

No. 17-1640

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

UPSTATE FOREVER and SAVANNAH RIVERKEEPER,
Plaintiffs-Appellants,

v.

KINDER MORGAN ENERGY PARTNERS, L.P., and
PLANTATION PIPE LINE COMPANY, INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA, ANDERSON DIVISION
CASE NO. 8:16-cv-04003-HMH

**BRIEF OF NATIONAL ASSOCIATION OF COUNTIES, NATIONAL
LEAGUE OF CITIES, NATIONAL ASSOCIATION OF CLEAN WATER
AGENCIES, AMERICAN FOREST & PAPER ASSOCIATION,
AMERICAN IRON AND STEEL INSTITUTE, EDISON ELECTRIC
INSTITUTE, NATIONAL MINING ASSOCIATION, AND
UTILITY WATER ACT GROUP AS *AMICI CURIAE*
IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE**

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Dated: September 8, 2017

Counsel for Amici Curiae

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

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

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

Signature: /s/ Michael R. Shebelskie

Date: September 8, 2017

Counsel for: National Association of Counties

CERTIFICATE OF SERVICE

I certify that on September 8, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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(signature)

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Counsel for: National League of Cities

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 17-1640 Caption: Upstate Forever et al. v. Kinder Morgan Energy Partners, L.P. et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Association of Clean Water Agencies
(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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

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

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
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Signature: /s/ Michael R. Shebelskie

Date: September 8, 2017

Counsel for: Nat'l Ass'n of Clean Water Agencies

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Counsel for: American Forest & Paper Ass'n

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Date: September 8, 2017

Counsel for: American Iron and Steel Institute

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No. 17-1640 Caption: Upstate Forever et al. v. Kinder Morgan Energy Partners, L.P. et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Edison Electric Institute
(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Counsel for: Edison Electric Institute

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No. 17-1640 Caption: Upstate Forever et al. v. Kinder Morgan Energy Partners, L.P. et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Mining Association
(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
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Counsel for: National Mining Association

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Date: September 8, 2017

Counsel for: Utility Water Act Group

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*AMICI CURIAE'S INTEREST*¹

Amici curiae (“*Amici*”)—National Association of Counties, National League of Cities, National Association of Clean Water Agencies, American Forest & Paper Association, American Iron and Steel Institute, Edison Electric Institute, National Mining Association, and Utility Water Act Group—represent cities, towns, counties, public clean water utilities, and a cross-section of the nation’s energy, mining, manufacturing, and paper and wood products industries. *Amici’s* members are subject to the Clean Water Act (“CWA” or “Act”). 33 U.S.C. §§1251 *et seq.* *Amici’s* broad perspective will aid the Court understand why Appellants’ arguments ignore the Act’s text, framework, and legislative history. *Amici* also identify the regulatory uncertainty and costs imposed on their members, and the public broadly, under Appellants’ direct hydrologic connection theory, and why the theory is unnecessary to protect water quality. *Amici* participation will assist the Court to understand why it should reject Appellants’ arguments and affirm the District Court’s judgment.

¹ This brief was submitted with an accompanying motion for leave to file pursuant to Federal Rule of Appellate Procedure 29(a)(3). No counsel for a party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund this brief preparation or submission. Only *Amici* or their members made a monetary contribution intended to fund its preparation or submission.

ARGUMENT

I. No Unauthorized Addition of Pollutants to Navigable Waters from a Point Source Was Alleged, As Required By the Act

The CWA's prohibition against "the discharge of any pollutant" unless authorized, in relevant part, by a National Pollutant Discharge Elimination System ("NPDES") permit, 33 U.S.C. §1311(a), is limited to the addition of pollutants to navigable waters from a "point source," *id.* §1362(12), which means "any discernible, confined and discrete conveyance." *Id.* §1362(14).

Appellants alleged an unauthorized discharge occurred here because pollutants from Kinder Morgan's pipeline allegedly entered groundwater with a direct hydrologic connection to navigable waters. *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 8:16-4003-HMH, 2017 WL 2266875, at *4, 6 (D.S.C. Apr. 20, 2017) ("*Kinder Morgan*"). While a pipeline can be a point source, the District Court correctly held Appellants must "more than merely identify a possible point source." *Id.* at *3. They must allege (and prove) "the point source added pollutants to navigable waters." *Id.* at *4.

The District Court was correct: Appellants failed to allege that *a point source* added pollutants to navigable waters. *Id.* at *4. The pipeline leaked into soil and groundwater, not navigable waters. *Id.* at *3. A direct hydrologic connection between groundwater and navigable waters does not eliminate the statutory requirement that the means by which pollutants enter navigable waters

must be a discernible, confined and discrete conveyance. *Id.* at *4. While the CWA prohibits indirect discharges from point sources, pollutants still must enter navigable waters by means of some discernible, confined and discrete conveyance.

Groundwater is not a discernible, confined and discrete conveyance. Any addition of pollutants into navigable waters from groundwater is not by means of a discernible, confined and discrete conveyance. It constitutes nonpoint source pollution properly addressed by state law and/or other CWA or federal programs. *Chesapeake Bay Found., Inc. v. Severstal Sparrows Point, LLC*, 794 F. Supp. 2d 602, 619-20 (D. Md. 2011) (groundwater migration is nonpoint source pollution); *PennEnvironment v. PPG Indus., Inc.*, 964 F. Supp. 2d 429, 454-55 (W.D. Pa. 2013) (same); *Tri-Realty Co. v. Ursinus Coll.*, No. 11-5885, 2013 WL 6164092, at *8 (E.D. Pa. Nov. 21, 2013) (same). The District Court correctly dismissed Appellants' complaint. *Severstal*, 794 F. Supp. 2d at 620 ("There is no basis for a citizen suit for nonpoint source[s]").

A. The Cause of the Addition Must Be a Discernible, Confined and Discrete Conveyance

The District Court was correct that the means by which pollutants enter navigable waters must be a point source. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (the alleged point source must "convey the pollutant to 'navigable waters'"); *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993) (point sources "act as a means" of conveying

pollutants to navigable waters); *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 224 (2d Cir. 2009) (Act “requires that pollutants reach navigable waters by a ‘discernible, confined and discrete conveyance’”). If an intervening event causes the addition, then no discharge from the point source occurs. *Sierra Club v. BNSF Ry. Co.*, No. C 13-967-JCC, 2016 WL 6217108, at *8 (W.D. Wash. Oct. 25, 2016) (“discharges to land and [then] from land to water are not point source discharges”).

Appellants’ arguments would eliminate the requirement under Section 301(a) that the cause of the addition be a point source. As one court explained:

[N]onpoint source pollution ... could invariably be reformulated as point-source pollution by going up the causal chain to identify the initial point sources of the pollutants that eventually ended up through nonpoint sources to come to rest in navigable waters.

26 Crown Assocs., LLC v. Greater New Haven Reg’l Water Control Auth., No. 3:15-cv-1439 (JAM), 2017 WL 2960506, at *8 (D. Conn. July 11, 2017), *appeal docketed*, No. 17-2426 (2d Cir. Aug. 4, 2017). That result is contrary to the CWA’s plain language. *Cordiano*, 575 F.3d at 219 (“the phrase ‘discernible, confined, and discrete conveyance’ cannot be interpreted so broadly as to read the point source requirement out of the statute”).

To illustrate this requirement of the Act: if oil leaks onto the ground, and it subsequently rains, the conveyance of that oil by the rainwater into a navigable water does not constitute a discharge from a point source. *See Ecological Rights*

Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 508 (9th Cir. 2013) (“most common example of nonpoint source pollution is the residue left on roadways by automobiles”) (citation omitted); *Plaza Health Labs.*, 3 F.3d at 654 n.6 (“[Sources] may be point sources when they deposit waste directly into water; ... [not] when they ... deposit oil in a driveway, leaving it to be washed into nearby rivers.”).

Stormwater runoff and groundwater flow are indistinguishable, in this respect. *26 Crown Assocs.*, 2017 WL 2960506, at *8 (“Ground water migration is no different than surface water run-off for purpose of the ‘point source’ requirement.”). Therefore, if oil leaks into the soil, and groundwater flow subsequently conveys the oil to navigable waters, that too is not a discharge from a point source. *E.g.*, *Tri-Realty*, 2013 WL 6164092, at *8 (oil leaked from underground storage tank not a discharge from a point source).

Importantly, when Congress wanted to establish a discharge prohibition under the CWA without requiring that pollutants enter navigable waters through a discernible, confined and discrete conveyance, it knew how to do so. CWA Section 311 prohibits the discharge of oil or hazardous substances into or upon navigable waters and adjoining shorelines. 33 U.S.C. §1321(b)(1). Congress defined “discharge” for purpose of Section 311 differently, to mean “any spilling, leaking, pumping, pouring, emitting, emptying or dumping.” *Id.* §1321(a)(2),

compare, id. §1362(12), (16). Congress left enforcement of such “discharges” exclusively to governmental agencies. *Severstal*, 794 F. Supp. 2d at 618 (“claims brought pursuant to [CWA Section 311] are not authorized under the CWA citizen suit provision”).

B. No Direct Discharge Occurred Under the Facts Alleged

The District Court correctly held no direct discharge into navigable waters was alleged. *Kinder Morgan*, 2017 WL 2266875, at *4. Rather, the pipeline leaked into soil, and then groundwater,² which eventually carried some of the leaked material to navigable water. As the District Court wrote:

To find that the pipeline directly discharged pollutants into navigable waters under the facts alleged would result in the CWA applying to every discharge into the soil and groundwater no matter its location.

Id. See also *BNSF Ry. Co.*, 2016 WL 6217108, at *8.

Appellants ignore the Act’s text by arguing a leak into groundwater with a direct hydrologic connection to navigable waters is, effectively, a direct discharge from a point source. Appellants’ theory is contrary to the Act’s point source requirement, its framework and legislative history. The Court should reject it.

Congress decided not to extend the CWA prohibition to pollutants entering groundwater, despite *knowing* that polluted groundwater may enter navigable waters. In fact, the U.S. Environmental Protection Agency (“EPA”) asked

² Groundwater is not navigable water. 80 Fed. Reg. 37,054, 37,073 (June 29, 2015) (EPA has “never interpreted [groundwater] to be a [navigable water].”).

Congress for authority over groundwater and explicitly told Congress the authority was necessary because *polluted groundwater impacts surface waters*, as the then-EPA administrator explained:

The only reason for the request for Federal authority over ground waters was to assure that we have ***control over the water table in such a way as to insure that our authority over interstate and navigable streams*** cannot be circumvented, so we can obtain water quality by maintaining a control over ***all*** the sources of pollution, ***be they discharged directly into any stream or through the ground water table.***

Water Pollution Control Legislation—1971 (Proposed Amendments to Existing Legislation): Hearings before the H. Comm. on Pub. Works, 92nd Cong. 230 (1971) (statement of Hon. William Ruckelshaus, Administrator, EPA) (emphases added).

Despite being aware that pollutants in groundwater enter navigable waters, the Senate and the House rejected proposals to extend the CWA's reach. *E.g.*, S. Rep. No. 92-414, at 73 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3739 (“Several bills pending before the [Senate] Committee provided authority to establish Federally approved standards for groundwaters. ... Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation.”).

Representative Aspin introduced the rejected House amendment, arguing it was necessary because “[i]f we do not stop pollution of ground waters through

seepage and other means, *ground water gets into navigable waters*, and to control only the navigable water and not the ground water makes no sense at all.” 118 Cong.Rec. 10,666 (1972) (emphasis added). *See also Exxon Corp. v. Train*, 554 F.2d 1310, 1325-29 (5th Cir. 1977) (legislative history discussion). This removes any doubt Congress considered and rejected addressing the addition of pollutants to navigable waters through groundwater.

It is impossible to regulate the addition of pollutants to surface waters via groundwater without in practice regulating groundwater and nonpoint source pollution, which Congress rejected. *Shanty Town Assocs. Ltd. P'ship v. EPA*, 843 F.2d 782, 791 (4th Cir. 1988) (CWA “contains no mechanism for *direct* federal regulation of nonpoint source pollution”). That legislative decision must be respected.

While protecting the Nation’s waters is unquestionably an objective of the CWA, it was not Congress’ only goal and cannot justify rewriting the Act. *See* 33 U.S.C. §1251(a)(7), (b); *CTS Corp. v. Waldburger*, 134 S.Ct. 2175, 2185 (2014) (rejection of interpretation based on statute’s objective not grounded in the statute’s text and structure); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 494 (2d Cir. 2001) (“[T]he CWA balances a welter of consistent and inconsistent goals ... congressional intent is not served by

elevating one policy above the others, particularly where the balance struck in the text is sufficiently clear to point to an answer.”).

Contrary to Appellants’ argument, the “overwhelming majority” of courts have *not* held that the addition of pollutants into hydrologically connected groundwater constitutes a discharge from a point source under Section 301(a). Op.Br. at 9, 26, 31. Many of the cases Appellants cite do not examine the question. Others examine the separate question whether surface water features are navigable waters themselves. *E.g.*, *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007) (whether pond connected to river via groundwater was navigable water); *Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985) (whether gullies and arroyos that flowed into streams were navigable waters).

Others find “CWA jurisdiction,” but like Appellants, mistakenly relied on policy preferences about how the Act *should* be constructed, not what it actually says. *E.g.*, *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319 (S.D. Iowa 1997) (“because [of] the CWA’s goal”). *See also*, *Plaza Health Labs.*, 3 F.3d at 647 (whether a source is a point source “may not be resolved merely by simple reference to [the CWA’s] admirable goal[s]”); *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982) (“Caution is always advisable in relying on a general declaration of purpose to alter the apparent meaning of a specific

provision.”). A court cannot rewrite the Act to comport with its notion of how Congress ought to have written it. The courts’ “judicial task is only to determine the meaning of the statute as passed by Congress, not to question the wisdom of the provision enacted.” *Worden v. SunTrust Banks, Inc.*, 549 F.3d 334, 347 (4th Cir. 2008).

C. No Indirect Discharge Occurred Under the Facts Alleged

The type of “indirect” discharge *Rapanos v. United States*, 547 U.S. 715, 743 (2006) recognized cannot salvage Appellants’ complaint. *Rapanos* recognized that pollutants must still enter navigable waters by means of a discernible, confined and discrete conveyance to come within Section 301(a), and groundwater is the antithesis of such a conveyance.

As *Rapanos* recognized, the release of pollutants from the a point source (that is the original source of the pollutants) may require an NPDES permit under certain circumstances even if it is *not* directly into navigable waters. However, those circumstances exist only if “the pollutants discharged from a point source ... pass ‘through conveyances’ in between” the source of the pollutants and the navigable water. *Id.* at 743 (each case cited in *Rapanos* concerned an indirect discharge of pollutants to navigable waters through one or more subsequent discrete conveyances).

That is not what allegedly happened here. Appellants do not allege groundwater is a point source, but since groundwater is the only means in this case by which pollutants could enter navigable waters, their indirect discharge argument necessarily depends on groundwater being a discrete conveyance. *26 Crown Assocs.*, 2017 WL 2960506, at *7 (allegation “necessarily relies on an assumption that ground water must function as a ‘point source’”).

Groundwater is not a point source. EPA agrees.³ It is “basic science” that groundwater is diffuse. *Id.* at *8. Groundwater is the opposite of a “discernible, confined and discrete” conveyance. *Id.* (“Absent exceptional proof of something akin to a mythical Styx-like subterranean river, a diffuse medium like ground water for the passive migration of pollutants to navigable waters cannot constitute a ‘point source’”); *Tri-Realty Co.*, 2013 WL 6164092, at *8 (“[G]iven its natural physical attributes, groundwater [cannot] fairly be described as a ‘discernible, confined and discrete conveyance.’”).

Because groundwater is not a discernible, confined and discrete conveyance, its transportation of pollutants spilled into the soil from the pipeline does not give rise to an “indirect” discharge.

³ Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellees at 2, *Haw. Wildlife Fund v. Cty. of Maui*, No. 15-17447 (9th Cir. May 31, 2016), ECF No. 40 (“the United States does not contend that groundwater is a point source”).

II. EPA Statements on Direct Hydrologic Connection Merit No Deference

Appellants rely on EPA statements in 1991, 1998 and 2001 to argue a leak of pollutants into groundwater with a direct hydrologic connection to navigable waters is a direct discharge from a point source. Op.Br. at 34-36. Appellants' reliance is misplaced. EPA's interpretation is inconsistent with the Act, conflicts with prior EPA interpretations, is based on inapposite case law, and is not the product of a reasoned analysis. Deference is inappropriate.

A. These Statements Cannot Get *Chevron* Deference

The CWA is unambiguous—there must be an addition of pollutants to navigable water “from [a] point source.” 33 U.S.C. §§1311(a), 1362(12). Since Congress has spoken directly to the “precise question at issue,” the Act's text controls. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Moreover, only agency interpretations produced through formal adjudication or notice-and-comment rulemaking receive *Chevron* deference. *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000); accord, *United States v. Mead Corp.*, 533 U.S. 218, 226-27, 229 (2001) (statement must “carry[] the force of law” to receive *Chevron* deference).

The following history demonstrates why EPA's statements lack the force of law.

1. EPA's Contemporaneous Interpretation

- The modern CWA was enacted in 1972. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972). At the time, EPA interpreted Act as not prohibiting the addition of pollutants into groundwater, even groundwater hydrologically connected to navigable water. As discussed above, that is *why* EPA asked Congress (unsuccessfully) to amend the legislation. *See Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 847 (6th Cir. 1994) (Nelson, J., concurring) (rejection of an EPA interpretation that was “diametrically opposed” to contemporaneous interpretation).
- That remained the United States’ interpretation for nearly two decades, including when it was sued under the Act. In *Kelley v. United States*, 618 F. Supp. 1103, 1105-06 (W.D. Mich. 1985), “toxic chemicals were released into the ground ... [that] contaminated the groundwater ... [and] naturally discharg[ed] into the Grand Traverse Bay—an undisputed navigable body of water.” The United States denied liability, arguing the Act does not prohibit pollutants that enter navigable waters from spills into the soil and groundwater. *See* Memorandum in Support of Defendants’ Rule 12(b) Motion and in the Alternative for Summary Judgment at 5, *Kelley v. United States*, No. G-83-630 (W.D. Mich. July 12, 1984) (Exhibit A). The United States argued this had

consistently been EPA's position. *Id.* at 21-22. The court agreed with the United States:

Congress did not intend the [CWA] to extend federal regulatory and enforcement authority over groundwater contamination [even when pollutants in the groundwater migrate to navigable waters]. Rather, such authority was to be left to the states.

Kelley, 618 F. Supp. at 1107. *See also Kelley v. United States*, No. 1:79-cv-10199, 1980 U.S. Dist. LEXIS 17772, at *3 (E.D. Mich. Oct. 28, 1980) (similar CWA citizen suit based on spill that soaked into the ground and migrated through groundwater to navigable waters; as recounted by the district court, the United States argued that the migration of pollutants through groundwater to navigable waters is not a discharge from a point source).

2. Subsequent Collateral Comments

- EPA stated a contrary position for the first time in 1990, in response to comments in an unrelated rulemaking on stormwater permitting. 55 Fed. Reg. 47,990, 47,997 (Nov. 16, 1990). This collateral reference in a final rule preamble was not subject to public comment.
- EPA did not propose to rely on its new position in rulemaking until over ten years later, in 2001. 66 Fed. Reg. 2960, 3017 (Jan. 12, 2001). The proposal generated such criticism, however, that in the final rule EPA *rejected* the proposed option that relied on its new position. 68 Fed. Reg. 7176, 7216 (Feb. 12, 2003); *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 514-15 (2d Cir. 2005)

(recounting rejection of proposal without addressing the merits of EPA’s new position).

- EPA *never* again proposed to incorporate its new position into a regulation. EPA instead episodically inserted statements as collateral references in unrelated actions. *E.g.*, 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991) (Tribal water quality standards).

To give *Chevron* deference to EPA’s new position in light of this history would be to endorse stealth agency rulemaking. Courts should not give *Chevron* deference to interpretations in rule preambles on unrelated subject matter, placed where the public could not know about—let alone challenge—the agency’s interpretation. *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 966 (7th Cir. 1994) (“Collateral reference to a problem [in an EPA preamble] is not a satisfactory substitute for focused attention in rule-making or adjudication.”).

B. These Statements Cannot Get *Skidmore* Deference⁴

While agency interpretations may have the “power to persuade” even if not entitled to *Chevron*-deference, they must be the product of a careful, thorough, and consistent analysis. *Mead*, 533 U.S. at 221, 227-28; *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). EPA’s position here falls short.

⁴ Appellants have not argued *Skidmore* applies, but *Amici* want to be clear why no deference applies.

EPA's first statement on its new position, in 1990, is merely *ipse dixit*. EPA did not seek to ground its new position in the Act's text, structure, or legislative history. *See* 55 Fed. Reg. at 47,997; *United States v. ConAgra, Inc.*, No. CV 96-0134-S-LMB, 1997 WL 33545777, at *6 (D. Idaho Dec. 31, 1997) ("I do not believe that EPA's [1990] parenthetical comment in its discussion of storm water permit application regulations, without more, should be accorded the power to reshape the CWA's plain language and almost twentyfive years of [implementation]").

In 1990, EPA justified its position solely on two inapposite court decisions. 55 Fed. Reg. at 47,997. In the first, *Exxon*, the court explicitly said it was *not* deciding the issue. The court wrote:

EPA has not argued that the wastes disposed of into wells here do, or might, 'migrate' from groundwaters back into surface waters that concededly are within its regulatory jurisdiction. ... ***We mean to express no opinion on what the result would be if that were the state of facts.***

554 F.2d at 1312 n.1 (emphasis added).

In the second, *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182 (E.D. Cal. 1988), *vacated on other grounds*, 47 F.3d 325 (9th Cir. 1995), the court did not find a direct hydrologic connection results in a discharge from a point source. It examined the different question whether groundwater can be a navigable water because of its "effect" on surface water. *Id.* at 1196; *see also*

Martin v. Kan. Bd. of Regents, No. 90-2265-O, 1991 WL 33602, at *5 n.6 (D. Kan. Feb. 19, 1991) (citing *McClellan* for incorrect proposition that “[g]round water ... that is naturally connected to surface waters constitute ‘navigable waters’ under the Act”).

It was over a decade later, as part of its 2001 proposal, that EPA attempted to formulate a more detailed explanation of its new position, but as noted above, in the final rule EPA rejected the proposed option. And even there, EPA’s discussion relied on its passing reference in 1990 and the inapposite case law, or their progeny. 66 Fed. Reg. at 3017. EPA did not explain how its new position comported with the Act’s requirement that the means of pollutants entering navigable waters must be from a discernible, confined and discrete conveyance. EPA merely stated that an addition via groundwater is “effectively” from a point source. 56 Fed. Reg. at 64,892. That interpretation directly conflicts with the Act’s requirement that an addition *in fact* be from a point source.

Further, EPA did not explain in 2001 how its new position aligned with the balance Congress struck between discharges from point sources and nonpoint source pollution and groundwater. *United States v. Deaton*, 332 F.3d 698, 708 (4th Cir. 2003) (statutory interpretation should not disrupt careful balance struck by Congress). EPA also failed to reconcile Congress’ concern that “uniform federal regulation [is] virtually impossible” when the regulation of the addition of

pollutants is dependent upon site-specific factors, which Appellants acknowledge is the case with the direct hydrologic connection theory. *See Shanty Town*, 843 F.2d at 791; Op.Br. at 36.

Eschewing the Act's text, EPA relied on the Act's objective of protecting water quality, failing altogether to recognize that achieving that objective must be tempered by that text and the Act's other goals and policies, including the role of states in protecting water quality. *Rodriguez v. United States*, 480 U.S. 522, 525–526 (1987) (per curiam) (“it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law”).

EPA also ignored the legislative history and its failed request to obtain authority from Congress to regulate the addition of pollutants into groundwater *because* they can enter navigable waters. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (failure of proposed amendment “strongly militates against a judgment that Congress intended a result that it expressly declined to enact”).

Also, critically, EPA ignored its original, contrary understanding of the Act. Where an agency has changed its interpretation, “the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). EPA has never acknowledged its about-face after nearly

two decades of consistent application—much less attempt to explain it. EPA’s position does not warrant *Skidmore* deference.

III. The Direct Hydrologic Connection Theory, If Adopted, Would Have Significant Adverse Consequences to *Amici* and the Public

The direct hydrologic connection theory is unnecessary to protect water quality and would sow regulatory uncertainty, produce disincentives for critical infrastructure, and impose significant costs on *Amici* and the public.

A. The Direct Hydrologic Connection Theory Is Unnecessary to Protect Navigable Waters

Congress foresaw that an NPDES permit is not always the solution. 26 *Crown Assocs.*, 2017 WL 2960506, at *6 (CWA does not prohibit “every act that involves the noxious pollution of clean water.”). There are other authorities to utilize. See *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 529-30 (2d Cir. 2017) (interpretation exempting water transfers reasonable, in part, because “several alternatives could regulate pollution in water transfers even in the absence of an NPDES permitting scheme”).

The CWA itself contains alternatives, including, most notably, CWA Section 311. 33 U.S.C. §1321. Other CWA tools include total maximum daily loads (“TMDLs”);⁵ planning;⁶ grants;⁷ “processes, procedures, and methods to

⁵ 33 U.S.C. §1313(d)(1)(C); see also *Am. Farm Bureau Fed’n v. EPA*, 792 F.3d 281, 299 (3d Cir. 2015), *cert. denied*, 136 S.Ct. 1246 (2016) (TMDLs “tie

control [nonpoint source] pollution,”⁸ and nonpoint source management programs.⁹ Other federal statutes can also be utilized, such as the Resource Conservation and Recovery Act (“RCRA”). 42 U.S.C. §6973(a); *United States v. Waste Indus., Inc.*, 734 F.2d 159, 164-65 (4th Cir. 1984) (RCRA is “designed to deal with situations in which the regulatory schemes break down or have been circumvented.... Congress expressly intended that [RCRA] ... close loopholes in environmental protection.”).

Critically, States may adopt more stringent requirements, *see* 33 U.S.C. §1370 (preserves States’ ability to adopt any requirement to control pollution), and many States, including South Carolina, have adopted laws relevant to these circumstances.¹⁰

Rejection of the direct hydrologic connection theory will not result in “rampant pollution,” as Appellants contend. Op.Br. at 9. Applying the correct interpretation of the Act will prohibit leaks and spills—intentional or unintentional—both above and below ground, from industrial, commercial,

together point-source and nonpoint-source pollution issues in a manner that addresses the whole health of the water.”).

⁶ 33 U.S.C. §1288(b).

⁷ *Id.* §1288(f).

⁸ *Id.* §1314(f)(2)(A)-(F).

⁹ *Id.* §1329(b).

¹⁰ *E.g.*, S.C. Code Ann. §§48-1-90(A)(1), 48-1-10(2), (20); W. Va. Code §22-11-8(b); N.C. Gen. Stat. §143-215.2(a); Md. Code Ann., Envir. §9-322; Va. Code Ann. §62.1-44.5.A(1), (3); D.C. Code §8-103.06.

residential or public infrastructure, *when* the means of the addition to navigable waters is a discernible, confined and discrete conveyance. *E.g.*, *United States v. Lucas*, 516 F.3d 316, 330-34, n.43 (5th Cir. 2008) (septic system constructed *in* a wetland “making a system that is typically a diffuse, non-point source into a point source”); *Minn. Ctr. for Env'tl. Advocacy v. EPA*, No. CIV 03–5450(DWF/SRN), 2005 WL 1490331, at *6 (D. Minn. June 23, 2005) (addition from septic system via a pipe to “drain tiles” and “ditches” to navigable waters a prohibited indirect discharge).

B. The Direct Hydrologic Connection Theory Would Subject *Amici* and the Public to Regulatory Uncertainty

Appellants concede the existence of a direct hydrological connection is a fact-specific inquiry. Op.Br. at 36. It depends on site-specific factors, such as topography, climate, the distance to a surface water, geologic factors, and the like, and will require technical assessments. *See* 68 Fed. Reg. at 7216 (“highly dependent on site-specific variables”); *Umatilla Waterquality Protective Ass’n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1320 (D. Or. 1997) (it is “often not obvious” whether groundwater connects to navigable water).

Yet, there is no guidance on what is “direct.” No clues exist, for example, on the minimum distance to navigable water, or the necessary time for pollutants to travel through groundwater, for a connection to be “direct.” *Umatilla*, 962 F. Supp. at 1320 (this theory would “add a new level of uncertainty ... and would

expose potentially [millions] of ... [sources] to ... litigation and legal liability if they ... happen[] to make the ‘wrong’ choice”).

Supreme Court justices have bemoaned the regulatory uncertainty caused by the CWA definition of “waters of the United States.” *U.S. Army Corps of Eng’rs v. Hawkes Co., Inc.*, 136 S.Ct. 1807, 1816-17 (2016) (“the reach and systemic consequences of the [CWA] remain a cause for concern”) (Kennedy, J., concurring); *Sackett v. EPA*, 566 U.S. 120, 132-33 (2012) (“The reach of the [CWA] is notoriously unclear,” no “clarity and predictability.”) (Alito, J., concurring). This Court should not add to existing uncertainty by adopting Appellants’ argument.

If it did, this uncertainty would create disincentives for critical private and public infrastructure. For example, groundwater recharge systems are used to convey stormwater or recycled wastewater (which contain “pollutants”) into shallow subsurface aquifers to augment public water supplies, create seawater intrusion barriers, and eliminate surface outfalls, among other benefits.¹¹ This infrastructure can include spreading basins,¹² natural treatment systems,¹³ and

¹¹ EPA, 2012 Guidelines for Water Reuse at 4-25, EPA/600/R-12-618 (Sept. 2012), https://cfpub.epa.gov/si/si_public_record_report.cfm?dirEntryId=253411 (last visited Sept. 7, 2017) (“2012 Guidelines for Water Reuse”).

¹² *E.g.*, <http://obgma.com/san-antonio-creek-spreading-grounds/> (last visited Sept. 7, 2017).

injection wells,¹⁴ among others. Another example is green infrastructure, which is used to retain, percolate and infiltrate stormwater into the ground to minimize discharges of municipal stormwater and combined sewer overflows.¹⁵ This type of infrastructure provides multiple benefits to the public, including improving water quality. If Appellants' argument is adopted, it will create uncertainty whether NPDES permit requirements apply and will likely impede the application of this type of beneficial infrastructure.

C. If Adopted, the Direct Hydrologic Connection Theory Would Impose Significant Costs on *Amici* and the Public

If Appellants' argument is adopted, significant costs will be imposed on *Amici* and the public. It would make a detailed technical assessment of hydrologic and geologic conditions necessary for a wide range of activities and sites. *Amici* and the public likely cannot afford to assume otherwise. Just one CWA violation can result in a civil penalty of \$52,414 per day,¹⁶ in addition to injunctive relief and legal fees. 33 U.S.C. §1319(b), (d).

¹³ *E.g.*, <http://www.irwd.com/services/natural-treatment-system> (last visited Sept. 7, 2017).

¹⁴ *E.g.*, <https://www.ocwd.com/what-we-do/water-reuse/> (last visited Sept. 7, 2017).

¹⁵ *See generally*, EPA, Green Infrastructure, <https://www.epa.gov/green-infrastructure> (last visited Sept. 7, 2017).

¹⁶ 82 Fed. Reg. 3633, 3636 (Jan. 12, 2017) (inflation adjustment).

EPA once estimated the cost to determine whether groundwater beneath a source has a direct hydrologic connection to navigable water is \$4,472. *See* 66 Fed. Reg. at 3020.¹⁷ EPA's cost assumption was very conservative,¹⁸ and the cost to a specific source will depend on the nature of the facility, its geographic location, and availability of trained hydrogeologists, among other factors; therefore, it is a significant underestimation of the likely cost.

The real significance of this cost arises from the countless number of facilities and people upon which it would be imposed. It is impossible to distinguish the pipeline in this case from other critical infrastructure that may contribute pollutants into soil and groundwater, such as groundwater recharge systems, green infrastructure, treatment ponds, landfills, and other sources above or below ground. Pipelines that could leak due to age or episodic failures include

¹⁷ The original EPA estimate, \$3,000 (in 1999 dollars), was adjusted for inflation (to 2017 dollars) using the U.S. Bureau of Labor Statistics' CPI inflation calculator, https://www.bls.gov/data/inflation_calculator.htm (last visited Sept. 5, 2017).

¹⁸ *See* EPA, Cost Methodology Report for Beef and Dairy Animal Feeding Operations at 4-115 to 4-116, EPA-821-R-01-019 (Jan. 2001) (inputs used for EPA's cost estimate), <https://yosemite.epa.gov/ee/epa/ria.nsf/oeT/8AD19DE463D507CC85256A3B004F51D7> (last visited Sept. 5, 2017).

public water supply pipelines,¹⁹ recycled water pipelines,²⁰ and sanitary sewer pipelines.²¹

Septic systems are another ubiquitous example of a source that collects and disperses wastewater into soil and groundwater. Septic systems, generally, have not been understood to require NPDES permits. *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 345 (E.D. Va. 1997) (septic systems are nonpoint sources). But that would change under Appellants' argument.

Over 22.2 million homes have septic systems. *See* U.S. Department of Housing and Urban Development and U.S. Census Bureau, American Housing Survey for the United States: 2011 at 14, Table C-04-AO (Sept. 2013) ("Household Survey") (Exhibit B). Assuming one septic system per home, the cost nationwide to perform assessments (using EPA's conservative cost estimate) is approximately \$89 billion.²² These costs would be borne disproportionately by

¹⁹ Potable water contains, among other things, chloramine, which may be considered a pollutant. *See W.R. Grace & Co. v. EPA*, 261 F.3d 330, 333 (3d Cir. 2001) (describing disinfection process creating chloramines).

²⁰ *See* 2012 Guidelines for Water Reuse at D-132 (reclaimed water system in Cary, NC).

²¹ *See e.g., Cal. River Watch v. E. Mun. Water Dist.*, No. 5:15-cv-01079-VAP-SP (C.D. Cal. filed June 2, 2015), ECF No. 1 (citizen suit complaint alleging sanitary sewer system pipeline exfiltration of wastewater into groundwater with direct hydrologic connection to navigable waters).

²² This estimate uses the cost in 2011 dollars (i.e., \$4,021) to align the calculation with the U.S. Census Bureau's most recent Annual Household Survey. As noted, the current cost is \$4,472, which means the costs above are

rural, low income populations in the South. Rural communities disproportionately use septic systems rather than public sewer systems to dispose of wastewater: 42% in rural areas compared to 20% in the suburbs and 2% in the cities. *Id.* 11% of septic systems are associated with homes that are below the federal poverty level. *Id.* The 2017 federal poverty level for a family of four in South Carolina is \$24,600. *See* 82 Fed. Reg. 8831, 8832 (Jan. 31, 2017). The cost of an assessment would consume *18% or greater* of a family of four's annual income.²³ Many homeowners may choose to not perform an assessment, but they would still risk a citizen suit or agency enforcement.²⁴

Homeowners in the Fourth Circuit are among those that would face the greatest risk should these costs be imposed. A greater percentage of septic systems are in the South than in the rest of the U.S. 23% of homes in the South use septic systems for their sewage disposal, compared to 19%, 19% and 11% for the

underestimated. Additionally, this cost does not include the millions of other sources that will be caught up in Appellants' theory.

²³ Comparing the \$4,472 cost (in 2017 dollars) to the federal poverty level in 2017.

²⁴ Troublingly, EPA has argued that third parties are "free to file citizen suits against [owners of septic systems] to try and establish that they should be subject to federal permitting requirements." *See* United States' Memorandum in Support of Defendants' Motion for Summary Judgment at 2, *Conservation Law Found., Inc. v. EPA*, No. 1:10-cv-11455-MLW (D. Mass. Sept. 21, 2012), ECF No. 37.

Midwest, Northeast and West, respectively; 40% in South Carolina. Household Survey at 14.²⁵

Assessments would be just the beginning of the costs *Amici* and the public would face. There are permit application fees, compliance costs, and other financial and logistical impacts. EPA estimates that the public already spends over 19 million labor hours and over \$946 million in annual costs related to applying for NPDES permits and complying with just the monitoring, recordkeeping and reporting requirements. *See* EPA, ICR Supporting Statement, Information Collection Request for National Pollutant Discharge Elimination System (NPDES) Program (Renewal), OMB Control No. 2040-0004, EPA ICR No. 0229.21 at 17, Table 12.1, Appendix A (Dec. 2015) (Exhibit C).

Critically, even if *Amici* err on the side of caution and apply for a permit, there is no certainty a permit can be obtained. The NPDES permitting regulations are “end-of-pipe.” *Froebel v. Meyer*, 217 F.3d 928, 937 (7th Cir. 2000) (“The structure of the CWA’s definition of ‘point source’ ... connotes the terminal end of an artificial system for moving water, waste, and other materials.”). The permitting authority must calculate effluent limits,²⁶ determine the potential to

²⁵ EPA, Septic Systems Overview, <https://www.epa.gov/septic/septic-systems-overview> (last visited Sept. 7, 2017).

²⁶ 40 C.F.R. §122.45.

exceed water quality standards,²⁷ ensure consistency with antidegradation policies,²⁸ allocate load and waste loads as part of TMDLs,²⁹ assess the need for mixing zones,³⁰ and determine appropriate monitoring,³¹ among other critical functions. *See generally*, EPA, NPDES Permit Writer's Manual, EPA-833-K-10-001 (Sept. 2010) (overview of permitting requirements).³²

Determinations necessary to issue a permit would be infeasible (if not outright impossible) in the context of groundwater. Groundwater can be a “soup” of pollutants—mixing with pollutants from other sources and those naturally occurring—their fate and transport unknown. *Ecological Rights Found.*, 713 F.3d at 508.

Appellants' theory could prevent the permitting, and therefore the construction, of critical private and public infrastructure. *See, e.g.*, 40 C.F.R. §122.4(i) (no NPDES permit for a new source or a new discharger when the receiving water is impaired and there is not a sufficient load allocation); *Friends of Pinto Creek v. EPA*, 504 F.3d 1007 (9th Cir. 2007) (EPA violated §122.4(i) by

²⁷ 33 U.S.C. §1311(b)(1)(C); 40 C.F.R. §122.44(d).

²⁸ 40 C.F.R. §131.12.

²⁹ *Id.* §130.7.

³⁰ *Id.* §131.13.

³¹ *Id.* §122.44(i).

³² <https://www.epa.gov/npdes/npdes-permit-writers-manual> (last visited Sept. 7, 2017).

issuing NPDES permit). For septic systems, the result could be a CWA-based *prohibition* on new housing in watersheds impaired for nutrients (*e.g.*, Chesapeake Bay) because of the inability to obtain a permit. *See* EPA, Chesapeake Bay TMDL, Section 4 at 4-5, Table 4-1 (Dec. 29, 2010) (impaired for nitrogen; 36% and 24% of the total nitrogen load into the Bay attributed to septic systems from Maryland and Virginia, respectively).³³

If a permit cannot be obtained, all addition of pollutants must cease. 33 U.S.C. §1311(a). Significant resources to remove and/or replace infrastructure could be imposed on *Amici*.³⁴ Approximately \$298 billion is needed for infrastructure over the next 25 years to address just the 800,000 miles of aging public sewer pipelines.³⁵ There is no indication Congress intended the CWA to be the tool to remedy this problem. None of these costs to *Amici* and the public have ever been considered by EPA through rulemaking, which would be necessary if the direct hydrologic connection theory was in fact the rule. *See* 33 U.S.C. §1314(b)(2)(B) (shall consider “the cost of achieving such effluent reduction”).

³³ <https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document> (last visited Sept. 7, 2017).

³⁴ In this case, even if complete source removal was technically possible, it would upset the State’s existing Corrective Action Plan imposed via state authority after public comment. *Kinder Morgan*, 2017 WL 2266875, at *1.

³⁵ *See* American Society of Civil Engineers, 2013 Report Card for America’s Infrastructure, <https://www.infrastructurereportcard.org/cat-item/wastewater/> (last visited Sept. 7, 2017).

CONCLUSION

No pollutants were added to navigable waters by means of a discernible, confined and discrete conveyance. There is no basis for a CWA citizen suit. The Court should affirm the District Court's judgment.

Dated: September 8, 2017

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 17-1640 **Caption:** Upstate Forever v. Kinder Morgan Energy Partners

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Party Name Nat'l Ass'n of Counties et al.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September 2017, the foregoing document was served on all parties or their counsel of record through the CM/ECF system at the addresses indicated below:

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