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
REPLY AND CROSS-APPEAL RESPONSE BRIEF OF APPELLANT

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REPLY

Sierra Club's brief largely ignores the text, structure, and history of the statute it purports to construe. No one denies that the CWA's permit requirement is limited to discharges to "navigable waters," a term that excludes groundwater. Nor is there any dispute that Congress's exclusion of groundwater was deliberate. Congress was keenly aware that groundwater inevitably affects navigable waters—the two are ubiquitously connected. Congress declined to impose permit requirements for groundwater impacts *despite* those ubiquitous connections.

Sierra Club nonetheless insists that the CWA's permit requirement extends to groundwater that is "hydrologically connected" to navigable waters. But that is an end run around Congress's deliberate choice to exclude groundwater despite ever-present groundwater and surface-water connections. Sierra Club tries to cabin that circumvention by asserting that the hydrological connection must be "direct." But that term is not in the statutory text and in no way addresses Congress's reasons for excluding groundwater—the jurisdictional difficulties, technical challenges, and diversity of state approaches groundwater implicates. Moreover, the "direct hydrological connection" standard is hopelessly vague, as this case illustrates: Sierra Club never attempts to explain how groundwater that meanders along no particular path and could take years to carry pollutants to any surface waters has a "direct" connection to those surface waters. Simply put, Congress

chose to exclude groundwater from the CWA's permit program, leaving regulation of that issue to better tailored solid-waste regimes under state law and RCRA. Sierra Club would upend that choice.

Sierra Club finds no more support for its expansive construction of "point source." Sierra Club tries to erase the requirement that "point sources" act as "conveyances," expanding "point source" to include *any* discernable object from which pollutants might be drawn. That ignores the CWA's express terms. And it could turn practically every physical site feature into a point source.

Sierra Club never explains how the coal ash "conveys" pollutants here. At most, groundwater and rainwater that are migrating along no particular path may pick up pollutants as they come into contact with coal ash. The courts unanimously agree that the point-source requirement is not met when unchanneled rainwater picks up pollutants while flowing across landscape features. Sierra Club does not explain why the result should be any different for the unchanneled groundwater here.

The combined effect of Sierra Club's atextual constructions is extraordinary. Any physical object—a building, a pile of dirt, or a parking lot—could be a point source. And a permit could be required whenever water moves across a point source to the ground. Sierra Club's construction removes core limitations on the CWA's scope. It cannot be sustained.

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

A. Congress Intentionally Excluded Groundwater from the Clean Water Act's Permit Requirement

It is undisputed that Congress decided not to require CWA permits for groundwater impacts. Sierra Club nonetheless construes the CWA to require permits for *some* groundwater pollution, theorizing that such pollution amounts to a discharge to navigable waters if the groundwater has a "direct hydrological connection" to surface water. That construction reverses Congress's deliberate decision to exclude groundwater—a decision made with full knowledge of groundwater's ubiquitous relationship to navigable waters. Scattered district court decisions and unreasoned EPA statements cannot support that atextual expansion.

1. *Sierra Club's Hydrological-Connection Rule Circumvents Congress's Deliberate Exclusion of Groundwater*

Several key points are not in dispute. Sierra Club does not dispute that the CWA's permit requirement applies only to "discharges to navigable waters," "waters of the contiguous zone," and "the ocean." Dominion Br. 4, 31; *see* Sierra Club Br. 27-40. It agrees that "navigable waters" do not encompass "groundwater." Dominion Br. 31-33; *see* Sierra Club Br. 27-40. And no one disputes that Congress intentionally excluded groundwater when limiting the CWA's permit requirement to "navigable waters." Dominion Br. 31-35.

It is undisputed, moreover, that Congress did so "fully aware that groundwater contamination affects—inevitably affects—navigable waters." Dominion Br. 39. Congress "recognize[d] the essential link between ground and surface waters," that surface waters "are largely supplied with water from the ground," and the "artificial nature of any distinction" between the two. S. Rep. No. 92-414, at 73 (1971); *see also* 118 Cong. Rec. 10,666 (1972) (recognizing that "ground water [will] get[] into navigable waters"). Congress "considered—and rejected—proposals to extend the CWA to groundwater" nonetheless. Dominion Br. 33-34, 39-40. Congress concluded that groundwater regulation was too "complex and varied from State to State" to support a uniform federal approach. S. Rep. No. 92-414, at 73. And Congress lacked the "information," "knowledge," and "technology" to impose a groundwater permit requirement. 118 Cong. Rec. 10,667-68. Sierra Club disputes none of that.

Congress, moreover, expressly addressed groundwater pollution through other means, namely state controls and other federal statutes such as RCRA. Dominion Br. 32-33, 35. Sierra Club nowhere denies that those regimes are better tailored to address groundwater impacts from stored solid waste. The CWA does not "address site design," "provide for groundwater monitoring," or "address groundwater remediation." *Id.* at 44-45. By contrast, RCRA and similar state laws focus on precisely those issues. *Id.* Likewise, Sierra Club fails to address the fact

that "end-of-pipe" effluent limitations—a central feature of CWA permitting—are ill suited to diffuse groundwater migration. *Id.* at 43-44. Those facts are hardly "irrelevant." Sierra Club Br. 33. Far from creating a "'groundwater loophole,'" Waterkeeper Br. 33, Congress plugged any hole through better fitting regimes like RCRA. Extending the CWA to issues Congress addressed through those other regimes thwarts Congress's design.

Simply put, the CWA draws a sharp distinction between surface waters and groundwater. Congress might have regulated surface waters broadly, reaching "'any'" addition of "'any'" pollutant from "'any'" point source. Waterkeeper Br. 7. Congress likewise might have intended to cover discharges from a point source passing through an "intervening" surface "conduit." Sierra Club Br. 32. But Congress deliberately excluded groundwater because of jurisdictional, technological, and other obstacles—and did so despite ubiquitous connections between groundwater and surface waters. A judicially created "hydrological connection" exception reverses Congress's deliberate choice.

2. *Precedent Forecloses Sierra Club's Construction*

Largely ceding any argument about statutory text, structure, or history, Sierra Club relies on assorted cases. It urges that *Rapanos v. United States*, 547 U.S. 715 (2006), interpreted the CWA to encompass "the discharge of pollutants to navigable waters through an identifiable groundwater hydrologic connection."

Sierra Club Br. 32. But *Rapanos* did not address groundwater at all. It addressed whether the CWA confers jurisdiction over *surface waters* (wetlands) connected to navigable waters through intermittent *surface* flows. 547 U.S. at 729 (plurality opinion). Nothing in *Rapanos* remotely speaks to whether the CWA covers groundwater.

The plurality observed that the CWA does not require that pollutants be added "directly" to navigable waters. 547 U.S. at 743 (emphasis omitted). But that passage concerns discharges to surface waters that pass through "intermittent channels" of *surface waters*—channels that are themselves " 'conveyances' " and thus potential point sources. *Id.* at 743-44. Extending that theory to diffuse *groundwater* migration would frustrate Congress's deliberate choice to leave groundwater regulation to other regimes. Moreover, that interpretation would raise precisely the plurality's concerns about an "immense expansion of federal regulation of land." *Id.* at 722. It is one thing to debate whether the CWA requires permits for releases to surface waters that are connected to navigable waters. But stretching the CWA to cover anything rainwater and groundwater might touch as they migrate diffusely through the ground goes too far.

Justice Kennedy's concurring opinion underscores how far beyond *Rapanos* Sierra Club must go. The concurrence would extend CWA permitting jurisdiction to surface waters (wetlands) that are not "in fact" navigable—deeming them

"navigable" under the CWA if they have a "significant nexus" to waters that are navigable in fact. 547 U.S. at 759, 767, 779 (Kennedy, J., concurring). Under that standard too, Sierra Club would lose: Sierra Club concedes that ground waters are not "navigable waters" in *any* sense. Sierra Club Br. 19, 33.

Sierra Club's reliance on court of appeals decisions (at 38) fares worse still. The only courts of appeals to address the issue have rejected Sierra Club's position. Dominion Br. 41-43. Sierra Club tries to distinguish *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), as holding only that "groundwater" is not "'within the class of waters protected by the [CWA].'" Sierra Club Br. 39. But Sierra Club overlooks the Fifth Circuit's express holding: "It would be an unwarranted expansion of the [statute] to conclude that a discharge onto dry land, some of which eventually reaches groundwater and *some of the latter of which still later may reach navigable waters, all by gradual, natural seepage*, is the equivalent of a 'discharge' 'into or upon the navigable waters.'" 250 F.3d at 271 (emphasis added). Even if the *Rice* plaintiffs "failed to provide 'evidence of a close, direct and proximate link,'" Sierra Club Br. 39, the court's holding—its construction of the CWA—went beyond that shortcoming.

Nor can Sierra Club evade *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994). Sierra Club characterizes that decision as holding that a plaintiff must "allege[ ] or prove[ ]" a direct hydrological connection.

Sierra Club Br. 39. But the decision's rationale is broader. The Seventh Circuit recognized that "[t]he possibility of a hydrological connection *cannot be denied*," but refused to expand the CWA to cover groundwater nonetheless. 24 F.3d at 965 (emphasis added). As the court explained, the CWA does not provide "authority over ground waters, just because these may be hydrologically connected with surface waters." *Id.*

The Seventh Circuit did not hold otherwise in *U.S. Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977), *overruled on other grounds by City of West Chicago v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632 (7th Cir. 1983). *See* Sierra Club Br. 39-40. That case did not even address whether the CWA extends to hydrologically connected groundwater. It held that the EPA could regulate the disposal of pollutants into deep injection wells under a CWA permit because § 1342 requires permitting agencies to have "'adequate authority'" to "'control the disposal of pollutants into wells.'" 556 F.2d at 852. Sierra Club identifies no CWA provision giving permitting agencies similar authority over groundwater.

Nor was Sierra Club's position adopted in *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005). There, the EPA had *rejected* a standard "requir[ing] ground water monitoring and discharge controls" for all concentrated animal feeding operations. *Id.* at 514-15. The court upheld the EPA's approach. It noted that the EPA proposed imposing "groundwater-related requirements . . . on

a case-by-case basis." *Id.* at 515. But the court did not rule on the EPA's authority. It focused solely on the EPA's rationale that case-by-case evaluation, rather than across-the-board requirements, allowed effluent requirements to be "more effectively evaluated and implemented." *Id.*

The remaining cases cited by Sierra Club (at 38) do not help it either. In *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), a point source discharged into *wetlands*—surface waters—known as the "Basalt Pond." *Id.* at 995. The Ninth Circuit considered the wetlands' "'hydrologic linkage'" to a nearby river to determine whether the wetland constituted "navigable waters" under Justice Kennedy's "significant nexus" test. *Id.* at 1000-01. Here, Sierra Club agrees that groundwaters are not "navigable waters." Sierra Club Br. 19, 33. The Tenth Circuit's decision in *Quivira Mining Co. v. EPA*, 765 F.2d 126 (10th Cir. 1985), is similarly irrelevant: It too concerned discharges into surface waters—the Arroyo del Puerto and San Mateo Creek—connected by "surface connection[s]" and "regular[] [flows] through underground aquifers" to "navigable-in-fact streams." *Id.* at 130. Neither case addressed groundwater with a purported hydrological connection to surface water.[1]

[1] Sierra Club cites various district court decisions. But as the court below observed, other district courts "have disagreed." Op. 12(JA____); *see, e.g.*, *26 Crown Assocs., LLC v. Greater New Haven Reg. Water Pollution Control Auth.*, No. 15-cv-1439, 2017 WL 2960506, at *7-9 (D. Conn. July 11, 2017); *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 252 F. Supp. 3d 488, 496-98

3. *Unreasoned EPA Constructions Warrant No Deference*

The only other support Sierra Club invokes is statements from EPA documents. Of course, the EPA has "'never'" regarded groundwater as "'navigable waters.'" Dominion Br. 37. Sierra Club nonetheless urges this Court to defer to the EPA's purported view that the EPA can regulate groundwater if it is hydrologically connected to surface waters. Sierra Club Br. 33-38. The statute forecloses that position. Congress recognized that virtually *all* surface water is connected to groundwater—and excluded groundwater anyway. Dominion Br. 31-35, 38-41; pp. 3-5, *supra*. This Court cannot defer to agency statements that overturn rather than implement Congress's clear choices.

None of the cited EPA materials, moreover, speaks with "the force of law" or provides "adequate reasons"—defects that independently foreclose deference. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Most of the EPA materials cited by Sierra Club and its *amici* consist of bare assertions. Sierra Club Br. 34-36; Waterkeeper Br. 12-18. For example, in a 1990 rulemaking about stormwater pollution, the EPA stated that "discharges to groundwater are not covered . . . unless there is a hydrological connection between the ground water

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(D.S.C. 2017); *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014); *Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC*, 794 F. Supp. 2d 602, 619-20 (D. Md. 2011). The courts of appeals, by contrast, are unanimous in rejecting groundwater regulation under the CWA.

and a nearby surface water body." EPA, *NPDES Permit Application Regulations for Storm Water Discharges*, 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990). That was the *whole* of the EPA's analysis. An agency statement that so obviously fails to "wrestle with the relevant statutory provisions" warrants no deference. *Children's Hosp. & Research Ctr. of Oakland, Inc. v. NLRB*, 793 F.3d 56, 59 (D.C. Cir. 2015). Sierra Club also points to a 1991 preamble to a rule about Indian reservations, a 1998 rulemaking about stormwater pollution, and responses to comments on the agency's 2015 Clean Water Rule. Sierra Club Br. 35-36. None of those statements analyzes the CWA's text, structure, or history either. Such stray statements are no substitute for reasoned decisionmaking. *Oconomowoc Lake*, 24 F.3d at 966.

The only EPA analysis to go through notice and comment was a statement from a 2001 notice of *proposed* rulemaking. *See* EPA, *NPDES Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations*, 66 Fed. Reg. 2,960, 3,015 (Jan. 12, 2001). In the *final* rule, however, the EPA "*reject[ed]* establishing requirements related to discharges to surface water that occur via ground water with a direct hydrologic connection." EPA, *NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs)*, 68 Fed. Reg. 7,176, 7,216 (Feb. 12, 2003) (emphasis added). The EPA cited various reasons, including

"scientific uncertainties" and "conflicting legal precedents." *Id.* Sierra Club cannot plausibly ask this Court to defer to a *proposed* interpretation that the EPA backed away from due to doubts about its legality.

Waterkeeper invokes the EPA's later disclaimer that it "'did not . . . mean to suggest that NPDES authorities lacked the power to impose groundwater-related requirements on a case-by-case basis.'" Waterkeeper Br. 17. But an agency statement that it "did not . . . mean to suggest" the *absence* of authority is not an affirmative assertion that it *has* such authority. In any event, the EPA's disclaimer is unreasoned. It does not explain how the EPA could possess legal authority to regulate on a "case-by-case basis" if "conflicting legal precedents" caused the EPA to doubt its authority to do so by rule. Reasoned decisionmaking requires an agency to reconcile differing positions. *See Encino*, 136 S. Ct. at 2126. No such effort was undertaken here.

The EPA's doubts were well founded. For example, the 2001 proposal assumed that Congress's rejection of Representative Aspin's effort to extend the CWA to groundwater did not "signal an explicit decision by Congress to exclude even ground water per se from the scope of the permit program." 66 Fed. Reg. at 3,016. But the proposal did not cite—much less discuss—Congress's express rejection of other attempts to cover groundwater. *See* Dominion Br. 33-35. It ignored that Congress chose not to regulate groundwater *despite* recognizing that

any distinction between ground and surface water was "'artificial.'" *Id.* at 38-41. It ignored that regulating groundwater would federalize issues Congress sought to leave to the States, fundamentally altering the federal-state balance. *Id.* at 32, 35, 40-41, 43-49. It ignored the relationship between the CWA and more tailored regimes like RCRA. *Id.* at 4-8, 33, 41, 46-47. And it ignored Congress's rationales for excluding groundwater. *Id.* at 34-35.

The EPA's *amicus* brief in *Hawai'i Wildlife Fund v. County of Maui*, No. 15-17447 (9th Cir. filed May 31, 2016), fares no better. An agency's view in an *amicus* brief is "'entitled to respect' . . . only to the extent [it has] the 'power to persuade.'" *Bell v. Memphis Bar-B-Q Co.*, 228 F.3d 360, 365 (4th Cir. 2000). The EPA's *Maui* brief relies almost entirely on the "legal precedents" the agency deemed too "conflicting" to support its 2001 proposal. *See* EPA Br. 13-25. The brief nowhere discusses Congress's rejection of attempts to regulate groundwater, Congress's recognition of ubiquitous links between groundwater and surface water, or Congress's federalism concerns. And the brief does not explain how it derives a "direct hydrological connection" test from statutory provisions that do not contain the words "direct," "hydrological," or "connection."[2]

Sierra Club insists that the EPA's interpretation is "'longstanding and consistent.'" Sierra Club Br. 36. But "consistent repetition" of an error does not

[2] Even the analysis in the *Maui* brief, moreover, would not reach the groundwater at issue here. Dominion Br. 42 n.3. Sierra Club never contends otherwise.

"mend it." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998). Nor does "'applying an unreasonable statutory interpretation for several years . . . transform it into a reasonable interpretation.'" *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 26 (D.C. Cir. 2001). That is especially true here, where the EPA is currently narrowing its construction of the CWA's coverage. Dominion Br. 51.

Despite invoking agency deference, Sierra Club ignores the state agency—Virginia's DEQ—tasked with administrating the CWA here. Sierra Club does not dispute that the VDEQ regulates surface-water discharges at Dominion's site under its VPDES permit program, and groundwater impacts through its solid-waste permit program. Dominion Br. 45. That choice must be afforded, at minimum, "some deference." *See Ritter v. Cecil Cty. Office of Hous. & Cmty. Dev.*, 33 F.3d 323, 327-28 (4th Cir. 1994). Sierra Club simply ignores it.

B. Sierra Club's "Directness" Requirement Is Unsupported and Insufficient To Sustain the Judgment

Evidently recognizing the implausibility of reaching all groundwater that is "hydrologically connected" to surface water, Sierra Club tries to cabin its position. Groundwater is covered, Sierra Club asserts, if it has a "*direct* hydrologic connection" to surface water. Sierra Club Br. 43-44 (emphasis added). That standard has no statutory basis. Moreover, if this case involves a "direct" hydrological connection, the term has no limiting effect whatsoever. That exposes Sierra

Club's position for what it is—an effort to bring groundwater pollution within the CWA generally.

The terms "direct" and "indirect" appear nowhere in the CWA. Congress drew a different line. Congress distinguished "navigable waters," which the CWA covers, from "groundwaters," which it does not. Dominion Br. 31-35. Congress deliberately decided not to apply the permit requirement to "groundwaters" *despite* recognizing their "essential link" to navigable waters and the "artificial" nature of any distinction. S. Rep. No. 92-414, at 73. Congress chose to draw that line because "jurisdiction regarding groundwaters is so complex and varied from State to State." *Id.* It also chose that line because of technical concerns about applying effluent limitations to groundwaters. *Id.* Sierra Club's distinction between "direct" and "indirect" connections thus is not merely divorced from statutory text. It is wholly divorced from Congress's *reasons* for excluding groundwater.[3]

Sierra Club, moreover, refuses to explain how any connection could be "direct" here, underscoring that standard's indeterminacy. There is no dispute that the groundwater at Dominion's site "move[s] 'radially' along no particular path," migrating "diffusely 'in both a vertical and horizontal direction.'" Dominion Br.

[3] Sierra Club elsewhere resists a directness requirement, insisting that the CWA does not require a "direct[ ]" discharge of pollutants into navigable waters. Sierra Club Br. 32. But it also urges that the CWA requires a "direct" connection between groundwater and navigable waters. *Id.* at 31-35. Sierra Club thus simultaneously disclaims and embraces a directness requirement.

50; *see* Sierra Club Br. 11. Indeed, "[t]idal action cause[s] water to 'actually flow[] back into the land.'" Dominion Br. 50. The evidence showed that "[a]rsenic in groundwater migrates at a glacial pace—0.28 feet [*i.e.*, *4 inches*] per year." *Id.* Such slow, radial diffusion along no particular path is the opposite of "direct." It is not "proceed[ing] from one point to another . . . without deviation." *Webster's New International Dictionary* 738 (2d ed. 1953).

Sierra Club accuses Dominion of trying to "retry or distort the facts." Sierra Club Br. 40-42. But the district court's *factual* findings are not at issue. The problem is that Sierra Club's *legal* standard for finding a sufficient hydrological connection is devoid of content. Sierra Club also ignores *undisputed* facts showing that, whatever a "direct" connection requirement might entail, it cannot be met here—where pollutants move slowly and diffusely, in no particular direction, and often reversing course. The supposed evidence of "directness" Sierra Club cites (at 40) shows only that some pollutants allegedly reach the river, not that they do so directly. If a "direct" connection exists here, it is hard to see what could make a hydrological connection "indirect."

Waterkeeper invokes EPA guidance in connection with concentrated animal feeding operations. Waterkeeper Br. 30-34. But the district court did not apply that guidance. Sierra Club never invokes it. And the supposed guidance gives no substance to the "direct/indirect" distinction. The EPA alludes to "factors" such as

the "time it takes for a pollutant to move to surface waters" and "the distance it travels." EPA Br. 26. But it offers no insight on *how much* time is too much, or *what distance* is too far. The EPA itself proved the point: It concluded that "direct hydrologic connections" were so pervasive as to presumptively justify effluent limitations on *all* concentrated animal feeding operations, whether near a river or not. 66 Fed. Reg. at 3,015.

Waterkeeper admits that, whatever "direct" means, a connection might not be "direct" if pollutants took "'dozens'" of years to reach surface waters. Waterkeeper Br. 32. But the arsenic here moved at 0.28 feet per year—*i.e.*, 2.8 feet *per decade*. Dominion Br. 50. That connection would not qualify as "direct" even under Waterkeeper's standard.

In any event, Congress did not draw an amorphous line between "directly" and "indirectly" connected groundwater. It drew a clear, principled line between groundwater and surface water, preferring to regulate groundwater through other, more tailored regimes. Sierra Club's effort to replace that clear line with a different one defies the CWA's fundamental structure.

C. Sierra Club's Construction Expands the Clean Water Act to Unprecedented Bounds and Frustrates More Tailored Regimes

Sierra Club's expansive construction of the CWA would render the statute unrecognizable to the Congress that enacted it. Sierra Club does not deny that, if the CWA covers groundwater, it could cover home septic systems and lawn

irrigation systems. *See* Sierra Club Br. 43-44; Dominion Br. 47-48. Requiring regulators to issue permits for those everyday domestic activities would divert scarce resources from more pressing priorities. Dominion Br. 48.

Sierra Club asserts that "no such 'dramatic consequences' . . . have ensued" in States where district courts have adopted its construction. Sierra Club Br. 42-43. But Sierra Club does not provide any *legal principle* that would prevent citizen suits against homeowners if this Court were to adopt its theory. Moreover, while Sierra Club points to a handful of district court cases, such decisions are not binding on anyone but the parties to the litigation. A ruling from *this* Court adopting Sierra Club's expansive view would be dramatic: It would establish binding precedent throughout the Circuit.

Sierra Club effectively asks the Court to trust environmental groups and regulators to disregard the logical consequences of its position. That is small comfort. Already, the EPA brings CWA actions against individuals for infractions such as pouring chemicals into an apartment sink. *See, e.g.*, *United States v. Findlay*, No. 1:17-cr-189 (D. Idaho) (filed July 27, 2017). Under Sierra Club's position, regulators and citizen groups could sue homeowners for using hoses, septic tanks, or irrigation systems—and demand permits for all of them.

Moreover, if the CWA applies to discharges from sites like Dominion's, it could displace RCRA, the CCR rule, and state regimes that specifically address

solid waste like coal ash. Dominion Br. 46-47. RCRA expressly excludes any "'industrial discharge[]'" that is "'subject to'" a CWA permit. *Id.* If a CWA permit is required, RCRA cannot apply. Waterkeeper insists that the CWA governs "discharges" from solid waste while RCRA governs the "treatment, storage, and disposal" of solid waste. Waterkeeper Br. 27. But the "storage" and alleged "discharges" cannot be disentangled here. Regardless, RCRA addresses more than storage: It requires corrective action to address groundwater contamination from coal-ash deposits—the very thing Sierra Club seeks to regulate as "discharges" under the CWA here. *See* 42 U.S.C. § 6945(d); 40 C.F.R. §§ 257.96-257.98. Sierra Club's effort to expand the CWA beyond its terms would displace one of RCRA's central components.[4]

Sierra Club's brief thus does nothing to quell concerns about the disruptive consequences of its theory. Its construction threatens to extend lawsuits and permitting to routine activities never historically subject to the CWA, while simultaneously upsetting regulators' ability to manage solid waste (and associated groundwater impacts) through programs specifically established for that purpose.

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[4] *Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500 (4th Cir. 2015), does not even mention the solid-waste definition in RCRA that excludes discharges subject to CWA permits. Dominion Br. 46-47. That case involved another provision that merely urges the EPA to avoid duplicative regulations. 791 F.3d at 507-08.

This Court should reject Sierra Club's atextual position and adhere to the text Congress enacted—and the balance it struck.

II. Dominion's Coal Ash Is Not A "Point Source"

The district court's decision does not merely extend the CWA to groundwater. It also extends the term "point source" beyond its ordinary meaning. A point source must act as a "conveyance." But the Coal Ash Piles—masses of solid waste collectively spanning 44 acres—are not conveyances. They do not direct or channel water containing pollutants to a discernable point or in a particular direction. Water percolates or migrates through them diffusely the same way unchanneled runoff might wash over fields, hills, or structures. Unchanneled runoff does not meet the point-source requirement even if it picks up pollutants as it flows. Sierra Club never explains why unchanneled groundwater is any different.

A. The Coal Ash Piles Are Solid Waste—Not a Conveyance

A "point source" must act as a "conveyance." § 1362(14). Sierra Club does not deny that a "conveyance" is a feature that " 'transport[s]' " or " 'bear[s]' " something " 'from one place to another,' " such as a " 'channel or passage for conduction or transmission as of fluids.' " Dominion Br. 53 (emphasis omitted). Nor does Sierra Club dispute the legislative history—and overwhelming case law—confirming that Congress excluded "runoff" from the definition of "point source." S. Rep. No. 92-414, at 39; *see* Dominion Br. 55. A hillside, field, or road is not a

point source merely because water might pick up pollutants when it happens to wash over. Nor do site features like the Coal Ash Piles function as conveyances simply because rain or groundwater may pick up pollutants as it percolates or migrates through.

While Sierra Club asserts that Dominion's landfill and "historic pond" are point sources, Sierra Club Br. 22, it never explains how those features "convey" pollutants from one specific location to another. The landfill and historic pond are solid waste. Despite its name, the so-called "historic pond" is dry—it has not held coal-ash slurry since the 1980s. *See* Tr. 729:4-730:2 (JA____-____). The landfill and historic pond do not channel water: Water "infiltrates" and "percolates" through them along no particular path. Tr. 122:12-21, 123:21-124:3 (JA____-____, ____). The landfill and historic pond no more "convey" pollutants from one specific place to another than a farmer's field "conveys" pollutants when rainwater falls on it and washes off or percolates underneath.

Tellingly, Sierra Club declines to defend the district court's theory that the Coal Ash Piles are point sources because they "changed the geography of the peninsula." Op. 15 (JA____). That theory would convert nearly any physical site feature into a point source—be it a building, a pile of dirt, or a parking lot. That is not the law. Dominion Br. 57-61; *see also Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 508-10 (9th Cir. 2013).

Apart from the landfill and historic pond, Sierra Club argues that the two "settling ponds" constitute point sources. Sierra Club Br. 19, 22, 27. But Sierra Club does not explain how even those site features "convey" pollutants from one specific location to another. At trial, Sierra Club argued that, because the settling ponds were unlined, pollutants could seep out diffusely at no specific location. Tr. 22:12-22, 25:10-27:18 (JA____, ____-____). Sierra Club presented no evidence that those ponds channeled, directed, or transported pollutants through some particular point, the way that a leaky storage tank or broken dam might. The only specific place to which those ponds "channel" or "direct" water is the *permitted* outfall into Deep Creek. Tr. 600:3-9 (JA____); FPO ¶22 (JA____). In any event, Sierra Club's arguments about the settling ponds would require modifying the district court's rulings, not affirming them. They cannot sustain the decision below.[5]

B. Precedent Confirms That Solid Waste Is Not a Point Source

Precedent forecloses Sierra Club's position. Consistent with the requirement that point sources must be "conveyances"—they must *convey* or *transport*—court

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[5] The district court's judgment rests on the notion that *all* of the Coal Ash Piles—the dry landfill, the dry historic pond, and the settling ponds—are point sources. Op. 3, 14-15 (JA____, ____-____). If the landfill and the historic pond (the largest features at the site) are not point sources, the district court would have to reconsider its liability findings and limit the scope of any remedy to the features that qualify as point sources. For that reason too, the judgment cannot be sustained. *See A Helping Hand, LLC v. Baltimore County*, 515 F.3d 356, 373 (4th Cir. 2008).

after court has held that physical site features are not point sources merely because water picks up pollutants as it flows diffusely over or through them. *See, e.g.*, *Ecological Rights Found.*, 713 F.3d at 508-10 (rainwater washing off utility poles); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1141 (10th Cir. 2005) (groundwater seeping through rock); Dominion Br. 58-60 (additional cases).

This Court's decision in *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976), expressly recognized that the term "point source" excludes "unchanneled and uncollected surface waters." *Id.* at 1373. Sierra Club nowhere explains why that reasoning does not apply doubly to unchanneled and uncollected underground waters. Sierra Club asserts that *Train* defined "coal storage areas" as point sources. Sierra Club Br. 23. In that case, however, the parties merely agreed that "contaminated runoff" from "coal storage areas" could be regulated when "*collected* into a 'point source.'" 545 F.2d at 1373 (emphasis added). And the Court *rejected* the EPA's position that "*unchanneled* and *uncollected* surface waters" could be regulated as point sources (despite the EPA's contention that a contrary rule would "permit pollution by indirection which would otherwise be barred"). *Id.* (emphasis added). Sierra Club cannot explain why unchanneled and uncollected underground waters are any different.

Nor did *Consolidation Coal Co. v. Costle*, 604 F.2d 239 (4th Cir. 1979), *rev'd on other grounds sub nom. EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64

(1980), hold that "'coal preparation plants and associated areas'" are point sources. Sierra Club Br. 22. The Court rejected the argument that regulations covering "pumped, siphoned or drained" discharges from coal storage were invalid because they also reached "surface runoff." 604 F.2d at 250. Those regulations, the Court explained, would apply "*only* to discharges from point sources." *Id.* (emphasis added). The Court left the determination of which areas (if any) might constitute point sources for the "permit-issuing process." *Id.* But it made clear that "surface runoff . . . does not fit within the statutory definition of a point source." *Id.* The same is true of the underground seepage here.

The Ninth and Tenth Circuits have both rejected the claim that water "seep[ing]" through physical features, such as a mining-pit cover, is a point source. *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1153 (9th Cir. 2010); *see El Paso*, 421 F.3d at 1140 n.4. Sierra Club asserts that those cases "turned on factual disputes regarding the connection between the pollution and surface waters." Sierra Club Br. 27. But the cases also rejected the legal arguments Sierra Club presses now.

United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979), is not to the contrary. The court there held that the "escape" of liquid from a "confined system," such as "sumps, ditches, hoses and pumps," was a discharge from a point source. *Id.* at 374. Those mechanisms *are* point sources because they are

conveyances: Pumps, hoses, ditches, and sumps all move liquid from one location to another. They channel water. The Coal Ash Piles do no such thing.

C. Sierra Club's Remaining Arguments Fail

Sierra Club argues that the "'touchstone for finding a point source is the ability to identify a discrete facility from which pollutants have escaped.'" Sierra Club Br. 25. That theory reads the term "conveyance" out of the statute. It could turn almost anything into a point source—a bungalow, a parking lot, or a subdivision. Each of those surface features could constitute a "discrete facility from which pollutants have escaped." Sierra Club's definition thus suffers from the same defect as the district court's—it ignores the "conveyance" requirement entirely. A point source must transport liquid from one specific location to another. Dominion's Coal Ash Piles do not meet that test.

Sierra Club identifies no limiting principle that would distinguish Dominion's Coal Ash Piles—accumulations of solid waste covering 44 acres—from a farmer's field or a parking lot. Sierra Club denies the dramatic consequences of its position, but identifies no legal principle that would prevent them. A rationale that converts every physical site feature into a point source, subject only to the discretion of government officials and private plaintiffs, cannot be correct.

* * *

Sierra Club seeks two dramatic expansions of the CWA. It construes the statute to encompass hydrologically connected groundwater when Congress deliberately excluded groundwater despite ubiquitous hydrological connections. And it reads the term "conveyance" out of the definition of "point source." Congress did not design the CWA to regulate all pollutants that may affect water quality. Groundwater infiltration of solid waste, like surface runoff, may implicate important regulatory considerations. But Congress chose to address those issues through regimes like RCRA and state laws better suited to the task. The district court's insistence on distorting the CWA to cover those issues seeks to bash a square peg into a round hole. It thwarts Congress's careful design.

RESPONSE TO CROSS-APPEAL

Sierra Club's primary argument on cross-appeal is that, even if the CWA does not reach groundwater, the district court should have found Dominion liable for violating *state-law* permit conditions that do. But the CWA's citizen-suit provision does not permit that claim. That provision allows suits to enforce permit conditions addressing "discharges into navigable waters," not to enforce *state-law* requirements addressing other issues. States might include various requirements in permits. But the inclusion of state-law conditions does not transform their transgression into violations of federal law actionable in federal court. Besides, Dominion complied with all permit conditions here.

Sierra Club's attack on the district court's exercise of remedial discretion fares no better. Sierra Club proposed only one injunctive remedy below: the excavation of three million tons of coal ash. The district court was well within its discretion to reject that extreme remedy. Not only did the court find no irreparable harm—it found no harm to the environment whatsoever. By contrast, excavation would risk grave environmental harm and cost half a billion dollars, if it could be accomplished at all. Sierra Club identifies no abuse of discretion in the district court's assessment of those costs and risks. Its position amounts to the assertion that the CWA requires full abatement of every unpermitted discharge in every case—a position foreclosed by Supreme Court precedent.

JURISDICTIONAL STATEMENT

For the reasons below, the district court lacked jurisdiction under 33 U.S.C. § 1365(a) to enforce the state-law permit requirements at issue; this Court lacks jurisdiction under that provision as well. Otherwise, jurisdiction is proper as stated in Sierra Club's opening brief.

STATEMENT OF ISSUES

1. Whether Dominion violated state-law permit conditions that are enforceable through the Clean Water Act's citizen-suit provision.

2. Whether the district court abused its discretion by declining to order injunctive relief that threatened serious environmental damage and would have cost half a billion dollars—especially where the court found no irreparable harm.

3. Whether the district court abused its discretion by declining to impose civil penalties on a defendant that complied with regulators' directions in good faith.

SUMMARY OF ARGUMENT

I. Sierra Club cannot bring suit under the CWA's citizen-suit provision to enforce state-law permit conditions. The citizen-suit provision allows actions to enforce only permit requirements "issued under section 1342," *i.e.*, requirements authorized by § 1342. 33 U.S.C. § 1365. Nothing in § 1342 authorizes permit requirements for groundwater. That provision governs only discharges from "point

sources into *navigable waters*." Sierra Club cannot use § 1365 to create federal jurisdiction for pollution beyond the CWA's scope.

Statutory structure, common sense, and constitutional considerations confirm that the CWA cannot be invoked to enforce state-law groundwater conditions. A contrary rule would have the absurd effect of extending federal jurisdiction over areas Congress specifically declined to regulate. It would transform state-law requirements divorced from the CWA—even a requirement to pay an annual permit fee—into actionable violations of the CWA.

Dominion, moreover, did not violate its VPDES permit. The parties' unbroken course of dealing, agency regulations, and the broader regulatory scheme confirm that the state-law permit conditions regulate discharges into "surface waters"—not migrating groundwater. The state agency that wrote the permit agrees. As the agency explained, it addresses groundwater through a solid-waste permit instead. That determination is entitled to deference.

II. The district court properly refused to order Dominion to excavate three million tons of coal ash. Injunctive relief under the CWA is subject to equitable balancing under traditional criteria. None of the criteria supported excavation here. As the district court found, leaving the coal ash in place would not cause any irreparable harm. By contrast, excavating millions of tons of coal ash and moving it across Tidewater Virginia would risk serious environmental

harm—and cost half a billion dollars. Sierra Club argues that the CWA requires courts to abate even trivial violations despite serious risks and costs. But that theory amounts to arguing that courts must always grant intrusive relief no matter what—a principle the Supreme Court has rejected.

Sierra Club forfeited any other form of injunctive relief. But the district court nonetheless crafted an order that requires Dominion to work with expert regulators to obtain a permit that will address groundwater pollution while providing for ongoing monitoring. That tailored relief was plainly more appropriate than anything Sierra Club suggested.

III. The district court properly declined to impose civil penalties. Sierra Club's two-sentence argument shows no error. Dominion complied with regulators' directives in good faith. Requiring civil penalties here would be contrary to both the CWA's text and due process.

ARGUMENT

I. SIERRA CLUB IS NOT ENTITLED TO RELIEF FOR PURPORTED VIOLATIONS OF STATE-LAW PERMIT REQUIREMENTS

Reaching beyond the CWA, Sierra Club argues that Dominion violated *state-law* restrictions in its VPDES permit. Even if the CWA does not itself address groundwater, Sierra Club claims, state-law VPDES permit conditions do. Sierra Club thus seeks to prevail on "state law" requirements in Dominion's CWA permit that supposedly reach "waters 'beyond [the] federal mandate.'" Dkt. 74, at

13 (JA____); *see* Dkt. 178, at 17 (JA____). The CWA's citizen-suit provision, however, does not reach that far. And Dominion was in full compliance with all permit conditions in any event.

A. The Clean Water Act's Citizen-Suit Provision Does Not Create a Federal Action or Federal Jurisdiction for State Groundwater Requirements

Sierra Club contends that a citizen suit can be brought under § 1365 to enforce *any* requirement in a VPDES permit. But the text of § 1365 is limited to specific permit requirements—those imposed "under section 1342." And § 1342 is limited to "discharges into navigable waters," which excludes groundwater.

1. *The Citizen-Suit Provision Is Limited to Suits Addressing Discharges to Navigable Waters*

Section 1365 of the CWA authorizes citizen suits—and provides district court jurisdiction—to enforce an "effluent standard or limitation under" the CWA. § 1365(a)(1). That defined phrase includes "a permit or condition thereof" *if* it is "*issued under section 1342* of this title." § 1365(f) (emphasis added). Thus, the "effluent standards or limitations" enforceable through citizen suits do not encompass every condition States might include in a permit under state law. Rather, citizen suits may be entertained only for violations of conditions "issued under section 1342."

That limitation is significant. Section 1342 authorizes States to issue permits for "discharges *into navigable waters*." § 1342(b) (emphasis added).

Groundwaters are not "navigable waters." Consequently, even if Sierra Club were correct that *state-law* provisions in Dominion's VPDES permit address groundwater, that would add nothing here. Those provisions are not enforceable in a citizen suit under § 1365 because they are not "issued under section 1342"—they are imposed under state law.

The term "under" means "[w]ith the authorization of" or "by virtue of." *The American Heritage Dictionary* 1395 (1978). As a result, effluent limitations are enforceable in citizen suits only if issued "under"—that is, " 'pursuant to' " or " 'by reason of the authority of' "—§ 1342. *Ardestani v. INS*, 502 U.S. 129, 135 & n.2 (1991) (alterations omitted) (interpreting "expenses awarded under this subsection"); *see Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 52-53 (2008) ("under [Chapter 11]" means "pursuant to" Chapter 11). State-law conditions that do not address "discharges into navigable waters" are not issued by reason of, and thus are not issued under, § 1342.

The remainder of § 1342 reinforces that conclusion. That section declares that permits must "apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title." § 1342(b)(1)(A); *see also* § 1342(a)(1)-(2) (same for EPA-issued permits). *None* of those provisions addresses diffuse groundwater impacts, migration of pollutants in groundwater, or solid-waste disposal. They address discharges to *navigable* waters. *See* § 1311

(prohibiting unpermitted "discharge of any pollutant," *i.e.*, the "addition of any pollutant *to navigable waters from any point source*," § 1362(12) (emphasis added)); §§ 1312, 1316, 1317 (authorizing establishment of effluent standards for "discharges," as defined in § 1362(12), and "effluent limitations," *i.e.*, restrictions on "constituents which are discharged *from point sources into navigable waters*," § 1362(11) (emphasis added)).[6]

The definition of "effluent standard or limitation," moreover, includes seven categories of enforceable restrictions, including the "permit or condition thereof" provision at issue here. § 1365(f)(1)-(7). None of the other six categories includes state-law conditions; they all address *federal* obligations. *Id.* Under the *noscitur a sociis* canon, those other categories "cabin the contextual meaning" of the terms

[6] Congress incorporated the same limitations into the provisions of §§ 1311 and 1316 addressing "more stringent" state standards. Section 1311 incorporates state effluent limitations "more stringent" than the federal "effluent limitations for point sources." § 1311(b)(1)(A)-(C). But the term "effluent limitations" means limits on "constituents which are *discharged* from point sources *into navigable waters*." § 1362(11) (emphasis added). Similarly, § 1316(c) incorporates state "standards of performance for new sources." The phrase "standard of performance" means a standard for "the control of the *discharge* of pollutants," §1316(a) (emphasis added), which is defined as "any addition of any pollutant *to navigable waters from any point source*," § 1362(12) (emphasis added). Finally, while § 1311 mentions §1370, that provision is irrelevant. Section 1370 is a saving clause that merely preserves state authority from preemption.

they "surround[]." *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015). They confirm that § 1365 covers only federal, not state-law, conditions.[7]

The permit conditions Sierra Club invokes do not derive from the CWA or federal restrictions on discharges to navigable waters. By Sierra Club's own admission, those conditions are state-law requirements that purportedly reach groundwater " 'beyond' " the CWA's scope. Dkt. 74, at 13 (JA____); *see* Dkt. 178, at 17 (JA____). Because those conditions are not issued "under section 1342," they cannot be the basis for a citizen suit under § 1365.

2. *Common Sense Confirms Congress Did Not Create a Federal Action for State-Law Groundwater Restrictions*

Extending § 1365 to state-law permit conditions would lead to absurd results. Under Sierra Club's construction, any violation of a state permit condition—even a requirement to pay annual permit fees—would be a federally actionable CWA violation. That makes no sense. As Sierra Club acknowledges (at 21), the point of citizen suits is to ensure "compliance with the [Clean Water] Act." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987). Congress did

[7] Congress's use of the adjective "effluent" is also telling. *See Rapanos v. United States*, 547 U.S. 715, 731 (2006) (plurality) (modifying adjective is not "devoid of significance" even for defined terms). "Effluent" means something "[f]lowing out" or "emanating as an efflux." *Webster's New International Dictionary* 819-20 (2d ed. 1953). It is something that "emanates in or as if in a stream." *Webster's Third New International Dictionary* 725 (2002) ("efflux"). That term comfortably encompasses discharges from a point source, such as a pipe, but not groundwater migrating through a mass of solid waste along no particular path.

not create a federal forum for the enforcement of all state-law conditions that happen to appear in the same permit as federal CWA requirements.

Sierra Club's reading would put the CWA at war with itself. Congress imposed careful limits on the CWA's scope, rejecting invitations to regulate groundwater and diffuse surface runoff. Dominion Br. 31-38. Under Sierra Club's construction, a State could create federal jurisdiction for citizen suits over those precise topics simply by including such conditions in a permit. Courts should not construe a statute "so that one section destroy[s] the others." *United States v. Louisville & Nashville R.R. Co.*, 235 U.S. 314, 325-26 (1914).

Sierra Club's construction would also produce arbitrary distinctions. Under Virginia law, for example, the VPDES permit program combines a state program operated under the State Water Control Law with a federal CWA program, resulting in a single permit covering both sets of conditions. *See State Water Control Bd. v. Smithfield Foods, Inc.*, 542 S.E.2d 766, 767-68 (Va. 2001). The State could have issued separate permits—in which case Sierra Club would have no basis for asserting state-law requirements in federal court. Congress could not have intended for weighty questions of federal jurisdiction to turn on whether a state agency happens to issue one piece of paper or two.

3. *Congress and Agencies Agree on § 1365's Limited Scope*

Congress agrees. It described citizen suits as actions to enforce "a standard of performance, or a prohibition, or effluent standard or limitation *established under the act*." S. Rep. No. 92-414, at 80 (1971) (emphasis added). Section 1365, Congress explained, "establishes citizen participation in the enforcement of control requirements and regulations *created in the Act*." S. Conf. Rep. No. 92-1236, at 145 (1972) (emphasis added). Congress thus did not contemplate citizen suits to enforce all state limitations that happen to appear in the same permit as CWA conditions. Permit restrictions enforceable under § 1365 must be "established under," or "created in," the CWA and § 1342 in particular—not state law alone.

EPA regulations similarly caution that, if a state permitting program "has greater scope of coverage than required by Federal law[,] the additional coverage is not part of the Federally approved program." 40 C.F.R. § 123.1(i)(2). And in Dominion's VPDES permit, the VDEQ declared that "noncompliance with certain provisions of this permit may constitute a violation of the State Water Control Law but not the Clean Water Act." Dominion Ex. 17, at DOM00098989 (JA____). Those statements belie the notion that any state-law requirement mentioned in a permit constitutes a substantive CWA requirement.

4. *Sierra Club's Theory Defies Precedent*

Neither the Supreme Court nor any court of appeals has held that state-law groundwater requirements are enforceable through federal citizen suits. The Second Circuit has rejected any such theory. In *Atlantic States Legal Foundation, Inc. v. Eastman Kodak, Co.*, 12 F.3d 353 (2d Cir. 1993), the court considered a state-law permit condition that prohibited the discharge of any pollutant not expressly listed in the permit. *Id.* at 359. The court held that that state-law requirement, "which mandate[d] 'a greater scope of coverage than that required' by the federal CWA," was "not enforceable through a citizen suit." *Id.* As Dominion advised the district court, that same logic applies here. Dkt. 102, at 17-18 (JA____-____).

Sierra Club cites no contrary authority. It points to cases holding that state "effluent limitations . . . 'more stringent'" than federal ones are enforceable through citizen suits. *E.g.*, *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 224 (1976). But "effluent limitations" are restrictions on constituents "discharged *from point sources into navigable waters*." §1362(11) (emphasis added). State permit conditions regulating those discharges to navigable waters *are* "issued under section 1342," making violations potentially actionable under §1365. *See* pp. 32-33 & n.6, *supra*; *see also Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 988-90 (9th Cir. 1995) (explaining that §1342 "incor-

porate[s]" effluent limitations related to state "water quality requirements"). By contrast, state-law requirements that do not address navigable waters *at all* are not "issued under section 1342" and are *not* actionable under § 1365.[8]

5. *Sierra Club's Interpretation Raises Serious Constitutional Concerns*

Construing § 1365 to allow federal suits to enforce state-law conditions would raise serious constitutional concerns. Article III of the Constitution gives the Judiciary authority to hear cases "arising under" federal law. U.S. Const. art. III, § 2, cl. 1. For cases to "arise under" federal law, federal law must do "more than grant jurisdiction over [the] particular class of cases." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 496 (1983). "[P]ure jurisdictional statutes . . . cannot support Article III 'arising under' jurisdiction." *Mesa v. California*, 489 U.S. 121, 136 (1989).

[8] Some cases allow citizen-suit enforcement of state data-collection and reporting requirements for discharges to navigable waters. *See Sierra Club v. Simkin Indus., Inc.*, 847 F.2d 1109, 1115 (4th Cir. 1988); *see also Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1008-10 (11th Cir. 2004) (addressing state-law conditions for monitoring and management of discharges from point sources to navigable waters). But those restrictions are issued "under" § 1342(b): Section 1342 authorizes not only conditions that "apply" the CWA but also those that "insure compliance with" it. That is what data collection and reporting do. § 1341(a)(2). By contrast, Sierra Club seeks to enforce purported state-law conditions that address diffuse groundwater migration and solid-waste issues that Congress *excluded* from the CWA. Such conditions simply are not issued "under section 1342."

Sierra Club's theory crosses that constitutional line. Sierra Club claims a federal right to enforce permit conditions that regulate "'beyond [the] federal mandate'" of the CWA. Dkt. 74, at 13 (JA____). That theory would turn § 1365 into a pure jurisdictional grant that provides federal courts with jurisdiction to enforce state-law requirements—precisely what Article III prohibits.

"[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, [courts] will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Because Sierra Club's construction raises serious constitutional doubts, this Court should reject it. *See, e.g.*, *Mesa*, 489 U.S. at 137 (rejecting construction that would permit federal courts to hear suits against federal officers absent a federal defense because it "raise[d] serious constitutional doubt" under Article III).

B. Dominion Did Not Violate Its Permit Conditions

In any event, Dominion violated no permit conditions here. Sierra Club asks this Court to adopt an interpretation of state-law conditions, in a state-issued permit, that the state regulator rejects. The Court should decline that invitation.

1. *The Permit Conditions Regulate Discharges to Surface Waters, Not Groundwater Impacts*

Sierra Club asserts that Dominion violated two state-law conditions of its CWA permit. Condition II.F makes it unlawful to "[d]ischarge into state waters . . . wastes, or any noxious or deleterious substances," "[e]xcept in compliance with [a] permit." Dominion Ex. 17, at DOM00098985 (JA____). Condition II.R requires any disposal of "[s]olids, sludges or other pollutants removed in the course of treatment or management of pollutants" to be conducted so as to "prevent any pollutant from such materials from entering state waters." Dominion Ex. 17, at DOM00098991 (JA____). Sierra Club asserts that the term "state waters" in those provisions includes "groundwater." That construction flouts governing regulations and the mutual understanding that Dominion and the VDEQ have long shared.

Under Virginia law, permits must be interpreted like contracts. *Piney Run Pres. Ass'n v. Cty. Comm'rs*, 268 F.3d 255, 269 (4th Cir. 2001). Consequently, "prime significance attaches to the intentions of the parties." *Burbach Broad. Co. of Del. v. Elkins Radio Corp.*, 278 F.3d 401, 406 (4th Cir. 2002). If the parties understand a term to have a particular meaning, the term is "interpreted in accordance with that meaning." Restatement (Second) of Contracts § 201(1) (1981). The parties' course of dealing can demonstrate such an understanding even absent facial ambiguity. *See Brunswick Box Co. v. Coutinho, Caro & Co.*, 617 F.2d 355,

359 (4th Cir. 1980). By contrast, resort to extrinsic evidence (such as statutes) is proper only where a contract is ambiguous. *See Piney Run*, 268 F.3d at 269-71.

Here, the parties' course of dealing demonstrates their mutual understanding that Conditions II.F and II.R do not cover groundwater impacts. Since Dominion obtained its first VPDES permit in the 1970s, both the VDEQ and Dominion have understood that permit to regulate only the discharge of pollutants from "point sources" to "surface waters." Tr. 644:6-646:7, 794:19-795:14 (JA____-____, ____-____). As the VDEQ testified at trial, the permit does not apply to diffuse groundwater movements. Tr. 800:23-804:2 (JA____-____); *see* Op. 16 (JA____). Both "Dominion . . . and the Commonwealth[ ] thought [that Dominion] complied with state . . . law." Op. 17 (JA____). That unbroken course of dealing precludes Sierra Club's interpretation.

Sierra Club invokes a state statute that defines "state waters" to include groundwater. But VDEQ regulations, which specifically govern the VPDES permit program, limit VPDES permits to the "discharge of pollutants from a point source to *surface waters*." 9 Va. Admin. Code § 25-31-10 (emphasis added). Regulations codifying agency practice are important evidence of what the permit means. *See Piney Run*, 268 F.3d at 270 (examining agency practice); *United States v. Boynton*, 63 F.3d 337, 343-44 (4th Cir. 1995) (presuming that agency acts in

harmony with regulatory scheme). In any event, it is the parties' understanding that controls.

Sierra Club's construction, moreover, would create needless conflict among the permits governing Dominion's site. The VDEQ regulates discharges from "point source[s] *to surface water*" at Dominion's site under a *VPDES permit*. 9 Va. Admin. Code § 25-31-10 (emphasis added). It regulates the coal-ash landfill and groundwater impacts under a *solid-waste permit*. Tr. 690:5-11, 797:16-21, 805:9-806:6 (JA____, _____, _____-____). The solid-waste permit comprehensively addresses groundwater issues, but without imposing an absolute prohibition on the addition of pollutants. It makes no sense to interpret the VPDES permit to prohibit what the same agency decided to allow—subject to limits and regulation—in its solid-waste permit.

If there were a conflict, moreover, the solid-waste permit would control. That permit issued under the Virginia Waste Management Act, which provides for "all-embracing" regulation of the "passive, gradual seepage of leachate" from solid waste into groundwater. *Campbell County v. Royal*, 720 S.E.2d 90, 99-100 (Va. 2012). The Virginia Supreme Court has held that, due to its comprehensiveness, that statute is the "exclusive[ ]" means by which the legislature intended to regulate such pollution. *Id.* at 99. The Virginia Waste Management Act thus displaces

contrary requirements in the State Water Control Law—the statute authorizing the VPDES permit conditions at issue here. *See id.*

In all events, the VDEQ has resolved any doubts about what the state-law conditions mean: They apply to "point source discharge[s] to surface waters," not discharges to "groundwater." Tr. 802:5-804:2 (JA____-____). The VDEQ's interpretations of its own state-law permit requirements warrant "great deference." *Holtzman Oil Corp. v. Commonwealth*, 529 S.E.2d 333, 339 (Va. Ct. App. 2000).

Sierra Club cannot overcome that deference by claiming that the VDEQ's interpretation is "contrary to statute." Sierra Club Br. 45-46. The agency's construction of a *permit* cannot be "contrary to" a statutory definition the permit does not even reference. Permit conditions are construed like contracts, to reflect the parties' understanding—especially when consistent with valid regulations and longstanding practice. Sierra Club errs in reading a permit as if it drew its meaning solely from legislation instead.

Nor was deference inappropriate merely because the agency's position was "informal." Sierra Club Br. 46. Sierra Club agrees that some deference "can be afforded to informal state interpretations." *Id.* That deference is particularly

appropriate where, as here, a state agency is interpreting the meaning of state-law requirements in a state permit the agency itself issued.[9]

Finally, Sierra Club argues that, even if the permit covers only surface waters, Dominion violated the permit by discharging pollutants to those waters indirectly through groundwater. Sierra Club Br. 48. That argument fails for the same reasons as the CWA claim in Count I. *See* pp. 3-20, *supra*. A state regulatory scheme for *discharges to surface waters* does not cover solid-waste impacts on groundwater. The VDEQ has long understood as much: Aware of every fact Sierra Club presses here, the VDEQ concluded that Dominion was not in violation of its permit. Op. 17 (JA____).

2. *Sierra Club's Arguments Ignore Other Permit Terms*

Sierra Club's state-law arguments fail for additional reasons. Sierra Club asserts that Dominion violated Condition II.R—the "removed substances" provision—by allowing arsenic to escape from coal-ash solids removed from plant wastewater. Sierra Club Br. 53. But that condition cannot be read in isolation. The VDEQ regulates the storage of coal-ash solids at Dominion's site through a solid-waste permit, which includes conditions to address groundwater and surface-water impacts. *See* Dominion Br. 10-11, 44-46. Dominion has complied with that

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[9] Sierra Club contends that Dominion's witness admitted that the permit applies to "'state waters,' not only surface water." Sierra Club Br. 45. The witness agreed that the permit uses the term "state waters," but he made clear that the permit had "never been interpreted" to include groundwater. Tr. 681:5-25 (JA____-____).

permit. *Id.* at 18. Reading the VPDES and solid-waste permits together as two contracts between the same parties, the VPDES permit cannot be interpreted to prohibit coal-ash storage that complies with the solid-waste permit. A contrary reading would place the permits at war with each other and defy the parties' unbroken course of conduct demonstrating what each permit covers. *See* pp. 41-42, *supra*.[10]

Dominion did not violate Condition II.F either. That provision applies only to "*[d]ischarge[s]* into state waters." FPO ¶25 (JA____) (emphasis added). Virginia defines "discharge of a pollutant" the same way as the CWA: as "any addition of any pollutant . . . to surface waters *from any point source*." 9 Va. Admin. Code § 25-31-10 (emphasis added). For all the reasons above, Dominion's Coal Ash Piles are not a "point source." *See* pp. 20-25, *supra*; Dominion Br. 52-64. The absence of a point source for Sierra Club's federal claim is thus equally fatal to Sierra Club's reliance on Condition II.F.

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[10] Sierra Club argues that the VDEQ included express groundwater-related conditions in a VDPES permit for another site, Possum Point. Sierra Club Br. 55. But that permit proves Dominion's point: Where a site is not otherwise subject to a solid-waste permit, such as at Possum Point, the VDEQ may include *express* groundwater-specific conditions in a VPDES permit. Tr. 820:13-17 (JA____-____). The VDEQ included no such conditions in the VPDES permit at issue here. It had no need to do so because a separate, more tailored permit—the solid-waste permit—already addresses "all . . . groundwater impacts" at Dominion's site. Tr. 805:22-806:6 (JA____). It makes no sense to read generalized conditions in a VPDES permit to supersede specific provisions in a solid-waste permit.

II. THE DISTRICT COURT PROPERLY DECLINED TO ORDER EXCAVATION

Sierra Club urges that the district court abused its discretion by not requiring Dominion to excavate the coal ash, transport it across Tidewater Virginia, and deposit it at another location. But Sierra Club failed to prove that that remedy—which would have created significant environmental risks, taken at least eight years to implement, and cost half a billion dollars—was even feasible, much less that it would do more good than harm. Given the district court's finding that the Coal Ash Piles posed no threat to the environment, such intrusive, costly, and risky relief was clearly inappropriate.

A. The District Court Properly Applied Traditional Equitable Criteria To Reject the Drastic Remedy of Excavation

Under traditional equitable principles, a party requesting an injunction "must satisfy a four-factor test." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). The party must show (1) "irreparable injury"; (2) that legal remedies "are inadequate"; (3) that "the balance of hardships between the plaintiff and defendant" supports relief; and (4) that "the public interest would not be disserved." *Id.* Those considerations inform both *whether* to grant relief, *see id.*, and the *scope* of any relief, *see Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944).

Those factors apply with equal force in CWA cases. In *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), the Supreme Court made clear that injunctions in CWA cases are discretionary and reserved for the redress of serious harms:

An injunction "'is not a remedy which issues as of course,' or 'to restrain an act the injurious consequences of which are merely trifling.'" *Id.* at 311. Rather, an injunction "should issue *only* where the intervention of a court of equity 'is essential . . . to protect . . . against *injuries otherwise irremediable*.'" *Id.* at 312 (emphasis added). Moreover, courts must "balance[ ]" the hardships to the parties. *Id.* Consequently, where "the harms of a particular injunctive remedy outweigh the benefits, a court may decline to adopt it." *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 201 (4th Cir. 2005); *see Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1530 (11th Cir. 1996) (declining to abate unpermitted discharges where "discharges were minimal, and posed no risk to human health"). Finally, the "public consequences" must be given "particular regard." *Romero-Barcelo*, 456 U.S. at 312. The district court's application of those criteria was amply within its discretion here.

Irreparable Harm. Sierra Club failed to demonstrate any "irreparable injury"—a prerequisite to injunctive relief. *eBay,* 547 U.S. at 391. The district court found "no evidence" of "*any* injury, much less an irreparable one." Op. 18 (JA____) (emphasis added). "All tests of the surface waters surrounding the CEC"—73 in all—showed arsenic concentrations "well below the water quality criteria." Op. 8 (JA____); *see* Tr. 763:9-764:3, 765:14-20 (JA____-____, ____); Dominion Ex. 85, at DOM00275544 (JA____); Dominion Ex. 175 (JA____-____);

Dominion Ex. 176 (JA____-____). Extensive sampling of "water, sediment, pore water, and fish tissue data" confirmed there were "no 'human health or environmental concerns'"—and Sierra Club "offered no evidence to dispute" those findings. Op. 9 (JA____); *see* Tr. 885:16-20 (JA____-____). Thus, the one thing the district court "kn[ew]" with certainty was that any "discharge poses no threat to health or the environment." Op. 8 (JA____).

That alone is fatal to Sierra Club's claim. Injunctive relief—especially an injunction requiring tons of coal ash to be excavated and moved across the countryside—can be granted "*only* where . . . 'essential'" to prevent "'injuries otherwise *irremediable*.'" *Romero-Barcelo*, 456 U.S. at 312 (emphasis added). "[T]he basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Id.*; *see Nat'l Audubon*, 422 F.3d at 200. Sierra Club failed to prove that prerequisite. At the very least, the district court properly concluded that the absence of irreparable harm "weigh[s] against the drastic injunctive relief sought." Op. 18 (JA____).

Balance of Hardships. The district court properly concluded that the balance of hardships weighed against excavation. Excavating three million tons of coal ash would threaten grave environmental harm: "[N]o credible evidence" showed "how the ash will safely travel across Tidewater Virginia." Op. 18 (JA____). "How

much spillage," the court asked, "will occur when someone moves three million tons of ash?" *Id.* Sierra Club offered only "speculat[ion]." Op. 19 (JA____).

The district court found that the financial costs of excavating the coal ash would be extreme. Op. 18 (JA____). The only "credible evidence" showed that excavation would cost "hundreds of millions of dollars"—an estimated $477 million—and would take eight years to complete. *Id.*; *see* Tr. 894:19-895:5 (JA____-____). By contrast, the district court found "no evidence" of "any injury" from the alleged groundwater intrusion. Op. 18 (JA____). The balance of hardships on those facts is not even close.

Public Interest. Finally, the district court found that the public interest weighed against excavation. Op. 18 (JA____). Sierra Club urges that the public interest tends to lie in preventing environmental harm. *See* Sierra Club Br. 63-64; *S.C. Dep't of Wildlife & Marine Res. v. Marsh*, 866 F.2d 97, 100 (4th Cir. 1989). But that principle undermines its position: The district court specifically found that moving three million tons of coal ash threatened grave risks to the environment for "very little return." Op. 18-19 (JA____-____). Sierra Club did not "even attempt[ ] to itemize the collateral environmental effects of moving this much coal ash," Op. 18 (JA____)—including the use of 50 trucks to haul coal ash continuously over public roads for a period of eight years, Tr. 903:12-18 (JA____). Nor

did Sierra Club show that its proposed landfill "would accept over three million tons of coal ash." Op. 8 (JA____).

The enormous financial burden and potential liabilities, moreover, would likely fall on Dominion's ratepayers. Op. 18 (JA____). That observation was not "speculative." Sierra Club Br. 63. If Dominion's costs increase, the company must recover them somehow. Op. 18 (JA____). In addition, supervising an eight-year excavation would impose a "burdensome" process of "continuing superintendence" on the court. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 193 (2000). The public-interest considerations too weighed against excavation.

B. Sierra Club Shows No Abuse of Discretion in the District Court's Refusal To Order the Drastic Remedy of Excavation

Sierra Club insists that, once a court finds liability, it "must" issue an injunction that "achieve[s] compliance with the [Clean Water] Act." Sierra Club Br. 56. But *Romero-Barcelo* says the opposite. In that case, the district court had refused to enjoin the defendant's ongoing pollution while its CWA application was pending. 456 U.S. at 309-10. The First Circuit reversed, holding that an injunction was mandatory because the CWA imposed a "statutory obligation to stop any discharges of pollutants until the permit procedure has been followed." *Romero-Barcelo v. Brown*, 643 F.2d 835, 861 (1st Cir. 1981). The Supreme Court disagreed. The CWA, it explained, "*permits*" a court to "secure prompt

compliance." 456 U.S. at 320 (emphasis added). But the Court rejected the argument that the "grant of jurisdiction to ensure compliance . . . suggests an absolute duty to do so under any and all circumstances." *Id.* at 313. To the contrary, it emphasized the traditional equitable considerations of irreparable harm, balancing of hardships, and the public interest. *See id.* at 311-13; pp. 46-47, *supra*.

Citing a case interpreting a different statute, Sierra Club argues that irreparable injury is not a prerequisite. Sierra Club Br. 61-62. *Romero-Barcelo* forecloses that argument: It says injunctions may issue "'*only* where . . . essential . . . to protect . . . against *injuries otherwise irremediable*.'" 456 U.S. at 312 (emphasis added). The district court thus would have been "entirely correct in insisting that respondent satisfy the traditional prerequisites of extraordinary equitable relief by establishing irreparable harm." *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975). But the court did not do even that. It merely identified the absence of irreparable harm as a *consideration* among the "factors weigh[ing] against the drastic relief" sought. Op. 18 (JA____). Sierra Club cannot seriously dispute that absence of irreparable harm is at least highly relevant.

Sierra Club insists that irreparable harm exists whenever "pollutants" are "discharge[d]." Sierra Club Br. 62. But in *Romero-Barcelo*, the Supreme Court accepted the district court's finding that the violation caused no irreparable harm. 456 U.S. at 319; *see also Amoco Prod. Co. v. Village of Gambel*, 480 U.S. 531,

544-45 (1987) ("presum[ing]" irreparable harm would be "contrary to traditional equitable principles" and *Romero-Barcelo*). Indeed, *Romero-Barcelo* declares that injunctive relief is not available for injuries "'which are merely trifling.'" 456 U.S. at 311. Here, Sierra Club failed to prove any discharge of pollutants beyond a "trifling" amount (as little as "a few grams each day"), and it proved no injury of any sort. Op. 8, 18 (JA____, ____). Its assertions of harm (at 64) consist largely of testimony from two members who expressed subjective fears about local wildlife. The district court was not required to credit that testimony over actual proof.[11]

Nor does Sierra Club show an abuse of discretion in the balancing of hardships. Sierra Club attacks none of the findings related to that balancing—the environmental risk created by Sierra Club's proposed remedy, its cost, its duration, or its feasibility. Sierra Club instead argues that "the objectives of the Act outweigh the burdens that may be imposed on industry." Sierra Club Br. 63. But that amounts to saying that the CWA imposes an "absolute duty" to enjoin violations "under any and all circumstances"—the precise argument the Supreme Court rejected in *Romero-Barcelo*, 456 U.S. at 313.

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[11] Sierra Club claims irreparable harm because the district court found arsenic levels above state standards in some locations. Sierra Club Br. 62. But the cited passage refers to pollutant concentrations in *sediment* (pore water), a type of water for which no quality standard exists. Op. 7 (JA____); Tr. 549:25-550:5-12, 560:19-561:4, 573:3-11 (JA____, ____, ____). Sierra Club offered no testimony suggesting that the sediment concentrations raised CWA concerns—and the undisputed evidence showed no harm to fish (including bottom-feeders) or the environment. Op. 9 (JA____).

For the same reasons, Sierra Club's public-interest arguments fail. Excavation would harm the public and ratepayers alike. *See* pp. 49-50, *supra*. "[T]he fact that [a plaintiff] is pursuing a cause of action which has been generally recognized to serve the public interest provides no basis for concluding that it is relieved of showing irreparable harm and other usual prerequisites for injunctive relief." *Rondeau*, 422 U.S. at 64-65. The district court properly declined to order relief that would "entail years of effort costing hundreds of millions of dollars"—at serious risk—"for very little return." Op. 18 (JA____).

C. Sierra Club Forfeited Any Other Remedy

Having failed to establish that excavation was appropriate, Sierra Club insists it was entitled to some "alternative" remedy beyond the substantial relief granted by the district court. Sierra Club Br. 57-58, 65. But Sierra Club's sole request throughout this case was for excavation. Op. 19 (JA____). Sierra Club cannot seek different remedies now. *See United States v. One 1971 Mercedes Benz 2-Door Coupe, Serial No. 11304412023280*, 542 F.2d 912, 915 (4th Cir. 1976) (declining to grant alternative remedy not requested below).

Sierra Club contends that it requested "an injunction directing Dominion, in broad terms, to come into compliance by a date certain, but without specifying the means of doing so." Sierra Club Br. 57-58. But the footnote Sierra Club cites did not request even that relief: It merely noted that "the injunction entered in *Idaho*

Conservation League would provide an alternative approach." Dkt. 183, at 19 n.17 (JA____). That oblique reference to another case in a footnote was not sufficient to preserve the issue. *See Liberty Corp. v. NCNB Nat'l Bank of S.C.*, 984 F.2d 1383, 1390 (4th Cir. 1993) (one "minor reference" to claim did not preserve it). In any event, such a remedy—an "obey-the-law injunction"—would have been improper. An injunction must be " 'specific' " and " 'describe[] in reasonable detail . . . the act or acts sought to be restrained.' " *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974); *see also Peregrine Myan. Ltd. v. Segal*, 89 F.3d 41, 51 (2d Cir. 1996) (injunction must do more than merely compel obedience to statute). An injunction ordering Dominion to bring its site into compliance in some unspecified fashion would have violated that requirement.

Having failed to establish any prerequisite for the drastic relief it sought, Sierra Club could have been refused any remedy. The district court nonetheless ordered Dominion to reopen its solid-waste permit application at the VDEQ (subject to requirements set by the court) and required Dominion to undertake extensive monitoring of the site. Am. Inj. ¶¶ 1-32, 35 (JA____-____).

Courts regularly remedy CWA violations by requiring parties to seek a permit. *See, e.g.*, *Romero-Barcelo*, 456 U.S. at 309-10. Expert state regulators know more about groundwater pollution than the district court and are in a superior position to address the issue through the permit process. Moreover, while merely

capping the landfill would reduce pollution by limiting rainwater infiltration, Dominion Ex. 10, at SELC_070208 (JA____), the court ordered Dominion to do more, Am. Inj. ¶35 (JA____).

Sierra Club argues that the permit processes would address only the landfill and not the "historic pond." Sierra Club Br. 58-59. That is incorrect: Dominion understands that its revised solid-waste permit must address all groundwater impacts from coal ash site-wide. Indeed, Dominion monitors groundwater on a site-wide basis already. Tr. 620:24-25, 806:3-6 (JA____, ____). If Sierra Club is dissatisfied with the outcome of the permitting process, it can seek relief at that point. Until then, any complaints about the scope of the permit are premature.

III. THE DISTRICT COURT PROPERLY DECLINED TO IMPOSE A CIVIL PENALTY

In a single paragraph at the end of its brief, Sierra Club argues that the district court should have imposed a civil penalty, claiming that civil penalties are "mandatory." Sierra Club Br. 66. That is all Sierra Club argues. It raises no challenge to the factors the district court considered, how it balanced them, or the factual findings on which it relied. It is thus common ground that Dominion was a "good corporate citizen"; it "cooperated" with state regulators at "every step"; it "secured the precise permits" it was required to obtain; it believed it was in compliance with the CWA; and it was found liable under a "novel" theory—indeed, one rejected in other circuits. Op. 17-18 (JA____-____); *see Grayson O*

Co. v. Agadir Int'l LLC, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument by failing to present it in its opening brief or by failing 'to develop [its] argument.' ").

Nothing in the citizen-suit provision makes civil penalties mandatory, much less under these circumstances. Section 1365 gives district courts discretion to "apply *any appropriate* civil penalties." § 1365(a) (emphasis added). That authority includes discretion to impose *no* penalty: Sometimes the "appropriate" penalty is no penalty at all. *See Alabama v. North Carolina*, 560 U.S. 330, 345-46 (2010) (requirement to take "appropriate" steps includes discretion to do nothing); *Farrar v. Hobby*, 506 U.S. 103, 112-16 (1992) (only "reasonable" fee award for nominal success was "no fee at all").

Section 1319(d) is not to the contrary. It states only that violators "shall *be subject to* a civil penalty not to exceed $25,000 per day." § 1319(d) (emphasis added). It thus exposes violators to a penalty; it does not require the penalty's imposition. If a contract is "subject to" early termination, the counterparty is not *contractually required* to terminate it early. Likewise here, if a defendant is "subject to" a civil penalty, the court is not required to impose it. If Congress had intended to make civil penalties mandatory, it would have provided that violators

"shall pay" an amount. *See, e.g.*, 7 U.S.C. § 1596(a) ("shall pay"); 26 U.S.C. § 6038(b)(1) ("shall pay"). It did not.[12]

Mandatory civil penalties would create grave due-process concerns. Civil penalties are "'quasi-criminal' in nature," so a party must have fair notice. *First Am. Bank of Va. v. Dole*, 763 F.2d 644, 652 n.7 (4th Cir. 1985). Dominion had no such notice here. It "cooperated with the DEQ every step of the way"; "secured the precise permits the DEQ . . . required it to obtain"; and acted as both "it, and the Commonwealth, thought complied with" the law. Op. 17 (JA____). The court's finding of liability rested on a "novel interpretation." *Id.* Due process forecloses the imposition of penalties in such circumstances. *See Wis. Res. Prot. Council v. Flambeau Mining Co.*, 727 F.3d 700, 707-11 (7th Cir. 2013) (due process barred penalties against defendant that had followed state regulator's (incorrect) directions in good faith). In all events, the CWA should not be read to require penalties the Constitution forbids.

CONCLUSION

The Court should reverse the district court's judgment as to Count I, affirm as to Counts II and III, and affirm the denial of excavation and civil penalties.

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[12] *Stoddard v. West Carolina Regional Sewer Authority*, 784 F.2d 1200 (4th Cir. 1986), does not suggest otherwise. The Court there expressly limited its holding to the "circumstances of th[at] case." *Id.* at 1206, 1208. Sierra Club's other case, *American Canoe Ass'n v. Murphy Farms*, 412 F.3d 536, 538 (4th Cir. 2005), does not even mention civil penalties.

November 17, 2017

Respectfully submitted,

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November 17, 2017

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November 17, 2017

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