No. 17-6155

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TENNESSEE CLEAN WATER NETWORK
AND TENNESSEE SCENIC RIVERS ASSOCIATION,

Plaintiffs-Appellees,

v.

TENNESSEE VALLEY AUTHORITY,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Tennessee

PETITION FOR REHEARING *EN BANC*

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Pursuant to Federal Rule of Appellate Procedure 35, Plaintiffs-Appellees hereby petition this Court for rehearing *en banc*.

STATEMENT OF PURPOSE

Rehearing *en banc* should be granted because the decision:

(1) Conflicts with this Court's decisions in *National Cotton Council of America v. United States Environmental Protection Agency (EPA)*, 553 F.3d 927 (6th Cir. 2009), and *United States v. Dean*, 969 F.2d 187 (6th Cir. 1992), and the plurality opinion of the Supreme Court in *Rapanos v. United States*, 547 U.S. 715 (2006), regarding the scope of protections provided by the Clean Water Act, 33 U.S.C. § 1251–1388 (the Clean Water Act or Act), and their relationship to the Resource Conservation and Recovery Act, 42 U.S.C. §6901–6992k (RCRA). These conflicts are not addressed or adequately addressed in the decision, and reconsideration is necessary to maintain uniformity of this Court's decisions;

(2) Involves issues of exceptional importance by departing from the authoritative decisions of other circuits holding that the Clean Water Act protects navigable waters from discharges of pollutants that reach them indirectly, including *Upstate Forever v. Kinder Morgan Energy Partners, L.P.,* 887 F.3d 637 (4th Cir. 2018), *petition for cert. filed* (No. 18-268); *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018), *petition for cert. filed* (No. 18-260); *Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180 (2d Cir. 2010), and

others, *see infra* Section I.C, and creates a loophole not contemplated by the Act that threatens our nation's clean water; and

(3) Conflicts with this Court's principles of contract interpretation set forth in *Gallo v. Moen, Inc.*, 813 F.3d 265 (6th Cir. 2016), and involves issues of exceptional importance because it disregards the plain language of a Clean Water Act permit, eliminating express protections against pollution of public waters by wastewater treatment facilities.

ARGUMENT

I. The Panel Decision Departs from Precedent by Restricting Clean Water Act Protections to Pollutants Added *Directly* to Navigable Waters.

At the Gallatin Plant, the Defendant-Appellant Tennessee Valley Authority (TVA) operates a malfunctioning wastewater treatment system that is leaking toxic coal ash pollutants into the Cumberland River. (Op.,6RE95atPageID#16). Absent authorization by permit or exemption, the Clean Water Act prohibits "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). The divided panel held that the Act "has no say" if those pollutants travel short distances from the point source through groundwater before polluting a river. (Op.,6RE95atPageID#11).

The panel decision finds no support in the Clean Water Act or the decisions of this Court or its sister circuit courts, which universally have held that the Act

protects navigable waters from pollutants that reach them indirectly from a point source. *See* (Op.,6RE95atPageID#17-26 (Clay, J., dissenting)).

A. The Decision Conflicts with this Court's Precedent Defining the Scope of Clean Water Act Protections.

This Court has refused to "inject[]" new requirements that would limit the Clean Water Act's broad, plain-language prohibition against the unpermitted "discharge of a pollutant," defined as "'any addition of any pollutant to navigable waters from any point source.'" *Nat'l Cotton*, 553 F.3d at 939 (quoting 33 U.S.C. § 1362(12)(A)). Yet this decision did just that, injecting an artificial limitation that appears nowhere in the Act's prohibition against unpermitted discharges.

In *National Cotton*, EPA argued that pesticides were not subject to the Clean Water Act's permitting program because, although they were discharged from a point source, they did not become "pollutants" until later, when they were considered "excess" or "residue." *Id*. at 938–39. This Court confirmed, to the contrary, that a pesticide is "from" a point source when it is applied initially to land or dispersed in the air and "finds its way" into navigable waters. *Id.* at 939. It rejected—as "unsupported" by both the plain language and the purpose of the Act—EPA's attempt to "inject" into § 1362(12)(A) an additional requirement that a pollutant immediately enter navigable waters. *Id.* This Court further explained, "[B]ut for the application of the pesticide, the pesticide residue and excess pesticide would not be added to the water; therefore, the pesticide residue and

excess pesticide are ***from*** a 'point source.'" *Id.* at 940 (citing *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indian*s, 541 U.S. 95, 103 (2004)) (emphasis added).

This Court's reasoning in *National Cotton* applies with equal force to this case. The pollutants here unquestionably are "from" TVA's point-source impoundments and are added "to" the navigable waters of the Cumberland River. Indeed, the panel did not dispute that the impoundments are point sources, consistent with decades of case law from around the country. (Op.,6RE95atPageID#9; *see also* (AppelleeBr.,6RE62atPageID#34)).

However, the panel did what *National Cotton* forbade: it inserted a "direct discharge" requirement to exempt the discharges from these point sources. (Op.,6RE95atPageID#11). This is no more justifiable than EPA's unsuccessful attempt to insert an "immediate discharge" requirement into the same provision. The Clean Water Act "does not create such a requirement," *Nat'l Cotton*, 553 F.3d at 939, and for decades has protected navigable waters from indirect discharges such as those at issue here. *See infra* Section I.C; *see also Tamaska v. City of Bluff City,* 26 F. App'x 482, 483 (6th Cir. 2002) (affirming penalties assessed for discharges over plaintiffs' property into Boone Lake); *United States v. Hamel,* 551 F.2d 107, 108 (6th Cir. 1977) (affirming liability for discharges of gasoline from elevated pier into lake).

The panel decision to the contrary disregards the statutory text and "open[s] a gaping regulatory loophole" for any indirect discharges. (Op.,6RE95atPageID#19 (Clay, J., dissenting)); *cf. Nat'l Cotton*, 553 F.3d at 939 (explaining that the Clean Water Act is intended to cover pollutants from a point source that become harmful when they enter navigable waters); *Upstate Forever*, 887 F.3d at 652 ("[I]f the presence of a short distance of soil and ground water were enough to defeat a claim, polluters easily could avoid liability by ensuring that all discharges pass through soil and ground water before reaching navigable waters.").

The panel decision also conflicts with Justice Scalia's plurality opinion in *Rapanos*, 547 U.S. at 743. No Justice disagreed with the plurality's analysis that "[t]he Act 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.'" *Id.*; *see also* (Op.,6RE95atPageID##18-19 (Clay, J., dissenting)). The plurality recognized that lower courts enforce the permitting requirement in § 1342(a) based on the "indirect discharge" rationale. *Rapanos*, 547 U.S. at 744 (citing *Concerned Area Residents*, 34 F.3d at 118–19).

The prohibition sought to be enforced in this case bars the unauthorized "discharge of any pollutant." 33 U.S.C. § 1311(a). The plurality in *Rapanos* and this Court in *National Cotton* properly focused on the definition of "discharge of a pollutant" in § 1362(12)(A) to analyze the scope of Clean Water Act's protections

against any *unpermitted* discharges. In contrast, the panel limited those protections based upon the inapplicable definition of "effluent limitation" in a different section, § 1362(11), which applies only to certain *permitted* discharges. (Op.,6RE95atPageID##10-11).

As the dissent explains, the definition of "effluent limitation" is not relevant to citizen enforcement of the prohibition against the unauthorized "discharge of any pollutant." (Op.,6RE95atPageID##20-22 (Clay, J., dissenting)).

The panel decision is inconsistent with the Clean Water Act and this Court's precedent regarding the scope of the Act's protections. This Court should grant rehearing *en banc* to maintain the uniformity of its decisions.

B. The Decision Conflicts with this Court's Precedent and EPA's Longstanding View of RCRA and the Clean Water Act.

The decision also misconstrues the relationship between the Clean Water Act and RCRA, and conflicts with this Court's reconciling of those two statutes in *Dean*, 969 F.2d 187. There, the defendant argued that because an impoundment is a point source under the Act, it is exempt from RCRA's requirements. *Id.* at 194. This Court rejected this argument, holding that "it is only the actual discharges from a holding pond or similar feature into surface waters which are governed by the Clean Water Act, not the contents of the pond or discharges into it." *Id.*

Here, the panel wrongly concludes that the Clean Water Act's coverage of discharges to surface water through groundwater "would remove coal ash

treatment and storage practices from RCRA's coverage." (Op.,6RE95atPageID#13). This is not so. Although RCRA excludes from its coverage the "actual point source discharge"—the addition of pollutants to navigable waters—the pollutants from the point source that are present in groundwater "before discharge" to surface waters remain within RCRA's scope. 42 U.S.C. § 6903(27); 40 C.F.R. § 261.4(a)(2) cmt.; *see also* (Op.,6RE95atPageID##23-26 (Clay, J., dissenting)). The panel ignores the dividing line RCRA drew and *Dean* acknowledged. The panel not only fails to reconcile the two decisions; it does not even mention *Dean*.

EPA's interpretation of its own regulations confirms this Court's holding in *Dean*:

> [The RCRA] requirements apply to discharges of leachate into groundwater from leaking waste management units, even when the groundwater provides a direct hydrologic connection to a nearby surface water of the United States.
>
> …
>
> [W]astewater releases to groundwater from treatment and holding facilities do not come within the meaning of the RCRA exclusion in 40 C.F.R. § 261.4(a)(2), but rather remain within the jurisdiction of RCRA. In addition, such groundwater discharges are subject to CWA jurisdiction, based on EPA's interpretation that discharges from point sources through groundwater where there is a direct hydrologic connection to nearby surface waters of the United States are subject to the prohibition against unpermitted discharges, and thus are subject to the NPDES permitting requirements.

Memorandum from Michael A. Shapiro & Lisa Friedman, EPA Office of Solid Waste, *Interpretation of Industrial Wastewater Discharge Exclusion from the Definition of Solid Waste* 1–3 (1995), https://www3.epa.gov/npdes/pubs/owm607.pdf.

In contrast to the panel decision, *Dean* and EPA's interpretation comport with the well-settled principle that courts should harmonize statutes whenever possible. *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts … to regard each as effective.").

Further, RCRA itself explains that the Clean Water Act takes precedence. *See* 42 U.S.C. § 6905(a) ("Nothing in this chapter shall be construed to apply to… any activity or substance which is subject to the [Act]… except to the extent that such application (or regulation) is not inconsistent with the requirements of such Act[].").

The panel's conclusion cannot be squared with the Clean Water Act, RCRA, EPA's interpretation of its own regulations, and this Court's longstanding position in *Dean*.

C. The Decision Presents an Issue of Exceptional Importance Because It Departs from Other Circuits' Decisions Regarding the Scope of Clean Water Act Protections.

The decision departs from decades of precedent affirming liability under the Clean Water Act for pollution that reaches navigable waters indirectly. Most recently, the Courts of Appeals for the Ninth and Fourth Circuits reaffirmed this principle in cases addressing pollution from point sources that reached navigable waters through groundwater. In *Hawai'i Wildlife Fund*, a unanimous panel of the Court of Appeals for the Ninth Circuit held that the Act forbade the unpermitted discharge of pollutants traveling from injection wells a short distance through groundwater to the ocean. 886 F.3d at 746–49. Similarly, in *Upstate Forever*, the Court of Appeals for the Fourth Circuit held that the unpermitted discharge of pollutants traveling a short distance from a pipe through groundwater to a stream violated the Act. 887 F.3d at 650–53. Both courts grounded their decisions in the plain language of § 1362(12)(A). *See Hawai'i Wildlife Fund*, 886 F.3d at 749 (rejecting an interpretation of the Act that included "at least one critical term that does not appear on its face—that the pollutants must be discharged 'directly' to navigable waters from a point source"); *Upstate Forever*, 887 F.3d at 650 ("The plain language of the [Act] requires only that a discharge come 'from' a 'point source.'").

These decisions flow from a long line of cases holding that the Clean Water Act applies to indirect discharges that reach surface water via groundwater. Until the panel decision, every circuit court that had considered the issue reached the same conclusion. *Waterkeeper Alliance, Inc. v. EPA,* 399 F.3d 486, 514-15 (2d Cir. 2005) (discharges through groundwater at concentrated animal feeding operations); *Quivira Mining Co. v. EPA,* 765 F.2d 126, 129-130 (10th Cir. 1985) (flows carrying pollutants "through underground aquifers ... into navigable-in-fact streams")*; U.S. Steel Corp. v. Train,* 556 F.2d 822, 851–52 (7th Cir. 1977), *overruled on other grounds by City of West Chicago v. U.S. Nuclear Regulatory Comm'n*, 701 F.2d 632 (7th Cir. 1983) (discharges through underground injection wells). The overwhelming majority of district court decisions over four decades likewise affirm that the Clean Water Act applies to discharges of pollutants to surface waters via groundwater connection. (AppelleeBr.,6RE62atPageID#41,n.5).

These decisions follow longstanding precedent applying the Clean Water Act to point-source pollution discharged to surface waters through other media, including flows over land and even through air. *See, e.g., Concerned Area Residents for the Environment v. Southview Farm,* 34 F.3d 114, 119 (2d Cir. 1994) ("[C]ollection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point source discharges."); *Peconic Baykeeper*, 600 F.3d at 188–89 (pesticides sprayed into

water through air from trucks and helicopters); *Sierra Club v. Abston Construction Co.*, 620 F.2d 41, 45 (5th Cir. 1980) ("Gravity flow … may be part of a point source discharge if [facility] at least initially collected or channeled the water and other materials."); *League of Wilderness Def./Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1192–93 (9th Cir. 2002) (aerial insecticide spraying from airplanes over streams).

The panel decision also throws into confusion permits issued across the country to regulate discharges from point sources that add pollutants to navigable waters indirectly.[1]

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[1] *See, e.g.,* Tenn. Dep't Env't & Conservation, General State Operating Permit for Concentrated Animal Feeding Operations, Permit No. SOPC00000, at 12–13, Aug. 1, 2015, https://www.tn.gov/content/dam/tn/environment/water/documents/permit_water_sopc00000_pmt.pdf (limiting discharges through hydrologically connected subsurface waters); Tex. Comm'n Envtl. Quality, General Permit to Discharge Wates, Permit No. TXG920000, at 33–34, July 9, 2009, https://www.tceq.texas.gov/assets/public/permitting/wastewater/general/txg920000.pdf (allowing permittees, in lieu of installing a liner, to submit a demonstration of a lack of hydrologic connection between groundwater and surface water); EPA, Authorization to Discharge under the National Pollutant Discharge Elimination System for Concentrated Animal Feeding Operations (CAFOs), Permit No. IDG010000, at 30, May 8, 2012, https://www.epa.gov/sites/production/files/2017-12/documents/r10-npdes-idaho-cafo-gp-id010000-final-permit-2012.pdf (requiring remediation if "the potential exists for the contamination of surface waters or ground water with a direct hydrologic connection to surface water"); EPA, Authorization to Discharge under the National Pollutant Discharge Elimination System, Permit No. NM0022306, at partII.page2, Nov. 1, 2013, https://www.env.nm.gov/swqb/NPDES/Permits/NM0022306-Chevron-Questa.pdf ("This permit may be reopened if any significant discharge or seepage occurs or if

Contrary to the conclusions of these courts and regulators, the decision allows "a polluter [to] escape liability under the Clean Water Act … by moving its drainage pipes a few feet from the riverbank." (Op.,6RE95atPageID#17 (Clay, J., dissenting)).

Moreover, the panel erroneously concludes that other environmental laws address coal ash pollution entering the river, (*Id.*atPageID#16), and specifically invokes the federal Coal Combustion Residuals (CCR) Rule under RCRA. (*Id.*atPageID#13). The panel's sweeping exemption for indirect discharges fails to acknowledge that the CCR Rule requires compliance with the Clean Water Act, 40 C.F.R. §§ 257.3-3, 257.52, and that the CCR Rule does not regulate all coal ash disposal areas, *see id.* § 257.50(d) ("This subpart does not apply to CCR landfills that have ceased receiving CCR prior to October 19, 2015."). Indeed, TVA took the position below that the CCR Rule does not apply to the NRS, or to certain parts of the Ash Pond Complex. (TVAResp.Opp'nPls.Mot.Lim.ExcludeEvid.CCRRule, RE194atPageID##7121-23.) Thus, the panel decision threatens to leave permanently unaddressed pollution from unlined, leaking pits like those at Gallatin and throughout the country.

This Court should grant rehearing *en banc* to address these issues of exceptional importance to our nation's clean water.

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it is determined that existing seepage in other locations is hydrologically connected to the mine.").

II. The Decision Rewrites the Permit, Contrary to This Court's Precedent and the Clean Water Act.

The Permit independently supports liability under the Clean Water Act and the district court's injunction with respect to the Ash Pond Complex.[2] The Permit includes two common-sense provisions employed by the Tennessee Department of Environment and Conservation (TDEC) to ensure that wastewater treatment facilities like the Ash Pond Complex discharge pollutants only through designated outfalls and do not leak. But the panel held these provisions inapplicable, in conflict with their plain language, this Court's precedent, and the Act, which delegates implementation of the permitting program to state agencies like TDEC.

A. The Panel Substituted Its Judgment for the Plain Language of the Permit and the Implementing State Agency's Regulations.

Courts must enforce validly-issued permits as written. Only federal or state agencies, following specified procedures, may modify permits. *E.g.*, 33 U.S.C. §§ 1342(b), 1319(a); 40 C.F.R. §§ 122.62, 124.5(a); Tenn. Code Ann. §§ 69-3-107(14), 69-3-108(h).

The district court's factual findings are unchallenged: TVA is operating "'an unlined [coal] ash waste pond in karst terrain immediately adjacent to a river' that leaks pollutants into the groundwater." (Op.,6RE95atPageID#16). The district court applied the plain language of the Permit to these facts and found violations of

[2] As the panel explains, the NRS does not have a Clean Water Act permit. (Op.,6RE95atPageID#5).

two provisions. The State told this Court that the district court's findings "comport with how TDEC interprets and implements its NPDES permitting program and its solid-waste-management program." (Tenn.Am.Br.,6RE74,atPageID#6,17).[3]

Under settled principles of contract interpretation, "if the language is plain and capable of legal construction, the language alone must determine the permit's meaning." *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty.*, 268 F.3d 255, 270 (4th Cir. 2001) (internal quotation omitted). This Court further requires that a permit, like any other contract, "'should be read to give effect to all its provisions and to render them consistent with each other.'" *See Gallo*, 813 F.3d at 273 (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995)); *see also* (Op.,6RE95atPageID#14 (acknowledging that NPDES permits are interpreted like contracts)).

The panel ignores *Gallo*'s command. In doing so, the panel improperly rewrites and renders ineffectual the two provisions of the Permit at issue here.

1. The Removed Substances Provision

The Permit provides that "material removed" from wastewater "by any treatment works must be disposed of in a manner, which prevents its entrance into

[3] The panel states that since 2014, TDEC twice has found TVA in compliance with the Permit, (Op.,6RE95atPageID#6). However, as the panel also notes, the State of Tennessee, on behalf of TDEC, has brought an enforcement action raising state law claims. (*Id.*atPageID#7,n.3). Those claims include allegations that TVA is violating the Permit.

or pollution of any surface or subsurface waters." (*Id.*atPageID#14) (Removed Substances provision).[4]

As the panel acknowledges, the Ash Pond Complex functions by settling some coal ash solids out of the wastewater before discharging the wastewater through the outfalls. (*Id.*atPageID#2). Pollutants discharged from the outfall have not been "removed by any treatment works." By its plain terms, the Removed Substances provision applies only to pollutants from substances *removed* from wastewater by settling in the impoundments, which is how the district court applied it.[5]

The panel, in contrast, seizes upon a clause introducing "additional monitoring requirements and conditions applicable to Outfalls 001, 002, and 004," and limits the Removed Substances provision solely to discharges from those outfalls. (*Id.*atPageID#14). But Part I.A of the Permit expressly *authorizes* TVA to discharge pollutants through permitted outfalls. (*Id.*atPageID#2); (2012Permit,RE1-2atPageID##63-68). The panel's application of the Removed

[4] In May 2018, TDEC reissued the Permit and maintained the Removed Substances provision with a slightly amended introductory phase, "Additional monitoring requirements and conditions applicable to all outfalls include…." (2018Permit,6RE90-2atPageID#11).

[5] In *Sierra Club v. Virginia Electric & Power Co.*, 903 F.3d 403, 413–14 (4th Cir. 2018), the court held inapplicable a different permit provision issued and implemented by a different state agency.

Substances provision to only permitted outfalls therefore renders it inconsistent with other provisions of the Permit, contrary to this Court's instruction in *Gallo*.

2. The Sanitary Sewer Overflow Provision

The Permit also prohibits "the discharge to land or water of wastes from any portion of the collection, transmission, or treatment system other than through permitted outfalls" (SSO provision). (Op.,6RE95atPageID#15).

The panel held that the SSO provision applies only to sewage, not to "karst-related leaks." (*Id.*). The panel's reasoning ignores the plain language of the SSO provision in the Permit, which applies broadly to "wastes."[6] The panel's interpretation renders the SSO provision ineffectual, in conflict with *Gallo*, because TVA's coal ash impoundments do not process sewage. They process coal ash and other industrial wastes. (Op.,6RE95atPageID#27 (Clay, J., dissenting)); (2012Permit,RE1-2atPageID#63).

In reversing the district court's finding of liability, the panel relies upon the federal definition of an SSO and federal permit guidance. But federal regulations governing Clean Water Act permits expressly authorize states to adopt more-restrictive provisions, as the State did here. 40 C.F.R. § 123.25(a) (state programs "are not precluded from omitting or modifying any provisions to impose more stringent requirements"); *see also* (Op.,6RE95atPageID#26 (Clay, J., dissenting)

[6] The Permit's definition of "pollutant" includes "sewage, industrial wastes, or other wastes." (2012Permit,RE1-2atPageID#71).

("TVA's permit expert conceded … that the permit's definition is broader than the EPA's definition.")).

The panel's narrow interpretation also rewrites the Permit in a manner that violates the State's valid exercise of its rulemaking authority. The State's own regulations define sanitary sewer overflows as applicable to *all* unpermitted discharges of wastewater: "A 'sanitary sewer overflow (SSO)' is defined as an unpermitted discharge of wastewater from the collection or treatment system other than through the permitted outfall." Tenn. Comp. R. & Regs. § 0400-40-05-.02(73). Such SSOs are prohibited. *Id.* § 0400-40-05-.07(2)(n). The SSO provision in the Permit implements the State's own regulations, which in turn reflect its judgment of requirements necessary to protect the waters of Tennessee.

The panel substitutes its judgment for the plain language of the Permit and the regulations of the state agency that issued the Permit. *See* (Op.,6RE95atPageID##26-27 (Clay, J., dissenting)).[7] In doing so, the panel runs afoul of the Clean Water Act and of this Court's admonition in *Gallo* to give each provision of a permit independent effect.

[7] In May 2018, TDEC reissued the Permit and amended the SSO provision, replacing the term "wastes" with "sanitary wastes." (2018Permit,6RE90-2atPageID#24.) This ambiguous modification should be read to encompass industrial wastewater, as the 2012 Permit did, because a narrower reading would be inconsistent with TDEC's regulations.

B. The Decision Presents An Issue of Exceptional Importance Because It Eliminates Express Protections Against Leaks of Pollution into Public Waters by Wastewater Treatment Facilities.

The panel decision presents an issue of exceptional importance because it renders meaningless essential provisions that protect navigable waters from malfunctioning wastewater treatment facilities that leak untreated or removed waste, which these facilities are supposed to contain. The decision also invites federal courts to revise and refuse to enforce permit provisions, though the Clean Water Act provides no such role for them. Rather, the Act provides that federal courts enforce permits as they are written.

CONCLUSION

Plaintiffs-Appellees respectfully request rehearing *en banc*.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I, Amanda Garcia, hereby certify that this document contains 3,885 words and that this document was prepared using a proportionally spaced typeface, Times New Roman, 14 point.

s/ Amanda Garcia
Amanda Garcia

Counsel for Plaintiff-Appellee
Tennessee Scenic Rivers Association

Dated this 22nd day of October 2018

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Rehearing *En Banc* was filed electronically on October 22, 2018, through the Court's Electronic Filing System. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

s/ Amanda Garcia
Amanda Garcia

Counsel for Plaintiff-Appellee
Tennessee Scenic Rivers Association

Dated this 22nd day of October 2018