's decision to leave the regulation of groundwater to the States." *Id.* at 272; *see also Johnson*, 437 F.3d at 161 & n.4 (holding that "[t]he CWA does not cover any type of ground water" in discussing hydrologically connected surface water).[3]

Rapanos supports that same result. The plurality expressed grave concern over an expansive construction that would cover "the entire land area of the United States." 547 U.S. at 722. Extending the CWA to "hydrologically connected" groundwater raises that same concern: Surface waters are "largely supplied" by groundwater. S. Rep. No. 92-414, at 73; *see* pp. 34, 39, *supra*. The plurality did observe that "lower courts have held that the discharge into intermittent *channels*

[3] *Quivira Mining Co. v. EPA*, 765 F.2d 126 (10th Cir. 1985), is not to the contrary. That case held that certain *surface waters*—the Arroyo del Puerto and San Mateo Creek—were navigable waters. *Id.* at 130. Both were intermittently connected to other navigable waters by surface connections. *Id.* *Hawai'i Wildlife Fund v. County of Maui*, No. 15-17447, pending before the Ninth Circuit, involves pollutants flowing from an injection well through a putative underground "conduit" to surface waters. *See Haw. Wildlife Fund v. Cty. of Maui*, 24 F. Supp. 3d 980, 998 (D. Haw. 2014). A dye study "*directly traced*" pollutants to the original source. *Id.* Sierra Club attempted no such study here. *See* Tr. 20:15-16, 62:4-6 (JA____, ____).

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." 547 U.S. at 743 (emphasis altered). That passage, however, concerns discharges through "channels" of *surface water*—indeed, "conveyances" that are themselves point sources. The passage does not concern *groundwater*, which Congress deliberately excluded from the CWA's permit requirement.

C. Extending the Clean Water Act to Groundwater Would Frustrate Regulation Under More Tailored Regimes

The district court's decision threatens dramatic consequences. The CWA does not merely exclude groundwater from its permit requirement. It also imposes a permitting process that is ill-adapted to diffuse groundwater seepage. By contrast, Congress and Virginia have adopted solid-waste regulatory regimes specifically tailored to groundwater, including provisions addressed to coal ash in particular. Expert Virginia regulators charged with implementing the programs sensibly regulated groundwater impacts from Dominion's coal ash under those solid-waste programs. The district court's decision threatens the integrity of those programs.

1. CWA permits rely primarily on effluent limitations—limits on the "quantities, rates, and concentrations" of pollutants released. *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 204-05 (1976). Consequently,

permit applicants generally must identify "outfall location[s]" and lines of "water flow," including approximate flows at intake and discharge points, average flows, maximum flows, and effluent characteristics. 40 C.F.R. §122.21(g); *see* 9 Va. Admin. Code §25-31-100(H)-(I).

That program is designed for liquid-waste discharges into navigable waters from "specific confined conveyances, such as pipes." S. Rep. No. 92-414, at 78. It is entirely ill-suited to the storage of solid waste, where infiltrating rainwater or groundwater can result in diffuse seepage with no single identifiable intake point, no particular outflow point, and no measurable flow. Here, Sierra Club made no effort to identify specific outflows, measure pollutant concentrations at those outflows, or even estimate how much arsenic was transmitted to navigable waters. And the district court found it impossible to determine whether the releases involved only "a few grams"—or much more. Op. 8(JA____); *see* Tr. 217:4-10(JA____-____).

By contrast, solid-waste regulations are specifically tailored to those ground-water issues. Congress, the EPA, and Virginia have each specifically addressed coal-ash disposal and associated groundwater impacts under RCRA-based regimes. *See* pp. 7-8, 10-11, *supra*. Those regimes address site design (which the CWA does not). *See* 40 C.F.R. §§257.70-257.74; 9 Va. Admin. Code §20-81-210. They provide for groundwater monitoring (which the CWA does not). *See* 40 C.F.R.

§§257.90-257.95; 9 Va. Admin. Code §§20-81-250, 20-81-210. And they address groundwater remediation (which the CWA does not). *See* 40 C.F.R. §§257.96-257.98; 9 Va. Admin. Code §§20-81-260, 20-81-210. Diffuse groundwater impacts from coal ash are properly addressed under those provisions—not through a permit regime that deliberately excludes groundwater.

2. For those reasons, the VDEQ has long relied on the distinction between groundwater and surface water in deciding whether to regulate Dominion's site under CWA or RCRA permit programs. *See* Tr. 792:10-798:13 (JA____-____) (VDEQ testimony). Virginia has regulated discharges to *surface* waters through a VPDES permit. Tr. 792:10-14, 795:3-9, 802:10-16 (JA____, ____, ____); 9 Va. Admin. Code §§25-31-10, 25-31-100. That permit regulates discharges from specific "outfalls," *i.e.*, pipes through which wastewater flows into waterways. Tr. 600:5-601:22 (JA____-____); Dominion Ex. 17 (JA____-____); 9 Va. Admin. Code §25-31-100(H)-(I). Identifying outfalls makes it possible to set effluent limitations, test discharges for compliance, and treat wastewater before discharge as necessary.

By contrast, Virginia regulates *groundwater* impacts from stored coal ash through its solid-waste program. Tr. 796:5-798:13, 805:22-25 (JA____-____, ____) (VDEQ testimony); 9 Va. Admin. Code §§20-81-100 to 20-81-260, 20-81-800 to 20-81-820. Dominion's permit under that program allows the VDEQ to

regulate such impacts comprehensively. Even if discrete outflows cannot be identified or measured, the VDEQ can protect the environment through groundwater monitoring, groundwater protection standards, and corrective action plans for groundwater contamination. *See* Tr. 797:5-798:21, 805:9-25 (JA____-____, ____-____) (VDEQ testimony); *see* 9 Va. Admin. Code §§ 20-81-100 to 20-81-260, 20-81-800 to 20-81-820.[4]

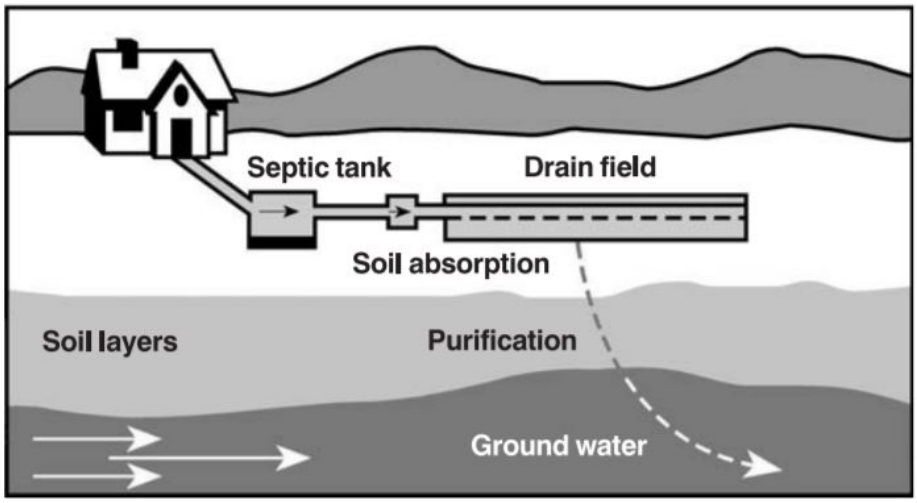
Even if state agencies do not receive *Chevron* deference, federal courts should "show some deference to a state agency interpreting regulations under the authority of a federally created program." *Ritter v. Cecil Cty. Office of Hous. & Cmty. Dev.*, 33 F.3d 323, 327-28 (4th Cir. 1994). Such deference is particularly appropriate where—as here—the state agency not only has substantial technical expertise and experience, but is specifically delegated implementation authority by federal law. *See* 33 U.S.C. § 1342(b); 42 U.S.C. §§ 6943-6947. The district court offered no good reason for rejecting Virginia's sensible regulatory decisions.

3. The district court's decision threatens to create significant regulatory gaps in some areas, while expanding regulations beyond sensible boundaries in others. RCRA and state law address "solid waste" but *exclude* any "industrial

[4] Even the district court recognized that Virginia regulates those groundwater impacts through its solid-waste program, not its VPDES program. Despite finding a violation of the CWA, the court's remedy required Dominion to reopen its application for a "solid waste permit." Am. Inj. ¶ 35 (JA____); Op. 20 (JA____). That mix-and-match remedy confirms that the coal ash is appropriately addressed under solid-waste law.

discharge[]" that is "subject to" a CWA permit. 42 U.S.C. §6903(27); *see* Va. Code §10.1-1400 (similar). Consequently, to the extent any discharges here are subject to CWA permitting, they are *excluded* from RCRA and related state laws. *See Inland Steel Co. v. EPA*, 901 F.2d 1419, 1421-22 (7th Cir. 1990). The district court's decision could thus render decades of state regulatory efforts—including ongoing corrective actions—a nullity. It could also render Congress's recent coal-ash amendments to RCRA and the EPA's CCR Rule inapplicable. The district court's expansion of the CWA thus threatens state and federal efforts to provide a comprehensive regulatory approach to the site and to coal-ash storage generally.

At the same time, the district court's decision expands CWA permitting beyond any sensible boundary. If the CWA covers releases of pollutants into groundwater, it encompasses virtually *all* releases of liquids from a point source to the ground. Even a septic system or lawn irrigation system releases pollutants (such as ammonia from waste or chloramine added by the water company) from an identifiable source:



EPA, *USEPA Onsite Wastewater Treatment Systems Manual* 1-1 (Feb. 2002). Those pollutants can then migrate through groundwater into surface waters. *See id.* at 1-2; Tr. 68:2-4, 529:2-9 (JA____, ____-____). The district court's decision thus threatens to force Virginia residents to submit, and Virginia regulators to process, hundreds of thousands of permit applications for virtually every home with a septic system (more than 1 in 5 nationwide) or lawn irrigation system. The resulting burden will inevitably divert scarce resources from more pressing environmental priorities.[5]

4. Finally, the decision below exposes regulated entities to massive liabilities despite good-faith obedience to state regulators. As the district court observed, Dominion cooperated with the VDEQ at "every step"; it obtained

[5] Even the EPA recognizes that discharges from septic systems and the like "do not need an NPDES permit" unless the "discharges go *directly to surface waters*." EPA, *Summary of the Clean Water Act*, https://www.epa.gov/laws-regulations/summary-clean-water-act (emphasis added).

precisely the permits it was told to obtain and sought at all times to be a "good corporate citizen." Op. 17 (JA____). Yet now, years after following state mandates, Dominion is deemed liable because the VDEQ purportedly relied on the "wrong" federal-state program. A regulated entity cannot be held liable in light of such uncertainty. *See Wis. Res. Prot. Council v. Flambeau Mining Co.*, 727 F.3d 700, 707-11 (7th Cir. 2013). And the need to avoid that uncertainty was precisely why Congress drew a clear regulatory line by excluding groundwater.

D. The District Court's Contrary Rationale Lacks Merit

Without analyzing the CWA's text or history, the district court opined that Congress's goal of "protect[ing] the water quality of the nation's surface water . . . would be defeated" unless the CWA covered hydrologically connected groundwater. Op. 12 (JA____). "But no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). And here, Congress also sought to preserve "the primary responsibilities and rights of States" in managing "land and water resources." 33 U.S.C. § 1251(b). The decision below upsets those state regulatory efforts, as well as Congress's deliberate choice to address groundwater by other means.

The district court's reference to a "direct" hydrological connection does not mitigate the impact. The line between a "direct" and "indirect" hydrological connection is opaque, and the court provided no guidance on where it should be

drawn. In this case, for example, Sierra Club offered no evidence, such as dye-trace or other studies, of a direct hydrological connection. *See* Tr. 20:15-16, 62:4-6 (JA____, ____). It was undisputed that the groundwater moved "radially" along no particular path, and migrated diffusely "in both a vertical and horizontal direction." Tr. 134:11-14, 193:6-17, 494:8-14 (JA____, ____, ____). Tidal action caused water to "actually flow[] back into the land." Tr. 159:9-12 (JA____). Arsenic in groundwater migrates at a glacial pace—0.28 feet per year. Tr. 720:3-721:21 (JA____-____). And arsenic could be immobilized by iron along the way, either temporarily or permanently. Tr. 260:3-261:2 (JA____-____). Such movement is hardly "direct" in the sense of "proceeding from one point to another . . . without deviation or interruption." *Webster's New International Dictionary* 738 (2d ed. 1953).

The phrase "direct hydrological connection," moreover, appears nowhere in the statute. The district court created that novel and undefined standard itself. Congress provided a different and clearer standard: Discharges from point sources into "navigable waters" are covered. Pollution of "groundwater" is not.

The district court's reliance on statements from the EPA fares no better. Op. 13 (JA____). That agency has "never" interpreted groundwater to be a "water of the United States." 80 Fed. Reg. at 37,073; 79 Fed. Reg. at 22,218. The EPA considers "hydrologic connection[s]" in determining whether *surface waters* that

are not "navigable in fact"—such as "wetlands," "tributaries," and "swales"—constitute "navigable waters." 80 Fed. Reg. at 37,101. But groundwaters are not surface waters.

Moreover, none of the administrative materials cited by the district court was issued in a rulemaking instituted to resolve whether the CWA covers groundwater. *See* EPA, *NPDES Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations*, 66 Fed. Reg. 2,960, 2,960-61 (Jan. 12, 2001) (addressing wastewater generated by concentrated animal feeding operations); EPA, *Notice of Final Rule for Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations*, 56 Fed. Reg. 64,876, 64,876 (Dec. 12, 1991) (amending water quality standards for Indian reservations). Stray statements and "[c]ollateral reference[s]" in rulemakings not addressing the issue at hand deserve no deference—they are no substitute for "focused attention." *Oconomowoc Lake*, 24 F.3d at 966. And the EPA is now reconsidering its prior rulemakings on "navigable waters," making reliance on them perilous in any event. *See* 82 Fed. Reg. at 34,899. By contrast, the VDEQ—the agency charged with boots-on-the-ground implementation—has given the issue focused attention. And it has chosen to regulate groundwater impacts at the site under RCRA and state law—not the CWA. *See* pp. 45-46, *supra*.

In any event, no agency can override Congress's clear direction. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-45 (1984). The stray EPA statements the district court cited never address statutory text, legislative history, or the EPA's repeatedly expressed view that "waters of the United States" excludes groundwater. Such statements are entitled to no deference under any standard. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (agency must explain "the validity of its reasoning" and "its consistency with earlier and later pronouncements" to be persuasive).

II. DOMINION'S STORED COAL ASH IS NOT A "POINT SOURCE" UNDER THE CLEAN WATER ACT

The district court also vastly expanded the scope of the term "point source." The court held that the "Coal Ash Piles"—which it defined to encompass the "Historic Pond, Ash Landfill, Bottom Ash Pond, and Sedimentation Pond"—constitute a "point source." Op. 3, 14 (JA____, ____). But those features together span 44 acres. They do not themselves transport pollutants. Except for features specifically designed to channel wastewater and rainwater to a *VPDES-permitted* outfall, there is no discernable point where water enters or exits. And a peninsula spanning 44 acres looks nothing like traditional point sources such as pipes, ditches, and channels. Yet the district court held that stored coal ash is a "point source"—a "discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). That holding is inconsistent with statutory text, history, and precedent.

A. A Point Source Must Be a Confined and Discrete Conveyance—Not a Mass of Solid Waste

1. *The Clean Water Act's Text Shows That a Point Source Must Be a Distinct Structure That Transports Pollutants*

The CWA defines "point source" in predictable fashion—as a "discernible, confined and discrete conveyance." § 1362(14). Each of those terms carries a distinct ordinary meaning. A "conveyance" is "a means or way of conveying," such as a "channel or passage for *conduction* or *transmission* as of fluids." *Webster's*, *supra*, at 583 (emphasis added); *see id.* (defining "convey" as "[t]o bear *from* one place *to* another; to *carry*; *transport*" (emphasis added)). The conveyance must be "discernible," *i.e.*, "[c]apable of being discerned" or "distinguishable." *Id.* at 742. It must be "confined," *i.e.*, having "a common boundary" or "restrain[ed] within limits." *Id.* at 560. And it must be "discrete"—"[s]eparate" or "individually distinct." *Id.* at 745. Thus, it is not enough that a medium be *distinguishable, restrained, and separate*. The medium must be a "conveyance"—a channel that *carries* and *transports* pollutants *from* one location *to* another.

The statutory examples make that clear. The CWA specifies that a point source "includ[es]" a "pipe," "ditch," "tunnel," "conduit," and similar objects. § 1362(14). Those mechanisms all *transport* pollutants along a specific, defined route from a starting point to a destination. While a few examples—such as "container[s]" or "concentrated animal feeding operation[s]"—are potentially

broader, those terms indicate only that *some* containers and *some* feeding operations are "point sources"—namely, those that operate as "conveyances" for pollutants. *See United States v. Parker*, 30 F.3d 542, 552-53 (4th Cir. 1994). Thus, in discussing concentrated animal feeding operations, Congress recognized that the definition of "point source" would encompass "*only* those concentrated animal feeding operations which would collect and concentrate waste for discharge *through a definite point source outlet*." 118 Cong. Rec. 10,762 (1972) (Rep. Henderson) (emphasis added). The inclusion of such examples cannot expand the meaning of "point source" beyond the definition itself.

That definition excludes the coal ash at issue here. The coal ash does not "carry" or "transport" pollutants from one place to another. A deposit of solid waste is no more a "conveyance" than a house with a shingled roof or a parking lot. Moreover, the alleged point source here comprises an area spanning 44 acres—twice the size of the median subdivision—and reaches up to 70 feet above sea level. *See* Tr. 115:3-6, 919:8-13 (JA____, ____); FPO ¶13 (JA____); Paul Emrath, *The Typical American Subdivision*, Nat'l Ass'n of Home Builders (Sept. 5, 2014), http://eyeonhousing.org/2014/09/the-typical-american-subdivision/. It dwarfs nearby forests and structures:

2014 Site Aerial (Dkt. 108-2)(JA____). In no sense is that site remotely "confined" or "discrete."

2. *The Clean Water Act's History Confirms the Meaning of "Point Source"*

Congress was well aware that free-flowing, unchanneled waters such as "runoff" moving across the landscape could have a "severe" impact on "water quality." S. Rep. No. 92-414, at 39. But Congress crafted a definition of "point source" that excludes "runoff" and other unchanneled waters, limiting the term to "specific confined conveyances, such as pipes." *Id.* at 78. Reaching beyond those specific channels would have required Congress to regulate land use—a task traditionally left to the States. *See id.* at 39. As Senator Muskie observed, "[t]here is no effective way as yet, other than land use control, by which you can intercept

that runoff and control it in the way that you do a point source." 117 Cong. Rec. 38,825 (1971).

Diffuse seepage into groundwater is no more a point source than surface runoff. Any effort to regulate it under the CWA would put the federal government in the business of regulating solid-waste disposal and land use generally. If diffuse seepage were a point source, every garden, farm, or golf course through which rainwater passes—picking up fertilizer or other residues as it percolates—would be a point source. So would every house, building, or engineered structure onto which rain falls. But Congress chose not to regulate those classic nonpoint sources under the CWA's permit requirement.

Congress instead limited the CWA to supporting state efforts to control nonpoint-source pollution by providing grants, 33 U.S.C. § 1255(b), assisting with program development, §§ 1288(b)(2), 1329, and providing technical guidance, § 1314(f). Where Congress addressed land use, it did so in specialized statutes, like RCRA, tailored to nonpoint-source pollution associated with waste storage. *See* 42 U.S.C. § 6942(c)(1); pp. 44-45, *supra*.

The CWA's permit regime is wholly unsuited to such sources. A discharge permit requires data about specific outfalls, monitoring at those outfalls, and pollutants emitted from those outfalls. *See* pp. 43-44, *supra.* Such a regime is ill-suited for diffuse groundwater seepage, which like runoff, cannot be "trace[d] . . .

to a particular point," "measure[d]," or subjected to effluent limitations. *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002). Seepage is thus regulated under state law, RCRA, and other land-use controls. Congress never envisioned that the CWA's effluent limitations would apply.

3. *Precedent Confirms That Stored Solid Waste Is Not a Point Source*

Precedent confirms that point sources must be discrete conveyances that channel—carry or transport—pollutants to navigable waters. In *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976), this Court recognized that "Congress has limited the definition of 'point source' to 'any discernible, confined or discrete conveyance'"—terms that "do[] not include unchanneled and uncollected surface waters." *Id.* at 1373. Likewise, in *Consolidation Coal Co. v. Costle*, 604 F.2d 239 (4th Cir. 1979), *rev'd on other grounds sub nom. EPA v. National Crushed Stone Ass'n*, 449 U.S. 64 (1980), the Court ruled that "surface runoff . . . does not fit within the statutory definition of a point source"—unlike "discharges which are *pumped, siphoned or drained*" from coal storage and associated areas. *Id.* at 250 (emphasis added).

Those cases foreclose the ruling below. If "unchanneled and uncollected surface waters" are not a point source—even if they pick up pollutants as they wash over a physical site feature—then unchanneled and uncollected groundwater is not either. Groundwater and rainwater that pick up arsenic as they migrate

through coal ash are no different from surface runoff collecting pollutants as it runs down the side of a hill.

Precedent from other courts confirms that conclusion. In *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004), the Supreme Court stated that "a point source . . . need only *convey*"—or "*transport*"—"the pollutant to 'navigable waters.'" *Id.* at 105 (emphasis added). The Second Circuit has likewise held that point sources are "physical structures and instrumentalities that systematically act as a means of *conveying* pollutants *from* an industrial source *to* navigable waterways." *United States v. Plaza Health Labs.*, 3 F.3d 643, 646 (2d Cir. 1993) (emphasis added). The coal ash at issue here does nothing of the sort. It does not *convey* pollutants by channeling them from one identifiable point to another. At most, groundwater or rainwater pick up pollutants as they naturally percolate or diffusely seep through.

Case after case rejects similar efforts to characterize such site features as point sources. In *Ecological Rights Foundation v. Pacific Gas & Electric Co.*, 713 F.3d 502 (9th Cir. 2013), the court held that wooden utility poles were not point sources merely because rainwater fell on the poles, picking up contaminants in the process. *Id.* at 508-10. The poles did not "channel[] and control[] stormwater" between two points. *Id.* at 510. In *Froebel v. Meyer*, 217 F.3d 928 (7th Cir. 2000), the court ruled that a dam lacking "outlets . . . such as spillways, pipes, and valves"

was not a point source. *Id.* at 937-38. And in *Woods Knoll, LLC v. City of Lincoln*, 548 F. App'x 577 (11th Cir. 2013), the court found no point source where the defendant cleared land but did not alter it so as to "cause[] stormwater to be collected or channeled" through "ditches, culverts, channels, and similar conveyances." *Id.* at 580. Those cases squarely apply here.[6]

By contrast, in *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979), the court found that a "combination of sumps, ditches, hoses and pumps" was a point source. *Id.* at 374. In *Driscoll v. Adams*, 181 F.3d 1285 (11th Cir. 1999), the court found a point source where the defendant "collected stormwater by pipes and other means," including culverts and check dams. *Id.* at 1287, 1290-91. And in *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008), the court found a point source where pollutants were conveyed through septic systems "directly into federal waters." *Id.* at 327, 330-34; *see also Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1141 (10th Cir. 2005) (abandoned mine shaft); *Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2d Cir. 1991) (culvert), *rev'd in part on other grounds*, 505 U.S. 557 (1992); *Trs. for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir.

[6] As noted above, the "sedimentation pond" and "bottom ash pond" intentionally channel water aboveground. *See* p. 15, *supra*. But they channel it to an outfall *with a VPDES permit* under the CWA. Tr. 599:15-601:9 (JA____-____); Dominion Ex. 17 (JA____-____). Moreover, the district court's reasoning and remedy do not distinguish either of those features from the other Coal Ash Piles, instead addressing them as "one location." Op. 14 (JA____).

1984) (sluice box). That critical feature—the transport of pollutants through a discernable channel or pipe—is lacking here.

Courts of appeals have also repeatedly held that groundwater seepage does not amount to a point source. In *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143 (9th Cir. 2010), the Ninth Circuit rejected the argument that water "seep[ing] through the cover" of a pit was a point source. *Id.* at 1153. That seepage constituted "nonpoint source pollution" because "there [wa]s no confinement or containment of the water." *Id.* By contrast, water that seeped through the cover *and entered a stormwater drain system* that "channel[ed]" it *would* be a point source. *Id.* at 1152-53. Similarly, the Tenth Circuit has held that "[g]roundwater seepage that travels through fractured rock would be nonpoint source pollution, which is not subject to NPDES permitting." *El Paso*, 421 F.3d at 1140 n.4.

Congress has acquiesced in those longstanding constructions. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). Congress has amended the definition of point source twice—in 1977, when it added an exception for "return flows from irrigated agriculture," Pub. L. No. 95-217, § 33(b), 91 Stat. 1566, 1577 (1977), and in 1987, when it added an exception for "agricultural stormwater discharges," Pub. L. No. 100-4, § 503, 101 Stat. 7, 75 (1987). Congress has not otherwise changed

the statutory definition. If Congress had wanted to alter the prevailing understanding that point sources must "convey" pollutants to navigable waters, it could have done so. It did not.

B. The District Court's Contrary Reasoning Is Unavailing

The district court held that the Coal Ash Piles were a point source because they "concentrate" coal ash into "one location" that "channels and conveys arsenic directly into the groundwater and thence into the surface waters." Op. 14-15 (JA____-____). That characterization is bereft of factual and legal support.

The coal ash is not a "specific confined conveyance[], such as [a] pipe[]." S. Rep. No. 92-414, at 78. It is a part of the landscape covering 44 acres and measuring 70 feet high. It is no more a conveyance than a boulder or a hill. Its composition may include some pollutants. But it is not a "conveyance" that channels, transports, or moves pollutants from one location to another.

Nor is the underlying groundwater a point source. Groundwater is "the water found underground in spaces or pores between soil particles or rock." Op. 4 (JA____). It migrates diffusely "in both a vertical and horizontal direction" and in "a radial type direction." Tr. 494:9-14 (JA____). Such diffuse seepage, like runoff, "water seep[ing]" through a mining-pit cover, or "[g]roundwater seepage" through "fractured rock," is quintessentially *nonpoint*-source pollution. *Greater Yellowstone*, 628 F.3d at 1153; *El Paso*, 421 F.3d at 1140 n.4. Sierra Club's own

expert thus conceded the groundwater is not a "point source": "Of course there's a ring of groundwater sources here, but *not an individual point source*." Tr. 511:12-13 (JA____) (emphasis added).

The district court opined that the stored coal ash is a point source because it allegedly "concentrates," "collects," and "channels" pollutants. Op. 14 (JA____). But the stored coal ash does not "concentrate" or "collect" pollutants, even if it is partly composed of them. Regardless, "concentrate" and "collect" appear nowhere in the statutory definition. *See* 33 U.S.C. § 1362(14). Many objects "concentrate" or "collect" pollutants, including lakes, fields, and other physical structures. That does not make them point sources. *See, e.g.*, *Froebel*, 217 F.3d at 937-38.

The stored coal ash also does not "channel" pollutants. Rainwater may absorb arsenic as it "percolat[es]" through coal ash, just as rainwater might percolate through the soil in a farmer's field. Tr. 122:12-23 (JA____-____). Or groundwater may pick up arsenic as it flows through along no particular path. Tr. 123:23-124:3 (JA____-____). But no one would claim the farmer's field is a "point source" that channels pollutants just because rainwater or groundwater seeps through it. The same is true here. The coal ash is solid waste. It does not "channel" anything.

The district court characterized the coal ash as "[e]ssentially" a "discrete mechanism[ ] that convey[s] pollutants from the old power plant to the river." Op.

14(JA____) (emphasis added). But the coal ash does no such thing. It does not "convey" anything, much less transport pollutants from the power plant to the river like a pipe or ditch. The statute requires an *actual* "conveyance," not an impressionistic metaphor.

Finally, the district court noted that the peninsula's current shape is the result of "human action" that had the "effect of channeling or changing the path" of "precipitation." Op. 15(JA____). That rationale stretches the meaning of "point source" beyond the breaking point. *Any* outdoor physical structure alters the flow of water in that sense. The tilling of a garden or the plowing of a farm "change[s] the geography" of a piece of land and alters the flow of rainwater. *Id.* The district court's rationale would convert *any* man-made feature—a mound of dirt, a bungalow, or an entire subdivision—into a point source. That cannot be right. Physical objects like utility poles, mining pits, or dams are not point sources merely because they "change the path" of water. *See Ecological Rights*, 713 F.3d at 509-10; *Greater Yellowstone*, 628 F.3d at 1153; *Froebel*, 217 F.3d at 937-38.

The district court claimed that *Sierra Club v. Abston Construction Co.*, 620 F.2d 41 (5th Cir. 1980), deemed a physical feature at a mining facility to be a point source because it affected the flow of water. Op. 15(JA____). But *Abston* held no such thing. The court recognized that "surface runoff from rainfall, when collected or channeled by coal miners in connection with mining activities, constitutes point

source pollution." 620 F.2d at 47. But it did not conclude that *every* physical feature at a mining site would be a point source whenever it altered the path of water. To the contrary, it stated that, if there was a "pipe," "confined system," or "ditches, gullies and similar conveyances" through which pollutants flowed, there "*may*" be a point source. *Id.* at 45, 47 (emphasis added); *cf. Consol. Coal*, 604 F.2d at 250. The "ultimate question" remained whether any "pollutants were discharged from 'discernible, confined, and discrete conveyance(s).'" *Abston*, 620 F.2d at 45. Far from suggesting that Dominion's site is a point source, that rationale directs courts to consider the very statutory terms the district court ignored.

CONCLUSION

The district court's judgment on Count I should be reversed.

REQUEST FOR ORAL ARGUMENT

Dominion respectfully requests oral argument. This is an important case, and the issues would benefit from argument.

September 13, 2017

Respectfully submitted,

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September 13, 2017

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