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Uncontainable Threat: The Nation's Coal Ash Ponds

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UNCONTAINABLE THREAT: THE NATION'S COAL ASH PONDS

ABSTRACT

*Coal ash ponds pose a significant threat to the environment and human health. Coal ash is a byproduct of the electricity production process, and it contains carcinogens like boron, arsenic, lithium, and mercury. Typically, utility companies store coal ash in ponds located near rivers and lakes. If coal ash is stored in ponds that lack an adequate liner, the coal ash can seep into the groundwater and travel to nearby surface waters, which may serve as a drinking water source for neighboring communities. The EPA has admitted that the majority of America's coal ash ponds are unlined and prone to leaks. Moreover, there have been several instances where coal ash ponds have failed and discharged millions of gallons of coal ash into surrounding surface waters. In an effort to protect citizens' health and the environment, plaintiffs have utilized the Clean Water Act to hold utilities liable when they discharge coal ash pollutants to surface waters via hydrologically connected groundwater. Nevertheless, the Fourth Circuit in *Sierra Club v. Virginia Electric and Power Co.* determined that coal ash ponds were not point sources under the CWA, and this decision will likely prevent future plaintiffs from bringing claims against utilities under the Act.*

*The holding in *Sierra Club* will also limit future plaintiffs' ability to hold polluters liable for unpermitted discharges from other types of "containers," which will increase the possibility of an environmental disaster. As a result, the Supreme Court must step in and reverse the Fourth Circuit's decision. More specifically, the Supreme Court must hold that coal ash ponds are point sources under the CWA. To reach this decision, the Supreme Court must first look to the purpose of the CWA, which was designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Then, the Supreme Court must look to the language of the Act, specifically the CWA's definition of the term "point source." Lastly, the Supreme Court must look to other cases involving "containers" as they indicate that "natural processes" may be part of a point source discharge if the polluter "initially collected" the pollutants.*

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INTRODUCTION

The Fourth Circuit has determined that coal ash piles are nonpoint sources under the Clean Water Act (CWA),¹ and this decision poses a significant threat to the environment and human health. Coal ash piles are constructed by coal-fired power plants to store the waste that is generated during the electricity production process, and they pose a great danger to human health and the environment as the coal ash contains “carcinogens and a myriad of neurotoxins.”² Coal ash piles are usually located in the ground next to power plants, and when they are unlined, pollutants can leach into the groundwater.³ The contaminants can travel through the groundwater to navigable surface waters, and as a result, drinking water sources may be contaminated with arsenic and other pollutants.⁴ Despite the significant threat posed by coal ash piles, the Fourth Circuit in *Sierra Club v. Virginia Electric and Power Co.* reasoned that a coal ash pile, or any other type of “container,” is not a point source under the CWA unless the coal ash pile itself served as a “conveyance of the pollutant into navigable waters.”⁵

The Fourth Circuit’s decision in *Sierra Club* rested upon its analysis of the CWA.⁶ Congress passed the CWA in 1972 “to restore and maintain the

¹ See *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 412 (4th Cir. 2018) (“In this case, the diffuse seepage of water through the ponds into the soil and groundwater does not make the pond a conveyance any more than it makes the landfill or soil generally a conveyance.”).

² See *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 420 (D.C. Cir. 2018) (first citing *Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities*, 80 Fed. Reg. 21,302, 21,303 (Apr. 17, 2015) (to be codified at 40 C.F.R. pts. 257, 261); and then citing *Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities*, 75 Fed. Reg. 35,128, 35,153, 35,168 (June 21, 2010)) (determining that “[c]oal-fired power plants in the United States ... produced approximately 110 million tons of solid waste” and “that waste contains myriad of carcinogens and neurotoxins”).

³ See *id.* at 422–23 (citing *Disposal of Coal Combustion Residuals*, 80 Fed. Reg. at 21,343–44) (discussing legacy ponds which “are ‘generally unlined’ and unmonitored, and so are shown to be more likely to leak than units at utilities still in operation”).

⁴ See *Va. Elec. & Power Co.*, 903 F.3d at 406 (“Following a bench trial, the district court found that rainwater and groundwater were indeed leaching arsenic from the coal ash in the landfill and settling ponds, polluting the groundwater, which carried the arsenic into navigable waters.”); *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 438 (6th Cir. 2018) (“After a bench trial, the district court found that TVA violated the CWA because its coal ash ponds at the Gallatin plant leaks pollutants through groundwater that is ‘hydrologically connected’ to the Cumberland River without a permit.”), *petition for cert. filed*, 2019 WL 1620581 (U.S. Apr. 15, 2019) (No. 18-1307).

⁵ *Va. Elec. & Power Co.*, 903 F.3d at 412 (“Regardless of whether a source is a pond or some other type of container, the source must still be functioning as a conveyance of the pollutant into navigable waters to qualify as a point source.”).

⁶ *Id.* at 410.

chemical, physical, and biological integrity of the Nation's waters."⁷ Instead of preserving the standards of liability under the 1948 Federal Water Pollution Control Act and the Water Quality Act of 1965, Congress fashioned the CWA to deliver a new standard of liability for polluters based on effluent limitations.⁸ The CWA serves as the primary "legislative source of the [Environmental Protection Agency's (EPA)] authority—and responsibility—to abate and control water pollution."⁹ Additionally, the CWA makes "the discharge of any pollutant by any person" illegal.¹⁰ According to the CWA, the term "discharge of a pollutant" includes "any addition of any pollutant to navigable waters from any point source."¹¹ However, the CWA provides for "exceptions to this general prohibition in the form of permits issued in accordance with the National Pollutant Discharge Elimination System (NPDES), which allows limited discharges."¹² Thus, the CWA provides a "default regime of strict liability" as any unpermitted discharge of a pollutant from a "point source" to the "navigable waters" of the United States is prohibited, unless the polluter holds a permit.¹³

Generally, five requirements must be satisfied before a defendant will be held liable under the CWA: "(1) a *pollutant* must be (2) *added* (3) *to navigable waters* (4) *from* (5) *a point source*."¹⁴ According to the CWA, the term navigable waters refers to the "waters of the United States,"¹⁵ and in *Rapanos v. United States*, the Supreme Court determined that a broad interpretation of the term is appropriate.¹⁶ Thus, rather than reading the term conservatively to include only

⁷ *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 273 F. Supp. 3d 775, 823 (M.D. Tenn. 2017) (quoting *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 434–35 (M.D.N.C. 2015)), *rev'd*, 905 F.3d 436 (6th Cir. 2018), *petition for cert. filed*, 2019 WL 1620581 (U.S. Apr. 15, 2019) (No. 18-1307).

⁸ *Tenn. Clean Water Network*, 905 F.3d at 438 (citing S. Rep. No. 92-414 (1971), *as reprinted in* 1972 U.S.C.A.N. 3668, 3675) ("The CWA overhauled the 1948 Federal Water Pollution Control Act and the Water Quality Act of 1965 by shifting the focal point of liability ... to capping effluent limitations from a discharging source.").

⁹ *Tenn. Clean Water Network*, 273 F. Supp. 3d at 823 (quoting *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 491 (2d Cir. 2005)).

¹⁰ *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 642 (4th Cir. 2018) (quoting 33 U.S.C. § 1311(a) (2012)), *petition for cert. filed*, 87 U.S.L.W. 3069 (U.S. Aug. 28, 2018) (No. 18-268).

¹¹ 33 U.S.C. § 1362(12)(A) (2012).

¹² *Upstate Forever*, 887 F.3d at 642 (citing 33 U.S.C. §§ 1311(a), 1342 (2012)).

¹³ *Tenn. Clean Water Network*, 273 F. Supp. 3d at 823 (citing *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 284 (6th Cir. 2015)).

¹⁴ *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988) (quoting *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982)).

¹⁵ 33 U.S.C. § 1362(7).

¹⁶ *Rapanos v. United States*, 547 U.S. 715, 731 (2006) (plurality opinion) (citing *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001)) ("[T]he Act's term 'navigable waters' includes something more than traditional navigable waters. We have twice stated that the meaning of 'navigable waters' in the Act is broader than the traditional understanding of that term."); *see also* *United States v. Riverside Bayview Homes*,

“waters that are navigable-in-fact,” like rivers and lakes, the Court determined that navigable waters include “wetlands and related hydrological environments.”¹⁷ Courts, however, have disagreed over whether the CWA regulates the discharge of pollutants to navigable waters through hydrologically connected groundwater.¹⁸ Most of the courts that have rejected arguments asserting the CWA encompasses a discharge of pollutants to navigable waters through groundwater have done so based on the belief that groundwater itself is not considered to be “a water of the United States.”¹⁹ On the other hand, at least one court believes the issue should not be viewed “as whether the CWA regulates the discharge of pollutants into groundwater itself,” but instead as “whether the CWA regulates the discharge of pollutants to navigable waters via groundwater.”²⁰ When the question is constructed in this manner, some courts have utilized the conduit theory when analyzing cases concerning the discharge of pollutants to navigable waters via hydrologically connected groundwater.²¹

Inc., 474 U.S. 121, 133 (1985).

¹⁷ See, e.g., *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 643 (4th Cir. 2018) (citing *Rapanos*, 547 U.S. at 730–31, 735 (“The Supreme Court has interpreted the term ‘navigable waters’ to mean more than waters that are navigable-in-fact, and to include, for example, wetlands and related hydrological environs.”)), *petition for cert. filed*, 87 U.S.L.W. 3069 (U.S. Aug. 28, 2018) (No. 18-268); see also *Riverside Bayview Homes, Inc.*, 474 U.S. at 133.

¹⁸ See, e.g., *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 444 (6th Cir. 2018) (“[A]ny alleged leakages into the groundwater are not a violation of the CWA.”), *petition for cert. filed*, 2019 WL 1620581 (U.S. Apr. 15, 2019) (No. 18-1307); *Upstate Forever*, 887 F.3d at 651 (“Accordingly, we hold in agreement with the Second and Ninth Circuits that to qualify as a discharge of a pollutant under the CWA, that discharge need not be channeled by a point source until it reaches navigable waters.”); *Haw. Wildlife Fund v. Cty. of Maui*, 881 F.3d 754, 765 (9th Cir. 2018) (holding that the county was liable under the CWA for point source discharges into hydrologically connected groundwater), *amended and superseded by* 886 F.3d 737 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 1164 (U.S. Feb. 19, 2019) (No. 18-260).

¹⁹ See, e.g., *Tenn. Clean Water Network*, 905 F.3d at 444 (“Thus, when the pollutants are discharged to the river, they are not coming from a point source; they are coming from groundwater which is a nonpoint-source conveyance. The CWA has no say over that conduct.”); *Rice v. Harken Expl. Co.*, 250 F.3d 264, 269 (5th Cir. 2001) (“The Rices urge this Court to apply the CWA definition of ‘navigable waters’ to the OPA. But, even that definition is not so expansive as to include groundwater within the class of waters protected by the CWA.”); *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994) (determining that the CWA does not cover groundwater contamination because neither “the [CWA] nor the EPA’s definition asserts authority over ground waters, just because these may be hydrologically connected to surface waters”); *Haw. Wildlife Fund v. Cty. of Maui*, 24 F. Supp. 3d 980, 996 (D. Haw. 2014) (“Almost every court that has allowed unpermitted discharges into groundwater has done so under the theory that the groundwater is not *itself* ‘water of the United States.’”), *amended and superseded by* 886 F.3d 737 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 1164 (U.S. Feb. 19, 2019) (No. 18-260).

²⁰ *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 445 (M.D.N.C. 2015) (“This Court views the issue not as whether the CWA regulates the discharge of pollutants into groundwater itself but rather whether the CWA regulates the discharge of pollutants to navigable waters via groundwater.”).

²¹ See *Upstate Forever*, 887 F.3d at 651 (“Accordingly, we hold . . . that discharge need not be channeled by a point source until it reaches navigable waters.”); *Haw. Wildlife Fund*, 881 F.3d at 765 (“We hold the County liable under the CWA because . . . the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water.”); *Yadkin*

Under this approach, groundwater is treated merely as a conduit through which pollutants move from the point source to nearby navigable surface waters.²² More specifically, this approach emphasizes that gravity flow, which moves groundwater through pollutants to nearby navigable waters, can “be part of a point source discharge if” a party “*at least initially collected or channeled the water and other materials.*”²³

Sources of water pollution can be divided into two categories under the CWA: “point sources” and “nonpoint sources.”²⁴ The statutory language of the CWA states that a “point source” is “any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.”²⁵ Nonpoint source discharges are the result of several dispersed discharges over a sizeable space, and it is difficult to regulate nonpoint source discharges because they are diffuse and cannot be linked to a single discrete source.²⁶ While point source pollution is subject to federal regulation under the CWA, nonpoint source pollution falls outside the scope of the CWA.²⁷ Ultimately, when a court looks to ascertain whether a discharge originated from a point source or a nonpoint source, “[t]he ultimate question is whether pollutants were discharged from ‘discernible, confined, and discrete conveyance(s)’ either by gravitational or nongravitational means.”²⁸

Considering the broad implications of the Fourth Circuit’s decision in *Sierra Club*, the Supreme Court must reverse the Fourth Circuit’s decision and hold that coal ash piles are point sources under the CWA. In *Sierra Club*, the Fourth Circuit erroneously concluded that a “container,” which the CWA lists as an

Riverkeeper, Inc., 141 F. Supp. 3d at 445 (“This Court agrees with the line of cases affirming CWA jurisdiction over the discharge of pollutants to navigable surface waters via hydrologically connected groundwater, which serves as a conduit between the point source and the navigable waters.”).

²² See *Haw. Wildlife Fund*, 881 F.3d at 763 (citing *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980)) (stating that gravity flow may be part of the point source, and the fact that “groundwater plays a role in delivering the pollutants to the navigable water does not preclude liability under the statute”).

²³ See *id.* (quoting *Abston Constr. Co.*, 620 F.2d at 41).

²⁴ 33 U.S.C. § 1362(14) (2012); see *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 273 F. Supp. 3d 775, 827 (M.D. Tenn. 2017) (quoting *Nat’l Wildlife Fed’n v. Consumers Power Co.*, 862 F.2d 580, 582 (6th Cir. 1988)), *rev’d*, 905 F.3d 436 (6th Cir. 2018), *petition for cert. filed*, 2019 WL 1620581 (U.S. Apr. 15, 2019) (No. 18-1307).

²⁵ 33 U.S.C. § 1362(14).

²⁶ *Haw. Wildlife Fund*, 881 F.3d at 761 (quoting *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 508 (9th Cir. 2013)).

²⁷ See *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 439 (6th Cir. 2018), *petition for cert. filed*, 2019 WL 1620581 (U.S. Apr. 15, 2019) (No. 18-1307).

²⁸ *Abston Constr. Co.*, 620 F.2d at 45.

example of a point source,²⁹ must itself convey pollutants “into” navigable waters to be considered a point source. The *Sierra Club* court also claimed that the seepage from the coal ash ponds was too diffuse for the ponds to be considered “conveyances.”³⁰ When humans construct an unlined container to collect waste and that container leaks pollutants, however, the container is “by definition, ‘conveying pollutants’ through those leaks.”³¹ It is inconsistent with the language and the purpose of the CWA to hold that several leaks in a large, pollutant-filled container are equivalent to diffuse discharges. More importantly, by holding that a container must operate as a “conveyance of the pollutant into navigable waters,” the court has not only limited future plaintiffs’ ability to hold polluters liable for leaking coal ash piles under the CWA, but it has also limited future plaintiffs’ ability to hold polluters liable for discharges from other types of containers that fail to pass the court’s test, including underground storage tanks, waste ponds, man-made settling basins, and coal mine impoundments. Thus, the repercussions of this decision will extend outside of cases in which there is an unpermitted discharge from a coal ash pond, and the decision will have a negative impact on cases involving discharges from other types of containers.

Moreover, the Fourth Circuit has contradicted their rulings in several other cases by determining that coal ash ponds are not point sources under the CWA. For instance, the Fourth Circuit in *Consolidation Coal Co. v. Costle* indicated that “slurry ponds, drainage ponds, coal refuse piles, and coal storage piles and facilities” are point sources.³² Additionally, the Fourth Circuit contradicted their ruling in *Upstate Forever v. Kinder Morgan Energy Partners, L.P.* that a gasoline pipeline was a point source and that the CWA covers unpermitted discharges of pollutants to navigable waters via hydrologically connected groundwater because the gasoline pipeline itself did not “convey” gasoline “into navigable waters.”³³ This Comment will show that by inserting additional non-

²⁹ 33 U.S.C. § 1362(14).

³⁰ *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 412 (4th Cir. 2018).

³¹ *See* *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 273 F. Supp. 3d 775, 830 (M.D. Tenn. 2017) (asserting that where a “discernible, discrete, and confined impoundment is ‘unlined and leaking pollutants’ it is also, by definition, ‘conveying pollutants’ through those leaks” (citation omitted)), *rev’d*, 905 F.3d 436 (6th Cir. 2018), *petition for cert. filed*, 2019 WL 1620581 (U.S. Apr. 15, 2019) (No. 18-1307).

³² *See* *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 249–50 (4th Cir. 1979), *rev’d sub nom.* *EPA v. Nat’l Crushed Stone Ass’n*, 449 U.S. 64 (1980); Plaintiff-Appellee’s Petition for Rehearing and for Rehearing En Banc at 5, *Va. Elec. & Power Co.*, 903 F.3d 403 (No. 17-1895).

³³ *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 650 (4th Cir. 2018) (“Under this plain meaning, a point source is the starting point or cause of a discharge under the CWA, but that starting point need not also convey the discharge directly to navigable waters.”), *petition for cert. filed*, 87 U.S.L.W. 3069 (U.S. Aug. 28, 2018) (No. 18-268); Plaintiff-Appellee’s Petition for Rehearing En Banc, *supra* note 32, at 4.

statutory requirements into the CWA's definition of a point source and excluding certain sources from the CWA's coverage, the court in *Sierra Club* has increased the likelihood of a catastrophic environmental disaster, which would pose a significant threat to humans and wildlife.

To begin, Part I of this Comment examines recent environmental disasters involving coal ash ponds and the dangers stemming from coal ash storage to demonstrate that it is important for the Supreme Court to hold that coal ash ponds are point sources under the CWA. It also highlights the relevant provisions of the CWA to show that the term "point source" was meant to be interpreted broadly, and that the CWA was designed to eliminate nearly all unpermitted discharges of pollutants to surface waters. Then, Part II of this Comment will analyze the two circuit court decisions in *Tennessee Clean Water Network v. Tennessee Valley Authority* and *Sierra Club v. Virginia Electric & Power Co.* to show how both courts analyzed the issue of whether unpermitted discharges from coal ash ponds are covered by the CWA. Shortly thereafter, Part III argues that the Supreme Court must establish that coal ash ponds and other "containers" that experience groundwater and rainwater penetration are point sources under the CWA. To bolster the assertion that the CWA should cover unpermitted discharges from coal ash ponds, it also argues that the conduit theory is appropriately employed in cases involving discharge from a coal ash pond to navigable waters via hydrologically connected groundwater. Lastly, Part IV argues that the *Sierra Club* court's decision will make it more difficult for plaintiffs to prove that "containers" are point sources under the CWA, and as a result, the Fourth Circuit has increased the probability of an environmental disaster.

I. COAL ASH STORAGE AND THE CWA: BACKGROUND

The Clean Water Act (CWA) is designed to prevent all unpermitted discharges of pollutants to surface waters. Moreover, the CWA should serve as the primary statute by which federal and state governments regulate discharges from coal ash ponds until Congress enacts a statute that provides an adequate solution to the coal ash problem. To understand the complexity and scope of the issues stemming from coal ash ponds, the Supreme Court must review background information regarding coal ash ponds and the CWA. Accordingly, this Part will discuss (1) coal ash storage and environmental disasters involving coal ash ponds; (2) the CWA's citizen suit provision and the National Pollutant Discharge Elimination System (NPDES) permit system; (3) the purpose of the CWA; and (4) the language of the CWA that is relative to the issue at hand.

Additionally, this Part will highlight the threat to the environment and human health posed by the Fourth Circuit's decision in *Sierra Club*.

A. *Coal Ash Storage and Disasters*

Unlined coal ash ponds are prone to leaks. Without sufficient regulation, they can cause catastrophic environmental disasters, and indeed, there have been several disasters involving coal ash ponds in recent years. This Section will discuss the process by which utilities store coal ash, the pollutants that are contained within coal ash, and the recent environmental disasters involving coal ash ponds.

In 2018, coal-fired power plants generated about thirty percent of the United States' electricity.³⁴ According to the EPA, coal combustion residuals from electric utilities constitute "one of the largest industrial waste streams generated in the United States."³⁵ Coal combustion residuals (CCRs) are a by-product of "coal combustion" at coal-fired power plants,³⁶ and the term encompasses several types of residuals, including boiler slag, flue gas desulfurization materials, bottom ash, and fly ash.³⁷ Nonetheless, all CCRs contain "contaminants of environmental concern," including cadmium, boron, lithium, mercury, and arsenic.³⁸ The dangers stemming from CCRs "include elevated probabilities of 'cancer in the skin, liver, bladder, and lungs,' as well as non-cancer risks such as 'neurological and psychiatric effects,' 'cardiovascular effects,' 'damage to blood vessels,' and 'anemia.'"³⁹ CCRs collectively form what is known as coal ash,⁴⁰ and after coal is burned to create electricity, coal-fired power plants usually store coal ash "on site in aging piles or pools that are at varying degrees of risk of protracted leakage and catastrophic structural

³⁴ See *Frequently Asked Questions*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/tools/faqs/faq.php?id=427&t=3> (last updated Mar. 1, 2019) (listing the various ways in which American power companies generate electricity).

³⁵ *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 420 (D.C. Cir. 2018) (citing Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,302, 21,303 (Apr. 17, 2015) (to be codified at 40 C.F.R. pts. 257, 261)).

³⁶ *Id.* at 421.

³⁷ See *id.*; *Coal Ash Basics*, ENVTL. PROTECT. AGENCY, <https://www.epa.gov/coalash/coal-ash-basics#01> (last updated Feb. 5, 2019).

³⁸ See *Util. Solid Waste Activities Grp.*, 901 F.3d at 421.

³⁹ *Id.* (quoting Disposal of Coal Combustion Residuals, 80 Fed. Reg. at 21,449).

⁴⁰ *Coal Ash Basics*, *supra* note 37.

failure.”⁴¹ Ultimately, it is the storage, not the production, of coal ash that poses the greatest threat to human health and the environment.⁴²

Coal-fired power plants produced more than 115 million tons of coal ash in 2015 alone,⁴³ and nearly 110 million tons of coal ash were produced in 2016.⁴⁴ Many coal-fired power plants sit near rivers or other surface waters, which supply water to the steam-powered electricity generating units, and the coal ash produced during the electricity generating process is usually stored nearby.⁴⁵ Typically, coal-fired power plants store coal ash in the ground near surface waters by channeling the coal ash into a wet surface impoundment or a dry landfill, depending on the method that the utility uses to capture the coal ash.⁴⁶ Surface impoundments are typically more than 50 acres wide with a depth of 20 feet, and on average landfills are more than 120 acres wide with a depth of 40 feet.⁴⁷ Overall, there are 1,425 coal ash sites in thirty-seven states, and seventy percent of coal ash dumps are located in impoverished areas.⁴⁸ Considering that the “risks generally stem from the fact that thousands, if not millions, of tons [of coal ash are] placed in a single concentrated location,”⁴⁹ it is important that utilities store the coal ash in a safe and effective manner.

Furthermore, the “sheer volume of” coal ash “at these sites ... can force contaminants into the underlying soil and groundwater, threatening sources of drinking water.”⁵⁰ Stated differently, drinking water sources, including rivers and lakes, are at risk of contamination as coal ash pollutants can leach into the

⁴¹ *Util. Solid Waste Activities Grp.*, 901 F.3d at 420 (citing Disposal of Coal Combustion Residuals, 80 Fed. Reg. at 21,302).

⁴² See Jay Crowder, Note, *Notice to SCOTUS: Coal Ash Should Be a Point Source Discharge Under the Clean Water Act*, 19 Vt. J. ENVTL. L. 89, 97 (2018).

⁴³ AM. COAL ASH ASS'N, 2015 COAL COMBUSTION PRODUCT (CCP) PRODUCTION & USE SURVEY REPORT (2015), https://www.aaa-usa.org/Portals/9/Files/PDFs/2015-Survey_Results_Table.pdf.

⁴⁴ AM. COAL ASH ASS'N, 2016 COAL COMBUSTION PRODUCT (CCP) PRODUCTION & USE SURVEY REPORT (2016), <https://www.aaa-usa.org/Portals/9/Files/PDFs/2016-Survey-Results.pdf>.

⁴⁵ Cale Jaffe, *The Toxic Legacy of Coal Ash on Southwestern Rivers, Waterways, and Reservoirs*, 40 WM. & MARY ENVTL. L. & POL'Y REV. 557, 560 (2016).

⁴⁶ See *Util. Solid Waste Activities Grp.*, 901 F.3d at 421; Robin Overby, Note, *Sitting on Their Ashes: Why Federal Regulations Should Plug the Gaping Holes in State Coal Ash Disposal Regulatory Regimes*, 4 GEO. WASH. J. ENERGY & ENVTL. L. 107, 109 (2013) (citing LINDA LUTHER, CONG. RESEARCH SERV., R41341, REGULATING COAL COMBUSTION WASTE DISPOSAL: ISSUES FOR CONGRESS 9 (2010)) (stating the coal ash may be stored in “either a surface impoundment or a landfill depending on how the coal ash waste was captured during the electricity production process”).

⁴⁷ *Util. Solid Waste Activities Grp.*, 901 F.3d at 421.

⁴⁸ *The Coal Ash Problem*, EARTHJUSTICE, <https://earthjustice.org/features/the-coal-ash-problem> (last visited Oct. 6, 2018).

⁴⁹ *Util. Solid Waste Activities Grp.*, 901 F.3d at 421–22.

⁵⁰ *Id.* at 422.

groundwater and travel to surface waters.⁵¹ Groundwater is stored underground in aquifers;⁵² areas of high pressure in the aquifer push the groundwater away, and from there, groundwater flows downhill through cracks and crevices in the rocks and soil.⁵³ As a result, groundwater will move through underground pathways, and normally, it “discharges to surface water, such as a stream or lake.”⁵⁴ As groundwater flows out of the aquifers, it is “recharged” by rainwater that seeps through the soil.⁵⁵ Ultimately, groundwater and surface waters can be contaminated if rainfall enters coal ash ponds before recharging groundwater, or they can be contaminated if the coal ash ponds leak pollutants into the groundwater.⁵⁶

There is a greater risk of groundwater and surface water contamination at sites where there is not an “adequate lining” between the soil and the coal ash.⁵⁷ The vast majority of coal ash piles, seventy percent of landfills and sixty-five percent of surface impoundments, do not have a liner.⁵⁸ Legacy ponds, or inactive coal ash impoundments, are “generally unlined and unmonitored,” and as a result, they are prone to leaks.⁵⁹ The EPA has admitted that it is “quite clear” that unlined impoundments pose a significant threat to the environment and human health.⁶⁰ Moreover, the EPA has determined that 250 impoundments pose a “significant” risk to human life and that there may be catastrophic structural failures at sites located in “geologically unstable areas.”⁶¹

⁵¹ See *Util. Solid Waste Activities Grp.*, 901 F.3d at 422 (“Surface water bodies ... are also at risk of contamination ...”); *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 412 (4th Cir. 2018) (determining that coal ash pollutants seeped into surface waters after traveling through groundwater, but declining to regulate the discharge under the CWA); *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 273 F. Supp. 3d 775, 827 (M.D. Tenn. 2017) (discussing a situation where coal ash pollutants traveled through the groundwater and into surface waters), *rev’d*, 905 F.3d 436 (6th Cir. 2018), *petition for cert. filed*, 2019 WL 1620581 (U.S. Apr. 15, 2019) (No. 18-1307).

⁵² *Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753, 757 (E.D. Va. 2017), *aff’d in part and rev’d in part*, 903 F.3d 403 (2018).

⁵³ See *id.*

⁵⁴ See *id.* (“Groundwater most commonly discharges to surface water, such as a stream or lake.”).

⁵⁵ See *id.* (“Precipitation usually recharges groundwater. The precipitation percolates through the soil to the groundwater and recharges it.”).

⁵⁶ See *id.* at 758 (stating that “three sources—seeps from the Bottom Ash Pond, leaks in the liner of the Ash Landfill, and direct rainfall that flows through the inner dike—likely recharge the groundwater”).

⁵⁷ See *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 422 (D.C. Cir. 2018) (“Groundwater contamination is more likely to occur at sites that are unlined or lack adequate lining between the coal ash and the soil beneath it.”).

⁵⁸ See *id.* (“[M]ost most existing coal ash disposal sites—70% of landfills and 65% of surface impoundments—have no liner at all.”).

⁵⁹ *Id.* at 422–23.

⁶⁰ *Id.* at 434.

⁶¹ See *id.* at 422.

According to the EPA, there have been at least 157 cases in which unmonitored coal ash piles caused damage to the environment and human health.⁶² One of the “largest volume industrial spill[s] in U.S. history” took place on December 22, 2008, and it involved an unlined coal ash pond in Kingston, Tennessee.⁶³ The coal ash pond was full of carcinogens and neurotoxins, and in one year alone, the coal-fired power plant in Kingston produced 49,000 pounds of lead, 1.4 million pounds of barium, and 45,000 pounds of arsenic.⁶⁴ The spill in Kingston stemmed from structural failure in a coal ash pond,⁶⁵ and it released nearly 5.4 million cubic yards of coal ash over 300 acres of land and into a nearby river.⁶⁶ Over eighty acres of aquatic ecosystems were “completely destroyed” after the river was contaminated, and one year later, the fish retrieved from the river still exhibited levels of contamination that rendered them unsuitable for human consumption.⁶⁷ Officials closed the river during the two years following the spill because it filled the river with arsenic and lead.⁶⁸ Furthermore, the spill cut off power in the area, damaged several homes, and shattered a natural gas pipe.⁶⁹ As a result, the Tennessee Valley Authority (TVA) invested \$1.2 billion over four years to remove the coal ash from the Emory River and soil in the surrounding area.⁷⁰

The spill in Kingston is not the only significant spill in recent history evidencing the threat posed by unlined coal ash piles. For instance, in 2005, over 100 million gallons of coal ash leaked from an impoundment at a Pennsylvania coal-fired power plant into the Delaware River, and the spill resulted in the short-term shutdown of a drinking water facility.⁷¹ Again in 2014, Duke Energy mismanaged a coal ash pond, and it spilled 39,000 tons of coal ash into the Dan River in Eden, North Carolina.⁷² Water samples were taken in the area, and they

⁶² Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,302, 21,325 (Apr. 17, 2015) (to be codified at 40 C.F.R. pts. 257, 261) (“EPA has confirmed a total of 157 cases, both proven and potential, in which CCR mismanagement has caused damage to human health and the environment.”).

⁶³ See *Util. Solid Waste Activities Grp.*, 901 F.3d at 423 (“The EPA recounts that public pressure to regulate Coal Residuals escalated after an unlined surface impoundment in Kingston, Tennessee suffered “catastrophic” structural failure on December 22, 2008.”).

⁶⁴ Shaila Dewan, *At Plant in Coal Ash Spill, Toxic Deposits by the Ton*, N.Y. TIMES, Dec. 29, 2008, at A14.

⁶⁵ *Util. Solid Waste Activities Grp.*, 901 F.3d at 423.

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Overby*, *supra* note 46, at 108.

⁷² *Duke Energy Coal Ash Spill in Eden, NC: History and Response Timeline*, ENVTL. PROTECT. AGENCY,

contained “extremely high levels of arsenic, chromium, iron, lead and other toxic materials.”⁷³ More recently, rainwaters from Hurricane Florence flooded three coal ash ponds at a site in Goldsboro, North Carolina,⁷⁴ and as a result, over 2,000 cubic yards of coal ash were emitted into the surrounding environment.⁷⁵ Recent environmental studies have shown that groundwater and surface water are “consistently and lastingly contaminated” by “coal ash ponds near 21 power plants in five Southeastern U.S. states.”⁷⁶

It is evident that unlined coal ash piles are prone to leaks, and when they are mismanaged, human life and entire ecosystems are at risk of destruction.⁷⁷ At least one electric utility, the Georgia Power Company, has decided to excavate and move all of its coal ash ponds to prevent future disasters.⁷⁸ Going forward, courts must hold power companies accountable and encourage them to take the necessary precautions to prevent disasters. The holding in *Sierra Club*, however, will make it easier for power companies to ignore existing coal ash ponds at their facilities because they cannot be regulated under the CWA.⁷⁹ Because pollutants from leaking coal ash piles move through groundwater before reaching surface waters, and because these pollutants pose a significant threat to human health and the environment,⁸⁰ it is important for the Supreme Court to establish that coal ash piles are point sources under the CWA.

B. *The Act*

When deciding whether a coal ash pond is a point source under the CWA, the Court must look to the purpose and language of the CWA for guidance. Furthermore, the CWA’s NPDES permit system and citizen suit provision can be used to reduce the risks associated with leaking coal ash ponds. This Section

<https://www.epa.gov/dukeenergy-coalash/history-and-response-timeline> (last visited Aug. 15, 2019).

⁷³ Catherine E. Shoichet, *Spill Spews Tons of Coal Ash into North Carolina River*, CNN (Feb. 9, 2014, 6:29 PM), <https://www.cnn.com/2014/02/09/us/north-carolina-coal-ash-spill/index.html>.

⁷⁴ Ellen M. Gilmer, *Clean Water Act Doesn’t Cover Power Plant’s Arsenic—Court*, GREENWIRE (Sept. 12, 2018), <https://www.eenews.net/greenwire/stories/1060100407/search?keyword=hurricane+florence>.

⁷⁵ Ken Silverstein, *Hurricane Florence Brings the Issue of Coal Ash Back to the Surface*, FORBES (Sept. 18, 2018, 8:45 AM), <https://www.forbes.com/sites/kensilverstein/2018/09/18/hurricane-florence-brings-the-issue-of-coal-ash-back-to-the-surface/#4b3dec031fe3>.

⁷⁶ Avner Vengosh, *Coal Ash Ponds Found to Leak Toxic Materials*, DUKE NICHOLAS SCH. ENV’T (June 10, 2016), <https://nicholas.duke.edu/about/news/coal-ash-ponds-found-leak-toxic-materials>.

⁷⁷ See *supra* notes 62–67.

⁷⁸ Dave Williams, *Georgia Power to Excavate and Close Two More Coal Ash Ponds*, ATLANTA BUS. CHRON. (Oct. 8, 2018, 10:26 AM), <https://www.bizjournals.com/atlanta/news/2018/08/31/georgia-power-to-excavate-and-close-two-more-coal.html>.

⁷⁹ See *infra* notes 199–203.

⁸⁰ See *supra* notes 57–66.

will illustrate the importance of the CWA's citizen suit provision and NPDES permit system, and it will describe how the two provisions operate. Then, this Section will examine the purpose and language of the CWA in an effort to provide clarity on this complex issue.

1. *The CWA's Citizen Suit Provision and NPDES Permit System*

If coal ash ponds are considered point sources under the CWA, utilities operating the ponds will be required to comply with all of the CWA's provisions, including the provisions regarding the NPDES permit system. The CWA established the NPDES to allow limited discharges of pollutants from point sources to navigable waters when the polluter has been issued a permit by the appropriate regulatory authority.⁸¹ Accordingly, if an individual or entity wants to lawfully discharge pollutants to the navigable waters of the United States, the NPDES demands that the individual or entity obtain a permit that sets limits on "the type and quantity of pollutants" discharged.⁸² More specifically, a permit issued according to the system may impose "effluent limitations" on the rate at which a pollutant can be discharged from a point source, and the permit can restrict the discharge of pollutants to certain outfalls at any given site.⁸³ The NPDES permit may also establish "related monitoring and reporting requirements, in order to improve cleanliness and safety of the Nation's waters."⁸⁴ Permits can be issued by the EPA or an authorized state environmental regulatory agency, and the issuing entity is charged with monitoring the polluter to ensure that they are complying with the requirements of the permit.⁸⁵

Thus, the "primary responsibility for enforcement" of the CWA "rests with the state and federal governments."⁸⁶ If the discharger receives a permit and fails to comply with the relative limitations established by the permit, the discharger is deemed to have violated the CWA.⁸⁷ Additionally, a polluter may violate the

⁸¹ *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 642 (4th Cir. 2018), *petition for cert. filed*, 87 U.S.L.W. 3069 (U.S. Aug. 28, 2018) (No. 18-268).

⁸² *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004); *United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

⁸³ 33 U.S.C. § 1362 (2012); *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 491 (2d Cir. 2005) (citing *S. Fl. Water Mgmt.*, 541 U.S. at 102).

⁸⁴ *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 435 (M.D.N.C. 2015) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 174 (2000)).

⁸⁵ See *Upstate Forever*, 887 F.3d at 642; cf. *Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753, 761 (E.D. Va. 2017), *aff'd in part and rev'd in part*, 903 F.3d 403 (2018).

⁸⁶ *Piney Run Pres. Ass'n v. Cty. Comm'rs*, 523 F.3d 453, 456 (4th Cir. 2008) (quoting *Sierra Club v. Hamilton Cty. Bd. of Cty. Comm'rs*, 504 F.3d 634, 637 (6th Cir. 2007)).

⁸⁷ *Yadkin Riverkeeper, Inc.*, 141 F. Supp. 3d at 435.

Act if the polluter discharges pollutants from an outflow that is not covered by the related permit.⁸⁸ To ensure compliance with the Act, government agencies can bring suit when a polluter violates the NPDES permit or any other provision of the CWA.⁸⁹

Furthermore, the citizen suit provision of the CWA allows citizens to bring suit when any polluter violates an “effluent standard or limitation” set forth in a permit,⁹⁰ and an “effluent standard or limitation is defined to include the Act’s central prohibition on the ‘discharge of any pollutant’ without a permit.”⁹¹ A “citizen,” according to the CWA, is any person or persons that have “an interest which is or may be adversely affected” by any unpermitted discharge of pollutants from a point source.⁹² By authorizing these suits, the CWA’s citizen suit provision establishes a second layer of protection for the nation’s navigable waters.⁹³ At least two courts have indicated that citizen suits are designed “to supplement rather than to supplant governmental action,” and that the purpose of these suits is “to abate pollution when the government cannot or will not command compliance.”⁹⁴

Before a citizen suit can proceed, the prospective plaintiff must provide sixty days’ notice regarding their intent to sue to the state agency, the EPA, and the alleged polluter.⁹⁵ During this time, the government can bring its own action against the polluter, and the polluter may remedy its violation and “bring itself into complete compliance with the Act.”⁹⁶ Additionally, citizen suits cannot proceed if the EPA or state is prosecuting a civil or criminal action against the alleged violator.⁹⁷ If the plaintiff satisfies the applicable requirements and the suit against the polluter is successful, a court may impose civil penalties on the defendant and grant injunctive relief in favor of the plaintiff.⁹⁸

⁸⁸ See *Upstate Forever*, 887 F.3d at 642 (“[A] polluter also may be in violation of the statute due to a discharge for which the polluter could not have obtained any permit.”).

⁸⁹ See *id.* (“The CWA authorizes both citizens and government agencies to enforce the Act’s provisions.”).

⁹⁰ 33 U.S.C. § 1365 (2012); *Upstate Forever*, 887 F.3d at 642; *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 152 (4th Cir. 2000).

⁹¹ *Upstate Forever*, 887 F.3d at 642–43 (citing 33 U.S.C. §§ 1365(f), 1311(a)).

⁹² *Friends of the Earth, Inc.*, 204 F.3d at 152 (quoting 33 U.S.C. § 1365).

⁹³ See *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 435 (M.D.N.C. 2015).

⁹⁴ See *id.* (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987)).

⁹⁵ 33 U.S.C. § 1365(1)(A).

⁹⁶ *Gwaltney of Smithfield, Ltd.*, 484 U.S. at 59–60.

⁹⁷ *Yadkin Riverkeeper, Inc.*, 141 F. Supp. 3d at 435.

⁹⁸ See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 152 (4th Cir. 2000) (“A successful suit may result in the award of injunctive relief and the imposition of civil penalties payable to the United States Treasury.”).

Overall, the NPDES permit system and the citizen suit provision are key to enforcing the CWA and mitigating the potential risks associated with coal ash ponds.⁹⁹ If the Supreme Court determines that coal ash ponds are point sources and subject to regulation under the CWA, utilities will be required to obtain a permit from a federal or state agency to lawfully discharge pollutants from coal ash ponds.¹⁰⁰ In turn, coal ash ponds will be monitored by state and federal regulatory agencies and limits will be placed on the quantity of pollutants that can be emitted from coal ash ponds.¹⁰¹ Considering that the EPA has admitted that many coal ash ponds across the country are prone to leaks, it is important that these sites remain under the coverage of the CWA so that they are monitored by the authorities. Moreover, the citizen suit provision operates as a safety net to ensure that utilities are complying with their permits.¹⁰²

If the Fourth Circuit's decision is upheld, however, coal ash ponds will fall outside the scope of the CWA, and citizens will no longer be able to bring suits against utilities for unpermitted discharges from coal ash ponds. If this enforcement mechanism is not applicable in the context of coal ash ponds, it will increase the chances that utilities will not take the appropriate steps to ensure that their coal ash ponds are not discharging pollutants to surface waters.

2. Purpose and Language of the CWA

In 1972, Congress created the Clean Water Act to serve as the primary means by which federal and state regulatory agencies could control water pollution across the United States.¹⁰³ Congress designed the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁰⁴ Ultimately, the Act was created with the objective of not only reducing but also completely eliminating the discharge of pollutants to the navigable waters of the United States, unless such discharges are in compliance with other provisions of the Act.¹⁰⁵ Moreover, the Act was designed to protect both humans and wildlife from toxic water pollution by maintaining “water quality which provides for the protection and propagation of ... wildlife” and “recreation in and on the water.”¹⁰⁶

⁹⁹ See *supra* notes 86–92 and accompanying text.

¹⁰⁰ See *supra* notes 81–85 and accompanying text.

¹⁰¹ See *supra* note 85 and accompanying text.

¹⁰² See *supra* notes 86–91 and accompanying text.

¹⁰³ *Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753, 760 (E.D. Va. 2017), *aff'd in part and rev'd in part*, 903 F.3d 403 (2018).

¹⁰⁴ 33 U.S.C. § 1251(a) (2012).

¹⁰⁵ *Id.* § 1251; *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 491 (2d Cir. 2005).

¹⁰⁶ 33 U.S.C. § 1251.

Relevant to the issue at hand is the language of the Act that states, “Except as in compliance with this ... Act, the discharge of any pollutant by any person shall be unlawful.”¹⁰⁷ The phrase “discharge of any pollutant” refers to “any addition of any pollutant to navigable waters from any point source.”¹⁰⁸ The Fourth Circuit recently determined that the CWA’s definition of “discharge of any pollutant” requires that the discharge only originates from a point source, and it stated that the “definition does not place temporal conditions on the discharge of a pollutant from a point source.”¹⁰⁹ In reaching this determination, the *Upstate Forever* court analyzed the plain language of the statute, and it noted that the word “from” merely indicates a “starting point or cause of a discharge.”¹¹⁰ Thus, the court in *Upstate Forever* held that the CWA does not require discharge to be “directly” from the point source to navigable waters.¹¹¹ Considering that a “discharge of any pollutant” does not have to be directly from the point source to navigable waters, the Fourth Circuit stated that nothing in the CWA prevents environmental authorities from regulating indirect discharges that travel through groundwater before reaching navigable waters.¹¹² The Ninth Circuit reached the same conclusion when analyzing the CWA and its definition of “the discharge of any pollutant.”¹¹³

When looking at the language and purpose of the Act, it is clear that Congress intended to “ban ... the discharge of any pollutant by any person” to protect the integrity of the nation’s waters.¹¹⁴ Additionally, according to one court, a point source under the CWA was meant to embrace “the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States.”¹¹⁵ Thus, it would be perplexing to hold that the CWA encompasses “a polluter who discharges pollutants via a pipe running from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via groundwater.”¹¹⁶

¹⁰⁷ *Id.* § 1311.

¹⁰⁸ *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 647 (4th Cir. 2018) (citing 33 U.S.C. § 1362(12)(A)), *petition for cert. filed*, 87 U.S.L.W. 3069 (U.S. Aug. 28, 2018) (No. 18-268).

¹⁰⁹ *Id.* at 648.

¹¹⁰ *Id.* at 650.

¹¹¹ *Id.* at 648.

¹¹² *Id.* at 651.

¹¹³ *Haw. Wildlife Fund v. Cty. of Maui*, 881 F.3d 754, 765 (9th Cir. 2018), *amended and superseded by* 886 F.3d 737 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 1164 (U.S. Feb. 19, 2019) (No. 18-260).

¹¹⁴ *W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 161–62 (4th Cir. 2010) (emphasis added) (quoting 33 U.S.C. § 1311(a) (2012)).

¹¹⁵ *United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

¹¹⁶ *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 273 F. Supp. 3d 775, 826 (M.D. Tenn. 2017) (quoting *N. Cal. RiverWatch v. Mercer Fraser Co.*, No. C–04–4620 SC, 2005 WL 2122052, at *2 (N.D. Cal.

Therefore, the Supreme Court should look to the purpose and language of the Act when deciding whether a coal ash pond is a point source under the CWA, as it will provide some clarity on this complex issue.

II. COAL ASH CASES AND “CONTAINERS”

The holding in *Sierra Club* will have an impact outside the realm of coal ash ponds, and if lower courts apply the holding from *Sierra Club* to other cases, the likelihood of an environmental disaster involving any type of “container” will increase significantly. The decision in *Sierra Club* and its potential to alter the way the CWA is applied to “containers” forms the foundation of this Comment. Moreover, the Supreme Court must reach a determination on two critical issues in order to provide adequate protection to the nation’s waters: (1) whether the “conduit theory” is a viable mechanism to regulate an unpermitted discharge of pollutants to surface waters via hydrologically connected groundwater; and (2) whether a coal ash pond is a point source under the CWA. Accordingly, this Part will discuss (1) the Sixth Circuit’s decision in *Tennessee Clean Water Network v. Tennessee Valley Authority*¹¹⁷ and (2) the Fourth Circuit’s decision in *Sierra Club v. Virginia Electric & Power Co.*¹¹⁸

A. Tennessee Clean Water Network v. Tennessee Valley Authority

While the Sixth Circuit has not stated whether it considers coal ash ponds to be point sources, it is important to discuss *Tennessee Clean Water Network v. Tennessee Valley Authority*, because the Sixth Circuit rejected the conduit theory and established that the CWA does not encompass discharges from coal ash ponds to surface waters via hydrologically connected groundwater.¹¹⁹ In *Tennessee Clean Water Network*, the defendant, TVA, operated a coal-fired power plant near the Cumberland River in Gallatin, Tennessee.¹²⁰ The coal ash produced at the plant is stored next to the river in unlined, man-made ponds.¹²¹ The TVA has two coal ash ponds at the Gallatin plant: the Non-Registered Site (“NRS”) and the Ash Pond Complex (“Complex”).¹²² The Complex remains

Sept. 1, 2005)), *rev’d* 905 F.3d 43 (6th Cir. 2018), *petition for cert. filed*, 2019 WL 1620581 (U.S. Apr. 15, 2019) (No. 18-1307).

¹¹⁷ See discussion *infra* Part II.A.

¹¹⁸ See discussion *infra* Part II.B.

¹¹⁹ *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 446 (6th Cir. 2018), *petition for cert. filed*, 2019 WL 1620581 (U.S. Apr. 15, 2019) (No. 18-1307).

¹²⁰ *Id.* at 438.

¹²¹ *Id.* at 440.

¹²² *Id.* at 439–40.

operational, but the NRS is closed.¹²³ The TVA closed and dewatered the NRS in 1998, and as a result, the TVA does not have a NPDES permit for the NRS.¹²⁴ The NRS holds approximately 2.3 million cubic yards of coal ash, and it is situated on loose soil, clay, and silt.¹²⁵ Thus, the district court found that some portions of the NRS and the Complex “penetrate the water table,”¹²⁶ and it determined that there was no evidence that the leaking stopped after the pond was “closed.”¹²⁷

The Complex is a series of unlined ponds that cover nearly 476 acres, and they hold approximately 11.5 million cubic yards of coal ash.¹²⁸ The TVA has a NPDES permit that allows it to discharge coal ash from the Complex into the Cumberland River through a pipe.¹²⁹ The permit, however, does not authorize coal ash discharges “to land or water ... from any portion of the ... treatment system other than” the pipe.¹³⁰ Both parties agreed that the Complex is located atop karst terrain.¹³¹ According to expert testimony, karst terrain is “a landscape characterized by underground sinkholes, fissures, and caves caused by water-dissolving limestone,” and in turn, groundwater flows through the conduits in the rock before spilling into the Cumberland River.¹³² After considering the expert testimony regarding the karst terrain below the Complex, the district court concluded that “[i]t is simply implausible, based on the evidence before the Court, that the Complex has not continued to, and will not continue to, suffer at least some leaking through karst features.”¹³³

The plaintiffs, two Tennessee conservation groups, brought a CWA citizen suit in the Middle District of Tennessee, alleging that the TVA violated the CWA by discharging coal ash into the Cumberland River via hydrologically connected groundwater.¹³⁴ The leaking ponds at the Gallatin plant are particularly concerning because there is a drinking water facility less than two miles

¹²³ *Id.* at 439.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 439–40.

¹²⁷ *Id.*

¹²⁸ *Id.* at 440.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 438.

downriver from the ponds,¹³⁵ and this portion of the Cumberland River, which is known as Old Hickory Lake, is a popular recreational spot.¹³⁶

On August 4, 2017, the district court rejected the TVA's proposal to dewater and put a cap on the unlined coal ash ponds, and the court ordered the TVA to "fully excavate" the coal ash at both sites and relocate it to a lined pond.¹³⁷ The court determined that the injunctive remedy was necessary because the CWA regulates the discharge of pollutants from a point source to navigable waters through hydrologically connected groundwater, as long as the hydrological connection between the point source and navigable waters "is direct, immediate, and can generally be traced."¹³⁸ According to the court, the expert testimony regarding the terrain underneath the ponds and the pollutant concentrations in the river was sufficient to establish that the ponds were leaching coal ash into groundwater that is hydrologically connected to the Cumberland River.¹³⁹ Moreover, the court determined that the coal ash ponds were point sources because they were "a series of discernible, confined, and discrete ponds that receive wastewater, treat that wastewater, and ultimately convey it to the Cumberland River."¹⁴⁰

The Sixth Circuit, however, rejected the district court's adoption of the conduit theory, and it determined that the CWA does not cover unpermitted discharges of pollutants to navigable waters via hydrologically connected groundwater.¹⁴¹ Rather than finding that a coal ash pond is not a point source, the Sixth Circuit held that *groundwater* is not a point source.¹⁴² According to its reasoning, when pollutants enter the river via groundwater, they are not coming from a point source, but from a nonpoint source.¹⁴³ The CWA does not regulate discharges from nonpoint sources.¹⁴⁴

To support its decision, the court pointed to the text of the CWA.¹⁴⁵ It stated that the foundation of the argument in support of the conduit theory is based on the fact that the relevant provision of the CWA does not use the word "directly,"

¹³⁵ *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 273 F. Supp. 3d 775, 804 (M.D. Tenn. 2017), *rev'd*, 905 F.3d 436 (6th Cir. 2018), *petition for cert. filed*, 2019 WL 1620581 (U.S. Apr. 15, 2019) (No. 18-1307).

¹³⁶ *Tenn. Clean Water Network*, 905 F.3d at 438.

¹³⁷ *Id.* at 442.

¹³⁸ *Id.* at 441.

¹³⁹ *Id.* at 441–42.

¹⁴⁰ *Id.* at 441.

¹⁴¹ *See id.* at 446.

¹⁴² *Id.* at 444.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *See id.* at 443–44 (asserting that "[t]he CWA's text suggests otherwise").

as it only prohibits discharges “to navigable waters *from* any point source.”¹⁴⁶ Thus, proponents of the conduit theory, like the district court, argued that “the CWA allows for pollutants to travel from a point source *through* nonpoint sources en route to navigable waters.”¹⁴⁷

The Sixth Circuit combatted this argument by pointing to “effluent limitations,” which set the standard of liability for polluters under the CWA.¹⁴⁸ According to the court, effluent limitations serve as caps on the quantity of pollutants that may be discharged from a point source, and the CWA “defines effluent limitations as restrictions on the amount of pollutants that may be ‘discharged from point sources *into* navigable waters.’”¹⁴⁹ After interpreting the word “into,” the court determined that an element of directness must be present in discharge before it is regulated under the CWA, and it held that “for a point source to discharge *into* navigable waters, it must dump *directly* into those navigable waters.”¹⁵⁰ Accordingly, the court determined that the coal ash, in this case, was not being dumped directly into the Cumberland River from a point source, and as a result, the discharges at the Gallatin plant were not regulated by the CWA.¹⁵¹

The court also addressed the plaintiff’s reliance on the Supreme Court’s decision in *Rapanos*.¹⁵² The plaintiff utilized the portion of the opinion in *Rapanos* that established that “the CWA does not forbid the ‘addition of any pollutant *directly* to navigable waters from any point source,’ but rather the addition of any pollutant to navigable waters.”¹⁵³ The court believed that this quote had been taken out of context, and that Justice Scalia pointed out a lack of directness to show that a discharge of pollutants can be regulated under the CWA if it travels through several point sources before spilling into navigable waters.¹⁵⁴

¹⁴⁶ 33 U.S.C. § 1362(12)(A) (emphasis added); *Tenn. Clean Water Network*, 905 F.3d at 444 (citing *Ky. Waterways All. v. Ky. Utils. Co.*, No. 18–5115, 2018 U.S. App. LEXIS 27283 (6th Cir. Sept. 21, 2018)).

¹⁴⁷ *Tenn. Clean Water Network*, 905 F.3d at 444.

¹⁴⁸ *See id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 444–45. In *Rapanos*, the Supreme Court consolidated two cases and granted certiorari to determine whether four Michigan wetlands constituted “waters of the United States” under the CWA. *Rapanos v. United States*, 547 U.S. 715, 729 (2006). The wetlands were positioned near ditches and man-made drains that eventually emptied into “traditional” navigable waters. *Id.* at 729–30. In one case, the petitioners discharged fill material “without a permit” into the wetlands, and in the other case, the petitioners were denied a permit to discharge fill material into a wetland located near a lake. *Id.* The United States Court of Appeals for the Sixth Circuit held that there was federal jurisdiction over the wetlands. *Id.* at 730.

¹⁵³ *Tenn. Clean Water Network*, 905 F.3d at 444 (citing *Rapanos*, 547 U.S. at 729–30).

¹⁵⁴ *Id.* 444–45.

According to the court, Scalia never contemplated the “point source to nonpoint source dumping” that was present in this case.¹⁵⁵

Lastly, the court claimed that the CWA protects the states’ rights and responsibilities. The Sixth Circuit reasoned that allowing the CWA to cover discharges to navigable waters through hydrologically connected groundwater would interfere with the administration of other federal statutes like the Resource Conservation and Recovery Act (RCRA).¹⁵⁶ According to the court, RCRA specifically covers coal ash ponds and “explicitly exempts from its coverage any pollution that is subject to CWA regulation.”¹⁵⁷ In turn, the Sixth Circuit believed that by holding that the CWA covers a discharge of pollutants to navigable waters via hydrologically connected groundwater, the district court rendered RCRA’s regulations regarding coal ash ponds useless.¹⁵⁸

Even though the Sixth Circuit did not state whether it considered a coal ash pond to be a point source, the decision in *Tennessee Clean Water Network* is important because it placed coal ash ponds outside the reach of the CWA.¹⁵⁹ The decision in the case is contrary to the Fourth and Ninth Circuits’ rulings that the CWA covers unpermitted discharges from point sources to navigable waters via hydrologically connected groundwater,¹⁶⁰ and the court’s ruling will make it difficult for plaintiffs to bring suit against utilities that operate coal ash impoundments. Thus, like the decision in *Sierra Club*, the Sixth Circuit’s decision will have a negative impact on the environment and human health because most coal ash ponds discharge pollutants to navigable waters via hydrologically connected groundwater. The Supreme Court should overrule this decision, and instead, the Court should follow the line of reasoning that has been upheld by the Fourth Circuit and the Ninth Circuit.

B. *Sierra Club v. Virginia Electric & Power Co.*

In *Sierra Club v. Virginia Electric & Power Co.*, the court focused on the question of whether a coal ash pond is a point source under the CWA.¹⁶¹ In this

¹⁵⁵ *Id.* at 445.

¹⁵⁶ *See id.* at 446.

¹⁵⁷ *Id.* at 445.

¹⁵⁸ *See id.* at 445 (“[R]eading the CWA in this way would remove coal ash treatment and storage practices from RCRA’s coverage.”).

¹⁵⁹ *See supra* note 149 and accompanying text.

¹⁶⁰ *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 (4th Cir. 2018), *petition for cert. filed*, 87 U.S.L.W. 3069 (U.S. Aug. 28, 2018) (No. 18-268); *Haw. Wildlife Fund v. Cty. of Maui*, 881 F.3d 754, 765 (9th Cir. 2018), *amended and superseded by* 886 F.3d 737 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 1164 (U.S. Feb. 19, 2019) (No. 18-260).

¹⁶¹ *See infra* notes 198–204 and accompanying text.

case, the defendant, Dominion Electric, operated a coal-fired power plant on a peninsula near the Deep Creek and Elizabeth River in Chesapeake, Virginia.¹⁶² Dominion shut the plant down in 2014, but it did not finish depositing coal ash at the site until October 2015.¹⁶³ Over a period of sixty years, Dominion pumped coal ash into various ponds, and in accordance with a NPDES permit, it discharged pollutants into nearby navigable waters.¹⁶⁴ Dominion stored coal ash in three ponds, which the district court termed the “Historic Pond,” from 1953 to 1984.¹⁶⁵ In 1984, Dominion constructed a coal ash landfill on top of a portion of the unlined Historic Pond and left the coal ash underneath in place.¹⁶⁶ Subsequently, Dominion constructed another unlined settling pond at the site to store coal ash.¹⁶⁷ Collectively, the coal ash ponds at the site hold about 3.3 million tons of coal ash, and approximately 150 tons of arsenic is stored at the site.¹⁶⁸ Dominion’s NPDES permit required the utility to monitor the level of arsenic in the groundwater near the plant.¹⁶⁹ To monitor the site, Dominion built wells around the edge of the plant that were used to test the groundwater.¹⁷⁰ Additional permits identified the specific locations at which Dominion was allowed to discharge pollutants, and they established that Dominion was only allowed to discharge a certain amount of pollutants to surface waters.¹⁷¹

In 2002, Dominion conducted tests which revealed that the arsenic levels in the groundwater surrounding the facility exceeded the limit set by the regulatory authority.¹⁷² Again, in 2014 and 2015, samples of groundwater taken from various wells at the site revealed that levels of arsenic exceeded the standards set by regulatory authorities.¹⁷³ As a result, Dominion launched several investigations to determine whether groundwater at the site was hydrologically connected to nearby navigable waters, and it concluded that “groundwater,” stored in aquifers beneath the site, “moves laterally into the surrounding surface water” after it flows through the coal ash stored at the site.¹⁷⁴ When Sierra Club

¹⁶² *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 407–08 (4th Cir. 2018).

¹⁶³ *Id.* at 408.

¹⁶⁴ *Id.* at 405–08.

¹⁶⁵ *Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753, 756 (E.D. Va. 2017), *aff’d in part and rev’d in part*, 903 F.3d 403 (2018).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 757.

¹⁶⁸ *See id.* (“In total, the Historic Pond, Ash Landfill, Bottom Ash Pond, and Sedimentation Pond (collectively, ‘the Coal Ash Piles’) currently hold about 2,830,000 cubic yards or 3,396,000 tons of coal ash.”).

¹⁶⁹ *Va. Elec. & Power Co.*, 903 F.3d at 408.

¹⁷⁰ *Id.*

¹⁷¹ *Va. Elec. & Power Co.*, 247 F. Supp. 3d at 757.

¹⁷² *Va. Elec. & Power Co.*, 903 F.3d at 408.

¹⁷³ *Va. Elec. & Power Co.*, 247 F. Supp. 3d at 757.

¹⁷⁴ *Id.* at 758.

filed a lawsuit, however, Dominion made arguments that contradicted its own findings, and their experts and representatives stated that “the movement of groundwater does not directly connect with the surface water, because the aquifer confines the groundwater and impedes it from reaching the surface water.”¹⁷⁵ Additionally, Dominion’s experts and representatives claimed that “any arsenic in the surface water surrounding the CEC, or in the sediments at the bottom of those waters, probably comes from other industries in the area.”¹⁷⁶

In March of 2015, Sierra Club filed a suit against Dominion under the citizen suit provision of the CWA, alleging that Dominion violated the CWA by discharging pollutants to the navigable waters surrounding the site.¹⁷⁷ Specifically, it alleged that the coal ash ponds were point sources under the CWA, and “that arsenic leached from them into the groundwater, which was ‘hydrologically connected’ to the Elizabeth River and Deep Creek, thereby carrying arsenic to navigable waters.”¹⁷⁸ The district court determined that the coal ash ponds at the site were point sources under the CWA, and it held that the CWA covers unpermitted discharges of pollutants to surface waters via hydrologically connected groundwater.¹⁷⁹ As a result, the court held that Dominion was violating the CWA by discharging arsenic to navigable waters from point sources.¹⁸⁰ In reaching its determination that coal ash piles are point sources under the CWA, the district court stated that “the ultimate question is whether pollutants were discharged from discernible, confined and discrete conveyance[s] either by gravitational or nongravitational means.”¹⁸¹ According to the district court, Dominion constructed the ponds to concentrate coal ash in a central location, and the ponds acted as “discrete mechanisms that convey pollutants from the old power plant to the river.”¹⁸²

Shortly thereafter, Dominion appealed the district court’s ruling that coal ash ponds were point sources and that the CWA covered unpermitted discharges of pollutants to groundwater,¹⁸³ and the Fourth Circuit ultimately overturned the lower court’s ruling that Dominion’s coal ash ponds were point sources.¹⁸⁴ When

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 759.

¹⁷⁷ *Va. Elec. & Power Co.*, 903 F.3d at 406.

¹⁷⁸ *Id.* at 408.

¹⁷⁹ *Id.* at 406.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 410 (quoting *Ohio Valley Envtl. Coal., Inc. v. Hernshaw Partners, LLC*, 984 F. Supp. 2d 589, 599 (S.D. W. Va. 2013)).

¹⁸² *Id.*

¹⁸³ *Id.* at 409.

¹⁸⁴ *Id.* at 406 (“[W]e reverse the district court’s ruling that Dominion was liable under § 1311(a) of the

deciding whether the CWA covers unpermitted discharges to groundwater, the Fourth Circuit applied the precedent it set in *Upstate Forever*, which established that unpermitted discharges of pollutants from point sources to groundwater are covered under the CWA when the plaintiff can demonstrate “a direct hydrological connection between [the] ground water and surface water.”¹⁸⁵ The Fourth Circuit upheld the district court’s conclusion on the issue because the facts in *Sierra Club* were enough to establish a direct hydrological connection between the groundwater and surface water near the site.¹⁸⁶ On the second issue, however, the court in *Sierra Club* reversed the district court’s ruling and held that Dominion’s coal ash ponds were not point sources under the CWA.¹⁸⁷

The Fourth Circuit framed the issue in a relatively simple manner where the ultimate question was whether the coal ash piles were point sources because they permitted precipitation to seep through them and carry pollutants to the groundwater.¹⁸⁸ To answer this question, Dominion argued that the coal ash piles were “stationary feature[s] of the landscape through which rainwater or groundwater can move diffusely,”¹⁸⁹ and in turn, the utility argued that the coal ash piles did not fulfill the statutory definition of a point source as a “discernible, confined and discrete conveyance.”¹⁹⁰ The *Sierra Club* court agreed with Dominion’s analysis of the issue, and it looked to the language of the Act to bolster its reasoning.¹⁹¹ Specifically, the court focused on the word “conveyance” as it is used in the CWA’s definition of a point source, and it highlighted the fact that the point source must not act as a “generalized conveyance.”¹⁹² To further its point, the court examined the dictionary definition of “conveyance,” and pointed out that a conveyance “requires a channel or medium—that is, a facility—for the movement of something from one place to another.”¹⁹³

Act.”).

¹⁸⁵ *Id.* at 409 (citing *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 (4th Cir. 2018), *petition for cert. filed*, 87 U.S.L.W. 3069 (U.S. Aug. 28, 2018) (No. 18-268)).

¹⁸⁶ *Id.*

¹⁸⁷ *See id.* at 412 (“By contrast, the coal ash piles and ponds, from which arsenic diffusely seeped, can hardly be construed as discernible, confined, or discrete conveyances, as required by the Clean Water Act.”).

¹⁸⁸ *See id.* at 410.

¹⁸⁹ *Id.* at 409.

¹⁹⁰ *Id.*

¹⁹¹ *See id.* at 410 (“At its core, the Act’s definition makes clear that some facility must be involved that functions as a discrete, not generalized, ‘conveyance.’”).

¹⁹² *Id.*

¹⁹³ *Id.* at 410–11 (first citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 499 (1961); and then citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 291–92 (1976)).

The court, in construing this language in its favor, was quick to point out that Dominion's coal ash piles were not constructed to convey anything, "such as a pipe or ditch would be," but rather, they were actually constructed to store coal ash in one central location.¹⁹⁴ The *Sierra Club* court held that the whole site suffered from "generalized," "diffuse seepage" in which rainwater and groundwater gushed through the coal ash piles and carried pollutants to nearby surface waters.¹⁹⁵ According to the court, the coal ash piles were "static recipients of the precipitation and groundwater that flowed through them," and as a result, they fell outside the reach of the CWA.¹⁹⁶ This reasoning allowed the court to show that the "conveying action" highlighted by the district court was merely a result of groundwater and rainwater moving through the coal ash piles.¹⁹⁷ Stated more simply, the court believed that the discharge of pollutants to surface waters, in this case, was not "a function of the coal ash piles" as the Act requires, but instead, it was "the result of a natural process" where rainwater seeped through the ground before it reached navigable waters near the facility.¹⁹⁸ Additionally, the court stated that when "a source works to convey a pollutant, the concentration of the pollutant and the rate at which it is discharged by that conveyance can be measured."¹⁹⁹ In this case, however, the court pointed out that the district court could not determine how much arsenic from the coal ash ponds reached nearby surface waters, and it said that this finding contradicted the effluent limitation scheme imposed by the CWA.²⁰⁰

Sierra Club argued that the coal ash piles at the site were "containers," which the CWA lists as an example of a point source.²⁰¹ Although the court admitted that the coal ash pond was a container by definition, the court also pointed out that a container must still function as a *conveyance* of pollutants to surface waters to be considered a point source under the CWA.²⁰² In this case, pollutants were not draining into navigable waters from a ditch or a pipe connected to the pond, but rather, they were flowing into navigable waters due to precipitation and groundwater seepage.²⁰³ Thus, the court asserted that the pond itself was not conveying pollutants to navigable waters.²⁰⁴ Moreover, the court addressed the

¹⁹⁴ *See id.* at 411 (stating that the coal ash piles were not constructed to "convey anything").

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 412.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 411.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 412.

²⁰² *See id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 412-13.

cases that Sierra Club cited in support of its assertion that various other courts had found facilities, outside the context of coal ash ponds, to be point sources when they appeared to be containers.²⁰⁵ In a rather vague attempt to distinguish those cases from the case at hand, the court contended that in each case cited by Sierra Club, the containers at issue were constructed to be a part of an active system, rather than a passive system, that conveyed pollutants.²⁰⁶

Overall, the Fourth Circuit concluded that even if a facility is some type of a container, it must “be functioning *as a conveyance* of the pollutant *into* navigable waters to qualify as a point source.”²⁰⁷ More specifically, the Fourth Circuit determined that the discharge of pollutants to surface waters in *Sierra Club* was not “a function of the coal ash piles” as the Act requires, but instead, it was “the result of a natural process” where rainwater seeped through the ground before it reached navigable waters.²⁰⁸ Thus, the holding in *Sierra Club* may remove any type of “container” that discharges pollutants to navigable waters via a “natural process” from the CWA’s coverage.

III. COAL ASH PONDS UNDER THE CWA: ANALYSIS

The *Sierra Club* court created a situation where utilities that maintain coal ash ponds are essentially exempt from liability under the CWA, and as a result, there is a significant risk that humans and wildlife will be exposed to deadly pollutants. To prevent environmental disasters involving coal ash ponds and mitigate the dangers stemming from coal ash storage, the Supreme Court must interpret the term “point source” broadly and follow the case law that is relevant to the issue at hand. Furthermore, the Court must also decide that the “conduit theory” can be used to regulate unpermitted discharges that travel to surface waters via hydrologically connected groundwater if it hopes to remedy the coal ash problem. Therefore, this Part argues that (1) the language and purpose of the CWA support the claim that a coal ash pond is a point source under the CWA, (2) other cases involving “containers” indicate that a point source may be present when the discharge was the “result of a natural process,” and (3) the “conduit theory” should be used to regulate unpermitted discharges of pollutants to surface waters via hydrologically connected groundwater.

²⁰⁵ *Id.* at 412–13 (first citing *United States v. Earth Scis., Inc.*, 599 F.2d 368, 374 (10th Cir. 1979); and then citing *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980)).

²⁰⁶ *See id.* (“The passive coal ash piles and ponds here are hardly analogous.”).

²⁰⁷ *Id.* at 412 (emphasis added).

²⁰⁸ *See id.*

A. *Coal Ash Ponds Are Point Sources Under the CWA*

This Section offers a critique of the Fourth Circuit's decision in *Sierra Club*, and it discusses a variety of arguments that the Supreme Court should utilize to upend the Fourth Circuit's decision. More specifically, this Section will argue that the language and purpose of the Act support the finding that a coal ash pond is a point source under the CWA. It will also apply the decisions from other cases to the facts in *Sierra Club* to show that a point source may be present when the discharge was "the result of a natural process," like rainwater and groundwater penetration. Finally, this Section will argue that while this issue is complex and confusing in many respects, it is important for the Supreme Court to hold that coal ash ponds are point sources under the CWA to prevent future harms to human health and the environment.

1. *The Language and Purpose of the CWA Support the Claim that Coal Ash Ponds Are Point Sources*

When deciding whether a coal ash pond is a point source under the CWA, the explicit language and purpose of the CWA is more persuasive than any other analytical tool utilized by the *Sierra Club* court. Above all else, the CWA was enacted to "maintain the ... integrity of the Nation's waters"²⁰⁹ by banning "the discharge of *any* pollutant by *any* person,"²¹⁰ so in turn, several courts have interpreted that a "point source" was meant to embrace "the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States."²¹¹ The *Sierra Club* court, however, took the opposite approach, and it limited the definition of a point source to only capture situations where a facility is "functioning *as a conveyance* of the pollutant *into* navigable waters."²¹² Therefore, it appears that the Fourth Circuit disregarded an interpretive practice that was employed by several courts, and as a result, the Fourth Circuit has diminished the coverage of the CWA and prevented courts from achieving the CWA's primary objective.

Furthermore, it would contradict the purpose of the CWA for a court to hold that the CWA covers "a polluter who discharges pollutants via a pipe running

²⁰⁹ 33 U.S.C. § 1251(a) (2012).

²¹⁰ *W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 161 (4th Cir. 2010) (quoting 33 U.S.C. § 1311(a)).

²¹¹ *See, e.g., United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979); *Ohio Valley Envtl. Coal., Inc., v. Hernshaw Partners, LLC*, 984 F. Supp. 2d 589, 598 (S.D. W. Va. 2013) ("[T]he definition of a 'point source' is intended to be interpreted broadly....").

²¹² *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 412 (4th Cir. 2018) (emphasis added).

from the factory directly to the riverbank, but not a polluter who dumps the same pollutants into a man-made settling basin some distance short of the river and then allows the pollutants to seep into the river via groundwater.”²¹³ The Fourth Circuit in *Sierra Club*, however, reached the determination that the court in *Northern California River Watch v. Mercer Fraser Co.* advocated against.²¹⁴ By determining that a point source is present only when the discharge is a “function of the coal ash ponds” themselves, the *Sierra Club* court has created a gap in the Act where utilities that maintain coal ash ponds can escape liability under the CWA by depositing coal ash in large, unlined ponds and allowing the pollutants to seep into groundwater and travel to surface waters.²¹⁵ The Fourth Circuit’s decision does not advance the CWA’s primary goal of protecting the nation’s waters, and there is no indication that Congress intended the CWA to operate in this way.

When deciding whether a coal ash pond is a point source, the Supreme Court must also be guided by the statutory definition of a point source, which specifies that a point source is a “[1] discernible, [2] confined, and [3] discrete [4] conveyance.”²¹⁶ In *Sierra Club*, the Fourth Circuit focused on the “conveyance” element of the statutory definition, and the court held that a coal ash pond must be “functioning as a conveyance of the pollutant into navigable waters” to be considered a point source.²¹⁷ The court also found that the coal ash ponds were not “functioning as conveyances” because the “movement of pollutants” was “the result of a natural process of precipitation percolating through the soil to the groundwater.”²¹⁸ This interpretation of the “conveyance” requirement, however, conflicts with the CWA’s language²¹⁹ and the decisions of several circuit and district courts,²²⁰ including the Fourth Circuit’s recent decision in *Upstate Forever*.²²¹

²¹³ See *supra* note 116 and accompanying text.

²¹⁴ See *Va. Elec. & Power Co.*, 903 F.3d at 412.

²¹⁵ *Id.*

²¹⁶ *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 273 F. Supp. 3d 775, 830 (M.D. Tenn. 2017), *rev’d*, 905 F.3d 436 (6th Cir. 2018), *petition for cert. filed*, 2019 WL 1620581 (U.S. Apr. 15, 2019) (No. 18-1307).

²¹⁷ *Va. Elec. & Power Co.*, 903 F.3d at 412.

²¹⁸ *Id.*

²¹⁹ See 33 U.S.C. § 1362 (2012).

²²⁰ See, e.g., *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 43–44 (5th Cir. 1980) (finding a point source even though the pollutants “were carried by natural forces,” including “erosion caused by rainwater runoff”); *United States v. Earth Scis., Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (“When it fails because of flaws in the construction or inadequate size to handle the fluids utilized ... the escape of liquid from the confined system is from a point source.”); *Ohio Valley Envtl. Coal., Inc. v. Hernshaw Partners, LLC*, 984 F. Supp. 2d 589, 599 (S.D. W. Va. 2013).

²²¹ See *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 651 (4th Cir. 2018) (“[T]he pipeline is the starting point and cause of pollution that has migrated and is migrating through ground water to

In *Upstate Forever*, the Fourth Circuit examined a case where a gasoline pipeline ruptured and spilled over 100,000 gallons of gasoline into the ground.²²² Consequently, gasoline seeped into the groundwater, which was hydrologically connected to nearby surface waters.²²³ In determining that the discharge was covered by the CWA, the court in *Upstate Forever* determined that the point source need not “convey the discharge directly to navigable waters,” and the court stressed that gravity, which “naturally washes” pollutants downstream, can be part of a point source discharge.²²⁴ The court in *Upstate Forever* pointed to Justice Scalia’s plurality opinion in *Rapanos* to confirm that the language of the CWA supports the proposition that a point source discharge may be present when a pollutant “naturally” flows to surface waters.²²⁵ Thus, the two Fourth Circuit decisions are contradictory.²²⁶ The court in *Sierra Club* determined that the coal ash ponds were not point sources because “the actual means of conveyance was the rainwater and groundwater flowing ... through the soil.”²²⁷ But in *Upstate Forever*, the conveying action of the gasoline pipeline resulted from a similar “natural process,”²²⁸ which, according to the court in *Sierra Club*, means the “movement of pollutants” from the gasoline pipeline to navigable waters was not a “function of” the pipeline itself.²²⁹ Moreover, the language of the CWA does not indicate that “the conveying action” must be “a function of the coal ash ponds” for the ponds to be considered point sources.²³⁰ The *Sierra Club* court has inserted a nonstatutory requirement into the CWA’s point source definition by determining that the coal ash pond itself must act as a “conveyance of the pollutant into navigable waters,” and this contradicts the Fourth Circuit’s recent holding in *Upstate Forever*.²³¹

Similarly, while analyzing the conveyance element, the Fourth Circuit inserted an additional, nonstatutory requirement into the CWA’s point source definition by suggesting that Dominion’s coal ash ponds were not point sources because they “were not *created* to convey anything and did not function in that

navigable waters.”), *petition for cert. filed*, 87 U.S.L.W. 3069 (U.S. Aug. 28, 2018) (No. 18-268).

²²² *Id.* at 641.

²²³ *See id.* (analyzing a case where gasoline spewed from a burst pipe).

²²⁴ *Id.* at 649–50.

²²⁵ *See id.* at 650 (citing *Rapanos v. United States*, 547 U.S. 715, 732–38 (2006)).

²²⁶ Plaintiff-Appellee’s Petition for Rehearing En Banc, *supra* note 32, at 3–4.

²²⁷ *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 411 (4th Cir. 2018).

²²⁸ *See Upstate Forever*, 887 F.3d at 651 (“[T]he pipeline is the starting point and cause of pollution that has migrated and is migrating through ground water to navigable waters.”).

²²⁹ *See Va. Elec. & Power Co.*, 903 F.3d at 412.

²³⁰ *See* 33 U.S.C. § 1362 (2012). *But see Va. Elec. & Power Co.*, 903 F.3d at 412.

²³¹ *See* Plaintiff-Appellee’s Petition for Rehearing En Banc, *supra* note 32, at 3–4.

manner.”²³² According to the language of the CWA, a point source is “any discernable, confined, and discrete conveyance,” but the Act does not state that a facility must have been “*created* to convey anything” to qualify as a point source.²³³ Moreover, the suggestion that a facility must have been “*created* to convey” pollutants to qualify as a point source contradicts the plain language of the CWA, specifically the language of the Act that indicates a “container” is a point source.²³⁴ While the CWA does not define the word “container” as it is used in the point source definition, the Fourth Circuit has usually followed the plain language of the CWA when looking to ascertain the meaning of certain undefined words and provisions in the Act.²³⁵ Accordingly, when analyzing the plain meaning of the word “container,” it is clear that a “container” is a facility “used to hold or store things in.”²³⁶ Under this plain meaning, a “container,” like a coal ash pond, need not be “created to convey anything” to be considered a point source as the *Sierra Club* court suggests, but rather, the polluter may construct the “container” in an effort to “hold or store” pollutants. Thus, it would be appropriate for a court to hold that the CWA only requires that a “container” be functioning as a conveyance at the time of the alleged discharge to qualify as a point source, and the “container” does not have to be “created to convey anything.” Correspondingly, the district court in *Tennessee Clean Water Network* correctly held that “where a discernible, discrete, and confined [coal ash] impoundment is ‘unlined and leaking pollutants’ it is ... by definition” functioning as a conveyance under the CWA.²³⁷

The *Sierra Club* court contradicted their own decision in *Upstate Forever*, along with the language and purpose of the CWA, by holding that the coal ash ponds were not “functioning as conveyances” because the “movement of pollutants” was “the result of a natural process”²³⁸ As evidenced above, a “point source” was meant to be interpreted in accordance with the “broadest

²³² See *Va. Elec. & Power Co.*, 903 F.3d at 411 (emphasis added).

²³³ See 33 U.S.C. § 1362 (emphasis added).

²³⁴ See *id.* § 1362(14) (2012) (emphasis added) (defining a point source and listing a “container” as an example).

²³⁵ See *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 650 (4th Cir. 2018) (first citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 913 (Philip Babcock Gove et al. eds., 2002); and then citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 729 (3d ed. 1992)) (“The word ‘from’ indicates ‘a starting point: as (1) a point or place where an actual physical movement ... has its beginning.’”), *petition for cert. filed*, 87 U.S.L.W. 3069 (U.S. Aug. 28, 2018) (No. 18-268).

²³⁶ *Container*, COLLINS DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/container> (last visited Jan. 4, 2019).

²³⁷ *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 273 F. Supp. 3d 775, 830 (M.D. Tenn. 2017), *rev’d*, 905 F.3d 436 (6th Cir. 2018), *petition for cert. filed*, 2019 WL 1620581 (U.S. Apr. 15, 2019) (No. 18-1307).

²³⁸ See *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 412 (4th Cir. 2018). *But see Upstate Forever*, 887 F.3d at 651.

possible definition,”²³⁹ but the *Sierra Club* court failed to adhere to this principle. Moreover, in determining that the seepage at Dominion’s site was “diffuse” nonpoint source pollution,²⁴⁰ the *Sierra Club* court has created a loophole in the CWA by which utilities, like Dominion, can escape liability under the CWA by depositing pollutants into large, unlined ponds and allowing the pollutants to seep into groundwater that is hydrologically connected to surface water. This outcome is something that Congress surely did not intend when it enacted the statute to “maintain the ... integrity of the Nation’s waters.”²⁴¹ It is also clear that while the seepage at Dominion’s site may seem “diffuse” at first glance, this categorization is ultimately indefensible. It is illogical and inconsistent with the purpose of the CWA to argue that the seepage stemming from Dominion’s coal ash ponds constituted “diffuse” seepage simply because there were several leaks in a large, unlined, and pollutant-filled container.²⁴²

2. *Other Cases Involving “Containers” Support the Claim That Coal Ash Ponds Are Point Sources Under the CWA*

The court in *Sierra Club* held that even if the coal ash ponds were “containers,” they failed to satisfy the conveyance element of the “point source” definition because the discharge resulted from a “natural process.”²⁴³ On the other hand, several district courts and circuit courts have determined that the CWA encompasses discharges from facilities that act as “containers,” even though the “movement of pollutants” was “the result of a natural process,” like “precipitation percolating through the soil to the groundwater.”²⁴⁴ Speaking directly to the issue at hand, at least one other district court in the Fourth Circuit answered the question of whether a coal ash pond is a point source under the CWA.²⁴⁵ In *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, the district court judge determined that coal ash lagoons were point sources under

²³⁹ See, e.g., *United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979); *Ohio Valley Envtl. Coal., Inc. v. Hershaw Partners, LLC*, 984 F. Supp. 2d 589, 598 (S.D. W. Va. 2013).

²⁴⁰ *Va. Elec. & Power Co.*, 903 F.3d at 412.

²⁴¹ 33 U.S.C. § 1251(a) (2012).

²⁴² The Fourth Circuit in *Sierra Club* determined that several leaks in a large, unlined, and pollutant filled container constituted “diffuse seepage.” See *Va. Elec. & Power Co.*, 903 F.3d at 412. On the other hand, the court seemed to indicate that the coal ash pond would be a point source if there was one large leak in the coal ash pond or the coal ash pond discharged pollutants to navigable waters via a pipe or ditch. *Id.* All of the aforementioned situations, however, produce the same result: Traceable amounts of pollutants are discharged to navigable waters.

²⁴³ See *id.*

²⁴⁴ See *id.* But see *supra* note 220 and accompanying text.

²⁴⁵ *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 443 (M.D.N.C. 2015).

the CWA because they were “confined and discrete” conveyances.²⁴⁶ The facilities at issue, in this case, were large coal ash lagoons located at the defendant utility’s Buck Steam Station along the banks of the Yadkin River, and the defendant allegedly discharged pollutants, through several seeps in the coal ash lagoons, to navigable waters via hydrologically connected groundwater.²⁴⁷

In reaching the determination that the discharge by the defendant was encompassed by the CWA, the district court found that the coal ash ponds were “unlined and leaking pollutants to the groundwater,” so by definition, the coal ash lagoons were “conveying pollutants to navigable waters.”²⁴⁸ The district court arrived at its conclusion in part because the purpose of the CWA demands a broad interpretation of the term “point source.”²⁴⁹ Moreover, in reaching its decision, the district court correctly applied the holdings of other courts to the facts of its case, specifically holdings from other courts that indicated similar types of “containers” were functioning as conveyances when the discharge resulted from a “natural process.”²⁵⁰ The *Sierra Club* court, however, construed the term “point source” narrowly and chose not to follow the case law cited in *Yadkin Riverkeeper, Inc.*²⁵¹ More importantly, by ignoring the holding and reasoning from *Yadkin Riverkeeper, Inc.*, the Fourth Circuit has increased the likelihood of an environmental disaster involving coal ash ponds.

Case law outside the context of coal ash ponds also supports the claim that Dominion’s ponds are point sources under the CWA, as evidenced by *United States v. Earth Sciences, Inc.*²⁵² There, the defendant, Earth Sciences, operated a gold leaching facility in which gold ore was sprayed with a cyanide-sodium hydroxide water solution (leachate solution) to separate the gold from the ore.²⁵³ The leachate solution was collected in a “small fiberglass-lined pool,”²⁵⁴ but snowmelt from the surrounding area penetrated the pool and caused the leachate solution to seep out of the pool and into a nearby creek.²⁵⁵ The EPA brought suit against Earth Sciences for violating the CWA, and Earth Sciences argued on

²⁴⁶ *Id.* at 444.

²⁴⁷ *Id.* at 435–36.

²⁴⁸ *Id.* at 443–44.

²⁴⁹ *Id.* at 444 (first citing *Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2d Cir. 1991); and then citing *United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979)).

²⁵⁰ *See id.* (citing *Umatilla Waterquality Protective Ass’n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1321 (D. Or. 1997)).

²⁵¹ *See Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 412 (4th Cir. 2018).

²⁵² *See Earth Scis., Inc.*, 599 F.2d at 374.

²⁵³ *Id.* at 370.

²⁵⁴ *Id.*

²⁵⁵ *See id.*

appeal that the “pools” were nonpoint sources under the CWA.²⁵⁶ On the other hand, the government highlighted the fact that a “container” is listed in the CWA as an example of a point source.²⁵⁷ Consequently, the Tenth Circuit stated that this “pool” was a point source despite its “large capacity.”²⁵⁸

While the discharge stemming from Earth Sciences’ “pool” was caused by a “natural process,” the Tenth Circuit nonetheless concluded that “excess rainfall or snow melt . . . is not the kind of general runoff considered to be from nonpoint sources” when the polluter’s “pool” fails due to “flaws in the construction.”²⁵⁹ This determination supports the claim that Dominion’s coal ash ponds are point sources under the CWA because “flaws in the construction” of the coal ash ponds allowed rainwater and groundwater to carry pollutants from the ponds to navigable waters.²⁶⁰ The *Sierra Club* court, however, attempted to address the Tenth Circuit’s holding by highlighting the fact that Earth Sciences’ pool was a part of a larger system that “conveyed” pollutants, and the discharge in *Earth Sciences, Inc.* occurred while the pollutants were being conveyed through the system.²⁶¹ The Fourth Circuit’s assessment here, however, ignores a key fact: Earth Sciences’ pool was intended to contain, not convey, the pollutants that were stored in the system, and the conveyance of pollutants to surface waters resulted from a “natural process.”²⁶² More specifically, the discharge of pollutants to navigable waters, or the conveying action, was not “a function of” Earth Sciences’ pool, but instead, it was the result of penetration by “excess rainfall” and “snowmelt,” which is comparable to the “precipitation” that “percolated through the soil to the groundwater” in *Sierra Club*.²⁶³ Thus, it is

²⁵⁶ *Id.* at 373.

²⁵⁷ *See id.* at 374 (“The government emphasizes the terms ‘well,’ ‘container’ and references to a concentrated feeding operation as a point source.”).

²⁵⁸ *See id.*

²⁵⁹ *See id.* (“When it fails because of flaws in the construction or inadequate size to handle the fluids utilized, with resulting discharge, whether from a fissure in the dirt berm or overflow of a wall, the escape of liquid from the confined system is from a point source. Although the source of the excess liquid is rainfall or snow melt, this is not the kind of general runoff considered to be from nonpoint sources under the FWPCA.”).

²⁶⁰ Dominion concluded that “groundwater,” stored in aquifers beneath the site, “moves laterally into the surrounding surface water” after it flows through the coal ash stored at the site. *See Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753, 758 (E.D. Va. 2017), *aff’d in part and rev’d in part*, 903 F.3d 403 (2018). Without an adequate liner, groundwater and rainwater penetrated the coal ash ponds, and this would indicate that there was a flaw in the construction of the ponds. *See id.*

²⁶¹ *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 413 (4th Cir. 2018) (citing *Earth Scis., Inc.*, 599 F.2d at 374) (“In other words, in the process of conveying this contaminated liquid through the system, the liquid escaped.”).

²⁶² *See id.* at 412. *But see Earth Scis., Inc.*, 599 F.2d at 370 (“The entire operation consists of several open excavations lined with plastic membrane . . . all designed to be a closed system without any pollutant discharge.”); Plaintiff-Appellee’s Petition for Rehearing En Banc, *supra* note 32, at 7.

²⁶³ *See Va. Elec. & Power Co.*, 903 F.3d at 412.

evident that Earth Sciences’ pool itself was not acting “as a conveyance of the pollutant into navigable waters”²⁶⁴ as the court in *Sierra Club* requires.

The Fifth Circuit, in *Sierra Club v. Abston Construction Co.* analyzed a case involving “sediment basins,” which were designed to catch and store rainwater runoff that flowed through mining pits and carried away pollutants.²⁶⁵ Similar to the defendant’s argument before the Fourth Circuit in *Sierra Club*, Abston Construction argued that the sediment basins were not point sources because the discharges from the sediment basins resulted from “natural forces,” like erosion caused by rainwater runoff.²⁶⁶ While the Fifth Circuit stated that the lower court needed to gather more facts on remand to determine whether the sediment basin was appropriately categorized as a “container,”²⁶⁷ the *Abston Construction Co.* court established that “[g]ravity flow ... may be part of a point source discharge if the miner at least initially collected ... the water and other materials,” and “[e]xamples of point source pollution ... are the collection, and subsequent percolation, of surface waters in the pits ...”²⁶⁸ Thus, the Fifth Circuit’s opinion in *Abston Construction Co.* seems to contradict the Fourth Circuit’s assertion in *Sierra Club*²⁶⁹ that a facility cannot be functioning as a conveyance if the discharge is a result of natural processes, like groundwater penetration and rainwater runoff.

The court in *Sierra Club* admitted that the Fifth Circuit’s opinion in *Abston Construction Co.* established that “the source of a pollutant regulated” under the CWA “might be a spoil or refuse pile.”²⁷⁰ However, the Fourth Circuit, in an attempt to square its holding with the Fifth Circuit’s holding, claimed the Fifth Circuit “noted that the facilities that actually transport the pollutant *must be* point sources—giving as examples, ‘ditches, gullies, and similar conveyances.’”²⁷¹ However, the court in *Abston Construction Co.* did not hold that “the facilities that ... transport the pollutant must be point sources.” The Fifth Circuit simply

²⁶⁴ *Id.*

²⁶⁵ See *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 43 (5th Cir. 1980) (“Rainwater runoff or water draining from within the mined pit at times carried the material to adjacent streams, causing siltation and acid deposits. In an effort to halt runoff, the miners here occasionally constructed ‘sediment basins,’ which were designed to catch the runoff before it reached the creek.”).

²⁶⁶ See *id.* at 43–44 (“Instead, any water and other materials that were deposited in Daniel Creek were carried by natural forces, mostly erosion caused by rainwater runoff.”).

²⁶⁷ See *id.* at 47 (“Furthermore, factual findings are lacking insofar as the sediment basins and other devices may be characterized as encompassing ‘container(s), ... from which pollutants are or may be discharged.’” (quoting 33 U.S.C. § 1362(12) (2012))).

²⁶⁸ *Id.* at 45.

²⁶⁹ *Va. Elec. & Power Co.*, 903 F.3d at 412.

²⁷⁰ *Id.* at 413.

²⁷¹ *Id.* (citing *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980)).

looked to see if the defendant “initially collected or channeled the water and other materials,” and in turn, it determined that the “[s]ediment basins dug by the miners and designed to collect sediment” were point sources “even though the materials were carried away from the basins by gravity flow ...”²⁷² Thus, it is apparent that the point sources in *Abston Construction Co.* were the sediment pits, and “gravity flow,” which transported the pollutants from the sediment pits to navigable waters, was considered to be a “part of” the “point source discharge.” Similarly, Dominion’s ponds were constructed to collect coal ash, and the pollutants “were carried away by gravity flow.” Accordingly, the Fifth Circuit’s opinion supports the claim that coal ash ponds are point sources under the CWA.

In *United States v. Alpha Natural Resources, Inc.*, the district court analyzed coal mine impoundments and settlement ponds that were used to store byproducts from a coal mining operation, and the court determined that the impoundments and settlement ponds were point sources under the CWA.²⁷³ While there was no indication that the ponds were “functioning as conveyances of pollutants into navigable waters,”²⁷⁴ the court nonetheless determined that the ponds and impoundments were still covered by the CWA.²⁷⁵ Similarly, the same district court, in *Ohio Valley Environmental Coalition, Inc. v. Hernshaw Partners, LLC*, analyzed a “valley fill” that was constructed to store byproducts from a nearby coal mine.²⁷⁶ The defendant, in this case, argued that the discharges from the valley fill were nonpoint source discharges because “any flow emanating from the valley fill” was the result of rainwater runoff or groundwater penetration.²⁷⁷ The court, however, construed the definition of a point source broadly,²⁷⁸ and after considering the Fifth Circuit’s opinion in *Abston Construction Co., Inc.* and the Tenth Circuit’s opinion in *Earth Sciences, Inc.*, it determined that the valley fill was a point source under the CWA.²⁷⁹

The court explained its decision by highlighting the fact that nonpoint source pollution “is limited to uncollected runoff water which is difficult to ascribe to

²⁷² *Abston Constr. Co.*, 620 F.2d at 45; Plaintiff-Appellee’s Petition for Rehearing En Banc, *supra* note 32, at 6–7.

²⁷³ *United States v. Alpha Nat. Res., Inc.*, Civil Action No. 2:14–11609, 2014 U.S. Dist. LEXIS 165842, at *1–2 (S.D. W. Va. Nov. 26, 2014).

²⁷⁴ *Va. Elec. & Power Co.*, 903 F.3d at 412.

²⁷⁵ *Alpha Nat. Res., Inc.*, 2014 U.S. Dist. LEXIS 165842, at *1–2.

²⁷⁶ 984 F. Supp. 2d 589, 592 (S.D. W. Va. 2013).

²⁷⁷ *Id.* at 598.

²⁷⁸ *See id.* (“However, the definition of a ‘point source’ is intended to be interpreted broadly, as indicated by the statute’s ‘including but not limited to’ language.” (citations omitted)).

²⁷⁹ *Id.* at 599.

one polluter.”²⁸⁰ As a result, the court found that “[u]nlike uncollected rainfall runoff, water discharged from ... the valley fill is easily ascribed to a single source: the valley fill.”²⁸¹ Applying the *Ohio Valley Environmental Coalition* court’s opinion to the facts of *Sierra Club*, it is clear that the discharge of arsenic to navigable waters was a point source discharge under the CWA as it was easily ascribed to “a single source,” which was Dominion’s coal ash ponds. Ultimately, rather than limiting the definition of a point source to only capture facilities where the discharge was a function of the facility itself like the Fourth Circuit did in *Sierra Club*, the *Ohio Valley Environmental Coalition* court determined that a point source may be present when natural forces, like rainwater runoff and the flow of groundwater, cause the “container” to convey pollutants to navigable waters.²⁸²

Looking outside the context of mining operations and in further support of reversing the holding of *Sierra Club*, the district court in *Umatilla Waterquality Protective Association v. Smith Frozen Foods* determined that an unlined brine pond was a point source when it was discharging pollutants to navigable waters via hydrologically connected groundwater.²⁸³ In holding that the unlined brine pond was a point source under the CWA, the court determined that “the Ninth Circuit has indicated that a discharger does not need to be actively conveying the pollutants to navigable waters—only that the discharger collected the discharged material prior to the discharge.”²⁸⁴ The court concluded by showing that the unlined brine pond was a “discrete conveyance,” despite the fact that the pollutants “migrated through dirt with the help of water sources such as rain water and gravity....”²⁸⁵ Comparably, in *Sierra Club*, the defendant was not actively conveying the pollutants to navigable waters, but Dominion did collect the materials for years prior to the discharge.²⁸⁶ Accordingly, even though the pollutants traveled to navigable waters via rainwater and groundwater, a court following the holding in *Umatilla Waterquality Protective Association* would find that Dominion’s coal ash ponds were point sources under the CWA. Moreover, the *Woodward v. Goodwin* court determined that a manure pit was covered by the CWA because “ponds have been found to be a point source.”²⁸⁷

²⁸⁰ *See id.* (quoting *Beartooth All. v. Crown Butte Mines*, 904 F. Supp. 1168, 1173 (D. Mont. 1995)).

²⁸¹ *See id.* (citing *Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41, 45 (5th Cir. 1980)).

²⁸² *See id.* (“The valley fill toe is a ‘discernible, confined and discrete conveyance,’ whereby water percolates and is discharged into the unnamed tributary of Laurel Fork.” (citations omitted)).

²⁸³ 962 F. Supp. 1312, 1321 (D. Or. 1997).

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *See Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 411–12 (4th Cir. 2018).

²⁸⁷ No. C 99–1103 MJJ, 2000 U.S. Dist. LEXIS 7642, at *31 (N.D. Cal. May 12, 2000).

In *Woodward*, the defendant maintained a manure pit which discharged pollutants on to the plaintiff's property, and the court held that "unintended run-off erosion" was actionable as a point source.²⁸⁸ This decision strengthens the claim that a coal ash pond is a point source under the CWA because the discharge of pollutants to surface waters in *Woodward* was not "a function of" the pond, but instead, it was "the result of a natural process."

The Fourth Circuit misinterpreted the precedent that would have brought coal ash ponds within the regulatory reach of the CWA, and as a result, it has increased the likelihood of an environmental disaster involving coal ash ponds. As evidenced above, the Fourth Circuit has been the only court to hold that a container itself must be functioning "as a conveyance of the pollutant into navigable waters" to be considered a point source under the CWA.²⁸⁹ Several courts have, however, found containers to be point sources when (1) the polluter initially collected and stored the pollutants in the container, (2) the container failed due to "flaws" in its "construction," and (3) the container conveyed pollutants to navigable waters via a natural process, like the flow of rainwater and groundwater.²⁹⁰ Thus, an accurate interpretation of the precedent indicates that Dominion's coal ash ponds are point sources under the CWA because Dominion stored coal ash in the ponds, Dominion failed to place a liner in the ponds, and the unlined ponds conveyed pollutants to navigable waters via hydrologically connected groundwater.²⁹¹ Moving forward, the Supreme Court should follow the precedent and move away from the language in *Sierra Club*.

B. The Conduit Theory and Coal Ash Ponds

This Section argues that the language and purpose of the CWA, along with recent decisions from the Fourth Circuit and the Ninth Circuit, support the "conduit theory" as a viable mechanism to regulate an unpermitted discharge of pollutants to surface waters via hydrologically connected groundwater. In turn,

²⁸⁸ *Woodward*, 2000 U.S. Dist. LEXIS 7642, at *31 (citing *Hudson River Fishermen's Ass'n. v. Arcuri*, 862 F. Supp. 73 (S.D.N.Y. 1994) ("Furthermore, the type of unintended run-off erosion from the Thomsen manure pit is cognizable as a point source.") (asserting that surface runoff erosion from a river bank was actionable as a point source).

²⁸⁹ *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 412 (4th Cir. 2018); *see also* Plaintiff-Appellee's Petition for Rehearing En Banc, *supra* note 32, at 8.

²⁹⁰ *See, e.g., Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 43, 45-46 (5th Cir. 1980) (determining that liability was possible when miners placed pollutants in basins and piles and these pollutants were carried away by rainwater); *United States v. Earth Scis., Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (stating liability is possible where a system of fluids in tubes and other apparatus failed to contain chemicals when melting snow caused overflow).

²⁹¹ *See Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753, 756 (E.D. Va. 2017), *aff'd in part and rev'd in part*, 903 F.3d 403 (2018).

it will show that the Court can utilize a variety of arguments and analytical tools to overturn the Sixth Circuit's decision in *Tennessee Clean Water Network*. Like the court in *Sierra Club*, the *Tennessee Clean Water Network* court has increased the likelihood of an environmental disaster involving coal ash ponds because its decision placed coal ash ponds outside the reach of the CWA. Therefore, this Section argues that the CWA can be used to regulate unpermitted discharges of coal ash that travel to surface waters via hydrologically connected groundwater.

A CWA violation consists of five elements: “(1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source.”²⁹² When deciding whether the CWA reaches an unpermitted addition of pollutants to navigable waters via hydrologically connected groundwater, the Supreme Court must analyze and follow the plain language of the CWA's term “discharge of a pollutant,” which means “any addition of any pollutant to navigable waters from any point source.”²⁹³ In *Tennessee Clean Water Network*, the Sixth Circuit analyzed this language, and it determined that an unpermitted discharge does not fall under the CWA's coverage unless the point source “dump[s]” pollutants “directly into ... navigable waters.”²⁹⁴ More specifically, the Sixth Circuit determined that “for pollution to qualify as a ‘discharge of a pollutant’: (1) the pollutant must make its way to navigable water (2) by virtue of a point-source conveyance.”²⁹⁵ However, this interpretation of the term “discharge of a pollutant” contradicts the plain language of the CWA,²⁹⁶ and it conflicts with the recent circuit court decisions in *Hawai'i Wildlife Fund v. County of Maui* and *Upstate Forever*.²⁹⁷

According to the plain language of the CWA, a discharge falls within the scope of the CWA if the discharge comes “from” a “point source,” and this language supports the “conduit theory.”²⁹⁸ Nevertheless, the *Tennessee Clean Water Network* court inserted the word “directly” into the CWA's definition of the term “discharge of a pollutant,” and as a result, coal ash ponds within the

²⁹² *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 655 (4th Cir. 2018), *petition for cert. filed*, 87 U.S.L.W. 3069 (U.S. Aug. 28, 2018) (No. 18-268).

²⁹³ *See, e.g., Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 438 (6th Cir. 2018), *petition for cert. filed*, 2019 WL 1620581 (U.S. Apr. 15, 2019) (No. 18-1307); *Upstate Forever*, 887 F.3d at 647.

²⁹⁴ *Tenn. Clean Water Network*, 905 F.3d at 444.

²⁹⁵ *Id.* at 444 (quoting *Ky. Waterways All. v. Ky. Util. Co.*, 905 F.3d 925, 934 (2018)).

²⁹⁶ 33 U.S.C. § 1362(12) (2012).

²⁹⁷ *Upstate Forever*, 887 F.3d at 650; *Haw. Wildlife Fund v. Cty. of Maui*, 881 F.3d 754, 765 (9th Cir. 2018), *amended and superseded by* 886 F.3d 737 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 1164 (U.S. Feb. 19, 2019) (No. 18-260).

²⁹⁸ *See Upstate Forever*, 887 F.3d at 650 (citing 33 U.S.C. § 1362(12)(A) (2012)) (“The plain language of the CWA requires only that a discharge come ‘from’ a ‘point source.’”).

Sixth Circuit’s jurisdiction must discharge pollutants “directly” to navigable waters to be subject to CWA regulation.²⁹⁹ To justify its holding, the *Tennessee Clean Water Network* court explained that “when the pollutants are discharged to the river, they are not coming *from* a point source; they are coming *from* groundwater which is a nonpoint-source conveyance.”³⁰⁰ The Sixth Circuit’s holding, however, does not follow the plain language of the CWA because “[t]he word ‘from’ indicates ‘a starting point: as [] a point or place where an actual physical movement ... has its beginning.’”³⁰¹ Accordingly, a point source does not need to discharge the pollutants “directly” to navigable waters as the Sixth Circuit indicated, but rather, the CWA only requires that the point source serves as the “starting point or cause of a discharge.”³⁰²

While following a similar line of reasoning, the Ninth Circuit held that the Act is only concerned with whether the pollutants “come ‘from’” a point source,³⁰³ and if that requirement is satisfied, “[g]ravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge”³⁰⁴ Thus, contrary to the holding in *Tennessee Clean Water Network*, the more accurate interpretation of the CWA’s language is that gravity flow, which moves groundwater through pollutants to nearby navigable waters, can “be part of a ... discharge” under the CWA if a “point source” served as the “starting point” for the discharge.³⁰⁵ To hold otherwise would contradict the express language and purpose of the CWA because it would require “pollutants be channeled not once but twice before the EPA can regulate them.”³⁰⁶ Moreover, when a point source “indirect[ly]” discharges pollutants to navigable waters, a

²⁹⁹ *But see, e.g., id.* (stating that discharge to a navigable body of water may be indirect); *Haw. Wildlife Fund*, 881 F.3d at 765 (same).

³⁰⁰ *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 444 (6th Cir. 2018) (quoting *Ky. Waterways*, F.3d at 934), *petition for cert. filed*, 2019 WL 1620581 (U.S. Apr. 15, 2019) (No. 18-1307).

³⁰¹ *Upstate Forever*, 887 F.3d at 650 (emphasis omitted) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 913 (Philip Babcock Gove et al. eds., 2002)).

³⁰² *See id.* (“Under this plain meaning, a point source is the starting point or cause of a discharge under the CWA, but that starting point need not also convey the discharge directly to navigable waters.”).

³⁰³ *See Haw. Wildlife Fund*, 881 F.3d at 762 (“Furthermore, when we stated the ‘pollution [must] reach[] the water through a confined, discrete conveyance,’ we were merely stating the pollution must come ‘from a discernible conveyance’ as opposed to some ‘[un]identifiable point of discharge.’” (quoting *Trs. for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984))).

³⁰⁴ *Id.* at 763 (quoting *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980)).

³⁰⁵ *See Upstate Forever*, 887 F.3d at 650 (“Under this plain meaning, a point source is the starting point or cause of a discharge under the CWA, but that starting point need not also convey the discharge directly to navigable waters.”); *Haw. Wildlife Fund*, 881 F.3d at 763 (stating that gravity flow may be part of the point source, and the fact that “groundwater plays a role in delivering the pollutants ... to the navigable water does not preclude liability under the statute”).

³⁰⁶ *Upstate Forever*, 887 F.3d at 650 (quoting *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 510–11 (2d Cir. 2005)).

“delay between the time at which pollution leaves the point source and the time at which it is added to navigable waters” is inevitable.³⁰⁷ The relevant language in the CWA, however, “does not place temporal conditions on the discharge of a pollutant from a point source,” which means that discharges involving “such a delay,” like discharges from coal ash ponds, can be regulated under the CWA.³⁰⁸

Additionally, Justice Scalia’s opinion in *Rapanos* provides support for the conduit theory: Scalia determined that “the CWA does not forbid the addition of any pollutant *directly* to navigable waters from any point source, but rather the addition of any pollutant *to* navigable waters.”³⁰⁹ Both the *Upstate Forever* court and the *Hawai’i Wildlife Fund* court cited the language from *Rapanos* in support of the conduit theory,³¹⁰ but the *Tennessee Clean Water Network* court determined that Scalia never contemplated the “point-source-to-nonpoint-source dumping” that is involved in the conduit theory.³¹¹ To further its point, the *Tennessee Clean Water Network* court explained that when Scalia pointed out that the word “directly” was missing from the CWA’s term “discharge of a pollutant,” he was aiming “to explain that pollutants which travel through multiple *point sources* before discharging into navigable waters are still covered by the CWA.”³¹² However, this interpretation of *Rapanos* is incorrect, as Scalia, in support of his opinion, indicated that “from the time of the CWA’s enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates” the CWA “even if the pollutants discharged from a point source do not emit ‘directly into’ covered waters”³¹³ More specifically, the *Tennessee Clean Water Network* court’s holding is inconsistent with *Rapanos* because a pollutant “that naturally washes downstream” is not necessarily “traveling through multiple point sources.”

Bearing in mind that the “plain language of [the CWA] should be enforced according to its terms,”³¹⁴ the Supreme Court should hold that the CWA covers unpermitted discharges of pollutants that travel to navigable waters via

³⁰⁷ *Id.* at 648.

³⁰⁸ *Id.*

³⁰⁹ *Haw. Wildlife Fund*, 881 F.3d at 764 (internal quotations omitted).

³¹⁰ *See Upstate Forever*, 887 F.3d at 649–50 (citing *Rapanos v. United States*, 547 U.S. 715, 732–38 (2006)) (relying on the plurality opinion in *Rapanos* to support enforcement against indirect transfer of pollutants); *Haw. Wildlife Fund*, 881 F.3d at 764 (citing *Rapanos*, 547 U.S. at 743) (same).

³¹¹ *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436, 445 (6th Cir. 2018), *petition for cert. filed*, 2019 WL 1620581 (U.S. Apr. 15, 2019) (No. 18-1307).

³¹² *Id.*

³¹³ *Haw. Wildlife Fund*, 881 F.3d at 764 (quoting *Rapanos*, 547 U.S. at 743).

³¹⁴ *Id.* at 765 (quoting *ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1210 (9th Cir. 2015)); *see Upstate Forever*, 887 F.3d at 650.

hydrologically connected groundwater. While it may be argued that the conduit theory will expand the Act's reach, such an expansion is warranted because "the CWA's prohibition of 'any addition of any pollutant to navigable waters'" is "strong evidence of the law's wide sweep."³¹⁵ Furthermore, there are limits placed on the CWA's coverage under the conduit theory as the plaintiff must "allege a direct hydrological connection between groundwater and navigable waters in order to state a claim under the CWA for a discharge ... that passes through groundwater."³¹⁶ Considering that both district courts in *Sierra Club* and *Tennessee Clean Water Network* concluded that a direct hydrological connection existed between the groundwater under the coal ash ponds and nearby navigable waters,³¹⁷ the Supreme Court must hold that the defendants in both cases violated the CWA by discharging pollutants from the coal ash ponds to navigable waters via hydrologically connected groundwater.

IV. THE COURT'S DECISION IN *SIERRA CLUB*: IMPLICATIONS

A. *The Court's Decision in Sierra Club Will Have an Impact on Other Cases Involving "Containers"*

In the future, lower courts may interpret the decision in *Sierra Club* broadly and apply it to cases involving other types of containers that discharge pollutants to navigable waters via a "natural process." Thus, this Section argues that the repercussions of the court's decision in *Sierra Club* will extend outside the realm of cases involving coal ash ponds, and in turn, it will show that cases involving unpermitted discharges from other types of containers may fall outside the reach of the CWA. In reaching this determination, it will highlight the relevant language from *Sierra Club* that is applicable to other types of containers, and it will demonstrate how that language may apply to cases involving containers. Overall, this Section argues that the *Sierra Club* court's holding has increased the risk of an environmental disaster because future plaintiffs will be unable to hold polluters liable for discharges from coal ash ponds and other types of

³¹⁵ *Haw. Wildlife Fund*, 881 F.3d at 764 (quoting *Rapanos*, 547 U.S. at 787, 800–06 (Stevens, J., dissenting)).

³¹⁶ *Upstate Forever*, 887 F.3d at 651.

³¹⁷ *See Tenn. Clean Water Network*, 905 F.3d at 441 (determining that the expert testimony regarding the terrain underneath the ponds and the pollutant concentrations in the river was sufficient to establish that the ponds were leaching coal ash into groundwater that is hydrologically connected to the Cumberland River); *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 409 (4th Cir. 2018) (stating that the district court's conclusion on the issue was correct because the facts in the case were enough to establish a direct hydrological connection between the groundwater and surface near the site).

containers, including, but not limited to, underground storage tanks, waste ponds, man-made settling basins, and coal mine impoundments.

The CWA explicitly states that the term “point source” was meant to capture facilities that act as “container[s].”³¹⁸ In *Sierra Club*, the Fourth Circuit indicated that “[r]egardless of whether a source is a pond or *some other type of container*, the source must still be functioning *as a conveyance* of the pollutant into navigable waters to qualify as a point source.”³¹⁹ To further its point, the *Sierra Club* court held that a point source is present only when the “movement of pollutants” is “a function of the” container itself “rather [than] the result of a natural process.”³²⁰ On the other hand, several district courts and circuit courts have determined that the CWA encompasses facilities that act as “containers,” and several of the facilities in those cases would not satisfy the test used by the Fourth Circuit in *Sierra Club* to determine whether a facility is a point source.³²¹ Thus, it is evident that if the *Sierra Club* court’s decision is applied to any type of “container” in the future, there is a significant risk that the facility will go unregulated under the CWA and continue to discharge pollutants to navigable waters.

The potential impact of *Sierra Club* becomes more apparent when the court’s reasoning is applied to previous cases involving “containers” that discharged pollutants to navigable waters via a “natural process.” For instance, in *Earth Sciences, Inc.*, the discharge of sodium cyanide to navigable waters was not “a function of”³²² Earth Sciences’ pool, but instead, it was the result of penetration by “excess rainfall” and “snowmelt.”³²³ Thus, the reserve sump in *Earth Sciences, Inc.* would not satisfy the *Sierra Club* court’s point source test, and if a similar facility were before a lower court in the Fourth Circuit’s jurisdiction, the court would be forced to allow the defendant to continue discharging sodium cyanide into the nation’s waters. Moreover, in *Abston Construction Co.*, the sediment basins discharged pollutants to navigable waters via rainwater runoff,

³¹⁸ 33 U.S.C. § 1362(14) (2012).

³¹⁹ *Va. Elec. & Power Co.*, 903 F.3d at 412 (emphasis added).

³²⁰ *See id.* (“That movement of pollutants, however, was not a function of the coal ash piles or ponds, but rather the result of a natural process ...”).

³²¹ *See supra* note 220 and accompanying text.

³²² *Va. Elec. & Power Co.*, 903 F.3d at 412.

³²³ *But see* *United States v. Earth Scis., Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (“When it fails because of flaws in the construction or inadequate size to handle the fluids utilized, with resulting discharge, whether from a fissure in the dirt berm or overflow of a wall, the escape of liquid from the confined system is from a point source. Although the source of the excess liquid is rainfall or snow melt, this is not the kind of general runoff considered to be from nonpoint sources under the FWPCA.”).

which constitutes a “natural process.”³²⁴ If a lower court within the Fourth Circuit’s jurisdiction considered whether comparable man-made sediment basins were point sources under the CWA, the lower court would likely find that the sediment basins were nonpoint sources because the discharge resulted from a “natural process.”³²⁵ Similarly, if the precedent from *Sierra Club* were applied to *Woodward*, the manure pits in *Woodward* would be excluded from the CWA’s coverage because the discharge of pollutants to surface waters in *Woodward* was not a function of the pits, but instead was the result of a natural process.³²⁶

Finally, if the Fourth Circuit’s opinion in *Sierra Club* is applied liberally by lower courts, it could even alter the decision in a case like *United States v. Lucas*. In *Lucas*, the Fifth Circuit determined that the underground septic systems installed by the defendants were appropriately categorized as “containers,” and as a result, the court established that they were point sources under the CWA.³²⁷ The defendant in *Lucas* constructed septic systems that eventually failed and discharged pollutants to wetlands and related hydrological environments, and it was determined that their behavior violated the CWA.³²⁸ While the Fifth Circuit determined that the “container” in *Lucas* was a point source, courts following the precedent from *Sierra Club* may arrive at a different conclusion as the defendant did not “create[]” the septic system to “convey anything” into the navigable waters.³²⁹

When the *Sierra Club* point source test is applied to other cases involving facilities that could be classified as “containers,” it is evident that the repercussions of the court’s decision in *Sierra Club* will extend outside of cases in which there is an unpermitted discharge from a coal ash pond, and it will have a negative impact on cases involving discharges from other types of “containers.” Not only has the Fourth Circuit failed to provide adequate

³²⁴ See *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 43–44 (5th Cir. 1980) (“Instead, any water and other materials that were deposited in Daniel Creek were carried by natural forces, mostly erosion caused by rainwater runoff.”).

³²⁵ See *Va. Elec. & Power Co.*, 903 F.3d at 412 (“That movement of pollutants, however, was not a function of the coal ash piles or ponds, but rather the result of a natural process of ‘precipitation percolat[ing] through the soil to the groundwater.’”)

³²⁶ See *Woodward v. Goodwin*, No. C 99–1103 MJJ, 2000 U.S. Dist. LEXIS 7642, at *31 (N.D. Cal. May 12, 2000) (citing *Hudson River Fishermen’s Ass’n v. Arcuri*, 862 F. Supp. 73 (S.D.N.Y. 1994) (“Furthermore, the type of untended run-off erosion from the Thomsen manure pit is cognizable as a point source.”) (asserting that surface runoff erosion from a river bank was actionable as a point source)).

³²⁷ *United States v. Lucas*, 516 F.3d 316, 332 (5th Cir. 2008) (“The septic systems on BHA are ‘containers,’ thus suggesting that they fall under the definition of ‘point source’ . . .”).

³²⁸ See *id.* at 322, 351 (“Defendants sold house lots and designed and certified septic systems on wetlands but represented the lots as dry. Septic systems on the lots failed, causing waste discharges.”).

³²⁹ *Va. Elec. & Power Co.*, 903 F.3d at 411.

protection to the nation's waters in the context of coal ash ponds, but it has interpreted the point source definition so narrowly that polluters will be able to avoid CWA liability simply by constructing a defective "container" that allows rainwater and groundwater to flow through it and carry pollutants to surface waters. As a result, the court's decision in *Sierra Club* will further increase the likelihood of an environmental disaster that could harm human health and the environment. This outcome hardly seems to be in line with the purpose and language of the CWA.

CONCLUSION

A majority of coal ash ponds across the country remain unlined and pose a significant threat to the environment and human health.³³⁰ Just last year, several major utilities, including Dominion, admitted that sixty-seven coal ash ponds across twenty-two states were leaking toxic levels of pollutants into the groundwater.³³¹ Even though the spill in Kingston resulted in at least thirty deaths and destroyed over eighty acres of aquatic ecosystems,³³² federal regulatory authorities have failed to solve the coal ash problem and utilities continue to discharge pollutants into the groundwater. Moreover, the problem will continue into the future, and catastrophic environmental disasters are likely to occur unless Congress and the judicial system provide adequate protection to the nation's waters. The *Sierra Club* court, however, has only exacerbated the problem as its decision removes coal ash ponds from the CWA's reach and allows utilities to discharge pollutants to navigable waters via hydrologically connected groundwater.

Unfortunately, the problem does not end there. The Fourth Circuit's decision also removed "other types of containers" that experience groundwater and rainwater penetration from the CWA's coverage, and now, the nation's waters are even more susceptible to pollution. Overall, the decision in *Sierra Club* has created a safe haven for polluters because they can escape liability under the

³³⁰ See *supra* notes 58–61 and accompanying text.

³³¹ Catherine Morehouse, *As 67 Coal Plants in 22 States Report Coal Ash Violations, Greens Fear Prolonged Cleanup*, UTIL. DIVE (Dec. 20, 2018), <https://www.utilitydive.com/news/as-67-coal-plants-in-22-states-report-coal-ash-violations-greens-fear-prol/544843>; *Utilities Admit Coal Plants in 22 States Are Violating Federal and State Pollution Standards by Leaking Toxic Chemicals Into Groundwater*, EARTHJUSTICE (Dec. 19, 2018), <https://earthjustice.org/news/press/2018/utilities-admit-coal-plants-in-22-states-are-violating-federal-and-state-pollution-standards-by-leaking-toxic-chemicals-into-groundwater>.

³³² *Utilities Admit Coal Plants in 22 States Are Violating Federal and State Pollution Standards by Leaking Toxic Chemicals Into Groundwater*, EARTHJUSTICE (Dec. 19, 2018), <https://earthjustice.org/news/press/2018/utilities-admit-coal-plants-in-22-states-are-violating-federal-and-state-pollution-standards-by-leaking-toxic-chemicals-into-groundwater>.

CWA by storing pollutants in flawed containers that allow groundwater and rainwater to carry the pollutants to navigable waters. In order to remedy this problem and provide adequate protection to the nation's waters, the Supreme Court must hold that a coal ash pond is a point source under the CWA. To find support for this conclusion, the Supreme Court must analyze (1) the language of the CWA, (2) the purpose of the CWA, and (3) the relevant case law involving "containers." Additionally, the Supreme Court should follow the Fourth Circuit and the Ninth Circuit and establish that the conduit theory provides a viable mechanism to regulate unpermitted discharges of pollutants to navigable waters via hydrologically connected groundwater.

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