

THE  
NATIONAL LAW REVIEW

---

## Kentucky Decision Has Implications for Utilities Fighting Citizen Suits

---

Monday, January 8, 2018

Last month, the U.S. District Court for the Eastern District of Kentucky sided with a utility and dismissed a citizen suit based on the Resource Conservation and Recovery Act (RCRA) and Clean Water Act (CWA). The opinion contradicts other recent federal court decisions analyzing the applicability of the CWA to coal ash discharges through groundwater.

The court's opinion in *Kentucky Waterways Alliance v. Kentucky Utilities Co.* provides a boost to utilities and other regulated entities seeking to quash citizen suits on standing and jurisdictional grounds at an early stage in litigation. However, it also underscores the uncertain state of the law with respect to whether coal ash discharges through groundwater are subject to the permitting requirements of the CWA.

The case was filed in 2015 by Plaintiffs Kentucky Waterway Alliance and Sierra Club. The suit alleged that Defendant Kentucky Utilities Co. (KU) violated RCRA and the CWA by its handling, storage, treatment, transportation, and disposal of coal combustion residuals (CCR) at its E.W. Brown generating station.

KU moved to dismiss the suit, arguing (1) the alleged CCR-related discharges were not subject to the CWA; and (2) the plaintiffs lacked standing for their RCRA claim because the Kentucky Energy and Environment Cabinet (Cabinet) had entered into a consent decree with KU addressing the alleged RCRA violations. The district court agreed and dismissed the suit on December 28, 2017.

Plaintiffs' CWA claim alleged that KU made unpermitted discharges of CCR-related pollutants through groundwater to a stream that qualifies as a navigable water of the U.S. under the CWA.

Defendants did not challenge that the stream at issue was subject to the CWA. Instead, defendants argued – and the court agreed – that the alleged discharges were not “point source” discharges subject to the CWA.

The court noted a split of authority as to whether groundwater that is “hydrologically connected” to navigable waters constitutes a “point source” under the CWA. Ultimately, the court answered that question in the negative, stating that to decide otherwise would subject virtually all groundwater discharges to the CWA – something that Congress explicitly declined to do when enacting the legislation.

The court's opinion contradicts (and specifically rejects) the reasoning of the [recent federal court decisions](#) in *Sierra Club v. Va. Elec. & Power Co.*, No. 2:15-cv-112 (E.D. Va.) and *Tenn. Clean Water Network v. Tenn. Valley Auth. (TVA)*, No. 3:15-cv-00424 (M.D. Tenn.), both of which held that coal ash discharged through groundwater constituted a “point source” under the CWA. Both of these cases are on appeal. In the *Sierra Club* case, both sides appealed the district court's decision to the Fourth Circuit, where oral argument is tentatively scheduled for March. In the *Tennessee Clean Water Network* case, TVA has filed a notice of appeal to the Sixth Circuit.

In holding that the plaintiffs lacked standing for their RCRA claim, the court in *Kentucky Waterways Alliance* also rejected the plaintiffs' argument that they were entitled to seek more stringent relief than that imposed by the

The logo for Schiff Hardin LLP, featuring the name "Schiff" in a blue, cursive-style font above the name "Hardin" in a black, bold, serif font.

Article By [Schiff Hardin LLP](#)  
[Katherine S. Walton](#)  
[Energy and Public Utilities Update](#)

[Litigation / Trial Practice](#)  
[Utilities & Transport](#)  
[6th Circuit \(incl. bankruptcy\)](#)

Cabinet in its consent decree with KU.

© 2019 Schiff Hardin LLP

**Source URL:** <https://www.natlawreview.com/article/kentucky-decision-has-implications-utilities-fighting-citizen-suits>